REPORT OF PROCEEDINGS BEFORE

GENERAL PURPOSE STANDING COMMITTEE No. 1

INQUIRY INTO SERIOUS INJURY AND DEATH IN THE WORKPLACE

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At Sydney on Monday 1 March 2004

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The Committee met at 9.00 a.m.

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PRESENT

Reverend the Hon. F. J. Nile (Chair)

The Hon. J. C. Burnswoods
The Hon. D. Clarke
The Hon. C. E. Cusack
The Hon. K. Griffith
The Hon. P. T. Primrose
Ms L. Rhiannon

PETER CLIVE ROZEN, Barrister, affirmed and examined:

The ACTING-CHAIR (The Hon. Peter Primrose): In what capacity are you appearing before the Committee—as a private individual or as a representative of an organisation or business?

Mr ROZEN: I appear as a private individual.

The ACTING-CHAIR: On behalf of the Chair, I welcome you all to this third public hearing of the General Purpose Standing Committee No. 1 inquiry into serious injury and death in the workplace. Before we commence I will briefly outline some of the issues about this inquiry. Following the evidence given on the first day, the Chair wrote to the employers of Mr Hampson and Mr McGoldrick, inviting them to respond to any evidence given in relation to themselves. The Committee expects to receive a reply shortly. It is also expected that in its evidence tomorrow WorkCover will provide the Committee with details about the conduct of the investigation into all cases raised during evidence so far. Due to the complexity of this inquiry and the large number of potential witnesses, the Committee has considered the need for an additional day of hearings, to be held towards the end of this month.

In today's evidence the Committee will be hearing from the State Secretary of the Australian Manufacturing Workers Union and Mr Peter Rozen, a specialist in occupational health and safety law, in relation to the legislative occupational health and safety framework in New South Wales and other jurisdictions, as well as some representatives of the State Debt Recovery Office, who will outline their role in relation to the enforcement of penalties imposed for breaches of occupational health and safety laws. The Committee is also hearing evidence from a panel comprising various organisations in relation to the incidence of needle stick injuries in the health care industry.

The evidence in this inquiry is likely to include material which could be seen to adversely affect third persons such as employers, WorkCover employees and others. The Committee believes it is important that the evidence of this inquiry is heard in public as far as possible as the inquiry will not be able to serve its purpose by hearing evidence in camera which cannot be used in the Committee's final report. However, the Committee is mindful of the need to ensure procedural fairness for all its participants. It is important that witnesses be aware that the Committee will review any evidence that may contain adverse reflections and invite the persons mentioned to either reply in writing or as a witness before the Committee. Therefore, the Chair will ask witnesses to try to minimise the mention of individuals and companies where possible, except if it is essential to address the terms of reference.

Parliamentary privilege, which applies to parliamentary proceedings, including Committee hearings, is not intended to provide a forum for people to make adverse reflections about others. If it becomes necessary the Chair may stop the witness at times if their evidence about another person is not necessary to address the issues in the terms of reference. At all times the Committee will try to be sensitive to balancing the needs of the witnesses and the need for procedural fairness.

I would ask anyone present to turn off their mobile phone during the proceedings. The Committee has previously resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of guidelines governing broadcast of the proceedings are available from the table.

I point out that in accordance with the Legislative Council guidelines for the broadcast of proceedings, a member of the Committee and witnesses may be filmed or recorded. People in the public gallery should not be the primary focus of any filming or photographs. In reporting the proceedings of this Committee, the media must take responsibility for what they publish or what interpretation is placed on anything that is said before that Committee.

Witnesses, members and their staff are advised that any messages should be delivered through the attendant on duty or through the Committee clerks.

I advise that under the standing orders of the Legislative Council evidence given before the Committee and any documents presented to the Committee that have not yet been tabled in Parliament

may not, except with the permission of the Committee, be disclosed or published by any member of such Committee or by any other person.

Mr Rozen, do you wish to make a brief opening statement before taking questions?

Mr ROZEN: I am happy to do that if that might assist the Committee.

ACTING-CHAIR: It will. Please proceed.

Mr ROZEN: Does the Committee need to know anything about me personally? I am not particularly keen to go through that, but I will if that will assist.

ACTING-CHAIR: It probably would assist if you could explain briefly your background as it is relevant to this inquiry.

Mr ROZEN: I am a barrister practising at the Victorian Bar. The area in which I specialise is occupational health and safety law, both as a prosecuting barrister and as a defending barrister. I have been at the Bar for just under five years now. Before that I worked as a solicitor, including three years as a prosecuting solicitor for the Victorian WorkCover Authority, doing the work that essentially is done by solicitors working within the New South Wales WorkCover Authority. I have also published articles and I am the co-author of a text in Victoria on occupational health and safety law. I have been involved in occupational health and safety law for about 15 years all-up in various capacities.

My principal focus today—subject to the questions that Committee members have of me—concerns the question of what often is referred to as industrial manslaughter or corporate manslaughter laws. It is a somewhat auspicious day to be talking about the subject because today is the day on which the ACT industrial manslaughter law commences; and, if the opponents of those laws are right, there will be a stamped of employers out of the ACT as we speak, or perhaps later today.

I take the view that the law should operate within the workplace in the same way that it operates outside the workplace: that is, that grossly negligent conduct within the workplace should be able to be prosecuted and punished in the same way as grossly negligent conduct outside the workplace. The way that the common law is in Victoria—and in New South Wales it is no different—is that effectively a legal immunity applies to large and even medium-size employers under the law as it stands in relation to offences where gross negligence has to be proved—for example, manslaughter or causing serious injury by gross negligence.

The difficulty arises because of the clumsy, in my view, way in which the courts have tried to develop rules that enable the prosecution to prove whether a corporation is grossly negligent or not. There has not been developed in the common law a mechanism for deciding if a company—a corporate employer, for example—is grossly negligent that takes into account the true structure of corporations. By focusing, as the courts have done, on directors and other senior officers within those corporations, they have not properly developed rules that enable them to determine whether a corporation has been grossly negligent or not.

As the Committee will be aware, in recent years there has been a lot of work done, both in Australia and overseas, by law reform bodies and committee such as this that have tried to grapple with these issues. I have quite a bit of experience of attempts over the past three years in Victoria to develop industrial manslaughter laws—which ultimately failed. I am in a position, if it would assist the Committee, to talk about what some of those difficulties were with those attempts and also what some of the good aspects of those attempts were as well. That is a broad overview. I have some examples of cases where these deficiencies in the laws have been, in my opinion, shown up quite graphically. I am happy to go into those, if that would assist the Committee.

ACTING-CHAIR: I, for one, would be very interested to hear about those cases but also something about the earlier issue that you raised earlier.

Mr ROZEN: About the Victorian laws?

ACTING-CHAIR: Yes.

Mr ROZEN: To understand both the cases and the Victorian laws, perhaps I should go through briefly what I think—and I think generally is recognised—are some of the difficulties the law faces in this area. The starting point is that the courts have accepted now for the best part of half a century that, in principle, a corporation can commit an offence such as manslaughter by gross negligence. The state of the law is that if the prosecution proves that the corporation has been guilty of gross negligence, and that gross negligence has caused the death of an employee or somebody else who happens to be walking past the building, for example, then the corporation can be found guilty. The question of how one penalises a corporation is, in a sense, a separate issue, but an important one. The ACP Act deals with that by introducing additional sanctions. But the starting point is that, yes, a corporation can be found guilty of gross negligence.

The difficulty arises in the next stage of the inquiry that a jury has to deal with, for example in a case where a corporation has been prosecuted, Whose gross negligence? That is because the corporation is a legal fiction; ultimately, it is a bit of paper, and is made up of directors and employees, contractors and so on. Whose negligence can be attributed to the corporation? That needs to be determined so that a court can ultimately say the corporation is guilty of gross negligence. The rule that has been developed—often referred to as they Tesco Supermarkets rule, after an English case from 1972—is that it is only people who qualify as the directing mind and will of a corporation whose conduct can be attributed to the corporation for which they carry out that role. Generally, that as a managing director or someone who is carrying out such a role and who is in a position to determine the direction of the corporation, what it does in relation to its activities, and so on.

That is where the difficulty arises. Let us look at a practical example of a building site situation, where there is grossly negligent conduct. Say an inspector has issued a prohibition notice to a supervisory employee on a building site saying, "No-one is to work at height without there being proper fall protection in place." Low and behold the next day an employee is working in precisely those circumstances and falls to his or her death. That corporation will only be liable for an offence involving proof of gross negligence if the person who had given the prohibition notice and who was affixed with the knowledge of that specific hazard can be said to be the directing mind of the corporation. And, if it is a large building company, the prosecution will fail at that first hurdle, because there is no way that a supervisor on site, far removed from the board room and the other decision-making process of the company, will be seen by the courts as the directing mind.

There is a Victorian case—probably a leading Victorian case—where a contractor was killed and another contractor was seriously injured. This is a case called Regina v. A. C. Hatrick Chemicals Pty Ltd, an unreported decision of Justice Hampel of the Victorian Supreme Court in 1995. The Director of Public Prosecutions prosecuted the company and two of its senior employees, a plant manager and a safety co-ordinator, for manslaughter and for negligently causing serious injury. The defence took the point: No matter how negligent these people—and they had allowed work to be carried on without any form of hot work permit being issued, so it was quite a significant departure from the standard safety rules that one would expect to be followed—the judge directed that the case could not go to the jury at all—in other words, it failed at the first hurdle—because, no matter how negligent the plant manager and the safety co-ordinator were, they were not the directing mind of the corporation. It was a medium-size corporation, of 100-odd employees. The court ruled that only employees more senior than those would have their negligence attributed to the corporation. So that was the end of the case as far as the prosecution was concerned.

It seems to me that one need only look at the facts of a case like that to see the difficulty. That is, safety-related decisions are, by definition, made at the workplace level. They are not generally made in board rooms. The board might implement a general safety policy, and might reach particular views about appropriate levels of training, supervision and so on, but the day-to-day decisions which result in either safe workplaces or unsafe workplaces generally are made at lower, hands-on levels, often not even at the plant level but, as members of the Committee will know, by shop floor supervisors, foremen and so on. That is the level at which such decisions are made.

If the hands-on foreman happens to be a director of a small company—and, of course, we know that happens with small contractors—then such a company, and potentially the director, will find themselves in the firing line of a manslaughter by gross negligence charge if the case involves gross negligence. But the bigger the company the more difficult it is to prosecute. Here is a quote that

I think sums it up. Brent Fisse and John Braithwaite, who are two leading criminologists in the area of corporate criminal liability, observed about the rules that "in practice, large corporations are virtually insulated from criminal liability for serious offences." That is from their book *Corporations, Crime and Accountability*, published in 1993. My view is that a legal system in which there is not in existence a level playing field as between small corporations and large corporations is a legal system that is failing in relation to the principle of everyone being equal before the law. That is the difficulty that we face at the moment. That, essentially, summarises the first issue, that is: Whose negligence can you attribute to a corporation?

The second issue is often described as aggregation; that is, that the courts have been unwilling, in determining whether or not a corporate body has been guilty of gross negligence, to aggregate the conduct of several employees together and to say that is the conduct of the corporation. So the courts have said that, unless the prosecution can identify one employee who is the directing mind of the company, and who was as an individually grossly negligent, then the company cannot be guilty of gross negligence. The difficulty with that, it seems to me, is that a corporation is more than just a group of individuals. Corporations have policies, rules of behaviour, and ways of doing their activities that are sometimes written and sometimes unwritten, and to make any sense of the inquiry "Was the corporation grossly negligent" the inquiry needs to go beyond just looking at a particular individual, and needs to examine a broader range of practices, policies and procedures within the corporation itself, to see whether they were grossly negligent.

There is a good example of that being looked at in the explanatory memorandum to the Commonwealth Criminal Code Act, which I can talk about a little bit, if that would assist, because it tries to grapple with some of these issues as well and is another example of a legal instrument that is out there dealing with these issues. The point that is made here is that there might be formal documents within a company, for example, which say that guards are not to be removed from dangerous machinery, but over time a practice may develop, because of production schedules that have been set, in which employees remove guards and that becomes known to management. If the court is merely going to examine the formal documentation, without looking at what is happening on the ground, then in that sort of case the formal documentation would appear to show the company fully in compliance with safety regulations.

It is necessary to be able to broaden the inquiry and to look at as much evidence as can be brought before the court about whether the corporation was grossly negligent. That is sometimes referred to as the aggregation principle, which cannot be looked at under the common law. The first issue is the identification—that is, whose conduct would be attributed to the corporation.

CHAIR: I recall some of the incidents that have occurred in the environmental area—for example, the discharge of oil in Alaska. Were any charges laid against the ship's captain or other persons? How do they identify who should be charged?

Mr ROZEN: That is the *Exxon Valdez* incident. I do not have a detailed knowledge of that. I understand that those charges have been laid under specific environmental laws that identify who has particular responsibility in the same way that, for example, the New South Wales Occupational Health and Safety [OHS] Act identifies the employer as having principal responsibility for maintaining a safe workplace and also imposes responsibilities on employees and suppliers of plant and so on. There is no real difficulty in specific laws, such as the OHS Act, that identify who must do what. The difficulty arises in a case where the negligence is gross and where ordinarily if gross negligence occurred, for example, on the road, in the home or anywhere other than a workplace setting, the police would look at whether charges should be brought under the general criminal law. That is where these legal difficulties are highlighted.

CHAIR: Concern has been expressed about the industrial manslaughter issue. Has anything triggered this debate? Have any serious accidents led to the changes in the Australian Capital Territory and South Australia?

MR ROZEN: I do not know what straw broke the camel's back. It has been recognised not only in Australia but also in the United Kingdom that something needs to be done. I was looking at a 2000 case in which the court acknowledged that law was as deficient as the prosecution said it was. However, the point was made that it was the responsibility of Parliament and not the courts to fix the

problem. I mentioned the Hatrick case a moment ago. It was a major case in Victoria in the mid-1990s. In his concluding remarks the judge recognised that the winds of change were blowing, which is what the prosecutor had said, but he also said that it is not for the court to change the law; its role is to identify the law and it is Parliament's role to make legislative changes. Rather than there being one particular event, there has been a growing concern about the inability of the law to deal with corporations and their negligence. The Longford case in Victoria also resulted in a great deal of comment in the Press and legal circles about these difficulties.

CHAIR: The Victorian bill was introduced as government policy and was defeated in the upper House. Was that purely a political issue? Sometimes governments do not control the upper House and they do not get cooperation. Was there any other justification for the rejection?

MR ROZEN: Interestingly, that Government now controls the upper House and it has not reintroduced the bill. The bill dealt appropriately with the two issues that I have identified and that approach deserves some consideration by this committee. First, it dealt with the aggregation problem. The legislation was the Crimes (Industrial Manslaughter) Bill, and the key provision is clause 14A. Subclause (5) provides that the conduct of any number of the employees, agents or officers of the corporation may be aggregated. Subclause (6) deals with the question of gross negligence. The starting point was that, if inquiries were to be made into whether a corporation was grossly negligent, one would not be limited to looking at a senior employee and attributing his or her conduct, rather, one could amalgamate or aggregate the conduct, acts or omissions of any officers, agents or employees. Secondly, it dealt with the narrow notion of the identification of an employee with the company. Identification and aggregation obviously overlap to some extent. The bill provides:

> (6) Without limiting this section, negligence of a body corporate may be evidenced by the failure of the body corporate—
>
> (a) adequately to manage, control or supervise the conduct of one or more of its employees, agents or senior officers; or
>
> (b) to provide adequate systems for conveying relevant information to relevant persons in the body corporate; or.
>
> (c) to take reasonable action to remedy a dangerous situation of which an officer has actual knowledge; or.
>
> (d) to take reasonable action to remedy a dangerous situation identified in a written notice served on the body corporate by or under an Act.

Referring back to my example about the prohibition notice being served on the building company, it is formally served on the company as a whole. However, in most circumstances it would not be brought to the attention of a person who is a director of the company; it would stay on site with perhaps a foreman or building supervisor. Under this provision, that would be sufficient to affix the company with knowledge of the hazard—that is, the hazard of employees working at height. If the company did not take reasonable action in response to that notice—for example, issuing a directive to all employees and ensuring that safety harnesses were available and could be attached appropriately—that would be evidence of gross negligence under this legislation. Under the existing law it would not be admissible as evidence against the corporation.

The bill then got into trouble, which led to significant opposition. It went further than dealing with those two problems. It then sought to address the question of directors' and senior officers' liability as accessories to the company. It assumed that the company was convicted of manslaughter and then asked in what circumstances an individual director or senior officer could also be guilty of the same offence. It effectively reversed the onus of proof and deemed them to be liable for manslaughter unless proof was placed before the court that absolved them of that responsibility. It did it in a particularly clumsy and complicated way and it was difficult to see how it could work. It differed from the normal rules of proving that person B was an accessory to an offence committed by person A. It my view there is nothing wrong with the existing laws for proving that person B is an accessory to an offence committed by person A, even if person B is the director of a company and person A is the company of which he or she is the director. By venturing into that area, the bill dealt with issues that go beyond the difficulties in the existing law in respect of corporations. That was one of the significant difficulties with the bill.

That is a very long answer to a straightforward question. There was a degree of political opposition to the bill, even in relation to those bits dealing with corporations. Those criticisms were largely unjustified because they did not accept the difficulties with the common law. However, the concern about the way in which the bill deals with directors and senior officers as accessories to corporations was well founded and ultimately appears to have led to its withdrawal. I am not aware of the reasoning process behind the Government's decision not to reintroduced bill once it gained control of the upper House.

CHAIR: Has it made any policy statement?

MR ROZEN: I do not think it is reconsidering it. The policy statement is that it is off the table and that, in its place, a review of the OHS Act will be undertaken by Chris Maxwell, a Victorian barrister.

CHAIR: Was that the result of the employers' strong opposition to the concept?

MR ROZEN: I think that is part of the reason.

CHAIR: Could a bill go ahead without the reverse onus of responsibility provisions that caused the problem in Victoria? Would a simpler bill be more workable?

MR ROZEN: It would be more workable and probably more politically palatable to limit the scope of the bill to dealing with the problems that exist for corporations and to retain the existing law, which determines when someone is guilty of being an accessory to someone else's offence. In appropriate cases there would still be scope for any officer or employee of a company to be prosecuted as an accessory to the company's negligence, but the evidence would have to exist of their awareness of the conduct that amounted to the criminal offence by the corporation—that is, the normal rules regarding the liability of accessories would be applied.

The Hon. DAVID CLARKE: Is there a situation in which the aggregate conduct of individuals can be taken together to establish manslaughter?

MR ROZEN: Do you mean when the defendant is a corporation?

The Hon. DAVID CLARKE: No, individuals. Could the aggregate conduct of a number of individuals be taken together to establish manslaughter?

MR ROZEN: Manslaughter by whom?

The Hon. DAVID CLARKE: By those individuals.

MR ROZEN: No. The individuals would have to be prosecuted as individuals and their gross negligence would have to be proved in each individual case before they could be found guilty.

The Hon. DAVID CLARKE: But the whole is greater than the sum of the individual parts.

MR ROZEN: Only if the whole is a separate legal entity. If individuals have agreed to form a corporation then the whole is greater than the sum of the individual parts.

The Hon. DAVID CLARKE: Are we lowering the bar for industrial manslaughter in respect of the existing law?

MR ROZEN: Are you asking whether the proposals that I have advocated would result in a lowering of the bar?

The Hon. DAVID CLARKE: Yes.

Mr ROZEN: No, they would not. My proposals would result in a levelling of the playing field in the sense that at the moment there are two bars. If the corporation is small and has a hands-on director or manager, the bar is at a same level as for any individual being charged with gross

negligence. The bigger the corporation, the higher the bar. If the corporation is very large it is an impossibly high standard for prosecution.

The Hon. DAVID CLARKE: Could various individuals involved in the operation of a shopping centre be charged with manslaughter if the other components exist? If someone died as a result of gross negligence on the part of the operators of a shopping complex, could the individuals who contributed be charged with manslaughter?

MR ROZEN: In the absence of the corporation being charged?

The Hon. DAVID CLARKE: Yes.

MR ROZEN: They could be charged but they would be convicted only if there were evidence that they themselves were grossly negligent or, alternatively, guilty of an unlawful and dangerous act.

The Hon. DAVID CLARKE: If a director of a company operating a shopping complex has ignored advice about safety precautions and so on, he or she could be charged under the present law. If it has been drawn to the director's attention that certain procedures should be followed but that advice has been and as a result of that failure someone has been killed would that attract a charge?

Mr ROZEN: Conceptually that could result in a charge. The reality of the situation, though, is that, depending of course on the corporate arrangements, it would be unusual for a director, particularly of a large organisation that is running a shopping centre for example, to be intimately involved in the day-to-day safety and related decisions. So negligence on your example would tend to be one, two or perhaps three steps removed from whatever it was—the dangerous lift well, or whatever it was that resulted in the ultimate death.

The Hon. DAVID CLARKE: But whoever was responsible for not carrying out the decisions could be charged?

Mr ROZEN: Yes, they could be charged.

The Hon. DAVID CLARKE: Why can that not be done now with corporations employing individuals? Why can we not do that? If we can charge with manslaughter individuals who are running and operating a shopping complex, why can we not do that with individuals in a corporation who are employing individuals? Why can we not apply the present law to cover the situation of what people are seeking to do with a new offence of industrial manslaughter?

Mr ROZEN: Because the present law, as has been revealed in practice in cases such as the Hattrick case—this is not a theoretical discussion because there are a number of cases on the books. It seems to me that the Hattrick case is a good example because it is an on-the-ground safety-related decision that was made, "We are going to do this maintenance work without having a hot work permit and without doing the proper checks". The decision was made by the plant manager who was the most senior person who was responsible for those decisions. The courts have said that it does not matter how negligent he was, the corporation cannot be guilty of manslaughter by gross negligence because he is not high enough up the tree within the corporation to be its directing mind and will.

The Hon. DAVID CLARKE: Did the case find that the individual could be charged?

Mr ROZEN: The case found that the individual, if gross negligence was proved against him—the judge ultimately had some doubts about whether the negligence was gross enough, but that is a secondary issue—if gross negligence could have been proved against him, then, yes, he could have been charged as an individual.

The Hon. DAVID CLARKE: There was nothing in the law to stop the individual who failed to carry out those precautions—there was nothing in the law to stop him from being charged?

Mr ROZEN: Correct.

The Hon. DAVID CLARKE: It was simply that we did not have the standard of proof necessary?

Mr ROZEN: That is right.

The Hon. DAVID CLARKE: Or the standard of negligence?

Mr ROZEN: There was nothing to stop him being charged but the difficulty shown up by the case is that the corporate employer was unable to be charged in those circumstances, not because of any deficiencies in the evidence but because of the way in which the law determines whether or not a corporation is grossly negligent.

The Hon. DAVID CLARKE: Taking the situation with employers and employees at the moment, would it be true to say that there are many individuals who are employers—individuals or managers of employer companies—who really could have been charged with manslaughter, and there has not been the will to pursue those cases?

Mr ROZEN: I cannot speak about the will of New South Wales prosecutors but I do know from my experience as a prosecutor in Victoria, that there were cases that I dealt with where I and those that I was working for were keen to pursue them, but we were unable to because of this ceiling that effectively operates within the law of corporate attribution.

The Hon. DAVID CLARKE: I am talking about individuals—it could be shown that individuals were clearly responsible for the decisions being taken, or not taken, and which were responsible for the death.

Mr ROZEN: Yes, there are such cases of individuals that have been charged. I do not believe there is a lack of will, certainly in my experience, to pursue such cases.

The Hon. DAVID CLARKE: Were they convicted?

Mr ROZEN: The question is: Have individuals been charged and convicted with manslaughter in the workplace setting?

The Hon. DAVID CLARKE: Yes.

Mr ROZEN: I cannot think of a case where that has occurred, off the top of my head.

The Hon. DAVID CLARKE: Why would that not be the case, do you think? Did you not say that you have had situations where individuals have been charged?

Mr ROZEN: Individuals have been charged with offences under health and safety law and been convicted.

The Hon. DAVID CLARKE: I am talking about manslaughter.

Mr ROZEN: Manslaughter in the workplace setting? If I said that, I would do not think I know of a case where that has occurred.

The Hon. DAVID CLARKE: Why has that not been the case?

Mr ROZEN: That is a very difficult question to answer. Part of the answer might be that the law is very clear about who has the ultimate responsibility for safety in a workplace, and it is the employer. In most cases—the overwhelming majority of cases—the employer is a corporation.

The Hon. DAVID CLARKE: What about a situation with small businesses?

Mr ROZEN: If I can just finish what I was saying. The responsibility of individuals, whether they are managers, employees or anyone else, is, under occupational health and safety law, subsidiary to that of the employer.

The Hon. DAVID CLARKE: What about the thousands of businesses where there are individuals who are employees, not corporations—individual electricians, plumbers and others who are not being shielded by a corporation? Have there been no cases of any of those employers ever being charged with manslaughter?

Mr ROZEN: I am unaware of such a case, no.

The Hon. PETER PRIMROSE: Do you believe that the current law is satisfactory in dealing with manslaughter in the workplace?

Mr ROZEN: No, it is not.

The Hon. PETER PRIMROSE: Would you therefore be advocating something along the lines of the Victorian legislation for industrial manslaughter, but maybe with that section at the end that caused so much trouble in the upper House deleted?

Mr ROZEN: Yes, I think that would be a workable approach to dealing with the problems. Can I also add—I should have mentioned this before—that there is another model that the Committee could examine and that is the model under the Commonwealth Criminal Code Act which, as members of the Committee may well be aware, was enacted in 1995 as a Commonwealth statute with a view to it being ultimately adopted by the States and Territories as part of their law. I think the excitement about nationally uniform laws that existed in the early and mid-nineties has perhaps waned a bit in Australia, but different jurisdictions have picked up different parts of the Commonwealth Criminal Code Act, and the Committee may be interested in looking at Part 2.5 which looks at corporate criminal responsibility. It addresses the same concerns that I have been talking about but in a different way to the Victorian bill and particularly it introduces a concept of corporate culture in an attempt to grapple with this idea that corporations are more than the sum of their individual parts, or exceed the sum of their individual parts. "Corporate culture" is defined in the Act as:

> … an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place"

They then go on and talk about the example that I gave earlier about the formal rule being that the guards do not come off, but the day-to-day practice being that they have to meet a production schedule. Under this model the evidence of what is happening on the ground would be admissible as against a corporation as well as the formal rule that says that the guards do stay on. Ultimately a jury would be able to make up its own mind about whether what was going on was grossly negligent or not. I think there are some difficulties with the corporate culture concept merely because it seems to be such a vague and ephemeral idea and ultimately may causes some real problems in terms of a jury understanding it and applying it in practice.

The Victorian bill, by providing specific examples of the sort of evidence that could be before a jury—such as the example of ignoring a notice that was provided or not dealing with an issue that has been raised in a health and safety committee for the past six months—they are the sorts of tangible things that I think a jury would look at and say "Yes, that seems grossly negligent to me. That goes beyond just breaking the safety rules", which would be enough to convict under occupational health and safety law. That puts it into a different category of ignoring the wheel that was obviously squeaking.

The Hon. KAYEE GRIFFIN: You said that with the withdrawal of the legislation in Victoria there was now a review of the Occupational Health and Safety Act. Is the review over the whole of that legislation or are there specific parts of it that are being looked at because of the withdrawal of the other legislation?

Mr ROZEN: No, it is a broad review. I do not think there are any limits to the scope of the review, except for one significant one in this context, and that is that Maxwell has not been asked to look at this question of whether industrial manslaughter legislation is necessary. Maxwell has been asked to examine the wording of the Occupational Health and Safety Act as it exists to look at what is

going on interstate and elsewhere and to report to the Government on whether the Act itself should be amended. He is not, for example, looking at whether the Crimes Act in Victoria should be amended.

The Hon. KAYEE GRIFFIN: So it is basically just looking at a review in relation to other types of similar legislation in other States as well?

Mr ROZEN: Yes, and the usual process of consultation with the people who are working with the legislation on a day-to-day basis and seeing what their views are. He put out an issues paper just before Christmas last year in which he looks for example at the way health and safety committees operate and the way that health and safety representatives are elected. It is that sort of machinery level, if I can call it that.

CHAIR: He has not tried to get his terms of reference expanded to include industrial manslaughter?

Mr ROZEN: No. He has not been so game.

Ms LEE RHIANNON: Mr Rozen, when earlier you said that the Crimes (Industrial Manslaughter) Amendment Act 2003 will be coming into practice in the ACT today, I was just wondering if you could comment on what you anticipate will be the impact of this legislation. Can we expect that a number of managers and corporations will be charged, or will corporation management become more aware of occupational health and safety issues and therefore make the workplace safer and fewer workers will die and there will be fewer injuries? Which way do you think it will go?

Mr ROZEN: They are probably not mutually exclusive categories. I think that, quite apart from the law operating in a way that is consistent and on what I have referred to as a living playing field, it is very important to bear in mind that even the debate about whether or not to have industrial manslaughter laws plays a role in raising awareness of safety issues in workplaces and can be expected, one could assume, to lead to their being safer ultimately. But I think it is very important not to judge the need for reform in the law in this area solely on whether it will lead to safer workplaces. Obviously one hopes that will be the ultimate outcome, but we do not decide to repeal laws concerning murder or rape because they are not stopping murder and rape. In other words, if conduct is criminal, it should be punished as criminal conduct. Hopefully that will lead to the conduct being deterred in the future, but the law has a role in punishing it, of itself, it seems to me.

The ACT Act is interesting because as I read it—maybe I am missing something but I have looked at it a couple times—it does not seem to me to grapple with this fundamental problem that exists in the common law, these notions of identification and aggregation. It merely states that a corporation can be guilty of manslaughter by gross negligence. It does not seem to me to advance the state of the law very far other than in the area of penalties. It makes some useful amendments. It deals with imposing fines on corporations and so on rather than just a fine and requiring corporations to perform community service. They are good ideas and they exist in the New South Wales Occupational Health and Safety Act presently. Unless the ACT—and I do not know the answer to this; it may already have adopted the Commonwealth Criminal Code approach, or unless it is intending to—but if it does that, there probably will be more cases on corporations and directors being charged with manslaughter, or some cases in the ACT. One would hope that even the threat of those charges would lead to improved safety performance.

CHAIR: Could that ACT law involved a gaol sentence? The way you spoke then, it seemed to be just fines?

Mr ROZEN: In relation to corporations, obviously a gaol sentence is not an option for the corporation itself, but it does also create an offence of senior officer manslaughter, and there is imprisonment for 20 years as a maximum penalty for that. So there is scope where senior officers are charged for imprisonment to be imposed. I should add that the trigger for a senior officer being charged is where their own personal conduct causes the death, so there is a need to have evidence of their own act or omission that causes the death, which is a different approach to that which was taken in Victoria.

CHAIR: Are you aware of any controversy in the ACT? I know it has a very small industrial base from an employer point of view. Have they been involved in the debate, or is it something that has just been introduced without much consultation?

Mr ROZEN: I do not know the answer to that. I would be surprised if there had not been some involvement by employers because I think the bill has been around for some time.

The Hon. DAVID CLARKE: Mr Rozen, at the moment under the ACT legislation, corporations and directors can in effect be charged with industrial manslaughter?

Mr ROZEN: This is under the new legislation?

The Hon. DAVID CLARKE: Yes.

Mr ROZEN: Yes.

The Hon. DAVID CLARKE: Let us take the situation of a corporation that owns a shopping centre. Can directors of the corporation be charged with manslaughter in respect of a member of the public who uses that shopping centre, if the other requirements at present? Can that happen?

Mr ROZEN: Under the new ACT Act?

The Hon. DAVID CLARKE: Yes.

Mr ROZEN: I think it is limited to workers.

The Hon. DAVID CLARKE: If it is limited to workers why should it be? Why should members of the public going into a shopping centre not have the same protection of the law as employees? If a corporation or directors are responsible for, in effect, manslaughter, why should the law be restricted to one section of the community and not to all sections of the community, including members of the public in a shopping complex?

Mr ROZEN: I do not see any reason in principle why it should be limited. Can I also add that the same difficulties that arise in the law that I spoke of earlier would arise in a situation where a company that was processing food put poisoned food out into the marketplace and that led to the death of a consumer. It is referred to as industrial manslaughter but it is really corporate manslaughter that we are concerned with. It is just that most of the examples that get into the newspapers and so on occur in a workplace setting.

The Hon. DAVID CLARKE: In other words it is a defect in the ACT legislation?

Mr ROZEN: As I understand the ACT legislation it is set out to deal with the responsibility of employers to employees, contractors and others. So it does deal with the scope that you addressed.

The Hon. DAVID CLARKE: But it should cover everybody, should it not?

Mr ROZEN: There is no reason in principle why it should be limited.

The Hon. DAVID CLARKE: In your view?

Mr ROZEN: In my view.

The Hon. DAVID CLARKE: So you think the law is defective in that sense, that it does not cover everybody?

Mr ROZEN: Well, yes, I suppose that is right.

CHAIR: Thank you very much for appearing as a witness before us and coming to Sydney especially this morning from Victoria. We thank you for your co-operation and for your information, which is very valuable.

Mr ROZEN: It is a pleasure, and I thank the Committee for the opportunity to speak to it.

(The witness withdrew)

PAUL ANTHONY BASTIAN, New South Wales State Secretary, Australian Manufacturing Workers Union, affirmed and examined:

CHAIR: Do you wish to make a brief opening statement prior to questions?

Mr BASTIAN: Yes.

CHAIR: At the conclusion of formal questions it is customary for the Chair to inform you that you can give evidence in camera, if you wish, if there is anything you feel should be heard in private by the Committee.

Mr BASTIAN: I would like to thank the Committee for the opportunity to put a submission on behalf of the Australian Manufacturing Workers Union **[**AMWU**]** about our concerns in relation to workplace death and serious injury. I think to some extent I will be going over what the last witness said in some areas because it covers very much the same ground. From the perspective of the AMWU we want to focus specifically on workplace deaths. Our issue is there needs to be an effective deterrent and that the deterrent should match, support and reinforce our occupational health and safety legislation. We say that there is a huge gap in that objective as it stands at the moment.

If one looks at the New South Wales occupational health and safety legislation, certainly from a trade union perspective it is probably one of, if not the best, regimes in Australia for workplace occupational health and safety. It puts the liability squarely where we say it belongs, and that is on the employer and the organisation providing workplace safety. But the gap between that and penal provisions or criminal provisions that exist currently in relation to workplace deaths, is that there is an inconsistency between the two. If one looks at the common law development of manslaughter—and this goes to a lot of what the last witness dealt with—in our view there are problems in being able to hold accountable and responsible those whom the Occupational Health and Safety Act say should be; senior management, right throughout the branches of the tree of the company, and the corporation itself.

They are issues that have been developed over the controlling mind and will that we have heard about; issues of intent and issues of aggregation or the inability to aggregate acts. For us that has resulted in an uneven playing field. We say that as the law stands in terms of common law manslaughter, unless you are a director who has got hands-on work on the shopfloor and hands-on knowledge, you are not going to be subject to manslaughter charges. That is, the further up the tree you go—the larger the corporation—the harder it is under the common law test to find a conviction against individuals who the Occupational Health and Safety Act says have ultimate responsibility. It is impossible to get a conviction against a corporation.

The ultimate test for us has been the test of whether or not the current laws meet our needs. There has never been a successful prosecution, to my knowledge, anywhere in any jurisdiction in Australia, let alone New South Wales when it comes to manslaughter, for a corporation or an industrial death. I think that is why in most other jurisdictions in New South Wales there are currently reviews in place in relation to their own laws, and we have seen some movement in the Act—that has already been discussed—to try to address that imbalance. For example, a case that comes to my mind is a small company, a father and son operated regime, where a young apprentice was put on some heavy equipment and he was crushed and killed. That company was under investigation for prosecution. It was clear to anyone who had been involved in the investigation and knew anything about the injury that there was going to be a fine under the occupational health and safety legislation. That company went into liquidation. The company now operates under another name, another legal entity, and it carries on its business.

So we have a problem with the current state of laws. I also sit on the New South Wales Workers Compensation Advisory Council, and have done for about a year. I have repeatedly asked from the prosecutions branch at that council for a list of recommendations that they have made to the department of public prosecutions for industrial manslaughter or of at least where industrial manslaughter has been considered. I have not been given any response to that correspondence that we have forwarded, or as to our request for any council minutes about an explanation as to whether they have considered manslaughter or whether the department of public prosecutions has rejected it.

It is suffice for us to say that there is that inconsistency between the objects of the Occupational Health and Safety Act and what is achievable under the current laws. That is why we have sought and have argued for some time that there is a need for a new law, a law of industrial manslaughter, that would hold those ultimately responsible for safe systems of work liable—regardless of their status in the organisation—that is capable of convicting a corporation, and that would reinforce and support our occupational health and safety legislation and would provide for a range of sentences. In relation to a corporation, for example, fines is one area; orders requiring some form of public benefit or community service, seizure of assets, deregistration, debarring directors from holding office or, indeed, custodial sentences against individuals, should not be ruled out.

We have not called for this law lightly. The law that we see is one that would be applied in the strictest circumstances, it would be on the basis of gross negligence. We simply say that that would act as a deterrent; it would also give some justice to the families and victims of workplace deaths to know that their case would be heard. We also have a predisposition for a criminal law under the Crimes Act as opposed to a criminal conviction under the Occupational Health and Safety Act. We do so for primarily two reasons: one is that we are saying it is a gross negligence, a charge that would be against a corporation or individuals, and that the proper forum for that is in a criminal court before a jury; we also say that there is a status that the community attaches, if you like, and respect in terms of criminal convictions before a criminal court and jury, as opposed to a conviction under occupational health and safety legislation. We have campaigned for some time for this to be recognised and we have campaigned for these new laws. We are hopeful that the Committee, amongst its other terms of reference that it has to address, will be able to address this inadequacy in the current regime.

CHAIR: For the example you gave where the company went into liquidation, is there are a way that you would still be able to pursue the father and son even though the company does not exist?

Mr BASTIAN: My understanding is that certainly under the occupational health and safety legislation as it currently stands in relation to fines, that may well be the case. But I have been unable to get any response in relation to where that prosecution is at.

The Hon. DAVID CLARKE: Under the proposals you are suggesting we could theoretically have a situation where the managing director of a corporation could in fact be charged if it is shown that there has been gross negligence by him in ensuring that the safety precautions and so forth have not been observed, would that be the case?

Mr BASTIAN: Yes.

The Hon. DAVID CLARKE: So conversely we could have a situation where a Minister, Federal or State, in charge of a department can similarly be charged?

Mr BASTIAN: Yes.

The Hon. DAVID CLARKE: If not he should be charged, would that follow through too?

Mr BASTIAN: If he has overwhelmingly breached his obligations in terms of overseeing safe systems of work, that is right.

The Hon. DAVID CLARKE: So any legislation we have should also cover State Ministers?

Mr BASTIAN: I do not see there should be any distinction drawn at all but I am not a lawyer. I will rephrase that: I am not a practising lawyer.

The Hon. DAVID CLARKE: Basically what you are saying, as I understand, is that the innocent death of employees should not be dealt with under the law; people should not escape the full effect of the law for manslaughter simply because that person is a director or a corporation. That is the unlevel playing field we are talking about?

Mr BASTIAN: That is right.

The Hon. DAVID CLARKE: There is also an unlevel playing field—and you may have heard the questions earlier—with those who go as shoppers into a shopping complex where the owner is a corporation. Do you not think the law should similarly apply so directors and corporations who operate, for instance, shopping centres, and who have been guilty of gross negligence, should not also be encompassed under this law that you are proposing? Because if we did not do that would that not leave an unlevel playing field in respect of the protection given to members of the public in a shopping complex?

Mr BASTIAN: Speaking for our organisation, we have not addressed that issue or turned our minds to it. We have specifically dealt with workplace deaths and the deaths of our members and the members of other unions who die at work. We have not turned our minds to that at all.

The Hon. DAVID CLARKE: Do you think that is something that should be looked at so that we have a level playing field right across the board?

Mr BASTIAN: If it is not already dealt with or covered by existing law I would not necessarily draw the distinction either. But we have not turned our minds to that at all.

The Hon. PETER PRIMROSE: What are the legal impediments to a corporation being successfully prosecuted for manslaughter under the present common law in New South Wales?

Mr BASTIAN: Our understanding is simply that there are the notions of being able to discern who has the controlling mind and will, the intent, and who the Act can be attributed to. If we wanted to prosecute a corporation for manslaughter a corporation first off has the difficulty of being identified as an individual, and there are all those other issues. For example, a director of a company who is aware of safe systems of work and who is grossly negligent in making sure they are maintained, under the current law it is extremely murky about whether or not any liability can be attached to that individual.

Yet, if the individual is lower down the tree, and is a working director, of which there are plenty, and works with the workers on the job and has the responsibility for a safe working system and a worker dies through gross negligence, that person is more likely to be charged for manslaughter under the current common law provisions. The further up the tree and the larger the corporation the more difficult it becomes. I am not aware of a single prosecution in any jurisdiction in Australia, let alone New South Wales. That is the test of the adequacies of the current law; they have failed.

CHAIR: You prefer cases to be heard in the criminal court. Obviously under the industrial law and the occupational health and safety provisions, a specialised knowledge has been built up. Do you say that the judges who handle the cases in the criminal court should have that knowledge? Or could any judge or any jury deal with such a complex matter?

Mr BASTIAN: You would not need any changes to the current system. Because we are talking about a serious charge, one that has a custodial sentence for individuals, it should attach to the criminal court, but it should be by a jury. We think that juries are quite capable of discerning the difference between gross negligence or a simple breach of legislation. We have the view that the community has a greater respect and understanding for that type of criminal conviction than it has for occupational health and safety convictions. I am sure the Committee has already heard of the provision of outstanding fines within the current regime. We see it as a totally different status, as they are not comparable. It is a serious offence and we would have thought the interests of those charged are better served by a jurisdiction such as the criminal court.

CHAIR: From your comment it sounds as if you think that WorkCover and its prosecution system has not been as tough as you would like. Is that so?

Mr BASTIAN: Certainly from our perspective. As I said, I have individually raised it on behalf of our union with the advisory council. I have written to the chair of the advisory council for details about the prosecutions branch in relation to any consideration given for manslaughter charges, and have never had a response. So, I cannot say I have had positive reinforcement from WorkCover, no.

CHAIR: You want to bring in a new industrial manslaughter offence, rather than amend the existing industrial law to create a serious offence in the case of manslaughter?

Mr BASTIAN: No, we think it needs a new head of law.

CHAIR: To be part of the Crimes Act?

Mr BASTIAN: That is our preference.

The Hon. KAYEE GRIFFIN: There has been discussion about the lack of sufficient evidence to secure a conviction in relation to some of the people who have given evidence before this hearing. If an industrial manslaughter offence is created, would it have any impact on the way that an industrial accident is investigated?

Mr BASTIAN: Yes. We think it has an effect in two areas. First, on the way it is investigated, certainly, in our view, by WorkCover. Second, I refer to a comment that Alan Fells made when he was the head of the Australian Competition and Consumer Commission, although it was in another context it is relevant. He said, "Nothing focuses the mind of an executive more than a gaol sentence". We think that that is right.

The Hon. KAYEE GRIFFIN: From your experience of the way accidents are investigated at the moment, what changes do you suggest?

Mr BASTIAN: I am not so sure that it is a problem about the investigation. In a workplace investigation obviously the police, the Coroner and WorkCover would be involved. It is more about what charges are available. In our view there is a need for a charge that supports and reinforces the objects of the occupational health and safety Act; that is, the corporation, the senior executives, are responsible for workplace safety and that should be reinforced by a similar law when it comes to workplace deaths. There is greater scope for that to occur by creating a new crime.

CHAIR: Have you given consideration to the problem of separating a corporation from an individual in a manslaughter matter? It could involve the plant manager or the foreman.

Mr BASTIAN: We say that the corporation is guilty by the abrogation of its officers, their omissions to act. The individuals are the same: they are part of that abrogation. If anyone on a job is grossly negligent and brings about a death, they will be caught by the current regime in any event, because of the level that they are at. We say it is omissions to act, through the abrogation of those acts, that will hold the corporation liable, but only when those omissions have been grossly negligent and brought about the death of a worker.

CHAIR: So only a corporation could be fined? One problem could be that a corporation would get off with a fine and it would not change its culture or attitude.

Mr BASTIAN: In our submission we say that the fine should be $1.25 million, which is a substantial increase in the fine available under the current regime.

CHAIR: It would get their attention.

Mr BASTIAN: We have also said that a range of sentences is available, such as debarring officials, deregulation, seizing of assets and damages to the victim. There were sentencing options and I have hard copies of our submission that I can leave with the Committee. We say that there is a range of sentencing options available that should be determined by the court when it is reviewing any sentencing options.

Ms LEE RHIANNON: To take up your point about sentencing operations, what are those options and in what circumstances would the offences be appropriate?

Mr BASTIAN: There would be a pre-sentencing report and that would go to the conduct of the corporation in relation to its occupational health and safety record, previous convictions, et cetera. Some options have been raised through the Victorian legislation when it considered this and included

that the company be required by the court to perform a specific act, to establish or carry out specific projects in the public interest, community service orders, damages payable to injured workers, an increase in fines, deregistration of a corporation—which ultimately would be a serious step to take and in our view would have to be considered in the light of the record of the company—forfeiture of assets and suspension of shareholder-directors. There was a range of sentencing options that could be explored other than a simple fine. The Longford case, which may have been raised previously, involved a fine. The amount of the fine is contained in our submission. When one considers the profit Longford made, the fine was inconsequential; about $256 million profit. How that acts as a deterrent is beyond me.

Ms LEE RHIANNON: Earlier you spoke about a company that went into liquidation after a young apprentice had died. The Committee has heard of other examples of companies acting in a similar way. Do you have any suggestions on how that can be overcome? How can a company be pursued if it is using other laws to avoid taking responsibility for a death or serious injury?

Mr BASTIAN: A couple of avenues could be looked at. First, the notion of lifting the corporate veil, which, again, is a common law or doctrine in which companies are considered as separate entities. Unless it can be demonstrated or proven that there was an arrangement or sham to avoid an obligation, you cannot get behind it to go to the assets, or follow the money up a tree. We found that a particularly hard notion to overcome. Our practical experience of that is employers' entitlements; it is a near impossibility to follow the money trail through the tree. With a manslaughter, for any fines against corporations we need to be able to get around that doctrine as well.

In terms of directors' conduct, we say they should not be allowed to hold directorships, nor be able to set up other companies, phoenix companies, and rise again. It would be a total and flagrant disregard for workplace deaths and for justice for victims and their families, and for community standards, to allow that to go on. We say that two areas need to be addressed, and they are under the corporations law.

The Hon. Jan Burnswoods: We would need to amend other substantial legislation as well.

Mr BASTIAN: There are real issues in relation to that area.

CHAIR: You mean, to amend company laws?

The Hon. Jan Burnswoods: That would be a Federal area.

Mr BASTIAN: Certainly with the corporations law it would be Federal.

CHAIR: Unless the Federal law were changed and you had more information about directors, they would have to declare their assets. That should be recorded somewhere, to overcome that veil.

Mr BASTIAN: Yes, but the sentencing options we have put up would get over that problem with directors, by debarring them from holding office. We have proposed a specific way of dealing with that, getting around that, but there is problem with the Federal corporations law.

CHAIR: I know with the changes to laws relating to builders they have to submit a list of assets before they will be given adequate insurance to proceed as a builder. There is more disclosure in other areas and it should be possible to look at that.

Mr BASTIAN: I agree.

The Hon. IAN WEST: I am aware of your expertise in this area. I am interested in your opinion on the question of onus. I we follow the criminal track, there will be a question of intent, proof of that intent, and who will do the prosecutions. Do you see any difficulties in that there may be a need to change the Crimes Act, the corporations Act and the Occupational Health and Safety Act. Also there may be some great difficulties in the prosecution area if we end up in the crimes jurisdiction.

Mr BASTIAN: No, I do not believe there will be difficulties in prosecuting the crimes jurisdiction. Earlier I said that this is a serious offence with a custodial sentence of up to 25 years. We do not treat that lightly, but we believe that those who are grossly negligent warrant custodial sentences. We believe that they have a right to a proper and fair hearing in the normal process and the proper form for that is the criminal jurisdiction before a jury in courts that are well experienced in the laws of evidence. We have problem with the notion of occupational health and safety. Whilst you can get a criminal conviction, having it in that frame does not provide the accused with a proper form for dealing with it. We do not think it reflects a community expectation about how such an issue should be undertaken. We do not see any reason why the death of a worker should be less significant than the death of someone at home, on the road or at a shopping centre. For us, there is no difference.

The Hon. IAN WEST: You see no difficulty in the prosecution being done by the police and with an onus of proof beyond reasonable doubt?

Mr BASTIAN: No. That goes with the jurisdiction that we believe is best reflected.

CHAIR: Obviously it is far better to encourage employers to have good safety programs, so we do not have the accidents and particularly deaths. Has your union been involved with employers in promoting joint safety campaigns, to try to avoid these situations? Have you had much co-operation in that regard?

Mr BASTIAN: With employers, no. From the employer organisational level we have a good relationship in terms of objectives and safety, but when it gets to individual employers it proves more difficult. Over the last two years we have been running a campaign on workplace safety that has seen our levels of trained safety representatives increase, with a focus on rehabilitation which has almost doubled the level of representation of occupational health and representatives and on-the-ground training, which we believe—and I think employers agree—benefits them as well in terms of focusing their minds on occupational health and safety.

However, unfortunately for us, when we have looked at statistics since the legislative change in 2000, everything in the statistics shows us that things have got worse, and we think that is an issue that needs to be redressed. By way of example, serious injuries have increased from 11.8 to 11.9 per million hours worked, occupational diseases have increased from 2.04 to 2.15 per million hours worked, since 2000 workplace fatalities have increased from 0.014 to 0.016, and deaths from occupational diseases have also increased since 2000. So the relevant statistics on workplace deaths and serious injuries since those changes have taken place has in fact increased. There is therefore a real need to focus on workplace safety and drive the issues home for all involved.

CHAIR: In your view, is there any explanation as to why that is happening, in spite of the new legislation?

Mr BASTIAN: Our view is that there is not a strong enough focus on occupational health and safety in the workplace. As a result of serious workplace injuries and deaths in manufacturing, we have instructed our people to be involved in regular safety audits of the workplace in accordance with the Act, to ensure that the workplace is closely monitored by those who ultimately suffer the injury and to continually focus on workplace safety and drive it from the bottom up, because our view is that it certainly has not been driven from the top down.

CHAIR: It appears that responsibility for implementation of the workplace laws that have come into force since 2000 is now falling on the unions. That responsibility should fall on WorkCover, should it not?

Mr BASTIAN: It should always be on WorkCover to police regime and make sure that a regime is working, and that adequate fines are imposed and those fines are paid. As we see it, there is also a proper role for unions in ensuring their members are safe at work, and in continuing to pursue the best possible safety standards for their members in workplaces. So we have a very strong role, and we do not detract from that.

CHAIR: I am not critical of the role; it is just whether you are carrying a lot of the responsibility that really should be carried by WorkCover and its officers and inspectors.

Mr BASTIAN: We would not question that there is a greater need for stronger emphasis from WorkCover and its inspectors in terms of policing the regime and ensuring that someone is finally charged.

The Hon. CATHERINE CUSACK: You said that those who commit industrial manslaughter deserve to be punished. Do you refer only to senior management, and directors and owners of businesses? Earlier you said that workers on the job are caught by the current regime. The industrial manslaughter laws would only apply to owners and directors but not to colleagues in the workplace, is that right?

Mr BASTIAN: The industrial manslaughter laws fill in the current gap in the playing field. A co-worker who is grossly negligent and brings about the death of another worker will be caught by the common law manslaughter provisions in any event. Where the common law fails now is that the larger the corporation, the higher up the tree you go, the more likely it is that you will not be charged under the common law provisions. That applies to the issues I raised previously about the problems with controlling mind and will, who performs the act and issues of intent. Those issues need to be addressed. If you have legislation in New South Wales that says, and rightly says, that those who are responsible for workplace safety are the company and its officers to ensure safe systems of work, surely you must have criminal sanctions that match that. As it currently stands, you do not; you have criminal sanctions that match co-workers or hands-on directors.

The Hon. CATHERINE CUSACK: Do you have examples of that?

Mr BASTIAN: No, I would not have any examples off the top of my head, but I think I can recall that when I was on the waterfront many years ago a co-worker was convicted for a negligent act at work.

The Hon. CATHERINE CUSACK: On my understanding, no-one has ever been convicted of manslaughter relating to a death in the workplace. I understand that no co-worker or manager-owner has ever been convicted.

Mr BASTIAN: That is my understanding.

The Hon. CATHERINE CUSACK: It would be difficult to believe that in the history of industry in New South Wales a co-worker had never been responsible for someone else's death through an act of negligence.

The Hon. CATHERINE CUSACK: Just as difficult as it is to believe that management would not be responsible as well.

The Hon. CATHERINE CUSACK: I suppose we are being asked to look at one side and not all sides. I am suggesting that perhaps we should be looking at the whole issue.

Mr BASTIAN: I agree. But, again, if you look at the elements of the two regimes of manslaughter and common law which deal with the issues of intent, and controlling mind and will, if a co-worker meets those elements presumably they will be charged and will cop the wrath of the law, as they should. That exists now, but it does not exist anywhere else up the tree within a corporation.

The Hon. CATHERINE CUSACK: Is it fair to say that negligence is more difficult because it is about inaction rather than action causing death?

Mr BASTIAN: I am not up to speed on negligence law. Could you repeat that?

The Hon. CATHERINE CUSACK: Negligence is more about inaction causing death than it is about action causing death. I am not a lawyer, but even I can see that under the criminal law it is easier to prove the case against a person because of something they have done than it is to prove the case because of something they have not done.

Mr BASTIAN: I do not think so. If you have legislation in New South Wales that requires an employer to provide safe systems of work, and the legislation relating to industrial manslaughter is based on omissions to act, surely the two mesh in with regard to whether or not a person, in senior management or a corporation, failed to make safe systems of work. I think we could probably find endless examples of management failing to provide safe systems of work in workplaces right now. But we would be pretty confident of being able to get over it.

The Hon. CATHERINE CUSACK: Do you think the law is not being properly implemented at the moment?

Mr BASTIAN: It is probably two things. It is probably argued that the law is not implemented properly now, but we also say that there is a clear failing in the law as it exists now in relation to being able to capture those areas that we have defined.

The Hon. CATHERINE CUSACK: When there is a death in a workplace, I understand that police attend the site but there does not appear to be any evidence that they do anything. I understand that they investigate the death, but if no charges arise I wonder what the police are doing there.

Mr BASTIAN: I cannot answer for how the police conduct the inquiry. On my understanding—and this is the reason I wrote to the prosecutions branch—WorkCover does the inspection and it also makes a recommendation as to the type of prosecution required.

The Hon. CATHERINE CUSACK: Given that we are talking about criminal negligence**,** should the police be relying on WorkCover, or should they be conducting investigations into the actions of WorkCover?

Mr BASTIAN: I think that WorkCover and the police have a dual role to play, in terms of both being able to investigate workplace deaths. It seems to me you must have adequate laws for either the police to lay charges or WorkCover to recommend.

The Hon. CATHERINE CUSACK: It is getting difficult to determine whether it is an occupational health and safety issue or a criminal issue. I know that police go to the sites, but I simply do not know what they do, because no-one is ever charged.

Mr BASTIAN: It is a criminal offence for a conviction under the occupational health and safety legislation now. The police are not involved; WorkCover is involved. At the end of the day, on such a serious charge my personal view is that the police should probably take over that area. But, again, it is not an area we have turned our mind to. As we understand the regime currently works, the police are involved in investigations, WorkCover is involved in investigations, WorkCover has a role to play in making a recommendation in terms of what charges are laid, and, as we have said, we are shooting blind. We have repeatedly asked for records of any recommendations WorkCover has made in the past for manslaughter, or we thought that manslaughter was up there, and we have been unable to achieve any response to that.

The Hon. CATHERINE CUSACK: Are you referring to inquiries of the police or WorkCover?

Mr BASTIAN: They were through WorkCover's advisory council.

The Hon. CATHERINE CUSACK: Have you approached police about the failure to bring manslaughter charges?

Mr BASTIAN: No. Our understanding is that WorkCover recommended charges.

The Hon. PETER PRIMROSE: The last witness raised the difference between laying charges and achieving convictions. I presume there would be not much incentive to lay a charge if experience showed that a conviction was not able to be achieved, given the current state of the law. Would that be the case?

Mr BASTIAN: There is certainly logic in that.

The Hon. PETER PRIMROSE: Do you expect that if industrial manslaughter law comes into effect employers will suddenly flock to other States or small specific nations and leave New South Wales?

Mr BASTIAN: I do not think that would be the case. It seems that any time, whether it is industrial manslaughter charges or some other form of regulation, that is the human cry from employers. The reality is that other jurisdictions are currently looking at similar legislation, or reviewing their occupational health and safety legislation with a focus on workplace death. I do not really think that there will be a mass exodus of employers, on the basis that the victims of workplace deaths and their families are brought some justice.

The Hon. PETER PRIMROSE: How many workplace deaths are we talking about in New South Wales?

Mr BASTIAN: According to the figures that we have, which were released by WorkCover, there is one death every 43 hours, which is one of the highest rates in the western world.

The Hon. PETER PRIMROSE: In paragraph 20 of your submission you briefly discuss the Transport Legislation Amendment (Safety and Reliability) Act 2003. Could you elaborate on the significance of these amendments to the Rail Safety Act 2002?

Mr BASTIAN: These are simply offences whereby the State has sought to make corporations liable for offences under the Rail Safety Act. One that comes to mind is the current drug and alcohol regime under RailCorp. RailCorp as a corporation is held liable for having a proper regime. If it does not, it does not get credited. This State already recognises the notion of holding a corporation responsible under those two regimes.

The Hon. DAVID CLARKE: Over the years many individual employers, as opposed to corporations, through gross negligence have been responsible for the death of employees, involving a sufficient level of negligence to warrant a charge of manslaughter. I think the evidence has been that you are not aware of any successful prosecutions of such individuals, is that correct?

Mr BASTIAN: That is my understanding.

The Hon. DAVID CLARKE: Are you aware of charges being brought against those people for manslaughter?

Mr BASTIAN: No. The submission referred to one case, not the individual but the company, where the company went into liquidation.

The Hon. DAVID CLARKE: I am talking about the many thousands of employers who are not corporations.

Mr BASTIAN: No, I am not aware that of any.

The Hon. DAVID CLARKE: If we change the law and bring in this new legislation for industrial manslaughter, employers who are not corporations will not be affected at all. It will affect only corporations. We will not be in a better position to prosecute employers who are individuals because the law already applies to them. Why are we not enforcing the law against employers who have no corporate protection and who have been responsible for manslaughter?

Mr BASTIAN: Perhaps it goes to what Mr Primrose raised about whether or not there is any clarity in existing laws when it comes to someone who is operating a company or corporation.

The Hon. DAVID CLARKE: I am not talking about the confusion of a corporation or a company, I am talking about employers who operate as individuals under a business name that does not give them any corporate protection. Why is it that the law for manslaughter is not enforced against an employer who is responsible?

Mr BASTIAN: I do not think I can answer that.

The Hon. DAVID CLARKE: Has the union pursued those cases?

Mr BASTIAN: No, we have not come across a case that pursued that issue. It is not for us to pursue. We do not have that option.

The Hon. DAVID CLARKE: You can encourage a relative, for instance, to seek to have an individual employer charged for manslaughter.

Mr BASTIAN: The vast bulk of our members do not work for individuals, they work for companies. We have very few self-employed people in our union.

The Hon. DAVID CLARKE: What about electricians who work for another electrician, plumbers who work for another plumber, or bricklayers who might work for contractors who do not operate under a corporate veil? I gather that a large percentage of employers are not corporations. Whether or not we introduce these changes, those employers will not be affected because the law already exists for those people. But you are saying that you are not aware of any successful criminal prosecutions for manslaughter in those situations.

Mr BASTIAN: I am not aware of any successful prosecution against a corporation for manslaughter.

The Hon. DAVID CLARKE: I am not talking about corporations, I am talking about employers who are not corporations. You are not aware of any at all?

Mr BASTIAN: No.

The Hon. DAVID CLARKE: Do you think there are cases out there? Clearly, if 50 per cent of employers are individuals then you would assume there would be a reasonable portion—

Mr BASTIAN: By individual do you mean private company?

The Hon. DAVID CLARKE: No, I mean an employer who is operating under his own name.

Mr BASTIAN: Owner-operator?

The Hon. DAVID CLARKE: Yes.

Mr BASTIAN: We do not have too many of those.

The Hon. DAVID CLARKE: You may not, but in other industries there may well be, for instance, electricians.

Mr BASTIAN: That is not my area of expertise, I am afraid.

CHAIR: We have run out of time. If members have any other questions or would like to follow up on something would you be happy for us to put those on notice?

Mr BASTIAN: I am happy to take any other questions on notice.

CHAIR: Thank you very much for coming and giving your time. We appreciate that, as a union secretary, you are a very busy person.

Mr BASTIAN: And thank you to the Committee for the opportunity.

GLENN STREET, Regulatory Affairs Officer, Medical Industry Association of Australia, and

SUSAN MARTLAND, Member of the Health Care Safety Special Interest Group, Medical Industry Association of Australia, affirmed and examined:

PATRICIA BUTREJ, Occupational Health and Safety Co-ordinator, sworn and examined

CHAIR: In what capacity are you appearing before the Committee?

Mr STREET: As a representative of an organisation.

CHAIR: Would you like to make a brief opening statement?

Mr STREET: Yes, I would.

CHAIR: In what capacity are you appearing for the Committee?

Ms MARTLAND: As a representative of an organisation.

CHAIR: Would you like to make a brief opening statement?

Ms MARTLAND: No, my colleague will do that.

CHAIR: In what capacity are you appearing before the Committee?

Ms BUTREJ: As a representative of the New South Wales Nurses Association.

CHAIR: Do you wish to make a brief opening statement?

Ms BUTREJ: Yes.

CHAIR: Mr Street, would you like to make your opening statement?

Mr STREET: The Medical Industry Association of Australia [MIAA] thanks the Committee members for this opportunity to appear before the New South Wales Parliamentary Inquiry into Serious Injury and Death in the Workplace. We welcome this inquiry, and the opportunity it provides to highlight the serious nature of injuries from sharp medical devices in New South Wales hospitals. Your inquiry has already heard details about many terrible workplace incidents, particularly those involving accidents at construction sites. Although the effect on health care workers who are accidentally stuck with a needle may not be as immediately obvious, the consequences can be equally devastating. We believe that these injuries should be treated just as seriously.

For the information of Committee members, MIAA is the peak industry body representing the Australian Medical Device and Diagnostic Industry. Our members supply approximately 85 per cent of all non-pharmaceutical medical products to hospitals, medical professionals and patients. They directly employ around 10,000 people, and turnover in excess of $2 billion annually. MIAA strongly believes that all health care workers have a right to a safe working environment. Our members have been liaising with health care worker representatives, including the Australian Nurses Federation, for the past two and a half years to highlight this issue. MIAA is encouraged by the excellent work that is being done to reduce the number of needle-stick and other sharp-object injuries by a number of individuals and institutions in New South Wales.

We were delighted to see WorkCover's publication late last year of the notification requirements for occupational exposure to blood-borne pathogens guide, July 2003. In the guide WorkCover acknowledges that exposure to blood-borne pathogens pose a serious risk in many workplaces. It states further that because of the risk of transmission of blood-borne pathogens, needle-stick injuries are of a major concern. Despite what you may believe, injuries where a used syringe or other sharp object pierces a health worker's skin are frighteningly common in hospitals. On the latest

available information, it is estimated that approximately 13,000 Australian health care workers were stuck by a needle or other sharp object in one year. That figure includes nurses, doctors, paramedics, hospital cleaners and laundry workers.

Taking nurses as a specific example, it is estimated that one in nine nurses in New South Wales suffers a needle-stick injury each year. This is a conservative estimate. Anecdotal evidence suggests that many nurses are too busy, embarrassed, or scared to report their injury, which leads to an underreporting rate of up to 60 per cent. In what other industry or profession do workers leave their homes every day knowing there is such a high chance that their work could expose them to serious and, potentially, blood-borne diseases such as HIV-AIDS, hepatitis B or hepatitis C. Already there have been 12 documented cases of HIV infection in the health care sector in Australia, including six cases of occupationally acquired HIV infection. A recent parliamentary inquiry in the United Kingdom found that four British health care workers had died after contracting HIV at work, while a further 13 had developed AIDS after receiving similar injuries. In most cases it is a stressful three months before a health care worker will know whether or not they have contracted a life-threatening, blood-borne disease.

We have been motivated to make this submission because our members manufacture many of the sharp devices that are so essential to medical practice. Naturally, they are concerned about the welfare of health care workers, the people who use these products. They feel strong obligation to assist in the improvement of health care worker safety. As well as producing conventional sharps, our members also produce a wide range of safety-engineered medical devices designed to eliminate the risk of transmission blood-borne disease. These safety-engineered medical devices were developed in response to a clear, worldwide demand by health care workers for greater protection and safety. Our submission makes a number of recommendations that will help WorkCover to improve the safety of all health care workers in New South Wales, while reducing the exposure of hospital, area health services and the New South Wales taxpayer to expensive damages from injured workers.

We are happy to discuss the recommendations listed in our submission in more detail with Committee members and the Committee Secretariat at any time. I want to make it clear that the MIAA has no issue with the New South Wales Department of Health infection control policy, or the protocols for management of health care workers potentially exposed to blood-borne diseases following a sharps injury. However, our argument is that proactive elimination of this reasonably foreseeable risk must be taken before the event in preventing the ongoing occurrence of such incidents. After all, this is a legal responsibility for all employers in New South Wales according to the Occupational Health and Safety legislation and regulations. We look forward to working with the New South Wales Government, WorkCover and the Department of Health to continue improving safety for health care workers in New South Wales.

CHAIR: Ms Butrej, would you like to make your statement?

Ms BUTREJ: The New South Wales Nurses Association represents approximately 48,000 members across New South Wales. Mr Street has eloquently addressed the potential impact of sharps injuries on employees, and I will not repeat them. I will make two additional points that are of particular interest from our perspective. The Occupational Health and Safety Act requires the provision of safe equipment for employees. Our perception is that best available technology in terms of safe equipment is not necessarily available to nurses in the workplace. Some needle-free technology has been taken up, but there is scope for a lot more to be done to take up equipment, such as the safer needle syringe technologies that are now available.

The other issue for us is that there is generally a lack of statistics on sharp injuries, particularly in the health sector, especially in the public hospital system, because most of them are dealt with in-house, and never make it to the workers compensation system until there is actually sera conversion. Sera conversions are quite uncommon. Therefore, most of the statistics that actually specify the number of people who are injured, and the costs associated with those injuries, are certainly not in the public domain and are not readily available. There has been a recent agreement between WorkCover and the Department of Health that the Department of Health will provide statistics to WorkCover on a six-monthly basis. I am not sure whether the first report has been

provided, and I am uncertain as to whether the cost of these injuries is included in that report, but it is something that needs to be addressed.

CHAIR: Do the bulk of hospitals use retractable needles, 10 per cent of hospitals or how widespread are they used?

Ms BUTREJ: It is certainly not widespread to my knowledge. I think a number of high-risk units, for example, those that deal specifically with patients who may have HIV might use the retractable syringes. They are not in common usage.

CHAIR: Why are they not used widespread?

Ms BUTREJ: I think it is primarily cost. I am also uncertain as to whether they are available on government contract but the Department of Health would probably be in a better position to answer that.

Mr STREET: Certainly there may be a cost factor to it. There is also the other aspect that the technology of the devices—scalpel blades or syringes—is relative new into the Australian environment. It has been developed in the United States of America and the European arena, but under the new legislation with the Therapeutic Goods Administration the engineered devices have only recently come into the market place for supply into that market place: so there are two factors to it. Possibly and initially because of basically the low volume that are coming in it may make the price a little higher but certainly as they come into generally usage we would expect prices to go down. But certainly the technologies are relatively new.

CHAIR: What is the approximate cost factor between an ordinary and retractable needle?

Mr STREET: I do not have those exact figures with me. I would say between a general syringe that uses a plunger and putting a needle on the end of it there may be a double cost in that needle.

CHAIR: If an ordinary needle costs $1 the retractable needle would cost $2?

Mr STREET: That is correct, it would be in that ballpark.

CHAIR: Has been a problem in relation to the safety a retractable needles?

Ms BUTREJ: Not to my knowledge.

CHAIR: Do they perform the same role?

Ms BUTREJ: I think they have some limitations.

Mr STREET: The limitation at the moment, and I am sure it will be remedied with development, is in the arena of deep intramuscular injection which would require a needle length of somewhere in the line of approximately 1½ to 2 inches long, using the old gauge. The needles at the moment are generally the smaller needles.

CHAIR: Are there certain medical procedures that require the use of the regular needle?

Ms BUTREJ: Yes.

Ms MARTLAND: One thing that needs to be kept in mind when we are talking about these injuries is that it is not just retractable needles or injuries just from needles: it is needles and other sharp medical products. There are a number of items or safety engineered devices that are available today for use in hospitals, such as protected scalpel blades, needle-free intravenous access products, IV cannulas with safety retraction, as well as retractable needles which, of course, seem to be in the press a lot. There is a lot of talk about that, as there should be because that is the newest technology available and what will really start to make a difference to the lives of nurses in hospitals. But there are a number of injuries that also occur in theatre, for example, and that is scalpel blades and suture

needles and that type of thing. What we are talking about here is across the board safety engineered devices that cover a whole range of areas within a hospital.

CHAIR: Are scalpel protectors widely used or are they available but are not being used? Is their use governed by a financial factor?

Ms MARTLAND: There is always a financial factor in any decision because hospitals have limited budgets, and that is understandable. But one of the things that we are trying to do with our health care workers safety special interest group is to try to work with individual hospitals and the various stakeholders in understanding the costs associated with not moving over to a safety protected device. That comes into thoughts of the human impact on the staff member who happens to be injured. It is a long process where they have got to think through "Is my life going to change? What will that mean to me?"

Not only that, if the staff member does determine that they are going to go down the path of some legal action then what cost is that on insurance premiums, et cetera. There is a cost benefit that has to be weighed up, and certainly the devices cost more. I guess, like anything else, cars with seat belts cost more when they first came out and now we would not even think about driving a car without a seat belt. There are lots of incidents in the past where things that are safer have cost more. The cost benefits need to be weighed up as well.

We are asking WorkCover, I guess in this submission, to look more closely at the risk assessment, to understand why the injuries are still happening and what can we do about it? Is there a way that you can do some cost benefit analysis to then make it clear that making the use of these devices mandatory will start to save in the future. Evidence from overseas has indicated that having mandatory safety devices in use—in particular, the United States of America that makes the use of safety engineered devices mandatory—the incidence of needle stick injuries has reduced by more than 50 per cent. Now if we think about what it means to the health care worker going to work every day, I think I know where I would like to be if I were the health care worker.

CHAIR: I am not suggesting the cost factor should stop them being used. I was asking if that is the reason they were not being widely used. Do you suggest that a mandatory requirement should be considered and that the occupational health and safety legislation should include in its protocols that retractable needles and scalpel protectors, or whatever be used?

Ms MARTLAND: Things have been talked about for a long time around the world. There are many countries that are actually starting to make their wording more specific. The recent changes to the occupational health and safety legislation and regulation in New South Wales have made it a very good document. The wording that is used is so close to what is used in other jurisdictions around the world. For example, Alberta, Canada, changed its wording. It has the same hierarchy of what needs to be reviewed when a hazard is being eliminated. They go through providing a safe product and then you get down to engineering controls and all they have done is add, for example, "needle protected devices" or on word and it makes it a stronger document.

It means that when the health care institution is reviewing "Why have we had this needle stick injury? We have got to assess this hazard." As part of the legal legislation, instead of going to the bottom of the hierarchy which is personal protection devices and education which are important but it will never change the fact that the needle-stick and other sharp object injuries occur daily, just having some small amount of extra wording into the legislation that is currently in place will absolutely make a difference. It does not need to happen overnight. Certainly in the United States where it is mandatory there has been a phase-in period, and that is understandable. We need to understand which areas in a hospital need to be assessed first but at the end of the day it makes it then easier for the staff to feel that they are getting the best products available and it then becomes a safer working environment and makes it easier to do what the legislation says you should be doing. The wording makes it clearer.

CHAIR: Would you prefer it be a mandatory requirement with a phase-in period?

The Hon. CATHERINE CUSACK: Point of order: This submission relates to a review of occupational health and safety regulations. I do not see that this is part of our inquiry.

CHAIR: Any recommendation the committee makes that reduces injuries or deaths is relevant.

Mr STREET: If I could add another perspective in relation to the regulatory aspect from the manufacture of the medical devices that come into Australia, all medical devices by definition of a "medical device" must undergo some form of assessment by the Therapeutic Goods Administration. The Therapeutic Goods Administration has enacted a new Act or amended the Act in 2002 onwards. Part of that informative assessment that now must take place is that every medical device has a risk analysis done on it. When the risk is identified it must be in writing or an engineering aspect put in place to try to mitigate that risk. Manufacturers of medical devices now are obliged by the Act to actually have those in place. As a response to that the safety engineered devices have really come into being because the manufacturer is responsible to try to cut that down.

As a response to that again both in the European arena and the American arena where those risks have been identified—and certainly scalpel blades and syringes are in that category—they have had to put things in place. The major area that they have put in place is to make, for syringes for example, retractable needles, for scalpel blades retractable covered blades et cetera. It is a mandatory obligation on a manufacturer if they wish to supply their goods into the Australian market place.

The Hon. DAVID CLARKE: Do I understand it correctly that one in nine nurses every year suffers a needle injury?

Ms BUTREJ: That is the statistic provided by Mr Street. I am unaware of the source of that statistic. I have not seen any authoritative statistics on the incidence of injuries.

The Hon. DAVID CLARKE: If Mr Street's statistics are correct, it is a very high rate. It means that over a nine-year cycle, theoretically every nurse will suffer a needle injury?

Ms BUTREJ: That is true. In some work areas the risk is higher than others. For example, in emergency departments and in theatres the incidence of sharps injuries may be quite a bit higher.

The Hon. DAVID CLARKE: In many instances it could be a life-threatening injury that a nurse suffers?

Ms BUTREJ: Definitely, for both HIV and hepatitis C the possible consequences are long-term debilitating illness or even death, especially with HIV. Yes, the consequences are potentially extremely severe. For hepatitis B a vaccine is available but as with other vaccines not everybody can be vaccinated for various reasons such as allergy.

The Hon. DAVID CLARKE: In relation to HIV for which no vaccine is available, are nurses always aware that they are dealing with patients who suffer from HIV?

Ms BUTREJ: Do they know the person's status in advance?

The Hon. DAVID CLARKE: Yes.

Ms BUTREJ: No.

The Hon. DAVID CLARKE: Why do they not know the person's status in advance?

Mr STREET: There may be times, certainly on the declaration that a patient makes prior to admission into hospital or at other times when it is in the emergency units or in psychiatry and the like, where the patient has not disclosed that they may be a patient at risk. There are certainly situations where there are some signs that a nurse, doctor or health care worker may be able to ascertain, but that is not going to be the case all the time.

In some cases there would be patients who would not declare that they were at-risk patients.

The Hon. DAVID CLARKE: Are they obliged, under the law, to declare that they are HIV sufferers?

Mr STREET: In the context of informed consent, which flows both ways, they would be, yes.

The Hon. DAVID CLARKE: So if you were dealing with a patient who had not declared that he or she suffered from HIV, that person would be breaking the law, is that right?

Mr STREET: Those words are very strong and that is certainly not my area. I have had cases—and there are known cases—where patients have not declared that. You asked me whether or not that would be a case of breaking the law. One would think so as they certainly would not have fulfilled their obligations.

The Hon. DAVID CLARKE: As this is a pretty important question that concerns nurses, I will ask Ms Butrej to respond to it. Ms Butrej, under the law, are HIV sufferers required to declare in any documentation whether they are HIV sufferers?

Ms BUTREJ: I am not sure what documentation hospitals use or what documents they ask people to sign. However, many people might not know that they are sufferers of HIV or hepatitis C in order to declare it in any event. Some people might arrive either in a state in which they are affected by drugs, or in an emergency situation where they might not even be conscious. Of course, they would then not be able to declare it. Generally, health care workers, including nurses, are expected to proceed and to provide treatment from the perspective that the person they are dealing with may be infected. So they have to treat everybody as being potentially infectious and, so far as they can, use appropriate equipment and precautions.

The Hon. DAVID CLARKE: I suppose that a worker going into a house that is to be demolished is entitled to know whether or not that house contains asbestos. Similarly, would you agree that nurses would be entitled to know whenever they were dealing with an HIV sufferer? Would that be correct?

Ms BUTREJ: That is a difficult question to answer. As I said before, not everybody knows. Testing every patient prior to providing treatment would be costly and not necessarily productive. A person could be infectious before antibodies even appeared in the bloodstream.

The Hon. DAVID CLARKE: I am talking about patients who know that they are suffering, or in those cases where hospital authorities know that they are suffering. Do hospital authorities always make it clear to nurses when they are dealing with a patient who is HIV positive?

Ms BUTREJ: It should be on the patient's record if the hospital is aware that the patient has a positive status. Incidents have been reported to us where a particular incident has occurred and that person was known to be hepatitis C positive. In the majority of cases when that status is known the nurses will know.

The Hon. DAVID CLARKE: Ms Martland, you suggested earlier that the regulations should be amended to reduce needlestick injuries and injuries from sharp instruments. Do you think such an amendment would be effective in reducing these incidents?

Ms MARTLAND: Absolutely.

The Hon. DAVID CLARKE: Have you suggested such an amendment before today?

Ms MARTLAND: I am a member of the health care workers special interest group. That group has been working for a number of years with various stakeholder groups to try to raise awareness of this serious issue through various inquiries in the past.

The Hon. DAVID CLARKE: Would that include making a submission to the Minister?

Ms MARTLAND: Not at this stage, no.

The Hon. DAVID CLARKE: Is there any reason why not?

Ms MARTLAND: That is on the list of things to get done.

The Hon. DAVID CLARKE: How long have you been asking for the regulations to be amended to reduce these injuries? How long has that issue been under consideration?

Ms MARTLAND: For about 2½ years various members of the Medical Industry Association [MIA] have been working in particular with hospitals. Our members work closely with hospitals, with nurses on the wards, with risk managers in the hospitals and with occupational health and safety people. We help them to understand what products are available, what a difference things could make, and so forth, and how they work.

The Hon. DAVID CLARKE: I am talking about an amendment to the regulations. You are talking about an amendment to the law. Any amendment to the law would involve the Minister. In view of the fact that you want the law amended have you specifically put it to the Minister that there should be such an amendment?

Ms MARTLAND: Specifically, no, we have not.

The Hon. DAVID CLARKE: Do you think that you should have?

Ms MARTLAND: The opportunity that this inquiry poses in talking further about the issue of serious injury and death in the workplace is part of the ongoing process. This is a long-term process.

The Hon. DAVID CLARKE: I understand that. However, if you had a specific proposal that would help to save the lives of health care workers, and that proposal involved an amendment to the law, would you not go to the Minister and put such a proposal to the Minister or to the department?

Ms MARTLAND: We will take advice from the Committee as to the best way to proceed in this matter. We are trying to do the right thing for health care workers. If there were a good process that would make a difference we would certainly consider doing that in the short term.

The Hon. DAVID CLARKE: I think you should make such an approach to the Minister.

The Hon. JAN BURNSWOODS: Do you have any comments about private hospitals, pathology providers and so on? You seemed earlier to be talking about the good co-operative relationship that you have in the public health area. However, I am not sure whether you include in that the rules and practices that have been laid down in the private health sector?

Mr STREET: That is certainly the case for members of the MIA who are primary suppliers of medical devices in this arena. The medical and surgical aspects are extremely important to those suppliers. Ongoing education is required under the new Therapeutic Goods Act. The Act requires us to provide education to the private sector as much as we would to the public sector. So we do have an involvement in the private sector.

Ms MARTLAND: That also includes pathology departments. Needlestick and sharp object injuries occur in every hospital, whether it be a government hospital or a private hospital.

The Hon. JAN BURNSWOODS: I was referring to private pathology testers and so on—the less seen and less regulated side of health injuries.

Mr STREET: Again, they are a large consumer of those goods. The industry, as a large consumer, requires that sort of education. Because there is an increasing number of private surgical hospitals and the like, we go into those arenas.

Ms MARTLAND: The breadth of safety engineered devices that are available specifically for, say, blood collecting—the majority of which would be done at pathology laboratories—is extensive. The majority of large, private pathology laboratories certainly are interested in safety engineered products and they are quite advanced in their use of them.

CHAIR: We have been given figures on the number of needlestick injuries that occur. Do you have any figures on the number of nurses or other hospital staff who have died from needlestick injuries? Have any staff members been totally incapacitated? Have any staff members had to retire as they were no longer able to continue working? We are concerned about workplace deaths as well as injuries.

Ms BUTREJ: I was called into this inquiry at short notice so I have not had time to conduct any research or to obtain statistics. Those cases should be evident and available through workers compensation statistics. I can either take that question on notice or WorkCover would be able to provide you with that information.

CHAIR: Are you aware of any cases as a result of your activities?

Ms BUTREJ: Over the past 10 years there have been a few seroconversions, but I do not know specifically and could not tell you who those people were, whether or not they have since died, or what their level of incapacity is at this stage.

Mr STREET: My experience, after having had a background in nursing, has shown that, as the incidence of such things has gone up, a great many nurses have changed direction with the idea of avoiding an accident and emergency centre area and the like because of that risk. I do not have the actual statistics because it has just been an observation, but we have received a great many requests from nurses who did not want to work in those areas. People have left the profession and they have gone into related professions. That is an issue in the minds of young nurses coming in. Those who believed that that might occur to them might have changed their career path.

CHAIR: We are aware of the shortage of nurses in hospitals. Do you believe that could be a factor?

Mr STREET: I believe so.

The Hon. JAN BURNSWOODS: Are you aware of any cases in which negligence seemed to be a factor? Were any cases of needlestick injury followed up by way of an investigation or a charge if it was claimed that there was some degree of negligence on the part of the hospital or whatever?

Mr STREET: None that I am aware of specifically, no. As we were saying earlier, the protocols that are in place post-needlestick injury or an object such as that are quite good. But I am not aware of negligence being an issue.

CHAIR: You are discussing in the main today needlestick injuries. Are you aware whether any other injuries or deaths have occurred as a result, for example, of patient assault?

Ms BUTREJ: A number of instances have been reported to us where patients have assaulted staff. A patient, for example, might have attempted to commit suicide and he or she might have been bleeding. Staff who were subjected to such violence and who might have been trying to restrain that patient could have ended up with quite a bit of blood all over them. I am thinking in particular of a patient who was hepatitis C positive. The nurses were very concerned about whether they had been exposed, not so much through the sharp object injury but through splashes to their eyes or the mouth area, or if they had any cuts or anything on their hands. There is potential exposure through that avenue. So violence is certainly an issue, yes.

Mr STREET: In the acute admission wards in the psychiatric arena the risk is extremely high. As we were saying earlier, when staff members are restraining a patient and they are trying to administer medications that will help that patient, there is a huge risk. While giving the medication or injection, which is generally in the acute phase, there is a great risk of needlestick and/or other injury.

Ms BUTREJ: Because the patient is resisting. The same applies in emergency departments or in areas where you may have patients who are affect by drugs and alcohol, not just mental illness, or by, for example, a brain injury or something else that affects their behaviour.

CHAIR: We have discussed other injuries and workplace deaths. It is difficult to establish who is responsible and who should be charged. That is made even more difficult in the medical area. You would be aware of current debate regarding what is going on in various hospitals and who is responsible. Have you had any thoughts about how we should ascertain who is responsible? Would it be the manager of the hospital or the board, or do you think it would not be possible to prosecute anybody?

Ms MARTLAND: It is difficult. Very few cases have actually gone to legal proceedings. One case happened a number of years ago involving a health care worker in the Illawarra Area Health Service. That particular health care worker was a laundry worker-cleaner who went around picking up laundry from the theatre and so forth. That worker, who sustained four needlestick injuries or four sharp object injuries over a period of time, went to the Chief Industrial Magistrate's Court where the case was heard.

The area health service was found to be in breach of the occupational health and safety legislation—that was prior to the change—and was found to be guilty of the charge. That is one of the few cases that actually got to court. A lot of cases anecdotally are where we understand people have been thinking of taking legal action and they are settled out of court or internally. Who is responsible? If you read the legislation and the regulations, is it the area health service chief executive officer, the board of directors or the Department of Health? That is not what we are here to respond to. It is a difficult question to answer and I would not like to suggest who would be ultimately responsible, but I guess it is no different to any other business that has a CEO, board of directors and chief financial officer. The health area is the employer of people who go to work every day and who need to have a safe and healthy working environment.

CHAIR: What was the penalty in the Illawarra case? You said they were found guilty,

Ms MARTLAND: Yes. It was the Chief Industrial Magistrates Court so the maximum was $55,000. I do not have the details with me but it is on record. If it had gone to the Industrial Relations Commission the potential fine would have been much higher.

Ms BUTREJ: The legislation, as you know, allows for a cascade of responses so there are a range of people who have responsibilities under the Act, including the employer, managers, directors and employees. To say who would be apportioned blame for such an incident would depend on investigation of a particular incident to see whether people had fulfilled the necessary obligations under the legislation. In many instances it is actually quite difficult, sometimes, to identify—for example, in the Illawarra illustration—who left the sharp instruments in the laundry. It could have been anybody, so from that perspective it can be difficult to ascertain a particular individual.

Obviously, if these kinds of things are happening there has to be some responsibility on the part of the employer to make sure that safe systems are in place, that the work environment is safe and that staffing is sufficient to allow people to carry out work with due care and not be so rushed because they have too many patients to look after than they can cope with, and that equipment is the safest possible equipment available so that as many risks as possible are engineered out and these things do not occur.

CHAIR: Are you aware of cases where WorkCover inspectors have issued penalties or prohibition notices to hospitals for unsafe needle use?

Ms BUTREJ: I am not aware of any, no. That does not mean there have not been any, but I am not aware of any.

Ms MARTLAND: Likewise. I am not aware of any, but I agree with Trish that it may or may not have occurred.

CHAIR: Your association has no way of knowing these things?

Ms BUTREJ: If the association makes a complaint to WorkCover about an incident, then that inspector will provide us with feedback as to what action they took, but many complaints are made directly to WorkCover that we may not be aware of and WorkCover would be obliged to respond to the person who made a complaint. We would not necessarily know what complaints were made or what the response was in each of those situations. WorkCover would have to provide you with that information.

CHAIR: Would you like to know?

Ms BUTREJ: Yes.

CHAIR: Should there be some system whereby you are advised?

Ms BUTREJ: Yes, it would be useful to know. The health and community services team manager does attend the health and community services industry reference group meetings and they do provide a report to the industry reference group. It would be useful if those kinds of figures were included in those reports.

Mr STREET: Certainly, under the Therapeutic Goods Act [TGA]—the Federal arena—as manufacturers and suppliers of medical devices, if there is an adverse event, there is a requirement to report that to the TGA.

CHAIR: And your association would then become aware of that?

Mr STREET: We have not received the absolute statistics on that from the TGA. We would certainly like to know that, but where an adverse incident does occur, we are obliged to actually inform the TGA of that, particularly if it is in the design of the device.

The Hon. CATHERINE CUSACK: Have you any idea what the value of sales would be of your members' products to the New South Wales health system?

Mr STREET: It is $2 billion overall but specifically down into needles or scalpel blades—

The Hon. CATHERINE CUSACK: No, just the total?

Mr STREET: It is in excess of $2 billion a year.

The Hon. CATHERINE CUSACK: Is that to the New South Wales health system?

Mr STREET: No, the Australian market as a whole.

The Hon. CATHERINE CUSACK: Probably about one-third of that would go to New South Wales?

Mr STREET: Yes. New South Wales certainly takes a good percentage of that.

The Hon. CATHERINE CUSACK: In terms of occupational health and safety, you have mentioned new technology today but that was not an issue some years ago because that technology was not available?

Mr STREET: No, I believe it was an issue then—

The Hon. CATHERINE CUSACK: I apologise. Needlestick injury has always been an issue, of course, in Corrective Services and a whole range of other agencies as well, but this solution was not available a few years ago?

Mr STREET: The solution was not available; in that this safety engineered device was not available, no. It has only been developed, with research and development possibly in the last seven years or so that has started it off and then gradually it came into being possibly around five years ago.

The Hon. CATHERINE CUSACK: So much money is spent on technology every year by the Department of Health, which has a number of competing demands on its budget, and I am sure that is probably the bottom line of the issue you are raising today. The question is: What obligation does that the department has to immediately jump on every development in technology and implement it quickly because it is available when there is always a range of emerging technologies and it would be impossible within the constraints of its budget to buy the best of everything all the time. Therefore, they have to prioritise. The people prioritising the budget need to have regard to the interests of their workers. Does failing to have enough money available for the individual officer or Minister to instantly adopt a recommendation like you have mentioned today place a legal liability on that person?

Mr STREET: That is an extremely difficult question to answer. As we said a little earlier, I do not believe any technology comes into being overnight. It is a gradual situation. We now have the statistics to show that there is a need within the industry and that the technologies that are available will certainly reduce the risks that are in there. I would have to say then that it is a matter for the administrators to prioritise that to see where that fits into being.

The Hon. CATHERINE CUSACK: I have just come down from the Northern Rivers and my local paper today highlights the need for a heart unit. People are dying because every hospital does not have a heart unit.

Mr STREET: Yes.

The Hon. CATHERINE CUSACK: Somebody has to make the decision and in health those decisions are life-determining decisions. In terms of this review, which is about justice for victims, how do we advise the Department of Health of the ethical framework in which to make those decisions? At the end of the day they cannot afford everything for everybody so what legal liability do they face?

Ms BUTREJ: In the end it is a risk management process. The occupational health and safety regulations require employers to either eliminate risks or control them to the best practicable level. We need to ponder here on what the word "practicable" actually means. There must be a degree of reasonableness about what the level of risk is in a particular situation or work area and just how much you can reduce it by provision of technology. Of course, you cannot instantly necessarily adopt the newest technology at any particular moment in time. It is a gradual process. Also, the government contracts process is not the speediest. My understanding is that contracts are renewed or reviewed approximately every three years and in doing so the department endeavours to put a range of technologies on government contracts and make a range of items available so that the health sector can then make appropriate choices from that.

The Hon. CATHERINE CUSACK: Is it your evidence today that we should be accelerating new technology in relation to needles ahead of all other priorities?

Ms BUTREJ: It is difficult to make a statement like that, that this should be ahead of all other priorities. It is certainly a priority and technology certainly needs to be looked at and, as was commented before, the more of these technologies that are adopted, the cheaper the product will become, until it is possibly no more expensive than the products that are currently in use. The safety technologies have been gradually moving into the work environment; for example, needle-free intravenous systems are becoming much more commonly used—in fact, they are very widely used—whereas syringes have not been adopted to the same degree. It is a gradual process and as things drop in price, they are being taken up more and more.

CHAIR: You mentioned earlier the cost of injuries and possible deaths?

Ms BUTREJ: Yes, that is the other thing. It is not only the cost of the injury itself and the death but also the cost, every time somebody sustains a needlestick injury, of carrying out the multiple

testing that occurs, the possible prophylaxis—the drugs that have to be given to try to prevent infection if the source was positive—and they are very expensive drugs, and also any time off or any mental stresses and counselling that goes with that testing and provision of prophylaxis. All that adds to the expense as well. If we have many thousands of sharps injuries occurring in the State, multiply that by the cost of running the reporting systems, the provision of prophylaxis and the cost of testing and you have already acquired a lot of cost, even without considering potential illnesses or diseases that may arise after that point.

Mr STREET: The emotional cost is phenomenal. It is generally a three-month period before any result is done and the emotional cost to that person and their immediate family is phenomenal. We certainly see that in the nursing profession—not just the nursing profession, but other health care areas such as laundry workers. Certainly, with nursing that three-month wait can be torture to both the person and their partner.

CHAIR: You mentioned that when America brought in the mandatory aspect there was an immediate reduction in needlestick injuries. Do you know of any hospital, either private or public, in New South Wales that has adopted this policy of retractable needles that has shown a remarkable decrease in injuries?

Ms MARTLAND: Each of the area health services and large private hospitals have, to certain extent, taken on board safety engineer technology. The use of needle-free intravenous access products is widespread through private and public hospitals, for example, the use of plastic blood collecting tubes rather than glass large collecting tubes is being used 100 per cent for blood collecting throughout the country. Various forms of safety engineering devices have been taken on board. Retractable needles are new and are getting the press at the moment. A number of products are already available.

Certainly, they are more expensive than the traditional needle and syringe, but for skin injection, which is where the issue is in a hospital with the syringe, is only around 25 per cent of the total number of needles and syringes in a hospital. It is not taking 100 per cent of the needles and syringes and converting them over. It is looking at where is the issue. The discussion today is centred around the fact that the use of these safety engineering devices, we feel, needs to be looked at more closely because you have these injuries happening on a daily basis, therefore, they are a foreseeable risk.

The legislation says the employer must go through certain processes to try to eliminate that. Where does WorkCover fit into that with the terms of reference? Where is WorkCover's role with that and how can people look at what happens before the injury, how can that be happening in a better process? Once the injury occurs there is a fabulous process of management of the healthcare worker, and we are not disputing that at all. It is looking more closely at how we make sure the injury does not happen in the first place when the safety-engineered products are available in various shapes and forms.

CHAIR: So, at this stage you are not sure if there is a hospital with a retractable needle policy?

Ms MARTLAND: I am aware of one particular hospital that has adopted them in a high-risk area in New South Wales.

CHAIR: What hospital is that?

Ms MARTLAND: Liverpool hospital in the Southwest Area Health Service. It has adopted them in one area.

CHAIR: Has that shown to decrease the needlestick injury?

Ms MARTLAND: It is a little too soon to tell. It has only just started it. That is where the recording and surveillance of data is really important. It is only by looking at surveillance data on an ongoing basis that you can see evidence of a reduction and then you can start to make sure that the implementation has worked. The idea is to look at the data on a six-monthly basis usually and, as

Trish rightly said, the Department of Health must provide to WorkCover on a six-monthly basis the total number of percutaneous injuries, which are the cutting of the skin, per area health service. So, that breaks it down. As I understand it, this data will be reviewed for the first time later in the year. It will be interesting to see what is going to happen with that data, because if we look at that on an ongoing basis and we do some sort of risk assessment for that institution we should be able to notice a reduction over time, if people are proactive about implementing these devices. In the United States it has definitely shown an improvement, and the data shows that.

The Hon. DAVID CLARKE: Mr Street, just continuing on this area of retractable needles, you indicated that one in nine nurses suffers a needle injury. That means over a nine or 10-year cycle, theoretically every nurse will suffer such an injury?

Mr STREET: Certainly the data says that.

The Hon. DAVID CLARKE: Are you saying that retractable needles will do away with a large proportion of these injuries involving nurses?

Mr STREET: I am saying that retractable needles will certainly go a great deal of the way.

The Hon. DAVID CLARKE: When you say a great deal of the way, would you say by 50 per cent?

Mr STREET: I would not have an exact figure on that. Perhaps Susan would have.

Ms MARTLAND: A number of studies have been done recently that have endeavoured to quantify, if we implemented retractable needles alone as opposed to other safety-engineered products, what would be the reduction. One study that was done recently in Queensland estimated that the introduction of retractable noodles would reduce the needlestick injury rate by 70 per cent.

The Hon. DAVID CLARKE: Following on from that, in general terms what is the price range of the ordinary needle as opposed to the price range of a retractable needle?

Ms MARTLAND: I do not have that exact information with me today. We are happy to provide it.

The Hon. DAVID CLARKE: Mr Street, have you any idea?

Mr STREET: I do not have an exact figure, but as we were saying before, if the normal syringes are $1, it is likely that the retractable syringe may be $2, but I do not have the exact figure on that, I am afraid.

The Hon. DAVID CLARKE: So, would you be saying that the introduction of retractable needles is a move that we cannot afford not to introduce?

Mr STREET: I do not think it is my role to say that categorically. All I can possibly say is the introduction in certain areas of those retractable syringes will go a great deal of the way to reducing that risk.

The Hon. DAVID CLARKE: Can I ask the representative of the nurses in New South Wales, do you believe there should be compulsory introduction of retractable needles to reduce this massive injury rate to your members?

Ms BUTREJ: I think there should be, but that is dependent on current technology and what situations you can use those syringes in. So, where an ordinary syringe can be replaced by a retractable syringe or some other technology, yes, I think it should be mandatory.

The Hon. DAVID CLARKE: From your expertise and knowledge, in what percentage of situations can the retractable needle take the place of an ordinary needle?

Ms BUTREJ: I am sorry, I cannot answer that question, I do not know.

The Hon. DAVID CLARKE: Anybody here?

Ms MARTLAND: Statistics show that in a hospital situation, if you look at the total supply of the needles and syringes, approximately 25 per cent or 30 per cent—25 to 30 per cent—of the total number that are purchased are used for skin injection, and it is skin injection that typically is where the needlestick injuries are occurring. The other use of the needles and syringes, the 70 per cent, are things like drawing up liquids, putting things into bags or things that are not touching people's blood and body fluid, so they are clean syringes. So, you are looking at 25 to 30 per cent of a hospital's purchase of needles and syringes, typically, could be replaced by a safety-engineered product and reduce needlestick injury.

The Hon. DAVID CLARKE: Would you therefore be asking that there be legislation requiring the use of retractable needles to replace ordinary needles when that replacement can occur?

Ms MARTLAND: I would say that that legislation would be a positive move forward, however I would like to suggest that it is not just retractable needles but safety-engineered devices, because there is more than just—

The Hon. DAVID CLARKE: I am just trying to deal with a specific area at the moment, and that is those 13,000 needle injuries to nurses every year.

Ms MARTLAND: The needlestick and other sharp object injuries.

The Hon. DAVID CLARKE: Needle injuries are a major proportion of those sharp object injuries, are they not?

Ms MARTLAND: Hollow-borne needle injuries.

The Hon. DAVID CLARKE: What percentage of these 13,000-odd injuries per year specifically relate to needles as opposed to other sharp objects, just in rough terms?

Ms MARTLAND: Typically around 60 per cent of injuries will occur to nurses and of the number of injuries that are occurring, usually around 82 per cent of the injuries will be percutaneous injuries caused by hollow-borne needles.

The Hon. DAVID CLARKE: So, 80 per cent of those 13,000 injuries each year to nurses relate to ordinary needles, and a significant portion of those injuries could be avoided by the compulsory introduction of retractable needles? Would that be a correct summary?

Ms MARTLAND: Yes.

The Hon. DAVID CLARKE: In that situation you believe—and I know there are other areas where we can introduce safety precautions, but in this specific instance—we could stop several thousand injuries each year to nurses, many of them potentially life-threatening, by the compulsory introduction of retractable needles?

Ms MARTLAND: Yes, I would agree with that.

CHAIR: Is there anything you would like to add before we conclude this hearing? Is there anything we have not covered that you think we should?

Ms MARTLAND: I would like to thank the committee for taking this as a serious discussion. It is difficult when WorkCover is responsible for so many areas and there are terrible injuries that occur and people's lives are changed every day when you see things that happen on the news and stuff. The fact that this is happening everyday to our nurses and other health-care workers and it is being taken as a serious issue is very encouraging. I appreciate the time the Committee has given to the issue and I hope we can move forward in removing some of these injuries.

CHAIR: You made the good point, of course, obviously a workplace accident in a factory hits the headlines, and nurses are suffering and no-one really knows except their closest associates.

Ms MARTLAND: That is right. That is happening everyday and it affects so many more people than just a staff member—there is the family and friends—and they can be eliminated.

(The witnesses withdrew)

BRIAN JOHN ROBERTSON, Director, State Debt Recovery Office, Sydney, and

BRENDAN JOSEPH NUGENT, Deputy Director, State Debt Recovery Office, Sydney, sworn and examined:

CHAIR: Thank you for agreeing to appear before the Committee today. As you probably know from your previous experience as witnesses, if you wish to have any evidence heard in camera the Committee will usually accede to your request. Do either of you wish to make a brief opening statement?

Mr ROBERTSON: Yes, thank you. The role of the State Debt Recovery Office [SDRO] comes from the Fines Act 1996. It is about the enforcement and recovery of outstanding fines and includes the making of fine enforcement orders, the taking of enforcement action and the write-off and receipt of moneys or fines. The SDRO made a submission to the Committee dated 17 February and today I have tabled a supplementary submission to you. The supplementary submission expands on enforcement against companies, the principles of enforcement and the types of sanctions chosen for enforcement. I would like to take this opportunity to clarify two issues raised in the first submission. The first relates to my comment on page 3 of the first submission about a large proportion of companies being prosecuted by WorkCover and being described as Phoenix or Phoenix-like. While that term is used and referred to by the Australian Securities and Investments Commission, I am unable to describe any of the companies currently under enforcement as Phoenix or Phoenix-like.

The second point that I would like to make relates to a comment also on page 3 of the first submission that makes reference to an amount recovered over a two-month period. That should have read "since commencement of enforcement action". My final comment concerns the supplementary submission provided today. That submission identified that there are 135 fines currently under enforcement where WorkCover was the prosecutor. We have identified that 28 files are currently being investigated by the State Debt Recovery Office and by WorkCover when a fine has been referred to the State Debt Recovery Office on an offence code where the prosecuting body was not WorkCover. The effect of this is likely to result in fewer than 135 WorkCover fines being the total under enforcement by the State Debt Recovery Office.

Supplementary submission tabled.

CHAIR: Mr Robertson, does your office enforce and collect penalty notice fines imposed by WorkCover inspectors as well as those imposed by the courts?

Mr ROBERTSON: Yes.

CHAIR: You note in your submission that the Industrial Relations Commission refers fines manually to your office. Do you know why this is still done manually when most fines are referred electronically? Does WorkCover transfer unpaid fines electronically or manually?

Mr NUGENT: WorkCover does not refer fines directly to the State Debt Recovery Office. The referring agencies are the courts or infringement bodies that have issued the ticket or convicted the defendants. To answer the first part of your question, the Industrial Relations Commission does not do it in an automated manner because of the volume that it transacts. Both the court system and the State Debt Recovery Office computer systems are undergoing enhancements to make them more

effective and efficient. They are both in the development stage so we will not go automated until the development of the new court system is completed.

CHAIR: Does the fact that they are referred manually create any problems for your office or make the process slower?

Mr NUGENT: It is not slower in enforcement. It is a pro forma. Basically, the court will fill out the information and a clerk in our office will type in the information and issue the enforcement order based on that. With automated processes there is a 24-hour turnaround time. It is exactly the same for a manual process—24-hour turnaround time.

Mr ROBERTSON: If I can put that in context in terms of total matters under management, about 3,000 fines are referred to us on a daily basis for enforcement. About 80 per cent of those come from the Infringement Processing Bureau [IPB] and, by their very volume, they are automated process. Fines from smaller agencies in terms of the numbers referred in some instances still come via manual reference.

CHAIR: Does the 80 per cent figure refer to motor vehicles?

Mr ROBERTSON: It relates to infringement notices that could be issued by councils or they could be traffic-related penalties issued by police or the Roads and Traffic Authority.

CHAIR: What is the percentage of WorkCover notices?

Mr ROBERTSON: WorkCover is very small in the total scheme. This year we are likely to receive about 750,000 fines for referral. As we have indicated, we currently have fewer than 135 matters from WorkCover under enforcement.

CHAIR: Are there any circumstances in which unpaid fines will not be transferred to your office? Is that possible?

Mr NUGENT: Yes. It is possible that the court could do a remission process through the Attorney General, who has the ability to exercise the royal prerogative of mercy. This means that the fine at the courthouse stage could technically be paid by the Governor, exercising that royal prerogative. That is done through the Attorney General's Department. A minute number of fines do not come to the State Debt Recovery Office if they are unpaid.

CHAIR: Can you think of any other category of fines that would not come to your office?

Mr NUGENT: No.

The Hon. CATHERINE CUSACK: We have information that WorkCover issued 1,259 penalty notices. Does it surprise you that only 135 matters are outstanding and came to you?

Mr ROBERTSON: It indicates that those matters are being resolved at the court.

Mr NUGENT: Yes, or at the infringement stage. It just means that the fines are being paid. They have a high recovery rate. It would be higher than the average recovery rates of issuing agencies—people who issue tickets.

Mr ROBERTSON: To give an example, the bulk of the matters that the State Debt Recovery Office handles comes from the Infringement Processing Bureau. About 75 per cent of all infringements that are processed through the Infringement Processing Bureau are resolved at the IPB. Therefore, we are getting the residual 25 per cent. That percentage will vary between the referring agencies. We also receive matters from the State Electoral Office, the jury branch of the Sheriff's Office and smaller numbers from other courts.

CHAIR: So you are virtually the bad debts department.

Mr ROBERTSON: Yes, if fines are not paid by the due date at those referring agencies they come to us.

CHAIR: The others are paid at the court through the normal procedures.

Mr ROBERTSON: Yes, they close there.

The Hon. CATHERINE CUSACK: So we assume that of the 1,259 notices only 135 were unpaid and therefore came to your office.

Mr NUGENT: That 35 is the very maximum. The vast majority of the fines that we have that were WorkCover prosecutions are court fines—there was an actual prosecution and conviction in court and non-payment at a courthouse.

The Hon. DAVID CLARKE: And 90 per cent of those fines have been paid?

Mr NUGENT: A larger number will have been paid through the infringement process than through the court process. Historically, that is the case. When a matter goes to court and a person is convicted in court he or she is less likely to pay than a person who receives an on-the-spot ticket.

The Hon. CATHERINE CUSACK: There are 462 prosecutions.

Mr NUGENT: At courthouses through the Industrial Relations Commission?

The Hon. CATHERINE CUSACK: I believe that is how they have separated the figures. There is a total of 1,700.

Mr NUGENT: It just means that those people are either—

The Hon. CATHERINE CUSACK: It is an amazing recovery rate.

Mr NUGENT: It is, but the recovery rate through the infringement process involves a person being given a ticket and then having the option to elect to have that matter heard in court. If a person takes that option the penalty notice no longer exists and a new indictment goes out to the person and it becomes a court matter. If the person nominates or elects to go to court he will not come to the State Debt Recovery Office through the infringement process; that person will come through the court process. So they could be very successful.

The Hon. CATHERINE CUSACK: I have that figure. It is about 16. It is very low.

CHAIR: Do you have the figures as to how many are dealt with by notices and how many go to court? It sounds as though only a small percentage go to court; the majority would be dealt with by paying the fine.

The Hon. CATHERINE CUSACK: Out of 1,259 penalty notices 16 were contested.

Mr ROBERTSON: And taken to court.

Mr NUGENT: That would indicate a very good success rate for those matters through infringements.

The Hon. IAN WEST: They are minor infringements.

Mr NUGENT: Most of them.

CHAIR: In your submission you note that the same procedures are followed regardless of the nature of the fine. What we are trying to discover in our inquiry is not so much the quantity but the quality. Do you consider a using different regime for penalties for convictions relating to injury or death in the workplace? Would you be aware of a fine from the court not being paid which relates to a

workplace death? Would a red light flash and would you be more diligent in pursuing that fine? Do you consider the types of cases or do you even know what types of cases are involved?

Mr ROBERTSON: We receive the fine or infringement referred to us, but the nature of the fine or the infringement is not the issue. In some cases it is not even immediately evident on data that we are given. The effect is that we typically enforce matters as we receive them and that could be from any agency. Certainly as to the matters that we have from WorkCover, the offence does not indicate consequential injury or death.

Mr NUGENT: Not necessarily. We may not know who the prosecuting authority was. The offence details are not material to the enforcement of the fines. We have established protocols with WorkCover so that there will be a red flag, but that will be a manual process. A protocol is being developed where a schedule of fines that are considered serious offences will be referred to the State Debt Recovery Office and our enforcement agents will then look at those fines more closely. Again, for the integrity of the fine enforcement process the State Debt Recovery Office does not want to distinguish between offence types en masse. We will look at them on the basis of a client relationship with WorkCover, but we would not want to start grading the seriousness of the monetary amount. At the end result we are enforcing fines.

CHAIR: Would you go after the large amounts with some enthusiasm compared to your action on small amounts?

Mr NUGENT: The enthusiasm is related to risk management. Yes, we want to get a person who has a large amount of fines outstanding or a large number of fines outstanding into a relationship with the State Debt Recovery Office where he is meeting his obligation. We have had sweeps that are based on the number of offences per client and/or the quantum.

CHAIR: You stated that you have entered into an arrangement with WorkCover in establishing a protocol. When did you enter into that agreement with WorkCover?

Mr NUGENT: The protocol has not been signed as to specific details. I would say before Christmas we basically had been dealing with WorkCover. WorkCover has been consistent since day one that I have been with the State Debt Recovery Office in asking us for reports and an automated system of reporting of information. We have been doing what we call ad hoc reporting, that is, basically at their request. The protocol we have been working on is a more systemic process of doing checks every month against all the fines that WorkCover has outstanding.

CHAIR: You said something happened before Christmas, presumably in December.

Mr NUGENT: To formalise a regular process.

The Hon. DAVID CLARKE: What percentage of fines referred to you for workplace injuries are not recovered because corporations have gone into liquidation?

Mr NUGENT: Seventy-three per cent of the company fines that we have are unlikely to be recovered. Of the fines we have currently, 33 per cent of the companies are under external administration, 35 per cent are deregistered, that is, not legal entities at this stage, and 5 per cent have either changed their name details or there are data discrepancies where we may not be able to isolate the company.

The Hon. DAVID CLARKE: Are you saying that three-quarters of the corporations that have received fines for breaches of workplace laws, specifically for injuries incurred, are getting out of paying their fines?

Mr ROBERTSON: Are unlikely to pay their fines. If I could qualify, Mr Nugent mentioned that 33 per cent are under external administration. In that situation an external administrator is appointed for 21 days. That time frame is not binding. At the conclusion, the company will become insolvent, complete a deed of arrangement or might be able to continue trading.

The Hon. CATHERINE CUSACK: As I understand it, you are referring to the small number of fines that are referred to you, that is, 135 fines. Of those 135 fines, 78 per cent are owed by companies. That is about 100 companies. Of that 100, 73 per cent are unlikely to pay. We are now talking about 73 fines that will not be recovered. To put it into perspective, we are talking about 73 out of a figure of about 1,700.

Mr NUGENT: Yes, but the figure of 1,700 that you are talking about through the infringement process—

The Hon. CATHERINE CUSACK: And the court process.

Mr NUGENT: Both, yes.

The Hon. CATHERINE CUSACK: Only 16 are contested.

Mr NUGENT: They are prosecutions that WorkCover commences—

The Hon. CATHERINE CUSACK: I am counting the prosecutions. There are 400-odd prosecutions.

Mr NUGENT: Those other prosecutions would also be incorporated.

The Hon. CATHERINE CUSACK: In the 1,700.

Mr NUGENT: It is 1,700 plus prosecutions that WorkCover does not issue an infringement for. It decides to prosecute them by issuing a summons or a court attendance notice for the person to appear directly in court and never giving them an option to have the matter dealt with through an infringement process.

The Hon. CATHERINE CUSACK: Referring to the group that you believe you will not be able to collect from, we are talking about 73 companies?

Mr NUGENT: Approximately.

The Hon. DAVID CLARKE: As to the 73 per cent, there is nothing more your office can do? You cannot get blood out of a stone.

Mr NUGENT: That is right.

The Hon. DAVID CLARKE: Do you have any figures available of the total number of prosecutions where fines are imposed on corporations because of breaches of workplace regulations?

Mr NUGENT: That would have to be a question for WorkCover or the courts.

The Hon. DAVID CLARKE: You are only aware of those that come to you?

Mr NUGENT: Yes.

The Hon. DAVID CLARKE: In other words, that 73 per cent is 73 per cent of the small number that comes to you, because most of the fines have been paid earlier in the process?

Mr NUGENT: Yes.

The Hon. DAVID CLARKE: The 73 per cent is 73 per cent of a small residual number that have come to your office because they have not been paid earlier in the process?

Mr NUGENT: That is correct.

CHAIR: Of the 73 per cent what amounts do they refer to? Are they small or large amounts? Do any of them relate to serious accidents or deaths?

Mr ROBERTSON: I do not know whether I can answer the second part.

CHAIR: You said earlier you do not have that figure. You said WorkCover has been discussing this matter with you since December. You must have an idea as to which cases it covers. Do you have that information now from WorkCover?

Mr ROBERTSON: Starting off with the 135 fines, the total amount owing there is $3.8 million. Then 73 per cent of the company fines totals just under $2 million—$1.99 million. Effectively, we are saying that $2 million of the $3.8 million relates to company fines unlikely to be collected.

CHAIR: Within that group of $1.9 million, do some of the companies have large amounts of fines?

Mr ROBERTSON: We will look for that.

CHAIR: You could take it on notice, if the information is difficult to obtain at the moment. How many companies owe what amount and do any of the amounts relate to serious injuries and/or deaths?

Mr ROBERTSON: Whilst we are looking for that, there are remaining 28 companies and 29 individuals who are under active enforcement. So we have come down from the 135 and we have taken out those companies that we are not able to progress against. That leaves us with approximately 28 companies and 29 individuals under active enforcement.

CHAIR: Do you ever consider trying to enforce the fine with individuals? If the companies have been deregistered or had a name change, do you know who the relevant individuals are? Have you ever considered trying to collect the fines from the chairman or director?

Mr NUGENT: If the fine is issued in the name of the company, the legal entity, we cannot transfer that liability to an individual. There are circumstances where orders are made for both the company and thereafter an individual where both have been prosecuted. An order is made that the company is to pay and in lieu of the company paying the individual becomes liable for the amount. In those circumstances we can pursue the individual.

CHAIR: Do you have many of those cases?

Mr NUGENT: No.

Mr ROBERTSON: If that is not in the order, then we are literally unable to pursue the individuals.

CHAIR: If we could get the courts to add after the name of a company an individual or individuals, would that assist you in collecting the fines?

Mr NUGENT: Yes.

CHAIR: That may be difficult for the courts to do.

Mr NUGENT: It is not always a matter of collecting the fine. The fine enforcement process is an entire process that tries to make people meet their obligations under the Fines Act for the original fine. For example, for an individual we can issue community service orders or warrants of commitment to their imprisonment. Those options are not available to a company. If individuals were the subject of the orders, we would have a broader range of sanctions that we could impose to make them meet their obligations. It does not always translate to having the fine paid, but again they are meeting their obligations at least under the guise of the Fines Act.

CHAIR: You can enforce a fine against either the company or the individual, it cannot be both?

Mr NUGENT: No, we can do both, but the order must be against both. We cannot recreate an order against the individual if it was not made for the individual.

The Hon. DAVID CLARKE: According to our figures, about 1,700 penalty notices and prosecutions are issued in respect of breaches of safety regulations as a result of WorkCover. Of the 135 that come to you for collection, how many are you unsuccessful in recovering against?

Mr ROBERTSON: We currently have 135 under management.

Mr NUGENT: That does not include fines that have been paid in full, for example. We have 16 fines that have been paid completely in full. It does not include those figures. It is 78 per cent of the company matters.

The Hon. CATHERINE CUSACK: It is 73 per cent of the 78 per cent that are companies.

The Hon. DAVID CLARKE: How many companies in the past 12 months have you been unable to recover from terms?

Mr NUGENT: As I said, 35 per cent of companies are under external administration, 37 per cent of companies are deregistered and 6 per cent are company names that do not match on Australian Securities and Investments Commission [ASIC] searches.

The Hon. DAVID CLARKE: So it is about 80 out of the total. How many individuals have gone into bankruptcy, for instance?

Mr NUGENT: There are 29 individuals. Bankruptcy does not protect an individual from a court fine or order.

The Hon. DAVID CLARKE: I understand that, but when you do not recover—

Mr NUGENT: There are 29 that are currently under management. We have enforcement sanctions against those 29 people in a process of trying to recover the fines.

The Hon. DAVID CLARKE: Those 80 companies, do you know how much in fines that represents, in dollar terms?

Mr ROBERTSON: Just under $2 million—$1.99 million.

CHAIR: I am following up on a reference in your submission that an order from Mr Polviac in the Industrial Relations Commission was unusual. Apparently you used that word. Are there any other examples of unusual orders that you are aware of?

Mr NUGENT: Not like the Polviac matter, no.

CHAIR: Why was that unusual?

Mr NUGENT: It is very unusual in my experience—my previous life is working in courts—it is very unusual for us to have had a situation where a magistrate made an order in lieu, that is, the magistrate would give a time frame for the company in which to pay, and then as the company could not pay there was a default order that the individual could be liable. The reason that we also considered it unusual was that, I do not know the exact section but I think section 51 of the WorkCover legislation was used to prosecute both of those bodies at the same time. So for us that was a double jeopardy issue until WorkCover clarified that they could basically prosecute both people at the same time.

CHAIR: And there was a delay in you even being advised, is that correct? You were not advised for two years after the date of the decision.

Mr NUGENT: Yes. The enforcement order was unusual for courts and, to draw on my experience, it was very unusual for even the courthouse and the court process was such that the company named in the fine was referred to the State Debt Recovery Office and then the court withdrew that referral from the State Debt Recovery Office when it realised there was an order that basically made the individual liable. Once we had worked out what the issue was, they then re-referred the fine for Mr Polviac.

CHAIR: Is it correct that there was a two-year delay from the decision to when you were told?

Mr NUGENT: Yes.

Mr ROBERTSON: Yes. It was May 2001 when the magistrate issued a fine against Metal Gutter Services Pty Ltd, and it was October 2003 when the registrar of the Downing Centre court re-issued the fine in the name of John Polviac.

Mr NUGENT: And that was an intervention from the State Debt Recovery Office. Basically, WorkCover had said that there should have been an order against Mr Polviac in the first place. We then contacted the court to get the court papers dug up from wherever they had got them from to have a look at the orders. With the referral, we also spoke to the court to try to understand the order.

CHAIR: Is it correct you were unaware of it until—

Mr NUGENT: Yes, we had no knowledge of it until it was actually referred to the State Debt Recovery Office.

CHAIR: And then you were the one who tried to set it right.

Mr NUGENT: Yes. I personally posted the enforcement order in the mailbox, yes.

The Hon. CATHERINE CUSACK: Did you apply for a variation to the order so that it was against the person rather than the company?

Mr NUGENT: No. We sought to clarify with the court the order that was made. So basically myself and several staff with extensive courts background had to go through and get copies of the court's order to look through it to understand whether the magistrate could in fact make that order. As I said, it was very unusual and certainly not within our experience. We had to work out that the magistrate could make that order. The State Debt Recovery Office had to ensure that it had a valid right to request us to issue the enforcement order because we did not want to be seen to be just issuing it at the whim of an issue. So we basically went through and made sure the order was legitimate with the court.

CHAIR: What happens if you are going through your normal procedure and the fine is not paid. Your staff may be very small, I gather. Do you have any facilities to pursue that debt? What do you do if you see you are not making any progress? Do you refer it back to another department?

Mr ROBERTSON: A couple of comments. Firstly, when an outstanding fine is referred to the SDRO there is no subsequent statute of limitations around that fine. So we are not driven by closing it within six months, 12 months or anything like that. We are obliged to commence with imposing or attempting to impose RTA sanctions and if they either are unsuccessful or cannot be done we then move to a range of civil enforcement sanctions. The RTA sanctions are very much an automated process every night between ourselves and the RTA. However, once we move to the civil enforcement sanctions, which could include property seizure orders, garnishee orders, an examination summons or community service if we believe that financial repayment is not appropriate, that becomes a very manual process. We then had to start looking at the circumstances of each case and making sure that we have adequate data to progress a property seizure order, which requires substantiating an address. If we were attempting a garnishee order we need details of either a bank account or employer to make an effective garnishee. So we do that.

As I said, we are not driven by the need to close the matter within 12 months. We will attempt enforcement until we believe that it is either inappropriate to keep going or there is no further effective enforcement that could be taken. At that point we will write off the fine, which has the effect of deferring it for five more years. If in that period no further fine is referred for that person or that company, we will then recommend to the Treasurer that that debt be waived. If a further fine comes forward for that individual or company then we have the opportunity to reinstate enforcement action against the original fine and the most recent one that has come to us.

CHAIR: You have just said that there is no real time pressure on you. What triggers that review process? Are you going to seize assets, et cetera? What makes that happen? Do you do that every six months?

Mr ROBERTSON: We have some internal guidelines about the write-off of debt. They are guidelines set by the Treasurer and that sits around a five-year period from when we first receive the matter. At that point, providing we have attempted several enforcement actions and they have been unsuccessful and we do not believe that any further enforcement action will be successful, we will then do that and I think we are doing that on a six-monthly basis.

CHAIR: But what starts the enforcement action?

Mr NUGENT: It is based on a timeframe. We have a database that literally puts them in date order as the date they moved into that database and our enforcement unit would take it based on age. So the oldest matters in the database are basically looked at for triangulation of data and to try to locate the defaulter or information that we have about the client and then we will issue an enforcement process based on that.

CHAIR: So it depends on how quickly the staff handle it?

Mr NUGENT: It also depends on the resources of the other agencies. For example, the Sheriff's Office of New South Wales does the property seizure orders. If we issue them left right and centre, they would not be able to go out and knock on all the doors of the people for whom we could issue property seizure orders. So it is based partly on the resourcing of other areas to issue the process.

The Hon. IAN WEST: Was there a situation at one stage where people were being put in gaol on a day-for-$1 basis?

Mr NUGENT: I heard $100 a day.

The Hon. IAN WEST: Did that prove successful?

Mr NUGENT: No. The old regime before the Fines Act came in was literally that for any non-payment of a fine that was a non-traffic fine a warrant of commitment could be issued for your arrest and you would spend 24 hours in gaol for every $100 you owed. Literally, because the police could not actively enforce those warrants, hundreds of millions of dollars sat without any active enforcement.

CHAIR: That is why your office was set up.

The Hon. IAN WEST: In terms of the question of liaison with WorkCover, and in terms of moiety, is there not some liaison between you as to payments of those moiety?

Mr NUGENT: Yes. Moiety is where a portion of —

The Hon. IAN WEST: And would there not be—for example, in the metal gutter case—some contact from WorkCover as to some recovery of its moiety?

Mr NUGENT: First of all, it had to be with the court because the court was managing the amount of money that was there. I am not 100 per cent sure whether moiety is a feature of the metal gutter case—I can check that in a second. But many of the prosecuting agencies have the concept that once it is prosecuted, the Fines Act says that it must go to the State Debt Recovery Office so active

intervention in the individual prosecution of matters is, first, something that is not encouraged by the State Debt Recovery Office. For example, the infringement processing bureau has 405 clients. If the State Debt Recovery Office had to enter into negotiations with all those clients about every single fine, we have 2.8 million fines under management. If we had to do that we would spend all our resources on just client liaison with the stakeholders, rather than dealing with people who have outstanding fines.

The Hon. IAN WEST: However, if someone was killed and there was a fine against them for an amount of money, and one-tenth of that amount of money was paid, would you not see that there would be some sensitivity to that issue of recovering the money?

Mr NUGENT: Yes.

The Hon. IAN WEST: So am I led to believe that there is some new system coming into place that would give us some understanding, some rundown as to what that might be?

Mr NUGENT: The process is that, because the volume of WorkCover fines is not great, the WorkCover prosecuting branch will forward a schedule every month to the State Debt Recovery Office. They will receive updates from the courts and the infringement processing bureau as to the prosecutions through their agencies. The State Debt Recovery Office will then indicate either at the status of each of those matters, where it is up to in enforcement, any recoveries that have come in, any information that we may require. For us, it is establishing the relationship where we can get additional information from WorkCover or from referring agencies to try to target enforcement.

CHAIR: So if something is in place now, whether our inquiry is going to encourage that to happen—that is probably one of the views of the Committee or some of the Committee members—

Ms LEE RHIANNON: I am still trying to get my head around how it all functions. You are very close to it and know it in detail. Presumably you would also agree that the system can be improved. What would your suggestions be for improvements?

Mr ROBERTSON: I will make two comments and Mr Nugent might follow up. Firstly, while I cannot quantify the relative effectiveness, we did say earlier that the Fines Act is more effective in enforcing outstanding fines against individuals than against companies because the range of enforcement actions is more effective. For example, community service orders, warrants and in some cases even property seizure orders are more effective against individuals than against companies. Secondly, the SDRO is reliant on locating fine defaulters and their assets and our role will be improved as we have access to a wider range of government databases. While section 117 of the Act provides for that to happen, in some cases that is not necessarily available. We have excellent interaction with the Roads and Traffic Authority database and that is very good. But further access to a range of databases will improve that. In fact, what we are working on with WorkCover is essentially on a smaller scale working very closely with them in terms of data and information about the defaulters which might not otherwise have come in with the fine that has been referred.

CHAIR: So you could actually link your system to WorkCover's computer system, have a direct link, and to company registers and so on? Is that what you are saying?

Mr NUGENT: We have access to the company registers through ATSIC already. We could not in the short term link our systems to WorkCover systems but in the development of our system where one of our major priorities is to get stakeholder reports that would give the status on whatever basis the stakeholder wants, a status of where the fine is up to, how much has been paid, what actively has happened within the past month, those sorts of issues.

CHAIR: Should your office have more responsibilities, do you have adequate staff to fulfil all the requirements?

Mr ROBERTSON: If I can take a step forward. The Infringement Processing Bureau actually transferred from NSW Police to the Office of State Revenue and is now part of the State Debt Recovery Office. I said earlier they represent 80 per cent of the volumes that we handle, so we now have the front end of the process, being infringement processing, and the back end, which is fine

enforcement against defaulters. We are finding that volume flows can vary, and from time to time we need to adjust our staffing levels to anticipate those flows from referring agencies. We do not determine our business volumes. They come to us from the initiatives or activities of a range of referring agencies. We are conscious of that. Quite separately to this, that is something we will be taking up with Treasury, to attempt to achieve some form of funding which allows us to move with the volumes referred, so that we are not necessarily based on a fixed recurrent budget but have some form of flexible funding that enables us to anticipate or quickly respond to changes in volumes.

CHAIR: You mentioned a protocol that you are working on with WorkCover. That will mean that someone from your office will have to monitor that information, especially as it relates to workplace debts and fines not collected. Are you going to do that yourself?

Mr NUGENT: The Manager of Client Services will do that, because they will have to relate to both the enforcement unit and to the client service unit with WorkCover.

Mr ROBERTSON: If I can expand on that. We have done that in a couple of other variations. We have introduced an MPs hotline, which is a dedicated resource so that MPs can make direct contact with the office. We have introduced a similar hotline with regard to Ombudsman inquiries. So we have been able to respond and put in place arrangements to try to improve the interaction between our clients and work.

CHAIR: The time has almost expired, but members may want to ask some questions.

The Hon. IAN WEST: In terms of the Mr Polviac case, what is the current status of the recovery?

Mr NUGENT: At the moment Mr Polviac is engaged in a time to pay arrangement, but that is in the short term. We have tried property seizure orders and other enforcement actions, but Mr Polviac does not have in his name any assets that we can seize. The reason that we have entered into a time to pay arrangement is that his wife has undertaken to meet the obligation of the debt through the sale of personal assets, a house. So we have basically a minimal instalment arrangement, on a monthly basis, to be reviewed in two months from the commencement of the arrangement—so, to be reviewed in March—paying $200 a month until we review it in March. We have a copy of a contract of sale document to validate that the sale is going ahead. I would note that there is no obligation because we cannot prosecute or enforce against Mrs Polviac, but we do believe it will be resolved.

Mr ROBERTSON: We did that because we believed it would be, on balance, the most likely resolution of the outstanding order. Although we cannot pursue his wife, whilst that is on the table it is the most likely resolution of achieving recovery of some of the outstanding amount.

The Hon. CATHERINE CUSACK: I understand that people who do not pay an outstanding debt cannot apply for a driver's licence in New South Wales. Does that apply to those people in that hiatus period?

Mr ROBERTSON: If we have imposed a sanction—be it a licence suspension, vehicle registration cancellation, or even a general customer business restriction—if they have outstanding amounts with us they are prevented from either doing business or renewing any of those existing licences.

The Hon. CATHERINE CUSACK: Would it be an option to extend that to the directors of companies that have avoided the payment of fines, or not paid their fines, even if they are in liquidation?

Mr NUGENT: If the directors were made liable in the first place, then the full range of sanctions would be available to the individual directors—as they are with Mr Polviac, for example.

The Hon. CATHERINE CUSACK: So, apart from perhaps suspending a driver's licence, are there any other sanctions or things that people cannot apply for in New South Wales? Can they still apply for a building licence and things like that?

Mr NUGENT: Yes. The sanctions are only the Roads and Traffic Authority sanctions that the SDRA applies, or they are civil sanctions, like putting a charge on land, property seizure, or a garnishee order, and an examination summons.

The Hon. CATHERINE CUSACK: Are the companies and I think 20 individuals that we spoke about earlier who have not paid separate individuals and companies, or do they overlap? Are there 135 different matters?

Mr NUGENT: They would be unique in that we created a defaulter file and they could have multiple enforcement orders outstanding for them. But the number we are talking about are defaulter records.

The Hon. CATHERINE CUSACK: So the 135 could have an average of say five matters each outstanding?

Mr NUGENT: They could, yes.

CHAIR: Thank you for appearing before the Committee.

(**The witnesses withdrew**)

GREGORY JOSEPH STEWART, Chief Health Officer, NSW Health, sworn and examined, and

KIM STEWART, Associate Director, AIDS and Infections Diseases Unit, NSW Health, affirmed and examined:

CHAIR: In what capacity are you appearing before the Committee—as a private individual or as the representative of an organisation or business?

Dr STEWART: I am appearing as a representative of the New South Wales Health Department, as the New South Wales Chief Health Officer.

Ms STEWART: I am a public servant appearing as a representative of the New South Wales Health Department.

CHAIR: Do you wish to make a brief opening statement before taking questions?

Dr STEWART: Yes, if the Committee would like that.

CHAIR: Do you wish to make an opening statement as well, Ms Stewart?

Ms STEWART: No.

CHAIR: As you probably know, it is available to us to have some evidence heard in camera. So, if at any point you feel some material should be given in confidence to the Committee, the Committee will consider that request. Dr Stewart, would you commence your opening statement.

Dr STEWART: The New South Wales Department of Health is pleased to provide a submission to the Committee and to answer any questions arising from that submission. I might begin by saying that NSW Health and the New South Wales health system in general are committed to maintaining the health and safety of our staff. Clearly, occupational exposures are an important and serious part of that. We have over many years developed a comprehensive framework for protection of staff from occupational exposures. I will briefly deal with that. It will take about ten or so minutes.

The areas that I will be covering in brief are regulated infection control standards, infection control policies, occupational screening and vaccination, management of occupational exposures, management of infected health care workers, monitoring occupational exposures through a mandatory surveillance system, work force development, support organisations and structures for occupational exposures, reporting of occupational exposures to WorkCover based on our mandatory hospital-acquired infection system, development of a plan to obtain information on occupational groups and exposures, and monitoring of the emerging safety devices and trends in implementation globally.

I will begin by speaking about legislative provisions. In 1993 New South Wales introduced infection control standards by way of regulations under the Medical Practice Act, the Nurses Act, the Physiotherapists Registration Act, the Dentists Act, the Podiatrists Act and the Dental Technicians Registration Act. All those Acts regulate health professions that are subject to health profession regulation Acts. The regulated standards cover handwashing; use of protective equipment, including gloves, gowns, masks, face shields and protective eyewear; sharps handling; reprocessing of instruments and equipment; and procedures for specific clinical practices and settings where appropriate. Those standards were developed over a length period of several years in the early 1990s with relevant clinicians and registration boards, and are based on a thorough analysis of the scientific literature on infection control.

In relation to policy, the department has in place a comprehensive policy in relation to infection control. In 1992 that was developed into an overarching policy. But, prior to that, for several decades we have had policies around occupational exposure. The issues addressed in the 1992 overarching document are consistent with those covered in the regulated standards for registered health professionals. Prior to 1992 the policy was articulated via a series of departmental circulars, and from the mid-1980s guidelines were issued by the then Australian National Council on AIDS—

known as ANCA—and these were adopted as policy in New South Wales. The reason for that was the decision to have consistent policies throughout Australia in relation to occupational exposures.

CHAIR: Dr Stewart, are you reading your submission to this Committee?

Dr STEWART: Yes. Do you want me to continue, Chair? I can deal with it more briefly, or I can deal with it at greater length. I am proceeding this way because it is easier for me to get the facts straight.

CHAIR: There may be questions covering some of the material in the submission, but we do not have access to your submission at this stage, so that puts us at somewhat of a disadvantage. How long do you think it would take you to go through the whole of the document?

Dr STEWART: Probably about another five or ten minutes. I will not deal with all the summary items that I spoke about at the outset. However, the policy has as its key objective minimising the risk to health care consumers and providers of acquiring a healthcare-associated or occupational infection. It is a framework within which area health services and health care facilities can develop detailed operational guidelines appropriate to their own setting. We can talk about the detail of that later on.

We have also developed a NSW Health information bulletin about an infection control audit tool. This was developed to facilitate implementation of the policy and to provide health care facilities with a standardised method of monitoring local compliance with infection control standards. Without going into too much detail, this includes things like orientation of staff, regulatory responsibilities, access to infection control manuals, and so on and so forth.

Occupational screening and vaccination is an important issue for us. We are committed to providing a safe and healthy working environment. In 1989 we released the policy about hepatitis B immunisation. This was to provide policy on that subject, although guidelines for preventing hepatitis B infections were first released in 1976.

Following a survey undertaken in 1999, which found that the uptake of vaccines among health care workers could have been improved, we released a further circular on occupational screening and vaccination in 2001. The current version, which was released in 2003 and entitled "Occupational Screening and Vaccination Against Infectious Diseases", extends the policy to departmental employees. This outlines various responsibilities and roles regarding occupational screening and vaccination. We can provide all these policies to the committee if required. The key point is that the circular reinforces the importance of adherence to standard and transmission-based procedures as the first line of protection for employees against exposure to infectious diseases.

We also have a policy about prevention and management of latex allergies. I mention this merely because it is an important aspect in terms of glove policy. I will not go into any further detail about that. In relation to the management of occupational exposure to blood or body substances, we first provided health care workers with guidelines dealing with hepatitis B in 1976. In 1981 further advice was provided on infection control guidelines for health care personnel when caring for patients with hepatitis and on the use of hepatitis B immunoglobulin. The latest version of that circular, also released in 2003 and entitled "Management of health care workers potentially exposed to HIV, hepatitis B and hepatitis C" stipulates that public health organisations must ensure an efficient local system for reporting and management of potential exposures and various other aspects.

Management of blood-borne virus infected health care workers is an important issue and it has been the subject of extensive policy development for nearly 20 years. In the early 1990s New South Wales Health released circulars regarding HIV and hepatitis B infected health care workers and these highlighted the need for health care organisations to have comprehensive occupational health programs to manage health care workers with functional impairment from any cause, including evaluation of worker fitness for duty based on competence, ability to perform routine duties and compliance with established guidelines and procedures. The latest version of this policy, released in 1999, is entitled "Health care workers infected with HIV, hepatitis B and hepatitis C". It has been developed in accordance with the principle that health care workers and employers have a legal obligation to care for the safety of others in the workplace, which includes other workers, patients and

visitors under the Occupational Health and Safety Act, and individual health care workers and health care facilities owe a common law duty of care to their patients.

The Hon. CATHERINE CUSACK: Is this an overview of the department's infectious diseases policy?

Dr STEWART: Yes, and particularly in relation to blood-borne viruses and needle-stick injuries.

The Hon. CATHERINE CUSACK: That is only one component of this overview.

Dr STEWART: This goes mainly to blood-borne viruses.

The Hon. CATHERINE CUSACK: Can we get a copy of the submission?

CHAIR: We will do that in a moment.

Dr STEWART: A number of initiatives have been established with regard to surveillance and monitoring of occupational exposure. In 1993 we undertook a survey and subsequently published a report on health care worker exposure to blood and body fluids. We have used a system called EPINet for counting exposures. Our 2002 circular, entitled "Infection control program quality monitoring", provides information about the counting and management of blood-borne virus exposure.

I will go into some detail about WorkCover New South Wales and clause 341(h) of the Occupational Health and Safety Regulation 2001. This relates to a development in the past 12 months that has particular relevance to the committee. In January 2004, WorkCover gazetted an exemption for New South Wales Health relating to the reporting of health care worker occupational exposures under that clause. A comprehensive system for reporting, recording and follow up of incidents has been established where there is a risk of occupational exposure to blood-borne diseases in accordance with New South Wales Health circulars and policies. New South Wales Health has agreed to provide to WorkCover with aggregated occupational exposure data by health care facilities twice each year for the periods January to June and July to December. We are about to provide to WorkCover data for the first six months of last year. That system has been put in place on the basis of a broader system for reporting hospital-acquired infection, which we first reported on publicly about four weeks ago. We use that system to enable us also to report on occupational exposures at work.

I can provide more information about sharps safety and safety devices. We have developed in recent times, as one would expect, comprehensive policies dealing with severe acute respiratory syndrome and avian influenza. We also have a capacity through various mechanisms and organisations within the health system for work force development, including courses at Sydney Hospital and Sydney Eye Hospital entitled "Epidemiology and evidence based practice for infection control nurses" and "Infection control post registration" and through the Albion Street Centre Education Unit. Other resources available include the New South Wales needle-stick injury hotline and the New South Wales Infection Control Resource Centre.

The Hon. KAYEE GRIFFIN: I move that the submission be tabled.

Motion agreed to.

CHAIR: The committee heard evidence this morning that 13,000 needle-stick injuries occur in Australia each year and that one in nine nurses are injured. Why are retractable needles not used more extensively in New South Wales?

Dr STEWART: We are not sure of the source of that information.

CHAIR: It came from the Medical Industry Association witnesses. I am not sure where they got it.

The Hon. PETER PRIMROSE: That came from a 1998 survey estimate based on data from the National Centre on HIV, Epidemiology and Clinical Research annual surveillance report.

Dr STEWART: We have other information in relation to possible exposure.

CHAIR: Are you suggesting that those figures are too high or too low?

Dr STEWART: Ms Stewart will deal with that. We heard that this morning and we were not sure of the source, but that has now been clarified.

Ms STEWART: I had not seen that figure. The published data I have has rates rather than an actual number.

CHAIR: Are they percentages?

Ms STEWART: They are rates per hundred bed days.

Dr STEWART: The technical way of dealing with it across Australia and, I think, internationally is to state exposures per hundred bed days. It is a better denominator.

CHAIR: The committee was told this morning that there are 13,000 needle-stick injuries in Australia each year and that one in nine nurses are injured. Why are retractable needles not used more extensively in New South Wales?

Ms STEWART: They are available to the health system; they have been on state contract since 2000, which approximates the time that they became widely available to the market. Becton Dickinson Pty Ltd had a syringe on state contract in 2000. Two companies have syringes on state contract now and both are manually operated. I understand that a small number of automatic retractable devices are available, but a number are in development undergoing the Therapeutic Goods Administration approval process. Although state contract tender documents called for automatic devices it was decided not to put any on contract because of the rapidly emerging new products coming onto the market. I am not sure why they are not widely available. They are certainly promoted by the department in its policy frameworks. Cost is possibly a factor. A conventional three-millimetre syringe is 8.4¢, the two-part safety syringe that must be self-assembled—it is a locking syringe with a retractable needle—is 47¢, and if it is purchased as an assembled product it is 79¢. There is a significant difference in the cost of the conventional products as opposed to the safety products.

Limited literature is available on the trialling of those devices in the health system, including some from the Australian health system that Professor McLaws' mentioned in her publication. She has also published some work in the area. We are aware of hospitals doing their own small studies in collaboration with the medical industry. A number of issues have emerged. A large amount of literature has also been published in the United States. However, in terms of ease of use and training, health care worker preference is for the conventional products. A range of factors seem to contribute to whether a safety product is selected. As the witnesses advised the committee this morning, in the pathology sector the use of safety devices approaches 100 per cent. That setting has a high risk of exposure to blood.

CHAIR: Who makes the decision to purchase them even if they are expensive? Is that decision left to the local medical area or hospital?

Dr STEWART: Areas are responsible for purchasing of products that their staff use on a day-to-day basis. There is also a national process—the Federal Government committed funds two or three years ago—dealing with development of retractable technology. The problem is that it is developing quickly. We have regular submissions and requests for meetings with manufacturers about various devices. One of the issues is that before we get these things on contract we want to ensure that they are available and working and that appropriate studies have been conducted. They are expensive. The price of retractable devices will fall in price as time goes by, which obviously will make it easier for area health services to purchase them in bulk, just as they purchase non-retractable devices.

In the past 15 or 20 years there has been a completely different method for dealing with exposure to sharps—that is, needles and devices used in surgery. It is not as though nothing has happened about the way we now deal with needles and syringes. When I was a young doctor it was

routine to resheath needles to prevent having exposed needles lying around. That is a no-no these days; no-one resheaths needles these days, nor should they. Yellow containers are available for used needles. One can see the logic in that, because resheathing is an exposure risk in itself; in fact, in some cases it presents the greatest risk. We have developed many practices to reduce occupational exposure to needles and other sharps. We are also looking at what can occur in relation to retractable devices when the science moves along.

Ms STEWART: The regulatory framework that has been in place since 1993 has built into it a number of requirements regarding reducing the risk of sharps injuries. Since those regulations were gazetted hand retracting has been prohibited, that is the practice of surgical staff and nurses using their hands to open wounds or to hold them open while a sharp instrument is being used in a body cavity. There is also a prohibition on passing sharps from hand to hand. Health care workers have been required to use bowls or trays to pass sharp instruments. The prohibition also extends to manipulation or recapping of needles by hand.

CHAIR: A moment ago you mentioned that she had some figures that are based on a rate of per hundred patients per day. Can you table those or provide those to the Committee?

Ms STEWART: Yes, I can. I can give you the references. It is two general articles that I have, and I also have the data available from the department's own monitoring system for the first six months of 2003.

The Hon. KAYEE GRIFFIN: I move:

That the documents be accepted.

Motion agreed to.

Ms STEWART: May I keep them to refer to?

CHAIR: Yes. We will just make a copy of them before you leave.

Ms STEWART: Okay, thanks.

CHAIR: They are actually published?

Ms STEWART: Yes, they are two published articles that I have as well as some information that is published on the department's web site.

CHAIR: That would be helpful. This morning we heard that apparently the Liverpool Hospital apparently has not produced retractable needles in some high-risk areas. We understand that; it was not dogmatic, but the witness thought that that was what was happening. Have you any data yet on whether that has had any impact on reducing needlestick injuries at the Liverpool Hospital?

Ms STEWART: No. I was not aware of that. I was sitting in the audience this morning, so I was not aware of that study. But, as I said before, a number of hospitals are working with the medical industry to trial products in various settings, and that is a process that is continual when new technologies are being introduced into the health system.

CHAIR: You said you had aggregated figures that you collate every six months and send to WorkCover. They would be basic figures that relate to each hospital—needlestick injuries per hospital?

Dr STEWART: Yes, it is the hospitals who collect the information, and then they provide it to a third party, in effect. The contract with a third party to analyse that information—that is the Australian Council of Healthcare Standards [ACHS]. We do that for various reasons, but they can analyse that for us in a more timely way, I suppose. Also, the hospitals system as a whole is more comfortable with a third party doing the analysis. There are issues, particularly around hospital-acquired infection where there are potential issues in relation to fixing up figures. Hospitals that do more serious surgery are likely to have higher rates, so that is done by the Australian Council of

Health Care Standards. There is a whole suite of hospital-acquired infection data and as well as that two indicators of occupational exposure, one for parenteral exposure—that is, needlesticks—and one for non-parenteral exposure—splashes, and so on. The aggregated data for the first six months for the whole of the States was for parenteral exposure was 0.04 exposures per hundred occupied bed days and for non-parenteral exposures 0.02 per hundred occupied bed days.

I do not have the complete number here because there is a numberal and a denominator. In fact we would have to go back to the ACHS to get it. But on the basis of what we think the number of occupied bed days is, that equates to several hundred exposures. We realise when we get that information that it remains a serious issue. The other activities that we have undertaken or the other protections that we have put in place are around immunisations, for example, and post-exposure prophylaxis obviously become important. I think it would be a fair comment to say that it would be impossible in any system to completely eliminate occupational exposures of this type. We strive to do that, but it would be impossible to do it just because from time to time there would be incidents that would occur.

CHAIR: Did you not just say then that it would equal a few hundred? Thirteen thousand seemed to be mentioned.

Ms STEWART: That was nationally.

CHAIR: But one-third of that would be New South Wales.

Dr STEWART: And for six months. Yes, that is why we questioned the 13,000 figure, but we can provide the Committee with the information in terms of the whole numbers but we always reported, for comparison purposes as well, in terms of per 100 occupied bed days. Obviously a hospital that is bigger would have more exposure so it is a matter of trying to get some comparison. A large part of what we are doing with this system, both in terms of hospital-acquired infections and occupational exposures to allow hospitals to compare with peer hospitals and with themselves over time.

Ms STEWART: So we have groupings. There are three groupings of hospitals as well—major metropolitan referral hospitals and non-metropolitan referral hospitals, district hospitals, and then very small facilities such as nursing homes are multiple purpose services.

CHAIR: Dr Stewart, are you aware that the Liverpool Hospital is still using retractable needles? Are you monitoring WorkCover buildings?

Dr STEWART: I was not aware particularly.

CHAIR: Had they advised you? They may not have advised you.

Dr STEWART: I know there have been several trials in various different hospitals around retractable technology and, as Kim says, I was aware but I was unaware of the extent that pathology practices use retractable technology now.

CHAIR: That information may be conveyed to you because you are the person in that area?

Ms STEWART: Possibly, but area health services have significant autonomy from the department, so the department is not always aware of those local trials or local work that hospitals are doing with medical industry. Sometimes they are approached by industry to try a new product and so perhaps in the case of the Liverpool Hospital, if this is a trial, there is a possibility that the company is providing the equipment free of charge for them to trial it, with a view to their purchasing it in the longer term, if it becomes available on contract, if it proves to be effective in that setting. We can certainly look into that and provide you with some advice about it, if the Committee would like that?

CHAIR: As you have heard this morning, there is also, in relation to HIV infection, a risk to the nurses contracting HIV and then of course dying and having both the trauma of that happening and then there is the sheer economic factor of whether there is in the case laid against the Department of Health, et cetera. The way it came across this morning was that maybe the high cost of retractable

needles is justified because on the other hand the cost may be imposed upon the Department of Health as a result of court cases over very injuries sustained through their normal work as nurses. Do you think that is a factor?

Dr STEWART: That would be the argument, but there are obviously two sides to that. One is: How many exposures are there? How many exposures have led to the kind of serious effects that you have just described? While we do not have absolute numbers on that we know from a study that was undertaken—the one that Kim just quoted from—up until 1995.

Ms STEWART: It was published in 1999, but until 1995 there had been 95 notified cases of HIV acquired by health care workers or occupationally acquired. Five of those cases were attributed to Australia. From the department's point of view, we are unaware of any recent seroconversions and there is another published article I have here which records 10 years of data from a Queensland hospital—that is Professor McClure's article—and no seroconversions were documented in that period.

CHAIR: Therefore, no deaths?

Ms STEWART: Therefore, we presume, no deaths. I guess it is about reporting as well, so none were reported or were found to have seroconverted.

CHAIR: That is the point, I suppose. It is only the reported cases. If a nurse resigned and went away and later died, you may not be aware of that.

Dr STEWART: That is true, but we know here in New South Wales of one of two instances over the past 10 or 15 years where there has been occupational exposure leading to seroconversion because these are matters of remark, obviously. This is the most serious consequence of an occupational exposure. But while we do not have absolute numbers, I think it is a fair comment that I could count on the fingers of one hand the number of cases that we are aware of. Having said that, clearly we need to have in place interventions when exposures occurred—prior interventions like immunisation particularly around hepatitis B, but post-exposure prophylaxis for potential exposure when there might be HIV involved.

There is quite a complicated and sophisticated mechanism when a person has a significant exposure for there to be post-exposure prophylaxis provided on an ongoing basis—tests taken to see what the person's current status is, tests taken of the patient when there is consent, and I will not go into the detail of it. That is important as well. But going to the main issue, we see retractable technology as being potentially very, very useful but it is one of those technologies where things need to develop. We are working on it in a national framework. As I said the Commonwealth Government two or three budgets ago set aside several million dollars to look at retractable technology. There has been a national committee that has been looking at how we develop it, what trials we do, what is the evidence to suggest that there will be lower exposure.

Ms STEWART: If I can just add to that: unfortunately, the Commonwealth, in the retractable needle project that it has announced, has decided not to proceed with looking at the use of retractable technology is in the health care setting, so the work that it is doing now is entirely focused on injecting drug users and the products that might be available to provide to injecting drug users to prevent the risk of littering with conventional needles and syringes. I think even though there was some lobbying of the Federal Government for there to be a health care worker component of that, and certainly the States and Territories were strong proponents of that, that has not proceeded.

CHAIR: Obviously you would support that?

Dr STEWART: Yes. That is an important clarification, Chair.

Ms STEWART: Yes.

The Hon. CATHERINE CUSACK: Can you just explain the difference between a retractable needle for a drug addict and one for a health worker?

Dr STEWART: No difference.

The Hon. CATHERINE CUSACK: So there is no negative impact, really, as long as the research is going ahead?

Ms STEWART: I suppose it depends what the research questions are. If you are looking at a products that can be rendered harmless by having a sharp part of it retracted back into it, so that a member of the community will not be injured by it—I need to stress that there are no published cases of seroconversion from a community-acquired needlestick injury either compare that with injuries that happen in the health care setting where we do have some published seroconversions. It is a different focus. It is not looking at a range of products that could be applied in a health care setting that could contribute to reducing occupational injury. It is really about the safety of a product that might be thrown away as litter.

The Hon. CATHERINE CUSACK: It would be beneficial, though, for all technology?

Dr STEWART: Potentially, yes.

Ms STEWART: I think so.

The Hon. DAVID CLARKE: Dr Stewart, who advertises your department on how to deal with possible occupation exposure to HIV infection or AIDS for health care workers? Which organisation is that?

Dr STEWART: Who advises us?

The Hon. DAVID CLARKE: Yes. I think you mentioned and Australian council on AIDS.

Dr STEWART: No. When national policy was being developed in the late 80s in relation to HIV, there were a lot of issues that were unknown or uncertain. The view was taken then by the New South Wales Government and the New South Wales Department of Health and by other health departments around Australia that it would be better to develop a national policy that was then endorsed by States and Territories. I think that was the process, Kim, was it not?

Ms STEWART: Yes.

Dr STEWART: So that was the Australian National Council on AIDS [ANCA]. I do not know if that still exists.

Ms STEWART: It does not.

Dr STEWART: But it certainly developed a series of policies around, for example, HIV infected health care workers, occupational exposures, post-exposure prophylaxis.

Ms STEWART: Not at that time because there were no drugs available, so it was not until the mid-to-late 1990s that those drugs were employed.

The Hon. DAVID CLARKE: So the overall strategy was based on the advice you received from the Australian National Council on AIDS?

Dr STEWART: At that time we obviously had in New South Wales, both in the New South Wales Department of Health and in other expert groups or organisations, including hospitals and the Albion Street centre, for example which provides a lot of advice to us around hospital-acquired infections. I do not want to overemphasise the role of ANCA here. It was about making sure that across Australia there was consistent national policy. So far as New South Wales Health is concerned, it is the New South Wales health policies that are the key policies and the ones that area health services must comply with.

The Hon. DAVID CLARKE: Just getting back to that Australian National Council of AIDS, was that a body that consisted of medical personnel, doctors, or was it a lay organisation?

Ms STEWART: No, it consisted of a range of people. It was chaired by Professor Ron Penny at the time, and I really do not know who the other members were but they would have been representatives of the partnership that has characterised the framework of the Australian response to HIV, so that is the medical and scientific community, the Government, and the affected community—people with HIV and people who represent them as well. In relation to clinical policies, clinical expertise is obviously the significant component of that. The New South Wales Minister for Health for many years—since the late 1980s—has had a ministerial advisory committee on HIV. It was initially chaired by Professor Ron Penny. The current chair is Dr Roger Garsia, who is an immunologist and the director of clinical HIV services at the Prince Alfred Hospital.

The Hon. DAVID CLARKE: The second issue, getting back to injuries caused to health care workers from the needles, the New South Wales Nurses Association or the body representing nurses believes that one in nine nurses every year is an affected or suffer such an injury. There seems to be some digression on the numbers here, but nevertheless we all agree that there are substantial injuries occurring to health care workers from his appeals. If that is the case, why would not we make it mandatory the use of retractable needles where it is possible to replace ordinary needles with retractable needles? I understand that there is this progress in development in this area, but that is no reason not to impose certain requirements now.

Dr STEWART: I suppose the issue is about developing technology and ensuring that whatever we put in place is something that is sustainable. There is a lot of development technology around retractable needles and, as well as that, the need to ensure that introduction of such technology will in fact lead to what it aims to do. We need to do trials to show that there is a significant difference. I have said before that on the basis of the information we have and other information there remains exposure to needle-sticks in health care settings; they get reported. The question here is does introducing retractable technology on a mandatory basis mean that those exposures—which may not be just about needles but about in surgery and other sharps—will somehow stop. Of course it won't. We need to keep our policy framework in place, of course.

Retractable technology is a question that we have to keep constantly under review. It may well be that at some stage when the prices go down to a greater degree than they are now and there is widespread acceptance of the product—because there are also issues around does the product work properly—is it possible to use it, given there have been other experiences over the years; many times when hospitals have tried to introduce different needles and so on there is resistance from health care workers.

The Hon. DAVID CLARKE: But there is always development and progress. We have safety bags, which are very expensive, but we have them, we have not waited for another five years into the future to see whether we can develop something better than safety bags, we have imposed what is available now. We have retractable needles that have presumably been around for while. We understand that large numbers, or a high percentage of these injuries occurring to health care workers from needles could be avoided by the use of retractable needles. Why would we not make that mandatory, even though we are constantly developing new strategies in regard to this area?

Dr STEWART: I suppose that is the key question: Will they lead to a great reduction? I am not so sure from the information I have and from my knowledge—but I am getting to the extent of my knowledge—that simply introducing it now will lead to a big reduction in exposures because there are more exposures than just needle-sticks. This is the thing we are testing. But the department certainly wants to make sure that we are at the forefront of the introduction of technology where it is working.

The Hon. DAVID CLARKE: For how long have you been testing whether the retractable needles will substantially reduce these types of injuries?

Dr STEWART: There have been various trials around the place for the past two years.

Ms STEWART: The department has not formally been involved.

The Hon. DAVID CLARKE: For the past few years?

Dr STEWART: I would have thought at least the past two or three years. We have got retractable technology on contract, which Kim mentioned earlier, which has been on contract for several years.

The Hon. DAVID CLARKE: But nothing is mandatory at this stage?

Dr STEWART: No, we do not mandate that area health services should use retractable technology.

The Hon. DAVID CLARKE: And you do not believe there is any place at this stage, or has there been over the past few years, for the mandatory imposition of retractable needles in any area of the health care service?

Dr STEWART: I think that the science is still such that we need to keep reviewing what is going on. We do mandate things in the health department. In the early nineties infection control became a very significant issue to us. We mandated a whole lot of things that were in actuality quite expensive but we mandated them because it was our view—Kim can give some examples—about non-use of items that were marked as single use only, for example. It was our view that that was a thing that should be done at that time. It has not been our view up to this point but we continue to observe whether we should mandate retractable technology.

The Hon. DAVID CLARKE: Are you expecting that there has been a substantial reduction in these sorts of injuries arising from the use of retractable needles where they have been used?

Dr STEWART: No, I am not accepting that because I do not have the information to confirm that. I do not know the Committee has had that information. One would expect that an organisation, for example the manufacturers, would say that is the case, and in controlled trials that may well be the case, but we want to ensure that too.

CHAIR: One of the witnesses claimed this morning that in the United States there had been a dramatic decrease in needle-stick injuries, and it is mandatory there.

Ms STEWART: I am not aware of the literature on that. There is an enormous amount of published literature, for instance, on vaccination and a significant reduction in hepatitis B that vaccination can contribute to. In the United States I think they reduced 17,000 hepatitis B infections acquired by health care workers in one period prior to the introduction of mandatory vaccination down to 400 per year after they introduced mandatory vaccination.

CHAIR: There could be other factors that are causing that.

Ms STEWART: No, that is the vaccination.

The Hon. DAVID CLARKE: Have you got in place a program to ascertain whether retractable needles are in fact of use in this area?

Ms STEWART: We are constantly monitoring the scientific literature in relation to our infection control program so that when the literature demonstrates that an intervention makes a significant difference then it is accommodated in policies.

The Hon. PETER PRIMROSE: Just along the same lines, as lay people here we are obviously beholding to people such as yourselves to give us the advice. You mentioned the Federal Government choosing not to have retractable needles as part of its evaluation processes. What are the reasons, for example, that it gave not to regard that as a valid part of their testing regime?

Ms STEWART: They are only looking at piloting them for the needle and syringe program. I am not aware of it having been documented anywhere but certainly I have been involved in discussions with colleagues in the Department of Health and Ageing. What we have been told is that there was not enough support for that component of the trial.

The Hon. DAVID CLARKE: When you say, "That is what we have been told", that is in some documentation somewhere?

Ms STEWART: No, I am saying I do not have any documentation in that regard. So I guess we could make an inquiry of the Federal Minister.

The Hon. DAVID CLARKE: How have you been told that the Federal Government did not feel it was worthwhile to introduce retractable needles?

Ms STEWART: In my capacity as a member of the intergovernmental committee on AIDS and related diseases. That is the forum where the State bureaucrats—my equivalent from the other States and Territories—meet with the Commonwealth bureaucrats from the health department. That is, in briefings in that context.

The Hon. DAVID CLARKE: Is there any written report of those briefings?

Ms STEWART: There are the minutes of the meetings but that is about it.

CHAIR: May I clarify something that comes out of Mr Clarke's questions? Apparently in November 2000 the United States Congress passed the Needle-stick Safety Prevention Act that was signed by President Clinton and it became government policy because of its economic factor. Without directing us, would you feel that that may be the way to go, that if the Government felt this was important enough then there would be legislation along the lines of the American legislation?

Dr STEWART: I would ask Kim to clarify this—I do not know enough about the legislation—but what I do know about it is that it requires health care workers to be directly involved in the selection of safety devices. I do not know if it mandates retractable devices all across America.

CHAIR: That is what we gathered from the evidence this morning, it was mandatory to use retractable needles.

Ms STEWART: I am not sure if that is the case actually.

CHAIR: I am only asking the question whether it is something that should be handled at a government level rather than the Department of Health because of this economic factor? The Government would have to therefore allocate funds if it wants to make it mandatory.

Ms STEWART: Certainly it would. And I guess the other thing to say is that just focusing on one strategy, which is retractable needles, as I think the Committee heard this morning, there is a range of sharp safety devices but infection control programs have to focus on more than one strategy. So in terms of what the literature says about that, it is about encouraging safe practices, it is about using barrier precautions, it is also about safer needle devices and sharp safe devices. It cannot just be a single strategy that is employed to try to reduce health care worker injuries in the workplace.

CHAIR: Where are the retractable needles being made? Are they being made in the United States?

Ms STEWART: Primarily in the United States, as I understand it.

CHAIR: They are not being produced in Australia?

Dr STEWART: There are plans. We have had some approaches from local manufacturers.

CHAIR: I thought that may be a factor in the cost of them, et cetera. We know a lot of things in the United States are a lot dearer.

Dr STEWART: Maybe. If the Committee would like us to provide more information in relation to our understanding of the Needle-stick Safety and Prevention Act passed in 2000 we can certainly do that.

CHAIR: We appreciate that. Maybe we can get some comparisons with your counterpart in the United States.

The Hon. JAN BURNSWOODS: I suspect we are beginning to go around in circles. I think Ms Stewart was interrupted before when she was citing some evidence from the United States that a large amount of the reduction in cases had come from vaccination against hepatitis B. It just seems to me that probably we, as a group of lay people without much real knowledge of this area, are building sort of castles in the air about the use of retractable needle technology, and particularly in the United States, when it seems clear that a whole lot of very different factors would all need to be balanced, added up and investigated. I just wonder if we are not in a sense claiming to ourselves much more expertise than we have really got and taking a very narrow approach to what is quite a complex issue. If the witnesses would like to comment on that?

Dr STEWART: Hepatitis B is a good example. On the evidence in the paper that Kim just cited there were thousands of conversions from hepatitis B negative status to hepatitis B positive status. Sometimes that means immune, sometimes that means ongoing hepatitis B carriage. That was dramatically reduced by the intervention that was around immunisation against hepatitis B, as one would expect because immunisation protects people against disease. That is in the context of no matter how hard we try—and we do try hard—we know that there will be exposures; it happens. So the decline in occupational exposures has been because of a whole raft of things, including the things I spoke about earlier, just completely different ways of dealing with sharps that we put into regulation and into policy back in 1992.

Obviously there is no single thing that will lead to the decline that we have seen, it is a whole raft of things, and needles and syringes are part of that. That is why we do not rule out retractable technology. We are at the stage, and so is every other State in Australia as far as I know, where we are still observing what can go on. I was not aware, and I am not sure if it is the case that the American legislation required retractable technology, but we will have to provide the Committee with that information.

The Hon. DAVID CLARKE: Does immunisation help in respect of infection from AIDS?

Dr STEWART: There has not been a successful vaccine produced.

The Hon. DAVID CLARKE: That is one strategy not available?

Dr STEWART: No.

CHAIR: Thank you very much for appearing before the Committee and giving us your valuable time. We know you are both very busy and we thank you for your corporation.

(The Committee adjourned at 3.45 p.m.)