CIVIL LIABILITY AMENDMENT BILL 2003

Consideration in Detail

Resumed from 8 May.

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

Debate was adjourned after the clause had been partly considered.

Mrs C.L. EDWARDES: Proposed part 1A, headed "Liability for harm caused by the fault of a person" comprises a number of proposed sections. I reflect back to clause 6 containing proposed section 3A relating to "damages excluded from Act". This provision relates to damages arising from personal injuries defined in clause 5. Item 4 in the schedule in proposed section 3A refers to personal injury resulting from smoking or the other use of tobacco products. Another column in that schedule in proposed section 3A is headed "provisions that do not apply" - that is, certain provisions do not apply to item 4 dealing with damages with personal injuries resulting from smoking and other use of tobacco products. Part 1A does not apply to damages excluded from the Act - talk about triple or quadruple negatives - apart from proposed sections 5A, 5B, 5C and 5D, which do not apply! Proposed section 5A before the House at the moment reads -

> (1) Subject to sections 3A and 4A, this Part applies to any claim for damages for harm caused by the fault of a person . . .

Can the parliamentary secretary explain - does it apply or does it not apply?

The ACTING SPEAKER (Mr A.D. McRae): Did members pick up the nuances of the member for Kingsley's question?

Mr M. McGOWAN: It is quite straightforward. I am surprised that someone with the member for Kingsley's undoubted tenacity was unable to work out what this provision means. As the member for Kingsley stated, clause 8 is comprehensive and comprises the majority of the amendment Bill. It contains enormous changes to the law of negligence in a range of areas. The way the member for Kingsley structured her question was interesting. She went back to provisions already dealt with in asking -

Mrs C.L. Edwardes: Does it apply or not?

Mr M. McGOWAN: I know what the member is doing. The member covered provisions I have previously explained to the House. The member referred to the part of the Bill dealing with personal injuries resulting from smoking and the use of tobacco products. The law of negligence excludes a range of areas such as motor vehicle accidents, workers compensation and damages under the Civil Liability Act, which all have statutory schemes for obvious reasons, plus injuries related to asbestos and smoking or other uses of tobacco products. This State, and I think all the other States, are of the view that that aspect of law is developing in its own way. We do not want it to be easy for people to escape liability from claims related to those products. However, we want to ensure that the provisions that codify the general principles of negligence - namely, duty of care, foreseeability and causation - are uniform across all areas on which someone could pursue a claim of negligence. I think I indicated to the member for Mitchell the last time this Bill was debated that we do not want to enable a tobacco company to claim that it was a good Samaritan if it had attempted to assist someone who was suffering from a tobacco-related illness and, therefore, escape liability under the law. We want to exclude any prospect of something like that happening. However, we want to make the provisions that codify the laws of negligence, the central principle of the Ipp report - foreseeability, causation, duty of care, the onus of proof and the basic codification measures - applicable in all areas of negligence.

Mrs C.L. EDWARDES: I am pleased that the parliamentary secretary was able to explain that. Presumably under part 1A the areas dealing with duty of care, causation and contributory negligence apply to damages relating to personal injury.

Mr M. McGOWAN: Not contributory negligence. Those provisions in this Bill deal with whether a person was intoxicated, for example.

Mrs C.L. Edwardes: Which section does that come under?

Mr M. McGOWAN: It is in proposed section 5L. Contributory negligence is not included in the provisions that will not apply to damages for personal injury resulting from smoking tobacco products.

Mrs C.L. Edwardes: Is it duty of care, causation and foreseeability?

Mr M. McGOWAN: All the areas that codify the law of negligence will have applicability to smoking and use of tobacco products. We want to make sure those provisions have uniform application.

Mrs C.L. Edwardes: Will a claim for damages relating to personal injury resulting from the inhalation of asbestos enable duty of care, causation and foreseeability to be taken into account?

Mr M. McGOWAN: I think the member has the basic principles correct. I had full confidence she would get on top of it. The basic provisions of this Bill that codify the law of negligence will apply in actions related to tobacco products and the inhalation of asbestos. That means that the codification of foreseeability, duty of care and causation are the three main elements of a negligence claim that will apply to asbestos and inhalation of tobacco smoke. However, the other provisions of the Act, including things like contributory negligence, to which the member for Kingsley referred earlier, will not apply.

Mr B.J. GRYLLS: Clause 8 is a critical part of the Bill, as I mentioned in this debate before the fairly long break, which I hope has given the parliamentary secretary time to read the National Party's amendments on the Notice Paper. I hope he will accept them on their merits because they would play a very important role in making this legislation work more effectively.

This clause deals with duty of care. We particularly need to establish the negligence principle. As we said when we spoke on this issue at length, the National Party is very concerned that Western Australia will go down a different path from that of the eastern States because it does not meet the recommendation of the Ipp report to apply these changes to legislation as part of a national code. As I have said previously, our concern is that by taking a separate path we will open up the legislation to interpretation by the courts. That will put Western Australia out on a limb. The National Party is extremely concerned that its amendment should be agreed to.

I move -

> Page 6, lines 23 and 24 - To delete "A person is not liable for harm caused by that person's fault" and substitute "A person is not negligent".

We have already debated this long and hard during the second reading stage and during debate on earlier clauses. The National Party clearly believes that if there is harm there must be fault. We want to use the same wording used in other jurisdictions. The parliamentary secretary has repeatedly referred to the New South Wales legislation in seeking to maintain consistency. My amendment will achieve that. Why introduce another parameter - that of harm - when negligence is defined, as it is in other jurisdictions? The National Party believes that the legislation should restrict the definition of harm to negligent acts rather than broaden the definition of negligence to harm caused by fault. We have had extensive consultation with industry leaders on this matter. We believe this is an important amendment that will make the Bill a better piece of legislation.

Mrs C.L. EDWARDES: I support the amendment for several reasons. It makes the clause simpler and easier to understand. It replaces about 20 words with five, which always makes legislation simpler and easier to understand when a matter gets to court. We are trying to be consistent, if these words are used in the New South Wales legislation. The whole point of the Ipp report is to have some level of uniformity. There is no other valid reason for each State implementing this legislation. At the moment there is no consistency between the States. If States use similar wording and language - New South Wales is one of the larger litigant States - a greater number of precedents will start coming through the system.

This legislation will not provide a level of certainty as to the reduction of premiums, primarily because there will be a need for an increased amount of interpretation before the courts and a set of precedents and arguments to be established. I will deal with those points as each clause comes up. The legal profession in this State expresses no uniformity of view about what each of the words is intended to do. As that is the case, I do not hold out much hope unless we start providing some level of continuity, such as that provided in the language put forward by the member for Merredin.

Mr B.J. GRYLLS: I have the Ipp report in front of me. Recommendation 2 states that a proposed Act should be expressed to apply to any claim for damages for personal injury or death resulting from negligence regardless of whether a claim is brought in tort, under contract, under statute or any other course of action. Here once again the word "negligence" is used, whereas in the legislation before us the wording is that a person is not liable for harm caused by that person's fault. We believe that there is a broad difference in the terminology. The members for Rockingham and Kingsley are both lawyers, whereas I am not, but as a bush lawyer I would think that it could lead to some concern. That would obviously leave Western Australia looking to define the terms in the legislation, which is something we should try to avoid. That is why this amendment is important.

Mr M. McGOWAN: The amendment of the member for Merredin follows on from the earlier debate. We debated at length the meaning of the word harm. I am of the view that harm is quite an easy concept to comprehend. The Government is of the view that the existing definition will suffice and will probably be better than the definition proposed by the member for Merredin. First, the Government is following a similar definition

to that in the legislation of Queensland. The argument that national uniformity is needed and that somehow Western Australia is out on its own does not hold water because Western Australia is using a similar formula to that of the third most populous State in the Commonwealth. If we adopted a uniform approach with New South Wales, the Opposition might well move amendments and say that we are not being uniform because the legislation is not uniform with that of Queensland.

Another basis for using that form of words is the much-vaunted Ipp report, which has formed the basis of most of these reforms across Australia. Mr Justice Ipp used that form of words throughout the report. For example, harm is a defining word on about 15 separate occasions on page 103. The Government adopted that form of words on the basis of Ipp and the Queensland formulation. I understand the point that the member for Merredin is making. I think it is six of one and half a dozen of the other in this context. The member for Merredin will put forward some very well thought out amendments later on, but I believe that we must agree to disagree on this one.

Amendment put and negatived.

Mrs C.L. EDWARDES: I refer the parliamentary secretary to proposed section 5B(1)(b). Proposed subsection (1)(a) refers to foreseeable risk. The parliamentary secretary mentioned earlier that the Bill is attempting to codify the current law. Proposed paragraph (b) refers to the risk being not insignificant. The Law Society of WA sought views from the members of its personal injuries committee. Those members who practise every day in personal injury law were unable to agree whether the whole of proposed section 5B, which deals with the duty of care, represented a change to the existing law. Their view is the view I have been putting forward. They anticipate that the courts would have similar problems and that, accordingly, this codification will lead to more litigation. Proposed section 5B is clearly intended to set a higher standard than "far-fetched or fanciful". It is already settled law that if a risk is far-fetched or fanciful, there is no duty to take action to reduce or avoid it. That was made quite clear in the very well-known case in 1980 of Wyong Shire Council v Shirt, in which Mr Justice Mason said -

> . . . a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable

Proposed paragraph (b) refers to risk not being insignificant. What does it mean? Is it setting a higher standard than far-fetched or fanciful? Is it limiting the duty to significant risk? The Ipp review points out that this does not mean that a person must always take precautions against any risk that was not insignificant. What is meant by the words "the risk was not insignificant"?

Mr M. McGOWAN: I am loath to emulate one of the members of this place, who quotes herself quite often, but I will do it on this occasion.

Mrs C.L. Edwardes: I quoted Mr Justice Mason!

Mr M. McGOWAN: I am not referring to the member for Kingsley. One member in this place quotes herself quite often; her speeches are littered with her quoting what she has said on other occasions. On this occasion I will quote myself, even though I am loath to do it, but at least I know I will be accurate! I quote from my second reading speech -

> The Bill will expand the scope of the Civil Liability Act 2002 by codifying, and in some cases varying, certain common law rules of negligence in relation to foreseeability, standard of care, causation and remoteness of damage and contributory negligence. Particularly, a risk must now be not insignificant before a court can find a person liable for failing to take precaution against that risk. The Ipp report states -
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> > The phrase 'not insignificant' is intended to indicate a risk that is of a higher probability than is indicated by the phrase 'not far-fetched or fanciful', but not so high as might be indicated by a phrase such as a 'substantial risk'.
>
> The Bill codifies a practice that courts are not able to rely solely on the benefit of hindsight or on evidence of subsequent remedial action by the defendant or that a risk was easily avoidable.

That is the key to the use of the words "not insignificant" in the Bill. It will tighten up the way in which negligence is interpreted by the courts by providing a stricter test than the test that the member for Kingsley has laid out.

Mrs C.L. Edwardes: It is setting a far higher standard.

Mr M. McGOWAN: It is setting a higher standard that people will need to meet to bring an action for negligence. I would not say it is a far higher standard. It is based on a range of cases, one of which is Caterson v

Commissioner for Railways 1972, 128 CLR 99, in which the court used the words "not unlikely", which is a similar formulation to the one we have chosen. We have chosen the words "not insignificant", based on the Ipp report. The words "not far-fetched or fanciful", which were the words quoted by the member for Kingsley, will make it easier to bring an action for negligence for failing to take precautions against risk than will the words "not insignificant". The reason we have done that is clear. This Bill is designed to tighten the laws of negligence so as to remove some of the frivolous actions that have been generated over time in the courts, and to reduce premiums and the prospect of community groups and businesses being sued as often as they are at the moment.

Mrs C.L. EDWARDES: In talking about the Ipp report I want to acknowledge John Fiocco, who recently spoke at a conference on the Civil Liability Act and the Civil Liability Amendment Bill. It was obvious to him that proposed new section 5B(1)(b), which states that "the risk was not insignificant", is intended to set a standard higher than the words "far-fetched or fanciful". As I have said, a risk that is not far-fetched or fanciful is really therefore foreseeable. The Ipp report points out that the duty to take precautions against significant risk does not mean that a person must always take precautions against any risk that is not insignificant. In other words, to use simpler language, if a person is not negligent unless the risk was not insignificant, how will the parliamentary secretary recommend to people, in picking up on the comments in the Ipp review, that they still must take precautions against any risk even though the risk may not be insignificant? People who read this legislation will suggest that if the test is high there is less likelihood that people will be found liable; therefore they may not always take the precautions that they should take against any risk. This point is made in the Ipp review. What will the parliamentary secretary say to those people?

Mr M. McGOWAN: I am aware of Mr Fiocco. I have spoken to him about his views on a number of occasions, and I have heard him speak. He has a very incisive mind. My impression is that he would be an outstanding advocate, and I would respect his point of view on various things, as well as the view of the lawyers who work for him. What we are attempting to do in this provision is in accord with the stated views of the Liberal Party on this Bill, which is to tighten the law of negligence and reduce the number of negligence actions that may not have merit. I think that would have the overwhelming support of the public. All of the States have adopted this form of words. The words "not insignificant" are probably the least sexy thing in the Bill, but they are the crux of the Bill. The reason we have used this form of words is that the Ipp report at page 105 in paragraph 7.15 refers to "not insignificant" as being the appropriate form of words to use. As I have said, all the States have adopted this form of words. What I would say to people is that not insignificant in relation to finding fault and in relation to failing to take precautions against risk of harm is a reasonable and meritorious test to be applied. Any defendant who is being pursued should take precautions against risks that are not insignificant. To say that people should take precautions against risks that are not fanciful or far-fetched is a far higher obligation to put on defendants. It is too high a test to put on home owners, small businesses, community groups and pony clubs - which we have discussed ad nauseam in this place - because it will mean people will be much less likely to continue to carry out activities that provide a great deal of enjoyment for the community. We are trying to ensure that the community can continue to operate in the way it has been operating over the centuries and people are encouraged to engage in fun activities without putting them under unnecessary obligations that will mean they cannot continue to carry out those activities.

Mrs C.L. EDWARDES: I refer to proposed section 5B(1)(c), which furthers the argument about the significance of the risk. The significance of the risk must also be measured in the context that, in the circumstances, a reasonable person in the person's position would have taken those precautions. As such, it is a test of hindsight rather than foresight. That is well known in the law of negligence, and many cases have proceeded upon that basis. I suggest that many of the textbooks also recognise that the law already operates on the basis that reasonable foreseeability is based on hindsight rather than foresight. This is one of those areas that appears to codify the law according to the way in which the well-known cases have been decided.

Mr M. McGOWAN: Essentially, this provision codifies the existing law, which is the reasonable person test - the man on the Clapham omnibus or the person walking through the Rockingham City Shopping Centre.

Mrs C.L. Edwardes: That was not in Fleming.

Mr M. McGOWAN: I have just created a new reasonable person test - the person sitting on the bench outside the Ploughmans Lunch in Rockingham City Shopping Centre. That is the new test being adopted, which is essentially the reasonable person test that has existed since Donoghue v Stevenson back in 1932.

Mrs C.L. EDWARDES: Proposed section 5B(2) takes the matter a little further. In assessing whether a reasonable person would have taken precautions against a risk, regard must be had to the probability that the harm would occur if care were not taken, the likely seriousness of the harm, the burden of taking precautions to avoid the risk of harm and the social utility of the activity that creates the risk of harm. A court must weigh up

all those factors. The High Court has already started to limit the area of negligence and the question of damages. A recent case to which we have referred previously in this debate, and also in the debate on the Civil Liability Bill, is Tame v New South Wales, before Mr Justice McHugh. He stated -

> I think that the time has come when this Court should retrace its steps so that the law of negligence accords with what people really do, or can be expected to do, in real life situations.

That is a very telling view, and it is the view of many people. All the States have their own civil liability legislation, and none of the legislation is uniform. A number of courts throughout the land will interpret the various States' Acts. Irrespective of the Ipp review and report, the High Court had already started to reduce damages and make the relevant changes. That is what the community wanted, and that is what Mr Justice McHugh was referring to. It is a matter of what people do, and can be expected to do, in real life situations. People were already starting to look at the cases being brought forward and the damages being awarded. They were of the view that they were unreasonable and unfair, and that people were not playing fair in the whole system.

I suggest that there will be problems with some of the terms used. For instance, paragraph (d) refers to "the social utility of the activity that creates the risk of harm." That term is widely accepted in some quarters, and practitioners have already determined that social utility should be recognised. For instance, an emergency situation may arise that requires the attendance of a police officer or the fire brigade. That incorporates a view of social utility. A fire officer may not have taken the requisite vehicle to a fire, because it was already being used elsewhere, and an accident occurred. The issue would be one of social utility. It was an emergency situation and somebody needed to deal with it.

Would the parliamentary secretary deal with two issues? What is social utility and how is it determined, other than in the example that I have given? What is the detriment that is often referred to? Paragraph (c) refers to the burden of taking precautions to avoid the risk of harm. What is incorporated in this provision? Is a belief factor incorporated in proposed subsection (2)(c)?

Mr M. McGOWAN: The member for Kingsley has raised a good point. The courts have recognised the public mood about this issue. Perhaps negligence has drifted too far. I suppose most members in this place would not be in the Parliament unless they thought that legislating is a measure that should be used by Governments to address social problems. I suppose I am a legal positivist when it comes to legislation. I believe it is our right and obligation to legislate to change the law when we believe it needs to be changed, because we have been elected to do so. That is why we are doing this, rather than allowing those involved with the common law to take their time to come to the view that the Parliament has reached.

Proposed section 5B(2) is taken directly from the Ipp report in determining whether a reasonable person would have taken reasonable precautions against a risk of harm, and the factors involved therein. The reason it was taken from the Ipp report is that it set out in the clearest possible terms the sorts of matters that would be relevant.

The member asked about social utility. She gave an excellent example that I could not better. She also mentioned the burden of taking precautions. That is fairly straightforward.

Mrs C.L. Edwardes: I was talking about the cost factor.

Mr M. McGOWAN: Exactly. A business may have a set of stairs. Would it be reasonable to require every business to install a lift? It probably would not be, because one of the factors involved would be the cost. If a person fell down some stairs, the burden of installing a lift would probably be too onerous. However, the burden of installing a light may not be too onerous. That is a relevant consideration. This proposed section probably sets out the position as any reasonable person would understand it to be.

Mr D.F. BARRON-SULLIVAN: I have a brief question of the future minister.

Mr M. McGowan: Parliamentary secretary.

Mr D.F. BARRON-SULLIVAN: Currently the parliamentary secretary. We are barracking for him.

As the member for Kingsley has alluded to, there is obviously a degree of uncertainty in the way in which the courts might interpret some of these provisions. Of course, as the parliamentary secretary pointed out regarding the findings of the Ipp review, there is the crucial phrase in proposed section 5B(2) that refers to "amongst other relevant things" that the courts can consider. This really opens the door to the discretion of the courts. My question is very simple, because people in the business community, community organisations and so on are looking for an indication of when this legislation might start to have a beneficial effect on insurance premiums. This proposed section is absolutely crucial because how the courts determine these matters will have a bearing on insurance premiums. Can the parliamentary secretary give us some indication of how long it will take before

we get some idea of the impact that this part of the legislation will have? To me, this is one of the most crucial parts of the Bill. I would like some indication of how many cases it will take or roughly how long the Government expects it to be before the insurance industry will gain enough confidence from the way the courts interpret and apply this legislation to enable us to see some genuine flow-on benefits. I am not asking the parliamentary secretary to say whether it will be 13 months from today or something like that, but to give us an idea whether it will be a couple of years or decades. What is likely to be the case?

Mr M. McGOWAN: There is no doubt that the benefits of this Bill will be more significant after it is passed. If we pass it, the benefits may come into effect more quickly and more readily than they are coming into effect at the moment. I expect that we will very quickly see impacts across Australia. The insurance industry and a large number of lawyers have been quite positive about the impacts this legislation will have on premiums. However, it is not retrospective legislation. I know that the Liberal Party does not believe in retrospective legislation, so there will be a bit of a backlog in the courts of matters that arose prior to this legislation coming into effect. As has been said, the insurance industry is a nationwide industry; Western Australia is a single pool among others across Australia. The reforms in other States also must have a bearing before the benefits will flow through. I cannot give the member an exact date. I think it will be sooner rather than later. We have already seen a benefit, which I am sure the National Party is happy to note; that is, on 1 January this year the Community Care Underwriting Agency set up in Western Australia to provide insurance for community groups. It has not set up in every State. We have seen a benefit from our first round of reforms. I expect we will see a benefit from these reforms over the coming few years.

Mr D.F. Barron-Sullivan: Does the parliamentary secretary have any idea what the impact has been in New South Wales, which passed slightly more comprehensive legislation last December?

Mr M. McGOWAN: I cannot say that we have any knowledge of what the impact has been in that State. As the member knows, these matters must be interpreted by courts once they are put into effect. There is a long lead time in a lot of these cases. I do not think the legislation in New South Wales is retrospective either, so there are some factors that militate against an immediate decline in premiums. As I have said, we are putting in place an environment that will produce declines in premiums.

Mr D.F. BARRON-SULLIVAN: I do not expect a response from the parliamentary secretary, because I am simply responding to something he said. However, I want to put on record that - I am not speaking for members of the National Party, but they have made it quite clear that they want changes to be made in this area as quickly as possible - if we had not been held up by the prostitution and the cannabis legislation, which are the Labor Party's priorities, we could have dealt with this Bill and probably could have passed it through both Chambers of this Parliament by now.

Mr B.J. GRYLLS: For the benefit of the parliamentary secretary, I am aware that the Community Care Underwriting Agency has been set up and is providing insurance to some of the groups and organisations in country Western Australia. I mentioned in debate yesterday or the day before that the Quairading bachelors' and spinsters' ball was lucky enough to receive cover under that agency, but it was for $6 500, which means that the first $6 500 of its fundraising must go towards paying its insurance bill.

Mr M. McGowan: The B&Ss that I have been to are fairly risky activities from my recollection.

Mr B.J. GRYLLS: There are very few incidents among very responsible young country people. Another point is that the Community Care Underwriting Agency is not the panacea for all problems. A $6 500 public liability insurance bill for the Mukinbudin golf club is getting a little out of hand, given that it was able to go to a private underwriter and receive cover for $650. There are still a few problems that need to be addressed.

Following on from the comments of the member for Mitchell, I have had briefings on this and have spoken to people in the industry. Obviously, the parliamentary secretary has had higher level briefings than I. Does he believe that the changes in this legislation that we are in the process of making will put a cap on further increases in premiums, or can he see a downward trend; and, if he does see a downward trend, is he prepared to say what those briefings from industry leaders have indicated could be the result of this legislation? At the end of the day, we can talk around it all we want, but we are really trying to put downward pressure on premiums, and downward pressure means a five, 10 or 15 per cent decrease. I am interested to know whether the parliamentary secretary can explain to the House what the effect will be.

Mr M. McGOWAN: I cannot give the member an exact figure for the premiums. The member will be aware that putting in place caps has historically resulted in people leaving the marketplace. We are putting in place an environment that will provide every opportunity for premiums to decrease. I am very pleased that the Government's earlier reforms have meant that the Quairading B&S can proceed and that other groups across Western Australia can now obtain insurance. What we are doing is actually working, and I am very pleased

about that. This is an extensive Bill and the member has the most extensive group of amendments I have seen in a long while. If we can get on with those amendments, it will help us put this legislation in place. I understand the concerns of members about other Bills that have been dealt with, but we are dealing with this Bill and I would like to get on with it so that we can make some changes.

Mrs C.L. EDWARDES: I refer the parliamentary secretary to proposed section 5C. Proposed subsection (1) refers to factual causation and scope of liability and states that a determination that the fault of a person caused particular harm comprises two elements, one of which is that the fault was a necessary condition of the occurrence of the harm. That is termed factual causation. The court also needs to determine whether it is appropriate to attach liability to that tortfeasor; that is, the person at fault. Proposed subsection (4) states -

> For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether and why responsibility for the harm should, or should not, be imposed on the tortfeasor.

In dealing with factual causation, account must be taken of proposed subsections (2) and (3). Proposed subsection (2) refers to a number of factors that the court must take into account, including, among other relevant things, whether and why responsibility for the harm should or should not be imposed on the tortfeasor and whether and why the harm should be left to lie where it fell. Proposed subsection (3) provides that if it is relevant to the court's determination of factual causation to determine what the person who suffered harm would have done if the tortfeasor had not been at fault, subject to paragraph (b), which I will come back to next, the matter is to be determined by considering what the injured person would have done if the tortfeasor had not been at fault.

This is a complex piece of legislation. Although proposed section 5C, general principles, refers to bringing codification to the common law as it is understood, that is not necessarily the case. The courts will need to go through a lengthy exercise to determine what is appropriate, the scope of the liability and the factors to be taken into account - not only the matters that are listed here but also other relevant matters. Although this is supposed to be regarded as codification, it is not codification in its entire sense. Many other factors must be taken into account. The courts will look at this legislation and will have similar problems to this Parliament when determining what the Parliament intended with those general principles. How does the parliamentary secretary see a court dealing with those general principles when a matter comes before it?

Mr M. McGOWAN: As the member has pointed out, this is a partial codification of the law of negligence. One element of an action for negligence is the principle of causation. This provision was put in place because it was a recommendation of the Ipp report. The member indicated that the courts may have trouble with this provision. The person who recommended it was a Supreme Court judge in New South Wales, formerly of Western Australia. He said there was a reason for doing this and that we should codify it along with other aspects of the legislation, which were duty of care and foreseeability. He thought that would create more certainty and that it would encourage courts to articulate arguments about where damages should fall. He thought it would be a better opportunity for a court to explain why it was attributing liability to one or another party. For instance, the State Government or a big insurance company could be standing behind one of the parties, and they have plenty of money. This means that the court must articulate arguments. Everyone knows that it is best to sue a Government because it can always pay. The best defendant is the Commonwealth because it has the deepest pockets, followed by State Governments, local governments and certain other parties. It removes the impression that those parties are easier targets before the courts.

Mrs C.L. EDWARDES: I mentioned that I would come back to proposed section 5C(3)(b), which is quite an unusual provision. It states that in determining factual causation it is relevant for the court to determine what the person who suffered harm would have done if the person who had been negligent had not been at fault. If the tortfeasor had not been at fault, what would the person who suffered harm have done? One would imagine that the important evidence would be taken from the person who suffered harm to learn what he or she would have done if the tortfeasor had not been at fault. Proposed section 5C(3)(b) states that -

> evidence of the injured person as to what he or she would have done if the tortfeasor had not been at fault is inadmissible.

The provision states that if it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the tortfeasor had not been at fault, subject to paragraph (b) - the section I am concerned about - the matter is to be determined by considering what the injured person would have done if the tortfeasor had not been at fault, and the evidence of the injured person as to what he or she would have done if the tortfeasor had not been at fault is inadmissible. What would the court have done if the tortfeasor had not been at fault and that person's evidence was inadmissible? The court must determine what the injured person would have done without the evidence of that person. Why have we gone down that path? South Australia has decided not to adopt this provision; it has decided that a plaintiff should be allowed to testify, but it is up to the

court to determine what weight, if any, should be attached to the evidence. That makes an awful lot of sense. If the court has to determine whether it is relevant to factual causation, it makes sense to hear from the injured person. New South Wales has adopted the approach of rendering the injured person's evidence inadmissible, with a minor variation; namely, that when the plaintiff's evidence is a statement against his or her interests - for example, if a plaintiff testifies that he or she would have had a medical procedure even if properly warned - it is admissible. This is a warning type of situation. Queensland has followed the New South Wales approach and has used identical words, except that the Queensland Bill is more limited in the scope of its application to personal injury claims. It is strange that we have gone down this path, given that there are many variations. One would think that Western Australia would apply careful consideration to whether it would make inadmissible the plaintiff's evidence. A far better approach would have been for the court - if the court has to determine that - to ask the plaintiff what he would have done if he had been warned or, going back to the reasonable person in the Rockingham shopping centre, what a reasonable person in the same position would have done. Why has Western Australia gone down this path, given the fact that there are variations among the States and it is most unusual?

Mr M. McGOWAN: I thank the member for Kingsley for her remarks. We have adopted this course of action because it was recommended by the Ipp report and it is uniform with Queensland and New South Wales.

Mrs C.L. Edwardes: No, it is not.

Mr M. McGOWAN: With minor variations.

Mrs C.L. Edwardes: No. South Australia has refused to adopt it.

Mr M. McGOWAN: In seeking to adopt the most uniform approach, we went with that taken in Queensland and New South Wales, which account for just over half the population of Australia, rather than that taken in South Australia, which accounts for about seven per cent of the population of Australia. We took the course of action that applies to 55 per cent rather than seven per cent of the population. I think we win the uniformity argument.

The reason we are doing it is quite clear. Evidence would be inadmissible under these proposals as the courts invariably find that such evidence is very much self-serving. If a lawyer asked a person whether he would have dived into a muddy creek if he had known it contained a branch, he would of course say no. Similarly, if someone was asked if he would have jumped off a tree into a waterhole if he had known it contained a rock, he would say no. It is always self-serving. We are leaving it to the courts to work out what a person would have done in those circumstances, having regard to that particular person. That is the approach that has been adopted in New South Wales and Queensland, although Queensland has decided that such evidence can be admissible if it is contrary to the plaintiff's interests. I am not sure how many plaintiffs give evidence that is contrary to their interests, but I do not think it happens very often. It is almost unheard of for a plaintiff to go to court and say that he would have done something even if he had known that the problem that caused his injury existed. If he did that, he would have no case because he would have admitted that he voluntarily accepted the risk. We are following the course of action taken by New South Wales and Queensland; that is, allowing the courts to determine the correct approach in this issue. That is quite reasonable. We have followed the lead of the most populous and third most populous States in the Commonwealth. We have adopted the most uniform approach.

This is all part of the tightening of this area of the law, which is the professed intention of the Liberal and National Parties.

Mrs C.L. EDWARDES: As variations exist and this is a most unusual circumstance, Western Australia could at least have given some thoughtful consideration to adopting Justice Ipp's recommendation. I again put on the record that the evidence of the injured person's state of mind would be most relevant in determining factual causation. It should be made available to the court so that it can decide whether to accept the evidence and the weight that it places upon it. It does that on a daily basis. The evidence of an injured person in determining factual causation would not greatly change this area of law and would make the court's job much easier than it will be under what is proposed in the Bill. This provision will create a problem for the court as it will have to determine factual causation and the relevance of the plaintiff's state of mind without hearing from the plaintiff.

Mr B.J. GRYLLS: I will not move the second amendment in my name as it was consequential to my earlier amendment to substitute "negligence" for "harm". As that first amendment was lost, there is no point moving this one.

Mrs C.L. EDWARDES: Proposed section 5D deals with the onus of proof as a factor relevant to the issue of causation, and states -

> In determining liability for damages for harm caused by the fault of a person, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

How does this provision codify the current law, and is it different in any respect?

Mr M. McGOWAN: My advice is that it is consistent with the existing common law and with recommendation 29 of the Ipp report, which states -

> The Proposed Act should embody the following principles:
>
> *Onus of proof*
>
> (a) The plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

My recollection of the law of negligence is that it is up to the plaintiff in virtually any civil case to prove the facts or relevant elements of the case on the balance of probabilities.

Mrs C.L. EDWARDES: Although I accept that is the intention, a problem may arise when the defendant tries to introduce new evidence to suggest a break in the causation of the injury. The wording is that the plaintiff always bears the onus of proving. That may become somewhat difficult. How will the interpretation of proposed section 5D apply to the plaintiff and the defendant if the defendant introduces new evidence to suggest that an intervening act broke the chain of causation?

Mr M. McGOWAN: We are following the advice of one of the most experienced negligence judges in Australia. I think his advice is good. The provision refers to the facts that the plaintiff must prove in a case on the balance of probabilities. All plaintiffs must put forward certain elements to establish their case. They need to prove, on the balance of probabilities, that certain events took place. It is a fundamental principle of law. The point of the member for Kingsley is that a plaintiff might have to disprove, on the balance of probabilities, a fact introduced by the other party. I do not think that will be a problem. The following wording is quite clear -

> . . . the plaintiff always bears the onus of proving, on the balance of probabilities, any factor relevant to the issue of causation.

It obviously refers to the plaintiff's claims. New South Wales and Queensland have exactly the same provision in place. On the basis of all the advice that we have, I do not think it is an issue.

Mrs C.L. EDWARDES: The codification - setting down in black and white - of what happens in the courts is always a problem. The legal onus of causation attaches to the plaintiff, whereas any evidentiary onus attaches to those individual plaintiffs and/or defendants who raise particular issues. That is what happens in the courts now. The concern is how the onus of proof has been defined. The Bill states that the plaintiff will always bear the onus of proving, but that is not the case in the courts today. The plaintiff must prove causation, but the evidentiary onus in respect of any other evidence that is introduced is on the individual plaintiffs and defendants who introduced it. I suspect that is what will happen, but interpretation is needed. I suggest this difficulty is caused by the codification of the law and the use of those words "the plaintiff always bears the onus of proving".

Mr M. McGOWAN: We are not arguing about anything here. The Bill uses the words provided by Justice Ipp and those used in Queensland and New South Wales. Parliamentary counsel has no difficulties with the formulation of words. It is appropriate in terms of codification and makes the Bill more, not less, certain.

Mr B.J. GRYLLS: Division 4 deals with recreational activity. The National Party has an amendment on the Notice Paper designed to achieve our intention with public liability premiums. The Bill refers to the assumption of risk, but limits that assumption to recreational activity. Such activity has been debated long and hard. It can be assumed that a person could fall off a horse and be injured when horse riding. The Government is attempting to force people to take responsibility for their own actions and to ensure that owner-operators of recreational activities and businesses are afforded some protection from huge increases in public liability insurance premiums. This Bill must go much further to achieve a good result and force insurance premiums down. If the community is willing to accept this assumption of risk with recreational activity, it should be willing to accept the assumption of risk across the whole gamut of activities in the community. That is the intent of the National Party's amendment. Its drafting is in concurrence with New South Wales legislation, which has a broader definition of assumption of risk and does not apply only to recreational activity. The Government's provisions relating to recreational activity will have an effect. However, it will be limited; they certainly will not apply across the board. Therefore, I move -

> Page 8, after line 22 - To insert the following -
>
> **Division 4 - Assumption of Risk**
>
> **5E. Meaning of "obvious risk"**
>
> (1) For the purposes of this Division, an ***obvious risk*** to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.

(2) Obvious risks include risks that are patent or a matter of common knowledge.

(3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.

(4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

5F. Injured persons presumed to be aware of obvious risks

(1) In determining liability for negligence, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.

(2) For the purposes of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

5G. No proactive duty to warn of obvious risk

(1) A person (***the defendant***) does not owe a duty of care to another person (***the plaintiff)*** to warn of an obvious risk to the plaintiff.

(2) This section does not apply if -

(a) the plaintiff has requested advice or information about the risk from the defendant; or

(b) the defendant is required by a written law to warn the plaintiff of the risk; or

(c) the defendant is a professional and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service by the defendant.

(3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

5H. No liability for materialisation of inherent risk

(1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.

(2) An ***inherent risk*** is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.

(3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

This is a lengthy amendment moved by the National Party to ensure that the Civil Liability Amendment Bill includes generally applicable restrictions regarding obvious and inherent risks, rather than limiting such assumption to recreational activities. As I have previously stated, the New South Wales Act has generally applicable provisions under assumption of risk regarding "obvious risk" and "inherent risk", such as the presumption of awareness of obvious risk. Furthermore, the legislation as it stands is specific in that the "enjoyment, relaxation or leisure" component applies to not only the place, but also the activity engaged in. My amendment seeks to broaden that definition in line with the provisions of the New South Wales Act. It will spread that assumption of risk. The community refers to the need for people to take more responsibility for their actions. This amendment will spread that responsibility beyond only recreational activity and will apply it across general activities in the community.

Mrs C.L. EDWARDES: On a point of clarification, I understood that if the amendment appears on the Notice Paper, the mover is required to read it out.

The DEPUTY SPEAKER: No. That is the case only if an amendment is distributed separately from the Notice Paper. I have indicated where the amendment can be found so it can be located by other members and Hansard.

Mr M. McGOWAN: I thank the member for Merredin for his thoughtful amendment. I appreciate that he has done considerable work on this Bill. His amendment has some merit. It essentially proposes that the provisions of the Bill dealing with dangerous recreational activities have the word recreational withdrawn. Is that right?

Mr B.J. Grylls: It is in line with the New South Wales Act.

Mr M. McGOWAN: Therefore, the Bill would apply to dangerous activities with an obvious or inherent risk. It is a thoughtful amendment, which the Government has not ruled out. However, it will not support the amendment at this time for a couple of reasons, notwithstanding its merit. First, the Government is still considering this matter. Secondly, the definition of recreational activity in the Bill, under proposed section 5E, reads -

> **"recreational activity"** includes -
>
> (a) any sport (whether or not the sport is an organised activity);
>
> (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure; and
>
> (c) any pursuit or activity engaged in for enjoyment, relaxation or leisure at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

That is a broad definition. My understanding is that a person goes to a shopping centre for recreation and enjoyment - certainly, shopping goes hand in hand with recreation and enjoyment for my wife.

Mr B.J. Grylls: Did she buy the tie?

Mr M. McGOWAN: She got me this shirt.

Mrs C.L. Edwardes: You put the tie with the shirt!

Mr M. McGOWAN: I thought it would be the most outrageous shirt of the day, but I was completely beaten by other members of the House. I never thought that the member for Roe would outdo me in fashion! He managed it today.

The definition of recreational activity is very broad; I find it difficult to think of a circumstance that would not be covered by the definition. It would cover most of the activities to which the provision should apply. The Bill is already extensive. The Government is still considering the matters proposed in the amendment. This is not meant as a criticism of the member for Merredin's drafting - I have not had it examined by parliamentary counsel - but an amendment of the magnitude of the member's, which covers a page of the Notice Paper, requires detailed consideration and examination. As a former Attorney General, the member for Kingsley well knows that a Bill amended in haste has a reasonable prospect of not being a good Act. I recall that the member for Kingsley accepted an amendment of mine during a debate held about 1997. She told me afterwards that she wished she had not accepted that amendment.

Mrs C.L. Edwardes: We're still talking about the Trenorden amendment to the workers compensation legislation.

Mr M. McGOWAN: The Government will not accept the amendment. The member for Merredin raised a good point, and the Government will decide on the issue in the future. However, it does not agree to the amendment at this stage.

Mr GRYLLS: Although I would like to take all the credit for the drafting of this amendment, because it meets the legal requirements and is well thought out, it would be remiss of me not to point out that it is a direct copy of a provision in the New South Wales legislation. We were trying to -

Mrs C.L. Edwardes: Provide some uniformity.

Mr B.J. GRYLLS: I thank the member for Kingsley. It is to provide uniformity. The parliamentary secretary need have no concerns about the drafting legalities, unless he is concerned about the drafting of the New South Wales Labor Government's legislation.

Mr M. McGowan: It is in the east; we must be worried.

Mr B.J. GRYLLS: The parliamentary secretary said that his partner regarded shopping as a leisure activity. It is this area in which my amendment has some significance. We do not want someone who makes a claim arising from an experience in a shopping centre to use the fact that shopping is a leisure activity and therefore did not have to assume risk. My amendment, which encompasses much more than just recreational activities, will achieve that purpose. If water is spilt on the floor of that same supermarket and someone slips over because he walked through the water, despite a sign being in place warning of the risks, the assumption of risk provisions in my amendment will ensure that the person will not be granted redress in the courts. The people who seek redress in the courts are the reason we have been here for so many days arguing about public liability premiums. I take on board the fact that the Government is still considering these amendments. This is a very important amendment and it goes to the crux of our efforts over so many hours in this Parliament to reduce public liability

premiums. Obviously the National Party will have another chance to move this amendment in the upper House. I hope the Government will have had time to consider this amendment and consult with its New South Wales colleagues to ascertain that this amendment is exactly the same as the one in the New South Wales legislation. The Government can then accept it and ensure that the aims of the Bill are as broad as possible so that explosive public liability claims can be reduced as much as possible.

Mr M. McGOWAN: I appreciate the remarks of the member for Merredin. He has put a lot of thought into this amendment. He raises some good points. There might be an opportunity in the upper House to accommodate the amendment.

Amendment put and negatived.

Mrs C.L. EDWARDES: Under proposed subsection (2) of proposed section 5J - no liability for recreational activity where risk warning - if a child suffers harm, the defendant may rely on a risk warning to a parent of the child if the parent is not an incompetent person, regardless of whether the child was accompanied by the parent. What sort of risk warning is given to an absent parent? How could it happen? Is it sufficient? Is it a gesture? Is it illusory? How does a person get a risk warning to a parent who is not accompanying a child?

Mr M. McGOWAN: This provision takes us back to the final discussion we had the last time the provision was debated when we discussed the different philosophies of the Liberal Party and the Labor Party. The Liberal Party has a range of amendments on the Notice Paper about children and people who may not have the capacity to understand a risk warning. It is a matter of a difference in philosophy. The Opposition's philosophy on this point accords with the New South Wales provisions. We have a different view from the New South Wales Government and from the Opposition in relation to children and people who do not have the capacity to understand warnings. Essentially, this Government believes that a risk warning will not be effective for 15-year-olds and younger. A risk warning can be accepted by a parent or guardian for people who are aged 16 and 17 and a risk warning will be effective for people aged 18 and over. We have good reasons for that philosophy. It is not as harsh and does not go as far as the New South Wales legislation because we believe that children should not be penalised for the rest of their lives if they suffer catastrophic injuries in circumstances of which they had no understanding. That is a fundamental point on which the Government will not compromise.

Mrs C.L. Edwardes: I thank the parliamentary secretary for his interpretation of the reason behind the proposed section. How can there be a risk warning when a parent is absent?

Mr M. McGOWAN: Bearing in mind that a child is defined as a 16 or 17-year-old, it covers a situation in which a form might be sent home seeking approval for a child to attend a school camp or an outing. It is a fairly reasonable way of approaching this situation. It will allow the great tradition of school camps to continue.

Mrs C.L. Edwardes: What if a parent drops off a child at a sporting venue where a sign is provided but in a place where the sign is not visible?

Mr M. McGOWAN: In that circumstance, the parent will not have accepted the risk warning. The definition of child appears later in that provision under proposed subsection (16) and it means a person who has reached 16 but is under 18 - a person aged 16 or 17. In that circumstance my interpretation would be that the parent has not accepted that particular risk on behalf of the child.

Mr D.F. BARRON-SULLIVAN: I want to clarify a couple of things in the lead-up to proposed new section 5J. Proposed new section 5E provides a definition of "dangerous recreational activity". Not having a legal background, I would like an explanation of how this definition will be interpreted by the courts. I am mindful of the fact that what is said in the second reading stage is important in this respect. I would appreciate it also if the parliamentary secretary could give some examples of activities that will be deemed dangerous recreational activities. I imagine that skydiving and rock climbing will be deemed dangerous recreational activities. However, what about wall climbing in a recreation centre? What about football? What about hockey, where a dirty big chunk of wood comes towards the players at a rate of knots? I am not saying this flippantly, but it may even extend to shopping. That is the first question, and it should be fairly easy to answer.

Proposed new section 5E also provides a definition of "obvious risk". This is dealt with in more detail in proposed new section 5F, which is the reasonable person test. Proposed subsection (1) states that it is "a reasonable person in the position of that person". I imagine that refers to people who are blind or infirm. Is the reasonable person test an entirely objective test or can it be deemed to be a reasonable person of the same age as the plaintiff; for example, a small child, or a 17-year-old?

Mr M. McGOWAN: The member has asked me how a court will interpret the definition of "dangerous recreational activity" in proposed new section 5E. I am not a judge, so I cannot give an exact description of how a court will interpret this provision. Dangerous recreational activity cannot be defined exactly. Australians have an incredible capacity to undertake dangerous recreational activities in thousands of different forms. It would

require hundreds of pages to define them in any comprehensive way in a Bill. I have heard of sports that involve people diving under water without air tanks down to a depth of 20 or 30 metres and then waiting for tuna to swim past, which they then spear and wrestle to the surface. That is the sort of thing that I am sure some of our country members might like to engage in, but it is not something that I would engage in. It is a dangerous recreational activity I am sure. There are a range of climbing, swimming, skydiving and running activities and various sports and social occasions that one could say are dangerous recreational activities. I remember from my days as a university student that a range of dangerous recreational activities were undertaken on Friday evenings that would probably qualify for this provision. It is far too difficult to define them all. That is the reason we have courts, and the courts will no doubt build up a body of precedent about what constitutes a dangerous recreational activity, and that body of precedent will guide other courts and also other people on whether they are able to bring an action in the future.

Mr D.F. BARRON-SULLIVAN: I understand that, but one of the controversies that arises is when courts effectively determine the law by interpreting the law. The parliamentary secretary has the opportunity to give some degree of assistance to the courts on how they should interpret this provision. Proposed new section 5I is headed "No liability for harm from inherent risks of dangerous recreational activities". The obvious question is whether that will apply to skydiving. Will there be any liability for harm from skydiving activities? Although much of the interpretation of this legislation will be left to the courts, some guidance would be appropriate, if for no other reason than to start to peg back on the areas in which liability will apply.

Mr M. McGOWAN: I understand the point the member is making. I will leave it to the courts. I think deep-sea diving to catch a tuna with one's bare hands is one example of a dangerous recreational activity. I expect that skydiving will be classed in anyone's language as a dangerous recreational activity. There is a range of such activities. I cannot give an exact definition, despite the member's efforts to get me to do so. The second question is the reasonable person test. That is a mixed subjective-objective test, which is a common concept in the law. The Ipp report states at page 63, with regard to the phrases "in the circumstances" and "reasonable person in the position of the participant" -

> These should give ample room for the law to develop flexibly to provide protection for people who are not in as good a position as a fully capable adult to take care for their own physical safety or to discern the risks of recreational activities in which they participate or which they observe.

It is a mixed test. It is particularly designed to take account of a child as defined in the Act and that person's interpretation of the circumstances that may exist at the time.

Mr D.F. BARRON-SULLIVAN: Aeons ago during the second reading debate it became obvious that proposed new section 5J is a crucial area of distinction between the approach taken by the Government and the approach that the Liberal Party would like to take. I think the parliamentary secretary alluded to that earlier, in response to a question from the member for Kingsley. We have questioned previously why the Government did not go down the path that New South Wales has gone down and provide for risk warnings to apply more broadly. When we looked at this part of the legislation a couple of things became apparent. One was that the Government did not want risk warnings to apply to children under 16 years of age, even if risk warnings were via their parents or guardians, responsible adults or whomever; in other words, it was quite clear - I think the parliamentary secretary made it clear - that the Government did not want to enable the parent to accept a risk warning on behalf of a child if the child is under 16 years of age. The Government's position is that if a child is between 16 and 18 years of age, a parent can accept the risk warning on his or her behalf, but if a child is under 16 years of age, the parent cannot.

Some of the amendments on the Notice Paper are sequential. If one is not acceptable, it may be that we will withdraw others. However, I will talk through the amendments in a little detail because they are important. The second aspect of the clause that we picked up was what we thought was a drafting error. It seems that was the case, because the parliamentary secretary has two amendments on the Notice Paper, which I think pick up a point that we raised earlier.

It is clear that the Labor Party does not want parents accepting risk warnings on behalf of children under 16 years of age, whereas we are quite comfortable with that. This is not in any way to deny any legal redress for children who might be hurt when undertaking particular activities. We believe in the notion of personal responsibility. We believe that parents should be able to make a decision as to whether their children should undertake those activities. The same thing should also apply to people with disabilities. Unfortunately, the way in which this part of the Bill is structured will have a negative impact on people with disabilities and children under 16 years of age. I will not go through all the detail again, but the sorts of examples that we gave last time included a business that might hire out go-karts. At the moment only five or 10 per cent of its custom may be from children under 16 years of age. Such businesses might say that they cannot simply put a sign on the wall or a notification on a ticket that constitutes a risk warning for children under 16 years of age and their parents

cannot accept a risk warning on their behalf, so they will put up a notice saying that they do not rent out go-karts to children under 16 years of age. In that way they know that it will be easier for them to get insurance and they hope that their insurance premiums will be lower. It means that they might give up some of their trade. It certainly means that younger children will not be able to use their go-karts. However, because of the way things are structured, it may be that their lawyer or whoever has advised them that that is the way to go. We can see that, purely from a business point of view, people will make a decision to limit services to younger children. Where it becomes difficult because of antidiscrimination laws is that - dare I say it - they might be reluctant in some areas to provide services to people with disabilities for the simple reason that they know that the risk warning cannot apply.

I would appreciate some comment. We do not need to go into a lot of detail because we did so with the parliamentary secretary. However, it is apparent from the amendments in the Government's name on the Notice Paper that the Government is sticking to its position of not allowing risk warnings to be picked up by parents on behalf of children under 16 years of age.

Mr J.C. KOBELKE: I am standing in for the parliamentary secretary who has had to catch a plane in order to represent the Premier at an interstate ministerial conference. I will obviously be relying on the people with the expertise.

I accept what the Deputy Leader of the Opposition has said about the different positions. It is a matter of balance, as with all these issues. Although we have moved in a whole range of ways to reduce the liability through insurance and therefore make insurance more readily available, we also wanted to make sure that we gave protection where it was needed. Young children under 16 years of age are clearly the most vulnerable. Therefore, we were not at this stage willing to move to - as the member has suggested - the Liberal Party position.

Mr D.F. BARRON-SULLIVAN: I move -

> Page 11, line 4 - To insert after "person" the following -
>
> who is not a child

It is quite clear that the Government will not accept this amendment. It links in with another amendment on page 16 of the Notice Paper, which is the second amendment in my name and probably the most crucial from our point of view. Under that amendment, which applies to page 13, we would like to see lines 13 and 14 changed so that the definition of child encompasses people who are under 16 years of age. Therefore, the essence of the first amendment in my name feeds into the main amendment. We have the opportunity to apply this legislation to enable risk warnings to be accepted by parents of children under 16 years of age. The amendment goes to our fundamental belief in personal responsibility and that families should be able to determine what is good and proper among themselves and that parents should be able to make decisions on behalf of their children.

The legislation contains enough provisions to provide safeguards, security and legal redress when appropriate if a child was involved in an accident and there was reckless disregard for safety in those circumstances. However, by not providing the leeway in the Liberal Party's amendments, adverse consequences will occur. The advice we have obtained from the business sector and people involved in insurance is that there is a high degree of concern that some services will be restricted for younger people. Alternatively, it will mean that those businesses that rely on providing recreational services to children and that cannot close their doors to younger customers will find that their insurance problems continue. They will still pay spiralling insurance premiums or, in many cases, they simply will not be able to get insurance.

Unless we agree to this amendment and to the subsequent amendments standing in the Liberal Party's name, we think that the impact of this legislation will be quite significantly reduced. As we said earlier, this is good legislation overall. I have said that the Liberal Party supports the broad thrust of it. The member for Kingsley has raised some very important technical and legal questions, many of which will only ever be resolved in time as the courts start to interpret aspects of this legislation. However, we know now that unless a change is made to proposed section 5J, the scope of the legislation will be curtailed quite significantly.

This amendment links in with the later, perhaps more significant, amendment. It would enable risk warnings for children under 16 years of age to be accepted by their parents; hence the need to amend proposed section 5J(1).

Mr B.J. GRYLLS: The National Party is also extremely concerned about children under 16 years of age not being covered by the scope of this Bill. We have amendments similar to those put forward by the Liberal Party, to try to bring children under 16 years of age into this equation. What we are trying to achieve with this Bill is to have businesses, recreational groups and similar bodies understand that they can continue. The problem that arises when children under the age of 16 are not included is that people will be excluded from this type of

legislation. I completely agree with the member for Mitchell that the simplest way to deal with these recreational activities is for a sign to be erected that states that those under 16 years of age cannot participate. However, that would disappoint many people. As a young person in the country, I spent many a time in a go-kart or on a horse. I engaged in recreational activities that not only country people but also all Western Australians enjoy. One of the major reasons that public liability insurance legislation is in the Parliament is that we do not want to get to a stage at which young people are denied access to those activities because of public liability insurance.

This issue is of great concern. I will be disappointed when one of my constituents telephones me and says that little Sarah cannot go to pony club any more because children under 16 have been excluded, but mum is allowed to ride the horse. Therefore, little Sarah will be sitting in the car while mum rides around the pony track. As the member for Mitchell said, this is a pivotal part of the legislation. I believe that members on this side of the House all agree that parents should be able to take responsibility for their children. If they take responsibility for their children, they can assess the risks that are inherent in those activities. Those activities will still be available to the younger generation if the risk is assessed and some protection is given under this legislation to the people who provide those activities.

Another point that needs to be recognised is that the younger the child, the bigger is the liability focus that the insurance company must have. With the statute of limitations extending to 18 years plus seven, for 25 years an insurance company must hold cash in reserve to cover any future claims by an injured party. The biggest concern an insurance company has when it frames the insurance market it is about to enter is the number of young people it will be exposed to. An insurance company may cover a car. If at the end of 12 months that car is not damaged, the insurance company is no longer exposed to a risk. If the insurance company has to cover a 12-year-old child, it will be exposed to a risk until that child turns 25. The insurance companies are saying that their greatest concern is to have an asset base to cover the risk. That is a change that has been brought about by the collapse of HIH Insurance and the changes in the insurance industry in the past couple of years. The legislation before us today explicitly excludes people under the age of 16. Therefore, there will be no noticeable change in the premiums for those activities that will involve people under 16. I return again to the reason that we are here today taking away people's rights: it is to put downward pressure on insurance premiums. If that will not happen, we should not be taking away people's rights.

Mr J.C. KOBELKE: The debate is ranging widely to deal with fundamental issues, rather than simply the amendment that is now before the House. The Government recognises that in this and other legislation, people's rights at law are being removed so that fewer people will receive payouts through litigation. Therefore, policies and lower premiums will be available in areas in which there has been a threat to withdraw policies, or in fact they have been withdrawn, because of the high cost of litigation. If all that was driving this legislation was the desire to reduce insurance premiums and make insurance available, rights could be reduced even further. The line must be drawn somewhere; and that is based on what the effect will be on the rights and the lives of individuals, and also on the whole insurance system.

The Government is doing a range of things, such as looking further into limitation laws, to which the member for Merredin referred. The Government is improving the standard of care required in certain areas. On this point, it is the Government's judgment, which is different from that of the Liberal and National Parties, that the most vulnerable members of our community - that is, people under the age of 16 - should have a greater level of protection. We believe we should leave the situation as it is, rather than make the changes proposed. By doing that, the insurance system will still improve, premiums will still be lower, and insurance will be more readily available. We accept that there will be a shift in different sectors of the market - different forms of coverage. However, the Government is determined that premiums will be reduced. Many issues are involved in that, not just this issue. It also relates to the way in which insurance is written across the whole of Australia. Insurance companies do not necessarily market just for Western Australia. The Government is following what is happening on the national scene. This State will not be totally in step with every element in the other States, but it will be part of the international insurance market and will get the benefits of that. However, in this area we believe that the most vulnerable people - young people - should have a higher level of protection at law than what is contained in this amendment. Therefore, it is not acceptable to the Government.

Amendment put and negatived.

Mr D.F. BARRON-SULLIVAN: I move -

Page 11, after line 14 - To insert the following -

(3) If an incapable person suffers harm, the defendant may rely on a risk warning to a person, who is not an incompetent person, who was apparently in charge of or responsible for the incapable person at the time of the warning.

I shall not go through this in great detail, because again this was covered earlier. The effect of this amendment is that a parent of a child who has some form of disability would be able to accept the risk warning on behalf of his or her child. That is just one commonsense example of what we are talking about. How restrictive this would be is open to debate. Obviously, businesses will not discriminate against people because they perhaps have a physical disability. Again, it goes to the question of personal responsibility and the fact that parents, guardians and responsible adults should be able to accept a risk warning on behalf of the people they are looking after. We discussed some possible scenarios when this arose last time. I shall not dwell on this, because we genuinely want this legislation to pass through the Parliament as quickly as possible. It has been made quite clear that the Government will not support this amendment.

Mr J.C. Kobelke: For similar reasons, the Government cannot accept this amendment.

Mr D.F. BARRON-SULLIVAN: Absolutely. However, I wanted to get the Opposition's stance on this issue on the record.

Amendment put and negatived.

Mr D.F. BARRON-SULLIVAN: I move -

Page 11, line 20 - To insert after "(b)" the following -

at the time of or after the warning was given and prior to the child suffering harm

The minister may want to think about taking this on board. The Opposition has received legal advice on this issue. Currently, proposed section 5J(3) states -

If a child suffers harm, the defendant may rely on a risk warning to another person who is not a parent of the child if -

(a) the other person is not an incompetent person; and

(b) either -

(i) the child was accompanied by that other person; or

(ii) the child was under the control of that other person.

The provision does not state that that needs to be done after the risk warning was given and prior to the child suffering harm. In other words, the risk warning could be given after the child is hurt. The effect of the simple wording of the amendment is that the risk warning cannot be given after the child has been hurt. Our interpretation of the current wording is that the child may be accompanied by the adult and be under the control of that person. The accident may happen and the child may be hurt. The owner of the business may then provide a risk warning to the person. It struck us that unless something else in the Act cuts in, firm clarification is needed to ensure that the accident had happened after the risk warning had been issued. It is a very simple provision. Unless there is a catch-all phrase elsewhere in the legislation, this might be worth considering.

Mr J.C. KOBELKE: I am advised that this part of the Bill is identical to the drafting of the legislation in New South Wales. It does not have a provision of the form proposed. Perhaps a warning could be given after the accident. My advice is that that would not fit with the meaning of the word warning. A warning must be given before or at the time the person undertakes the activity. That part of the argument is not supported by the amendment.

Mr D.F. BARRON-SULLIVAN: Can the minister point to the part in the Bill that specifies that a warning must be given before the accident takes place?

Mr J.C. Kobelke: It is just by common usage and the general interpretation of the word.

Mr D.F. BARRON-SULLIVAN: However, it does not say prior warning.

Mr J.C. Kobelke: True.

Mr D.F. BARRON-SULLIVAN: This has been on the Notice Paper for almost a month. I earnestly suggest that before the Bill goes to the upper House, the Government consider this aspect. I realise the situation with New South Wales. However, as the parliamentary secretary said earlier, the Government is not trotting down the path of the New South Wales provisions all the time. The advice we have received from people with a good legal

background is that this could be quite a substantial loophole. For the sake of a bit of tidying up or trimming, it might be worth obtaining some comprehensive legal advice.

Mr J.C. Kobelke: I am happy to give the undertaking that I will ask the parliamentary secretary and the minister responsible to consider the member's amendment.

Mr D.F. BARRON-SULLIVAN: On the basis of the minister's undertaking, I seek leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Mr D.F. BARRON-SULLIVAN: In that case, I move -

> Page 12, line 11 - To insert after "in" the following -
>
> > or is given generally by another person for the benefit of people engaging in the activity in respect of which the risk warning is given

This amendment is to proposed section 5J(8). The proposed subsection would then read -

> A defendant is not entitled to rely on a risk warning unless it is given by or on behalf of the defendant or by or on behalf of the occupier of the place where the recreational activity is engaged in or is given generally by another person for the benefit of people engaging in the activity in respect of which the risk warning is given.

I suppose it is self-explanatory. It simply broadens the provision of proposed subsection (8) and will have some practical application. It touches on matters that have been discussed previously. I realise that the minister is filling in for the parliamentary secretary. Again, if the minister is prepared to indicate that he will give this -

Mr J.C. Kobelke: Our legal advice is that it makes it more open ended and therefore creates greater uncertainty. On that basis, our legal advice is that we cannot accept it. I am not saying that the intent could not be picked up in another way. The amendment as drafted leads to greater uncertainty and therefore is not acceptable.

Mr D.F. BARRON-SULLIVAN: Would the minister be prepared to look at another way of covering the intent of this amendment? I am suggesting not that he commit to it at the moment, but that it be looked at and reported in the upper House when it reaches that place.

Mr J.C. Kobelke: Can the member explain more clearly what he is trying to achieve by this amendment?

Mr D.F. BARRON-SULLIVAN: Exactly what it says; that is, to broaden the provision a bit. At the moment under the provision, a businessperson is not entitled to rely on a risk warning unless it is given by that businessperson or by or on behalf of the occupier of a place where the recreational activity is engaged in. The defendant or the occupier of the place must provide the risk warning. We are suggesting that the provision be broadened to cover employees or other people associated with organising an activity, so that they can accept that responsibility. Again, all we are trying to do is ensure that there is not a practical constraint in the business sector in which recreational activities and so on are undertaken.

Mr J.C. KOBELKE: As I said earlier, this amendment broadens the provision and makes it vaguer. People standing in a queue to get on some sort of amusement equipment could be advised by someone passing by. What does that mean? It may be a well-founded warning or it may be totally frivolous, unrelated or ill-founded and yet prove to be coincidental and align with something that in the end happens. It opens it up in a way that makes it far too vague. On that basis, we cannot accept it. Looking for further advice is not likely to cause us to move very far from that position.

Amendment thus negatived.

Mr D.F. BARRON-SULLIVAN: Proposed subsection (11) states that a defendant is not entitled to rely on a risk warning if the plaintiff was required to engage in the recreational activity by the defendant. I presume that this refers to school sports, compulsory camps and so on. I presume that children who are given a voluntary opportunity to go on a particular activity from school will be in a different situation. For example, what happens when the activity is part of a curriculum but the child's parents do not pay a fee to send their child on the course or to the camp and the child does not participate? Is that deemed to be a voluntary activity or is the child required to engage in the recreational activity? This could be important, particularly for the different school activities that are undertaken. If the organiser of an activity is able to require somebody to undertake that activity - a school activity is probably not a good example because a lot of the participants will be under the age of 16 - I can understand how this proposed subsection would apply. However, it would be a little unfair on the

defendant if someone else was able to require the plaintiff to undertake that activity. Can the minister see the point I am getting at?

Mr J.C. KOBELKE: I will address the amendment that has not yet been moved. It would simply repeat what is already in the Bill. My advice is that it does not add any further clarity or meaning to what is already drafted in proposed subsection (11). If it were mandated that the plaintiff be involved in the recreational activity - the simplest example of that would be an employee who may be required to be involved in conducting the activity of paintballing or riding on a particular piece of equipment as part of his employment - the defendant could not rely on the risk warning.

Mr D.F. BARRON-SULLIVAN: I take the minister's point that the words at the end of the subsection "by the defendant" seem to cover this point. I will go back to my notes to see why we deemed it important to put this after the word required. That is something I can take up with my counterpart in the upper House. I will not move this amendment or my next, because the next amendment on the Notice Paper is a government amendment.

Mr J.C. KOBELKE: I move -

Page 12, line 32 - To delete "incapable" and substitute "incompetent".

This is a drafting error that needs to be corrected.

Mr D.F. BARRON-SULLIVAN: It is good to see that the Government picked up on this point without acknowledging that it was pointed out earlier that it appeared to be a fairly simple drafting error. This amendment in isolation confirms the Government's approach to proposed new section 5J and the fact that ultimately it will limit the application of the risk warnings. We will not stand in the way of this amendment because it will make this section operate in the way the Government intends, but I again put on the record that we think this provision should be far more broad.

Amendment put and passed.

Mr B.J. GRYLLS: Before I move my amendment, I wish to ask the minister something. We have reached a very important part of the Bill concerning the age restriction. Before the parliamentary secretary left we were engaged in a two-way debate. We were discussing the relative merits of the Bill. Earlier the minister said we would go a little beyond 5.00 pm and then draw the debate to a close. Before moving my amendment, will the minister give me an opportunity to debate this point with the parliamentary secretary? I would like the minister to finish the debate now and give me the opportunity to move my amendment with the parliamentary secretary at the Table so that we can continue our robust debate, because without that we will not get the true recognition of this important fact.

Mr J.C. KOBELKE: The member has entered into this debate in a meaningful way, but we have dealt with an earlier amendment put by the Deputy Leader of the Opposition to the same effect. I have already responded on a couple of occasions about why the Government has made a different judgment on the need to provide a greater level of protection for the most vulnerable; that is, young people under the age of 16. That is a matter of judgment. The member's proposed amendment goes to the same area and we have a difference of opinion. I am reflecting the Government's opinion, which was formed in Cabinet when we looked at a range of views, and the Government has decided on a range of issues to improve the system. It is making changes to reduce liability, thereby reducing premiums and making insurance more readily available, but it must rule the line somewhere. At this point we differ on where that line should be drawn.

Mr B.J. GRYLLS: I acknowledge what the minister has said, but during the consideration in detail stage we have had robust, two-way conversations and the opportunity to explore ideas before the legislation goes to the upper House. The minister is telling me that that is not the case. That is very disappointing, because when the parliamentary secretary left he assured me that, although my previous amendment would not be agreed to in the lower House, he would pursue it to see what could be achieved in the upper House. I believe that to be the function of the consideration in detail stage of this debate. The Opposition and the Government should work together to come up with the best outcome for this legislation.

Mr J.C. Kobelke: That earlier matter, which I was following, did not relate to persons under 16 years of age. I followed and understood what the parliamentary secretary said in that respect, but when we were debating the issue about 16 year-olds just before he left we were dealing with a different issue, on which the Government had a clear position. That is what I have tried to explain to the member.

Mr B.J. GRYLLS: I know the Government has a clear position, but during the consideration in detail stage the Opposition has the opportunity to put its position in an endeavour to arrive at a satisfactory outcome. The minister spoke about adjourning the debate at this stage, and I asked him to consider doing that.

Adjournment of Debate

Mr B.J. GRYLLS: For that reason, I move -

That the debate be adjourned.

Question put and a division taken with the following result -

Ayes (9)

Mr R.A. Ainsworth	Mrs C.L. Edwardes	Ms S.E. Walker
Mr D.F. Barron-Sullivan	Mr B.J. Grylls	Dr J.M. Woollard
Mr J.H.D. Day	Mr R.F. Johnson	Mr J.L. Bradshaw *(Teller)*

Noes (24)

Mr P.W. Andrews	Mrs D.J. Guise	Ms S.M. McHale	Ms J.A. Radisich
Mr J.J.M. Bowler	Mr J.N. Hyde	Mr A.D. McRae	Mrs M.H. Roberts
Mr C.M. Brown	Mr J.C. Kobelke	Mrs C.A. Martin	Mr D.A. Templeman
Mr A.J. Carpenter	Mr F.M. Logan	Mr M.P. Murray	Mr P.B. Watson
Mr A.J. Dean	Ms A.J. MacTiernan	Mr A.P. O'Gorman	Mr M.P. Whitely
Dr G.I. Gallop	Mr J.A. McGinty	Mr J.R. Quigley	Ms M.M. Quirk *(Teller)*

Pairs

Mr B.K. Masters	Mr E.S. Ripper
Mr R.N. Sweetman	Dr J.M. Edwards
Ms K. Hodson-Thomas	Mr N.R. Marlborough

Question thus negatived.

Consideration in Detail Resumed

Mr B.J. GRYLLS: I move -

Page 13, lines 13 and 14 - To delete "who has reached 16 years but is".

The debate has been held about the effect of not covering children under the age of 16 years in this legislation. By not accepting this amendment, the Government will fail to address a fundamental area; namely, parents accepting responsibility for their children. The flow-on effect will be that children will be excluded from many activities they are used to attending, which would be a disappointing result. The Liberal Opposition and the National Party have made it clear that children under the age of 16 years should be included within the scope of the Bill. It is disappointing that the minister has indicated that he will not accept the amendment, and that the merits of the argument will not be debated with the parliamentary secretary.

Mr D.F. BARRON-SULLIVAN: I lend the Liberal Party's support to the National Party amendment in the same way that the Nationals supported the Liberal amendment. We came to the same problem from slightly different angles and produced slightly different draft amendments, but, in essence, they would have achieved the same outcome. The Liberal Party believes in the fundamentally important notion of personal responsibility. A lot of discussion has taken place about the New South Wales legislation proclaimed in December last year, which went to the next level when compared with the Civil Liability Amendment Bill. Interestingly, the New South Wales legislation was titled the Civil Liability Amendment (Personal Responsibility) Act 2002. New South Wales, under a Labor Administration - dare I say it - can claim credit for applying "personal responsibility" through its legislation. The Government cannot make the same claim with the Civil Liability Amendment Bill because it does not support the Opposition's amendments.

The member for Merredin reiterated a point made a number of times in this Chamber; namely, the concern in the business community and among people who provide recreational activities that services for children will be curtailed. In addition, problems will continue in relation to insurance premiums and access to insurance policies. I used the example of a little business that hires out motorcycles and pays through the nose for insurance. Some such businesses find it impossible to obtain insurance. A significant proportion of the clientele of these businesses is under the age of 16 years. The scope of the legislation is limited, and its beneficial impact for people in the business community and sporting organisations as a whole will be considerably limited.

It is disappointing that the Government will not accept either the Liberal Party or National Party recommendations. It was made clear that if the Government thought this was a politically hot potato and was

worried about flak in the community as a result of enabling risk warnings to be assumed by parents on behalf of children, the Opposition was prepared to share that burden with the Government. The Opposition wanted to work with the Government to tighten up the Bill. I had a private discussion with the parliamentary secretary and offered all the assistance we could provide in that regard. It is disappointing. As I said, the legislation is still good legislation and it will still have an impact, but only time will tell how limiting this clause will be.

Amendment put and negatived.

Mr D.F. BARRON-SULLIVAN: I will not move the next amendment in my name as I think it would be futile to waste the time of the Chamber.

Mr J.C. KOBELKE: I move -

Page 13, lines 15 to 17 - To delete the lines.

This amendment is consequential to the Government's earlier amendment to the Bill.

Mrs C.L. EDWARDES: I support this amendment, primarily because the definition has no further relevance following the amendment of the term incapable person in proposed section 5J(13). There is no other reference to it in the legislation. The amendment also addresses the possibility of a 17-year-old being an accompanying person or even a parent.

Amendment put and passed.

Mr D.F. BARRON-SULLIVAN: I move -

Page 13, line 20 - To insert after "disability" the following -

which is apparent to a reasonable person

This is a commonsense amendment. An incompetent person means a person who is under 18 years of age or who because of a physical or mental disability lacks the capacity to understand the risk warning. I think it would make sense to include these words so that the definition refers to someone who, because of a physical or mental disability that is apparent to a reasonable person, lacks the capacity to understand the risk warning. The amendment is self-explanatory. Someone operating a business or some sort of recreational activity may not necessarily know that a person has a physical or mental disability, and that person may not point out the disability. This is simply a commonsense amendment to ensure that somebody does not inadvertently get caught out.

Mr J.C. KOBELKE: It is not possible to accept this amendment as it would open up a range of issues. For example, a person may have a decision-making disability, which would not be apparent. It is suggested to me that a range of issues would arise if this were included. The amendment goes beyond what we are willing to accept.

Amendment put and negatived.

Mrs C.L. EDWARDES: I refer the minister to proposed section 5J(9) on page 12, which states -

> A defendant is not entitled to rely on a risk warning if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a written law, or a law of the Commonwealth, that establishes specific practices or procedures for the protection of personal safety.

Could the minister outline exactly what is provided here?

Mr J.C. Kobelke: We have moved past this proposed section.

Mrs C.L. EDWARDES: I am still dealing with clause 8, even though amendments have been moved.

The SPEAKER: It is still being debated but it is not possible to move an amendment to any proposed sections listed before an amendment.

Mrs C.L. EDWARDES: Are we talking about Australian standards? Why were they not specifically referred to? What else is being provided other than Australian standards?

Mr J.C. Kobelke: The clause indicates that a risk warning cannot be used to waive standard requirements such as those for health and safety or machinery advice that has standing through codes or other means.

Mrs C.L. EDWARDES: A code of practice that is not regulated would not be incorporated, but would it be by legislation or by delegated legislation?

Mr J.C. Kobelke: It might be a code that sits under such legislation.

Mrs C.L. EDWARDES: Although I know that workers compensation is excluded from this, it is an area that the minister and I know well. A series of regulations incorporate various Australian standards. Would that be applicable if workers compensation legislation were to apply?

Mr J.C. Kobelke: It would apply if it were given effect by law.

Dr J.M. WOOLLARD: I would like clarification on proposed section 5J(6), where it states that a risk warning can be given orally or in writing, including by means of a sign or otherwise. What would happen if it were in writing but the people undertaking activities were unable to read?

Mr J.C. KOBELKE: The answer to the member's question is in subsection (4), which provides that the risk warning to a person about a recreational activity must be given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity.

Dr J.M. WOOLLARD: That does not necessarily answer my question. If someone is unable to read and there is no provision to ensure that an explanation is provided to people, what would happen if an accident occurred? It does not give a clear explanation of the options open to someone who cannot read or write.

Mr J.C. KOBELKE: The courts would apply the test according to this legislation. I have referred to another clause. The member missed the earlier debate.

Dr J.M. Woollard: I thought that was the proposed section under discussion.

Mr J.C. KOBELKE: The earlier debate revealed that some people feel very strongly that children should not have protection. There is a move to reduce protection even further because it will help keep premiums down.

Dr J.M. Woollard: I would like to see more protection.

Mr J.C. KOBELKE: We have had that debate. The Government has voted against a number of amendments because it is the Government's judgment that there should be greater protection. I might be wrong, but I got the impression that the member for Alfred Cove was looking for greater protection in this area.

Dr J.M. Woollard: Yes.

Mr J.C. KOBELKE: The object of this legislation is to reduce people's rights in a range of measured ways so that the insurance industry can provide the required cover at a reasonable price. A provision contained in proposed section 5J(6), and conditioned by other proposed sections, particularly 5J(4), is part of the whole package. It is fairly clear what the meaning is, but in due course it will be a matter of case law and we will see how it is interpreted.

Mrs C.L. EDWARDES: I refer the minister to proposed section 5J(4). I know that proposed section 5J(6) refers to a sign, which is what the member for Alfred Cove was talking about, in relation to a blind person. Does proposed section 5J(4) mean that, if the defendant were relying purely on a sign, a blind person would not be reasonably likely to be considered to have been warned? Is that what the minister is suggesting? Does it go further and require that the sign must be reasonably placed? If it is not reasonably placed - if it is stuck behind a tree, or if the entrance is not the only entrance and people cannot be expected to see it as they go either through the gate, into the park, or whatever - does that also mean that a defendant cannot rely on that warning? Does it also apply to other than a blind person? Does it also add the extra protection that the defendant must have placed the sign in a such way that any person would be expected to have been warned? If it is not visible to a blind person, or even to a sighted person, it is not a warning that could reasonably have resulted in that person accepting the warning.

Mr B.J. GRYLLS: I refer to proposed section 5J(11), which reads -

> A defendant is not entitled to rely on a risk warning if the plaintiff was required to engage in the recreational activity by the defendant.

I would like the minister to spend a couple of minutes explaining how that could take place.

Mr J.C. Kobelke: I did that a while ago, for the member for Mitchell.

Mr B.J. GRYLLS: Is the minister sure of that?

Mr J.C. Kobelke: Yes.

Mr B.J. GRYLLS: When the plaintiff is required to engage in a recreational activity by the defendant, could the minister confirm that that would be the case for a worker in a recreational activity?

Mr J.C. Kobelke: Yes, an employee; that is one example I gave.

Mr J.C. KOBELKE: It is the intention of the House to rise fairly soon, but it would be useful if the member for Merredin moved his fairly large amendment, which starts towards the bottom of page 16 of the Notice Paper.

Mr B.J. GRYLLS: I move -

Page 14, after line 28 - To insert the following -

Division 5 - Professional negligence

5L. Standard of care for professionals

(1) A person practising a profession (a professional) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.

(2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.

(3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.

(4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

5M. Division does not apply to duty to warn of risk

This Division does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in respect of the risk of death of or injury to a person associated with the provision by a professional of a professional service.

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

House adjourned at 5.58 pm