## CIVIL LIABILITY AMENDMENT BILL 2003

*Second Reading*

Resumed from 7 May.

**MR D.F. BARRON-SULLIVAN** (Mitchell - Deputy Leader of the Opposition) [10.08 am]: The Liberal Party very strongly supports this legislation. I have indicated that we are prepared to work in a constructive and positive way with the Government to ensure that this legislation has the maximum benefit for small businesses throughout Western Australia and for community and sporting organisations everywhere.

I want to turn specifically to the impact that this legislation will have on recreational activities. Without a doubt it is an area that has been severely impacted upon as a result of the public liability insurance problems that have emanated since the collapse of HIH Insurance more than two years ago and a range of subsequent events. It is interesting to see that the Ipp report looked at the leisure industry and determined that special rules should apply when there is voluntary participation in recreational activities. The Ipp report found that those rules should apply not just to personal recreational activities but also those conducted by business. As I said yesterday, from the Liberal Party's point of view, this is where this legislation really starts to get to the nub of the matter. It really will benefit small business throughout Western Australia, especially people involved in tourism, recreational activities and adventure tourism in particular. Members would be very familiar with the problems that emanated in the legal field with what is known as the Nagle case at Rottnest some years ago. It opened up a Pandora's box and set a precedent for public liability. The Gracetown tragedy is an extreme example of the sort of situation this legislation confronts.

The Bill will set up a two-tier framework to deal with public liability in relation to recreational activities. This is another example of how the Bill reflects the model put in place in New South Wales.

The first stage of assessing whether liability arises for harm derived from some recreational activity is to determine whether there was an obvious risk of dangerous recreational activity. According to the legislation, no liability arises for harm derived from obvious risk of dangerous recreational activity. The second stage of the assessment framework is that other recreational activities will be covered by risk warnings and waivers. I will talk about this aspect a fair amount because the concept of risk warnings is crucial to the small business sector in particular, and it is vital that Parliament ensure that the provisions are workable and sufficiently comprehensive to benefit the small business community as a whole.

This is another example of the Government going a little further than the Ipp report recommended. In copying the New South Wales approach, the Government has taken the right route. Provided risk warnings and waivers work in the way we understand them to work, and provided the legislation is tidied up a little today and in the upper House - the Opposition is prepared to work with the Government in that regard - it is clear the provisions will have enormous scope. For example, a number of tourism rail operations are found in the State, such as that in the electorate of Warren-Blackwood and that in my electorate from time to time, and our reading is that such activity will be covered by the provisions. The Bill extends to activities like ballroom dancing and even sunbaking. The scope of protection offered by the provisions could be considerable, provided we get the wording of the legislation right. The Liberal Party suggests it is necessary to tighten up this aspect of the Bill.

This Bill is about restoring the notion of personal responsibility. It is about allowing parents, for example, to assume a risk on behalf of their children, and allowing adults to assume some risk for themselves. How often have we seen examples of people attending a motor sporting event as spectators and subsequently being injured, and then legal action has resulted? With a number of examples we say, "Crikey, commonsense dictates that you know what you're getting yourself into!" Provided adequate risk warnings are given, such as entry ticket warnings and signs installed so the situation is patently obvious, surely commonsense dictates that people should not have the right to make a public liability claim as a result of such an accident. The Bill's provisions will provide that security and boost the notion of personal responsibility dramatically.

The Bill will achieve this in a couple of ways. First, as mentioned earlier, it considers the concept of obvious risk; that is, something that would have been obvious to a reasonable person from the position of that person. For example, if a person is blind or deaf, the courts would evaluate that circumstance when determining whether an obvious risk existed. If an obvious risk were found, exclusion from liability would result.

I referred earlier to the definition of dangerous recreational activity. We may need to go into that definition further during consideration in detail. According to the legislation, this activity involves a significant risk of harm. Commonsense is to be instilled into the legislative framework governing public liability arrangements. I focus now on risk warnings. During my contribution to the second reading debate, I will go into some detail to illustrate concerns about the wording of the legislation. The Opposition is not convinced that the Bill picks up

the Government's intentions. I will also indicate why the Liberal Party believes the legislation should be firmed up considerably. I will refer to proposed section 5J of proposed part 1A found in clause 8 of the Bill. I will not go through it in detail at this stage. However, these provisions ensure that there will be no liability for harm arising from a voluntary - I stress that word - recreational activity that was the subject of a risk warning. A definition is provided as to what constitutes an appropriate risk warning. It will let people assume the risk associated with any voluntary recreational activity. In other words, it will provide for genuine personal responsibility. It is not open ended. It does not include situations, for example, involving reckless disregard. As such, it is not a blank cheque for any adventure tourism operator to escape liability if he or she is not running the operation properly.

A provision outlines that risk warnings can be provided in writing, and that the wording associated with the warning can be very general. That is important. The more prescriptive one becomes in these matters, the harder it becomes for people in small business and community organisations to be guaranteed exemption from liability when providing risk warnings. Having said that, the legislation makes specific provision that an operator cannot underestimate a risk. If it is clear that an operator has deliberately underestimated a risk, and the risk warnings were not adequate, the operator may not have a defence at law.

Verbal risk warnings are provided for in the Bill. Again, that is very important for the tourism industry. Charter boat operators and a range of other businesses would find it very difficult to provide handouts and written warnings. The legislation provides that warnings can be provided in different languages, but that is not always necessary. Let us use the example of a charter operator somewhere in the north west. It would be difficult to ascertain whether everybody coming on board that boat has a perfect comprehension of the English language. Therefore, a generic risk warning in the English language would be adequate, according to the Opposition's reading of the Bill. However, if the tour were specifically for Japanese tourists, an argument might be made that the risk warning should be provided in the Japanese language. The legislation provides enough flexibility to give the business sector and community and sporting organisations the confidence they need that they will not be pinned down by excessive public liability requirements. Hopefully, by reducing the scope for successful public liability claims in these commonsense areas, this will have a direct bearing on containing insurance premiums and ultimately on bringing them down. I argue that this part of the legislation is the single most important part. There are other very important parts of this legislation, particularly in relation to proportionate liability. However, when one talks to people in the small business community and in the sporting and recreation organisations, one finds that this is the sort of thing for which they have been crying out for some time.

On a number of occasions members give personal examples of situations. Sometimes it is good to hear those. I will give a number of examples later of organisations that are looking forward to this provision being enacted in a workable way. However, I will give the House one personal example; that is, my six-year-old boy. Occasionally we go out with friends and he goes on a motorbike. The people involved in renting out these motorcycles are having an enormous problem at the moment with obtaining public liability insurance. If the operator was able to implement an effective risk warning system, as a parent I would have no problems whatsoever with assuming the risk on behalf of my child in that activity and with assuming the responsibility for determining whether I thought that operation was run in a professional manner. I have every confidence in that small business. In fact, I believe those people operate it very effectively. However, at the moment, because there is no risk warning procedure and no arrangements that would enable me to waive either my rights at law or those on behalf of my son, that operator is suffering enormously through either a lack of public liability insurance or, if he can get it, exorbitant premiums.

I stress that what we are dealing with now is probably the single most important provision in this legislation. Again, it is worth emphasising that this would apply to businesses, sports, community-based activities and even things that happen at home. A person may have a private activity, and it may be appropriate that there be a risk warning in some circumstances.

The Opposition is concerned about the way in which this legislation has been drafted. It is necessary to look at the Government's intention, particularly with risk warnings relating to children; that is, risk warnings issued directly to children or risk warnings assumed on behalf of children by their parents. In the parliamentary secretary's second reading speech, he said -

> . . . there will be no liability for harm resulting from a recreational activity that was the subject of a risk warning. Risk warnings will not, however, be effective for children under 16 or to those who, because of a physical or mental disability, lack the capacity to understand the risk warning.

This is very significant. The parliamentary secretary is saying that the government policy to be enacted through this legislation is that a risk warning cannot be assumed on behalf of children aged under 16 years. That was reiterated in the explanatory memorandum that was issued with this legislation, which states in part -

> Warnings to parents and to other competent adults accompanying children aged 16 years or over will also be capable of extending to those children.

That means that a parent or a responsible adult can assume a risk on behalf of a child who is over 16 but under 18 years of age. For example, a parent of a 17-year-old child can assume the risk on behalf of that 17-year-old child. It is that simple. However, the explanatory memorandum goes on to say -

> Risk warnings will not be applicable to younger children nor to disabled persons lacking the capacity to understand the warning, who need and deserve special protection from risks of harm.

In our view, this is crucial, because it means that the Government does not want parents to be able to assume the risk on behalf of children who are less than 16 years of age.

The importance of this can be illustrated by looking at some real life examples. One must bear in mind that if children under 16 are excluded from the risk warning provisions of this legislation, a huge amount of uncertainty will be left in the small business sector and among community organisations throughout the State. Not only that, the situation also will be very much complicated. I will give a couple of examples. The Pony Club Association of Western Australia has about 1 840 riding members. Of those riders, 1 567 either will turn 16 or are under 16 this year. Therefore, at this stage some 85 per cent of the membership are under 16. To provide a risk warning for children over 16, albeit through their parents, will benefit only 15 per cent of the membership of the Pony Club.

I will deal with rock climbing, which people would say is a fairly hazardous area. However, it is very professionally organised. A Bayswater business called the Hangout Indoor Rock Climbing Centre estimates that 80 per cent of its clientele are under 16. In go-karting, there is the Cockburn International Raceway. The member for Peel is probably familiar with that. Apparently five per cent of its clientele are under 16. I believe the go-kart operators in the State generally have a height limit, and that cuts out most children under 12. The member for Peel could probably still just get in.

Mr N.R. Marlborough: Although a weight provision might knock me out!

Mr D.F. BARRON-SULLIVAN: I will deal with another area; namely, ballroom dancing. As I said earlier, on our reading, that would be covered by this legislation. We looked at a studio operating in Morley, which told us that 50 per cent of its clients are under 16.

That is a variety of organisations that would hope to gain some confidence from this legislation; yet they have told us that from five to 85 per cent of their clientele are under 16. This opens up a number of questions. What would happen if the legislation passed in accordance with the policy settings of this Government? Some of those organisations might say that they will not allow children under 16 to use their services. I am not saying that that is what the go-karting people would do, but if only five per cent of their clientele are under 16, it might be a lot easier for them to put up a sign saying that people cannot use the go-karts if they are under 16. That might assist them in getting public liability insurance and in making sure their premiums are as low as possible.

Members are well aware that the Pony Club is desperately looking for a permanent resolution to the public liability crisis in this State. It might mean that because 85 per cent of its clientele are under 16, and because this legislation does not provide comfort and protection in relation to its activities as a result of that, insurers will say to the club that they are not interested or, alternatively, the club will have to pay through the nose to get its insurance. Yet one could bet one's bottom dollar that virtually all the parents of those children in the Pony Club would be quite happy to assume the risk on behalf of their children, and those who did not could make a personal decision about whether their children participated in those activities. They are some real life examples of areas in which there would be a complication if the Government's intention is to exclude children under 16 from the risk warning provisions of this Bill.

New South Wales provided an exemption for all children through their parents. I will quote the Premier of that State, because he took charge of this matter. In his speech on the New South Wales Civil Liability Amendment (Personal Responsibility) Bill, he said -

> Risk warnings will be effective for children and disabled people in certain circumstances. It is important because it would be unreasonable that a recreational service provider should not be able to rely on warnings given, for example, to parents before their child goes horse riding. You cannot expect potential defendants to take better care of a child than the child's own parents would take.

That hits the nail on the head, and it fits in exactly with the pony club example. The Labor Government in New South Wales acknowledged the extent of the problem and that a distinction cannot be drawn between a 16-year-old, a 15-year-old and a 10-year-old. It was made clear that parents should assume that responsibility. To me and to the Liberal Party this is how this clause should operate, and it is interesting that this is how this clause

does operate. During the consideration in detail stage we will point out that it is our firm understanding that this clause provides for risk warnings to be given to children of any age. We will explain that in detail when the time arrives, but it does not operate as well as it should. For example, the legislation provides that a parent can take a risk warning and assume the risk on behalf of, say, a 17-year-old child, but this provision also enables an operator to give a risk warning directly to a four-year-old - not to the parents of that four-year-old. We argue that that is not right. We argue that the operators of, say, a go-kart facility or whatever should not be able to give a risk warning directly to a 12-year-old; that should be done through the parents. By the time children reach 16 years of age, we presume they can accept a risk warning in their own right, although there might be some argument whether that age should be 15, 16 or 17. The point is that older children, teenagers, should be able to accept risk of their own accord. We do not believe that four-year-olds should accept a risk warning of their own accord, but the way this legislation is drafted that is definitely the case. We will present some fairly extensive drafting changes to this clause to tighten up the legislation, but it will still provide for risk warnings to be provided to the parents of children under 16 years of age, and will provide for children between the ages of 16 and 18 to accept a risk warning of their own accord.

Not all States have gone down the path suggested by New South Wales, which is the option we are proposing. Victoria and South Australia have reflected the stated intention of the Western Australian Government. Those States have also implemented very firm standards of practice and codes of conduct covering these areas. That is not the way to go. We think New South Wales has chosen the right path.

The legislation does provide for waivers. We have provided the parliamentary secretary's advisers with copies of our draft amendments. We are genuine and we will be working with the Government to try to make sure that this legislation is as workable as possible. We are also mindful that politically it may be a rather tough decision to say that risk warnings should be extended to cover children under 16 years of age, but we know it is the right thing to do; we know it is what the small business community and community organisations expect; and it is certainly the advice we are receiving from people involved in the insurance industry. If we can work together to achieve this, it will be a tremendous outcome.

Also important is the provision for waivers. The legislation has provisions that enable adults to sign a waiver that will remove their ability to later on make a public liability claim. The provisions in this legislation override the provisions in the State's Fair Trading Act, and I think those provisions are in line with the commonwealth policy amending the federal Trade Practices Act as well. They are very commendable provisions.

We will deal with a number of other specific issues at the next stage. I applaud the Government for including provision - at last - for good Samaritans. This legislation contains a provision that the vicarious liability arrangements will not be changed. Somebody may go to the aid of somebody else in a remote area, for example. That person might telephone his employer - or he may not - for some advice on the matter, but he looks after the injured person. Later on that injured person might sue, not the good Samaritan, because he or she is now protected from any public liability claim, but the employer. That is our reading of this legislation, but it is something we will need to explore during the next stage.

The other area that is worth singling out is proportionate liability. The system operating in this State, and nationally, is based on the notion of joint and several liability. When there is a claim against a group of three people, the claim can actually be made against any one of those three. An individual may be singled out because that individual is perceived to have greater capacity to pay a successful public liability claim; or, alternatively, it may simply be too difficult to initiate a claim in the courts against one of the other people. Someone could end up picking up a disproportionate share of the liability for that claim.

The business sector has been crying out for the law to reflect the notion of proportionate liability, and it is interesting that New South Wales, Queensland, South Australia and Victoria have gone down that path. A number of organisations have contacted us about this, but the Institution of Engineers Australia wrote in to demonstrate the impact of the public liability and professional indemnity problems in its industry. That organisation made a plea for the Liberal Party to support the Government's legislation in relation to bringing in the notion of proportionate liability. It will be pleased to hear that we will be supporting this legislation 120 per cent.

However, it was disturbing to learn the extent of professional indemnity problems in that industry. At the moment, 29 per cent of engineers report that they are not covered by professional indemnity insurance; 71 per cent of engineers throughout Australia do have cover, but in Western Australia the figure is worse. In this State, 40 per cent of engineers are not covered by professional indemnity insurance; the situation is extreme in that industry. Forty-six per cent of engineers indicated that the main reason for not having coverage was cost. They are also finding an increasing use of exclusion clauses in a lot of these policies; 28 per cent of engineers have indicated that because of exclusion clauses in these policies, they may as well not have the insurance. The

impact on that industry alone has been very severe, and we are also hearing this story throughout the small business sector.

This legislation provides a public policy defence that will be very important for the local government sector. I reiterate that the Liberal Party will wholeheartedly support this legislation. When it reaches the upper House, depending on what comes out of the consideration in detail stage, we may suggest some technical improvements to the legislation. However, I give notice that we will be suggesting some fairly extensive drafting changes to proposed new section 5J in clause 8, because we want to ensure that those risk warnings provided in this legislation are effective.

**MR B.J. GRYLLS** (Merredin) [10.40 am]: I wish to give the National Party's view and position on the Civil Liability Amendment Bill. I begin by noting the not so strong presence of government members in the Chamber. However, I will not be calling for a quorum, because I am sure they are attending a very important function, that being Australia's Biggest Morning Tea, which raises funds for cancer research; and, as well as that, the Civil Liability Amendment Bill is pretty tough going and dry stuff.

I thank the member for Mitchell for his contribution to the debate on this Bill. I am sure the member for Rockingham is listening intently and is looking forward to making his response. This civil liability legislation is very important and is something for which the National Party has been calling strongly since I first came into the Parliament, because the problem of public liability insurance, which has become a major issue in our community, still has not been resolved. The National Party welcomes this second tranche of civil liability legislation. We are still working on putting together the complete package so that we can get across-the-board action on public liability insurance and the insurance industry in general. We still must refer to the insurance issue as a crisis, because we are yet to see the dramatic decrease in insurance premiums for which we have been calling. Many country organisations and groups cannot afford the premiums that they are being required to pay to obtain public liability insurance. One of the most concerning issues is that not only have the premiums skyrocketed, but also many organisations and groups cannot obtain public liability insurance at all.

The National Party welcomes the Bill, because it goes some way towards providing some relief to the problems that have beset the insurance industry. However, we propose to move some amendments to the Bill, because we believe that in many cases the Civil Liability Amendment Bill does not hit the mark and address what it is required to address. The National Party has been very vocal on this issue. Very early in the piece, in March of last year, we released our plan on how to address this crisis. It has taken over a year for the Gallop Labor Government to draft this Bill and implement some of the actions that the National Party called for in March. This includes issues such as the strengthening of waivers, and the acknowledgment of risk for activities that by their very nature incorporate an element of danger. The member for Mitchell has outlined several examples of activities that are intrinsically dangerous, as people would know before they undertake them. Those activities need the protection of solid legislation so they can continue to be offered in our community.

We welcome the Bill. However, unfortunately we fear that it may not deliver the desired outcome of insurers making public liability insurance available to all those who require it, at an affordable premium. One of our main concerns is that the Bill does not adhere to the agreement reached by all state ministers that what is required is nationally consistent legislation. Members may recall that when the National Party was bringing this issue forward in the Parliament on a weekly basis, the minister responsible was quite often in the eastern States negotiating with his ministerial counterparts to try to come up with nationally consistent legislation that would be of benefit in reducing public liability premiums. However, as we will detail in our contribution to this debate, in some areas of the Bill that is not the case. It appears that the Government has modelled this legislation on the New South Wales Civil Liability Act 2002. However, there have been some modifications that affect the substance of the New South Wales provisions. National consistency is an important issue in this Bill, because we are not only dealing with reforms in the area of calculation of damages that are subject to interstate differences of both historic and current interest, but also amending areas of legal principle. It was this area that all state ministers agreed required a national solution. The fact that Australia is a federation, and the fact that the very nature of the insurance business requires that it operate across state boundaries, means that we cannot afford to have significantly different laws operating across the States.

One of the major parts of the Bill is liability for harm caused by the fault of a person. The emphasis in the Bill appears to be on causing harm rather than negligence. Clause 8, which introduces a duty of care, refers to a person being liable for harm. However, the legal principle that is entrenched in the legislative reforms in other States is negligence. Currently the Bill refers to a person being liable for harm caused by that person's fault. We believe the clause should read that a person is not negligent in failing to take precautions against a risk of harm. The National Party will therefore be moving an amendment and making consequential changes to ensure consistency of terminology throughout the Bill.

The significance of this legislation cannot be downplayed. If we do not get it right, the impact will be felt not only in Western Australia but nationwide. In the majority of cases, insurance companies are nationwide insurers. They have to weigh up risk, which they do in regard to industry sectors and the laws of the State within which those industries are operating. If laws are not nationally consistent and pose a greater risk in some States than in others, an insurance company will have two choices: either it can spread the risk across all of its clients nationwide, or it can choose to adjust its coverage and premiums accordingly for each State. A simple example of the considerations that must be made by an insurer is hire car businesses. A lot of hire car businesses are registered in the eastern States for stamp duty reasons. If a person has an accident in Western Australia, the claim can be lodged in either Western Australia or the State in which the vehicle is registered. What this leads to, as I am sure members are aware, is jurisdiction hopping, whereby the insurance company for the hire car business lodges the claim in the State in which the lawyers believe they can get the best result. We believe jurisdiction hopping should be avoided, and we are trying to stamp that out with nationally consistent legislation. Therefore, the National Party will be moving the required amendments to ensure consistency with interstate legislation, and entrenching negligence as the legal principle. This is probably the most important part of the Bill, and we will be pushing our amendments as a critical point to ensure we get the Bill correct. The critical reason behind the National Party's amendments is that the Bill emphasises harm rather than negligence. In the broader Western Australian language, that provides much wider scope for litigation. That is not what we are seeking to achieve. We are seeking to close the window for litigation. The other States have used negligence rather than harm as the centre plank of their legislation. We are very concerned that the concept of harm in this Bill will lead to the need for the Western Australian courts to set new precedents, whereas there is already a well-established principle of negligence that exists Australia-wide. Therefore, the key amendment that we will be seeking is to make the centre plank of this legislation negligence rather than the causing of harm, because we believe some wide-ranging problems will arise if the Bill continues to stand as it is written.

The next matter is the assumption of risk for recreational activities. On this matter the Bill also has some inconsistency with the New South Wales Act. In the Bill assumption of risk is dealt with only with regard to recreational activities. The New South Wales Act has generally applicable provisions under assumption of risk with regard to obvious risk and inherent risk, such as the presumption of awareness of obvious risks. Furthermore, the Western Australian Bill is specific in that the enjoyment, relaxation and leisure component applies to both the place and the activity. Both the leisure activity and the place of the activity will, therefore, have to be very clearly defined. The National Party will move amendments to broaden this provision in line with the general provisions of the New South Wales Civil Liability Act 2002 so that, once again, the door will be closed for wide-ranging litigation that affects the insurance industry. Moreover, risk warnings given to parents or carers under the provisions in the Western Australian Bill apply only to children aged between 16 and 18. The New South Wales Act defines an incapable person as someone who cannot understand a risk warning because of the young age of the person; that is, liability restrictions apply to children younger than 16. If the principle of this legislation is to reverse the attitude and cultural trend towards a litigious society, the National Party believes that the Government should consider amending the Bill to place responsibility for children on parents. We keep coming back to that platform. We are trying to change the nature of society to being less litigious so that as soon as something goes wrong people do not consult a lawyer to sue someone for damages. That attitude has decimated the public liability insurance industry and the ability of many valuable contributors throughout society, both in recreation and in business, to go about their normal operations because they cannot get insurance. This legislation is about making some broad-ranging changes to establish legal principles to diminish the break and sue mentality.

I turn now to contributory negligence. The National Party will move an amendment to reduce damages by 100 per cent if a court believes it just and equitable to do so. There have been many examples in the media of people having brought harm or damage upon themselves for which they were clearly 100 per cent responsible. Clearly, 100 per cent blame should be attributed to any person who suffers such injury or harm. However, because the law on contributory negligence does not allow for a 100 per cent reduction, that person would still get a damages payout. The National Party will move an amendment to apply a 100 per cent reduction for contributory negligence. The Bill before us is silent in that respect. The National Party believes this is an important amendment that will strengthen the principles of the Bill, address the increased reliance on litigation and, in particular, force people to assume responsibility for their own actions.

The National Party welcomes the part of the Bill that deals with contributory negligence due to intoxication. The New South Wales Act automatically reduces the amount of damages by 20 per cent for an intoxicated claimant. The National Party will seek support from the Government to include this provision in the Western Australian legislation so that it appropriately reflects the intent of the Bill. An intoxicated person who is injured or harmed will have a claim for damages reduced by 25 per cent because of that intoxication.

The National Party will seek clarification on the application of the mental harm provisions of the Bill to ensure that pure nervous shock from witnessing an incident, or the incident itself, is not a sufficient reason to initiate a claim for liability through negligence. Although people who suffer measurable harm after an incident need appropriate recourse to pursue a claim, we believe pure nervous shock should not be a reason to claim compensation. An example of that type of claim came from the eastern States only a couple of months ago. A young person broke into a hotel and the hotelier gave him a knock around the head with a baseball bat. When the young person arrived home, his mother saw the state of his face after he had received the knock over the head with the baseball bat. The mother made a claim for the nervous shock of witnessing the effects of the incident and was actually awarded more damages than the victim of the incident. We are saying that if the mother demonstrated through normal medical processes that mental harm had occurred, she would still have the right to make a claim but that she would not have the right to make a claim for nervous shock from witnessing the incident. Claims such as those have forced the cost of public liability insurance through the roof. The person in my example broke into a hotel and obviously the owner of the premises did what he believed was necessary to get rid of him; but then the family of the person who broke and entered the hotel got an award for damages. We hope that the Bill before us will ensure those types of claims are not made.

[Leave granted for the member's time to be extended.]

Mr B.J. GRYLLS: The next part of the Bill I will deal with relates to good Samaritans. Like the member for Mitchell, the National Party called strongly for this legislation at the beginning of the insurance crisis. We will strongly support a restriction on the liability of good Samaritans. People, especially in the United States, will not aid someone who is injured for fear of being sued. That is something I would certainly never do. Some people fear giving assistance to other people who are injured because they might be sued later if they had not moved the injured person's arm correctly or had not stopped the person bleeding. The vast majority of Australians would not accept that and I certainly do not accept it. It is a good thing that this legislation covers good Samaritans who aid people to the best of their ability at a time when that aid is needed. This is, therefore, a very good provision.

The next part of the Bill relates to the standard of care for professionals. The National Party will ask the Government why the Bill does not have a provision for a standard of care for professionals. We will seek clarification on that matter, particularly in the light of the recent joint announcement by the Minister for Health and the Attorney General that the Government intends to implement restrictions on liability for public patients in public hospitals. That announcement was made in response to doctors announcing that they would not work in public hospitals until the issue was sorted out. The Minister for Health has made good progress in allaying their fears and ensuring that they are covered by insurance when they work in public hospitals. However, the National Party will seek to include in the Bill a provision for a standard of care for professionals so that it will provide general protection to people practising a profession in a manner widely accepted by peer opinion. We look forward to the Government's response to the proposed amendment to the Bill.

The medical indemnity reforms announced recently introduced the Bolam principle which controls the liability of the State Government. I will explain the Bolam principle, although the member for Rockingham may be able to correct me. Bolam was a doctor who, in the course of treating a patient, did everything that his peers believed was acceptable and to the best of his ability to aid the patient. Something went wrong and the doctor was sued for his actions. However, the court decided that the doctor should not have been sued and no award was made because the doctor had done everything to the best of his ability to ensure that the patient had the best possible care. As we all know, things do go wrong and the best practices do not always get the best results. However, we must protect professionals who do their job to the best of their ability, although issues will still arise. Professional people must be protected from claims such as that against Bolam, otherwise they will leave the industry, just as doctors are leaving the industry. Some people have said that obstetricians will be an extinct species if we do not fix this problem because their capacity to be sued is increasing with every baby they deliver. Professionals across the board are in the same position. The principle of standard of care that we advocate should be afforded to the rest of the professional community.

Professional indemnity insurance is an area of great concern to many professional groups. I use an example of a business broker who has been discussing with the National Party his inability to obtain professional indemnity insurance. To be a licensed real estate valuer and to be registered with the Real Estate Institute of Western Australia, a business must have professional indemnity insurance. In 2001, the business that contacted us paid $5 500 for professional indemnity insurance. In 2002, it received a quote that professional indemnity insurance would cost it $37 000, an increase of $32 000. This year it has been told by an insurance broker that business brokers will no longer be offered business coverage. The real estate business paid $5 500 for professional indemnity insurance in 2001 but has been told this year that the insurance broker does not want its business.

Currently, the business does not have indemnity insurance. I must add that this business has never made an insurance claim.

The reason for the huge blow-out in professional indemnity is the changes to legislation that were passed recently. Previously, insurance companies used to base their asset backup for claims on the premiums they charged for that business sector. However, now the asset backup must reflect the ability of the insurer to make a claim. Increases in the number of claims paid and increased litigation to win payouts has meant that the necessary asset bases of insurance companies have increased by millions of dollars. Many of the smaller insurance companies have simply walked away because they cannot get the asset backing they need. In this current environment, not too many people will invest in the share market in companies that do this. Investors have walked away from the share market and, therefore, the insurance companies have walked away. That is why in the example I have just provided, the insurance broker with which the real estate valuer had worked for the past three years said it did not want to cover that facet of the business. The inability of that business to obtain professional indemnity insurance means that it cannot maintain its membership of REIWA, which in turn means a loss of recognised professional standards and status.

Business brokers, engineers and medical practitioners are just some of the professions suffering from the professional indemnity insurance crisis. A survey commissioned by the Institution of Engineers Australia showed that premiums have more than tripled in the past three years. Premiums have increased from $6 500 to $21 000. Insurance excesses over this period have jumped by 166 per cent. The effects of this are demonstrated by the fact that 29 per cent of engineers said they were planning to cease or had already stopped offering services because of either rising insurance costs or policy exclusions.

The medical crisis is very well documented. Doctors are retiring early, leaving the industry or finding other employment in fields that involve less litigation. That is occurring in many professions. This will have a wide-ranging effect on the whole economy. The ramifications of inaccessible professional indemnity insurance are numerous and include reduced business investment, project development undertaken without special expertise and a reduced availability of professional services. The list continues.

We cannot afford to let this problem go unchecked because the ramifications are too great. I urge the minister to work with the federal minister and other States to implement the required reforms to the relevant federal legislation.

I urge the Government to accept the National Party's amendments, which will meet the objectives outlined by the parliamentary secretary in his second reading speech. The parliamentary secretary made five points in his second reading speech about the need to introduce these reforms, the first of which was to deliver on a commitment to introduce consistent reforms across jurisdictions. Some of the National Party's amendments reflect this. The second point was to bring clarity, certainty and predictability to the law of negligence. The third was to respond to the needs of community groups, businesses and, in particular, recreational service sector providers. The fourth was to ensure that consumers can continue to access and participate in the services that businesses and community organisations provide by reinvigorating the concept of personal responsibility - something with which I am sure we would all agree. The fifth point was to reverse the attitude and cultural trend towards a litigious society. This is a key plank. The liability and insurance reforms that we want implemented are aimed at trying to reduce the trend in society to sue someone when something goes wrong. Until we achieve this, there will not be a marked reduction in insurance premiums.

Many people in the insurance industry believe that insurance premiums will never get back to where they once were. We are now in a new era in which insurance will be much more difficult to obtain and will be more expensive. It is important for this Parliament and the federal Parliament to make some changes to ensure that some of the smaller groups, which pay the same amount of public liability premiums as the larger groups simply because of their industry involvement, are able to access public liability insurance and go about their usual business activities as they previously did.

**MR D.A. TEMPLEMAN** (Mandurah) [11.06 am]: I will speak briefly on the Civil Liability Amendment Bill 2003. I am very interested in the comments made by previous speakers. I am pleased that there is broad support for the Bill. Obviously many members are well and truly aware of the concerns in our communities regarding the implications for volunteer organisations, community organisations and organisations involved in sport, cultural and recreational-type activities. The implications of the insurance problems have been apparent over the past few years. Those concerns have been very much more apparent in the past year or so because they threaten the very existence of these types of activities in many communities.

I am very pleased that the Government has already introduced and put in place a raft of reforms that is geared towards ensuring that people involved in a range of community activities are given protection. I note that the parliamentary secretary highlighted a number of reforms and initiatives that have been put in place, which I

applaud. Those reforms include the Volunteers (Protection from Liability) Act 2002, which was, of course, geared towards ensuring that volunteers working for incorporated not-for-profit associations are protected from personal civil liability. The Fire and Emergency Services Legislation Amendment Act ensures that people who work in our very important volunteer fire units and marine rescue units are also protected. The Insurance Commission of Western Australia Amendment Act 2002 relates to a range of insurance fund issues and is geared towards ensuring that community organisations have access to affordable insurance.

The Government has addressed a number of those matters through legislation that has already been before the House. One of the election commitments the Labor Party made before it came to office was to establish the encouragement and nurturing of volunteering through the establishment of the volunteering secretariat within the Department for Community Development. That election commitment was geared towards ensuring that volunteering continues to be nurtured and encouraged in our communities, which is reflected in the establishment of that secretariat.

Last year I had the privilege of chairing a volunteer task force that visited regional and metropolitan Western Australia to ensure that one of our election commitments - the establishment of a framework for valuing volunteers into the future - was being delivered. In the numerous regional communities that we visited the issue of insurance was at the top of the list highlighted to us by a range of people involved in volunteer organisations throughout regional Western Australia. One of the issues included aspects that will be addressed in the legislation before us today. I am therefore very pleased that the Bill covers a range of issues. Many of the speakers, including the previous speaker, the member for Merredin, have highlighted a number of key aspects of the Bill. I will not go through all of them again, but they include the good Samaritans clause, the aspects that clarify certainty and predictability in the law of negligence and the aspects that respond to the needs of community groups, business and sporting organisations to clarify the importance of risk management etc. All those aspects are important parts of this Bill.

Like many members of this House, I support many community organisations and I am a proud patron of a number of organisations, including sporting, cultural and arts bodies. They all welcome the reforms that the Government has already put in place. They also welcome the provisions of this Bill, which will continue to deliver quality improvements to the circumstances of volunteers and volunteer organisations in our community.

I will be watching with interest the progress of this Bill through this House. I will be looking with great interest at the proposed amendments. However, at the end of the day we need to make sure that we demonstrate to the members of our communities who are doing tremendous work in whatever field, whether sport and recreation or culture and the arts, that we understand the predicaments that many of their organisations face and that we are doing something about their concerns and predicaments. This Bill will go a very long way to ensuring that our communities are protected and that their work is reinforced and strengthened.

**MRS C.L. EDWARDES** (Kingsley) [11.12 am]: This is not a simple piece of legislation. Although the Government has our support for this legislation, the legislation will not be able to be dealt with as quickly and as easily as perhaps the Government thinks it should be. This legislation will change the law as we know it today. That is not wrong and it is a beginning. Certainty is absolutely critical when establishing insurance premiums. I suggest that if insurance companies do not have certainty on how new sections of the law on public liability will be determined in the courts, there will be no certainty of those premiums coming down, let alone retaining their status quo.

The provisions in this legislation will bring about changes in the warnings for recreational liability - what is in and what is out. They will provide that no state law will override this legislation, but a federal law will if it relates to safety provisions. The legislation indicates how harm will be determined, as against all the laws that have been established by the courts through common law over hundreds of years, when determining the law of negligence. How will the legislation change the law as we know it? What will be significant risk and what will be insignificant risk? The legislation will bring about so many changes that we will not know for many years how it will be determined in order to give some certainty to insurance premiums.

Although we acknowledge the changes that are being brought about by this legislation and that they are part of a national process flowing out of the Ipp report, which in turn flowed from a lot of other circumstances in the insurance industry over the past couple of years, no-one should misunderstand the impact that this legislation will have on the law of negligence. As much as we might support this Bill, it will bring about significant changes and it will be many years before the courts determine the law on the interpretation of many of those changes.

The Australian Competition and Consumer Commission undertook an insurance industry market pricing review. I believe it came about as a result of some inconsistencies in premiums being applied for services and industries or within industries. Some of the inconsistencies were disproportionate and they could not be readily

recognised, particularly for professional public liability. I understand the comments that the member for Merredin made on professional liability. This legislation deals with proportionate liability. The ACCC report identified some factors that impacted on the level of professional indemnity and public liability insurance premiums. They include general wage inflation and the fact that low premiums had occurred in recent years, necessitating the restoration of premiums to an adequate level. When a premium is established, the premium in one year does not equal the costs in that year; the costs in one year flow from claims for things that might have taken place many years before. Premiums need to be established recognising that claims will be made in the future that will also have an effect on costs. Therefore, premiums charged in any one year cannot ever be equated to the costs in that year. Many people make that mistake when looking at the figures from insurance companies.

One must also consider the continuing increases in the costs of claims. It has been recognised that the majority of public liability claims are for less than $100 000. Insurance companies claim that huge administrative burdens are incurred when processing small claims. However, I would suggest that although insurance companies incur a huge administrative burden when processing small claims, that in itself is not sufficient reason to turn over the whole of the law of negligence as we know it.

Another issue drawn to our attention by insurance companies is that large payouts have been made for minor injuries. They regard that as the major cause of premium increases. Increased reinsurance costs were also incurred as the industry recovered from recent losses. That has occurred for a number of reasons, some of which are no fault of insurance companies nor, I would suggest, of the individual - the potential defendant. When setting public policy one needs to balance the cost to the whole community against the cost to one individual. Insurers seek to recover past losses and very low returns, which may have caused some insurers to withdraw from the market, and the removal of that capacity when insurance premiums are at a high level.

The ACCC has submitted two reports on the insurance industry market pricing review. I commend them to members in this House so that they may gain some understanding at least of what impacts on premium setting. Justice Ipp warns that an inconsistent approach would be dangerous as litigants would seek out the most pro-plaintiff jurisdiction. Members should keep in mind that we also have national insurance companies.

Justice Ipp stated in a *The Australian Financial Review* article that "Litigation is like water; it will always find a channel." The insurance companies themselves are not so much concerned about the different approaches to the assessment of damages, but they want to see a consistent, if not uniform, approach to the liability provisions. The legislation reflects the laws in New South Wales, which is taking a strong lead in this regard. This Bill does not reflect what some other States are doing as the different jurisdictions seem to be all over the place.

Again, I return to the two words that will be significant in the assessment of any premiums - consistency and certainty. If there is no certainty, the legislation will not have an impact in the near future. It will take some time before that occurs. Members should not go out to their communities and say certainty will be achieved because it will not happen immediately. The law is changing significantly as a result of this legislation. Lawyers will test the law on behalf of their clients. That is important because we will not achieve certainty until the law is tested. Holes in the measure will be identified in the courts, and members may find that the legislation is back before Parliament for amendment. The law needs to be tested on a consistent basis.

The information we receive from the insurance industry has always been a concern. I experienced this concern in my previous role as the minister dealing with workers compensation. A better disaggregation of information on which insurance companies are required to report is needed, and a more consistent approach is necessary with the information required to be reported at state and national levels. First, that would reduce costs. Anything that reduces costs to the insurance companies will be reflected in premium setting. It is important that more information be provided than was previously the case.

Justice Ipp, in preparing his report, accused the insurance industry of refusing to provide information to his inquiry, and being partly responsible for the insurance crisis. In an article in *The Australian Financial Review*, Justice Ipp indicated he believed -

> . . . "no doubt that one of the causes of the insurance crisis was the negligence, incompetence or greed - or perhaps a combination of all three - of the insurance companies".

In a competitive spirit in the past, insurance companies sought large clients; therefore, they set premiums across a wide range of insurances that did not reflect the cost of insurance for particular industries. Consequently, some premiums were low in relation to claims made in certain areas. Insurance companies endured significant losses, but that was not the sole reason for the premium increases. The Australian Competition and Consumer Commission highlighted that point to a great extent.

Inconsistency is found across the States. This is a new and significant change to the law as we know it today for public liability. It is a change to professional liability to apply proportional liability as opposed to joint and several liability. That on its own should make a significant difference to premiums for professional liability. However, some concerns will be created in the litigation industry. It will take time to establish how matters will be determined by the courts.

In closing, I quote an article written by Doug Pearce, the Insurance Australia Group's executive of personal injury, health and commercial insurance. In the article published in *The Australian Financial Review* last September, he wrote -

> Australia's personal injury law schemes have suffered crises at regular intervals. The Ipp review can help break this cycle by refocusing the personal injury schemes to help people recover from injuries sooner.

Members should not forget that in our wish to help our community volunteer groups achieve insurance at a cost they can afford, this Bill will affect a wider group of people. I refer here to people who suffer injuries. I refer to the local council with the pothole or the uneven slab on the footpath. A young person and an older person may trip over that slab and experience different injuries; therefore, any claim those individuals make against the local council may involve significantly different costs. When we flatten the law and say that people must be responsible to a certain extent for themselves and their injuries, we level out the differences between the two individuals in my example; namely, the young person with a significant injury that will affect his or her entire life career, and the older person without private medical insurance cover who suffers great pain in his or her later years. These injuries resulted from tripping over a slab. Is it their fault? Who is at fault? Those questions will arise in the community. This is a significant piece of legislation to change the law as we know it today. The certainty this is supposed to provide to reduce premiums will not happen overnight. It will take some years to impact on premiums once the courts have decided what the words we pass today mean.

**DR J.M. WOOLLARD** (Alfred Cove) [11.27 am]: I was very concerned when the Civil Liability Bill came before this House, and I am even more concerned about the Bill now before the House. As the member for Kingsley stated, many people believe problems in the insurance industry have resulted from the insurance companies' greed, bad investments and bad judgments. The community has suffered because of those bad investments and judgments with large premiums over the past few years. As a result of this Bill, some people who previously would have been able to make liability claims will no longer be able to do so.

This Bill relies on the goodwill of the insurance companies to decrease premiums. Many plaintiff lawyers and other lawyers I have spoken to fundamentally opposed the Civil Liability Act and this amending Bill. Federally, Simon Crean and the Labor Party are very concerned about what is happening in civil liability throughout the States. He is attempting to send this issue to the Australian Competition and Consumer Commission to monitor progress and to ensure that premiums come down. This should not be legislation that only stops community members from receiving awards for personal injury, and resulting savings must be passed on to community groups.

It is very important that an evaluation be undertaken of the effects of a Bill such as this. I hope to move an amendment during consideration in detail that will seek to enable the Department of Consumer and Employment Protection to review the outcome of this Bill within 18 months and report to Parliament. The aim of that review will be to get an indication of its impact on the community and whether the cost of premiums has begun to decline. If the department is unable to report within 18 months, the Government can give it another six or 12 months in which to report. It would be wrong for the Parliament to implement the Bill in its current form, which is based on trust placed in insurance companies that caused the problems we are now facing. An evaluation of the Bill should be guaranteed so that we know that premiums are being reduced, and that many groups are able to take out insurance according to the undertakings given in the negotiations the Government has had with insurance companies. We therefore should see some facts and figures within either 18 months or two years to indicate whether that is occurring.

**MR M. McGOWAN** (Rockingham - Parliamentary Secretary) [11.31 am]: I thank members opposite for their contribution to this very important and complex legislation. It is apparent that members have done considerable research on this issue and apprised themselves of the facts across Australia on the ability of community groups, businesses and individuals to obtain insurance cover. I am very pleased that the Liberal Party has given its full support, and will no doubt vote for the Bill to be passed by both Houses of Parliament. On that basis, we can assume that the Bill will be passed substantially in its present form.

I was unable to detect from the remarks of the National Party whether it will support the Bill. However, I presume it will. I have just been presented with some amendments proposed by the National Party and the

Liberal Party. The Government will consider them during the course of the debate. I hope the National Party will give the Bill its support.

The issue is controversial. The Bill provides for changes to laws that have existed in common law since the State's foundation just over 100 years ago. The laws are the culmination of the work of the courts through the build-up of precedents over more than a century. They impact on people's everyday lives. Change to these laws required extensive consideration by the Government, parliamentary counsel and the Cabinet, and they have been considered at length. I understand that they have been fulsomely debated within cabinet and the result is very considered and reasonable legislation.

It builds on steps that the Government has taken over the past year or so. In February last year, as I relayed to this place earlier, a national meeting of Premiers, Treasurers and ministers responsible for this area of law agreed that a national review would be held into the law of negligence. Over the past 10 years or so insurance premiums have increased at more than 10 per cent per annum; in fact, they have accelerated from that point in the past couple of years. Those increases have been very substantial and have had a dramatic effect on community groups and small businesses throughout the State. A little over a year ago, Governments throughout the Commonwealth met and decided on a course of action. A Western Australian judge, Justice Ipp, was appointed to chair a review into the law of negligence. He handed down two reports late last year. At the urging of the Commonwealth, the State Government introduced substantive changes to the law of negligence following the handing down of those reports. The Government followed due process. It heeded the Commonwealth's urging and waited until the reports were presented before it introduced its laws. Western Australia was probably the second or third-fastest State to implement legislative changes. As members have indicated, Western Australia was not the first; New South Wales was. That was largely dictated by two factors: firstly, an election was to be held in that State in March this year and, secondly, difficulty with insurance and the massive increases in the amount of litigation was placing stress on New South Wales' system. This Government has moved quickly. I reject assertions that this has not been a swift process. As members said, and I think the member for Kingsley said quite forcefully, these are enormous and complex changes. That is why they have been given full consideration.

What has the Government done? It implemented the Civil Liability Act on 1 January this year, introduced the Civil Liability Amendment Bill based on further recommendations of the Ipp report, and implemented a range of measures to assist sporting and small business groups assess their potential for public liability claims. By that I mean various government departments and agencies have implemented assistance measures for community groups to assess their liability and fix the risk. The Department of Sport and Recreation has implemented measures for sporting and recreation groups, and the Small Business Development Commission has implemented measures for small businesses. The Government also implemented the Volunteers (Protection from Liability) Act last year, which ensures that volunteers will be protected from liability when they carry out acts in good faith and that the organisations of which they are members will be the liable party.

The Government has passed an Act to protect volunteer firefighters from liability when something happens during the performance of their duties. The reform has been long called on behalf of the people who perform those vital duties for the people of this State. The Government has also assisted groups to obtain insurance in relation to pooling arrangements, which was also much sought after by various groups, in particular local government.

The Government has taken a number of steps in this matter, and it has done so in the interests of the public. The Government has always remembered that the public, community groups and small businesses pay the premiums of insurance companies. If those premiums rise or if people cannot obtain insurance, the public suffers. The Government has recognised that a number of cost pressures are on insurers, and it has taken steps to reduce those cost pressures so that the insurers can pass on the benefits to the community.

The Premier has written to the Australian Competition and Consumer Commission asking it to impose stern measures to ensure that insurers pass on the benefits of our reforms to the community. We have sought price monitoring under the Commonwealth's Prices Surveillance Act 1983, under which the ACCC has the capacity to impose strict price monitoring on insurers to ensure that they pass on the benefits of the changes to the law to consumers.

As a State, we feel - I expect all the States feel this way - that we have carried out our part of a national bargain, which has resulted in major reforms to the law. We want the Commonwealth to also play its part in that national bargain. As I said earlier, we have moved swiftly on these laws, which are very complex. We will cop, and have copped, some political heat about these changes. We want to make sure that the benefit of these changes goes to the public and to consumers across the State. That is why we have urged the Commonwealth, which has authority over insurance under the commonwealth Constitution and over price monitoring under the Trade

Practices Act and the Prices Surveillance Act, to ensure that as many steps as possible are put in place to monitor insurers so that the benefits are passed on to the broader community.

Last year the Insurance Commission of Western Australia Amendment Bill was passed, which was designed to allow the Insurance Commission to provide insurance for community groups that were unable to obtain insurance elsewhere or at an affordable price.

The consequence of the Government's reforms last year was that the Community Care Underwriting Agency was established in Western Australia. That service has not been established in every State, but it has been established in Western Australia. A range of community groups or their umbrella organisations are now able to obtain insurance from that agency. It provides low-cost insurance for community groups - those sorts of groups that normally have low risk and are unable to obtain insurance from another source. The Government has ensured that there is an environment in Western Australia in which insurers have confidence to come back into the marketplace in this State to offer decent and low premiums and to pass on the benefits to consumers. That has happened, despite the protestations of some people that there would be no consequences as a result of our reforms. The Community Care Underwriting Agency is now up and running in Western Australia, and it has people on its books.

People may say that the reforms we passed last year did not achieve anything. I have heard people say that. In fact, I believe one or two people have said that during this debate. The Community Care Underwriting Agency has achieved results for community groups. The Insurance Commission of Western Australia Amendment Act has also ensured that some community groups now have insurance. It must be remembered that these reforms came into existence on only 1 January this year. As things roll on and people's insurance premiums come up for renewal, there will be an increasing use of these services. We are particularly keen on the public accessing and using the Community Care Underwriting Agency, which is an amalgam of a number of insurers offering low-cost insurance to community groups.

I will go through this Bill only briefly because I want to get to the consideration in detail stage. I emphasise that the Government would like to get these reforms through the Parliament very quickly. In coming weeks we will have the budget debate and the corruption and crime commission debate. There will need to be set time frames on when those two matters are passed by this Parliament. The Government wants the benefits of these reforms, which the Opposition has said it supports, to be passed on to the community as soon as possible so that premiums can be lowered. I implore the Opposition to give this Bill its attention so that we can treat the Bill seriously and with respect, get the reforms through both Houses of this Parliament very quickly and pass on the benefits of the reforms to the wider community.

Some issues in this Bill need little introduction. I am sure that very few people would object to the changes to the law to protect the actions of good Samaritans from the prospect of litigation. Most people in this Parliament would support the concept of an apology being made without admission of liability. Under these reforms, people will be able to say sorry without being sued for that apology. We are introducing proportionate liability in relation to claims for economic loss. That is a necessary reform designed to ensure that groups such as obstetricians, who have been mentioned, can remain in practice. It is also designed to ensure that the insurance costs for various professions, in particular engineers, are kept down. I would have thought that most of those changes would receive widespread support.

Additionally, I hope that the changes regarding contributory negligence will receive widespread support from everyone in this Parliament so that they can be passed quite quickly. In circumstances in which a person is voluntarily intoxicated by alcohol or drugs, that person must rebut that the intoxication contributed to his or her injury.

We are codifying the laws regarding mental harm to provide certainty, based upon the High Court case of Annetts. We are trying to ensure that the concept of mental harm has some certainty in the law. We are putting in place a range of reforms in relation to the voluntary assumption of risk for recreational activities, which most people in the community would regard as commonsense reforms. People engage in recreational and enjoyable activities of their own volition. We are introducing a range of measures to ensure that those people can assume responsibility for their own actions, and that businesses involved in and community service providers of those recreational activities are able to protect themselves against liability by the use of signage or waivers; or if the activities have an obvious or inherent risk, there will not be any liability. Most people would regard those reforms as commonsense. They will be welcomed by community groups, business and people who merely want to participate in those activities at a reasonable cost.

We are putting in place a public policy defence for authorities to ensure that they are not exposed to risk in certain cases. The best example is the pothole and crack in the pavement cases. This will enable local

governments, local authorities and public agencies to make policy decisions that are reasonable. They will no longer have to expend an overly large amount of their hard-won taxpayers and ratepayers funds in the pursuit of ambitions that do not meet their policy but will be able to look forward to spending those funds in a rational and sensible way rather than being constantly concerned about the threat of litigation for things over which they have very little control.

As part of this Bill we have codified the general principles of the law of negligence with regard to foreseeability, standard of care, causation and remoteness of damage. That was a central recommendation of the Ipp review, and we have followed the Ipp review on this matter, as have the other States. That sums up briefly the components of this part of the Government's reform package. In consideration in detail, I will deal with the amendments proposed by the Opposition, and the Opposition's concerns. I emphasise that the Bill has widespread support, and the Government would like the Bill to get through the Parliament as quickly as possible, because the sooner it gets through the Parliament the sooner its benefits can be received by the community.

The National Party indicated that we should have nationally-uniform laws in this area of the law. A number of the States and Territories have not passed their laws on this matter. We have gone down a similar track to New South Wales, with one or two exceptions. The reason we do not have an identical formulation of words in this Bill is that there are some differences between the Acts that will need to be amended in Western Australia and the Acts that will need to be amended in New South Wales. The obvious difference is the one mentioned by the members for Mitchell and Merredin with regard to children. The Government stands by its reforms in this area. We will not legislate for uniformity with regard to risk warnings for children and adults. We will retain the provision that children under the age of 16, or people who have an incapacity that means they cannot understand risk warnings, will not be subject to those risk warnings. I realise that some States, in particular New South Wales, have gone in a different direction, but there are other States that have gone in the same direction as us. If members opposite want to argue for uniformity, then perhaps New South Wales should be uniform with Western Australia rather than the other way around. We believe that to say that people under the age of 16 should not be subject to an exemption in this area of the law is to abrogate our responsibility as a Parliament to children. Therefore, the Government has deliberately decided not to go down that path. We recognise that people under the age of 16 may suffer a catastrophic injury that may affect them for the remainder of their lives, in circumstances in which they were unable to understand or assume responsibility for their activities. We believe those people need protection, and we are in the business of giving them that protection.

In talking about national consistency, it may interest members to know that Queensland has a different formulation of the law with regard to proportionate liability. The Queensland Government has introduced a threshold of $500 000 for proportionate liability. That means that proportionate liability kicks in only when the claim for economic loss due to the negligence of another person or party is in excess of $500 000. In our view the Queensland formulation will create an artificial circumstance in which people will try to keep their claims under $500 000. At the same time, the benefit of the reforms will not be significant for consumers. That is why we have adopted the more rational and easily understood model of putting in place proportionate liability.

Different States do things differently. The overall thrust across the Commonwealth is good. The overall thrust in Western Australia is very good. The correspondence that we have received from community and business groups is that they welcome these reforms. To my knowledge, there has not been any great clamour to have the exact same formulation of words across the Commonwealth. As I have said, in any case it would be impossible for us to do so, because the Acts that we may need to amend in Western Australia may have different names and different formulations from the Acts in other States. We will not be following the centralist model. We will be following the model that stands up for and represents Western Australia's interests as best we can. That is why we have adopted that model. We are unabashed, proud Western Australians, and we will not be captured or captivated by the centralist socialists in the National Party. We will not cop the centralist idea that we should just bow to the other States. We do our own work here. We have come up with our own Bill. We do not just slavishly copy the words that the men and women from the east say we should copy. We do it our own way over here. That is why the whippersnapper centralist member for Merredin will not be receiving our support for his idea of some sort of national, overarching, octopus model that covers every State and does not allow for the independence and freedom of thought that Western Australians are known for.

I will deal with the concerns of each of the members opposite in consideration in detail. I urge members to treat this Bill very seriously and to make sure that we get this Bill through the Parliament as quickly as possible so that we can pass on the benefits to consumers.

Question put and passed.

Bill read a second time.

*Consideration in Detail*

**Clause 1: Short title -**

Mr D.F. BARRON-SULLIVAN: I will not dwell on this clause but I have a very simple question. Why was this chosen as the title of the Bill last year? Obviously there was a strong push for a uniform national approach to the whole question of public liability, professional indemnity and tort law reform. The first recommendation that came from the Ipp review was for a single statute with a particular name. The Liberal Party does not have any great problems with the name. However, will the parliamentary secretary indicate why this was chosen as the title and whether any thought was given to changing the title, bearing in mind that this Bill is far more substantial than the principal Act?

Mr M. McGOWAN: We largely copied the formulation suggested by the Ipp report in its first recommendation. In fact, it has the same name as the Queensland Act. We thought, therefore, it would be an appropriate name for this Bill. There was no uniformity to start with and we therefore had to go with one formulation. We went with the formulation that was closest to that suggested by the Ipp recommendation and the same as Queensland's Act. South Australia called its Bill the Law Reform (Ipp Recommendations) Bill 2003. I think in years to come the Law Reform (Ipp Recommendations) Bill might be somewhat confusing to members of the community when the memory of Mr Justice Ipp and his review have faded. We therefore used the most sensible formulation that would allow people to understand the legislation.

Mr B.J. GRYLLS: I am unsure whether this is the time to ask this question and I will take direction from you, Mr Acting Speaker. The parliamentary secretary stated towards the end of his response to the second reading debate that the Government would not go down a centralist path by following the lead of the other States. Will the parliamentary secretary explain why all the state ministers agreed that nationally consistent legislation was required? Obviously this is important. I am unsure whether the parliamentary secretary was being jovial - which I welcome - or whether he was quite serious in what he said.

Mr M. McGOWAN: I thank the member for Merredin. I was trying to add a bit of levity to a serious matter. However, I recall that the member for Merredin is a very serious member and that, according to him, levity should not be part of these debates. In future I will not use levity when I am dealing with the member for Merredin.

**Clause put and passed.**

**Clause 2: Commencement -**

Mr D.F. BARRON-SULLIVAN: Will the parliamentary secretary explain how the commencement provisions in the legislation will work? Subclause (2) states that different days may be fixed under subsection (1) for different provisions. Clause 8 of the legislation, which is probably the longest clause of any in legislation I have had to deal with, provides for parts of the legislation to be proclaimed on different days. What does the commencement date mean? How will it work, particularly when different days can be set for different provisions? At what stage of the process will those different days be set? Will the parliamentary secretary indicate how this clause will work, because it is different from the normal arrangements?

Mr M. McGOWAN: That is a reasonable question. We want the Act largely in its totality to be proclaimed as soon as possible. This clause is a standard provision to allow some provisions to be brought into effect at different times. A national effort has been made to get a uniform approach to proportionate liability and for legislation to be brought into effect uniformly. I suppose that is one exception to my earlier statement; we may hold off on proclaiming that part while waiting for uniformity from the other States. New South Wales has not commenced its provisions on proportionate liability.

The member's question relates also to retrospectivity, although he did not mention that. This Bill will not be retrospective; it will take effect from the date on which it is proclaimed. Personal injury cases started prior to the commencement of the Bill will be dealt with by existing law rather than by this law when it comes into effect.

Mr D.F. BARRON-SULLIVAN: When we get to clause 6, I will ask the parliamentary secretary again - I am giving his advisers a bit of time to think it through - about the regulations and so on that are proposed to be amended. What impact will that have on setting commencement dates? Another question relates to something the parliamentary secretary said in his response to the second reading debate. He said that the Government had moved quickly on this legislation. I must ask the obvious question: why has it taken so long to get to this stage? As I said, New South Wales proclaimed its equivalent legislation on 6 December last year. On 30 May last year, almost 12 months ago, Hon Nick Griffiths announced that the Government would go down this path. When another State is six months ahead of us and this Bill was announced 12 months ago, why has it taken so long to get to this stage?

Mr M. McGOWAN: That is a good point. I covered that matter in my response a moment ago but I will explain it in more detail. New South Wales has passed its law. As I indicated in my speech a moment ago, the difference between Western Australia and New South Wales is that New South Wales went to an election on 22 March. It rushed its legislation into the Parliament. It also has within its borders a city by the name of Sydney, which, by all accounts, is one of the most litigious cities in the world. Outside of the State of California in the United States, Sydney has one of the highest concentration of personal injury lawyers in the world, and one of the highest numbers of personal injury claims per head of population. The New South Wales legislation was, therefore, subject to a degree of urgency because of those facts and because it was facing an election. We all know what that entails.

The federal Assistant Treasurer, Senator Helen Coonan, in, I think, September last year - I have the notes with me but I will not refer to them - urged all the States to await the outcome of the Ipp review before they brought their laws into Parliament. She is the Assistant Treasurer of the Commonwealth and a member of the Liberal Party. She said that the matter was so complex and had such far-reaching implications for all citizens that we should not rush it. As I said in my speech earlier, it has been an exhaustive drafting process and we think we have it right. There are many nuances in the legislation and we therefore awaited the Ipp review. We introduced these laws to the Parliament on 3 March this year, if my memory serves me correctly, which was virtually the first sitting week of the year. The final volume of the Ipp review was released in September last year. There were two more months of Parliament after that and we introduced the legislation at the first available opportunity this year. The member's point raises a significant issue of getting these Bills through Parliament. We would like the Opposition's support to do that.

Mr D.F. Barron-Sullivan: Can I ask a brutal question? Why did you put the cannabis legislation before this legislation given that the cannabis legislation is not progressing in the upper House? I do not want to turn this into a political debate. People in the business community ask me why we are not dealing with this matter. I tell them that the Opposition does not set the program and that we would like to deal with the Civil Liability Amendment Bill. Can the parliamentary secretary explain that?

Mr M. McGOWAN: I cannot recall the exact dates on which various Bills were introduced into this Chamber. However, my recollection is that the Cannabis Control Bill came into Parliament a little while before this Bill. Therefore, the rule whereby a Bill must lay on the Table of the House for three weeks means that the cannabis Bill was debated first, as a matter of course.

**Clause put and passed.**

**Clauses 3 and 4 passed.**

**Clause 5: Section 3 amended -**

Mrs C.L. EDWARDES: This clause provides a definition of what is meant by harm. What is meant by harm? What does this legislation propose?

Mr M. McGOWAN: That is a reasonable question. The member for Kingsley is a lawyer. Those members who studied negligence law at university would be very familiar with the concept of negligence and personal injury. However, the concept of harm did not fix in my memory. The reason this formulation was followed is that it is the same formulation that was used in New South Wales and Queensland. New South Wales drafted, introduced and passed its civil liability Bill into Parliament last year. A civil liability Bill was also introduced into the Queensland Parliament. The Western Australian Parliament is the third State Parliament to introduce a civil liability Bill. Parliamentary counsel decided that the legislation introduced into New South Wales and Queensland was the best formulation to deal with this issue.

The Opposition would like to use the word negligence instead of harm. The term harm of any kind was used in preference to negligence because its meaning was considered to be broader and to have a wider application. I understand that the Ipp report did not use the word harm because it was limited only to negligence for personal injuries. Pure economic loss and property damage were not strictly part of its terms of reference. This Bill is broader than that, which is why the term harm was used rather than another formulation. We have followed the Queensland and New South Wales models in that regard.

It is our view that if there is to be a nationally consistent approach so that courts can easily understand and work from precedents set in other States, there should be a similar form of wording on those central points with regard to this Bill. In that way, precedents in Queensland and New South Wales - which our courts refer to all the time - will have a much greater application here, and a body of common law will be built up to interpret this Bill more swiftly than would otherwise be the case.

Mr B.J. GRYLLS: I must have missed something. I have the Ipp report in front of me. The overarching recommendation states that negligence should be the term used. New South Wales has already passed its legislation, and it uses the word negligence.

Mr M. McGowan: Where does it say that?

Mr B.J. GRYLLS: It is on the front page of the list of recommendations in the Ipp report under overarching recommendation 2. It says that the proposed Act should be expressed or applied in the absence of express provision to the contrary to any claim for damages for personal injury or death resulting from negligence. This gets back to the point I made before. If the Western Australia Government uses the word harm in its legislation rather than the word negligence, it is not being consistent with the Ipp report or with New South Wales. The parliamentary secretary just spoke about the courts referring to New South Wales' legislation and other Supreme Courts as precedents. By using the word harm in Western Australian legislation rather than negligence, it will be up to the Western Australian courts to set precedents and they will have nothing to refer to. I thought that the process for this legislation was not to broaden the ability for people to pursue actions but to limit the ability for people to pursue actions. By using the word harm throughout this Bill, we will not achieve that; we will open up Western Australia to more problems than if the word negligence were used.

Mr M. McGOWAN: I understand the point that the member has raised. However, I repeat that we are using the same words as used in legislation in New South Wales. The New South Wales Civil Liability Act 2002 uses the word harm. It states that the word harm means any harm of any kind, including personal injury or death, damage to property and economic loss. The Western Australian Bill uses the word harm, meaning harm of any kind, including personal injury, damage to property and economic loss. The Queensland Act uses the word harm, which includes, personal injury, damage to property and economic loss. Parliamentary counsel advised the Government that we have broadened the scope of the Bill by using the word harm.

Mr B.J. Grylls: It broadens the Bill beyond what we are trying to achieve. By using the word harm, the Government is broadening the ability for the word harm to be used in litigation, whereas the word negligence is clearly defined in all other jurisdictions. That would close windows that are open for litigation whereas by using the word harm, we are opening them. That is what I want the parliamentary secretary to address.

Mr M. McGOWAN: As I have already said, we are following the advice of parliamentary counsel in the other States. By broadening, I mean that we are expanding the scope of the Bill to cover more areas. To be brutal about it, it means that the word harm will have wider application to the claims defendants make. The definition means not only personal injuries but also economic loss of claims. For example, someone might injure himself and rip his shirt as a result. He could make a claim for damages for not only the personal injury, but also the ripped shirt. We are broadening the definition beyond just the individual.

As I said earlier, the Ipp report was limited by its terms of reference to personal injuries. The report did not include consideration for pure economic loss and property damage claims. That is why we have expanded the Bill to those areas. By expanding the application of this Bill to those areas beyond straightforward personal injury law, a regime will be put in place that will put downward pressure on insurance premiums. The advice from parliamentary counsel is that the word harm was the best way to do that. That is the advice that New South Wales and Queensland received also. New South Wales and Queensland probably have the largest number of lawyers and the most amount of crown law officers. Lawyers in New South Wales would be the most experienced in personal injury claims in the country. We accepted the same advice that they received.

Mrs C.L. EDWARDES: I do not have difficulty accepting that we are using the examples of Queensland and New South Wales, because, as I have indicated, consistency will lead to certainty, which is important. I want to get an understanding of how the parliamentary secretary has interpreted the definition of harm. I understand the breadth of it is greater than a mere injury and includes economic loss, but how broadly will harm be interpreted? The parliamentary secretary has said that his legal advice is that the interpretation will lead to a downward spiral of premiums.

Debate interrupted, pursuant to standing orders.

[Continued on page 7376.]