CIVIL LIABILITY AMENDMENT BILL 2003

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 5: Section 3 amended -

Debate was interrupted after the clause had been partly considered.

Mrs C.L. EDWARDES: Earlier I was talking about the definition of harm. I am sure that the parliamentary secretary would be surprised to learn that harm is not defined in the Bill. I have checked many legal dictionaries to determine the definition of harm. The Bill refers to "the kind of harm" but does not provide a definition of harm itself. The only definition that one comes across in any reasonable dictionary is a harm principle, which goes back to the great philosopher John Stewart Mill. Is the Government referring to John Stewart Mill's type of harm? Given that the Bill revolves around the word harm and how it will reduce civil liability premiums, what does the Government mean by harm? We know that negligence is a tort. I understand and accept that the Government has adopted the word harm as it was used in legislation in Queensland and New South Wales. However, for there to be confidence in matters when they reach court, we must know the definition of harm. How are the courts expected to know what was is in the Government's and Parliament's mind when they interpret the word harm?

Mr M. McGOWAN: I am not sure that the member was talking about this point before the break. In the Bill, the word harm means its ordinary meaning in common usage. It should be interpreted using the ordinary dictionary meaning that people would normally interpret it to mean; that is, detriment to a person or a body. It is a simple concept. The use of the word harm and its explanation in clause 5 are based on, as I said before the break, the exact same formulation of words that were used in the Acts passed in Queensland and New South Wales and on the numerous references made to that word throughout the Ipp report. Like Queensland and New South Wales, the Government concentrated on the Ipp report.

Paragraph 7.19 of the Ipp report, which refers at length to the concept of harm, states that -

> Although the Proposed Act applies only to claims for negligently-caused personal injury and death, the principles in Recommendation 28 are relevant to any claim for negligently-caused harm, whatever sort of harm is in issue. The Panel's considered opinion is that these principles are suitable to be applied to all claims for negligently-caused harm.

Further, recommendation 28 states -

> The Proposed Act should embody the following principles:
>
> (a) A person is not negligent by reason only of failing to take precautions against a foreseeable risk of harm . . .
>
> (b) It cannot be negligent to fail to take precautions against a risk of harm unless that risk can be described as 'not insignificant'.
>
> (c) A person is not negligent by reason of failing to take precautions against a risk that can be described as 'not insignificant' unless, under the circumstances, the reasonable person in that person's position would have taken precautions against the risk.
>
> (d) In determining whether the reasonable person would have taken precautions against a risk of harm, it is relevant to consider (amongst other things):
>
> (i) the probability that the harm would occur if care was not taken;
>
> (ii) the likely seriousness of that harm;
>
> (iii) the burden of taking precautions to avoid the harm; and
>
> (iv) the social utility of the risk-creating activity.

The use of the word harm was carefully considered by the Government when it constructed this clause. That concept has been used because it is easily and simply understood and because these days it is a canon of legal drafting to use, as much as possible, simple and commonly understood language. Further, it was used in New South Wales and Queensland and was contemplated at length for the proposed legislation in the Ipp report. It is not unusual to use a term in a Bill that one would find in a dictionary. I submit that in any Act of Parliament one would find thousands of terms for which their ordinary and usual meaning can be obtained from a dictionary. This is quite an ordinary situation. We have applied ordinary criteria in the drafting of the Bill on the advice of

parliamentary counsel and by following the examples set by two other State Parliaments that have introduced similar Bills.

Mrs C.L. EDWARDES: I thank the parliamentary secretary for his explanation. I do not have a problem with the word harm, nor do I have a problem with making legal drafting easier to understand for the ordinary person by using words than can be found in the dictionary. However, the point of this legislation is to reduce insurance premiums. In the short time that I have spent searching words and phrases in legal dictionaries and checking the Internet - to the extent that such data is available - I have not come across a reference to harm. There can be a harmful event and there can be a wide range of other issues involved in legal cases. However, the word harm has not been defined legally. How can the Governments of Western Australia, New South Wales and Queensland be so sure that using and basing their legislation on the word harm will reduce insurance premiums? Has the parliamentary secretary or the New South Wales or Queensland Governments sought any actuarial advice about this matter? I do not know whether the parliamentary secretary asked those States prior to their using the word what its impact would be. This Bill will create at least five years of doubt before there will be some level of definition or usage of the word harm in the courts. Until that happens, there will be no confidence in the system to ensure that those premiums are reduced.

I reiterate my earlier point: this legislation will not reduce premiums overnight. All the volunteer groups that members have represented in this Parliament and all the organisations that have had difficulty not only paying their public liability premiums but also getting public liability insurance will not immediately be able to do so as a result of this legislation. Although it may be a useful term, and it may be all of these measures, it is only a beginning, because the Bill does not use words that are readily known to the community in a legally understood way. Unless the Government uses terms that are understood in a legal way, court cases will result so that a determination can be made on the matter. That will take time and insurance premiums will not come down overnight. Indeed, there will not be any definition of this word for at least another five years.

Mr B.J. GRYLLS: I wholeheartedly support exactly what the member for Kingsley has so eloquently explained to this House. By introducing the word harm, all this legislation will do is create uncertainty. As the member for Kingsley said, currently there is a definition of negligence. Negligence is a tort; harm is a new word. In framing an answer, I hope that the parliamentary secretary can explain to us which industry groups he consulted before this legislation was drafted. As has been discussed previously on many occasions, obviously this legislation is aimed at reducing public liability insurance premiums for industry and the community. Given the fact that this is all about making the insurance industry reduce its premiums, I thought the insurance industry would have been consulted on the issue. I have it on very good authority that the Insurance Council of Australia Ltd was not consulted. The council is very concerned with the use of the word harm rather than the word negligence.

Mr M. McGOWAN: I thank members for their contributions on the word harm. They are saying that there is no definition of the word harm, yet we are dealing with the definition clause of the Bill, which defines the word harm.

Mrs C.L. Edwardes: No, it does not. It does not tell us what harm is at all. It tells us the kinds of harm.

Mr M. McGOWAN: I listened in silence. I will read the clause. It states -

> (1) Section 3 is amended by inserting the following definitions before the definition of "personal injury damages" -
>
> **"harm"** means harm of any kind, including the following -
>
> (a) personal injury;
>
> (b) damage to property;
>
> (c) economic loss;

I am referring to the definition clause, which includes the definition of harm. The Opposition is saying that we should somehow include a separate definition of harm so that we can then say that harm means harm, and then we can have another definition of the word harm, which is taking this Bill to a ridiculous point. There are thousands of words in this Bill that are not in the definition clause; yet the word that the Opposition is concerned about actually is in the definition clause. However, the member for Kingsley said that the word harm will somehow slow this Bill's progress in reducing or putting pressure on insurance premiums. What will put pressure on insurance premiums is passing this Bill through the Parliament. What will put pressure on insurance premiums is the fact that we have already passed through the Parliament a Bill that has thresholds for general damages, caps for economic loss and the potential for structured settlements, and restricts the advertising of lawyers and puts competition back into the system. This Bill has a range of provisions enabling commonsense

solutions to ordinary situations through which people go every day. That is what will reduce and put pressure on insurance premiums. That is quite obvious to anyone who has examined the situation.

The Insurance Council of Australia is extremely happy with this Bill. The Bill has not been created for insurers, but so that members know, the Insurance Council is happy with it. We have met with representatives from the Insurance Council on a number of occasions and with representatives of other insurance companies, we have spoken to various representative organisations and groups affected by this Bill and we have listened to the public. On pages 240 to 244 of the Ipp report there is a list of 100 organisations that were consulted by Justice Ipp on the matter before he made these recommendations. Justice Ipp uses the word harm on numerous occasions. As I have quoted to the House previously, at paragraph 7.19 and recommendation 28, Ipp contemplates the use of the word harm. That is the word he wants us to use. I do not know whether getting too concerned about the use of the word harm is productive in this context.

I will go over it. Two States used the word; it is the definition used in this Bill; it was used by Justice Ipp at length; the Bill has been supported by the organisations that the member for Merredin was concerned about; and Justice Ipp consulted 100 organisations in the construction of his report. It is a common canon of statutory interpretation that ordinary commonsense words are used, and, I put to the House, harm is a word commonly in use.

Mrs C.L. EDWARDES: I thank the parliamentary secretary for his response. Although he tried to make light of the comments made, I will remind him in a couple of years that we are talking about impacting on and reducing the level of premiums. This Bill will not do it by using ordinary words. I wish he would just acknowledge that it will not happen overnight. The reason it will not happen overnight is that the Bill uses new words. Yes, they may come from a dictionary and have ordinary usage. However, the parliamentary secretary is a lawyer. This Bill will allow lawyers to go into court on behalf of their clients and get an interpretation. That will slow this legislation in lowering premiums because there will be no certainty. Until the insurance companies have certainty about how the claims will be determined and the extent of those claims, premiums will not be lowered. The parliamentary secretary has said that this is very broad. I put it to him that that is exactly what will happen. It is very broad. The Bill does not limit civil liability; it broadens it. By broadening it in this way - by using new words that have not yet been interpreted legally - it will leave the courts open to extensive litigation. That is not an attack on the use of the words; it is an attack on the basis of using something new. Does the parliamentary secretary have actuarial advice? Did he seek actuarial advice on the impact of using this? Did New South Wales or Queensland do so? Were those States asked for their advice? Secondly, subclause (2) states -

> Section 3 is amended in the definition of "personal injury damages" by deleting "the death of, or injury to, a person" and inserting instead -
>
> " personal injury to a person ".

What is the meaning of that change?

Mr M. McGOWAN: The greatest difficulty in the interpretation of this statute would be if the States had different meanings for different words. I agree with the member for Merredin when he made the substantial point that it would be easier to interpret this Bill if there were some consistency between the States. The definition we have used is consistent with that used in Queensland and New South Wales. New South Wales has a population about four times the size of WA's population and it has a much more litigious culture, so it is more likely to have a body of case law in relation to these Bills in the near future and an interpretation of various wording in the Bill. We have met with the Insurance Council of Australia, which has its own legal advisers and I think it also retains some law firms. They have not expressed any concern about the use of the word harm.

Actuarial advice was provided by PricewaterhouseCoopers for the wording of the New South Wales Bill, which is identical to the wording in the Bill before us, and that actuarial advice was that the wording of the New South Wales Bill is satisfactory. These Bills are designed to put downward pressure on premiums; that is why we are debating them. I thought all members were in agreement on the Bills. The biggest difficulty would be if there were inconsistency between the States, and we will not go down that path.

Dr J.M. WOOLLARD: As the New South Wales Act has been in existence for a few months, can the parliamentary secretary inform us about some of the cases that have considered the definition of harm and how it has been interpreted?

Mr M. McGOWAN: The New South Wales legislation came into effect in December or January of this year. As yet I am not aware of any cases in New South Wales that have examined this exact point.

Dr J.M. WOOLLARD: I am a bit disappointed that the parliamentary secretary has not done his homework to see whether any cases have been presented on this point in New South Wales. The Law Reform Commission

refers to the word harm as contributory negligence and apportionment of liability. The parliamentary secretary may be able to explain how derivative harm fits in?

Mr M. McGowan: What is the member referring to?

Dr J.M. WOOLLARD: I have just looked this up on the Internet using Butterworth's dictionary.

Mr M. McGOWAN: The word harm is defined in the Bill, and I am happy with that definition.

Dr J.M. WOOLLARD: Will the parliamentary secretary repeat that? I could not hear him very well.

Mr M. McGOWAN: This is an amending Bill to the Civil Liability Act that was passed and proclaimed on 1 January this year. These clauses amend the head Bill. This clause contains definitions, and it includes a definition of harm. The member is asking me to define it again; I cannot define something twice. It would be unusual for a Bill to define something twice in one clause, and it would be somewhat confusing to have two definitions of harm. In clause 5 of the Bill it is defined as follows -

> **"harm"** means harm of any kind, including the following -
>
> (a) personal injury;
>
> (b) damage to property;
>
> (c) economic loss;

All sorts of clauses with all sorts of words appear in the Bill and we accept their commonly understood meaning. I have confidence that the judges in this State can work out the meaning of the word harm. I can find all sorts of words in the Bill- such as incident, social, insignificant, liability - that are not defined, but this Government has confidence in its courts and their ability to understand the meaning of the word harm.

Dr J.M. WOOLLARD: I thank the Government for giving me a briefing on this Bill. As you know, Madam Deputy Speaker, I opposed various clauses of the Civil Liability Amendment Bill when it was put on the Table a few months ago. I was told that this Bill codifies torts and that it will put a cap on payouts and remove some people's access to cover. This legislation will have a pronounced effect on the community and on people who previously would have been able to make a claim if they had an accident but will no longer be able to. The parliamentary secretary keeps talking about New South Wales but I notice he has not mentioned the civil liability legislation that has been introduced in South Australia. I believe the approach taken in SA has been a standards approach. I am sure he has done his homework on the differences that exist between the New South Wales legislation and the South Australian legislation. Has harm been defined in a similar way in South Australia, where standards are used rather than capping?

Mr M. McGOWAN: The member for Alfred Cove is correct; she did receive a briefing, as did other members of the Opposition and the National Party. One or two of the parties may have taken two or three opportunities for different briefings on this Bill. The briefing received by the member for Alfred Cove informed her that the Bill partially codifies the law of negligence. The law of negligence is enormous, and it was not ever the intention of this Bill, or the Ipp report, for all of it to be codified in a way similar to the criminal law. This Bill codifies four principles of the law of negligence: the areas of foreseeability, duty of care, remoteness of damage and causation. This has been done to provide some certainty. It is my understanding that every State across Australia has identical or similar provisions in relation to those four areas. That is where the codification comes in.

The member for Alfred Cove then said that somehow the Government was introducing caps and stopping people from claiming, or words to that effect. In fact, with the support of the Opposition the Parliament last year passed a Bill, which is now the law of the State, to put in place caps and thresholds for claims for damages for economic loss and for general damages. That was done last year, and the member spoke on that Bill.

Mrs C.L. EDWARDES: I thank the parliamentary secretary for agreeing with exactly the point I have been making: it will have to be left up to the courts. I wonder, then, if the parliamentary secretary knows what is the current period between the commencement of a civil liability action in the District Court and the time when the case actually gets to court. I suggest that it will be three to five years before anybody of authority determines what we are changing. That is a criticism not of the usage being made of the words in the Bill, but rather of the notion that this Bill will have an immediately downward impact on insurance premiums; it will not. The parliamentary secretary has agreed with me that it will have to be left up to the courts to decide.

I now bring the parliamentary secretary back to the other question I asked, which he has not yet answered, about clause 5(2). Why is this change being made, and what does it mean?

Mr M. McGOWAN: That was a good question from the member for Kingsley. We have changed that definition in the Act to "personal injury to a person" because we now define the term "personal injury" in the subclause

before that, which provides that personal injury includes death, prenatal injury, impairment of a person's physical or mental condition, and disease. It just simplifies that point.

Mrs C.L. EDWARDES: In fact, this is broadening the definition of personal injury beyond what it is currently. Is prenatal injury added because of some court cases that have made negative comments about the definition of an injury to a person? What is the difference between impairment of a person's physical or mental condition and injury to a person? Has disease been included in the ordinary definition or legal interpretation of "death of" or "injury to"?

Mr M. McGOWAN: This is moving toward greater consistency with New South Wales. The member will note that there is a similar definition in the New South Wales Bill. This basically give examples of what personal injuries can be. If the member for Kingsley can think of anything that could comprise a personal injury that goes outside the four areas detailed in clause 5(1), I would be very surprised.

Mr B.J. GRYLLS: I ask the parliamentary secretary again, given that the objective or the agenda of this Bill is for insurance companies to believe that there will be a reduction in the number and value of claims, so that they will then be moved to reduce their premiums, and that the parliamentary secretary has very clearly stated that it will be up to the courts to define harm, once it gets to the court, how can there be any immediate downward pressure on public liability insurance premiums?

Mr M. McGOWAN: Is the member for Merredin talking about how this Bill will translate into lower premiums? Is he asking how the definition of harm will translates into lower premiums?

Mr B.J. Grylls: I am asking about the relationship between this legislation and insurance companies reducing their premiums.

Mr M. McGOWAN: As I said in my second reading speech, and as is contained in the explanatory memorandum, and as the Deputy Leader of the Opposition said, this Bill is the most significant reform in this area in the history of this State and is designed to drive down premiums. We are very confident that that will be the outcome. As we have discussed at length, all these reforms are very substantial, and we will cover them at length as this debate proceeds. They have been supported by the insurers, who have given us indications that this will put downward pressure on premiums. We are very confident that this will happen, and that is why we are doing this. There is a lot of pressure from various interest groups on these matters, and in some ways it is not a pleasant task putting in place measures that will mean that, at some point, people will not receive damages, when they may well have done in the past. That is, in effect, what the Government is doing with this Bill. Some people who are injured due to the actions of a good Samaritan, who are injured and receive an apology, or who undertake recreational activity, and who yesterday would have been able to use those factors to assist them in supporting a claim for damages, will not be able to use those factors once this Bill is proclaimed. In effect, this legislation is changing the level of payouts, and in some cases removing them altogether. I am sure we have the support of the Opposition in doing that.

Dr J.M. WOOLLARD: In his last response to me the parliamentary secretary mentioned foreseeability, duty of care, remoteness of care and damages in relation to torts and the definition of harm. I have looked through this Bill and I can see the duty of care, but I am not quite sure of the clauses to which the parliamentary secretary is alluding; namely, that the courts will look for foreseeability, remoteness of care and damages. Perhaps the parliamentary secretary could explain to me how those two will link.

Mr M. McGOWAN: I refer the member to clause 8 of the Bill, with which we will be dealing shortly.

Mrs C.L. EDWARDES: I am sure the parliamentary secretary is not trying to be deliberately obtuse. I refer to clause 5(2). I do not want to add to the definition, I am asking why he has added to the definition of personal injury.

The definition of personal injury in the Civil Liability Bill referred to the death of, or injury to, a person. This Bill will add to that definition by including prenatal injury. Is that because prenatal injury was not determined by courts to be an injury to a person? The Government also seeks to add to the definition a provision for the impairment of a person's physical or mental condition. Is that because impairment to a person's mental condition was not being interpreted as an injury to a person? Is the Government adding disease to that definition because disease was not being interpreted as injury to a person? The Government is seeking to broaden the definition. Why? Is it because legal interpretation has limited the definition in the past to injury to a person? What does that change mean in terms of the legislation and in putting pressure on the downward trend of premiums?

Mr M. McGOWAN: Clause 5 includes in the definition of personal injury death, prenatal injury, impairment of a person's physical and mental condition, and disease, so that there can be no uncertainty about what the

definition covers and to enable a court to readily define the concept of personal injury. In the past, some cases were perhaps obscure on the area of prenatal injury, so the Government wanted to make it clear.

Mrs C.L. EDWARDES: Although the broadening of this definition may make it easier to determine what is meant by personal injury, it will also add to the cost of premiums. The parliamentary secretary suggested that this definition would place pressure on the downward trend of premiums. The parliamentary secretary and I would agree that when an injury occurs, whether it is prenatal or otherwise, damages should apply. However, by making this clear in the definition of personal injury, the Government is broadening the scope of the definition. Insurance companies will have to account for that in their prudential figures into the future. As such, it is unlikely that there will be a downward trend in premiums as a result of the broadening of the definition of personal injury.

Mr M. McGOWAN: As the member for Kingsley probably knows, the part of the clause she is referring to broadens the concept of personal injury to its widest possible scope. The member has indicated that this Bill will explicitly apply to the widest range of injuries possible. By normal reasoning, that will mean that it will apply to as many injuries as possible. By definition, that means that there will be downward pressure on premiums.

Mrs C.L. Edwardes: No, it would increase the pressure on premiums because there would be an increase in the number of claims.

Mr M. McGOWAN: The definition broadens the applicability of this Bill. As we would all agree, this Bill was designed to put downward pressure on premiums. By broadening its applicability, it will also broaden the downward pressure on premiums, because it will have wider application to injury.

Mrs C.L. EDWARDES: I do not quite understand that point. One of the things a person does if he wants to lower his insurance premiums is restrict the applicability of his policy. The current Act places caps on payouts. By broadening the scope of the definition, the number of claims will increase. The Government is not spreading but increasing the costs. If costs increase, premiums will increase. This definition will not reduce premiums but will add to the cost pressures on insurers, unless the parliamentary secretary can tell me differently. The parliamentary secretary agrees that this clause broadens the scope of the definition of personal injury. As such, it will increase cost pressures.

Mr M. McGOWAN: The natural concomitant argument to that of the member for Kingsley is that if we were to reduce the scope of the definition of personal injury, that would somehow put greater pressure on premiums to go in a downward direction, which is, quite frankly, ridiculous.

Mrs C.L. Edwardes: Why?

Mr M. McGOWAN: What if personal injury was defined just as disease? Of necessity, that would mean that the Bill would apply to far fewer injuries. Therefore, the Bill would not apply to the vast majority of people who are injured. It is so obvious. By making the definition of personal injury applicable to the widest range of personal injuries that are caused by the negligence of another person, it will in fact put as much pressure as possible on premiums in a downward direction.

Mr M.W. Trenorden: How? It does not make any sense!

Mr M. McGOWAN: Does the member for Avon want the Bill to apply only to a narrow range of injuries?

Mr M.W. Trenorden: We want people to be able to afford the insurance.

Mr M. McGOWAN: I thank the member.

Mr M.W. TRENORDEN: The parliamentary secretary is displaying amazing ignorance of insurance matters in this State. How can he come into this House and say that by broadening the possibilities for claims, it will reduce premiums?

Mr M. McGowan: You misunderstood what I said.

Mr M.W. TRENORDEN: That is precisely what the parliamentary secretary said. That is verbatim what he said. It is a ridiculous statement. The parliamentary secretary may not know it, but there is a crisis in these areas, particularly in the medical area. The parliamentary secretary is responsible for the Bill in this House. He is promoting growth in premiums.

Dr J.M. WOOLLARD: I may have misunderstood this point when I received a briefing from the parliamentary secretary and the minister's staff. The staff said that the insurance companies would not pay out quite as much. I thought that comment related to the further capping of payments. From what the member for Rockingham has said, because there will be wider application for payouts, insurance companies will pay out less. Perhaps that is where I became confused about the capping of payments, because I was told less would be paid out. Did the

member for Rockingham say that, because there will be wider application for payouts, the insurance companies will pay out less?

Mr M. McGOWAN: What I said previously to the member for Alfred Cove was that a Bill was passed last year that placed caps and thresholds on payouts for personal injuries damages. The Bill before us today does not include caps or thresholds. That has all been done. This Bill contains provisions to allow for such things as apologies to be made without an admission of liability. It allows for the codification of various concepts in the law of negligence, which apparently have had different definitions applied to them by various courts over the past few years. That has been codified in conjunction with every other State. That is what this Bill is doing. This Bill deals with the substantive law of negligence, whereas the previous Bill dealt with the quantum of awards made to individuals. That is the difference between the two Bills. The first Bill also dealt with advertising by lawyers. I do not know whether I can say it more clearly than that.

Personal injury is being defined in this way to enable the Bill to apply to all impairments or injuries that might be suffered by a person, including death, prenatal injury, the impairment of a person's physical or mental condition, and disease. By applying the definition widely to all those things, many injuries suffered by individuals will be brought under the scope of this Bill. We all agree that this Bill is designed to ease the pressure on premiums. I do not know how to say it any more clearly than that. The purpose of this Bill is for the definition to apply as widely as possible. We want to bring under the scope of this Bill as many personal injuries suffered by people due to another person's alleged negligence as possible. Therefore, as I said before, the codification of the duty of care and foreseeability and the risk warning and intoxication provisions will apply to those cases. That is why personal injury is defined in a wide sense rather than in a narrow sense. If it were defined in a narrow sense, this Bill would have very limited utility and application. That is why we have not applied it in a narrow sense.

Dr J.M. WOOLLARD: The member for Rockingham is saying that certain claims will be excluded under this legislation because the person in the community will have taken risk upon himself. He is saying that is the reason there will be fewer payouts. However, he is also saying there will be a wider application. I followed the member for Rockingham when he said that we would no longer make payouts in some areas - such as bungee jumping or whitewater rafting - that were previously covered. However, I do not follow him when he says there will be a wider application. What does this Bill contain that plaintiff lawyers have not already applied on behalf of their clients?

Mr M. McGOWAN: In terms of the wider application, the term personal injury will apply to theft, prenatal injury, impairment of a person's physical or mental condition and disease. We saw that as a necessary definition of personal injury, and that is how we defined it. If someone suffers one of those things following the allegedly negligent act of another, it is a personal injury. That is what this Bill will apply to.

Dr J.M. WOOLLARD: Those areas would have been challenged before, such as a prenatal death and the other examples the member for Rockingham gave. I do not see how adding the term personal injury -

Mr M. McGowan: We are basically codifying the existing common law definition or understanding of personal injury.

Dr J.M. WOOLLARD: If the Government is codifying what is currently accepted, how can it say that it has developed a wider application? The member said that this is a codification of what exists. If it is a codification of what exists, how is it a wider application? What is new?

Mr M. McGOWAN: I defy anyone to come up with any form of personal injury other than the four referred to in the Bill. It is a very wide codification of what exists. It is a very wide interpretation of personal injury.

Dr J.M. WOOLLARD: Is it possible that when the member for Rockingham referred to wider application, he did not mean to say "application"? Is it possible that he meant there will be a large codification of harm?

Mr M. McGOWAN: I cannot define the term personal injury more than I have already. Both personal injury and harm have been defined in the Bill to the best ability of parliamentary counsel. It is defined in a similar fashion as it is in New South Wales and Queensland. The best legal minds in the Governments of all three States have arrived at this mechanism of defining harm and personal injury. I have given members the best advice I can about why the terms have been defined and why the definitions are broad.

Mrs C.L. EDWARDES: I refer again to harm. The parliamentary secretary does not need to respond to this. I provide an example of the sorts of things the courts will have to face. This is not a definition from the *Oxford Dictionary* or the *Macquarie Dictionary*. It is much broader than that. I have picked a quick definition. Lawyers such as the parliamentary secretary, if he were to go back into practice, would be bright enough to follow through on behalf of their clients on the issues we are talking about. He would be surprised to learn that harm can be defined in a number of ways, including as diachronic or subjunctive historical. That means that an action harms someone only if the defendant causes or allows the plaintiff to be worse off at some later time than

he was before. The parliamentary secretary understands what that means. The subjunctive historical interpretation has another formula: an action or inaction at a point of time harms the plaintiff only if the defendant causes or allows the plaintiff to be worse off at some later time than the person would have been had the defendant not interacted with or acted with respect to the plaintiff at all. This is not simply a matter of picking up an *Oxford Dictionary* or a *Macquarie Dictionary* or asking the reasonable person on the street what harm means. Some very bright lawyers will make, on behalf of their clients, representations about what they believe was likely to have been harm at the time, the experience that caused the harm and what it was likely to impact upon. I say that so that the parliamentary secretary does not think that it will be left up to the courts to define and determine this in a very easy way.

We will not get an immediate impact through the so-called downward pressure on insurance premiums. It will not be immediate. If the parliamentary secretary acknowledges that the decline in premiums will not be immediate, we will not continue to pursue our line of argument that this legislation, as good as it may be, will take some time to have an impact because of the language that has been used. There will not be an immediate impact on public liability or civil liability premiums.

Dr J.M. WOOLLARD: Can the member for Kingsley continue with her points about the time she thinks it will take for premiums to decline?

Mrs C.L. EDWARDES: As I have identified the issue, it will be at least three to five years. We earlier asked the parliamentary secretary whether he knows how long it takes an action - only one - to be heard in the District Court after it is lodged. Is it 12 months, 18 months or three years? For there to be downward pressure on premiums, insurance companies need some certainty in establishing their premiums. They will not put themselves at risk of an HIH scenario in which they do not have enough money in the bank to pay out future claims. They need some certainty about how cases will be determined. Until they get that certainty, they will not lower their premiums. They have been caught out before. Therefore, it will be at least three to five years before we start to see the impact of this legislation.

Clause put and passed.

Clause 6: Section 3A inserted -

Mr D.F. BARRON-SULLIVAN: Proposed section 3A includes a table, the third column of which lists the provisions in the different parts of this legislation that do not apply to damages of a class that are specified in the middle column. Why has part 1D - which concerns the good Samaritan provisions further on in the Bill - been excluded with regard to employment damages, item 3; tobacco products, item 4; damages under the Civil Aviation (Carriers' Liability) Act 1961, item 5; and damages relating to personal injury that resulted from the inhalation of asbestos, item 6?

Mr M. McGOWAN: Part 1D concerns good Samaritans and the related provisions are in the legislation for an obvious reason. I am unaware of any cases in Western Australia - except for anecdotal reports - but certainly in other jurisdictions people have declined to go to the aid of another person on the basis that they might be sued for whatever steps they take if found to be negligent. A case has been reported to me anecdotally - I cannot verify its truth - in which a person collapsed in a shopping centre due to some illness. People were not willing to go to the aid of that person because they thought that if they did, and performed cardiopulmonary resuscitation, mouth-to-mouth or whatever incorrectly and in a negligent fashion, they might be sued. Therefore, it has obtained a degree of currency in the community - probably unwarranted - that by going to the aid of another person one risks liability. I would be surprised if the courts held a person liable for any steps they took in good faith when going to the aid of another person, provided those actions were not carried out under the influence of alcohol or drugs. That is what this provision is designed to do and it clarifies the law as it currently stands.

The member was quite right when he said that part 1D had been excluded from certain types of damages in relation to the commencement of the Bill. That has been done because largely those types of damages are statutory schemes with their own regime. In the first Civil Liability Bill 2002, those schemes were largely excluded from the operation of the Act. In this second Bill we are excluding them from the operation of the Act to avoid undue complexity and confusion in those areas of law. It is our understanding that other States have done the same thing because of statutory schemes in relation to workers compensation and civil aviation into which these provisions are not incorporated.

Mr D.F. BARRON-SULLIVAN: It is all very well to say that the other States have done it and to explain what it means - I think we understand that. However, why do we need that exclusion, particularly with regard to workers compensation matters and not motor vehicle insurance matters? It is hard to think of examples, but in the case of workers compensation, if someone acted as a good Samaritan in the workplace, that might give rise to action in accordance with the Workers' Compensation Rehabilitation Act. Why should that person be denied

protection under the Civil Liability Amendment Bill simply because he happened to act as a good Samaritan in an area related to workers compensation? Why should someone not be afforded protection under this Bill with regard to a workers compensation matter when he is afforded that protection with regard to motor vehicle third party insurance matters? I am not a lawyer but I do not know why the good Samaritan provisions should not also be incorporated into or apply to matters covered by the Civil Aviation (Carriers' Liability) Act. Perhaps the parliamentary secretary can help by providing some real-life examples to demonstrate why the exclusion should apply.

Mr M. McGOWAN: The workers compensation scheme is no fault and, therefore, these provisions are not applicable. The member made a good point with regard to tobacco. A good Samaritan may come to the aid of a person who has suffered from a tobacco-related illness or an illness in relation to the inhalation of asbestos. The only circumstance foreseen may be when a tobacco company comes to that person's aid in an indirect sense. Another example is an asbestos mining company coming to a person's aid in an indirect sense to somehow save that person from the illness that it in fact caused. Therefore, we did not think it was good public policy to give them that protection.

Mr D.F. Barron-Sullivan: So, in a nutshell, Philip Morris might use that provision as a loophole.

Mr M. McGOWAN: It is unlikely, but we wanted to rule out the possibility.

Mr D.F. BARRON-SULLIVAN: I thank the parliamentary secretary for that explanation. I have another question regarding the way this provision is structured. By law, these exclusions are being established in a statute. However, proposed section 3A(2) states -

> Regulations may amend the Table to subsection (1) by -
>
> (a) adding . . .

It then goes on to list various items and so forth. In other words, this matter that is being dealt with by statute in this Parliament can then be added to through regulation. When dealing with these sorts of matters it does not seem to be a good principle to say, "Well, down the track perhaps we will do something by regulation or publish it in the gazette or whatever." When dealing with these sorts of matters, surely they deserve legislative authority. If there are going to be any amendments, surely they are the sort of matters that should be dealt with by this Parliament. Conversely, if that is not the case and if the parliamentary secretary can provide an excellent reason for this provision being amended by regulation, then the obvious question is: why was this table not put in regulation to start with?

Mr M. McGOWAN: If we did that we would not be able to sit here discussing it at length, and that would be a tragedy! Last year's head Bill that we are now amending allows for this regulation-making power, which is common practice in most Bills. However, the essential purpose of the provision is that if the Bill has any unintended consequences or unexpected outcomes - it is very complex - we want to be able to fix it quickly. As members know, legislative agendas can get very full. To get an amending Bill into a Parliament can take a while. We are about to go through the budget process. At the start of the sitting year we go through the Governor's address and the Address-in-Reply. The Parliament generally sits for only half the year. As such, things sometimes need to be rectified urgently. That is why we are rectifying the matter this way. I expect the regulations to be a disallowable instrument. The Government wants to fix the matter quickly depending upon the circumstances.

Mr D.F. BARRON-SULLIVAN: I have a sense of deja vu because we had a similar debate recently on credit legislation. The Government wanted legislation determined by template legislation derived from a ministerial council meeting and put in place by the Queensland Parliament. It was to be automatically presented to our Governor for assent in Western Australia. The parliamentary secretary is probably aware that the Opposition opposed that quite strongly because it meant there would be no parliamentary scrutiny on behalf of the people of Western Australia. It is interesting to see that the legislation is now in the upper House and the Greens (WA) have seen the same dangers in that approach as the Liberal Party did. The legislation is at a stalemate in the upper House. We are talking to the parliamentary secretary's ministerial colleague to see what can be done about it.

The question of parliamentary scrutiny and accountability is extremely important. I will give one simple example. At the moment, if this Bill goes through the Parliament it will confer on people in Western Australia particular rights in relation to their acts as good Samaritans in accordance with this legislation. For example, if someone acts as a good Samaritan at the scene of a motor vehicle accident, the rights conferred on the person in accordance with this legislation are not negated by the third column in the table we are presently discussing. People have legislative rights when they act as good Samaritans. The Government of the day can change the regulations by putting one number and one letter in the third column, that being 1D. By doing that, the rights

will be taken away. Those rights will have been determined by both Houses of this Parliament after extensive scrutiny and lots of polite banter between the parliamentary secretary and me and our counterparts in the upper House. I have grave difficulty in confronting a situation in which this sort of thing can be changed by regulation. I accept there may be a disallowance motion in the upper House, but that does not give anywhere near the same degree of scrutiny as the parliamentary process deserves and requires.

Mr M. McGOWAN: The member for Mitchell said he was getting deja vu; I get deja vu every day I am in this House! The years all run together in this place.

The member is correct about this provision. It would be nice to debate everything at length in the Parliament. As I said, there may be unexpected consequences of this legislation when enacted that require urgent repair. That is why the Government has done what it has. It will not enable it to take out any of the provisions in the third column; it will allow it only to add provisions to the third column. By definition, that will halve the regulation-making capacity under the clause. It is a disallowable instrument. The Greens (WA) and the Liberal Party can join forces in the upper House to deal with it if they want to. As such, it has some degree of parliamentary scrutiny. If something were added to this it would mean only that one of the provisions of the Bill would be excluded from the operation of whatever area of law was referred to in the middle column. It would not mean that common law was excluded; common law would still subsist.

Mr D.F. BARRON-SULLIVAN: The Opposition will not oppose the provision. In principle, this is not the way to go about things, especially when it may deny people strong legislative rights. This will get further and more detailed discussion in the upper House.

Clause put and passed.

Clause 7 put and passed.

Clause 8: Parts 1A, 1B, 1C, 1D and 1E inserted -

Mr D.F. BARRON-SULLIVAN: This is an enormous clause.

Mr M. McGowan: A record maker!

Mr D.F. BARRON-SULLIVAN: The Government has really pulled one off here!

There are a number of matters on which the parliamentary secretary will be questioned. The member for Merredin may support our approach. Because we are dealing with one clause we could deal with amendments throughout the clause and then return to aspects that appear before the amendments.

The ACTING SPEAKER (Mr A.D. McRae): Is the member asking whether his proposed amendments must be done in sequence?

Mr D.F. BARRON-SULLIVAN: I realise they must be done in sequence.

The ACTING SPEAKER: The debate can go anywhere within clause 8.

Mr D.F. BARRON-SULLIVAN: I want to start with proposed section 5J because I have a sneaking suspicion we will not finish this debate today. It might give the parliamentary secretary and his advisers time to consider some of the things that we have put to him already before we return to this Bill at a later time. Proposed section 5J is a crucial part of this legislation. I know it is the Government's stated intention that children aged under 16 years should be excluded from the provisions that enable them to assume liability when there is a risk warning or to have the liability set aside because their parents assume the risk on their behalf. As I understand it, if someone is aged between 16 and 18 years, his parents or guardian can assume the risk on his behalf. If someone is aged under 16 years nothing in effect changes. Proposed subsection (1) is totally unambiguous. It states -

> Subject to this section, a person (the **"defendant"**) does not owe a duty of care to another person who engages in a recreational activity (the **"plaintiff"**) to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff.

That means that all people can accept a risk warning, in which case the liability is negated. The proposed section also refers to a child, who is defined as someone aged between 16 and 18 years. I cannot find anything that restricts the scope of proposed subsection (1). Proposed subsection (13) states -

> A defendant is not entitled to rely on a risk warning to an incapable person.

The definition of an incapable person is not limited in any way by age. The only limitation referring to age is under the definition of an incompetent person, which means a person under the age of 18 years. That is not used in any way to limit the scope of proposed subsection (1) in the way that the Government's stated policy seems to intend. Putting it bluntly, the way I read this is that parents of a 17-year-old can assume the risk on his behalf or

the 17-year-old can assume the risk himself. More importantly, a five-year-old can assume a risk. For example, if a five-year-old went to a pony club and the operator of the pony club told him that riding a horse was dangerous and that he should be advised of that, according to this, the pony club operator is not liable. On the other hand, the parents of that same five-year-old cannot assume that risk on behalf of their child. Although the Bill ostensibly meets our requirements - it is a bit messy in parts and is not as fair as we would like it to be - it does not seem to fit in with the Government's expectations. That is why, in order to clarify the situation, I have already provided the parliamentary secretary's advisers with a range of amendments for proposed subsection 5J. Those amendments are based on the fact that it should be possible for a child to have the risk assumed on their behalf.

Mr B.J. GRYLLS: The member for Mitchell needs more of an opportunity to explain his point.

Mr D.F. BARRON-SULLIVAN: Will the parliamentary secretary explain what it is that prevents the operators of a pony club from directly issuing a risk warning to a five-year-old and for that risk warning to then trigger the provisions of proposed section 5J(1)?

Mr M. McGOWAN: I thank the member for Mitchell for his question He has obviously examined this clause at length. As he said earlier, and I agree in part, this is an important component of the Bill, particularly for those small businesses and community groups whose facilities provide social or recreational services and/or interaction. The community very much accepts the reinstatement of the risk-warning concept into Western Australian law. In that way, there will be some certainty for those organisations because people will have to take some personal responsibility for their go-kart racing, horse riding, tennis, and all of the activities that we take for granted, and for which insurance premiums are going through the roof. I accept the point that this is an important component of the Bill. It will be much welcomed when it is passed by Parliament, which I hope is quite soon.

The Government has decided upon a regime in which an adult - that is, a person over the age of 18 - can voluntarily accept the risk via appropriate risk-warning signage. For example, the signage at a tennis club may read that tennis is a physical activity that may result in injury. If, after having read that sign, a person plays tennis and strains his groin, he cannot sue the tennis club for the consequences of that injury because he read the sign and accepted that risk was a part of that activity. That is acceptable for a person over 18 years of age. There are essentially two systems for those below the age of 18. The first relates to children below the age of 16 who cannot accept a risk warning because they do not have the legal capacity to understand what it involves. They will be excluded from the operation of this Bill.

Mr D.F. Barron-Sullivan: Where in the Bill is a five or six-year-old excluded?

Mr M. McGOWAN: I appreciate the member for Mitchell pointing out that the Bill may require some amendments. Parliamentary counsel is currently working on that point. Essentially, the regime that the Government is putting in place assumes that children below the age of 16 are not capable of accepting that risk warning, and, therefore, will be excluded from the operation of this part of the Bill as it relates to recreational activities for which risk warnings are provided.

Mr D.F. Barron-Sullivan: Are you saying that children under the age of 18 are incapable of accepting them?

Mr M. McGOWAN: No, children under 16 years of age are incapable of accepting risk warnings, and they will be excluded, as will those who are unable to comprehend risk warnings as a result of a physical or mental incapacity.

A risk warning will be able to be applied to children between 16 and 18 years when a parent or guardian accepts that warning on their behalf. Any regime devised by the Government would be subject to some criticism. During his second reading contribution, the member for Mitchell criticised the Government's regime when he stated that children use the facilities of many small business operators and they would like liability to be excluded. Conversely - I am dealing with the general principle - children under 16 years of age are incapable of understanding what they are doing and should not be penalised for the rest of their lives should they suffer an injury that results in a catastrophic life-changing event that affects them for the rest of their lives. That is what Caucus and Cabinet decided, and that is what the Government has proposed in the legislation.

Mr D.F. BARRON-SULLIVAN: I understand what the parliamentary secretary is saying, but I think he missed the point I was trying to make during my contribution to the second reading debate. At the moment, the way the Bill is written, the go-kart operator, for example, can issue a risk warning to a five-year-old. We do not agree with that. The parliamentary secretary has stated that that provision needs amending, which is good. We also believe that a go-kart operator should be able to issue a risk warning to the parents of a five-year-old and that they should then be able to decide, using parental responsibility, whether they want their five-year-old to use a go-kart. I gave a personal example when I referred to my six-year-old. I gave four examples - three involving

businesses and one involving a pony club - of organisations whose clients are significantly under 16 years of age. It is mind boggling to assume that parents cannot assume the responsibility of looking after their children in this way. Parents look after their children and make decisions on their behalf daily. I do not see why parents should not have the opportunity to make that decision. If parents believe that go-karting or bungee jumping is too risky for their five-year-old - I do not think I would let my six-year-old go bungee jumping - they should be able to make that decision.

Mr P.B. Watson interjected.

Mr D.F. BARRON-SULLIVAN: I would let the member for Albany go bungee jumping -

Mr P.B. Watson: I have been bungee jumping. Do you want to see my certificate?

Mr D.F. BARRON-SULLIVAN: Rats! Do not tell me that they actually gave the member a rubber band.

Mr P.B. Watson: When you touch the water the rubber band takes effect and you are flung back up in the air.

Mr D.F. BARRON-SULLIVAN: Good grief.

The point is that parents should be able to accept that responsibility. It is not just a matter of principle; people in the industry have told us that enormous problems will be experienced when children under 16 years are exempted from this safeguard while those between 16 and 18 years are able to take advantage of it. Quite bluntly, some operators will deny services to younger children - I have already been told that - particularly if the majority of their clientele are over 16 years of age. Such operators will probably put up a sign that reads "Sorry; we can provide this service only to 16-year-olds" because they will either not get public liability insurance or they will pay a higher premium. Therefore, children may be denied some services. Some people in Caucus and in the Labor ranks may be edgy about providing this type of facility and of allowing parents to have this responsibility. I could be nasty in my terminology and say that they are the type of people who believe in a nanny state. However, I can understand that there might have been concerns that politically it might damage the Government in the community. I do not believe that is the case. People are looking for some tough decisions to try to resolve the problem with the public liability insurance crisis in this State. I make the parliamentary secretary this offer in good faith: if we can talk through this and get an arrangement whereby all children are in some way provided with the necessary legislative safeguard that we are talking about and parents can assume the risk on behalf of their children, we in the Liberal Party - I cannot speak for members of the National Party, but I know we are thinking along the same lines - will do everything we can to support the Government in that respect.

As I said earlier, I point out what the Premier of New South Wales, Hon Bob Carr, said when he spoke about the NSW equivalent of this legislation, the Civil Liability Amendment (Personal Responsibility) Bill. He said -

> Risk warnings will be effective for children and disabled people in certain circumstances. It is important because it would be unreasonable that a recreational service provider should not be able to rely on warnings given, for example, to parents before their child goes horse riding.

That is exactly the point I made earlier. Eighty-five per cent of the clients of the Pony Club Association of Western Australia are children under 16 years of age. We have rung the club and it has told us. That is the sort of organisation that would benefit tremendously if this Parliament had the guts to do the right thing with this clause. I am interested that the parliamentary secretary has said that he will amend this clause. Obviously he accepts that there is a technical flaw in the drafting. Unfortunately, the way in which he will amend it is very different from the Liberal Party's intention.

Mr M. McGOWAN: I thank the member for Mitchell for his comments. The Government will amend the clause to remove the technical flaw in the drafting, and parliamentary counsel has taken notes. However, it is a difficult area. It is a fundamental area for many people. I suspect that members opposite would be very uncomfortable with four-year-olds, five-year-olds or six-year-olds or even 14-year-olds being able to suffer an injury from an activity for which it was presumed they accepted the risk and therefore having their lifelong earning capacity and enjoyment and quality of life impacted on with no compensation.

Mr D.F. Barron-Sullivan: Why should that not be the parent's decision?

Mr M. McGOWAN: Let me finish. A lot of people would have difficulty with that and say that we live in Australia, which is a community that looks after its children, and we will draw a line in the sand. All we are doing is leaving the existing situation in place for those kids. All these organisations - go-kart tracks, pony clubs, tennis clubs, whitewater rafting and canoeing clubs, archery clubs and so on - operate at the moment and children can access those activities. It is a fundamental principle of the Government that it will look after children in those circumstances. We will not allow them to be impacted on for the remainder of their lives due

to the negligence of another with no compensation, whether or not there was a risk warning. That is a fundamental principle of the Government.

An example has just been given to me. Let us say that mum or dad dropped a five-year-old at a go-kart track, which had a sign saying that it was dangerous and that people should enter at their own risk, and the parent accepted the liability, but the cart went off the track at 40 kilometres an hour, crashed into a barrier and the five-year-old child was grievously injured, which affected that child for another 60 or 80 years of his life. That parent never went onto the track but presumed that the management of the track would not allow a five-year-old to get into a go-kart. That is a circumstance that could happen. The Government will not allow that to happen. That is a fundamental principle from which we will not move. If the Opposition wants to propose amendments to allow provisions to be put in place to allow a child of five, eight, 10 or 12 years of age or his parent to accept that sort of responsibility, that is a point of difference between the Government and the Opposition. We will not move on this point. It is probably a philosophical difference. I understand the member's point of view, but we have taken a stand on this area in relation to children. All the other provisions - the thresholds for general damages, the caps on economic loss, the structured settlement provisions, the limitation period legislation and all the other mechanisms put in place in this area of the law - apply to children. We have taken a range of steps in relation to children to assist business and community groups. However, we draw the line at allowing a person who has no capacity to understand such a warning to be injured and damaged for the rest of his or her life and receive no recompense for that. I suspect that a lot of members of the Liberal Party agree with that view.

Debate adjourned, on motion by Mr J.C. Kobelke (Leader of the House).