

REPORT ON PROCEEDINGS BEFORE

**PORTFOLIO COMMITTEE NO. 1 – PREMIER AND
FINANCE**

WORK HEALTH AND SAFETY AMENDMENT (REVIEW) BILL 2019

CORRECTED

At Macquarie Room, Parliament House, Sydney, on Monday 10 February 2020

The Committee met at 9:43 a.m.

PRESENT

The Hon. Tara Moriarty (Chair)

The Hon. Robert Borsak (Deputy Chair)

The Hon. Anthony D'Adam

The Hon. Trevor Khan

The Hon. Taylor Martin

The Hon. Adam Searle

Mr David Shoebridge

The Hon. Natalie Ward

The CHAIR: I welcome everyone to the hearing of the inquiry into the provisions of the Work Health and Safety Amendment (Review) Bill 2019. Before I commence I acknowledge the Gadigal people, who are the traditional custodians of this land. I would also like to pay respect to Elders past and present of the Eora nation, and extend that respect to Aboriginals present. Today we will hear from a number of stakeholders who have views in relation to the bill, including a family who have been very personally affected by a workplace accident, unions and employee representatives, representatives of industry and from the New South Wales Government.

Before we commence I will make some brief comments about the procedures for today's hearing. Today's hearing is open to the public and is being broadcast live by the Parliament's website. A transcript of today's hearing will be placed on the Committee's website when it becomes available. In accordance with the broadcasting guidelines, while members of the media may film or record Committee members and witnesses, people in the public gallery should not be the primary focus of any filming or photography. I also remind media representatives that they must take responsibility for what they publish about the Committee's proceedings. It is important to remember that parliamentary privilege does not apply to what witnesses may say outside of their evidence at the hearing. I urge witnesses to be careful about any comments they may make to the media or to others after you complete your evidence, as such comments would not be protected by parliamentary privilege if another person decided to take an action for defamation. The guidelines for the broadcast of proceedings are available from the secretariat.

Witnesses are advised that any messages to be delivered to Committee members need to be done so through Committee staff. To aid the audibility of this hearing, may I remind both Committee members and witnesses to speak into the microphones. The room is filled with induction loops, compatible with hearing aid systems that have telecoil receivers. In addition, several seats have been reserved near the loud speakers for persons in the public hearing who have difficulty hearing. Finally, would everyone please turn their mobile phones to silent for the duration of the hearing.

ROBERT CASSANITI, Father of Christopher Cassaniti, sworn and examined

PATRIZIA CASSANITI, Mother of Christopher Cassaniti, sworn and examined

The CHAIR: You are now invited to make an opening statement. However, given the procedural decisions that we made this morning, we might open with the video that you have asked to show so we can deal with that first.

Mrs CASSANITI: Sure.

VIDEO – confidential to the committee.

The CHAIR: I want to start by saying I am very sorry for what has happened to your family and to your son. I am sure that is on behalf of the entire Committee. Thank you for being here today. I invite you to make an opening statement.

Mrs CASSANITI: Ladies and gentlemen, if you think that was hard, imagine how I feel. That was not a re-enactment; that was very real. Please excuse the swearing and the emotional heartache but it is the uncut reality of a tragic event that happened on 1 April 2019 when my son Christopher tragically died, being crushed and suffocated by a 17-metre scaffold. The guy you saw on the stretcher is a 39-year-old man, Khaled Wehbe who was also critically injured and probably will never be able to work again. My name is Patrizia Cassaniti and I am a mother and I am here today on a mission to make sure that no other worker in Australia goes to work to never come home. Safety needs to be a priority for every worker, at every workplace and must not be compromised by budgets.

The day Christopher died is a day that I will never forget. It will haunt me for the rest of my life. The knock-on effects of such tragedies are detrimental. I know my life and the lives of my family will never be the same. It not only destroyed us, but all his friends and co-workers who are still traumatised today. Some quit their jobs and some are still unable to go back to work at full capacity. The costs involved for mental health, rehabilitation and trauma outweigh the costs required for prevention of these incidents in the first place.

The penalties currently in place to hold directors and those responsible accountable are appalling and do not bring justice to the victims. My penalty is a life sentence, yet the entities who are responsible for my son's death will walk away with a slap on the wrist and a fine that will not exceed \$1 million. If the persons plead guilty they instantly get a 25 per cent discount, bringing down the penalty to \$750,000, which insurance pays in most cases. But wait, here comes the sting: Where is my discount? Do I get half a son back? No. The people responsible get a discount, but not us as victims. The biggest issue here is that the penalties in place are a joke and not taken seriously enough. Therefore, why should a builder even care?

My poor baby died a horrible and frightening death. He was alive for 20 minutes and died of suffocation and bled to death internally from his horrific injuries. He had only just turned 18 four days prior. He was in his prime and had just picked up his first car on the Friday before. He had bought himself a boat and was ready to conquer the world with an infectious and beautiful happy smile. He had plans. He was very proud of himself for what he had achieved so far. He had a great life ahead of him, but it was all cut too short. My husband, Rob, my two other sons, Adriano and Michael, and I have been served a life sentence. Our lives will never be the same. But life must go on and we need to endure the pain and sorrow to only learn to live with it.

The day Christopher died it seemed our world had ended and our nightmare had just begun. Grief struck and it did not come alone, it brings shock, deep sorrow and despair. It brings pain that we have never known before, so it is really unfair and it is a living hell. Grief cannot be watered down with wine or softened with a pill, it is here to stay and be part of us with the strongest will. Grief is harsh, it is raw and it will cut you to the bone. Grief can tear you down on any day, significant or not, and it can exhaust you with its presence and take all that we have got. My family will never live without grief, it is with us until our end. Grief is a victim's unwanted shadow.

For me personally joy does not feel the same any more and it is not like it used to be, food does not taste the same, my throat swells every time and my heart skips a beat every time I hear his name or I see a fluoro shirt on the streets. I miss my baby, my little boy and the amazing young man he had become. I miss my daily hugs and kisses that he used to give me, even on the job site. I miss the smallest of simplest things like, "What's for dinner mum?" I miss the milestones that he made and the ones he will never make and all his memories and pictures and clothes that I have to hug, that is all I have left. How is that even fair? I will fight Christopher's Law to be implemented for the safety and the right of every single worker in Australia. I looked up the statistics of

deaths. As at December 2019, 166 Australians died at work that year alone. That is an average of 16 Aussies a month that went to work and did not come home.

Straight after Christopher's death, SafeWork NSW commenced Operation Scaf Safe targeting unsafe scaffolds by visiting more than 700 construction sites by October, with shocking results. They issued 832 notices, including \$109,000 on-the-spot fines for falls risks. Whilst the inspectors had seen improvements in scaffold safety recently, the level of risk is still unacceptable; 44 per cent of scaffolds had missing parts, whilst 36 per cent of the sites it appeared unlicensed workers had actually altered or removed those scaffolding components. With my on-site talks and exposes that I do, I always ask the workers to actually stop and think and take responsibility for their actions, stop being complacent because the words and the thoughts, "I've done this before, it's not going to happen to me" and "she'll be right mate" is not going to keep them from dying or getting injured. I remind them that if something happens it is disastrous, not only for their families, their workmates and friends, but also injuries and deaths lead to mental health issues. It is a never-ending story.

The other issue is that 95 per cent who die or get injured are actually the breadwinner, the husband leaving behind a wife and children. I advise them to stop and think. If they get asked to do something that is unsafe, I tell them to stop and speak up, fix it, fix the situation or call someone that can fix it. I do not want anyone to be ignoring unsafe situations and turning a blind eye. The reason why is because of the culture of the industry. I want Christopher's Law to give all workers the assurance and confidence that they have the right without being persecuted and without being victimised for fear of losing their job, to remove themselves from those unsafe situations and speak up when they believe that they are being put in danger, because unfortunately workers are faced with this intimidating culture in this industry. My mission is to change that through my talks. But I cannot do this on my own. I need everybody's help to do this.

Christopher's Law shall protect our workers from dying or even getting injured and live to face a world of despair. This is a simple right that all workers have to come home to their families safely. I do not think it is a privilege. It should not be a privilege, to be able to come home safe. Christopher's Law shall ensure all safety supervisors that are appointed to large-scale construction sites are independent and not employees of the building, so nobody turns a blind eye to an unsafe situation. If you are employed by the builder you can always put blinkers on because you know you are going to lose your licence if you say something. Christopher's Law shall have third-party valuers and estimators to check all bids and tenders on large-scale construction sites, eliminating bad construction due to cost cutting and time factors. This is the biggest thing. It is always about time and money.

I also want the White Card to be abolished from online applications. I reckon the White Card needs to be done in a TAFE situation, at least three days with practical and theory so that people actually understand what the White Card means. Most people who have a White Card in the industry today do not even know what the White Card is for. Christopher's Law abolishes self-regulation in an industry that is extremely dangerous and actually requires stricter regulations. I would like apprentices to be wearing different coloured hard hats so that they are recognised and told when they are in an unsafe situation. I want all supervisory levels in personnel to have to complete a full health and safety representative course and a certificate IV on work health and safety so that they are aware of the consequences of involving unsafe work practices. You will be surprised how many are out there that are supervising massive jobs that do not even have this under their belt. It is appalling. I did this course myself to try to understand what the legislation is, and even the person who was teaching us told us that most of them do not even have it. It is disgusting, absolutely disgusting. It should be mandatory.

The biggest game changer here that must not only be considered but must be actioned is introducing industrial manslaughter into New South Wales. Most States in Australia have this law introduced already and it is proving to be effective in preventing accidents and incidents from happening. How is it even possible that a cat is more important than my son? And an interstate worker is more important than a worker in New South Wales? I do not get that, I do not get that at all. Other States have taken action and New South Wales should too.

As a parent who has lost a beloved son I have experienced the pain that one feels when company directors, and/or senior management who make decisions about safety seem to place more emphasis on saving a dollar and cutting corners than ensuring the safety of young contractors under their control. Directors and CEOs in New South Wales should be held personally accountable to make sure that they take an active role ensuring that a safe environment exists in their workplace. In Queensland and other States industrial manslaughter legislation actually holds these directors personally accountable for the workers under their control. The legislation in Queensland has resulted in CEOs and directors, boards, et cetera, placing more emphasis on safety, increasing training, ensuring work defects are rectified as soon as possible that could cause harm to their workforce.

Again in Queensland, most directors now personally strive to ensure that all safety mechanisms are in place for the workers to minimise an injury occurring as they are held accountable for a failure to act after

becoming aware of a risk. With the introduction of industrial manslaughter laws in Queensland, directors are now paying closer attention to their safety. Company directors in Queensland and other States now even invite professionals to talk about risks and hazards that exist in the industry for their workplace because of the personal accountability and liability and ultimate fear of prosecution that a director now faces.

If a director does not act and a worker dies or is seriously injured at their workplace, I ask you how have they met their duty of care. Obviously self-preservation of directors in Queensland and the individual risks of prosecution that they have faced since the introduction of the industrial manslaughter [IM] laws has been a factor in the increased spending on safety. What concerns me is that it took an incident like the multiple deaths at Dreamworld in Queensland and the failure of the Dreamworld senior management to act for the Government to introduce industrial manslaughter legislation to create a change. What is different in New South Wales?

I would have had to lose a son to make everybody aware that industrial manslaughter is not around. Since Christopher died there have been several deaths and I have made them public. I have made sure that everybody knows because before Christopher's death I did not take any notice of the television when somebody died in their workplace. So every time I hear the news of another death, I relive my son's. My already broken heart breaks even more every time I think about another mum or a wife out there that has lost a loved one to a work site or a work place. I cannot escape from it because I have to live with it forever. It is not fair that workers go to work to die. I have got images here, only of the ones that I have captured so God knows how many are not actually reported. These are incidents that happened just last year straight after my son died.

It is always someone dying at a workplace. It is never-ending. This year we have already had three people die in workplace accidents. How many more have to die before things are changed and industrial manslaughter is brought in? I do not want people to go to jail just for the sake of going to jail. I just want people to slow down, take it seriously and actually take a step back because when industrial manslaughter is introduced into New South Wales, what happens is the directors, the CEOs and senior management actually take a step back and think, stop now because that is going to put me into jail.

It prevents these incidents from happening. I am still clicking. There are many. Scaffoldshield is a company born straight after Christopher's death. It is an invention that followed Christopher's death. Scaffoldshield is a revolutionary, anti-tamper locking assembly which reduces the risk of scaffold ties and couplers from being detached from fixed scaffolding, reducing scaffold collapse or failure. It is a product that has been engineered to prevent scaffold nuts from being removed or loosened by unauthorised personnel, increasing safety on site. Scaffoldshield has just been nominated for the Innovation of the Year Award for the Australian Construction Awards. I feel these kind of products should be mandatory on all job sites.

I do have a sample here. This is literally a separate key. No tradie is allowed to have this. There are these little yellow things that go over it. It can only be opened by a special key which is only held on one job site by one person who is in charge. This key goes in there. There is a swivel on top of the nut that is removed by workers—unlicensed workers—even after they have been told they are not allowed to touch this scaffold. They still go in there and remove these components, making the scaffold unsafe. In my son's case, there was not one tie in the scaffold. They were all removed. Every single one of them. It was grossly overloaded and there was no chance that that scaffold was going to hold. No chance whatsoever.

Things like this should be made mandatory on all job sites to stop people thinking they can take other people's lives in their hands just because they want to get their jobs done. Just because they are being pushed for time and money. All this has got to stop. It has to stop. We do not need any more workers dying. So that is all for me. All I can say is just think of it as being your own child or anyone that you may have that goes to work and dies. As a mum, I prayed for my children to go slow in the car. Just be careful. He had just got his licence and a new car. I prayed for him to come home safely from road car accidents, not from going to work.

You do not do that as a mum. You do not pray for that stuff. It does not even cross your mind. I have got some handouts I would like to give you so that you can have a read about the other legislation in Queensland and Victoria. Why they bought in industrial manslaughter laws and why they thought it was important. I hope you will have a look and think about what needs to be done in New South Wales. Changes need to be made and it is up to you. You are the ones in power here and I need your help to do this. I am out there helping other workers, to make sure they stop doing things they should not be doing by doing talks and going on sites. This is my full-time job now. I make sure that workers see that video and I put them in a real situation because looking at pictures does not have the same impact. I have grown men walking out, crying after they see that picture. But I wanted to be imprinted on them what is real and what could happen. Thank you for the opportunity today to show you what it is really like out there. Thank you.

The CHAIR: Thank you very much. Mr Cassaniti, is there anything that you wanted to add?

Mr CASSANITI: How do you top that? I did not come prepared with anything. I was lying in bed last night thinking, what am I feeling and what am I thinking? Three words came to mind straightaway even with my employment and where I work. Chain of responsibility. Where I work chain of responsibility is paramount. If I do something wrong my direct manager [DM] wraps me round the knuckles and the chain goes up and he cops it as well, and further and further. I believe my son was killed because of a lack of chain of responsibility. Because of the process of the construction game. The greed, the money, get things done quicker. Workers overlapping each other. It happens on every site, in every factory, rush, rush, rush. Let us get this thing done because they get paid incentives to finish earlier.

I believe industrial manslaughter should be in New South Wales or at least the fines should be much greater as a deterrent to all managers and the officers of a company. To make them responsible. To see what can happen. If they are facing a \$10 million or a \$15 million fine if something happens on their work site, I think that will act as a deterrent and make them aware that their safety protocols need to be addressed even further. Another thing that came to mind was that in New South Wales, we call ourselves the premier State. But our current workplace health and safety laws make us look like the banana state. A \$1 million fine as opposed to \$16 million in Queensland and \$19 million in Victoria.

If we are the premier State, why are we not leading the way in protecting our workers in New South Wales? I do not want to see CEOs go to jail. I do not want to see them cough up millions of dollars of fines. What I want them to do is be more vigilant. Whether it be the construction game, the rag trade or the car industry, everyone needs to be held accountable for something that happens on job sites. Why is a New South Wales worker less important than other States where they have protected their workers with higher penalties, making the bosses aware that "If I don't get my ship in order, big consequences are on the way"?

I believe in Queensland they are trying to introduce industrial manslaughter into the mining Act, which was just recently on TV. The mining sector was trying to keep it out because of the number of deaths that happen in the mining industry. I am glad that they have accepted industrial manslaughter coming into the mining Act very soon and I am sure they will get their safety protocols in order and save more lives and keep people safe at work. You do not go to work not to come home. You go to work to work, to earn a living, to supply for your family and put food on the table. My son was young. He was keen. It ain't happening anymore. Please consider the pain that goes through to families. Thank you.

The CHAIR: Thank you.

The Hon. ADAM SEARLE: Mrs Cassaniti, Mr Cassaniti, as inadequate as it is, let me start by saying how sorry we are for what has happened to you and your family. Thank you for coming and giving that quite powerful presentation to the Committee this morning. In relation to your advocacy for industrial manslaughter laws, have you spoken with any Minister in the New South Wales Government about what you think should happen with the laws in New South Wales?

Mrs CASSANITI: Yes.

Mr CASSANITI: Yes. We have had a few meetings with Mr Anderson. One minute it is on; one minute it is off. Then he came and showed us the new amendments to the current Work Health and Safety Act; I think the signs go from \$1 million to \$3.5 million. The insurance no longer pays, because at the time insurance pays your fines. So he scrapped that. He has done a few good things, and I think the custodial sentence is a little bit greater than one year. But let's face it: They hardly ever go to jail anyway—not that we want that; but if it is, like with my son's case, an act of gross negligence, the chain of responsibility failed. Mr Anderson came and showed us the amendment. I thought it was okay, but it was not enough. It will not act as a deterrent for tier 1 builders and big factories. Three million dollars is their pay cheque for the week or the year, whatever it may be. It is nothing. It is not a deterrent.

The Hon. ADAM SEARLE: You said, "One minute it's on, then the next it's off." In your initial discussions with the Government, did you have the impression that they were going to do an industrial manslaughter law?

Mr CASSANITI: Yes. Mr Anderson came to us and we said, "What about industrial manslaughter?" He said, "I have never heard about it. Maybe we should look at it." I think it was part of legislation in 2005, then it was scrapped. I think the two parties agreed, "You know what? We don't need this." But he kept on saying to us, "We want to do something," but in the media he kept on saying, "They're just pretty words on a paper. If we can't get a conviction, then what is the point of having industrial manslaughter?" I am not a judge; I am not a prosecutor. I do not know how they get the convictions.

Mr DAVID SHOEBRIDGE: Did you explain to him what Mrs Cassaniti said about the deterrent effect—that having the laws in place is not about convictions, it is about changing incentives and practice?

Mrs CASSANITI: Yes.

Mr CASSANITI: Exactly. We did have that discussion. I said, "Even if you don't get a conviction, if these people have industrial manslaughter hanging over their heads surely they will change their systems even if you don't get a conviction." But if it is there and you can prove gross negligence, yes, go for it.

The Hon. ADAM SEARLE: When did you meet with him, and when did you have the impression that the Government was going to pursue an industrial manslaughter solution?

Mrs CASSANITI: Pretty much from the beginning. When Christopher died, we were getting messages from people who were quite informed about industrial manslaughter, and knowing that it is not in New South Wales actually made us aware of that. We are just workers; we do not know these kinds of things, so we searched into it and we did put it forward right from the beginning that New South Wales needs to look at industrial manslaughter as well, like the other States. The indications there—"Yes, we'll look into it and see." The Marie Boland report was put in as—what is the word?

Mr CASSANITI: The Marie Boland review was a review of the national industrial workplace health and safety Act, I believe. I said to Mr Anderson, "Have you read the Boland report?" He said yes and he looked me in the eye and he said, "We want to go over, above and beyond the 26 recommendations."

The Hon. ADAM SEARLE: When was this, roughly?

Mrs CASSANITI: Mid-year.

Mrs CASSANITI: He came to our house to pass on his condolence with flowers, and then the following meeting probably two months after my son passed, or six weeks.

The Hon. ADAM SEARLE: So June or July last year?

Mrs CASSANITI: Yes, I think around June.

Mr CASSANITI: Yes. We came to him and we showed him the Boland report. He said, "I want to go over and above and beyond Marie Boland's 26 recommendations."

The Hon. ADAM SEARLE: How did you learn that the Government was not going to proceed with industrial manslaughter laws here in New South Wales?

Mr CASSANITI: Through the media.

The Hon. ADAM SEARLE: Newspaper?

Mr CASSANITI: Radio. Patricia has had interviews with Kevin Anderson on 2GB, and Kevin Anderson suggested, "We're going to look into it. But at the end of the day, if they're just pretty words on a paper and we can't get a conviction, then what's the point?" So he is telling us yes, he is saying no, maybe.

Mrs CASSANITI: The Sunday before we launched the safety app that was done with SafeWork NSW, Minister Kevin Anderson actually put in an editorial in the *Sydney Morning Herald*, I think it was, saying that industrial manslaughter is not going to work in New South Wales. That was kind of a surprise to me, because we have been discussing. I had a meeting with him just before we launched the safety app and I said to him, "Why the change of mind?" I said, "We need to bring in deterrence. The safety app is a deterrent because people are able to speak up without feeling victimised because they can do this anonymously." He goes, "Yeah, but industrial manslaughter just isn't going to work." I am saying, "Why? It's a deterrent for the CEOs and all the big supervisory levels and directors of companies that actually will change the way they do things and put safety on top of their list to make sure that they don't end up in jail."

Mr DAVID SHOEBRIDGE: We need more than an app—

Mrs CASSANITI: We do.

Mr DAVID SHOEBRIDGE: —to allow workers to step up and be able to feel safe talking about safety.

Mrs CASSANITI: Of course they do.

Mr DAVID SHOEBRIDGE: Many of them feel really scared that if they raise safety issues, they will lose their job or they might be prosecuted.

Mr CASSANITI: Correct.

Mrs CASSANITI: Of course.

Mr DAVID SHOEBRIDGE: What do you want to say to the Premier, in particular, about that? How do you want the law to work?

Mrs CASSANITI: We will look after the workers, in the sense that I will make them aware of this safety app and try and give them the confidence to speak up, to say "This is your life. Speak up and save others. You need to stop. You can't put yourselves in dangerous situations." But the dangerous situations sometimes come from the top. They are being put there because everyone is rushing to get jobs done. If we put something on the top to give them something to worry about, then they will not put these workers in unsafe situations because they will go to jail and they will get hefty fines and insurance is not going to pay.

Mr CASSANITI: The app is a good thing where the people, like you said, are scared of losing their jobs. So they can report unsafe situations anonymously and SafeWork NSW will triage the incident and investigate. We have met with SafeWork NSW a couple of months ago and they told us about the app. I said, "How's the app going?" They said, "Yeah, we had a really good response and now we have photo evidence." But the photo evidence can only do so much. It is up to SafeWork NSW to issue prohibition notices, not just fix-it notices.

The Hon. TREVOR KHAN: When you talk about photo evidence, is that photo evidence that is downloadable from the app?

Mrs CASSANITI: Yes.

Mr CASSANITI: Yes. For example, if I am on-site and I was to take a photo of an unsafe situation, it is an app. So you take three photos and send it off to SafeWork, they will triage it and then they will investigate and send their inspectors out. If it is important they will go out the same day, but even if it is a couple of days old—for example, there was a photo taken of what looked to be scaffolding too close to powerlines. In actual fact, when SafeWork did investigate, powerlines went through the scaffolding.

Mr DAVID SHOEBRIDGE: But you see, we need workers to be up to grade but we need a legal—

Mr CASSANITI: It is not enough.

Mr DAVID SHOEBRIDGE: —framework and a culture where that work stops immediately—you do not wait for three days with powerlines going through scaffolding.

Mr CASSANITI: Correct.

Mr DAVID SHOEBRIDGE: What do we need to make that happen?

Mrs CASSANITI: The only way to make that happen is to make sure that the directors who are putting these things in place and saying, "Yeah, that'll do. Don't worry about it. It's fine. Just put some safeguard on it", it is that decision-making of the supervisory levels that will make them think twice about putting powerlines through a scaffold. I mean, what was that person thinking? Why was that person thinking that way? They do not have any consequences; why should they care? If there are no consequences why should they care?

The Hon. TREVOR KHAN: What, at the supervisory level?

Mrs CASSANITI: Yes. If a supervisor or inspector or any safety inspectors that are coming through, going through the job site and doing a walk through, and they are on the top level and they are walking next to a powerline, do you not think they would say, "Hang on, what's going on here?"

The Hon. TREVOR KHAN: Mrs Cassaniti, would those people not be liable under the current legislation?

Mrs CASSANITI: No.

The Hon. TREVOR KHAN: Really? As a supervisor on a job?

Mrs CASSANITI: Their liability is laughable. The consequence is like yeah, a walk in the park, who cares? A million dollars for someone that is a director of a \$220 million project—a million dollars is one day.

The Hon. TREVOR KHAN: Mrs Cassaniti, I think perhaps we are at cross-purposes. You spoke in terms of supervisors and we have spoken in terms of directors. Let us talk about the supervisor who walks past the scaffolding where the lines are running through the scaffolding. You would agree with me that they are liable under the current legislation if they fail to act; they have created an unsafe system of work.

Mr CASSANITI: They are.

Mrs CASSANITI: They have. What is the consequence?

Mr CASSANITI: The fines are minimal.

Mr DAVID SHOEBRIDGE: That is if they are fined. I think your concern is that most times they just get an improvement notice; they do not even get a prohibition notice.

Mr CASSANITI: They get an improvement notice.

The Hon. TREVOR KHAN: Again, we might be speaking at cross-purposes and we might be in some agreement.

Mr CASSANITI: Again, depending on the severity of the incident that SafeWork find, I think they issue more improvement notices than prohibition notices.

The Hon. ROBERT BORSAK: Mrs Cassaniti, we are talking about here, with your excellent recommendations, as a failsafe really. But what is your view in relation to what actually is going on on-site. Obviously if people are taking the ties off before the scaffold has started to be taken down there is a problem with procedure.

Mrs CASSANITI: Yes.

The Hon. ROBERT BORSAK: There is a problem with training, there is a problem with who actually is supervising the site. How is that covered in what your safety program is dealing with?

Mrs CASSANITI: It starts from the top and it also goes from the bottom. My onsite talks that I do is making the workers aware that they are responsible. It is not always up to the safety supervisor to make sure that the site is safe; it is putting in safety protocols. What is in the books in the office does not happen on the ground.

The Hon. ROBERT BORSAK: So who is responsible for making that happen? There is obviously a failure there, especially in the case of your son.

Mrs CASSANITI: It is a chain of command. There is always a chain of command. People do not just do things that they want to do because they have to do it. Some workers will take it upon themselves to remove scaffolding components so that they continue to do their job. A tie could be in their way; so they will remove that so that they can render or paint.

Mr CASSANITI: They know they are not supposed to touch scaffolding, yet they still do it because they are not told not to touch it.

The Hon. ROBERT BORSAK: What about the quality of the scaffolding and the components themselves? Have you had any issues in relation to those?

Mr CASSANITI: Yes. We spoke to SafeWork about that and they have tested the integrity of the scaffolding and I believe it came back fine.

Mr DAVID SHOEBRIDGE: But you would be aware of other sites, and I have seen images of it, where the scaffold has been imported with no safety checks and you could literally bend it with your hands, the joints. Are you aware of those concerns?

Mrs CASSANITI: Yes. They are made out of aluminium. Before scaffold used to be made out of steel; now they are starting to bring in aluminium scaffolding, which is crazy.

The Hon. ROBERT BORSAK: High-rise jobs cannot use aluminium scaffolding—that is illegal.

Mrs CASSANITI: Yes.

Mr DAVID SHOEBRIDGE: But they do.

Mrs CASSANITI: The industry is self-regulated, so a lot of builders do whatever they want to do.

The Hon. ROBERT BORSAK: You are aware that the Minister is currently going through a major review of the industry.

Mrs CASSANITI: Yes.

The Hon. ROBERT BORSAK: Have you spoken to the Building Commissioner?

Mrs CASSANITI: No. I have been wanting to meet with the Building Commissioner. I am sure I eventually will meet with him. There are a lot of changes to be made—a lot. The culture in the industry is appalling and new people that are coming into the industry are taking in those ways of working. We need to educate the

younger that are coming into the industry that these are done in a certain way, but the Government also needs to put in stricter regulations on this industry.

The Hon. ROBERT BORSAK: Just one final question. Your son was an apprentice. An apprentice what?

Mrs CASSANITI: Form worker.

Mr CASSANITI: He was at the bottom of the scaffolding; he was not on the scaffolding.

The Hon. ROBERT BORSAK: He was standing beside it, was he?

Mr CASSANITI: Underneath. I am told that the scaffolding was coming down as they were painting or laying bricks or whatever. They have removed ties but not rebraced the scaffolding.

Mrs CASSANITI: How they are meant to.

Mr CASSANITI: I will be going into that with SafeWork, but yes, it was not an accident, nor was it intentional.

The Hon. ROBERT BORSAK: So it was not an accident?

Mr CASSANITI: It was not an accident, nor was it intentional. It was just constant lack of chain of responsibility.

The Hon. ROBERT BORSAK: So it was negligence?

Mrs CASSANITI: Yes.

Mr CASSANITI: Yes, and that is another thing that Mr Anderson has changed in the WH and S Act. He has called it gross negligence. I think he has a fear of calling it industrial manslaughter. He has put in a clause saying "gross negligence", which means they could be fined prior as well, which is a good thing, but I think the fines need to be higher.

Mrs CASSANITI: They need to be a deterrent.

Mr CASSANITI: They are not a deterrent. They will pay the fine and keep going.

The Hon. NATALIE WARD: Mr and Mrs Cassaniti, I also am so very sorry for your loss. I know all the work that you are doing is very helpful. I know that no words we can express will go anywhere close. I have a teenage son and I cannot even imagine how you deal with it every day. So thank you for what you are doing. Can I put it to you that everyone wants safer workplaces, we are all agreed on that—no-one disagrees with that—it is a question of how. With the industrial manslaughter proposition my concern is, and I want to ascertain your view on that, is that there do not seem to have been many or any successful prosecutions under that either.

Mrs CASSANITI: There has been lately, yes. I think in Queensland there is one as a current—

The Hon. NATALIE WARD: An ongoing but not yet resolved.

Mrs CASSANITI: An ongoing.

The Hon. NATALIE WARD: I note that this matter—and I am sorry to raise it—is also undergoing current investigation.

Mr CASSANITI: Correct.

The Hon. NATALIE WARD: So it is a current matter.

Mrs CASSANITI: Yes.

The Hon. NATALIE WARD: Hence I do not want to go into those details too much; I do not want to prejudice the possibility of a successful prosecution in this matter, which there should be.

Mrs CASSANITI: But industrial manslaughter has only been around not that long, in the other States either.

The Hon. NATALIE WARD: In any event, it has been around for a time, but my concern is deterrence—and I agree with you that deterrence is the best factor. Is it possible that because there have been no successful prosecutions under industrial manslaughter that maybe that is not working either and perhaps the deterrence that we all agree on is something that we need to focus on? Is there a possibility that lowering the threshold other than industrial manslaughter or somehow making it easier to prosecute to get to the end that we

all want is another option for increased deterrence? That is, if a director of a company thinks that he or she will not be prosecuted, it is not really a deterrent for them and that perhaps we need something that will be the better deterrent. Is that something you could contemplate?

Mrs CASSANITI: But what would you call a better deterrent?

The Hon. NATALIE WARD: Perhaps a lower threshold for a prosecution, as proposed in this bill. I think that is perhaps the intention. We all want deterrence but we want an effective deterrence that will actually ensure prosecutions happen.

Mrs CASSANITI: It has to be effective, that is right. I know that there are a few ongoing matters that they are working on at the moment. I did hear that there was one case under industrial manslaughter in Queensland. What I think is that what we currently have—I said to the Minister, "I don't care what you call it. You don't have to call it industrial manslaughter. What's the consequences in place? Call it whatever you want to call it but they need to be put in place and it needs to be law." People need to understand that if you do something wrong, or put someone in danger there are consequences and the consequences are massive that will change somebody else.

The Hon. NATALIE WARD: Would you agree that the successful prosecution is the deterrence?

Mrs CASSANITI: Yes.

The Hon. NATALIE WARD: The possibility of having those successful prosecutions, if there is an evidence base for an alternative, that might result in more prosecutions?

Mr CASSANITI: There is but at the moment with the current Work Health and Safety Act I do not think they are great enough as a great deterrent at all.

Mr DAVID SHOEBRIDGE: Wherever we place the deterrence, what is missing at the moment is direction from senior managers.

The Hon. TREVOR KHAN: David, let Mr and Mrs Cassaniti answer. Do not give a speech.

Mr DAVID SHOEBRIDGE: Are you asking for greater responsibility?

Mr CASSANITI: Yes.

Mr DAVID SHOEBRIDGE: At the senior manager and director level?

Mr CASSANITI: Correct.

Mr DAVID SHOEBRIDGE: The reality in a workplace is that an 18-year-old apprentice has almost no power and even if they see a safety issue, do you think at the moment the laws support them to raise the safety issue and feel like they are going to be protected?

Mr CASSANITI: Not at the moment, no.

Mrs CASSANITI: No.

Mr CASSANITI: They barely had an app. We spoke to an employee who was a safety officer for a company. He could no longer get a job because he was constantly whistleblowing on the company—"there is something wrong here"—so they stopped the job site. He was costing someone money and they turfed him. And that reputation went with him. He could no longer find a job in his industry because of what he had done and the word got out.

The Hon. NATALIE WARD: I return to the prosecution. In 2004 I think the Australian Capital Territory introduced industrial manslaughter. It has been in for over a decade, quite some time.

Mrs CASSANITI: But it was the only State that had it.

The Hon. NATALIE WARD: But they also have not had any successful prosecutions. I am interested in why this seems to be the threshold as opposed to something that might lower the threshold and have more prosecutions. I ask you to comment: industrial manslaughter I think requires, unfortunately, a death to have occurred first.

Mr CASSANITI: Correct.

The Hon. NATALIE WARD: Is there, in your submission, some focus on other preventative measures—

Mrs CASSANITI: Yes—

The Hon. NATALIE WARD: —in the legislation that could be contemplated that does not require a death to occur for prosecution?

Mrs CASSANITI: No. Industrial manslaughter is there just as a consequence. Me, I want the preventative. I work on preventative and that is what I focus on—

The Hon. NATALIE WARD: The app, the communication—

Mrs CASSANITI: Educating workers. I want to get into TAFE and talk to construction workers who are apprentices that are coming in to make them realise that it is their responsibility for what they do.

The Hon. ADAM SEARLE: It is your evidence, as I understand it, that under the current bill the consequences for failing to have that chain of responsibility in place are simply not great enough for the kind of the culture change you are seeking?

Mrs CASSANITI: No, they are appalling. They need to be raised. Once you introduce something like industrial manslaughter, we have a \$16.1 million fine and 20 years jail. And it needs to come with education. You cannot just put in a law a say, "Here you go, there's a law." People need to be educated and it needs to be shown to the chief executive officers, the directors and those at the supervisory level that there is this law in place. And that gets done by, obviously, letting them know that these things are in place. That is what is happening in the other States.

So a lot of professionals who know about the IM laws get called into workplaces and talk to chief executive officers and let them know of those consequences and what they have in place that makes their sites unsafe, what they need to change to make sure that they are safe, so that they do not end up in jail. Once an IM law is introduced education must follow. It must go through the TAFEs. I can only go to so many job sites. I plan to be on every single job site in Sydney and interstate as is possible to educate the worker because it does not come from the supervisory level. Yes, they do give the command and there is a chain of command but it is the worker that does the work. If they have been told to do something that they feel is unsafe, I want to educate them and make them confident to say "no" because that is what they are not doing.

Mr CASSANITI: And to be responsible as well.

Mrs CASSANITI: Yes.

Mr DAVID SHOEBRIDGE: Successful prosecutions are not the mark of a successful law. We have had racial vilification laws now for three decades and there has never been a successful prosecution.

The Hon. TREVOR KHAN: David, you are making a speech again.

Mr DAVID SHOEBRIDGE: Everybody agrees they are useful.

Mr CASSANITI: Yes, I believe the higher fines and the higher custodial sentences is a big deterrent. I think \$3 million is nothing. A month, a year's term is nothing.

Mrs CASSANITI: It is.

The CHAIR: I thank you for attending the hearing today. I personally again apologise for what happened in the loss of Christopher. I am sure on behalf of the whole Committee we are very sorry for what has happened to Christopher to both of you and your entire family. It is very devastating. I thank you for the work you are doing. We appreciate your time today.

Mrs CASSANITI: Thank you for having us.

Mr CASSANITI: It was a pleasure meeting you guys, thank you.

Mrs CASSANITI: But we have to do this together. All I want to say is safety should not be a differentiated under what it is—Liberal, Labor, union or whatever it is.

Mr CASSANITI: Safety is everyone's responsibility.

Mrs CASSANITI: Safety must be number one and not budgeted, and that is what needs to be done, and education.

(The witnesses withdrew.)

NATASHA FLORES, Industrial officer, Unions NSW, affirmed and examined

MARK MOREY, Secretary, Unions NSW, affirmed and examined

ANGUS SKINNER, Research Manager, Police Association of NSW, affirmed and examined

TONY KING, President, Police Association of NSW, sworn and examined

BEN KRUSE, Legal and Industrial Officer, Construction, Forestry, Maritime, Mining and Energy Union, affirmed and examined

ALISTAIR SAGE, Senior Legal Officer, Australian Workers Union, affirmed and examined

DAVID HENRY, National Work, Health and Safety Officer, Australian Manufacturing Workers Union, affirmed and examined

The CHAIR: Thank you to all the witnesses who are appearing today. I invite a representative of each organisation to make an opening statement, if they wish to.

Mr HENRY: Thank you. Firstly, I thank the Committee for the opportunity to supplement our written submission. We believe that it is important to not just have health and safety laws, but to have health and safety laws that are effective. The Australian Manufacturing Workers' Union [AMWU] welcomes some of the positive proposals included in the bill, including the easing of access to health and safety representative training and the increased penalties, which will hopefully help to further create an appropriate deterrent. There are still too many workplace injuries and fatalities. In 2019, 162 Australian workers were fatally injured while working, compared to 144 the previous year. Despite some of the rhetoric in relation to fatalities decreasing, the evidence provided by Safe Work Australia tells a very different story. We also note that a recent document published in November last year on the Safe Work Australia website sets out New South Wales as having the highest level of workplace fatalities of any jurisdiction in the country.

Proposals regarding referencing of manslaughter laws in this bill do not seem to meet with the standard and the energy around the country. We argue that it does not meet the intention that was put forward by the Boland review, which is to be considered by Ministers this year. We argue that the proposition put forward by the Government to address industrial manslaughter laws dangerously leaves the corporate veil untouched, shielding both corporations and their officers. The only target left is workers—those who possess the least influence and control in the workplace. In the eventuality of a worker being successfully prosecuted under the Crimes Act, I ask the Committee what deterrent effect that will have on the real decision makers in our workplaces. Safety laws are too important not to be taken seriously. We ask that if the New South Wales Government wants to create the necessary deterrence to roguish or negligent behaviour towards safety, and lower the number of injuries and deaths in our State, real industrial manslaughter laws need to be introduced. Thank you.

Mr SAGE: I thank the Committee for giving us the opportunity to appear today to supplement our written submission. I will briefly go over the main points that we have raised. A number of my colleagues have gone into significantly more detail on some specific policy areas. By way of background, the Australian Workers' Union [AWU] is a large, predominantly blue-collar union representing over 20,000 members in New South Wales. We represent members in industries ranging from steelmaking to horticulture, to hairdressing and a few operations in our national parks. Our members face physical and mental health and safety challenges on a daily basis and rely on the work health and safety framework to protect them at work. We make the following observations about the bill that is before the Committee. Firstly, we are largely supportive of the changes themselves, although we are disappointed to see that the Government's position in its submission appears to rule out the introduction of an industrial manslaughter offence as part of the national consideration of the Boland review.

Apart from that concern, we support the Government's decision to fast-track some of the reforms proposed by the Boland review in this bill, namely expanding liability for category one offences to include negligence and reducing disputation in relation to training for health and safety representatives. While there are a number of other recommendations from the Boland review we would like to see implemented urgently on a similar fast-track basis, we nonetheless support these reforms as a good start—subject to my comment about the Government's position in relation to industrial manslaughter, with which we disagree. We note the commitment by the Minister in the second reading speech to progressing further amendments to the model Act, following national discussions next year, and we hope that we will have the opportunity to engage in that process as well, through a constructive tripartite consultation arrangement at both the State and national levels.

On the substance of the bill and our written submission, there are two changes we have proposed that are set out in more detail in our submission. The first is that as we read it, the amended category one offence as drafted includes in the group of duty holders who could be made liable in gross negligence, any duty holder under the Act. This leads to the possibility that a worker with no supervisory duties and no autonomy to influence safety procedures on a site could be charged with a category one offence in negligence, not for recklessness. In our view that is a misstep and goes beyond the intention of the Boland review, which was to make it simpler to ensure that persons conducting a business or undertaking [PCBU] and managers and senior officers of those PCBUs could be found liable in negligence. For that reason we have proposed that a change should be made to that part of the bill to ensure that low-paid workers, in particular those without any ability to influence the safety systems, cannot be imprisoned for up to five years for their role in a safety incident and that should be reserved to officers of a PCBU or the PCBU itself.

The second principal suggestion that we have made is in relation to the changes to the health and safety representative training arrangements. We support those changes because the current situation leads to needless disputation. Currently before an inspector can intervene to direct which training provider will be used by a health and safety representative [HSR], the HSR needs to engage in discussions for 90 days—three months—with their employer. If those discussions are not productive, then there is a further process for referring the matter to the inspector to make a decision. That in and of itself creates potentially a three-month delay. We strongly support the change which allows the HSR to have the right to decide the training provider.

The comment we have made in our submission is that in the context of those changes it does not appear there is a remedy available to an HSR if the employer, the PCBU, refuses to comply. At the moment the remedy is the matter is referred to the inspector and if the employer does not comply with the inspector's direction to allow them to attend training it is a civil penalty offence. The bill, as we read it, removes that and so we have a concern that it is not clear how a worker would enforce their right to have the training undertaken, except perhaps by way of relief in the Supreme Court, which I do not think anyone thinks is a good idea. That was all I had to say by way of opening comments. Thank you.

Mr KRUSE: The Construction, Forestry, Maritime, Mining and Energy Union's [CFMMEU] concerns about the proposed legislation are not so much about what is contained in the legislation but what is not addressed. There are certainly far too many industrial deaths in New South Wales. SafeWork NSW statistics quote 58 between 2014 and 2018 and I have had the benefit of hearing Mr and Mrs Cassaniti's submission today and it certainly brings the reality of this home. We have got to change our approach to work safety so that death and serious injury is not just seen as a cost of business, which sadly is the case in many respects. We do support the approach to the category 1 offence in bringing a more objective standard to measuring the intent-related issues. We do note that those changes are opposed in the submissions from the Australian Industry Group, the NSW Business Chamber and the Housing Industry Association. We certainly do urge the Government to proceed with those amendments, regardless of the opposition from industry.

We are concerned that the Government is not taking prompt action to implement recommendation 23b of the Boland report, which addresses industrial manslaughter. Again, hearing Mrs Cassaniti today, really she gave a very compelling case. It is certainly our experience that in those jurisdictions where such laws have been introduced it is not just the legal impact of those changes, it is the social change in attitude and the deterrent effect that exists from having those laws in place. We do agree that care needs to be taken in identifying the managers and senior officers who would be the subject of those offences. These laws should not be structured in such a way so that they become targeted at workers, which sadly is often where responses to these matters are brought. In our view the industrial manslaughter legislation needs to be targeted towards both acts and omissions. It needs to apply to corporate duty holders, that is officers who have the capacity to significantly affect health and safety outcomes, so not just address the immediate cause but actually look at the root cause of what has happened, review the systems failures in how work safety is carried out on site.

With the Crimes Act amendments, our concern there is that those changes are unlikely to have any realistic impact on the prosecution of safety breaches in New South Wales. There are difficulties in aggregating the negligence of individuals such that a crime is seen to be committed at the corporate level. We do not really think that that adds anything. Really, it all gets down to this; it is about resourcing. No matter how many changes we make to the legislation, no matter how much we tweak this or that source of liability, these changes will achieve nothing if we do not resource the bodies that are responsible for implementing these laws so we do not have a standalone prosecutorial service in New South Wales directed at work health and safety [WHS] contraventions and crimes. The focus of the regulator, SafeWork, now is largely on education and on-the-spot fines and we know from our work at work sites that employers and head contractors just do not have any sense of urgency in terms of deterrence. They can be reasonably satisfied at the moment that the regulator, the Government, will not take action where safety breaches have occurred.

The Government has recently decided to abolish SafeWork as a standalone institution. There was no consultation about that with the union movement that I am aware of and there has now been a mega department, I think it is called the Department of Better Regulation, which dissipates the functions of SafeWork across a whole lot of management portfolios and lumps them in with gambling, racing, I think choking hazards in shops. Our concern is that over a period of time the ability of the Government to take action on safety breaches is going to be reduced by that decision. Another resourcing issue is that at the moment coronial investigations are not carried out as a mandatory response to workplace deaths. That should certainly occur.

I want to comment briefly on the submissions that we have made about the silica crisis in New South Wales. The silicosis notifications have risen exponentially from one or two a year up to eight or nine a year now and this is the third inquiry that I have attended where there has been largely a consensus about regulatory responses to deal with that.

The Hon. TREVOR KHAN: I think you are wrong, I think it is the fourth.

Mr KRUSE: It might be, I am losing count. But nothing is happening. The Council of Australian Government WHS ministers has agreed to reduce the workplace exposure standard for respirable silica from 0.1 micrograms per cubic metre to 0.05 and Victoria has now acted to bring in that reduction and in fact they propose to go further to 0.02, which is the health recommended standard. If you look at the SafeWork NSW website, it says, yes, agreement has been reached on this and we will look towards implementing this by September 2022. I am personally aware that, for example, on a State Government infrastructure site, the Arncliffe M5 tunnel, the readings in the Arncliffe M5 tunnel were hovering around that 50 per cent of the current exposure rating now, in a context where workers were not being provided with masks and other protection. If that recommended reduced standard of 0.05 was in place now, that sort of activity, which is being performed by major contractors on behalf of the State Government, would constitute a breach of the work health and safety regulations.

The question is why is there a delay in achieving that really simple reform? Is it fear that it will get in the way of business as usual with rolling out infrastructure programs? It needs to be done, and it certainly has not been done. There is the associated issue and that is the amendment of regulations, in particular regulation 50, which requires monitoring of silica when work is being carried out. At the moment, the regulation says you are only required to monitor for silica exposure if you are not certain, on reasonable grounds, that the workplace exposure standard is being breached. In other words, if you do not monitor, you cannot be sure there is a breach and that means you do not have to monitor. It is a completely circular argument. It needs to be resolved. There needs to be a simple and clear statement in the regulations that monitoring has to occur when work is being done in dusty environments. Again, we have raised this for several years now and there has been no action occur.

The last comment I will make is in relation to really the most significant omission in the legislation at the moment, and that is part 12, the review of decisions. Listening to the debate with the Cassaniti, the concern was that there is no accountability. At the moment, the legislation is structured so that if SafeWork do not act in response to a safety issue, the only people who have standing to bring that before SafeWork itself as an internal review, or indeed the Industrial Relations Commission as an external review, are the employee, the employer or the health and safety representative.

Now the HSR is an employee and we heard Mrs Cassaniti say that employees just do not have the power. They do not have the independent standing at that workplace to be able to raise issues and challenge, let alone their boss, the safety regulator itself. So that means unions do not have standing as of right to review decisions by SafeWork not to act. That must be changed. For us to have a truly tripartite system of safety regulation in New South Wales so that workers are properly and adequately represented and there is some degree of equality in terms of responding to work health and safety issues, unions must be given standing to review decisions by SafeWork not to act on safety breaches. Thank you.

Mr SKINNER: The bill improves the WHS Act and therefore, for those reasons, we support the bill as introduced and we recognise and applaud that introduction. However, like our colleagues, our primary concern is contents not contained in the bill that was an important part of the 2018 review. The primary concern for our members is the regulations as they relate to psychological risks and psychological injury. There is a significant disparity between the skill sets of employers to identify, assess, control and monitor risks as they relate to psychological injuries, compared with that same skill set as applies to physical injuries. It is no coincidence that there is also significant disparity between the clarity of expression of obligations expressed under the regulations for psychological injury, compared to the extensive definition and obligations set in relation to physical injuries.

We believe the implementation of recommendation 2 of the 2018 review makes a significant contribution to the objective of rectifying that disparity and strongly support recommendation 2. The primary mechanism of psychological injuries is organisational factors: work intensification, burnout and workplace conflict.

Psychological injuries contain complex factors which makes embarking on the exercise of controlling those risks quite daunting. But we should take great encouragement from the fact that the primary cause of psychological injuries is internal organisational factors because that means that those risks that are causing harm are well within the bounds of what is easily controllable by employers and PCBU's.

We appreciate that before the recommendations of the 2018 review can be fully implemented, there is a process that has to go through at a national level and through COAG, but this Committee today is an opportunity for us as New South Wales stakeholders to make representations to our representatives in New South Wales Parliament. For the sake of the psychological welfare of police officers and workers throughout New South Wales, we would ask the Committee to strongly consider and make recommendations regarding psychological risks and the sufficient definition and obligations set in the regulations. Those recommendations can then be taken by the New South Wales Government as a basis to work with at the national level, and to express a commitment to implement these recommendations as far as they apply to New South Wales police officers and other workers. Thank you.

Mr MOREY: Unions NSW thanks the Committee for the opportunity to appear today. Unions NSW supports the recommendations of the Boland review and, in principle, we support the changes that the amendment bill has proposed. We are extremely supportive of some of the amendments and hopefully have adequately expressed that in our submission. We will continue to advocate for further improvements to the WHS Act and further amendments to meet the recommendations of the Boland review, including industrial manslaughter. Of great concern to us is the continual failure of the Act to guard against psychosocial harm as a result of work. We acknowledge the work that is currently being undertaken by SafeWork NSW's regulation of risks to psychological health working group and we value the opportunity we have had with our affiliate unions to represent our members on that group. However, Unions NSW made our concerns over the terms of reference of the working group clear, which will not review the regulations.

We are of the firm belief that change must occur within the regulations to ensure clarity, certainty and conformity. We do not believe mentally safe workplaces can be achieved without changes to those regulations. We believe change can only be achieved if the meaning of SafeWork's system of work is clearly defined and good work design is simply explained. This can only be enforced through those regulations. As it stands, mental health continues to deteriorate across our nation, often as the result of work and the enormous pressure and stresses placed on thousands of workers each day. We are hopeful that the Minister will continue this in his recommendations post the report of the working group. Again, we thank you for the opportunity to appear today to discuss our submission.

The CHAIR: Thank you, everybody. I will open it up to questions. This morning we resolved to rotate questions between Opposition and crossbench. If the Government members want to ask questions, they can do so through me.

The Hon. ADAM SEARLE: I was just going to ask this question; I am happy for more than one person to take it. One of the key conflicts in the submissions is around the industrial manslaughter proposals. They are in the Boland review. The Government has not included it in its legislation. Some stakeholders, including yourselves, strongly advocate for it. Others say it is unnecessary and it has not worked in other jurisdictions. I think I am right in saying that in the media commentary the relevant Ministers described it as window-dressing. Is the industrial manslaughter notion a really substantive one, or is it just a matter of ideological positioning?

Ms FLORES: In theory, we support industrial manslaughter, but we certainly have concerns around the way it is drafted. We will be looking at the Victorian legislation to see how that travels. We are pleased to see that that legislation does remove the employee from being potentially prosecuted. The legal arguments that are out there at the moment are not incorrect. The Crimes Act does not cease to exist because we walk into the workplace. We understand that. Our concern, of course, is that the Crimes Act has not been utilised and putting a note in the legislation—I do not know whether that will actually go far enough. If it is utilised, there are so many questions as to how it will be utilised.

One of the concerns that we have is the crossover or, I guess, the lack of interaction between the regulator—SafeWork NSW—and the police, and the different approaches that are taken. Generally speaking, if there is a death at a workplace, a fatality at a workplace, then the regulator—SafeWork NSW—will respond to that. If there is a death outside the workplace, the police respond to that. There are also some cases—I think I have mentioned one; where the death of a nurse, in the residence of a patient he was attending to, occurred last year. That matter became a police matter, obviously. Unfortunately, the patient, who is a diagnosed schizophrenic, will most likely be prosecuted and, obviously, there are safety concerns for the community. But SafeWork NSW was not involved in that.

The Hon. ADAM SEARLE: Even though it involved someone at work?

Ms FLORES: Even though it involved someone at work. They argued that it was a private residence, that the police took over the matter and that it was not their responsibility. Under the Robens model of work health and safety—and it is a model I agree with—we talk about constant improvement and we look at incidents, if you like, as an opportunity to improve the way we do things in the workplace. So, my concern in that particular case is someone will be prosecuted, someone who was mentally incapacitated, but the system of work will not change: Nurses will still go into those houses, they will still be at risk, they will not have the adequate equipment or any sort of equipment that they need. I understand that people who install Foxtel have better security arrangements than these nurses do.

My question is: How does that interact? How will it work in practice because the argument is the Crimes Act has always had a place—and that is correct—but it has not been used, and the police and the regulator generally do not work together. I know that there are a couple of academics and solicitors who have argued strongly that industrial manslaughter is not the solution, and I understand where they are coming from. They are arguing that manslaughter is manslaughter. They have also argued that the objectives of the Act are that we look for constant improvement and that we want to discourage employers from tampering with evidence, however, we do know that that happens anyway. To me, there are simply more questions than there are answers in this scenario. I do not understand how a system that—this has always been the case: The Crimes Act exists wherever you are but it has not been utilised. How do we get the police and SafeWork NSW to work together to ensure that the correct people are prosecuted and the correct changes take place to ensure that systems of work that fail are improved in the future?

The Hon. TREVOR KHAN: Can I ask a related follow-up question to that? I think all of those who spoke were being very careful with their language. As a backbencher in this place, I think all of us, in a sense, form that role. I am interested because in the upper House I think we will get stakes put in the ground of amendments potentially moved and some potentially passed. As you would be aware, it will go back to the lower House. Certainly the Government will never really tell me anything, but I anticipate the amendments could then be rejected and, as has happened with some other bills, the bill could end up simply stalled in the Parliament going nowhere. So, you have a view about industrial manslaughter but I suppose my question to all of you is: If we get into one of those stall positions—of the Government having one position and the Opposition having another—do you or do you not want this bill to pass without industrial manslaughter being a component of it?

Mr HENRY: I might take the answer on that, and I might limit it—

The Hon. TREVOR KHAN: You may not all have the same position, but it seems to me that is where this game is going.

Mr HENRY: I might limit my response to the particular provisions in the bill that were set out to address industrial manslaughter. I note that I am not a lawyer, I am the health and safety officer, but the advice that I have received in relation to the proposal, in relation to tying it back to the Crimes Act, is particularly problematic when you think of intent. What is the intention? What was the intention of the Government, of the Minister, in putting forward this proposal? If that intention was, "We want to send clear messages to industry that they have responsibilities, that we want to further drive down the level of fatalities in our workplaces and we want to reinforce people's sense of their duties in the workplace," then we need to look at what is the application that is proposed? And what was proposed was using the Crimes Act. The advice that I have received is that it is problematic on a number of fronts. The first is that the Crimes Act, as I have been advised, is something that can only be brought against a natural person. So, the first issue is, when we talk about industrial manslaughter laws it encompasses, under the Work Health and Safety Act, a PCBU, so the corporations are captured in that way, but within the Crimes Act how do you capture a corporation because it is not a natural person?

The Hon. TREVOR KHAN: Mr Henry, I am sorry if I am cutting you off. Obviously, I have been unclear. What I am asking is this: Let us suppose this bill does not address the wish list of having an industrial manslaughter offence created by it. Let us suppose that is how we take it. Do you or do you not want the bill to pass?

Mr HENRY: The issue with the proposal is that, effectively, the only person who could be prosecuted is a worker because the other component is that you must owe a duty to the person who has been killed. Officers of organisations under the Act do not owe duties to workers—their duty is owed to the PCBU. So if the intention of the bill is that the only people in our sights for prosecution—in the regulator's sight and the Government's sight—are workers, then what is proposed will accomplish that outcome. But I am not hearing from either side that that was ever what was intended. In my opening remarks I said, "What deterrence do we create within industry by jailing workers?" None. So, as I said, there are components of this bill which we applaud, but what has been

proposed does not just miss the mark—it could have unintended consequences. Our view is that what has been proposed needs to be removed.

The Hon. TREVOR KHAN: Does anyone else want to have a crack at it?

Ms FLORES: I agree with what Mr Henry is saying, but I guess the note is simply reminding us of the situation that currently exists. This is currently the case. I also have concerns that, if industrial manslaughter is not drafted very carefully, workers will also be prosecuted under that—and they are being prosecuted in other States. In the Australian Capital Territory three workers are currently being prosecuted under the industrial manslaughter provisions. So, the note to me is simply just a reminder: This is the law as it stands.

The Hon. TREVOR KHAN: I would agree with that. Mr Kruse or Mr Sage?

Mr KRUSE: I agree with Mr Henry's concerns that we want to be very careful that the changes that are proposed in this bill do not end up focusing the attention on workers as duty holders. That is not the problem at the moment. I suppose our approach with this bill is that it does not deal with the issue. There are some positive aspects of it—the changes of the HSRs and, certainly, the insurance arrangements to prohibit employers being able to take out insurance to cover their fines, absolutely—but it looks like a bill that has been crafted so as to argue that there has been a response to the Boland reforms and to put off, potentially forever, a real response to those concerns. Let us be clear—this bill does not have an industrial manslaughter provision and the changes to the category one offences might see a focus on that but there is no guarantee. If this bill passes there is no offence of industrial manslaughter in New South Wales. It puts us outside the patterns of responses from the other States and it does not respond to the very real community concerns that you heard this morning about that issue.

The Hon. TREVOR KHAN: Mr Sage, do you want to have a crack at a yes, no or maybe?

Mr SAGE: I endorse what my colleagues have said.

The Hon. TREVOR KHAN: Of course. It would be very dangerous not to.

Mr MOREY: Just like your party room.

The Hon. TREVOR KHAN: Yes, absolutely. We all know how this works.

Mr SAGE: I think the answer would be a qualified yes. The principal points that we see that are tremendously important are the resolution of the health and safety representative training issue. We have encountered situations in the not-too-distant past where we have had very significant delays in having our duly elected health and safety representatives precluded from attending the course of their choice with a very lengthy delay—and the requirement to have an inspector attend the worksite. From our perspective it is tremendously important that that provision passes and we certainly support that part of the bill. We also support the changes to the category 1 offence, subject to our proviso, which is a concern my colleagues have echoed, around workers being the target. That is why we have suggested that the amendment specifically state that workers who are not officers are not subject to that negligence liability.

The Hon. ADAM SEARLE: In relation to the different potential models of industrial manslaughter, Queensland and Victoria have both placed it in their work health and safety legislation. The ACT have actually put it into their Crimes Act. Of course, you have given evidence that the Crimes Act approach has generally not been used in workplace matters. Is it consistent across all of the stakeholders here that the Victorian model is probably the better of the two in the WHS framework?

Mr HENRY: We would support that proposition.

Ms FLORES: Yes, I think so. However, it is a very new amendment and it has just passed, so we have to keep our eye on it. I think it was brought up previously that the ACT has had industrial manslaughter for many years and it has not been used.

The Hon. ADAM SEARLE: But in that case the prosecutor is the DPP, is it not? You have the issue about whether or not the Crimes Act or the traditional criminal law approach works in a workplace setting. There is a question mark about that.

Ms FLORES: It is a difficult proposition. At the end of the day the Crimes Act will always apply, so workers are not ever completely exempt, because that Act will always apply. Every day we see workers who undertake their right to cease work because of an imminent risk are questioned constantly, and many unions have been dragged through the commission for taking supposedly unprotected industrial action. If workers are to be safe under this legislation, there have to be very, very good provisions to protect workers. There is no way a gig

worker, a casual worker, a temporary worker or a contract worker is going to refuse to undertake an activity even if they know it is unsafe.

I have seen and heard horrendous stories of workers undertaking tasks that they have been instructed to undertake, knowing full well that what they are doing is incredibly dangerous but not wanting to be left off the roster tomorrow or not wanting to be thrown out of the tunnel and sent above ground, because the conditions are so dreadful in the tunnel, yet the pay far exceeds the pay of the workers who are working above ground. The problem is that we do have workers who will take risks, and they know that, but they do that so that they can continue to pay the rent, the mortgage or to feed themselves. So they are at risk.

The Hon. NATALIE WARD: If deterrence is the endgame, if we all agree that this is not a problem for workers or employers but a mutual problem and that everybody should be on the same page—I think we all absolutely agree here that we want safer workplaces—if that is the case, help me to understand why industrial manslaughter, which has been brought in in the ACT and in Queensland and has had no successful prosecutions, is the optimal cause. I am interested in what will absolutely deter cutting corners. If this has been in place in other jurisdictions and has not resulted in prosecutions, why would we pursue it? Particularly when we are saying, in the criminal sense, for criminal manslaughter, it is unlikely that criminal manslaughter will be brought, therefore we should not use it. It is unlikely that industrial manslaughter, as has been proven in other jurisdictions, will be effective and result in prosecutions. Why would we go down that path? Can I understand what the difficulty is with lowering the threshold on the category 1 offence to try and have more prosecutions?

Ms FLORES: My concern and the concern that I hear from my affiliates—because I run the committee that we have at Unions NSW—is often around the regulator and the lack of resources that the regulator has. It is just impossible for the regulator to be out at all of the places that it needs to be as quickly as it needs to be.

The Hon. NATALIE WARD: But, with respect, that is not my question. My question is: In the jurisdictions where it has been brought in and there have not been successful prosecutions—that is not SafeWork NSW—can I understand why we would opt for something that does not seem to be working?

Ms FLORES: I would often argue, though, and I think some of my colleagues would agree, that the piece of legislation that we have, the WHS Act, is not a bad piece of legislation. The more we tweak it, great. But if we had a regulator that did what it was meant to do, we would not need to be doing any of this.

Mr MOREY: The problem is that people are continuing to die at work in great numbers. There needs to be a clear message sent that we will not tolerate a worker going to work and being killed at work.

The Hon. NATALIE WARD: Absolutely.

Mr MOREY: That is not clear in this. It has been muddled. There are very limited prosecutions, you are right, because the infrastructure under a claim for industrial manslaughter is not in place to ensure that people are actually properly prosecuted. The waters get muddled, the investigations are not properly carried out and so the case is never put together. It just dissipates over a long period of time.

The Hon. NATALIE WARD: So why would we go there? I am not trying to be difficult, I am just trying to understand it.

The CHAIR: Please let the witnesses answer the question that was asked of them.

Mr MOREY: There are two points. One is sending a clear message, which is what industrial manslaughter does, that we will not tolerate it. But if that is just left out there as a piece of legislation that hangs by itself without appropriately resourced people to implement it, collect the information and make an adequate prosecution, then no-one is ever going to be prosecuted. I know the legislation has been changed in a number of jurisdictions recently, so we will see how that plays out. But, prior to that, there has not been a proper push to ensure that people who are grossly negligent in a workplace and kill a worker are held to account. That infrastructure is not there. SafeWork NSW has not done that. Previously WorkCover failed to do that. That is the point that Ms Flores also makes. When someone is killed at work it is not a police matter, it is just work. There should be proper resources put into actually resourcing an investigation and holding appropriate people accountable. That is not what is happening.

The Hon. NATALIE WARD: Is the ACT and Victoria under-resourced, where they have this legislation?

Ms FLORES: There is a very, very long history I think of under-resourcing. There is a very interesting article by the academic, Richard Johnstone, on the history of the regulators, going way back to England and the Factory Act, where regulators were hesitant to regulate because of the status of the businessman within the

community and, as a result of that, there was always an attempt to negotiate or come to an agreement. Whilst the legislation has always had that criminal aspect, going back hundreds of years it has just never been applied. If we did not have police policing the roads, if we did not know that we may be pulled over and breathalysed or that we may be picked up by a camera or pulled over by a police officer, we would probably be driving crazy speeds or drink-driving all the time.

The Hon. NATALIE WARD: Just on that, there was something introduced—

The CHAIR: Please let Mr Kruse answer.

Mr KRUSE: There are a number of us involved. Your question was if there has been no prosecutions in the other States why do we need it?

The Hon. NATALIE WARD: Yes, I am just trying to get to what is happening.

Mr KRUSE: The simple fact is that at the moment without an offence of industrial manslaughter on the statute books employers will not believe that there is any risk of them being prosecuted. Certainly the feedback that we have got from our members and from branches in other States where such legislation has been introduced is that it sends a very strong deterrent message. To finish the answer, Mr Morey raised a very crucial issue, that is, it is also a matter of resourcing. Certainly in New South Wales there is not a specialist prosecutorial branch that is actually doing anything in this area and in other States these laws are relatively recent so it is not surprising that they have not had—

The Hon. NATALIE WARD: I want to ask exactly on that then, there was an industrial manslaughter offence in New South Wales between 2005 and 2011. It was in place and it was on the statute books as you say and it was the offence of reckless conduct causing death at a work place which was introduced on the books. That also did not see any successful prosecutions. I am wondering if it has been there and did not work—

Mr KRUSE: There are no resources and no commitment to this. As I have said, at the moment SafeWork are completely unaccountable. No one with any real power to challenge SafeWork actually has the ability to review these decisions and bring these matters forward.

The Hon. ADAM SEARLE: Mr Kruse, you talked about how some of the offences are relatively new. The Victorian offence is brand new. The Queensland offence was enacted in 2017 and only proclaimed 2018. I think there have been two prosecutions in Queensland. I will get some verification of that. Do you have any other information about the status of the Queensland prosecutions?

Mr KRUSE: No, but again all of these items of legislation are relatively recent. It is not at all surprising there have not been. One would hope that such prosecutions would be rare. That is the reason why you need the statute book so that there can occasionally be prosecutions and that deterrent effect can take place.

The Hon. NATALIE WARD: One alternative to that deterrent might be if the threshold is lower it is easier to prosecute you—we would all be able to prosecute you because it is not as high a threshold and potentially that is another alternative to get to the end point which we all went, which is deterrence and effective prosecution, is it not?

Mr MOREY: I think one of the problems in this jurisdiction is it is the only jurisdiction I know where safety is breached, the legislation is breached and then we have a negotiation about "Can we reduce that down?" If a prohibition notice is put on, and someone rings up "Can we just turn it into a pin?" It is a jurisdiction where there is always a negotiation down around safety.

The Hon. TREVOR KHAN: I have to say Morey, you should be around the courts sometimes. You would see some interesting exercises there.

Mr MOREY: Sure, but that is the point of it. You set a standard, the highest possible standard you can set, and then you work out how to ensure that you do not have to prosecute people under that standard; that you actually have safe systems of work in place—

The Hon. TREVOR KHAN: We are working at cross-purposes. If you talk in terms of negotiations on plea deals, I am suggesting to you it is not that often is contrary to the fact.

Mr MOREY: No, I am talking about the culture within safety within this State where employers and government seem to think it is a negotiation down to a sort of working level where the lowest common denominator occurs.

The Hon. NATALIE WARD: I do not think that is anyone's view.

Mr MOREY: That is where we actually are, and that is why people die at work. That is why we are so passionate about having a standard that is clearly set out. It is very high because the people who sit around this table get sick and tired of talking to families whose kids die. If we are going to negotiate that, this Committee is on the wrong track.

Mr HENRY: I would like to address the question raised by the Hon. Adam Searle. In relation to Queensland, and the timeframe, and there has been some question about why the lag period, the Committee should look at how long it takes to bring prosecutions now. It is often two years, post a worker being killed, if not longer. In fact, one might argue that the Queensland example is quite expedient given when normal prosecutions are brought being mindful that in New South Wales within the normal scheme—putting aside the mining scheme—there has been no category one prosecutions. But even in those cases it is a particularly long time. The matter I was involved in DIC Australia at Auburn occurred in December 2017. It was only in the second half of last year that the Regulator announced that it was proceeding with that matter.

The Hon. TREVOR KHAN: Because they have got 12 months from the date of any finding by a Coroner in which—

Mr HENRY: That is correct. They have got two years from the death or if there has been an extended period following the Coronial inquiry—

The Hon. ADAM SEARLE: And it was not unusual for the prosecutor to file very close to the two-year mark based on workload management and collecting statements.

Mr KRUSE: Absolutely.

Mr HENRY: I cannot answer for the logic behind it.

The Hon. TREVOR KHAN: Indeed, there does not seem to be a logic behind it.

Mr HENRY: I have had many heated conversations with the Regulator based on that because in many cases I am aware that their investigation has completed and then this incredible prolonged period of time. In the DIC matter, I was aware that the investigation of that matter was completed in 2018. It took then over half a year then to make a decision to proceed.

The Hon. ADAM SEARLE: Is it the common experience for the stakeholders present that in New South Wales the Safety Regulator often files charges very close, if not right up on the boundary of the limitation period?

The Hon. TREVOR KHAN: I will give evidence to that effect.

The Hon. ADAM SEARLE: So will I. That is correct, is it not? That is a question to the Police Association because I think the concerns that have been raised in its submission are a little bit different in that they are very much focused to psycho-social hazards and risks, not to say the other stakeholders do not have that as a focus. I think in your sector it is a particularly difficult one. Is what you are seeking? An in-principle commitment from the New South Wales Government to implement this part of the Boland report? There is not a particular set of provisions that you are advocating for, it is more of a commitment to pursue this?

Mr SKINNER: Yes, acknowledging that in the second reading speech it was stated that the recommendations from the Boland review that are not included in this bill, the reason behind that is that there is further process at a national level to go through to develop the model to implement those recommendations. We appreciate that that is the case; that the Minister has selected specific components of the review that he believes can be expedited and, therefore, introduced in this bill and that that in his view does not apply to recommendation 2. We appreciate that that is the case and therefore as our first opportunity to engage with New South Wales Parliament regarding the issue of recommendation 2. We would hope that we would get a recommendation out of the Committee committing to implement fully recommendation 2. I know there has been some debate round whether the status quo or recommendation 2 is preferred.

Subsequent to that national process, and during that national process, indeed the representations by the New South Wales Government on a model that would best protect New South Wales police officers and New South Wales workers. We believe that the full implementation of recommendation 2 that extensive provisions within the regulations are on par with the significant detail and significant number of obligations in the regulations as applies to physical injury, that that is the ideal position to come out of that national process. We are seeking every opportunity available to ensure that that happens and that the New South Wales Government commits to that position.

The Hon. ANTHONY D'ADAM: Is there a draft model regulation already at a national level?

Mr SKINNER: Not that has been endorsed as part of this process. Unions would be more than willing to participate in that. There were not draft provisions put forward as part of the review or as drafted by SafeWork that I am aware of yet. But the knowledge within Unions and regulators and drafters would certainly be able to develop that. The level of detail around the obligations for physical injuries is very extensive and, as highlighted in the opening statement of Unions NSW, provisions around safe systems of work, work intensification, workload, internal conflict are all things that need to have provisions in the regulations just as physical risks do.

The Hon. ANTHONY D'ADAM: How far away is a draft model at a national level?

Ms FLORES: I can add something that Angus may not be fully briefed on because it has happened quite recently. SafeWork NSW had a working group and it was the regulation of risks to psychological health called Industry and Social Partners Working Group. I was on that group. We had an official from the NSW Nurses and Midwives' Association and an official from the Shop, Distributive and Allied Employees' Association [SDA], a number of academics and some employee representatives were on that committee. One concern that we raised was that the terms of reference stated that the regulations would not be looked at so we would not be given the opportunity to look at any changes to the regulations. We said that we felt that was a mistake and that if you go online and Google psychosocial risks, or psychological safety or any of those sorts of things, nationally there is an absolute plethora of information available—probably too much information available; it is quite overwhelming. Much of that was raised at this group that I was involved in.

We spent two days working through a number of questions with the group. The group was chaired by Dr Peter Miller and the recommendations that we made will go to the Minister and the Minister will make a decision on that. I have a feeling that we may end up with a code of practice from this, which is not the worst result that could happen. One thing I noted in my submission was that the provision that has been added to the Queensland Act gives codes of practice the same status as regulations, which I think is a very positive amendment and could go a long way in our world to assisting in preventing, or at least enforcing, compliance. Time and time again we argue with SafeWork NSW around what a safe system of work is. It cannot give us an answer.

To me, I think it is fairly clear that one nurse on a shift with fifty-something dementia patients at night, four of whom are dying, is probably not a safe system of work. But that is not something it wants to touch. It would require directing an employer to put more money into the business to provide more resources. SafeWork NSW is very hesitant to go down that path and we strongly believe that an understaffed workplace is not a mentally healthy, safe workplace. We argue vehemently that a definition of safe systems of work could go a long way to good work design. The academic Carlo Caponecchia talks about good work design constantly. It is the answer to a safe and healthy workplace.

Mr SKINNER: The expertise within the union movement and within academia to set the parameters for obligations regarding psychosocial risks is there and could be used to draft provisions. The delay would be commitment by regulators and parliaments and governments around Australia to engage in that process to bring that expertise to draft those regulations. Your question was a time frame on implementing that—the expertise is there to do it but it would be starting that process of drafting and committing to implementing obligations as extensive as the regulations are on physical risks.

The Hon. ADAM SEARLE: A few years ago there was a Legislative Council inquiry into allegations of bullying in WorkCover. One of the outcomes from some of the evidence was around the issue of psychosocial risks and harms, but WorkCover—as it then was—was completely unskilled and unequipped to even understand what the risks were, and employers were—similarly—further behind the regulator. Measuring physical injuries is much simpler and more straightforward. The regulator was totally unequipped to understand and prosecute or enforce these standards. Has anything changed in the past four or five years?

Ms FLORES: I have met with a worker from SafeWork NSW. When I asked him what the result of the inquiry was, he said that SafeWork has become better at hiding things. Unfortunately, an inspector from SafeWork committed suicide last year. It has a lot of problems.

Mr SKINNER: I think that is precisely the reason that the bounds of those obligations need to be defined by the regulation. At the moment the approach to psychosocial risks and the injuries that arise from them, is that the primary duty of care has now been defined to include physical risks and psychosocial risks. Therefore, psychosocial risks are covered by the primary duty of care—happy days, the existing framework can deal with psychological injuries. That is clearly not what is happening in practice, which is demonstrated by the fact that the obligations around physical risks are so thoroughly defined through hundreds and hundreds of provisions that set specific obligations—"you must do this in relation to this risk, you must have this plan to identify, assess, monitor and control this physical injury risk"—and there is no equivalent for psychosocial risks. There is an assumption that now that the primary duty of care at the very top of that cascading hierarchy includes psychosocial

risks, it is now addressed. But there is no guidance and no equivalent obligations that cascade down from the primary duty of care.

The Hon. TREVOR KHAN: If I accept all that you say, what I took from your opening statement was that you were not saying, "Do not pass the bill now", you are saying, "This is something we want to lob over the ramparts and to be appropriately addressed". Is that your position?

Mr SKINNER: Very much so, in that the bill is an improvement on the current WHS Act and it is overtly stated that the objective of the bill is to implement the 2018 review. From the perspective of our membership—police officers in New South Wales—the most pressing issue from the 2018 review was—

The Hon. TREVOR KHAN: Is recommendation 2.

Mr SKINNER: —recommendation 2 and so we are seeking to ensure that that recommendation does not—

The Hon. TREVOR KHAN: Get lost?

Mr SKINNER: —not occur because it is not included in this bill.

The Hon. NATALIE WARD: But they are not mutually exclusive, are they?

Mr SKINNER: No.

The Hon. NATALIE WARD: This bill could be done and that could be followed through as part of the national—

Mr SKINNER: Yes.

The Hon. ADAM SEARLE: Mr Kruse touched on an important matter in his earlier evidence—that SafeWork NSW, as it has been known, appears to have been mainstreamed, or perhaps deconstructed to some degree or blended with other regulatory functions. Are any of the other stakeholders here able to expand on that—when they became aware of this happening and what some of the practical consequences have been?

Ms FLORES: We became aware of it because a member—

The Hon. TREVOR KHAN: Can you explain what you became aware of?

Ms FLORES: We became aware of what the Government is referring to as a "realignment" of SafeWork NSW and a number of departments through a worker who contacted his or her union—I do not know who that worker was. That worker was a member of the Public Service Association [PSA], which is the union that covers workers within SafeWork NSW and other government departments. I understand that there were concerns from workers in all of those departments around lack of consultation and what this would mean for them and their job security. We have not received a lot of information and we really do not know—we have asked the Minister and Mr Morey and I have met with the Minister and been told that nothing will really change. I cannot really speak further on that.

The Hon. ADAM SEARLE: We will have the Government in a bit later, but when SafeWork NSW—or WorkCover—used to be a separate statutory authority it was within the Finance cluster. It stopped having annual reports. Its reports were then blended into the finance department annual report and now it seems that it is part of the Department of Customer Service.

Ms FLORES: Correct.

The Hon. ADAM SEARLE: Is it still a separate body within that?

Ms FLORES: It does not seem to be. It seems that there is a cluster of—there are sections and there is a section on regulation, a section on—I do not have the document with me, but within those different sections you could have the regulation of workplaces, greyhounds, liquor licensing, et cetera. The first concern we raised was that of expertise and that the expertise within all of those workers—the workers who obviously work within the areas of liquor licensing, greyhounds, safety, et cetera—may be lost and it may be that the person who was the SafeWork NSW inspector may have to inspect a building in the morning and a greyhound in the afternoon. We were told that that would not be the case and that nothing would really change and people's jobs would be what they were. Look, to be completely honest with you—

The Hon. TREVOR KHAN: I would hope so.

Ms FLORES: —my disappointment with the regulator over the many, many, many years, there are times when I think maybe this will help, I really do not know; it has not been good so far. Maybe it will get worse, maybe it will get better, but my experience has not been a good one to date.

Mr HENRY: Can I just bring to the Committee's attention that a similar experiment was done in the ACT and its safety regulator was melded into an organisation called Access ACT. Last year the ACT Government had to unpick that and recreate that regulator because of the systemic failings that were created by that as a system. It is a new model as far as it has never been tried before, but where it has been tried it was not successful.

The Hon. ANTHONY D'ADAM: Coming back to the discussion about industrial manslaughter and particularly also the proposal around section 31, on the question of this notion of gross negligence, is the threshold too high? Is there a view amongst the panel about whether even that threshold will be too high in order to have successful prosecutions? Because as I understand it, particularly if we are looking at trying to establish culpability at the higher levels of organisations, that establishing gross negligence is actually quite a high threshold and if you are trying to deal with questions around the systems of work that are in place, then it is unlikely that even those will be captured by a notion of gross negligence. Are there any views people would like to express?

Mr KRUSE: The move towards gross negligence does pick up a more objective standard. So that is an improvement on the current situation that you do not have to get inside the minds and the actual intent of the individual. However, what it does not guarantee is that if a worker is killed on a worksite then there will be repercussions, there will be consequences. So yes, we do hold concerns that there needs to be a more direct consequence, that if a worker is killed on a worksite then there will be action taken against those responsible.

Mr SAGE: I think the term "gross negligence" is picked up from the Boland review.

The Hon. TREVOR KHAN: Precisely. It was one of the recommendations.

The Hon. NATALIE WARD: Recommendation one.

Mr SAGE: So in that sense I think it is sort of referring to negligence to the criminal standard. So in that context I think that is reflecting the Boland review. But if we were looking at civil penalty issues I think certainly there is an argument for negligence to the civil standard to be the application, but I think because the offence does involve possible imprisonment they have picked up negligence to the criminal standard there.

The Hon. NATALIE WARD: I think presently it is recklessness, which is extremely difficult to prove. So it is lowering it to gross negligence, which is easier than recklessness.

Ms FLORES: Our feedback from SafeWork is that they are very hesitant to undertake prosecutions because of that incredibly high threshold.

The Hon. TREVOR KHAN: I think the problem is that the legal advice they receive seems to knock them around each time. That is my understanding of it.

Ms FLORES: That is my understanding.

Mr SAGE: If there is an officer or someone senior in a company who has simply not turned their mind to the question, you are almost off the hook because you kind of have been really reckless potentially. It is not you turned your mind to the issue but you certainly may have been grossly negligent.

The Hon. TREVOR KHAN: I know that we have spoken in terms of—and Mr Kruse you did then—the death of a worker. You would agree with me there are many other circumstances where there is, for instance, gross negligence in which there has not been, perhaps more fortuitously than anything else, the death of a worker. The measure should not be the death that is the criteria, should it not, it should be the actions or inactions of the employer in terms of providing that safe system of work? That really should be where we are going, is it not? That is part of the deterrence, is it not?

Ms FLORES: Yes, absolutely. A serious injury to a worker has incredible consequences, and because of the changes to the workers compensation legislation—

The Hon. TREVOR KHAN: Can I just interrupt and say I am not—because I know the Cassanitis are still here—belittling what has occurred to any worker, but it seems to me that in terms of legislating one needs to look to a broader category of outcomes.

Ms FLORES: Absolutely. We deal with workers who have had serious injuries and will never be able to work again. It destroys their lives.

The Hon. ADAM SEARLE: But it is also important to have a law that deals with consequences, not just risks. You would agree with that?

Mr KRUSE: Yes, and, Mr Khan, if you compare our industrial laws with our driving laws, we do have laws in our driving laws that go to driving occasioning death—it is specifically identified as a crime because of the consequences, and this is what is absent in our industrial laws.

The Hon. TREVOR KHAN: Indeed, I well remember those.

Mr KRUSE: We say community expectations and the expectations of our members are that there will be a focus on a review of the specific offence where there has been a death. Changes to Category 1 laws apply to a whole plethora of circumstances where negligence may have been a factor, but there is no community response at the moment available where there has been the death of a worker that is specifically targeted towards that consequence that has occurred for that workforce and the repercussions throughout families, throughout that whole community of workers. There is no State response that addresses that outcome.

The CHAIR: Thank you everybody. We are at the conclusion of the time allocated for this section. Thank you very much for appearing today and providing this evidence. We really do appreciate it. Thank you for your time.

(The witnesses withdrew.)

MARK GOODSELL, Head—NSW, Australian Industry Group, affirmed and examined

The CHAIR: Thank you, Mr Goodsell, for coming in. We all appreciate your time. You have the opportunity now to make an opening statement, if you wish.

Mr GOODSELL: Thank you. I start by thanking the Committee for the opportunity to address you today and supplement the written submission that we have made. The only real point I would like to make in opening up is just to put, as we did in our written submission, this appearance and this bill in a bigger context, which is the context of harmonisation of work health and safety laws. This bill is triggered, in essence, by the Boland report. Marie Boland, at page 6 of her report, noted that:

The harmonisation of WHS laws across the country is an ambitious objective. It has largely been achieved and remains strongly supported. Most of those consulted over the last year urged the Government of Victoria and Government of Western Australia to adopt the model WHS laws as a matter of urgency and other jurisdictions to minimise variations to the model wherever possible. If the harmonisation objective is to be sustained into the future, it is critical that all jurisdictions commit to it.

It is an important point to make; we make it every time we appear in any jurisdiction in relation to work health and safety laws since harmonisation. Sometimes it can be forgotten that this is not just a jurisdictional issue; it is part of a beast of the Federation that is complicated. It can require a fair bit of energy to sustain, but it is very important and the Boland report confirms that pretty much all the stakeholders support the harmonisation. Our submission was made in that context and that is the major point I would make in opening.

The CHAIR: We have now a period until one o'clock where I will open this up for questions. The standing orders that we agreed to this morning were that it would rotate between Opposition and crossbench members and Government members can, through me, ask questions if they wish.

The Hon. ADAM SEARLE: Mr Goodsell, in terms of harm harmonisation, I think that your organisation represents larger employers who might operate in more than one jurisdiction. Most employers do not operate in more than one jurisdiction, though, do they? So the practical impacts of harmonisation are not that great.

Mr GOODSELL: Contrary to popular belief, about 80 per cent of our members have fewer than 50 employees. The demographics of our membership reflect the demographics of Australian industry. Our membership is in the industrial sector of the economy: manufacturing, engineering, construction, industrial services, some parts of transport. That has, as is typical in Australian markets, a few large companies and lots of small companies. So our interests and our position take into account not only large companies, but also an awful lot of small companies as well. It is true that large companies see the immediate effects of harmonisation because they have to deal directly with the different jurisdictions in managing the safety systems that they put in place for their national company, but it is surprising how many small companies actually have a few employees in more than one State.

Probably more importantly, no company operates as an island. The point I made in our submission is that the markets and the supply chains and the sectors of the economy for whom—safety is important for all of them, but especially those for whom safety is a day-to-day challenge. They are national markets. Trucks are loaded in one State and unloaded 1000 kilometres away. When there is a major mining project or, indeed, a construction project, there are contractors and subcontractors who come from all over the country. So although the jurisdiction for safety regulation falls with the States, the actual market for safety regulation is a national market.

The Hon. ADAM SEARLE: Your organisation has members in Queensland and Victoria, does it?

Mr GOODSELL: We do.

The Hon. ADAM SEARLE: What has been the impact of the advent of industrial homicide laws or industrial manslaughter laws in those two jurisdictions? Is it a matter of no consequence or no interest to them because it is irrelevant to their day-to-day operations, or has it had an effect?

Mr GOODSELL: I have not had any direct conversations. Queensland has been in place for, I think, more than two years. Victoria was probably late last year. I think the overarching expression has been they are not quite sure what the need was—what was the event or what was the trend that suddenly required this sort of thing to happen. The sectors that we represent are sectors where risks are real and managing safety does require a fair bit of attention, unlike some other sectors of the economy where it is not a top of mind management issue. It is for these, and so they are conscious that the improvement in both injury and major injury incident rates have been decreasing in line with the national strategy and fatality rates have fallen by at least one-third, taking into account rises and falls in the working population. They take safety very seriously and they are not quite sure what

it is that has triggered this sort of need—particularly in Victoria, who up until last year were telling everyone who would listen that their safety laws were the best in the country and did not need amendment and did not need harmonisation. Then suddenly they need the radical surgery of industrial manslaughter.

So there is a bit of confusion. They very much understand the increasing community concern that workplaces are safe and that people—if they go to work there is an expectation, particularly amongst themselves and their families, that that is a safe place to be. They understand that and they do their best to create that reality. It would seem that as, particularly, fatalities have become rarer, each one becomes more dramatic and perhaps that is a source of the public and the political anguish about it. But it has not been a particularly mature debate with industry to say, "This is what is happening and this is why we are reacting." It is almost like industry has been sidelined in the debate. They have not really been embraced and they have been demonised in some cases. Some of the rhetoric has been that in every case where there is a workplace fatality, there must have been somebody who did something wrong. That cannot be the case. There are examples where, really, no-one understands why a person died at work; it is just almost inexplicable. There are plenty of other cases where you think—

The Hon. ANTHONY D'ADAM: That would be the rarity, though, would it not?

Mr GOODSELL: It would be rare, but it is not so rare that it does not worry employers to think, "Are we going to get dragged into a legal regime where there is effectively no defence; because we have had a fatality, that in itself will be enough to"—

The Hon. ANTHONY D'ADAM: What should be the consequence when a worker dies in a workplace? What do you think is an appropriate approach if someone is killed?

Mr GOODSELL: There should be an investigation of the circumstances leading up to that death, and it should not go through a filter of a pre-judging that it must have been a corporate or a management failure. That certainly should be a key focus of the investigation, but it should not be the sole focus of the investigation because that would be unfair.

The Hon. ANTHONY D'ADAM: Ultimately the employers are responsible for safe systems of work, are they not? If we are going to have continuous improvement, then they need to be focusing on that and if they are not focusing on that should they not be held accountable for the consequences?

Mr GOODSELL: Yes, but the degree of culpability is tempered by the term "reasonable" and their responsibility is clearly tempered by doing all that is reasonable.

The Hon. ANTHONY D'ADAM: The courts would determine that, would they not, ultimately?

Mr GOODSELL: Yes, they are, and that is my point. That is why we are concerned about a debate that does not use the word "reasonable" it often defaults to "absolute". I can understand the circumstances of families who have lost a family member, I totally understand that situation. But, as you would know as lawmakers, that is one factor that is fed into the broader concept of what is the right balance that you apply when you are making laws that could send people to jail. These businesses are conducting businesses that we want them to conduct, we want people to undertake high-rise construction, we want people to undertake agricultural activities, we want people to undertake transport activities. They are the three most dangerous industries by fatality statistics, but the economy and the society wants companies to undertake those activities. There needs to be a balance between a desire for those activities to be undertaken with the proper framing of culpability if there is either a fatality or if there is a situation where someone could have been exposed to a fatality or a serious injury.

The Hon. ADAM SEARLE: Society wants those activities to be undertaken safely and we have had evidence that laws of this nature, in the nature of industrial manslaughter, because employers and people in management are exposed to a greater risk of being personally prosecuted it has led to a greater focus on raising the standards of safety in their workplaces.

Mr GOODSELL: No doubt about that, and that is not confined to safety law. That would play out in a whole range of corporate regulation, regulation of driving on the road, drink driving, there is a constant balance between the need to not totally discourage an activity that the community or the economy wants, with the appropriate formulation of culpability. That is the debate we have before us here, what is that right balance. And the continuous improvement point is also very valid and relevant to discussion on how industry sees offences. It is true, particularly at the lower level of offences, there is a bit of a continuous improvement model in the way safety works. In other words, you ask a lot of employers in any State, "If you had an accident what will happen?" You probably get the response, "Well, they will probably find we did something wrong because they want us to not do that again, even if objectively before the event that may not have been terribly foreseeable."

There is a continuous improvement nudge in the formulation of occupational health and safety law, work health and safety law. That is clearly in the minds, and sort of accepted, it is accepted by employers. But when you are then talking about very serious offences with multiple-year terms of imprisonment for individuals and multimillion-dollar fines, that fear and that sort of theory of being exposed to a continuous improvement model starts to get in the way of an acceptance of those things because it sort of contaminates their thinking and people think, hold on, at the lower level you are sort of guilty until proven innocent, then you have all these other really serious fines. How does that all fit together in a proper legal framework?

I hear that and I see that kind of confusion and fear and anxiety amongst employers when they are asked to engage with debates about this type of legislation. It does not mean that we should not have this kind of debate, it does not mean that legislation should not change, but it is a factor that plays out in the willingness of employers to roll up to formats like this and say, yes, let us change the law and make it tougher, that is okay, because there is this fear that there is a contamination of this continuous improvement model, with at the other end we are talking about very serious criminal or quasi criminal offences that ought to—because they do in other areas of criminal law—have very strong protections against abuse and unfairness.

The Hon. ADAM SEARLE: Just on that, I guess different approaches, your organisation's submission is essentially one of broad support for the bill as it currently stands, but other employer bodies have made submissions, some of them are taking a different view. Some of them think the legislation has already gone too far.

Mr GOODSELL: To be honest, I have not read the other submissions. I am vaguely aware of what some of them may say about it but I have not read the submissions in the timeframe. Our view, as said, which is why I made the point at the beginning, is if it were a standalone exercise of just a piece of legislation that was only going to apply in New South Wales and there was not another exercise going on in the background, there are fair bits of the bill that we unambiguously support but in the context of this wider package there is an ongoing process that we are part of, because we are represented on Safe Work Australia. We will be there with the jurisdictions and the Australian Council of Trade Unions debating the Boland report outcomes in their totality. So it is difficult for us to say, well, look, something like gross negligence is fine when we know that it is actually part of a wider package that is yet to be finalised. That is the difficulty. Other elements in the bill, the training thing, I know that is important to the unions and our very pragmatic view is although it could cause some problems in the odd workplace, it is probably better that that is resolved in a legislative sense. We have got more important things to deal with in safety than to worry about—

The Hon. ADAM SEARLE: Which course people go to.

Mr GOODSELL: Yes, exactly, provided that the system is working as we think it is and that those courses are accredited, there is no price gouging because suddenly somebody thinks they have cornered the market, that sort of thing. And we express those concerns in the submission.

The Hon. NATALIE WARD: That is something I could pick up on with that point just in relation to the bill and the option to implement some fairly easy matters. Obviously industrial manslaughter is something we are all getting the picture is a bigger debate.

Mr GOODSELL: Yes.

The Hon. NATALIE WARD: If there are practical things that can be implemented reasonably quickly, do I understand that you are supportive of the bill with a view to the larger national harmonisation stuff down the track, but that this really should not be held up for the sake of the perfect, if I can put it that way?

Mr GOODSELL: Yes. We have a very clear view about how a harmonisation should proceed, but we are battle scarred enough to know that it is pretty messy in each jurisdiction and we take a pragmatic approach. So, yes, the bill, with the exception of the comments we made about the gross negligence offence in the context of the wider discussion—the thing on industrial manslaughter, the note about manslaughter, manslaughter has been used in workplace contexts. It has been used in South Australia, it is currently being used, I think it is being used in the Australian Capital Territory. On the contrary, industrial manslaughter has been in the Australian Capital Territory since 2004.

Five years after it was brought in there was a major—and I imagine if you went back to the inquiries and second reading speeches in 2004 they probably would have covered exactly the same ground that is being covered here about strong deterrent, this will stop things happening. In reality it did not and the Australian Capital Territory I think in 2007 had to have a major inquiry into its construction industry because it was not travelling as well as it should, and in recent weeks there has been media and criticism, including from unions, that the Australian

Capital Territory construction industry is not as safe as it should be. Whether that is right or not, it does not appear that having industrial manslaughter has changed that, influenced that trajectory.

The Hon. NATALIE WARD: I just want to clarify something quickly for the record. I think you mentioned South Australia that does not have industrial manslaughter, I think it is the Australian Capital Territory or Victoria and Queensland.

Mr GOODSELL: South Australia—but they have used manslaughter.

The Hon. NATALIE WARD: Yes, criminal manslaughter. I wanted to clarify not industrial.

Mr GOODSELL: I think they are the only jurisdiction to have made that stick. I do not know why the other jurisdictions have not done it. The assertion is that it does not work. Well, it can work because I do not think the South Australian Crimes Act is that much different.

The Hon. NATALIE WARD: I just want to focus on that and deterrence because in my view, and I have said it to other parties, I think deterrence is what we are all agreed on. It is a matter of how we get to that end point. If we have jurisdictions where industrial manslaughter has been in place since 2004 and there have not been prosecutions— and I think you have just indicated to the Committee that you do not think it has been a deterrent. Do you say it for that reason?

Mr GOODSELL: I suspect that logically it would be need to be used for it to be a deterrent. There is probably a period when it is first brought in, where there is a lot of excitement about it. But if it is not used—

The Hon. ANTHONY D'ADAM: What is your explanation for why it is not used?

The Hon. NATALIE WARD: I am sorry. I have not finished. I did let you have some time earlier so if I could just—

The CHAIR: Actually that is not what the standing orders we agreed to this morning allow for.

The Hon. NATALIE WARD: I would just like to be able to finish my question.

The Hon. ANTHONY D'ADAM: I am happy for the Hon. Natalie Ward to proceed with her question as long as I can come back to my question later.

The Hon. NATALIE WARD: My point was about the deterrence effect and what in your view would be an effective deterrent? We have heard evidence that industrial manslaughter requires a death first and nobody wants it to get to that point. We want a bill or legislation that is effective, that is a deterrent, way before that point so that every worker comes home. Can I ask you to comment on that in relation to the bill and in relation to the greater harmonisation?

Mr GOODSELL: There needs to be strong penalties. What appears to be at the root of the industrial manslaughter push is the assertion that five years in jail is not a big threat. I do not know of any of our members who feel that the threat of five years jail is not a significant threat. A lot of the debate has proceeded in the media and by people who ought to be more informed, that there is somehow is not the capability to jail managers and directors when there is. Indeed, not only under manslaughter, in Victoria there has been a category one jailing in recent years and in Queensland they have been two category one penalties involving jail terms but I understand they are both on bail pending appeal.

So this idea that you cannot go to jail when in fact you can and that is happening in the last few years. That deterrent we think is significant. If you think about industrial manslaughter, how would it work? Well it would work if every now and then when somebody was killed at work there would be a jailing of somebody in the appropriate circumstances. But as you point out, that requires somebody to have died at work. So in a sense—in a pure logical sense—you have already failed by having an offence there unused. Then you think, how could you have the offence there but not use it?

Well you need to be doing much more intervention earlier on. This is why we make the point in our submission about what we think is the unused provisions in relation to due diligence. That is where the regulators now under the harmonisation model really have the capacity to get in and start testing the thinking of those who run organisations, well before they have even near misses. So I think I was being asked by the next questioner, why have there not been any prosecutions? I do not know. I am not in the prosecution business. I know it is a complex process involving the institutions that initiate prosecutions, how they relate to each other, the gathering of evidence by them and I suspect it is all of the above. They may not be very good at gathering evidence that supports those kind of prosecutions because most of their work is at a lower level about more physical anomalies in the workplace rather than the culture and the type of thing that industrial manslaughter would be looking at.

The Hon. ADAM SEARLE: In the Australian Capital Territory [ACT], their industrial manslaughter law is actually in their mainstream criminal legislation.

Mr GOODSELL: It is.

The Hon. ADAM SEARLE: In Queensland and Victoria—relatively new—but it is in their Workplace Health and Safety [WHS] framework. So that could be one explanation given that the criminal law generally has not been used in workplace matters, that could be one possible explanation we do not know. But in relation to what you mentioned earlier that they had been a couple of category one prosecutions in Victoria—

Mr GOODSELL: One in Victoria and I think two in Queensland.

The Hon. ADAM SEARLE: But we have not had any in New South Wales so even with the current regime, the regulator has not found an appropriate case or has not seen fit to prosecute anybody.

Mr GOODSELL: But the Queensland law is the same—

The Hon. NATALIE WARD: That is why there is a bill.

Mr GOODSELL: The Queensland law is the same and the Victorian law, as I understand it, hangs off recklessness as well and they found a way of doing it. My issue is that it may be a product—because this is the legislative process there can be a suggestion that it is always the legislation that is the problem. It could actually be the regulator's ability to use the legislative powers that they have got.

The Hon. NATALIE WARD: Could it be one other thing? Could it be that it is just not that simple? It is not one person or one physical thing that was missed. It is a combination of— and we heard evidence earlier about the reporting lines and the chain of responsibility. Could it be that the legislation is aimed at one particular thing and it is a combination of oversight, lack of reporting, somebody not feeling able to report something's happened. It is not just the one person. Is that another possible opportunity?

Mr GOODSELL: This is the point I made at the beginning. If you look objectively at serious safety incidences, the chain of causation would be very complicated. They often say in safety it is a Swiss cheese argument. All the holes lined up. The job of legislators is to frame a framework for culpability that allows you to follow the Swiss cheese holes on the occasions when a few different things go wrong. But at what point are you being unfair?

The Hon. NATALIE WARD: That is of course why we have proximity.

Mr GOODSELL: And reasonableness. You can go to any major construction site out here in Sydney, stand on the footpath, have a look and ask yourself how would I manage the safety of that structure? It is a major effort, particularly in those kind of industries, to make sure that they are executed safely. After an event you always have the challenge of making sure you do not look at the event with too much hindsight and are unfair to the people you are examining.

The Hon. ANTHONY D'ADAM: The problem with that submission is that ultimately nobody is held accountable and that is the experience that we have got. That is what we are trying to reconcile here. We have got hundreds of people dying in workplaces and almost all of them are resulting in nobody being held accountable for those deaths. Surely that is not an acceptable situation?

The Hon. TREVOR KHAN: Well I am not quite sure whether you can say that.

The CHAIR: He has been asked the question and I would like to hear the answer to the question. Everyone has had a good go.

Mr GOODSELL: If you are asking me whether we should have a regime where people are not held properly accountable, we are not supporting that regime. The observation that there have not been many serious prosecutions resulting in jail terms, as I said, the process of people being jailed is a complex process and the framing of the legislation is only part of that. This debate about industrial manslaughter appears to proceed solely on the basis that it is just the framing of the offence and the only evidence we have got about that theory is what happened in the ACT, which suggests it is more complicated than just the offence. In Queensland there is currently a prosecution underway under their industrial manslaughter offence. I understand that it is industrial manslaughter against the corporation but not against the individuals. They are using category one against the individuals which existed before their industrial manslaughter.

The Hon. ADAM SEARLE: But that is the other point, is it not? Both Queensland and Victoria have used this harmonised approach but they have added industrial manslaughter as an additional tool. They are not

saying, "Look, it is good enough to just pick up the pieces after someone dies." We are still trying to do the prevention and raising the standard, but they have added it as an extra.

Mr GOODSELL: Our contention is that if they do all the other elements, you do not need the offence based on outcome. It already exists in the criminal law and that is where it should stay because the structure and the philosophy of the work health and safety harmonised model was not outcomes-based—it was considered and it was rejected. The idea of gross negligence was included in there but as an alternative to industrial manslaughter, not as an addition. The Boland review has refined that—I understand that. Marie Boland says it is on the basis of community perception. I do not know how many of the community she talked to outside employers, unions, regulators and victims' families. I do not think it was wider than that in terms of wider community consultation. That is all being thrown into a debate where all the jurisdictions will consider—as I understand it, South Australia, because it has successfully used its crimes Act, has a different view to the jurisdictions that have not—about the need for industrial manslaughter.

The Hon. ADAM SEARLE: And they may well have had a different experience.

Mr GOODSELL: We are not, and our members are not, arguing that there should not be strong sanctions for those who do the wrong thing, but this is a proper discussion, as it happens, in many areas of criminal law about what is the proper framing of culpability so that you are providing a disincentive and a deterrent and you are punishing those who are doing the wrong thing, but you are not punishing or exposing people to the trauma of expected punishment where they have not done the wrong thing.

The Hon. ADAM SEARLE: You would accept, though, in the area of safety, often the doing of the wrong thing are the omissions rather than the overt acts—often it is what you have not done to create a safe system.

Mr GOODSELL: Yes, and that is almost always clearer in hindsight. On a particular worksite in a high-risk industry, there are a thousand things that could go wrong in a day, but after an event you are only ever concentrating on the one thing that went wrong, not the 999 things you got right. That feeds into the anxiety employers feel about these kinds of debates because they proceed back from the one event, rather than the other way—from all the things they have consistently managed well. They accept that the "one events" are traumatic and that there needs to be an appropriate sense of culpability, but they want some balance in that analysis.

The Hon. ADAM SEARLE: Category 1—that does not convey the magnitude of it. You would agree the term "industrial manslaughter" carries a much greater sense of moral opprobrium in terms of the outcomes of workplace deaths.

Mr GOODSELL: It does, although its usefulness is that it is loaded and its disadvantage is that it is a loaded term, to be honest. In the United Kingdom they use "corporate manslaughter" because they have confined it to a corporate offence and they leave the individual offence to the criminal law. That has attractions because it saves senior people in companies to think that the examination will only be of their conduct and it will not be a fuller examination of anyone's conduct. That is the other element of industrial manslaughter that causes anguish—the sense, as I suggested earlier, that we have already prejudged that wherever fault lies it must be with the senior managers and directors; it cannot be anywhere else. I am not even sure that families would want an investigation that starts off with that kind of prejudice. That is not to underestimate that senior managers and directors have more influence over what happens in workplaces.

The Hon. ADAM SEARLE: They can obviously influence the budget for things like investment in safety—proper equipment, proper scaffolding, whatever is—

Mr GOODSELL: They do, but you are talking about human systems when you talk about organisations, and with all the vagaries of human behaviour. As I said, there have been occasions where regulators have said to me, "We do not know why that person did what they did on that day."

The CHAIR: Thank you very much for your time. We appreciate it.

Mr GOODSELL: Thank you for the opportunity.

(The witness withdrew.)

(Luncheon adjournment)

STEPHEN LARSSON, Federation of Hunting Clubs, sworn and examined

The CHAIR: Thank you, Mr Larsson, for coming in today to give evidence. I invite you to make an opening statement.

Mr LARSSON: Thank you. I appreciate the time lines of this inquiry are very short and some Committee members may not have had an opportunity to read the submission. I point out that the Federation's submission focuses on recommendation No. 3 and No. 5 of the Boland report. Just briefly, recommendation 3 regards "continuously assessing new industries, hazards and working arrangements"—they are an important point. The Federation feels that these certainly need to be considered. Recommendation No. 5 concerns the development of a new model code and that is particularly relevant in terms of new working arrangements such as outsourcing within the agricultural sector.

The Federation is grateful for the opportunity to appear and give evidence here today. Hearing impairment meets the definition of serious injury or illness as set out in the Work Health and Safety [WHS] Act as it results in the loss of a bodily function. Noise-induced hearing loss is largely preventable. It is especially prevalent in the agriculture sector. Safe Work Australia's WHS strategy includes noise-induced hearing loss as one of six national priority areas and the agricultural sector as one of the priority industries because it is marked by high numbers and rates of injury and fatalities.

The WHS strategy is underpinned by the key principle that all workers, regardless of their occupation or how they are engaged, have the right to a healthy and safe working environment. The Australian WHS strategy emphasises that WHS policy and practice should be informed by robust evidence. Of all the noise-generating equipment used in the agricultural sector, firearm noise is one of, if not the greatest hazard. Firearms typically produce noise in the vicinity of 160 decibels, well above the exposure standard for impulse noise of 140 decibels specified in the WHS regulation.

The WHS regulation and the code of practice *Managing noise and preventing hearing loss at work* both require duty holders to comply with the hierarchy of noise control measures. This is a legal requirement—the hierarchy must be complied with. It is mandatory. The hierarchy ranks control measures from the highest level of protection and reliability to the lowest. If a noise hazard and associated risks cannot be eliminated, substituted or isolated the hierarchy requires that engineering controls—that is, firearm suppressors—be used before personal protective equipment such as earmuffs or ear plugs.

Access to firearm suppressors is regulated by the Weapons Prohibition Act. Effectively there are two genuine reasons for which one can apply to own and use a firearm suppressor: business or employment purposes, and recreational or sporting purposes. Currently the authority to issue firearm suppressor permits rests solely with the commissioner of police. The issue of suppressor permits should not be left to the discretion of the commissioner nor to the whim of his delegates. As at January 2019, 378,000 firearm licences had been issued for the genuine reason of recreational hunting and vermin control.

Many licence holders are engaged by farmers to undertake important pest control work in this State under outsourcing arrangements. These outsource workers should be afforded the same protections and access to the most effective hearing protection under the WHS legislation as other workers and volunteers. It is simply unacceptable to withhold access to the most effective means of hearing protection for firearm users simply because of philosophical opposition to firearms, political rivalry with the only political party that represents the interests of firearm owners or the Hollywood created myth that silencers are somehow evil and only used by assassins and gangsters.

I will finish up with three facts. First, firearm suppressors do not "silence" firearm noise. They simply reduce the noise from about 160 decibels to around 140 decibels, which is approximately the noise produced by a jet engine at 30 metres. Second, in all the firearm suppressor refusal decisions taken to the NSW Civil and Administrative Tribunal [NCAT] for review, not once have the commissioner of police or his "expert witnesses" ever produced any evidence that suppressors are used by criminals to conceal their crimes. Finally, because the WHS regulation requires mandatory adherence with the hierarchy of control measures, firearm suppressors are indeed required and necessary before resorting to less effective and less reliable earmuffs or earplugs to control noise. Thank you.

The CHAIR: Thank you, Mr Larsson. We will open it up to questions, starting with the Opposition.

The Hon. ADAM SEARLE: I do not have any questions for Mr Larsson.

The Hon. ANTHONY D'ADAM: Are you proposing a change to the Work Health and Safety Act? This is another legislative change.

Mr LARSSON: There is, Mr D'Adam. The recommendations in the submission by the Federation include an amendment to the Act to override the requirements or the specifications in the Weapons Prohibition Act that give sole discretion to the Police Commissioner and his delegates to authorise the issue of permits for suppressors. We believe that this is wrong. These need to come under the Work Health and Safety Regulations and should be readily available.

The Hon. ADAM SEARLE: Your argument is this is a work health and safety measure to protect hearing, particularly in these agricultural industries.

Mr LARSSON: That is correct.

The CHAIR: Just so that I can understand it, your submission is that you seek that silencers be available to anyone—sorry, what is the technical term? Suppressors?

Mr LARSSON: It is a misnomer.

The CHAIR: Sorry, I do not mean any offence by that. I do not know the technical term "suppressors".

Mr LARSSON: There is a lot of people who do not understand suppressors at all—most people.

The CHAIR: Yes. But your recommendation here is that you—

Mr LARSSON: The WHS Act be amended to enable these to—

The CHAIR: So that they would be available to anybody.

Mr LARSSON: That is correct—to protect hearing, because they are the most effective device.

The Hon. ANTHONY D'ADAM: Do they suppress the noise sufficiently to keep it under a level that would cause hearing damage?

Mr LARSSON: It depends on the calibre, Mr D'Adam. Larger calibre firearms certainly it would bring it down in the vicinity of the standard of 140 but certainly not below. For smaller calibre firearms, .22 rim-fires, low-calibre centre-fires, yes, it is pretty much around that area.

The Hon. ANTHONY D'ADAM: You can use suppressors on rifles, can you?

Mr LARSSON: Yes, you can. There is a large number—I guess it would be in the hundreds now—within New South Wales of licensed vertebrate pest controllers that have been issued permits. But in his wisdom the Commissioner for Police and the firearms registry have not issued any suppressor permits apart from one for recreational sporting purposes. These are the very people who get out there and assist farmers through outsource arrangements to control pests on their property when they do not have the time to do the job themselves.

The Hon. ANTHONY D'ADAM: Is it a separate licensing arrangement so that it is a separate permit from a firearms permit?

Mr LARSSON: Yes, it is a separate permit.

The Hon. ANTHONY D'ADAM: And only one has been issued?

Mr LARSSON: One to a recreational shooter. That gentleman was—I have to be careful here because I cannot disclose his identity, but that was on medical grounds. He had quite some severe medical issues that had to be dealt with.

The Hon. TREVOR KHAN: This is a question I asked of a number of the union witnesses but I did not seem to get too many clear answers. If your proposals were not successful—if we deal with, as you would know, the potentiality of amendments being moved in the upper House, going to the lower House and being rejected—if your recommendations were not accepted, would you prefer to see this bill die or would you accept that it is a step, albeit from your view an imperfect step, forward?

Mr LARSSON: We certainly would not want to see the bill die, Mr Khan. There are lots of good points in there. I did not sit through all of the proceedings this morning, but I would not want to see it terminated just because we do not get what we want—we are not that petulant. In terms of the legislation, these things are indeed required and necessary. It is only the mystique about these things, or the bias against firearm owners—for whatever reason—that these things are not being made available.

The Hon. ANTHONY D'ADAM: Are they subject to the same secure storage requirements?

Mr LARSSON: Absolutely, yes, if not more stringent. Category 2, which is a higher level of safe storage, requires—I do not have one so I am not familiar with the storage requirements. All firearms are required to be stored in a locked safe when not in use and that is a graded system. For category C and D firearms, the requirements are much stricter.

The Hon. ANTHONY D'ADAM: Are you suggesting that someone other than the Commissioner of Police be given authority to issue permits?

Mr LARSSON: This is a work health and safety issue, it is not a policing issue. With respect to the Police Commissioner, I do not think he has any particular expertise in work health and safety matters, nor do his delegates who make the decisions on these things.

The Hon. ANTHONY D'ADAM: Who would make the decision under your proposal?

Mr LARSSON: Perhaps Safe Work Australia. An amendment could be incorporated into the bill to override the authority that the Commissioner currently has. That would enable these things to be available without overturning the misuse of them.

The Hon. ANTHONY D'ADAM: Under your proposal the Commissioner would lose all oversight. Basically, the decision will be solely with Safe Work?

Mr LARSSON: Yes. It depends on how the amendment might turn out.

The CHAIR: Can I quickly clarify something? I think this was asked earlier, so forgive me, but I do not know the answer to this in terms of how licensing works. Is there a specific category of licence for people who only use guns for farm or agricultural work? Or are people with licences able to do that work?

Mr LARSSON: No. There are primary producers licences but, as I mentioned before, primary producers do not often have the luxury of time to be able to do all of the pest control work that needs to be done, so they outsource it to recreational shooters.

The CHAIR: So it is recreational shooters full stop? It is not a specific licence category for people who work—

Mr LARSSON: No, that is right—recreational shooters and/or licensed vertebrate pest controllers. Licensed vertebrate pest controllers and primary producers can obtain firearms and suppressor permits at the moment and they are being issued sparingly.

The CHAIR: Just to clarify, I do not just mean in terms of suppressors, I mean in terms of firearm licences full stop—there is not a separate category for people who are working in pest control?

Mr LARSSON: Yes, there is.

The CHAIR: Right, okay, that's what I mean.

Mr LARSSON: I have a table here from the Firearms Registry that I can hand up, if that is of interest?

The CHAIR: That is fine. I meant in terms of your recommendation, which is quite specific in terms of Safe Work. I just wanted to clarify that there is a specific category for people who work in that space.

The Hon. NATALIE WARD: Thank you, Mr Larsson. I apologise because I was slightly late and missed the first part of your introduction, but I have your submission. I want to clarify something: You appear here today in your capacity as part of the Federation of Hunting Clubs, but are you also working in the Parliament?

Mr LARSSON: I do indeed. There is a declaration in the back. I wear multiple hats, like many people.

The Hon. NATALIE WARD: I thought you looked familiar—and nicely so. If you could clarify your—

Mr LARSSON: I work in the Hon. Robert Borsak's office.

The Hon. ADAM SEARLE: It is in the submission.

The Hon. NATALIE WARD: Thank you. I do not have it with me so I just wanted to clarify.

Mr LARSSON: I point out that Mr Borsak had no input into this submission, whatsoever.

The Hon. NATALIE WARD: That is why it reads so well.

Mr LARSSON: I will let him know you said that.

The Hon. NATALIE WARD: I was not making any negative issue of it, I was just clarifying.

The Hon. ANTHONY D'ADAM: Are there any other benefits to suppressors, other than the noise impact on the user? Is any other reason why you would need a suppressor or use one?

Mr LARSSON: Absolutely. There are multiple reasons but this one focuses on work health and safety.

The Hon. ANTHONY D'ADAM: I am just trying to contextualise why—there might be other reasons why.

Mr LARSSON: It depends on how long you have. I could talk about this subject for hours.

The Hon. NATALIE WARD: Please do.

Mr LARSSON: Please do? Please don't.

The Hon. ANTHONY D'ADAM: I think you only have 10 minutes.

The Hon. ADAM SEARLE: We do not have hours, sadly.

Mr LARSSON: There are other advantages to them—just quickly. Vertebrate pest controllers I know and have spoken to say that the noise suppression by these devices is not absolute, but it disguises and confuses the source of the noise so that pest animals do not know where the sound is coming from. Because of that, pest controllers have more opportunity to control more pests, rather than firing one shot and the rest scattering.

The Hon. ANTHONY D'ADAM: Right.

Mr LARSSON: That is a common phenomenon. There are multiple other reasons, such as reduction in disturbance of livestock. Often we find that—particularly with the foxes and cats that tend to loiter around flocks of lambing ewes—foxes can be shot right in amongst flocks of sheep. So there is less disturbance of the stock and of neighbours on smaller hobby farms these days. Many people do not support firearm use, so it is a good neighbourly thing to keep noise down as much as one can.

The Hon. TREVOR KHAN: Do I take it that in order to be caught within the work health and safety legislation, a recreational shooter coming onto a property would be considered a volunteer?

Mr LARSSON: Or an outsource worker. That comes under the recommendation in the Boland review—

The Hon. TREVOR KHAN: Yes, it does.

Mr LARSSON: —under recommendation number 5. This is one of the new working arrangements—well, it is not new, it has been around since Adam was a boy. I have assisted dozens of property owners controlling pests as an outsource arrangement, who simply do not have time to do all the work themselves.

The Hon. TREVOR KHAN: If it be a situation where the recreational shooter comes to the landowner and says, "We would like to come onto your property"—I am not trying to be cute—"and shoot any errant kangaroos that are on your property", does that create the same circumstance as when a farmer goes to the local pub or church—covering all bases—

Mr LARSSON: Indeed.

The Hon. TREVOR KHAN: —and says, "I need a couple of recreational shooters to come onto my property to assist me because I have errant kangaroos." Are they in the same category of status under work health and safety legislation?

Mr LARSSON: I do not know. I am not an expert in work health and safety legislation, Mr Khan.

The Hon. TREVOR KHAN: I am not professing to be, either. A volunteer or an unpaid outsource worker is one thing, but I wonder if someone who seeks to undertake a recreational pursuit on someone else's property—

Mr LARSSON: This is outsource work, as opposed to—well, I guess—

The Hon. TREVOR KHAN: That depends upon—

Mr LARSSON: Of course, I see your point.

The Hon. ANTHONY D'ADAM: You are saying that in a circumstance where there is no payment—if you are an enthusiast hunter and you go onto someone's property to shoot feral pigs or whatever the practice is—the farmer obviously has the problem that they have not specifically sought you out to do it—

The Hon. TREVOR KHAN: Well, they need permission. If they do not have permission there is—

The Hon. ANTHONY D'ADAM: No, but they have not specifically sought out someone to—

The Hon. ADAM SEARLE: If they do not have permission then we are in a different field of inquiry.

The Hon. ANTHONY D'ADAM: To control the pests, it is, I suppose, unsolicited. The farmer gives consent, and then it is not really a contract, is it?

The Hon. TREVOR KHAN: I do not know the answer to that.

The Hon. ANTHONY D'ADAM: It is probably outside, I would have thought.

Mr LARSSON: Maybe it would help to clarify things if I gave you the approach that I take. When I go and seek permission to get access to rural properties I do not say, "Can I come on and hunt for recreation?" I come on and say, "Can I assist with your feral animal control work?" That is the approach that I take.

The Hon. TREVOR KHAN: But let us be frank: you are far more precise and measured in your approach than I suspect a lot of other people might be.

Mr LARSSON: You cannot say that, I do not think, with respect.

The Hon. TREVOR KHAN: Really?

Mr LARSSON: Yes.

The CHAIR: I thank you very much for your time.

Mr LARSSON: Is that it?

The CHAIR: That is it.

Mr LARSSON: I am disappointed. I have copies of some documents I would like to hand out to the Committee. These are an excerpt from the *Code of Practice: Managing Noise and Preventing Hearing Loss at Work* with some highlighted parts of the hierarchy of noise control. The second one is just an example from recent media showing that these devices, contrary to popular opinion, are not used by criminals. This is from last year and there is some very nice video footage showing where there was an assailant who approached a house, or an occupant walking into his house, with a pistol and fired multiple shots. No suppressor was attached to the firearm, he did not even bother—criminals do not bother using suppressors—and it was all over in 19 seconds, gone.

The CHAIR: Thank you very much for your time.

(The witness withdrew.)

MARY SNELL, Deputy General Counsel, Legal Services Group, Department of Customer Service, sworn and examined

ROSE WEBB, Deputy Secretary, Better Regulation Division, Department of Customer Service, affirmed and examined

The CHAIR: Hello, Ms Webb and Ms Snell. Thank you so much for coming to appear before us today. You are each now able to make an opening statement if you wish.

Ms WEBB: I will make one on behalf of us both. Thank you for the opportunity to appear before the Committee. I note that the New South Wales Government provided a submission to this inquiry. This submission contains information on how work health and safety is regulated in Australia, the policy context over recent years and information on the reforms contained in the Work Health and Safety Amendment (Review) Bill 2019. I would like to direct my opening comments briefly to the following matters: the role of SafeWork NSW as a work health and safety regulator for New South Wales; the status of the 2018 national review of the model work health and safety laws; and the Work Health and Safety Amendment (Review) Bill 2019.

The Work Health and Safety Act 2011 established SafeWork NSW as the work health and safety regulator for all workplaces in New South Wales with the exception of mines and petroleum sites. The Act adopted the national model work health and safety laws and put in place in New South Wales the risk preventative framework that supports the national work health and safety framework. SafeWork NSW's role is to work with New South Wales businesses to prevent harm and improve the health, safety and welfare of workers and others at workplaces. SafeWork NSW's work is guided by the Work Health and Safety Roadmap for NSW 2022, which sets out a six-year strategy to achieve a vision of healthy, safe and productive lives in New South Wales.

SafeWork NSW and the Resources Regulator, which regulates mines and petroleum sites, operate independently to regulate work health and safety in New South Wales. We also work together regularly on shared policy and legislation issues. We actively cooperate and coordinate with other work health and safety regulators across Australia on issues of national significance and to share information, including through Safe Work Australia. I am the New South Wales member of Safe Work Australia in nomination. It is being progressed but I will shortly become the member.

SafeWork NSW activities in the community include: providing advice and information to duty holders and to the community; promoting and supporting education and training; monitoring and enforcing compliance; investigating incidents; and taking prosecution action against breaches of work health and safety laws. The New South Wales Government's submission to this parliamentary inquiry contains information on the three New South Wales targets set out in the roadmap to reduce work-related fatalities and the incidence of serious injuries and illnesses. As stated in our submission, that targets that were set at a national level for 2022 have already been exceeded by New South Wales and so we replaced them in 2018 with higher targets of a 30 per cent reduction in work-related fatalities and a 50 per cent reduction in the incidence of serious injuries and illnesses. To that end, I note that in 2019, there were 47 worker fatalities in New South Wales—an improvement on previous years.

SafeWork NSW continues to focus its efforts on meeting the revised targets of reducing worker fatalities. Our activities have included an ongoing increase in the number of prosecutions we have commenced. In 2018-19 we commenced 61 prosecutions, of which 59 were successful. This was a significant increase from the 48 matters that we commenced in 2017-2018 and the 36 that we commenced the year before that. In the first half of 2019-20—that is, the six months to 31 December 2019—SafeWork NSW commenced another 39 prosecutions, and since the beginning of this year, in the last five weeks, we have commenced another seven. In 2018-19 there were over 43,000 inspector activities supporting New South Wales workplaces, and over 10,000 notices issued. Finally, a key action of the roadmap has been to identify and prioritise sectors, workplaces, harms and risks where the most significant work health and safety risks exist.

I would like to draw the Committee's attention to a number of key events concerning the 2018 national review of the model work health and safety laws. Ms Boland's 2018 national review report was released by Safe Work Australia in February 2019. A Consultation Regulation Impact Statement [Consultation RIS] was released in June 2019. SafeWork NSW and the Resources Regulator made a joint New South Wales work health and safety regulators' submission to the Consultation RIS in August 2019. This submission is publicly available on Safe Work Australia's website. We have also brought some copies along today for the Committee.

Safe Work Australia has now provided the Decision Regulation Impact Statement [Decision RIS] to work health and safety Ministers for their consideration, but it is still under strict embargo. Decision RIS was developed in consultation with the Commonwealth Office of Best Practice Regulation. It is anticipated that work health and

safety Ministers will meet this year to discuss and vote on its recommendations. It is not anticipated to happen before the second quarter of this year. It is likely that the implementation of decisions made by work health and safety Ministers about the Decision RIS recommendations will not commence until at least the second half of 2020. The department will participate in this work as the New South Wales representatives to Safe Work Australia.

The Work Health and Safety Amendment (Review) Bill 2019 seeks to expedite implementation of 12 proposals coming from the 2018 national review. In developing the reforms proposed in this bill, careful consideration has been given to the national process. The proposals that are contained in the bill relate to recommendations that were considered extensively in the Consultation RIS or recommendations that seek to clarify the law and are not anticipated to have significant regulatory impacts. A Better Regulation statement on the bill's proposals is publicly available on SafeWork NSW's website. The New South Wales Government submission to this Committee contains further detail on the specific proposals that are contained in the bill. Thank you.

The CHAIR: Thank you very much.

The Hon. ANTHONY D'ADAM: In your opening statement, Ms Webb, you talked about the number of prosecutions that have been initiated in the last three years. How many of those were category 1 prosecutions?

Ms WEBB: None of them were, from Safe Work Australia. None.

The Hon. ANTHONY D'ADAM: Why is it that there is no category 1 prosecutions being initiated?

Ms WEBB: It would depend a lot on the particular circumstances of a particular investigation and the particular case. But I think, in summary, it is probably whether the evidence that we have been able to obtain would stack up to meet the tests in the category 1 offence.

The Hon. TREVOR KHAN: Under the current—

Ms WEBB: Under the current version of category 1, exactly. Yes.

The Hon. ANTHONY D'ADAM: The proposal is to amend section 31 to reduce the threshold of gross negligence. Can you talk us through what the implications of that are in terms of how it will assist in increasing the number of category 1 prosecutions, presumably?

Ms WEBB: At a very high level, it should make it easier because the tests that we have to meet will be a bit less. We will just have to show recklessness. I might get Ms Snell to elaborate as being the lawyer who would be able to take you through it.

Ms SNELL: The bill proposes, as you know, members, to introduce an alternate fault element of gross negligence. That is considered to be a lesser threshold than recklessness in that it will have an objective state of mind test. Our experience has been that the recklessness threshold was difficult to meet. So that is the intent of the new threshold, to open up the potential for more prosecutions and more investigations to get evidence to the threshold.

The Hon. ANTHONY D'ADAM: Have you, in considering this proposal, looked back at the cases that were not proceeded with to make an assessment of whether they would have proceeded under the new proposal?

Ms WEBB: I do not think we have gone so far as to get some sort of separate legal advice from a counsel or something, to say, "If the tests had been different, would your recommendation on this outcome of the case have been different?" But, in general, the information that we have from our investigators and our prosecuting counsel is that we have continually failed to meet the test that it is at the moment and that, in principle, objective tests should be easier. They have given us general feedback. I cannot think that we have actually done an exercise of completely reviewing the legal advice on a particular case.

The Hon. ADAM SEARLE: You are sure that you have not done that, or you do not think you have done it?

Ms WEBB: I do not think we have, but—

Ms SNELL: No.

The Hon. ADAM SEARLE: Can you take that on notice and come back to us with a definitive answer?

Ms WEBB: It may be that in a couple of cases we have looked at whether category 1 was a possibility, so we would have done a bit of work on whether we meet the test or not. We can take a look.

The Hon. TREVOR KHAN: But this adjustment down to gross negligence, if that be what it is, was one of the recommendations that was made by Mary Boland. That is correct?

Ms WEBB: Yes.

The Hon. TREVOR KHAN: And it was perceived in her report that this was, in a sense, a lowering of the standard as well. That seems to be a commonly accepted view, does it not?

Ms WEBB: I think Safe Work health and safety regulators across the country struggle to meet the category 1 test particularly, as Ms Snell mentioned, because of the fact that currently you have to show someone's state of mind—that they were actively reckless—whereas an objective test should be easier.

The Hon. TREVOR KHAN: Are you able to provide us—and I think it is Ms Snell who probably can because I think she has done some fair work on this, if I remember some things—with any decisions by the courts in which they dealt with the question of what was required to prove recklessness as opposed to gross negligence, or simply the recklessness, so we understand what the essential problem has been?

Ms SNELL: In my understanding, there have been three matters where a category 1 prosecution has been finalised. Two of those were brought in South Australia. In both of those matters, it was the prosecution of workers. They plead guilty.

The Hon. TREVOR KHAN: That is not going to assist us with an interpretation of the law because they have thrown their hands up in the air.

Ms SNELL: The same for Cudal Lime Products, which was the Resources Regulator's prosecution in New South Wales. There has not been, to my knowledge, any judicial commentary. I am aware that there was a Queensland matter, which I understand has not yet been finalised, as well as the charges that were laid onto the new provision late last year.

The Hon. ANTHONY D'ADAM: I suppose the line of my questioning is directed to this question of whether even that threshold is too high and will meet with a similar kind of fate in terms of not too many, if any, successful prosecutions. Of course, there has been some concern expressed in evidence earlier about the consequence of prosecuting workers, as opposed to looking further up the food chain to those who are actually controlling the business. Can you offer some comment in terms of your view about how you might establish culpability for those who are not actively directing the work at a particular site but control the systems?

Ms SNELL: Sure. I should add in the Cudal Lime Products that the Resources Regulator has already taken that under consideration in that they brought a category 2 prosecution against a worker and the category 1 prosecution related to the company. In terms of going forward under this new provision, each matter would come down to its own set of facts and circumstances. The primary duty is on the person conducting the business or undertaking, so we would look to the culpability of all that were involved and undertake—if a prosecution was considered to be in the public interest—to take into account the factors about the role each party or each entity had in creating the risk.

Ms WEBB: I think it is probably fair to say that that is the way we approach all our prosecutions anyway. We always would look at the overall culpability. As you know, despite us taking more prosecutions, we still do not prosecute every event and sometimes get some criticism for not doing enough prosecutions. Certainly, I would think, in a case where there was clearly someone more culpable in the process, we would be focusing on them.

The Hon. TAYLOR MARTIN: Just on that point, would you happen to have any data around prosecutions that you could provide to the Committee?

Ms WEBB: Apart from those numbers that I read out?

The Hon. TAYLOR MARTIN: Yes.

Ms WEBB: What sort of data?

The Hon. TAYLOR MARTIN: More details.

Ms WEBB: About what they are? What sort of cases, and things like that?

The Hon. TAYLOR MARTIN: Which particular charges.

Ms WEBB: Yes, absolutely.

The Hon. TAYLOR MARTIN: Thank you. Over the medium term—five years or so.

Ms WEBB: Okay. And outcomes, or something?

The Hon. TREVOR KHAN: Yes.

Ms WEBB: I think we have published something shows the penalties.

The Hon. TAYLOR MARTIN: We won't be prescriptive. Whatever you can provide would help paint the picture.

The Hon. TREVOR KHAN: But it would be interesting to know what penalties are imposed. In part, the penalties that are imposed may be determined upon whether there was a plea of guilty and at what stage. Nevertheless, it would be interesting to know, particularly in the light of what is now being proposed with an increase in penalties, how it has been tracking up until this point.

Ms WEBB: Sure. We should be able to get that data.

The Hon. ANTHONY D'ADAM: One of the assertions that has underlined questioning so far has been that industrial manslaughter just does not work. There are no prosecutions or very few prosecutions from the legislation that has been enacted so far. Do you have a view about why that is?

Ms WEBB: It is a bit of a hypothetical view because—

The Hon. ANTHONY D'ADAM: To give that context, the unions here really, in terms of the overall direction of prosecutions, are suggesting that part of the reason is just an unwillingness on the part of the regulator. Effectively, they blame you for not actually taking enough prosecutions and not pushing or taking line ball cases through to trial. The alternative is that it is not about the regulator; it is something to do with the legislative framework that is obstructing cases proceeding. Do you have a view about that?

Ms WEBB: We do not have an industrial manslaughter provision here at the moment, so it is a hypothetical discussion.

The Hon. ANTHONY D'ADAM: But you have provided a submission that says that it is not a viable option.

Ms WEBB: Yes, and we have seen the example in other jurisdictions. They are pretty new provisions so it is hard to know for sure how they will play out. I think there is probably some truth in what people say, that regulators tend to focus on the legislation that they are responsible for. I think there is probably something in that, that you are probably more inclined to take a prosecution under your own provisions rather than send it off to the DPP and put yourself in the queue with the Crimes Act and other provisions. But that is not to say that an industrial manslaughter case, if we had the law in New South Wales, might not be appropriate in certain circumstances. It is just very hard to say.

I think what we are saying is that we can do quite a lot in terms of effective work health and safety regulation in New South Wales with current provisions and the ones that are proposed, and that maybe giving them a go would be appropriate rather than there being any particular benefit in trying to shoehorn things into the industrial manslaughter framework. The other issue is that, at the moment, the work health and safety provisions and the framework are all risk-based. The idea is that, no matter what the outcome is, if someone has engaged in conduct that could have caused some injury or fatality, then they are liable to be prosecuted. With manslaughter you could have a circumstance where an employer has done something just as bad, has caused a fatality in one case, has caused catastrophic injury to a person who is dependent on the State for years and years and their family carries a great burden, but because the person did not actually die it is not a manslaughter provision.

The Hon. ADAM SEARLE: I understand what you say. Traditionally, for many years the legislation of New South Wales has been addressed at dealing with risk rather than consequences, but obviously the taking of life, deliberately or through some kind of misadventure—recklessness, negligence and what have you—has a special place in the law. It is frowned on and the heaviest penalties in the criminal law are reserved for situations where there is a loss of life. Given the continuing public concern about workplace fatalities where they occur, shouldn't there be the clearest signal sent for the consequences?

The Hon. TREVOR KHAN: I will take a point of order when you finish and before the witness answers.

The Hon. ADAM SEARLE: Shouldn't there be the highest penalties for cases like that, to deal with the consequences, not just the risks?

The Hon. TREVOR KHAN: Point of order: Without being in any way disparaging of the witnesses, these witnesses are members of the public service. The question that is being asked is clearly a matter of policy. I know the Minister is not here but, be that as it may, I think the question is decidedly unfair on this one.

The Hon. ADAM SEARLE: I will rephrase it. I accept that they are public servants and I am not asking for their personal views but, nevertheless, the Government has provided a submission that goes to these issues. While I am not asking them for their personal views, I am asking for the official insight provided by the Government as to these matters—understanding the very official position.

The Hon. TREVOR KHAN: I just do not want them to throw themselves on the—

The Hon. ADAM SEARLE: I would not invite them to do so.

The Hon. TREVOR KHAN: Good.

Ms WEBB: I cannot give you the definitive view about the Government's process and I think we would also recognise that the national process is continuing on. We have said we will engage in that as well. I do think that the penalties—particularly if we can improve the category 1 experience—could be quite high. I am just not clear that prosecuting someone under work health and safety legislation and prosecuting them for industrial manslaughter would actually result in a whole different outcome by the time the court considers the case.

The Hon. ADAM SEARLE: Would you accept that the term "category 1" is a fairly value neutral term, whereas a term like "industrial manslaughter" carries a very clear moral opprobrium?

Ms WEBB: Again, I think that is a political policy question. From my perspective, a fatality is a fatality. A fatality should be treated very seriously and investigated to the nth degree. Certainly the cases involving workers who have suffered a fatality are high profile and we certainly use them to learn good lessons and bring people's attention to them.

The Hon. ADAM SEARLE: Perhaps we can go back to something that you might be able to provide some insight into. There has been some criticism of the regulator, certainly from the union submissions and certainly when you look at the statistics—at least the last time I looked at them—of prosecutions and penalties recovered there does seem to have been an uneven but, overall, downward trend over the past decade in terms of prosecutions—leaving aside other forms of activities, such as enforceable undertakings now. Can you tell us what has happened to SafeWork NSW? It used to be a standalone statutory authority. It used to be WorkCover, then it was SafeWork NSW, then it was part of Finance and Services—schedule 2 to the legislation says the regulator is the secretary of the Department of Finance, Services and Innovation, which does not exist anymore—and hereafter it is known as SafeWork NSW. Is that now the secretary of Customer Service?

Ms WEBB: That is correct, yes.

The Hon. ADAM SEARLE: What has happened to the separate organisation previously known as SafeWork NSW? Does it still exist?

Ms WEBB: First of all, I do not accept the proposition that the number of prosecutions has declined over time.

The Hon. ADAM SEARLE: You will provide us with the stats.

Ms WEBB: I have figures in front of me going back five years. It is 33, 50, 36, 48 and 61. As I have said, we have done 30—

The Hon. TREVOR KHAN: That is matters?

Ms WEBB: Matters that we have prosecuted.

The Hon. TREVOR KHAN: Do you have charges?

Ms WEBB: Sometimes they are more because we might double up on some of the same matters. I can give you that data. I just wanted to put on record that I do not accept the proposition that the number of prosecutions has declined. In terms of the structural arrangement, WorkCover split into the State Insurance Regulatory Authority [SIRA] and SafeWork NSW. SafeWork NSW is part of the department and SIRA is an independent regulatory authority because it regulates insurance agencies and has a board. The secretary is the regulator but all her powers and functions under the Work Health and Safety Act are delegated down to SafeWork NSW inspectors. We still have a rigorous process where someone comes in and does quite a lot of training to be appointed as a SafeWork NSW inspector. People are clearly appointed as a SafeWork NSW inspector and their only duty is to work under the Work Health and Safety Act. They do not have any other functions. That is the only regulatory function they have.

The Hon. TREVOR KHAN: So any suggestion that they could be doing work health and safety in the morning and greyhounds in the afternoon is—

Ms WEBB: No, absolutely not correct. They go through quite a long, rigorous and expensive training process and they are specifically appointed for those purposes.

The Hon. ANTHONY D'ADAM: So there is still a discrete SafeWork NSW entity, is that what you are saying?

Ms WEBB: There are discrete SafeWork NSW inspectors. There is no entity called SafeWork NSW in a statutory sense.

The Hon. ANTHONY D'ADAM: What about in an organisational sense?

Ms WEBB: There are a whole lot of SafeWork NSW directorates. Our construction directorate, our return to work directorate and our chemicals and hazardous waste directorate, they are all combined in SafeWork NSW. All of these people are SafeWork NSW.

The Hon. ADAM SEARLE: What about the legal advising section leading to the decisions on whether or not to make prosecutions?

Ms WEBB: The process is we have a discrete SafeWork NSW investigation team that only does SafeWork NSW investigations. They have a process by which they put a report up to a committee, which is comprised of SafeWork NSW directors, so only people who work full-time in SafeWork NSW matters. They make the recommendation whether or not a matter should be moved to prosecution and then it is signed off by an executive director in the department. But it is done by people with SafeWork NSW experience.

The Hon. ANTHONY D'ADAM: When you talk about SafeWork NSW directors, that is not a discrete group within an organisational structure. They sit amongst other directors in other functional areas, is that right?

Ms WEBB: That is right, yes. The Better Regulation division, of which I am the deputy secretary, has SafeWork NSW, the work health and safety legislation, a whole lot of functions that Fair Trading NSW does under about 60 different statutes, Liquor & Gaming NSW and then a few other discrete regulators. The directorates are separate SafeWork NSW directorates but they might sit with other directorates that do other regulation work. There is opportunity there for them to share their experience and professional expertise in generic things like how to do search warrants, how to serve notices and engage with each other on that professional side. But in terms of expertise in the particular legislation, that sits with particular groups of people.

The Hon. NATALIE WARD: Has there been a reduction in the inspectors or in the number of directorates?

Ms WEBB: No, we are currently recruiting 30 more inspectors.

The Hon. NATALIE WARD: Any reduction in resources?

Ms WEBB: No. SafeWork NSW is funded off a levy on the workers compensation fund.

The Hon. ADAM SEARLE: I was going to come to that.

Ms WEBB: Luckily it has not had any sort of efficiency dividend or anything like that.

The Hon. ANTHONY D'ADAM: To clarify, there is a Better Regulation directorate but there is no discrete, organised entity within that directorate called SafeWork NSW?

Ms WEBB: That is correct, because some parts of the business—for example, the policy themes—are independent of the inspectorate, but they would do work health and safety policy. Some people do work health and safety licensing and some people help with the communications area. That is a little bit more amalgamated. But the inspectorate is quite clear.

The Hon. ANTHONY D'ADAM: When did it lose its discrete identity?

Ms WEBB: I only joined the New South Wales public service in November 2017. At that time SafeWork NSW and Fair Trading NSW were together in the division where I took the job. I am not quite sure exactly how many years before WorkCover and SIRA split off. I think maybe 2016.

Ms SNELL: September 2015.

Ms WEBB: Thanks.

The Hon. NATALIE WARD: You said you were recruiting more?

Ms WEBB: SafeWork NSW inspectors, yes.

The Hon. NATALIE WARD: Can you tell us what the time line is on that, how many you got and where is that up to?

Ms WEBB: We have done some interviews, a few people have already been appointed and then, for the remainder, we are just finalising the outcomes.

The Hon. NATALIE WARD: With a view to recruiting 30 more?

Ms WEBB: Yes.

The Hon. NATALIE WARD: By when?

Ms WEBB: I would hope in the next month or so we would have finalised it and then we will be ready to run a training course, which they all have to go through before they can start being inspectors.

The Hon. NATALIE WARD: And purely SafeWork NSW?

Ms WEBB: Yes.

The Hon. NATALIE WARD: Not greyhounds?

Ms WEBB: No. Part of it is to do with the fact that SafeWork NSW is funded the way SafeWork NSW is funded, so we have to make sure the resources go to SafeWork NSW.

The Hon. ADAM SEARLE: We are trying to understand when SafeWork NSW ceased being a separate organisation.

Ms WEBB: Is that 2015, September?

Ms SNELL: I have only known it since September 2015—it joined the Department of Finance, Services and Innovation. It was a regulator that sat, so far as I understand it, within the department.

The Hon. ADAM SEARLE: We do not have total observability of machinery-of-government changes, but my understanding at that time was while SafeWork NSW was in the finance cluster and subject to overall control and direction of the finance secretary, it was still a separate organisation. Is that not right?

Ms WEBB: No. It has been quite a while since some of the functions, like the policy work and the communications work and the legal work—all of that was combined. The licensing work and the requests for service get dealt with through the contact centre; that is a joint contact centre. That has been in place for quite some time. The brand SafeWork NSW is still used and still will be used.

The Hon. ADAM SEARLE: It is still in the legislation.

Ms WEBB: Yes.

The Hon. ADAM SEARLE: So the legal section is no longer separate? There is no longer a dedicated legal function?

Ms WEBB: There are dedicated lawyers.

Ms SNELL: There is a dedicated team of lawyers within the larger legal team that services the whole department. There is quite a substantive group of lawyers that came across.

Ms WEBB: Ms Snell looks after both—

The Hon. TREVOR KHAN: How many of them are there—including yourself, I take it? Is that right?

Ms SNELL: Yes. I have to take that on notice, but I think there is about 40.

Ms WEBB: Not just dedicated to SafeWork NSW?

Ms SNELL: No, 40 staff.

Ms WEBB: Forty lawyers, but they do Fair Trading prosecutions.

Ms SNELL: No, this is separate.

The Hon. ADAM SEARLE: We are interested in the SafeWork NSW function.

Ms SNELL: They support SIRA as well.

The Hon. ADAM SEARLE: Again, if you could take this on notice, we would like to know over the past four years what the budget has been to support what we will call SafeWork NSW functions—that is, the inspectors, the legal advisings and the prosecutions, but only for work health and safety matters.

Ms WEBB: Yes, that is okay.

The Hon. ADAM SEARLE: You said it is separately funded. It used to be that the premiums on workers compensation payments by employers were put into a pool. There was a levy on the pool. The levy would finance WorkCover, as it then was, then SafeWork NSW and now the Workers Compensation Commission.

Ms WEBB: And SIRA and the Workers Compensation Independent Review Office [WIRO] and SafeWork NSW.

The Hon. ADAM SEARLE: And it used to do the workers compensation corporation but now the compensation commission.

Ms WEBB: Yes. Those were funded off that levy.

The Hon. ADAM SEARLE: Who sets that levy from year to year? It used to be the WorkCover board.

Ms WEBB: The SIRA board is the administrator of the workers compensation fund, so they take a close interest in it. But it is usually through the departmental finance arrangements that sets the actual amount.

The Hon. ADAM SEARLE: In a legal sense, who sets the levy that sets the amount of resources from year to year?

Ms WEBB: I think we would have to take that on notice.

The Hon. ADAM SEARLE: That is fine.

The Hon. TREVOR KHAN: Even if it does not have anything to do with the terms of the inquiry.

The Hon. NATALIE WARD: Could I come back to the bill and ask, Ms Snell, for those of us who were hanging around in 2012 with the national harmonisation, part of that process was a review every five years. That brought about the Boland review.

Ms SNELL: Yes.

The Hon. NATALIE WARD: We still have that ongoing; that will always be the case.

Ms SNELL: Yes.

The Hon. NATALIE WARD: Can I then turn—without asking you to make a policy comment—to the policy justification for our current bill, talking about this category 1 amendment as opposed to an industrial manslaughter proposition. I understand from the Government's submission that is because the national framework is taking a risk-based approach, and that is what it is based on, presumably.

Ms SNELL: Yes.

The Hon. NATALIE WARD: Can you talk to that? We brought up earlier that industrial manslaughter is after the fact—unfortunately, after a death has occurred—as opposed to the category 1 amendments. Can you speak to the Committee about the category 1 amendments and how that is a risk-based approach and why that is preferable, in your legal opinion, for prosecutions?

Ms SNELL: Certainly. It obviously closely aligns with the Boland recommendation 23a. The advantage of a risk-based offence is that it addresses the risks; it need not wait for an injury or a death to occur before a party can be held liable for the culpability for that conduct.

The Hon. NATALIE WARD: And it is serious injury or death?

Ms SNELL: Yes.

The Hon. NATALIE WARD: So it encompasses both on the risk base?

Ms SNELL: Yes.

The Hon. NATALIE WARD: It does not sound as scary as industrial manslaughter or corporate manslaughter, but that is the justification for it.

Ms SNELL: Yes.

The Hon. NATALIE WARD: Just coming back to the Hon. Adam Searle's point because I am trying to get to the nub of it, which is really these two competing ideologies about how we get to effective deterrence.

Ms SNELL: Yes.

The Hon. NATALIE WARD: On the Boland review, was there any justification for the recommendation of industrial manslaughter—any legal basis for it? I cannot seem to find anything in there that says to me there was a legal justification. Otherwise it seems to be a great idea and it happens in some other places, but is there anything else that you are aware of that was some fabulous reason for it?

Ms WEBB: No. I think the Senate inquiry came out with the same conclusion, and that maybe fed into the thinking. That is the only thing I can think of.

The Hon. NATALIE WARD: The recommendation is based on, I presume, similar ideas to the industrial manslaughter legislation that is in place in other States. We heard from other witnesses about the Australian Capital Territory, Queensland and Victoria having this in place and it having raised deterrence, but I am not sure that we have an evidentiary basis for that. I ask you to comment on your views about it. Obviously you have not prosecuted them, but I understand there have been no prosecutions. Is that something that you think we should be heading towards?

The Hon. ADAM SEARLE: Except the evidence is there has been in Queensland.

The Hon. TREVOR KHAN: One or two.

Ms WEBB: It is still on foot.

The Hon. NATALIE WARD: One, which is ongoing. We have no prosecutions yet.

The Hon. ADAM SEARLE: We are not sure.

Ms WEBB: I guess there is always this big difficulty with cause and effect in being able to show that a particular provision had a result of a lessening of numbers of injuries or numbers of adverse outcomes. It is very hard for us to make a conclusion that the deterrent effect of a particular provision has worked or not worked, so it is a bit hard to opine on that. Even if it was the case that the numbers of fatalities in the jurisdictions where there was an industrial manslaughter provision had declined, it would not necessarily follow that there was a cause and effect there. It is very hard to make that conclusion.

Ms SNELL: In Australia I am not aware of a known conviction under an industrial manslaughter offence, either in the Australian Capital Territory—there have been a few convictions for manslaughter under a crimes offence. The Australian Capital Territory provision is sitting in the Crimes Act legislation.

The Hon. TREVOR KHAN: Could I ask a follow-up question to that? My attention was drawn to a statement that Ms Flores has made during the evidence from the unions, where she indicated a concern—I am not seeking to overstate or verbal her in any way, but a concern with the wording, I think, of the Victorian legislation with regards to industrial manslaughter. That raises, in my mind, the question that we all talk about industrial manslaughter in the different States, but from her comments it seems that it may be a different offence in Victoria compared to others. Are you able to comment on whether the same model has been used in each of the States, or are we using a generic term for something that is quite diverse in its legislative terms?

Ms SNELL: At a high level, I can comment. There is a distinction between in which framework it might sit—whether it is a criminal legislative framework or a work health safety framework. There is a distinction between who might be prosecuted. There is a distinction between who is protected. The Queensland offence applies to protection of workers but not necessarily to others, whereas I understand the Victorian model extends further. So there is that nuance. The other thing is what would be the evidentiary threshold. Some have negligence; some have both recklessness and negligence.

The Hon. ANTHONY D'ADAM: Gross negligence or just negligence?

Ms SNELL: They refer to it as negligence, but in the explanatory notes to the Queensland legislation it refers to criminal negligence. The interpretation of the provision would look to the common-law concept, which, as we understand it, has interchangeably used gross negligence and criminal negligence.

The Hon. TREVOR KHAN: There is a decision, I think, by Kirby that used gross negligence, criminal negligence and, I think, some third term. Ms Webb, you might remember.

Ms WEBB: No. That could well be the case.

The Hon. TREVOR KHAN: I might be able to find it somewhere. I had a view but I was wrong.

The Hon. ANTHONY D'ADAM: You talk about the work health and safety framework, a risk-based preventative framework. That is at odds with a community expectation about consequences. If someone dies at work there should be consequences for those who are responsible. That notion is at odds with the pure notion of prevention, deterrence. There is something more in that concept of there being some consequence. Is it not possible for us to have that element incorporated in the work health and safety framework without disturbing, in a significant way, the notion of a risk-based preventative framework?

Ms WEBB: Even without it being specifically in the legal provisions, I do think consequences play a role. The fact is that a fatality will attract an investigation in circumstances that some conduct might not. It is likely to attract a greater sentence when it comes to the court. I do not think it would be—

The Hon. ANTHONY D'ADAM: That is not borne out by the experience, is it? The experience is that there has not been a great number of prosecutions. There certainly has not been a significant number of people who have served time as a consequence of this type of events. It seems odd that the consequences for a death in a workplace are not the same for the consequences of a death on a road, for example. That is the balance that we are trying to reconcile and that the industrial manslaughter legislation is directed at. Do you have a comment about that?

Ms WEBB: I think that is straying back into the policy area about what the policy is behind it.

The Hon. ADAM SEARLE: Maybe I could put it this way: Can you give us the number of prosecutions by year for workplace fatalities since, say, 2012, and what penalties have attached to each of those outcomes? And can you give us the same statistics for, say, the five years before 2012—how many prosecutions involving workplace deaths and what were the penalties imposed for those?

The Hon. TREVOR KHAN: I am not arguing it, but for what purpose is that?

The Hon. ADAM SEARLE: Simply so we can see how workplace fatalities have been treated by the courts over a period of time.

The Hon. TREVOR KHAN: So clearly—

The Hon. ADAM SEARLE: I will elaborate on that. As I understand it—I do not know whether this is borne out in more recent jurisprudence—it certainly used to be the case that when judges were dealing with the issue of penalty and they were dealing with the legislative regime, they would always talk about the issue of risk. Obviously, the fact that someone was injured, or how badly injured they were, was just a feature of risk. So, you were not being punished or the penalty was not attaching to the consequence—it was being attached to the level of risk. I know that is somewhat of an artificial construct sometimes but, nevertheless, because the legislation is directed—

The Hon. TREVOR KHAN: It is precisely the same assessment that is undertaken in a traffic matter.

The Hon. ADAM SEARLE: I am not being critical.

The Hon. TREVOR KHAN: It is the culpability that arises from the acts and recklessness—

Ms SNELL: The objectiveness.

The Hon. TREVOR KHAN: Yes, the objectiveness; not the outcome.

The Hon. ADAM SEARLE: I understand that but this is the difference between the current approach in the legislation and proposed in the bill versus, perhaps, an industrial manslaughter offence, which would attach to consequences rather than risk. I think that is the dialogue. I am just interested to see how the courts have treated it.

Ms WEBB: Yes, so perhaps in the data that we have already agreed to provide, we can pull out, particularly, the cases that relate to a fatality.

The Hon. ADAM SEARLE: Yes, that would be useful.

The Hon. NATALIE WARD: Just on that, the actual penalties imposed are imposed not by SafeWork NSW but by the judiciary.

The Hon. ADAM SEARLE: I understand.

The Hon. NATALIE WARD: It is not within your remit, just to be clear.

The Hon. ADAM SEARLE: I am just interested in how the issue of workplace fatalities has been treated over time.

Ms SNELL: Could I make one comment if I might in that the request relates to pre-2012? In the model laws or the new Act that was adopted, the maximum penalties doubled, just in terms of the correlation between—

The Hon. ADAM SEARLE: The maximum penalties have changed. It would be interesting to see whether the median penalties, or the penalties being imposed by the judges, have changed. I think from 2012 the prosecutions were brought in the District Court—

Ms SNELL: Yes.

Ms WEBB: Yes.

The Hon. ADAM SEARLE: —rather than in the Industrial Court.

Ms SNELL: Yes.

Ms WEBB: Yes.

The Hon. ADAM SEARLE: It would be interesting to see whether there has been no change, whether there has been a beneficial change and that the courts are imposing double the penalties, or not.

Ms SNELL: And the onus of proof changed.

The Hon. NATALIE WARD: I think that was a requirement of the crossbench at the time.

The Hon. ADAM SEARLE: Ah well, it was in the Government's bill.

The Hon. ANTHONY D'ADAM: I see this inquiry as looking at the range of options to try to address a similar problem. We acknowledge that there does not appear to be adequate successful prosecutions arising from workplace deaths. Industrial manslaughter is one model. The amendment to section 31 is a second option. It seems to me that perhaps the other aspect of this is that we acknowledge that if we are going to change workplace culture we need to direct the consequences or, I suppose, the penalties to people higher up the decision-making chain. My concern about some of the discussion that has transpired so far is that the fault elements are difficult to prove in relation to those people higher up the decision-making chain. I would like you to proffer some advice or comments in relation to what other options might be available to achieve that outcome? If we do not go down the section 31 amendment path or the industrial manslaughter path, how do we make sure that those people who are responsible for the systems of work actually bear the consequences of their failure when that occurs?

The Hon. TREVOR KHAN: You lower the threshold.

The Hon. ANTHONY D'ADAM: Maybe that is it. Maybe it is a question of not dealing with gross negligence but negligence and the threshold drops down—

The Hon. TREVOR KHAN: No. If you lower it from recklessness—because the less immediate a manager is from work, the less likely it is you can prove either direct knowledge or recklessness. You reduce it to negligence or gross negligence, you are more likely to catch people further up the chain. That is the purpose of the amendment to category 1. Sorry to be an advocate for it but that is the rationale.

The Hon. ANTHONY D'ADAM: From what I can gather, establishing all the elements of gross negligence seems too high still. We know it will still be—

The Hon. TREVOR KHAN: You say that. It has not been tested.

The Hon. ANTHONY D'ADAM: In a longwinded way, I am asking—and that is the purpose—to get to what you think about that particular conundrum.

The Hon. ADAM SEARLE: Yes, the witnesses cannot resolve our dispute.

Ms WEBB: We all acknowledge that the framework is intended to look to those people who carry the ultimate responsibility for the safe system of work. That is certainly the way in which we approach our investigations and our enforcement activity. We have not been able to take many category 1 offences and I guess we are hoping that we might take more if the standard is changed.

The Hon. ADAM SEARLE: It is not a criticism, but you have not been able to take any in New South Wales since we have adopted that framework.

Ms WEBB: Yes, that is true. And I do not think we will change our approach of always looking to every person who might be culpable and then thinking about the appropriateness of what charge we took against the person, depending on what the fact scenario was as to who was the most culpable. That would include who was responsible for the system of work, as opposed to people who might have been there at the time that something

happened. I think that is our approach and this provision will not change that overall approach. We are certainly increasing our number of prosecutions. I do not think there is any indication that we are prosecuting workers at a rate that we are not prosecuting employers. But we will give you some data about those prosecutions. I do not think I can say much more in terms of our actual practice on the ground. Anything else is really a policy issue for the Government to determine.

The Hon. TREVOR KHAN: Could I put it to you—perhaps to Ms Snell but really to both of you—the test of gross negligence that I want to put to you is, in fact, the test is an alternative terminology to criminal negligence, which is, indeed, the test under the criminal law for manslaughter, is it not?

Ms SNELL: Yes.

The Hon. TREVOR KHAN: So, in a sense, what we are doing under the category 1 offence is to apply the standard of culpability that applies for an offence of manslaughter or criminal negligence. Yes?

Ms SNELL: Yes.

The Hon. TREVOR KHAN: Right, but what it does under category 1, in terms of applying that standard of negligence, is to apply it not just to deaths but also to serious injury.

Ms SNELL: Yes.

Ms WEBB: Yes.

The Hon. TREVOR KHAN: So, in a sense, I suggest that the category 1 offence achieves, without the label, precisely what various of the union officials want. That is it, is it not?

The Hon. ADAM SEARLE: Well, save that manslaughter usually carries a penalty of 20 to 25 years.

The Hon. TREVOR KHAN: That is a different issue. In terms of the culpability level, it is the same as a matter of judicial interpretation, it is the same standard of conduct.

Ms SNELL: That is the intent.

Ms WEBB: Yes.

The Hon. ADAM SEARLE: Just a question about the timing. This is not a criticism but the bill is being brought forward in advance of the Labor Ministers Council considering the Boland recommendations. Is that because the New South Wales Government wants to sort of foreclose on consideration of the other recommendations in the Boland review or is it still the intention to consider them in a second wave of responses?

Ms WEBB: Yes. I think we made it clear in our submission that we would completely engage in the process of the discussion that is to happen with the Boland review.

Ms SNELL: I think, just to add, that is consistent with the Consultation RIS response that has been published.

The Hon. NATALIE WARD: Can I just be clear on the data that you are providing on notice? That is all prosecutions, not just on workplace deaths?

Ms WEBB: Yes, we will do all prosecutions but we will highlight how many of those were fatality-related ones and the penalty outcome. Is there a time frame that you need it?

The Hon. TREVOR KHAN: As soon as possible, I think.

The CHAIR: The Committee will consider the time line and we will let you know.

Ms WEBB: We will get on to it straightaway.

The Hon. TREVOR KHAN: Could I just ask—I think we have got a relatively short period of time—could you do it in a week?

Ms WEBB: I think we could, yes. We will do what we can in a week.

The CHAIR: Thank you very much. We really appreciate your time. Thank you for coming in today.

(The witnesses withdrew.)

(The Committee adjourned at 15:02)