

**OFFENDERS (LEGAL ACTION) BILL 2000**

*Second Reading*

Resumed from 12 October.

**HON N.D. GRIFFITHS** (East Metropolitan) [4.35 pm]: The Offenders (Legal Action) Bill 2000 presents yet another opportunity for the Australian Labor Party to show to the Western Australian community that it is very concerned about public safety. It regrets the parlous record of the Government in that regard, but it wishes to be bipartisan and to vote for all reasonable measures in respect of community safety. As such, we support the Offenders (Legal Action) Bill, which is designed to prevent offenders and others from taking legal action for harm suffered in the course of committing an offence. This Bill seeks to provide a defence to an action for injury or loss suffered by an offender for the defendant to show that the injury or loss was suffered in the course of criminal conduct by the offender.

This is not a Bill of great moment. However, I inquire of the Attorney General as to whether there have been any cases in Western Australia in which the offender has sued a victim for injury or loss incurred during the commission of an offence. I understand there was a case in New South Wales more than a third of a century ago, when the offender was precluded by considerations of public policy from recovering damages for injuries sustained as a result of the defendant's negligence. I note that the Bill does not provide immunity from criminal liability. In terms of day-to-day concerns in Western Australia, this is an example of a Government making much of very little. Notwithstanding that - to use the words of the Attorney General in respect of the former order of the day - we enthusiastically support the passage of this legislation and do not propose to delay it.

**HON HELEN HODGSON** (North Metropolitan) [4.38 pm]: I was interested to hear Hon Nick Griffiths ask the Attorney General about the number of instances, if any, that legal action has been taken under this legislation. I was also planning to ask that question of the Attorney. We are all aware of the potential for this to happen. People say, "Well, you could be sued", but I am not aware of any instances of that happening.

Hon N.D. Griffiths: In Western Australia?

Hon HELEN HODGSON: In Western Australia, yes. The closest I could come to that situation was when a person put his fist through the window of a Centrelink building, and in a sense he was committing a crime. I believe he received a payout. That was a fairly recent occurrence. If a person is committing an offence it is appropriate that he not be able to sue the home owner, as long as the home owner is not committing a greater offence. Again, it comes down to this question of whether the offender should be able to seek compensation, but the home owner also must act in a reasonable manner. If a person set a trap of some sort to catch an offender, perhaps that might be going a little beyond what we would regard as a reasonable level of defence.

I received one letter from a person who was concerned about the extent of this legislation, and it raised a couple of concerns. One concern related specifically to clause 5(2)(b)(i), which provides -

- (2) Subsection (1) does not apply if the person bringing the action can show that the injury or loss suffered by the offender -
  - ...
  - (b) arose from circumstances -
    - (i) which were entirely separate from those to which the offender was exposed by reason of being engaged in criminal conduct;

The context in which this question was brought to my attention concerns the broad definition of "criminal conduct". It can include, for example, travelling time to or from the place of a crime. There is a question as to whether the broad definition of "criminal conduct", combined with the exemption, could create a situation in which, if a person is injured as a result of another person's gross negligence while proceeding to commit an offence, the wrongdoer is absolved of all responsibility. I hope that is not the outcome, because I believe the intention is to make it clear that there must be a connection. I seek clarification of that point.

Retrospectivity is another issue. Clause 4 states -

This Act applies to an action whether the cause of action arose before or after the coming into operation of this Act.

Is the Attorney General aware of any cases in which this has been a defence? If he does have such information, it would be useful to have it on the record. The Australian Democrats cannot see any reason that an offender should be able to take legal action when injuries are incurred as result of his illegal actions. The Australian Democrats will not oppose the Bill.

**HON PETER FOSS** (East Metropolitan - Attorney General) [4.41 pm]: I want to correct some misapprehensions. I am not aware of any cases in Western Australia that would be affected by the Bill. This legislation has been introduced for a number of reasons. This has been the law for many years. The case of *Godbolt v Fittock*, referred to in the second reading speech, is a New South Wales case in which the law was applied by the High Court. Since that time the rule has been, generally speaking, lost to common law. This legislation is intended to restore the situation. Another reason relates to section 5 of the Occupiers' Liability Act. That section changed the rules relating to properties and gave rise to the possibility that a statutory right had been given in certain limited circumstances to an offender to bring an action arising from actions committed on premises that he was on unlawfully. It is addressed in clause 5(3).

The setting of traps is dealt with in section 305 of the Criminal Code, which states -

Any person who sets or places any spring-gun, mantrap, or other engine calculated to destroy human life or to inflict grievous bodily harm, or causes any such thing to be set or placed in any place with the intent that it may kill or inflict grievous bodily harm upon a trespasser or other person coming in contact with it . . . is guilty of a misdemeanour, and is liable to imprisonment for 3 years.

The third paragraph of the section states -

This section does not make it unlawful to set any gin or trap such as is usually set for the purpose of destroying vermin;

Rabbit traps and fox traps are good examples. It continues -

or to set any spring-gun, mantrap, or engine, at night in a dwelling for the protection of the dwelling.

By virtue of that section, it is acceptable to set mantraps in a dwelling at night. I do not recommend that people do it because it is more likely that the person who sets the trap will be caught.

The protection is not limited to the victim of the crime. An example is the case of *Godbolt v Fittock*, which involved cattle rustlers. They were on a foray to rustle cattle when the truck ran off the road and the passenger was injured. It was held that the passenger was not able to recover damages as he was involved in illegal activities at the time. The victim was the person whose cattle they intended to steal, not the passenger of the vehicle. Therefore, the law was applied to prevent the action. It is not limited to victims; it relates to the carrying out of the offence. Clause 5(2)(b) is not as limited as it may appear. Clause 5(2)(a) provides -

arose from an unlawful act that was intended to result in the offender suffering injury or loss;

Quite plainly this does not include a lawful defence of the property, so the two do go together to this extent. If a victim is lawfully defending property, clause 5(2)(a) would not apply, so the right of defence would still be there, because of both section 5 of the Criminal Code Act Compilation Act 1913 and this clause. Clause 5(2)(b) provides -

arose from circumstances -

- (i) which were entirely separate from those to which the offender was exposed by reason of being engaged in criminal conduct; and
- (ii) to which the offender was exposed in common with other persons who were not engaged in criminal conduct.

If the criminal were travelling on a bus which crashed, that would be entirely separate from the criminal act. Assuming the criminal was not actually robbing the bus, and every other passenger on the bus was similarly exposed, that situation would be covered by this clause. On the other hand, if the criminal were driving his car to a property that he intended to rob and, as happened in the case of *Godbolt v Fittock*, the car was driven off the road and the passenger, similarly involved in the burglary, was injured, the passenger would be excluded from recovering damages against the driver. It is not a total exclusion of irrelevant events; it is a partial exclusion, which occurs only when the things that happen are in common with a large number of other people, such as a bus crash or a train derailment. In such a case, the criminal would have the capacity to recover damages in the same way as any other person who suffered. It is not affected by the fact the person was on the way to commit a crime. If the criminal is driving his car and another vehicle collides with it, the criminal is excluded from recovering damages from the other driver by virtue of being on the way to commit a crime. It would be difficult in such a case to prove that the person was on his way to commit a crime, so perhaps a more realistic example would be criminals racing away from a bank after having robbed it. There would still be factual matters to consider in such a case. Clause 5(2)(b)(ii) is limited in its effect. I thank members for their support and commend the Bill to the House.

Question put and passed.

Bill read a second time, proceeded through remaining stages without debate and passed.