LEGISLATIVE COUNCIL

Thursday 4 December 2003

The PRESIDENT (Hon. R.R. Roberts) took the chair at 11 a.m. and read prayers.

STANDING ORDERS SUSPENSION

The Hon. P. HOLLOWAY (Minister for Agriculture, Food and Fisheries): I move:

That standing orders be so far suspended as to enable petitions, the tabling of papers and question time to be taken into consideration at 2.15 p.m.

Motion carried.

LAW REFORM (IPP RECOMMENDATIONS) BILL

In committee.

(Continued from 1 December. Page 778.)

Clause 1.

The Hon. P. HOLLOWAY: The Hon. Robert Lawson asked about the collapse of United Medical Protection (UMP) and whether there had been any reports or inquiries into the causes of its financial problems. The UMP group is the medical defence organisation for about 50 per cent of Australia's doctors and went into provisional liquidation on 3 May 2002. Medical indemnity was, until recently, provided on a discretionary and unlimited basis by doctor-owned and operated mutual organisations. This discretionary indemnity meant that MDOs were not prudentially regulated, even though they were operating businesses that were almost indistinguishable from that of insurance companies.

In the wake of the financial situation of UMP AMIL, it was discovered that some MDOs were not adequately provisioning for claims. They were generally left to rely on the capacity to make calls on doctors to cover any funding shortfalls. UMP AMIL made such a call in November 2001. There have not been any formal public investigations into the reasons why UMP experienced financial difficulties leading to its provisional liquidation. However, the Australian government has implemented a package of measures to address difficulties in medical indemnity that respond to the fallout from UMP and the broader problems in medical indemnity insurance. Importantly, these include a new act, the Medical Indemnity Prudential Supervision and Product Standards Act 2003, under which discretionary medical indemnity is now prohibited.

From 1 July 2003, medical indemnity cover must be offered and provided only by authorised insurers, subject to regulation by the Australian Prudential Regulation Authority (APRA) and only by way of contracts of insurance. Another measure includes a scheme called the 'incurred but not reported indemnity scheme', under which the commonwealth would assume the unfunded incurred but not reported indemnity liabilities of MDOs and then recoup those amounts over time from member doctors.

In a speech to the Australian Medical Association national conference on 31 May 2003, Senator Helen Coonan, the Minister for Revenue and Assistant Treasurer, stated:

A major contributor to UMP's problems was the failure of the company to set aside provisions to cover incurred but not reported claims. On entering provisional liquidation, UMP had in the order of $400 million to $500 million in unfunded IBNR liabilities.

In a media release dated 1 August 2003, Senator Coonan announced that UMP would be the only MDO that would need to participate in the IBNR scheme in 2003-04. On 1 October 2003, Senator Coonan further stated in a media release:

The medical defence organisation, UMP, was run in ways that excluded scrutiny from the regulator and premiums were set at such a low level that insufficient thought had been given to how liabilities would be met in the future.

UMP doctors were invoiced for their IBNR amounts in August 2003. In October 2003, the Australian government announced that the levy notices to UMP doctors would be withdrawn and any payments refunded and that new levy notices would not be issued until the medical indemnity policy review process is complete. That process involves a panel (chaired by the Minister for Health and Ageing, the Hon. Tony Abbott MP, and including Senator Coonan) which will report to the Prime Minister by 10 December 2003 on medical indemnity arrangements in Australia. The panel also includes representatives from the federal AMA, the Rural Doctors Association of New South Wales and the Council of Procedural Specialists.

Specifically, the panel is to report on ways to ensure that medical indemnity arrangements in Australia are financially sustainable and affordable to doctors; that ensure that doctors can continue to practice in confidence; and ways to safeguard the interests of the community. The panel will also examine the effectiveness of reforms to state and territory based tort law and new prudential arrangements of medical insurers. The Australian government also implemented a guarantee covering UMP until 31 December 2003. This guarantee allowed UMP to continue operating whilst in provisional liquidation.

Last month the New South Wales Supreme Court allowed UMP and its subsidiaries to exit provisional liquidation and to return to business as usual following an application from the provisional liquidator. Following this decision, Senator Coonan stated in a media release dated 10 November 2003:

Without the Australian government's indemnity to UMP and provisional liquidator David Lomby's comprehensive restructure of the group, UMP would almost certainly have gone into liquidation, leaving doctors and patients exposed to unfunded claims.

The Australian government's assistance to UMP Amil was also acknowledged by the provisional liquidator and UMP's CEO in an open letter to doctors of UMP dated November 2003. Other measures implemented by the Australian government in response to the difficulties faced in medical indemnity include:

Ensuring retirement cover is provided to doctors retiring in 2003-04 and that longer term certainty for retirement cover for doctors will be implemented by 1 July 2004;

The commonwealth assuming liability for exceptional claims above an insured limit of $20 million;

The commonwealth providing premium subsidies to obstetricians, neurosurgeons, procedural GPs and procedural GP registrars to make their premiums more affordable;

A high cost claims scheme, already extended by the Australian government in October 2003 from $2 million to $500 000, under which the Australian government will reimburse medical indemnity insurers on a per claim basis for 50 per cent of insurance payouts above these limits and up to the limit of the doctor's insurance contract.

Continued meetings with the states and territories chaired by Senator Coonan to continue tort law reform efforts to help limit the size and cost of claims against doctors, at which a possible national long-term care model is also being examined on the basis of no net cost shifting.

Senator Coonan stated in her address to the AMA national conference that placing downward pressure on premiums in the longer term critically depends on state and territory governments implementing reforms to the law of negligence. In particular, reforms are necessary to make the test for the standard of care apply to doctors more reasonable, reducing limitation periods and putting in place appropriate caps and thresholds on particular heads of damage. Finally, commonwealth legislation is required to underpin state and territory law reform efforts, including the Trade Practices Amendment (Personal Injuries and Death) Bill of 2003.

The Hon. NICK XENOPHON: I have some comments in relation to clause 1. At the outset I understand very clearly that this clause is not about redebating the bill, but matters have arisen as a consequence of what the leader has put to us and as a result of statements of the Treasurer, the Hon. Mr Foley, in the media yesterday on this very bill which go to the very heart and rationale behind the bill, that is, so-called tort reform. I will begin by referring to questions I put to the government in my second reading contribution and my concern that those questions have not been adequately answered in many respects.

I ask the government: on what empirical data and information does the government base its claims of a litigation crisis—which is very much the undercurrent of the bill? There was a response to the effect that there has been an increasing trend in all jurisdictions, but that does not accord with the Trowbridge Consulting report—commissioned by the commonwealth and, I understand, a ministerial council—on the costs of claims. The Trowbridge Consulting report, at pages 62 to 65, sets out the average cost of claims and provides a graph as to what the costs would be uncapped, presumably for awards of damages, and capped at $500 000. It indicates, for instance, that the all Australia average cost of claims—and the most recent figure appears to be for 2001—was, if it is capped at $500 000, a bit over $14 000. If uncapped, the all Australia average is a bit over $16 000.

In New South Wales (let us not forget that New South Wales has been the significant driver, through Premier Carr, of these so-called reforms) the uncapped cost of claims seems to be just on $25 000; capped at $500 000 it would be just over $20 000. Again, in Victoria, it is just over $12 000 if it is capped at $500 000 and close to $16 000 if it is uncapped. In South Australia the cost appears to be one of the lowest in the nation, close to Western Australia, where the capped cost of claims was $8 500 and just under $9 000 for uncapped. That seems to be a lower average than Western Australia, which seems to be close to that and below that of Queensland, which seems to be about $11 000 on my reading of the graph. We are implementing a number of draconian measures that will take away people's rights when the average cost of claims in this state appears to be one of the lowest in the nation—not according to my statistics, but to Trowbridge Consulting, the consultants the commonwealth and state governments turned to, I understand. That concerns me greatly.

I do not believe I received a response from the government on what is the average cost of claims in South Australia. I quoted a figure based on an article in *The Financial Review*, which stated that the average cost of public liability claims was of the order of $19 000 here in South Australia compared with $48 000 in New South Wales, yet we are getting virtually the same legislative package, the same removal of rights, here in South Australia, as they are getting in New South Wales. I do not believe that that has been adequately answered and it ought to be raised in the context of the underlying premise of the government's approach to this so-called reform legislation. We are basing this on the premise that there is an insurance crisis in this state when in fact it appears to be very much a New South Wales problem.

The Hon. R.D. Lawson interjecting:

The Hon. NICK XENOPHON: The Hon. Mr Lawson says, 'Speak to some of our lower house members if they say there is no crisis.' It seems that we are going down the path of taking away benefits when the South Australian market appears to be very different. The Hon. Robert Lawson bases his rationale on the fact that if we implement these changes we will see a reduction in insurance premiums when it appears that this is clearly a cyclical market affected by other factors, but there are swings and roundabouts in the insurance market. I have put on record in my second reading contribution some of the bumper profits insurers are making.

Given the very constructive interjection of the Hon. Robert Lawson about this whole issue, I think we also need to take a step back and consider what happens when so-called tort reforms are implemented in other jurisdictions, and I refer to *The Ralph Nader Reader* written by Ralph Nader, the American consumer advocate. In relation to tort reform, he says that in 1978, for example, Pennsylvania enacted a law immunising all Pennsylvanian municipalities from most kinds of liability suits and limiting liability for even catastrophic events to $500 000 per occurrence, yet Pennsylvania cities and towns are still having their insurance policies cancelled. So, it did not work as it was meant to. Mr Nader goes on to say:

> In Iowa, law makers abolished joint and several liability as applied to defendants who were less than 50 per cent at fault for all cases tried after July 1, 1984. Still in late 1985, 41 Iowa counties had their liability insurance cancelled.

He refers to the Canadian experience which has a closer legal system to ours rather than the US system (a US system with which I do not agree) where there is not a cost indemnity rule, so that if you bring a claim, even one that verges on the frivolous, you do not have to pay the other side's legal costs if you lose. I do not agree with that.

Mr Nader says that in Ontario Canada most tort reform measures sought by the insurance industry are already law. These measures include caps on awards for pain and suffering, restrictions on the award of punitive damages and prohibition of contingency fees. In addition, Ontario court rules require any unsuccessful plaintiff to pay the defendant's costs. There is no constitutional right to a jury trial in Canada, so most trials are before judges, yet the insurance industry is raising premiums for many of its customers by 400 per cent (or more), cancelling coverage in mid-term and refusing to provide coverage at any price. That is based on an article that appeared in *The Toronto Star* of 1 August 1986 and also *The Toronto Globe and Mail* of 15 January 1986.

I recently described to the chamber the difficulties that Des Munro (senior insolvency company administrator in this state with SimsPartners) encountered in respect of Australian insurers not being prepared to insure a company under administration, so the company approached an internationally reputable insurance underwriter, or insurers via Lloyds of London, where it got it for less than one-tenth of the cost, so I think there is a very real issue.

My response to the Hon. Mr Lawson is that we need to put the blowtorch on insurers in the way in which they conduct their business, because something is seriously wrong in terms of the way in which the market is operating. In terms of the

specific matters which the government has not answered, in fairness to the government and the government's advisers, I now put them on record. The government has not provided detailed information on the difference between claim costs in South Australia and other states, particularly New South Wales. No assurances have been given that premiums will go down with these draconian changes. We have had some vague assurances and discussions with the ACCC and, indeed, yesterday on ABC radio 891, on the Matthew Abraham and David Bevan program, the Treasurer was interviewed by Messrs Abraham and Bevan. Matthew Abraham asked:

> What guarantees have been given by the insurance company that if we give up our rights to sue they'll cap the premiums?

The Treasurer said—and I hope that this is an accurate transcript as possible:

> Well look we have, you can't get a written guarantee from the insurance companies and that's where as governments we do take on risk that is the risk of making these reforms without the guarantee that premiums will come down.

My position is that we have a different insurance market in South Australia. Claims are amongst the lowest in the nation. These matters have not been satisfactorily answered. Mr Chairman, I could go on, but perhaps in fairness to the leader—

The CHAIRMAN: I would prefer if the leader responds to those points at this stage, otherwise we will be here for a long time.

The Hon. P. HOLLOWAY: The honourable member raised a number of points. There is no doubt that in New South Wales claims are greater than in other states. That has long been the case and it is well recognised. That is why it has been pointed out that, in relation to insurance costs, obviously the New South Wales market tends to set the standards for other states. Of course, most insurance companies would have their head offices in that state. I am not aware of any state-based insurance companies in this state—it is highly unlikely that there would be. That leads me to one point that we should make; that is, when these insurance companies are setting their standards, conditions and premiums obviously they will be looking at an Australian market. Are they going to tailor their product for a market that has only 6 per cent, 7 per cent, or whatever, of the country's population?

It is very important, particularly when you have an industry such as insurance that is based on actuarial amounts, that, the larger the pool, the greater protection there is. That is the whole principle of insurance. The point I am making is that, if we have conditions that are at variance with those in New South Wales or other states where the premiums are set, members can imagine that insurance companies will look with some reluctance towards insuring within our market. That is the point I think the Hon. Robert Lawson was making earlier. The anecdotal evidence we have is that it is very difficult for some people in this state, some professionals in particular, to get insurance—and I am sure that they are the complaints lower house members are receiving. It is the availability of insurance that is the problem.

In relation to the specifics of the honourable member's question about claims costs, he referred to the Trowbridge report. I understand that within the Trowbridge consulting report the figures are given of property versus bodily injury combined and, if members look at those figures, they appear to be reasonably static. However, if members unravel the property claims from the bodily injury claims, there is a growth in the average cost of bodily injury claims. Indeed, I notice that the ACCC has indicated how premiums are rising in this state, and I guess that is a reflection of the fact that there is this growth in average cost. Yes, they are at a lower base than New South Wales, but I would suggest that the underlying factors at play in the industry are the same here as they are in New South Wales.

The Hon. R.D. LAWSON: I will make a couple of brief comments in response to the Hon. Nick Xenophon who referred to the Trowbridge Consulting report. He did not refer to the conclusion that Trowbridge reached, which I now put on the record:

> There is a crisis today in public liability. The crisis is that there are many people seeking insurance who either can find it only at very high prices (compared to prices during the last five years) or cannot find it at all.
>
> The nature of the crisis is that there are fewer insurers than ever before accepting the business and these insurers are generally charging much higher prices than previously and are also being very selective in their acceptance of risks.

That is from the executive summary. I will not read it all, but by way of summary it says that investigations reveal that there are two sets of issues to deal with: firstly, the increasing cost of claims; and, secondly, an insurance market crisis. Trowbridge further says:

- we can now see clearly that insurers under-priced the business during most of the 1990s
- insurers are generally not comfortable with this business due to the difficulty of assessing risks and estimating future claims costs at the time they quote for the business
- insurers are now determined, in the interests of their shareholders, not to under-price or to insure risks that do not meet their criteria
- prices in 2002 are likely to average 30 per cent more than 2001, with many individual premiums several times higher than last year.

The report confirms the existence in Australia of an insurance crisis, something that is reflected in many complaints made to members of parliament by their constituents, especially small business people, tourism operators, historic railway service people and medical practitioners refusing to continue practising in the country because of the non-availability of medical indemnity insurance—meaning, therefore, that obstetric services are no longer available to people in the country. To suggest, as the honourable member does, that there is no insurance crisis or that it is a figment of the imagination or an invention of greedy insurance companies misses the point.

The honourable member also quoted David Bevan, who asked the Treasurer a question that the Hon. Nick Xenophon thought cogent—I did not get it all down. Matthew Abraham said:

> In effect, if we give up our right to sue, what guarantee is there that insurance premiums will fall?

That question is a false question. Giving up one's right to sue is not what is contained in this legislation. We in the Liberal Party would not have supported a measure of this kind if it meant forfeiting the right to sue. This legislation seeks to modify the rules of negligence so that into the future we will have a sustainable system of compensation, obtainable through the courts for people who are injured as a result of the negligence of others. In the absence of reforms of this kind, we will simply not have an effective system of compensation. That is why the Liberal Party has supported this measure.

We have never believed that there will be an immediate fall in premiums as a result of the passage of this measure.

That has never been claimed by the government—this government in South Australia, the federal government or any other government around the country that has adopted these measures. These measures are not about taking away people's right to sue or abolishing common law right—as it has been abolished in most jurisdictions in respect of injuries in the workplace, for example—but about modifying the rules so that we will have a sustainable system of compensation, as well as a sustainable system of insurance that will enable businesses and professionals to continue.

The Hon. NICK XENOPHON: Concerning my colleague the Hon. Mr Lawson's saying that it is a false question about rights to sue being taken away and that the Liberal Party would not support that—

An honourable member interjecting:

The Hon. NICK XENOPHON: To give up our rights to sue is a false question—that is why the Hon. Robert Lawson is such an eminent QC. It is a question of semantics in this sense: sure, people could still sue for an accident, but the fact is—

The Hon. Ian Gilfillan interjecting:

The Hon. NICK XENOPHON: No, the fact is—and I am sure the Hon. Mr Lawson will correct me—as I understand it, he says that it is a false question because the right to sue will be taken away—

The Hon. R.D. Lawson interjecting:

The Hon. NICK XENOPHON: The Hon. Mr Lawson is saying that the right to sue is not being taken away and is still there. That is true. However, the problem is that, if you sue, if these so-called reforms go through, you are much more likely to lose. So, fewer people will sue, because they will be quite properly advised by their legal advisers that, because the law has changed, the obvious risk provisions, the changes to the standard of care and the other changes, people are less likely to bring about a claim. So, the right to sue is still there. You can sue for anything you want, but whether you succeed is another matter. After these changes, it would be much more difficult for people, who now would be able to maintain a reasonable action, to bring a good, successful action. It is a question of semantics.

As I understand what the Hon. Mr Holloway is saying—and he set out an exposition for what occurred there—UMP has not affected the South Australian market. There has been a real question over the internal management of UMP in that jurisdiction, with medical insurers in this state not having faced the same problems as UMP. The Hon. Mr Holloway referred to the extent of the rise in bodily injury claims. Do we have any idea as to what the extent of the rise in bodily injuries claims, in dollar terms—other than compulsory third party claims—has been in this state over the past few years compared to the rise of insurance premiums? Are the two closely correlated, or has there been a spike in insurance premiums?

I must respond to what the Hon. Mr Lawson said about the insurance crisis. I commend members to get off the internet—if they have not heard it already—the background briefing story on Radio National of 30 November, headed 'Making a killing' about the insurance industry. It makes extensive reference to—

The Hon. R.D. Lawson: HIH's bumper profits!

The Hon. NICK XENOPHON: And UMP's bumper profits, Mr Lawson said. For the benefit of *Hansard*, the Hon. Mr Lawson was being sarcastic. Sometimes you cannot tell by reading *Hansard*. The point made by the presenter of the background briefing program, referring to a US consumer advocate, Joanne Dorishow, is as follows:

> Not only have the tort reforms in the United States failed to bring down the price of insurance but that everything has happened has been part of the predictable insurance cycle.

This goes to the core of what these so-called reforms are about. Joanne Dorishow is quoted as saying:

> Legal changes have had absolutely no impact on insurance rights in the US, and it is because that is not what is driving the so-called insurance crisis here, which is the same insurance crisis that exists in Australia and a number of other countries. It is really a global crisis which is cyclical. This is now the third time in 30 years that we have experienced this kind of crisis, meaning sudden rate hikes, skyrocketing rates for certain kinds of policy holders and cancellation of insurance coverage, that sort of thing. It is driven by the economy and dropping interest rates, because insurers make most of their money from investment income, and when they are doing really well with their investments and in the stock market, they keep rates artificially low and then, like clockwork, when the economy weakens and interest rates drop, they raise rates all of a sudden, and they say, Well, don't look at us it's those juries and those lawyers, it's a very predictable phenomenon.

That needs to be to put on the record. We have now seen interest rate rises, and I query whether the imperative and the pressure on insurers will still be there now that they are more likely to make more handsome returns on their investments. My concern is: do we have any figures on the extent of the rise of bodily injuries payouts in this state compared to the rises in premiums that consumers have been hit with?

The Hon. P. HOLLOWAY: The honourable member is basically assuming that premiums and payouts are directly linked, and that they are the only link. Of course, they are not. I agree with the honourable member's quote. My understanding of insurance is that insurers gain much of their income from investments. I remember back in the 1980s, when I was working for a federal member of parliament, I did a lot of work into this. At that time, general insurers were not making any profit at all from their premiums. Their income was made through their investments. If you are talking about those insurers that insure professional indemnity insurance, where there might be a long tail in terms of claims, those insurance companies will need to build into premiums and decisions the cost of likely future claims, as well as current claims.

Of course, the cost of reinsurance is another relevant factor that feeds into costs, and a number of other issues also affect insurance. The other point that needs to be made is that, in this country, HIH was obviously keeping prices down in the market, because it was offering premiums that were unsustainable. That company has now gone bust so, inevitably, there will be some catch-up as competing companies were keeping their rates below sustainable levels. That is the way that markets work. The insurance market is like other markets, and it will work in that way.

It is important that insurance is available and that the costs are reasonable, and factors that impact upon that need to be addressed. My information from the Trowbridge report is that in 1993 the average payout for bodily injury was approximately $15 000 and, in 2001, it was $25 000. Obviously, that is a fairly significant increase over eight years. What the insurance company actuaries and others will do is project forward on those increases. They need to do so, or they would be negligent to their company if they did not make allowances for the rise in claims.

The Hon. NICK XENOPHON: I do not take issue with the comment just made by the leader about Trowbridge and the fact that the actuaries would be negligent if they did not allow for increasing trends (and I think that fairly sums up the

Hon. Mr Holloway's comments). However, last year, through the government, this parliament passed a bill to cap damages and to have a point scale of assessment of damages, so that the less serious injuries, which make up the bulk of the claims, would get a significantly lesser amount in payment for non-economic loss. I was not here for that debate, but I know that the Hons Mr Redford and Mr Lawson and the member for Heysen were active participants in that debate.

To what extent has Trowbridge and the government taken into account the moderating effect on payouts of the changes that were passed just a year ago in this parliament? Surely, that needs to be taken into account. We should not forget that we had quite significant changes last year in capping and reducing the payout to those with less serious injuries, in particular. What can the government tell us about that in terms of actuarial projections? What has the insurance industry told the government?

My understanding is that, with the Motor Accident Commission, such changes, which are similar to public liability payouts, would result in savings of something in the order of $50 million (and I stand to be corrected by the government on this). That figure may be wrong, but I understand that there was a very significant projected saving. What does that mean for general insurance as well for public liability and medical and professional negligence claims?

The Hon. P. HOLLOWAY: I do not have the MAC figures, but they are in the annual report. Certainly, over recent years, notwithstanding the various changes to legislation to try to limit the payouts from the fund, there have been quite substantial increases in compulsory third party insurance. We do not have the annual report, but those figures are tabled each year. I am sure that, if the honourable member looks at them, unfortunately he will not find too many years recently when there has been an increase of CPI or below. My recollection is that, generally, they have been well above CPI.

The Hon. NICK XENOPHON: I will make some inquiries, using my resources (which are not quite up to those of the government), to find out the projected savings for the Motor Accident Commission. Hopefully, I will be in a position to bring that information back to the committee in the not too distant future.

However, there has been an underlying premise that we need to bring in all these changes. Since we introduced changes a year ago, has there been a response from the insurance industry to thank us for introducing a cap and reducing payouts for the less serious injuries and so on? Indeed, the difference between the Motor Accident Commission payout scale, the Wrongs Act scale and the scale that has been introduced generally is that victims of motor vehicle accidents will now get a significantly lower amount for the less serious injuries. But, the more serious injuries will receive an increase in payout, but I understand that that will be for a very small proportion of claims. That is why significant cost savings were projected for the Motor Accident Commission for the fund.

In relation to insurers in public liability and medical and professional negligence claims, in a sense the savings were greater because it was an across the board reduction in damages (a capping) for pain and suffering at the top end, and also those who were less seriously injured would get a substantially lesser amount for damages. Given that non-economic loss is a significant proportion of many claims, what do we know about that in the context of these quite sweeping draconian reforms?

The Hon. P. HOLLOWAY: I can make two general points in relation to the honourable member's comments. First, as to the issue of time lags, obviously there are significant delays in these cases, that is, between the time that an accident happens or, in a professional negligence case, before some event occurs, and the case goes to court, is assessed and payment made. So, there are significant time lags, and that obviously is an issue in relation to the matters that we are talking about. Obviously, it will take some time before one will get a response because of those time lags in the system.

I repeat the point I made earlier that, when HIH was involved in some of these markets, it was obviously offering premiums that were at unsustainable levels. Clearly, there was some underpricing at that time, so one could reasonably assume that part of the increase in premiums is a reaction to this underpricing and some restoration of premiums to more sustainable levels. I suppose that, in this context, 'sustainable' means reasonable. It is not in anyone's interests to have premiums at unsustainable levels, because it will only mean that these schemes like the UMP will collapse.

The Hon. R.D. LAWSON: The Hon. Mr Xenophon talked about responses from the insurance company. While we are on the subject of responses, can either the minister or the Hon. Mr Xenophon indicate whether there has been any response from Mr Rann to a letter which was published in *The Advertiser* of 2 December, to which two members of this council were signatories? Has that letter, in fact, been delivered to the Premier? If so, what has been the response?

The Hon. NICK XENOPHON: I am very grateful for the Hon. Mr Lawson's question. It was an open letter. I know very well that the Premier has read that letter, because I passed him in the corridor that morning and we had a brief discussion about the contents of the open letter. So, I can assure the Hon. Mr Lawson that the Premier has certainly read that letter—and I think that the Chairman can vouch for the fact that the Premier and I were having a brief discussion. I am not saying that he heard the conversation, but he can vouch for the fact that we were engaged in a brief conversation on the morning that the open letter was published.

The Hon. P. Holloway interjecting:

The Hon. NICK XENOPHON: The Hon. Mr Holloway asked whether I have had a discussion with the Treasurer in relation to the open letter. I did have a brief discussion with him. I also made the point to him that I thought that, if there was not a law against damning people with faint praise there ought to be one, given what he said about me on radio yesterday. In reply to the Hon. Mr Lawson, I think the Premier is well and truly aware of the contents of that letter.

The Hon. A.J. Redford: What was his response?

The CHAIRMAN: I didn't hear a thing.

The Hon. NICK XENOPHON: I think it would be fair to say that the Premier disagreed with the contents of that letter. It was quite a striking open letter. Quite a few people—

The Hon. A.J. Redford interjecting:

The Hon. NICK XENOPHON: Yes. The Hon. Mr Redford said—

The CHAIRMAN: I do not believe that the letter that appeared in *The Advertiser* is the subject of the committee's deliberations.

The Hon. NICK XENOPHON: Thank you for reminding me of that, Mr Chairman. I will not be diverted. But I was responding to a question from the Hon. Mr Lawson. The government has said that it wants market certainty. To which market was the government referring—the Australian market,

the New South Wales market, the global market or the South Australian market? The Hon. Mr Redford has commented on the Law Society's indemnity scheme, and our premiums are, as I understand it, much lower than those in other states. The Hon. Mr Redford has more expertise in this than I do, and there is also the work that the he has done on volunteer organisations and insurance schemes.

I know that the government is talking about global insurance and a broader market but, given that we have some practical examples of how to reduce premiums in this state—particularly the example given by the Hon. Mr Redford of the Law Society's indemnity scheme—to which market is the government referring about a crisis in the market? Does the government acknowledge that you can send market signals and that you can get advantages for consumers, in terms of insurance premiums in the market, by doing the sorts of things that the Law Society has done?

The Hon. R.D. Lawson interjecting:

The Hon. NICK XENOPHON: The Hon. Mr Lawson has made reference to all that WorkCover has done with $500 million—did you say down the gurgler?

The Hon. R.D. Lawson: Unfunded liabilities.

The Hon. NICK XENOPHON: The Hon. Mr Sneath, the Hon. Ms Schaefer, the Hon. Mr Stevens, the Hon. Mr Evans and I are members of the Statutory Authorities Review Committee, and we have heard evidence from WorkCover in relation to that matter. I do not think it is fair for the Hon. Mr Lawson to make reference to a scheme that is quite different. It is a statutory scheme. There are a number of other factors to take into account with respect to WorkCover. Indeed, it was the Hon. Mr Redford, supported by his party and the crossbenchers, that supported a Statutory Authority Review Committee inquiry into WorkCover. I just do not see the relevance of WorkCover in the context of this legislation.

The Hon. P. HOLLOWAY: First, in relation to WorkCover, I could not let the opportunity go without reminding the council that there had been a significant decrease in premiums for that scheme just prior to—

The Hon. A.J. Redford: That's not true. Don't make things up.

The CHAIRMAN: Order!

The Hon. P. HOLLOWAY: —the election.

The Hon. A.J. Redford interjecting:

The CHAIRMAN: Order!

The Hon. P. HOLLOWAY: I can understand why members opposite are embarrassed by it but—

The Hon. A.J. Redford: I'm just tired of you—

The Hon. P. HOLLOWAY: No, I am tired of the opposition misrepresenting the truth.

The CHAIRMAN: Order! Honourable members will conduct themselves as members of Her Majesty's Legislative Council. The Hon. Mr Redford will have an opportunity to speak if he disagrees with something that the minister has to say.

The Hon. P. HOLLOWAY: The Hon. Angus Redford has interjected and made comments on the record, and I think that they need to be addressed. The fact is that, with respect to WorkCover, the unfunded liability increased, obviously, due to two factors. One is the negative stock market returns, which have affected every other insurance company investment scheme not only in this country but also through much of the western world. The second factor is the rebates that were announced by the previous government just before the election. It comes back to the comments that I made earlier about sustainability. You have to have premiums at a level in relation to these schemes. You have to have a balance between the income that is coming in and what is being paid out. If you give rebates before an election to make yourself electorally popular but you are not putting in sufficient income to cover the outgoings you will end up with unfunded liabilities: it is a fact of life. I just wish to address the interjection that was made.

The CHAIRMAN: The interjections are out of order.

The Hon. P. HOLLOWAY: Yes, they are, and it is not really relevant to it. The honourable member asked some questions about markets. The Law Society scheme, as I understand it, is a compulsory scheme, in the sense that the standard members of the Law Society are all members of that scheme. It is also a scheme the market for which is lawyers in South Australia. Any insurance company that tenders for the business will be looking at that as one distinct, separate market. On the other hand, if you were looking at the market for, say, medical indemnity insurance (and I do not claim any expertise in this matter), I think it is fairly obvious that it will be a national market that you would look at.

There may be sectors of the national market, but I think you could reasonably expect that, if you were an insurer that was offering professional indemnity insurance to a group such as medical practitioners you could either do it, as the Law Society does, to a particular market—target that market—or you would look at it generally as a national market. There is nothing, really, to stop groups banding together. Indeed, the government has encouraged that (as I outlined in some of my answers the other day), in relation to the local government community schemes and so on. It is a very useful way of addressing the premiums for particular classes of markets. What we are dealing with here, as well as those specific distinct markets, is the broader question of professional indemnity insurance across the country, and that is the one we need to address as a national market.

The Hon. A.J. REDFORD: I want to correct the record because I do not want it misunderstood. We all know with WorkCover that the premium level in terms of its total premium income has remained unchanged, despite the rebate and despite the short-term reduction in the average premium. The income as disclosed on a regular basis has gone up in line with inflation, and one might assume that it has managed to do that because of an increase in economic activity. To say that its income has dropped is simply not true. The problem with WorkCover is that, since the day following the election of this government, there has been an increase in claims payouts of $20 million per quarter. I am not sure why there has been such a significant increase from an average of between $60 million and $69 million to $89 million-plus in quarterly claims payouts, and maybe it has something to do with what we are endeavouring to address here. That is what the problem is.

The other issue that the leader mentioned is the change and the negative impact of stock markets internationally. Sure it had an impact but it was a one-off impact—it is not a sustained impact—and the evidence that we are getting is that that is now returning. There has been an improvement in stock market returns and it was a blip. That is why I react because the government singularly does not understand this issue. I do not blame the leader because it is the minister who has this Nero approach to WorkCover, who plays on the fiddle while it burns, who cannot give anyone any answer as to why claims payouts have increased from between $15 million to $20 million a quarter since he became minister. That is what the problem is, and I suggest that,

when it comes up next in cabinet, the minister raise that issue with the minister responsible for WorkCover. He will not give an answer because he does not know it.

The CHAIRMAN: I want members to understand that WorkCover is not under consideration in the context of this bill and I ask all members to confine their remarks to the bill. The Hon. Mr Xenophon's line of argument is in response to answers that were incomplete, and I understand what he is doing. He is saying that he is not satisfied with the answers that he has received so, given all the other conventions in committees here, I am allowing him to continue, but I point out to members that time is getting on and the time for consideration of council business is shortening. I ask members to remember those fundamentals.

The Hon. NICK XENOPHON: Thank you, Mr Chairman. I am guided by your remarks, but thank goodness we have an upper house where we can have an exhaustive committee stage. Thank goodness that in this chamber we do things differently from the other place. It has been a convention in this place that we have an opportunity to analyse legislation, to look at its ramifications in the way that the other place does not seem to do.

Earlier on I raised issues with respect to the Motor Accident Commission, issues that were directly relevant in the context of this package of legislative changes, because a year ago changes were introduced to the payouts. Payouts were not only capped but they were also capped on a step-by-step basis on a points scale so that the amount for less serious injuries would also be reduced significantly. My officers have provided me with an extract of the Motor Accident Commission's annual report for 2002-03.

Under the heading 'Legislative change', the Chief Executive Officer said, 'During the year, two legislative amendments were made that impacted on MAC and the CTP Fund.' The first one, which is not directly relevant to this debate, related to the requirement for the MAC to seek to achieve and maintain sufficient solvency by regulation. I will quote directly from the Chief Executive Officer's report so that it is in context:

> The second set of amendments became effective on 1 December 2002 and adjusted payments made under the points scale for pain and suffering (non-economic loss) pursuant to the *Wrongs Act 1936 (SA)*. The adjustments were made as part of the Government's package of measures to reduce the cost of public liability claims and, from the CTP point of view, meant that those with less serious injuries will receive somewhat smaller amounts of compensation whilst those with more significant injuries receive significantly larger payouts. Not only does this provide greater certainty but the scheme actuaries have forecast that this amendment could save the CTP scheme in the region of $15 million per annum. This aspect of Government policy represents a significant contribution to reducing the upward pressure on CTP premiums. It may also assist in achieving sufficient solvency for the Fund.

I have a number of questions to the government in respect of that. The actuaries retained by the government in relation to the CTP fund have said that there will be a significant saving. My understanding, and I will stand corrected by the leader, is that changes for public liability claims were more radical because, with a CTP claim, those with less serious injuries were getting somewhat less or considerably less and getting more for more serious injuries. However, in respect of the public liability claims, there was an overall reduction, a more significant reduction, of claims costs for non-economic loss. So, the Chief Executive Officer's report on the Motor Accident Commission states that last year's changes made a significant contribution to reducing the upward pressure on CTP premiums to the effect of $15 million per annum in projected savings. The changes to public liability law in terms of the caps on damages and a reduction in the amount that would be paid overall across the board, as I understand it, would be even more significant.

Can the leader indicate what information the government has about the impact of the changes last year on public liability claims, given what we have heard from the Motor Accident Commission? Is it the fact that, for public liability claims, the changes will be even more significant in terms of cost savings for insurers, given the way that the previous scheme operated, in contrast to the old common law system for public liability claims and the statutory scheme that applied for CTP claims? The savings will be even more significant than for CTP claims.

The Hon. P. HOLLOWAY: It would be fair to say that the changes being made to public liability, where a scale system is being introduced, will be significant.

The Hon. NICK XENOPHON: Are they last year's or current changes?

The Hon. P. HOLLOWAY: The government would not introduce them if it did not think they would have some impact. If they had negligible impact, there would not be much point in introducing them. In relation to the Motor Accident Commission scheme, there has been a points system there for a number of years and there have been a number of changes made in recent years. I recall that during the term of the previous government a number of amendments were made to that particular scheme in order to limit payouts. There were additional ones made in 2002.

The honourable member quoted the CEO of the Motor Accident Commission who said that the costs were $15 million per annum and that they would reduce upward pressure on rates. Even though there may be such restrictions on benefits in particular cases, we still need to be mindful of the fact that the number of claims could vary and that the payout per claim can change. If I understand the comments of the chief executive of the MAC, he said that the $15 million would help restrict upward pressure on the rates; that is one of the factors here. It is not just a matter of trying to reduce premiums to a level that is sustainable; it is also a matter of limiting upward pressure so that we do not get more and more people not able to pay their insurance premiums.

The Hon. NICK XENOPHON: With respect, perhaps I did not put my questions clearly enough to the Hon. Mr Holloway. The system we had in place for public liability claims prior to 1 December 2002 was that damages for non-economic loss were generally assessed in terms of common law principles. The system we had in place in relation to compulsory third party claims was that assessments of non-economic loss were made pursuant to the Wrongs Act scale, implemented in 1987. That was a zero to 60 scale, adjusted for inflation. The adjustment of the Wrongs Act scale concerning compulsory third party claims means that those with less serious injuries—the lower points on the scale (perhaps the Hon. Mr Lawson could assist me), start to receive greater benefits—than under the previous scale—at around 15 or 20 points. There were adjustments there.

In so far as public liability claims are concerned, there was a much more significant reduction in payouts because the impact was much greater. It went from a common law system for public liability and professional and medical negligence claims, back to a statutory points system. There was already a statutory points system for the Wrongs Act. The impact on public liability claims was much greater. I would be grateful if the government could provide confirmation of that.

The Hon. Mr Holloway made reference to the chief executive officer's report. The chief executive officer discussed savings to the CTP scheme in the region of $15 million per annum. He writes:

> This aspect of government policy represents a significant contribution to reducing the upward pressure on CTP premiums. It may also assist in achieving sufficient solvency for the Fund.

The point I make is that there were changes to the CTP scheme which were not as radical in reducing payouts to individuals for public liability and medical and professional negligence claims. They were much more radical than the CTP changes and there were still significant savings for the CTP fund. Does the government concede that the impact on public liability claims, as a result of the government's legislative changes last year, would be greater than the impact on the CTP fund? Has the government consulted with or requested information from the insurance industry to work out what benefits it will receive? We know from the CTP fund and the actuaries that there is a degree of openness and transparency in the compulsory third party fund because of its statutory obligations and, because it reports to parliament, it is subject to scrutiny that private insurers are not. What assurances have private insurers given? What have they told the government about the potential savings under those changes of a year ago?

The Hon. P. HOLLOWAY: It would be reasonable to say that the changes made to the public liability scheme, given that they are introducing a statutory points system as opposed to an unpegged scheme, would be more far-reaching than the types of changes that have been made to the CTP. I do not really know that we are achieving anything in this debate. Perhaps the honourable member can make his point clearer. As I say, it would be reasonable to expect that, yes, those changes would be more significant.

The Hon. NICK XENOPHON: I will do my best to make the point clearer. The point that I am making is that we know that, as a result of the changes that came into force a year ago, there will be significant savings for the compulsory third party scheme. Changes implemented at the same time for public liability claims included an overall reduction and capping of awards—not just capping at the top end. If there was an incremental cap in the statutory points scheme, changes would be more significant. If the underlying premise of this legislation is about increasing premiums and a crisis in the insurance industry, they were given a significant benefit last year with those changes.

Surely there has been some communication between the insurance industry and the government to say that as a result of these changes we can expect there to be a significant reduction. The government has had its actuaries for the compulsory third party fund giving specific details of projected savings. Has there been any information provided by the insurance industry to this government or to Treasury to say that there will be some significant savings as a result of the changes and capping of awards? This bill is supposed to be the second stage. I say it is relevant because this is seen as the second tranche of these insurance changes but we do not seem to have a response as to what the projected savings will be for the reforms that occurred last year.

The Hon. P. HOLLOWAY: I can only repeat the answers that I gave several days ago. This is a national scheme. The Ipp reforms are national reforms; the discussions about them have been at a national ministerial level. There was the Pricewaterhousecooper report to which I have referred in considerable detail in previous answers. That report provided information to the state and commonwealth treasurers about the impact of the implementation of the Ipp proposals upon insurance premiums. That is what that was about and it has been the principal source of information on which these reforms have been devised.

The only other comment I wish to make concerns the point the honourable member keeps making about the Motor Accident Commission. I remind him of the comments made by the CEO of the scheme, which he quoted himself, that the $15 million (or whatever it was) revenue would mitigate against the upward pressure on insurance premiums. There are pressures arising. While there is no doubt that the changes made in the past year will have—because they need to have—a significant impact on public liability premiums, there are still upward pressures that must be dealt with, as the CEO of the Motor Accident Commission states.

The Hon. NICK XENOPHON: Just so that this aspect can be dealt with once and for all, has the government received advice from the insurance industry, either from individual insurers or their representative body, the Insurance Council of Australia, or some independent actuarial advice, as to what impact and savings have resulted from the changes that were put in place last year on public liability, professional negligence, and medical negligence claims? If that advice has not been received, that is fine—I cannot pursue it any further. However, given that the Treasurer has said in the past that this set of changes is the second wave, if you like, of reform there must be some idea given that the MAC has told us what those changes will bring. Do we know anything? Do we have any information from the insurance industry, or any other source, about the prospective savings from those changes?

The Hon. P. HOLLOWAY: I am not aware of any other information than that to which I have referred—namely, the PricewaterhouseCoopers report. That was a very comprehensive report which looked at the impact of the Ipp reforms as a whole. Obviously, there are some variations in this state because there have been different approaches compared with the national Ipp report. However, this comprehensive and I would imagine expensive report (it would be interesting to know what it cost the commonwealth) really is the basis on which the changes are made. I repeat that the government is not aware of any additional information subsequent to that major report.

The Hon. NICK XENOPHON: Will the Hon. Mr Holloway be able to get a response from the Treasurer this afternoon on whether the government intends to obtain information, make inquiries or ascertain the views of the insurance industry, in some form of hard actuarial data? I would be very surprised if private insurers—the QBEs of this world—would not have made some assessment of last years changes regarding their payouts and projected liabilities in the medium and longer term. Does the government intend to ask the insurance industry to disclose what impact it says those changes of last year will have on premiums, upward pressures, downward pressures or whatever? Does it consider it to be reasonable that those questions be asked?

The payouts that individuals receive have been reduced. Is it not reasonable for consumers, who are paying virtually the same premiums, to expect a much lower payout for injuries? That has been accepted by this parliament, and that has been done. However, is the government going to tap the insurers on the shoulder and say, 'Well, what impact is this going to have on your premiums in the longer term?' Given that it is the first stage of the reforms, this is the second stage,

I would have thought the two are interlinked. That is why I am pursuing this line of questioning.

The Hon. R.D. LAWSON: The minister has already responded several times to this very same question. Mr Chairman, you have been very generous in the time allowed for debate on clause 1 of this bill. There must come a time when we can proceed to other clauses. The only useful comment I can add to what I said before is that my advice is that the ACCC is part of the commonwealth arrangements in relation to this. We will monitor premiums and costs at six monthly intervals.

The Ipp recommendations were part of a commonwealth and state combined effort to try to deal with the situation we have in relation to public liability insurance. It was based on the Price Waterhouse consultancy that provided detailed information on what the impact of the changes would be. Obviously there are some variations between states, but South Australia has signed up with other states and the commonwealth to try to introduce these measures to deal with it and part of the arrangement is to ensure that they are effective. The ACCC has the role of monitoring the outcomes of these reforms at six monthly intervals.

The CHAIRMAN: I am cognisant of the point made by the Hon. Mr Lawson about the extended proceedings on clause 1. When the Hon. Mr Xenophon started out he said that he had not received complete answers on some matters. That has been a convention we have had before. We have had an extensive debate on this point. The point made by the Hon. Mr Lawson is cogent. The minister has made three attempts to satisfy your question and I do not think he will do any better. If the honourable member has any other matters in line with his first assertion, that is fine, otherwise we will start to wind this up: we have had a fair go.

No-one has mentioned the title of the bill yet, but the convention has been that we conduct our affairs this way and I have been encouraged in the past that we have this rather extensive debate on clause 1 and then fly through the remaining clauses. However, I am not confident that that will happen today. I ask that we conclude the matters on which the honourable member did not get answers. Things have changed, so we can get on with the rest of the clauses.

The Hon. NICK XENOPHON: Thank you, Mr Chairman, for your guidance. To refer to specific examples given in the Hon. Mr Holloway's second reading response, I thought that it would be better to deal with it now rather than when we deal with the obvious risk provisions because it involves asking a specific question on the law. First, the Treasurer, yesterday on the Abraham and Bevan program, gave an example of the sorts of claims people should not be able to make and said, 'But if you jump into a river you should know there is an obvious risk in diving into a river. Diving into the Murray, for example, you may not see a log floating underneath the surface, but that should not negate your responsibility to understand that there is an obvious risk that if you dive into a river you could get injured. We are saying that in those instances you have to take responsibility for your actions.' I know that treasurers are fond of logs, particularly hollow logs, but here the Treasurer is talking about a floating log—

The Hon. P. Holloway: A submerged log.

The Hon. NICK XENOPHON: A submerged log. No, it is a log floating underneath the surface—a floating submerged log in the example given by the Treasurer yesterday on ABC 891. In this regard I have had cause to speak to some of my colleagues in the legal profession who were scratching their heads with that example. They say that there does not appear to be any case law that would say that any municipal or government authority or private company that had control of a waterway would be responsible for a log floating past on which somebody hits their head and suffers a serious injury. I am not aware of any case law.

It seems that the Treasurer has given an example as a justification for this draconian legislation, but one that is an absolute furphy. Perhaps the leader may want to take that on notice. Maybe it was a floating submerged hollow log, but my understanding is that not even in the United States, where they have a different system, would a claim like that succeed. I cannot see how a claimant would succeed in those circumstances.

The other point has to do with snakes—not the door snakes the government will be providing to all South Australians in the near future. I commend that move—although it raises obvious issues of risk if you trip over a government-issued door snake and whether it would come under this legislation. In the example given by the leader in his second reading response—and this is important in the context of the underlying basis for this legislation—the government is saying that you cannot have claims in these situations as it is an obvious risk. It is important to put this on notice for when we proceed after lunch. The leader said:

> The answer is that a risk may be well understood by everyone, even if it does not take a physical form. One example is the risk that, if you go bush walking in a national park, you might be bitten by a snake. There may be no signs of snakes. You may not know for sure whether there are any in the park or not, that is, the risk may not be conspicuous or physically observable. Just the same, the danger is so readily apparent to most people that it is fair to call it obvious.

He then gave an example of a bodysurfer. I am not aware of any case—and the Hon. Mr Lawson as a senior counsel may be able to assist with this—as with the floating submerged log, for example, where any authority has been held liable for somebody being bitten by a snake and I query whether under the wording of the legislation it would fall within the terms of the legislation in any event. I am not aware of a national park or a statutory authority, being done in the snake example.

The Hon. R.D. Lawson: Not yet.

The Hon. NICK XENOPHON: The Hon. Mr Lawson says 'not yet'. I am not sure that is a terribly cogent answer.

The Hon. P. HOLLOWAY: I make a quick point that if what the honourable member says is true, that this bill in effect is restating the common law position, how can it be so draconian? That really is the point. The government does not believe the bill is draconian. We could be saying that we are simply restating the common law position.

The CHAIRMAN: My legendary patience is fast running out. Does the Hon. Mr Xenophon have any other points?

The Hon. NICK XENOPHON: This is important because the government is saying, on both the parliamentary record and the public record, via the media, that we need this legislation to avoid these sort of claims. Are there cases to this effect? It does not seem to make sense in that context, which is why I raised it. The flip side of what the Hon. Mr Holloway said is: why proceed with it at all if it is not going to make much difference? They say it is part of a package and the insurance industry is desperate to bring about these changes. It relates to obvious risk: there are different arguments in terms of professional standards and negligence. It would be helpful if the government could provide details of any cases, such as the Treasurer's example in the media

yesterday of the floating submerged log and in relation to the issue of the snake referred to in the second reading reply of the leader.

The CHAIRMAN: I am sure the committee has no doubt about the sincerity of the thoughts and the actions of the Hon. Mr Xenophon, but we are very close to redebating the issue. Many of the points the honourable member is making are able to be sustained by way of questions to particular clauses in this bill, and I think that we should move towards doing that, because it has now reached the point where we are redebating the bill on many of these issues. I take the point that some of them have occurred since the second reading stage, but it is now reaching the point where the honourable member is trying to redebate the issue.

The questions the honourable member asks may be relevant and pertinent to some of the clauses in the bill, but I think the honourable member should make those points when we are discussing the relevant clause. It is time we started to work our way through the clauses. The committee has been extremely tolerant. As I say, I understand the sincerity of the honourable member in respect of the questions he is asking, but we have to revert to the formal structure of the committee and proceed it clause by clause.

The Hon. P. HOLLOWAY: Perhaps if I can close this off and, hopefully, that will be the end of it. I will give three examples of where the law of negligence has arguably gone too far. First of all, Nagle v Rottnest Island Tourist Authority (1993). A tourist authority was legally liable because a visitor dived head first into shallow water and struck a rock. The basis of the claim was that the authority should have put up a warning sign. Secondly, The Municipality of Waverley v Bloom (1999) in which a local council was liable because a body surfer was struck by a surfboard whilst surfing between the flags. The lifeguards were in breach of their duty to keep board riders out of the flagged area. Thirdly, Mount Isa Basketball Association v Anderson (1997) in which a player acting temporarily as a referee tripped over while running backwards across the court. The association was liable for not warning her that it was dangerous to run backwards.

Clause passed.

Clause 2.

The Hon. A.J. REDFORD: Clause 2 provides that the legislation will come into operation on a day to be fixed by proclamation. Can the government give me any indication as to when that is likely to be?

The Hon. P. HOLLOWAY: Assuming we pass this bill today, it has to go before the lower house—

The Hon. A.J. REDFORD: No; how long after it is passed? I know the minister cannot predict how long this will take.

The Hon. P. HOLLOWAY: The only advice I can give is the government certainly has no plans to delay the proclamation of this legislation for any longer than it has to after the bill is passed by parliament.

The Hon. A.J. REDFORD: Is any preparatory work required before proclamation of the legislation and its coming into effect?

The Hon. P. HOLLOWAY: My advice is that we are not aware of any preparatory work that has to be done that has not already been done.

The Hon. A.J. REDFORD: Will the government be engaging in any public education or publicity program in relation to the impact of this legislation at any stage, whether it be before it is proclaimed or after?

The Hon. P. HOLLOWAY: There has been no discussion of that at this stage. Perhaps that is because this bill has been around for so long—it has been nearly 18 months since the process began. It is a reasonable suggestion and I will put it to the Treasurer.

The Hon. A.J. REDFORD: I understand the minister has to make some inquiries of the Treasurer and I accept and understand that answer. Would the minister be able to advise us of what the Treasurer has in mind in relation to that; and could he give us some indication as to when we will know?

The Hon. P. HOLLOWAY: I think the point was that the Treasurer does not have anything in mind. This bill will not be made law for at least several months, but perhaps that is something that could be considered when the Treasurer handles this bill in the other place. Perhaps that question could be asked of the Treasurer at that stage next year.

The Hon. A.J. REDFORD: There may well be a need for some seminars and programs to be conducted for the legal profession. This brings in some complexities and some issues that they probably have not dealt with in the past, and they are at the front line of advising people as to whether or not they can make a claim. The making of a claim in a court is a serious step indeed, and having a well-informed legal profession would assist. That is one general comment I make to the minister.

The Hon. P. HOLLOWAY: The suggestion from the honourable member seems reasonable. Obviously what one might actually advise would depend on the ultimate form in which this bill passes the parliament.

The Hon. NICK XENOPHON: Can the minister at least get an indication from the government as to whether it is planning something down that path in terms of public education such as the sorts of things raised by the Hon. Mr Redford? Can we get some indication later today whether we will be going down that path once this bill is passed in whatever form?

The Hon. P. HOLLOWAY: I will try to provide what information I can.

The Hon. R.D. LAWSON: Will the government consider subsidising the Law Society in the seminar which it is holding on 10 February and at which the Hon. Nick Xenophon is chairing the session to explain the provisions of the bill?

The Hon. P. HOLLOWAY: I am sure that the Treasurer does not like any form of subsidies.

Clause passed.

Clauses 3 to 7 passed.

Clause 8.

The Hon. A.J. REDFORD: I have a series of questions and I think it would be easier for everyone if we move down the page. If I get ahead of any other member who has questions, just stop me. I do not have any questions in relation to page 4 concerning the definition of 'accident' or 'consequential mental harm', but I do have a question in relation to the consumer price index. What other options were considered in relation to the consumer price index? Consumer price indexes vary all over the place and are different from state to state. You can have a consumer price index that is directed at housing costs or living costs. If you are looking at cases such as this, particularly in personal injuries cases, medical costs are probably increasing at a rate double that of inflation. My concern is that in assessing future medical costs using that definition would adversely affect victims who have legitimately made a claim under this act or under the common law. I think the minister understands my question.

The Hon. P. HOLLOWAY: This clause is one of a number in the bill which are really just a rearrangement of existing provisions in the law. My advice is that this definition has not been considered as part of the bill.

The Hon. A.J. REDFORD: I understand and accept the answer the minister has given. When you are assessing future medical expense—that is, if you have a plaintiff who has a need for sustained future medical treatment—my understanding is that, in making that assessment, this definition of consumer price index is a relevant definition. Given that medical costs are increasing at about double the rate of the definition set out in this bill, might there be a more appropriate definition of CPI in relation to that specific issue? This clause provides:

> *Consumer Price Index* means the Consumer Price Index (all groups index for Adelaide) published by the Australian Statistician under the Census and Statistics Act 1905 (Cwth);

I have no issue about that when you are assessing future loss of income. However, when you are assessing future losses or expense for medical expenses, that would significantly and adversely affect victims in those circumstances.

The Hon. P. HOLLOWAY: I can only say that I understand the honourable member's point. That matter was not really addressed in relation to this bill. It is essentially a repeat. CPI refers to the indexation of the damages for non-economic loss. So it is the points scale. That is what is being adjusted. It is probably not strictly relevant to the point the honourable member is making in relation to medical costs. This is indexation of the points scale for non-economic loss.

The Hon. NICK XENOPHON: To what extent does the definition of 'contributory negligence' compare to definitions in other legislation? Is it based on a uniform national definition of 'contributory negligence' in the context of the government's approach?

The Hon. P. HOLLOWAY: My advice is that this definition is one that parliamentary counsel has devised. If the honourable member is aware of any other definitions, we will have a look. At this stage, we are not sure that there are any.

The Hon. NICK XENOPHON: 'Mental harm' is defined as 'impairment of a person's mental condition'. Having practised in the past extensively dealing with these sorts of claims, both in the workers compensation jurisdiction and at common law, does impairment of a person's mental condition mean that in the assessment of damages it must be a permanent impairment? A person might suffer from post-traumatic stress disorder and might have a terrible time of it but after a couple of years could be fully recovered, and there is no longer any further impairment as such.

Does that mean that that person would be precluded from claiming for those two years that they were basically out of action because of a serious post-traumatic stress disorder? It is an issue that you raised in the context of the former government changing workers compensation regulation with respect to section 43 lump sum payouts under the Workers Compensation and Rehabilitation Act in the context of what the threshold was or when you could claim. In other words, does the definition of 'mental harm' mean that, in order to claim, you may be unable to claim if it is not a permanent condition at the time that your claim is determined by the court?

The Hon. P. HOLLOWAY: My advice is that an impairment can be either permanent or temporary. With this new definition, there is no time restriction on it. Clause 32 of the bill provides the restraints in relation to mental impairment.

The Hon. NICK XENOPHON: So, it is not intended that there is a threshold requirement given by the wording of the definition that it needs to be permanent for a claim to be assessed. I just wanted to be reassured on that.

The Hon. P. HOLLOWAY: There is no implication of permanency in the definition.

Clause passed.

Clause 9.

The Hon. NICK XENOPHON: In terms of the application of this legislation, clause 9, in part, provides:

> (3) This Act does not derogate from the Recreational Services (Limitation of Liability) Act 2002.
>
> (4) This Act does not affect a right to compensation under the Workers Rehabilitation and Compensation Act 1986.

In respect of the Recreational Services (Limitation of Liability) Act 2002, are the codes of practice that were anticipated or mooted in relation to that act in place? In the absence of any such codes, does it mean that this act applies? I am just trying to understand the interaction between the two in the context of the overall bill and in this clause in particular.

The Hon. P. HOLLOWAY: This is a general provision that applies across the board. The Recreational Services (Limitation of Liability) Act will have the limited application of applying only where a code is in place.

The Hon. NICK XENOPHON: If the code is not in place, this bill applies in the context of obvious risk, other standards and other amendments. Is that the case?

The Hon. P. HOLLOWAY: That is my understanding of the situation.

Clause passed.

Clauses 10 to 19 passed.

Clause 20.

The Hon. NICK XENOPHON: Section 20(2) of the Wrongs Act currently provides:

> In every such action the court may give such damages as it thinks proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit the action is brought.

Clause 20(2) provides:

> In every such action, the court may, subject to this Act, give such damages as it thinks proportioned to the harm resulting from the death to the parties respectively for whom and for whose benefit the action is brought.

Will the minister explain the distinction and the impact on claims, if any, for these sorts of wrongful death claims?

The Hon. P. HOLLOWAY: This clause clarifies that any assessment of a death claim is also subject to the same cap. For example, if someone were seriously injured, the cap would apply. This amendment makes it clear that the dependants of the person killed are also subject to that same cap.

The Hon. NICK XENOPHON: Does that mean that, in the context of the changes that came into effect on 1 December last year, the cap does not apply for those claims, unless this clause is enacted?

The Hon. P. HOLLOWAY: Yes; it is simply to make the situation quite clear. It is ambiguous, but this amendment makes it crystal clear.

Clause passed.

Clauses 21 to 26 passed.

Progress reported; committee to sit again.

[Sitting suspended from 1 to 2.15 p.m.]

AUDITOR-GENERAL'S REPORT, SUPPLEMENTARY

The PRESIDENT: I lay on the table the supplementary report of the Auditor-General 2002-03 concerning information and communications technology, future directions, management and control.

PAPERS TABLED

The following papers were laid on the table:

By the President—

Reports, 2002-03—
- City of Unley
- Clare and Gilbert Valleys Council
- District Councils—
  - Le Hunte
  - Mount Gambier

By the Minister for Aboriginal Affairs and Reconciliation (Hon. T.G. Roberts)—

Reports, 2002-03—
- Barossa Area Health Services Inc
- Central Eyre Peninsula Soil Conservation Board
- Industrial Relations Advisory Committee
- Industrial Relations Commission—ordered to be printed
- Mining and Quarrying Occupational Health and Safety Committee
- Occupational Health, Safety and Welfare Advisory Committee
- The Department of Water, land and Biodiversity Conservation
- TransAdelaide—Replacement Pages
- WorkCover Corporation SA—ordered to be printed

Industrial Relations Advisory Committee—Report, 2001-02

Interim Operation of the City of Onkaparinga Local Heritage (Willunga) and the City of Onkaparinga Local Heritage (Noarlunga) Plan Amendments

Interim Operation of the City of Victor Harbor Local Heritage Plan Amendment Report.

QUESTIONS ON NOTICE

The PRESIDENT: I direct that written answers to questions on notice Nos 191 and 256 of the last session and the following question on notice of this session be distributed and printed in *Hansard*: No. 92.

TRANSPORTSA, INVESTING PROGRAM

191. (Second session). **The Hon. DIANA LAIDLAW:**

1. What is the budget for Transport SA's investing program in 2002-03 compared to the previous year?

2. What is the year to date progress in terms of budget estimates in relation to each project in this program this financial year.

The Hon. T.G. ROBERTS:

1. I advise the honourable member that the Government announced a total transport capital works investing budget for 2002-03 of $134.2 million. This compares with a figure for 2001-02 of $137.1 million, as stated in the State Budget Papers.

The investing budget for 2002-03 was subsequently reduced to $125.962 million due to deferral of $10.0 million relating to the South East Rail Project and additional expenditure on works for which external revenue was received.

2. In relation to the status of each project on the program, I refer the honourable member to 2003-04 Budget Paper 4, Volume 3 pages 10.25 and 10.26.

Transport SA's Investing Program for 2002-03

Investing program	Year to date expenditure at 31/1/2003 $'000	2002-03 budget $'000
Major Works		
Safer Roads program		
State Black Spot program	265	3 500
Shoulder Sealing program	1 051	5 100
Overtaking Lanes program	2 183	6 000
Programmed Safety Works	1 622	3 277
Other Safer Roads Program Projects (Wallaroo-Pt Wakefield, Lincoln Hwy, Road Safety Audit Response)	1 194	2 600
Adelaide Better Roads program (Torrens Road)	3 583	5 000
Bus Replacement program	6 321	9 670
Commercial Road, Noarlunga	1 395	3 550
DRIVERS replacement	387	1 167
Mawson Lakes Development program	211	1 500
City West Connector	214	3 900
Metropolitan Traffic Management Works program (Bus Priority Lanes)	327	1 750
National Highways Program—		
Major Works	9 558	23 050
Port River Expressway	8 700	19 410
South East Rail	0	10 000
Southern Expressway	2 613	1 500
Unkerbed Urban Arterial Roads program	175	1 991
Unsealed Rural Arterial Roads program	1 179	2 828
West Lakes Revetment	763	1 243
Other	2 435	0
Total Major Works	44 175	107 036
Minor Works		
State Road Minor Works	6 558	18 658
National Highways Minor Works	1 617	4 470
Federally Funded Black Spots	1 711	3 490
Marine Minor Works	8	562
Total Minor Works	9 894	27 180
Total Investing Program	54 070	134 216

PUBLIC TRANSPORT, SUBSIDIES

256. (Second session). **The Hon. SANDRA KANCK:**

1. What was the total cost of subsidies for public transport in metropolitan Adelaide?

2. What was the total cost of subsidies for public transport in other areas of South Australia?

3. What was the per capita cost of public transport subsidies for metropolitan Adelaide?

4. What was the per capita cost of public transport subsidies for other areas of South Australia?

5. What was the total cost of public transport subsidies and the per capita cost of subsidies for:

(a) Mount Gambier;
(b) Millicent;
(c) Naracoorte;
(d) Kadina;
(e) Whyalla;
(f) Strathalbyn;
(g) Lobethal;
(h) Port Augusta;
(i) Port Pirie;
(j) Port Lincoln;
(k) Renmark;
(l) Barossa Valley;
(m) Yorketown; and
(n) Berri?

The Hon. T.G. ROBERTS: The type of Government assistance provided in regional areas is quite different to metropolitan Adelaide. Also, the nature of transport services is that they are not always exclusive to one area of the State. For these reasons, it is extremely difficult to make a direct comparison between metropolitan and regional South Australia.

The type of Government support in regional areas varies and may include direct subsidy, operating grants, or reimbursement for concession fares. The different types of services are as follows:

1. Regional Route Services—predominantly the bus services between major regional centres and Adelaide.

2. Community Passenger Networks (CPNs)—based around regional areas, CPNs facilitate and provide access to transport, particularly for transport disadvantaged people.

3. Provincial City Bus Services—the regional city equivalents of Adelaide's public transport system. They operate in Port Pirie, Port Augusta, Whyalla, Port Lincoln, Mount Gambier and Murray Bridge.

4. Country Taxi Services—licensed by the local Council in a regional area or operating as non-metropolitan hire cars accredited by the Passenger Transport Board.

5. Tour and Charter Services—numerous small bus companies provide charter services in regional areas. Many are contracted to the Department of Education and Children's Services (DECS) or private schools to provide school bus services.

6. Department of Education and Children's Services (DECS) school bus fleet—controlled and operated by DECS to provide school buses in regional areas.

7. Department of Human Services—provides payment for travel costs including accommodation for patients in rural and remote areas through the Patient Assistance Transport Scheme.

8. Remote Air Services Subsidy—serves people in remote outback South Australia.

9. Community services—Councils and other providers provide community buses and other forms of transport in some areas.

For the year 2002:

1. For the financial year 2001-002 the contribution to public transport in metropolitan Adelaide was approximately $182 million.

This includes the subsidy to Adelaide Metro bus, train and tram public transport services. It does not include other forms of subsidy for passenger transport, like the subsidy provided to people with disabilities through the South Australian Transport Subsidy Scheme (SATSS).

2. Different agencies contribute to supporting passenger transport in regional South Australia. Some of the agencies programs are not split between regional and metropolitan areas. Accordingly, it is not possible to provide an exact figure for the total cost of Government subsidy. However, an estimate based on the 2001-02 financial year is:

- Department of Transport and Urban Planning—$7.1 million
- Department of Education and Children's Services (DECS)—$22 million
- Patient Assisted Transport Scheme, Department of Human Services—$3.1 million

3. and 4. Given the different types of subsidy for people in regional South Australia and people in metropolitan Adelaide, a reliable direct comparison is not available.

5. The subsidies are applied to many different types of services and these services travel between different regions. Accordingly it is not possible to provide meaningful data on the level of subsidy by specific region as requested above.

MEMORANDUMS OF UNDERSTANDING

92. **The Hon. KATE REYNOLDS:**

1. How many Memorandum of Understandings (MOU) are in existence between the Department of Human Services (DHS), or any other South Australian Government agency, in relation to the provision of health services, dental services, correctional services, counselling services and any other services provided to people in immigration detention in South Australia?

2. (a) Will the Minister, or any other relevant Minister, Table these MOU's in the Parliament;

(b) If so, when; and

(c) If not, why not?

3. How many Tier 1, Tier 2 or Tier 3 child protection notifications have been made to the DHS since the opening of the Baxter Immigration Detention Centre in September 2002 in accordance with the MOU between the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) and the DHS relating to Child Protection Notifications and child welfare issues?

4. How many written statements have been received from DIMIA since September 2002 in relation to action taken regarding Tier 1 notifications as per section 8.6 of the MOU between DIMIA and DHS?

5. Will the Minister provide details about the training provided to DIMIA Officers and persons employed by the detention service's provider as agreed to in section 12.1 of the MOU between DIMIA and DHS?

The Hon. T.G. ROBERTS:

1. The Department of Human Services (DHS) is party to two Memorandum of Understandings (MOU) with the Commonwealth Government in relation to people in immigration detention. The first MOU relates to child protection notifications and child welfare issues pertaining to children in immigration detention in South Australia, signed on 6 December 2001.

The second MOU relates to unaccompanied humanitarian minors who have been in immigration detention but who have since been relocated into the community on a temporary protection visa. This was signed in November 2002.

The Department of Education and Children's Services (DECS) signed a Memorandum of Understanding in December 2002 to provide access for children detained in immigration detention in South Australia to education in South Australian Government schools.

2. (a), (b), (c). The MOU's will be tabled on 2 December 2003.

3. A total of 41 child protection notifications classified as Tier 2 and involving 64 children have been made to DHS since the opening of the Baxter Immigration Detention Centre in September 2002.

4. There have been no child protection notifications classified as Tier 1 since September 2002.

5. Training in the one-day module of Mandated Notifier Training was provided by FAYS staff at Baxter to fourteen new detention centre staff in July 2003.

The training enabled staff to recognise possible cases of abuse and the circumstances under which staff may intervene in family life when there are reasonable grounds to believe that a child is at risk of abuse or neglect, to be familiar with reporting and notification procedures and understanding their role as mandated notifiers under the Children's Protection Act.

Several detention centre staff have also received 3-day Train the Trainer Mandated Notifier training which enables detention centre staff to provide ongoing mandated notifier training to new staff. This training was held in Adelaide in August and October 2002. To date, ten staff have received this training, although it is understood that only five still remain in employment at Baxter.

Other training has occurred as required on a case by case basis, providing staff with skills to provide appropriate care and protection for children in detention and to assist families to carry out their responsibilities to care for and protect their children.

PRINTING COMMITTEE

The Hon. R.K. SNEATH: I bring up the first report of the committee 2003-04 and move:

That the report be adopted.

Motion carried.

CRAIGMORE HIGH SCHOOL

The Hon. P. HOLLOWAY (Minister for Agriculture, Food and Fisheries): I table a ministerial statement about Craigmore High School made today by the Minister for Education and Children's Services.

NATIONAL LIVESTOCK IDENTIFICATION SCHEME

The Hon. P. HOLLOWAY (Minister for Agriculture, Food and Fisheries): I seek leave to make a ministerial statement on the National Livestock Identification Scheme.

Leave granted.

The Hon. P. HOLLOWAY: I undertook to obtain further information in response to a question from the Hon. Caroline Schaefer on 2 December regarding the National Livestock Identification Scheme (NLIS). The honourable member requested that I bring back this information as a matter of priority and I am pleased to do so.

With regard to exemptions for NLIS tags for South Australian cattle producers, the South Australian NLIS implementation working group has recommended that bobby calves (calves under six weeks of age), consigned for slaughter only, be identified with a bobby calf ear tag. There has been some discussion of the possibility of having exemptions until 2010 for large lines of breeding cattle (over 20 head in a consignment) being consigned from property of birth direct to abattoir provided they are identified with a transaction tag as suggested in the economic impact study.

This week, a request was made by a South Australian abattoir operator to the working group that this type of exemption be put in place for all interstate cattle consigned direct to slaughter from the property of birth. The issue of low-risk cattle being consigned direct to slaughter will be discussed by the working group when it next meets on 12 December.

In October, the Primary Industries Ministerial Council (PIMC) agreed to an extension of the deadline for the start of the implementation of NLIS to 1 July 2005 for Queensland, the Northern Territory and Western Australia. The other states have agreed to begin implementation by 1 July 2004. In Queensland, the Northern Territory and Western Australia, it is mandatory for the producer to consign cattle with a waybill and they must be branded. With the implementation of NLIS, cattle in the states and the Northern Territory will be required to have some form of identification, whether it be a brand, earmark, transaction tag or NLIS tag. In each of these jurisdictions there are some existing exemptions. In Queensland, an exemption from tail-tagging currently exists for a line of 22 or more cattle of the same sex when consigned direct from property of origin to abattoir. These cattle are consigned on a weight and grade basis and are required to be maintained as a segregated group until slaughter, thus maintaining the integrity of the identity of the animals. This is to continue after the implementation of NLIS.

With the introduction of NLIS in Western Australia, cattle consigned from property of birth direct to slaughter or to live export will be required to be identified with a transaction tag (preferably a transaction ear tag) bearing the identification code of the property of birth. These cattle must also be either branded or earmarked, consigned with a waybill and maintained as a segregated group until slaughter. For other types of movements (property to property or property to saleyard) cattle will be required to be identified with an NLIS device. In the case of cattle entering South Australia, the animals must be identified in the same manner as South Australian born and raised cattle. However, some exemptions have been granted for specific low-risk cattle consigned direct to slaughter. There are expectations that this practice will continue. However, in order to maintain the integrity of the whole of life identification process, these exemptions will be kept to a minimum and will be of the shortest possible term. South Australia will take the lead in facilitating negotiations to bring all Australian jurisdictions to a point of agreement as soon as possible. To achieve this national consensus, the chair of the South Australian NLIS Implementation Working Group is planning a meeting of the chairs of all other state and territory implementation working groups early in the new year.

QUESTION TIME

ICT CONTRACT

The Hon. R.I. LUCAS (Leader of the Opposition): I seek leave to make a brief explanation before asking the minister representing the Treasurer a question about the government's ICT contract.

Leave granted.

The Hon. R.I. LUCAS: Members would be aware that the Auditor-General raised concerns about potential conflicts of interest with senior public servants involved in the government's procurement process for the ICT contracts. There have been a number of questions raised publicly in both houses about the conflict of interest issue. I am advised that the Economic and Finance Committee has now agreed to have the Auditor-General present evidence to the committee in relation to potential conflicts of interest of senior public servants involved in the process.

The government has already taken some key decisions about the ICT contract regarding how it is to be packaged, or divided up and repackaged rather than being a single outsourced whole of government contract. There are some companies and lobbyists who are already happy with that government decision, but there are some companies and lobbyists who are unhappy with the decision. I have been advised that a key steering committee of senior public servants, which is advising the government on this issue, includes the Under Treasurer, Mr Jim Wright; the head of the Department of Premier and Cabinet, Mr Warren McCann; the former commissioner for public employment, Mr Paul Case, who is now CEO of DAIS; and, at one stage, Mr Bill Cossey, from the Courts Administration Authority, although I am not sure whether he still serves on that committee. The project director is Mr Andrew Mills from DAIS and the government's ongoing consultant is Mr Ian Kowalick, but the key committee comprises Mr Wright, Mr Case, Mr McCann, and possibly Mr Cossey.

My colleague the Hon. Dorothy Kotz asked minister Weatherill a question about this particular issue, and in November minister Weatherill said:

> We are in the process of addressing that very issue [that is, the issue of conflicts of interest] by having a particular body of work which will ensure that those people who are intimately involved in the procurement decision do not have a conflict of interest; and those steps are being taken.

The other issue that I place on the record is that some concern has been expressed to me that the government has decided not to take any other legal advice than that available through crown law. Without wishing to be critical of crown law and its individual officers, concerns have been expressed about their capacity to manage and compete against the legion of lawyers that major national and international companies will line up against them during the coming procurement process. My questions are:

1. Does the Treasurer now agree with the statement of minister Weatherill when he said, 'The government will ensure that those people who are intimately involved in the procurement decision do not have a conflict of interest; and those steps are being taken'?

2. Is the government convinced that it does not require any additional legal assistance to protect the taxpayers' interest in relation to the coming procurement process over and above the legal expertise available through crown law?

3. Can the Treasurer assure the parliament that one of the senior public servants, about which the Auditor-General has raised questions and concerns, is not in fact the Under Treasurer, Mr Jim Wright, who is a member of the key steering committee advising the minister and the government on these issues?

The Hon. P. HOLLOWAY (Minister for Agriculture, Food and Fisheries): I will refer those questions to the Treasurer and bring back a reply.

ANANGU PITJANTJATJARA EXECUTIVE BOARD

The Hon. R.D. LAWSON: I seek leave to make a brief explanation before asking the Minister for Aboriginal Affairs and Reconciliation a question about the Anangu Pitjantjatjara Executive Board.

Leave granted.

The Hon. R.D. LAWSON: On 10 November, in response to a question I asked concerning the lengths of terms of members of the AP Executive Board, the minister indicated that the government had received a request that the current executive be rolled over for a three year term. The minister informed the Legislative Council that, in the government's view, that was not possible and that it was necessary to comply with the terms of the legislation, which stipulate that members of the executive board and the chair hold office for one year. The minister said:

> We have indicated to the APY executive that it would have to face an election at its annual meeting and it is my understanding that the decision has been made to that effect.

The minister made clear that that was the view of the government. I have now been furnished with a copy of the notice convening the annual general meeting of AP, to be held at Umuwa on the 15th of this month. That agenda includes nine items, none of which is the election of office bearers and executive or a chair. The notice is signed by Mr Gary Lewis. I have received a communication from the lands in the following terms:

> Traditional owners and elders want to know why there is no election for the executive and the chairman.

My questions are as follows:

1. Is it true, as has been reported, that the minister has given tacit approval to the course of action proposed by the executive?

2. If not, what steps will the minister take to communicate to the convener of the meeting that the act requires annual elections of office bearers and the chairman?

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): I thank the honourable member for his questions. It is true that I indicated to parliament that an election would have to be held for the office bearers for the AP executive in accordance with the act and with my role as minister with responsibility for the act. The role of the executive in relation to the changes that have taken place on the lands in relation to governance is in the hands of the APY executive. How it deals with that change is up to it and not up to the government. We do not want to be in a position of looking over the APY executive's shoulder all the time in relation to how it conducts its business in between annual general meetings.

The last annual general meeting held was based on a formula put together by a consultant, Chris Marshall, who choose the method of having nominations from 16 communities to represent the APY executive and then the APY executive electing its chair. Those delegates at the last annual general meeting were endorsed as nominations by the communities as representatives of the APY council or board. The situation at this election is that a motion will be put to that annual general meeting to re-elect those nominated people. That will be put in the same way as any other motion would be put in relation to delegates being elected. In this case there have been some resignations or some individuals not elected at the last AGM will be running as fresh delegates due to resignations from within those communities.

In the main the basic make-up of the APY executive that is being considered by the annual general meeting for roll-over are the same people. I have said in this place before that governance on the lands at the moment is such that they have to engage our governance. We have to change our governance, and we have done that to try to simplify the methods of delivery, particularly human services, within the APY lands.

Certainly, we have tried to engage the APY executive in a more receptive method of dealing with both commonwealth and state funding bodies. One of the real problems that not only the APY executive has but also the other land management and human service management bodies within our remote communities is the myriad of departments, funding regimes and applications they have to go through in dealing with some of the issues on a daily basis. It is no secret that I have encouraged a more simplified but more effective way of dealing with funding regimes within the lands.

I have also tried to find a more responsive way for government to work in partnership with APY, so that we are able to measure the results of the funding regimes going into those programs so that it is not a one-way ticket; that is, governments put forward their funding regimes and executives in remote regions accept those responsibilities for the delivery of those programs but then go away and put them in place on their own. That is not the way in which this government is dealing with this matter. We have made an appeal to the opposition to support that as a way forward and to change the way we deal with remote and regional communities, in some cases, to ensure that the moneys that are expended by ATSIC and the state and commonwealth governments reach their targets and we are able to measure change, because, in the past, those funds have not hit the target.

We still have the worst possible health conditions for Aboriginal people in remote communities. All members would be ashamed if they were to visit the communities and see what is happening. We do not have poverty in those communities: we have extreme poverty—abject poverty. We are trying to change that. In relation to the annual elections, is it true that I have given tacit approval to the method of election? How those delegates and the chairman are elected is APY's business, as long as it conforms with the requirements of the act, which is my role and function.

I have been told that an item on the agenda will deal with the endorsement of the delegates who have been elected at a community level and that it will be for a further two years (as decided by the APY executive at general meetings during the year); and that those issues have been discussed at a community level and endorsed by many of the communities. I am not saying that all communities have agreed with it, but, in the main, it appears that there will be a general consensus. That meeting has not been held yet.

We are not sure what the final proposal will be in relation to how that motion is put, so we will be watching carefully. The government will have representatives at the meeting and we will do an assessment, as we did after the elections last year, to ensure that the intention of the act and the definitions

within the act are upheld as far as our responsibilities are concerned. What I am saying is that we will also be encouraging the APY to change its method of governance so that perhaps this will be the last election in which the elected bodies are formed in this way. We are talking with the APY executive and local government bodies to try to have a form of local governance in those regions. That will be by agreement: we will not be forcing that on those Aboriginal communities but will be talking to them.

We will be encouraging them to pick up a form of local governance which takes them away from the inadequacies of the act we are now policing, that is, the act that was drawn up in 1981 that had land management as the key feature in it and very little reference to human services. We are trying to separate human services from infrastructure services to try to put the emphasis back on human services so that health, education, housing and the issues associated with better lifestyle in that community are features of any new governance. We want to arrange our governance such that we can get it by agreement.

DISTINGUISHED VISITORS

The PRESIDENT: I draw honourable members' attention to the presence today of a delegation of the staff from the Vietnamese National Assembly, who are being hosted by the Adelaide TAFE as part of an education program, and they are being sponsored by the Education Officer, Penny Cavanagh. I am sure honourable members will all join me in welcoming our guests to our parliament, and we hope the experience is educational.

ANANGU PITJANTJATJARA EXECUTIVE BOARD

The Hon. R.D. LAWSON: As a supplementary question: given that the Premier informed a delegation from the APY Executive on its recent visit to Adelaide that the board should go to the forthcoming annual general meeting for re-election, and given that the minister has today indicated that he is aware that the proposal is that at the meeting those elected will be endorsed for a further two years, will the minister communicate with the convenor of the meeting that the act requires election, not endorsement, for one year, not two years?

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): As I have said, there is an item on the agenda that is indicative of the re-election of those delegates who were nominated and elected at a community level as representatives of their community. The intention of the AP board is to endorse those delegates, the same as was done in the last election on the AP lands when they first changed their method of electing their community delegates. After the proposals have been put, we will be looking at the way in which the rollover position is put. It is quite possible for any group to put up a motion that opposes the general principles inherent in the motion being put by the executive. If that happens, there will be a general election. If that is what the AP wants, it is in the hands of the meeting. I will not dictate nor determine the outcomes of the method by which they bring about their changes.

Members interjecting:

The Hon. T.G. ROBERTS: As the Hon. John Gazzola has just said, I cannot make a determination in that way. As I have said, the act is deficient in a lot of ways.

An honourable member interjecting:

The Hon. T.G. ROBERTS: It doesn't say how. The annual election—

An honourable member interjecting:

The Hon. T.G. ROBERTS: The indicated flier of which the honourable member obviously has a copy says that there will be an annual general meeting, which is in line with the act, and there will be elections for office holders—

An honourable member interjecting:

The Hon. T.G. ROBERTS: I'm saying it—and the chairman at that meeting. The method by which they do that will be determined by the meeting, as it always is. There will be observers from crown law, from the state government's perspective, to make sure that the government's position on the legislation is protected and adhered to, and we will make an assessment after the meeting as to the way in which the election will be held. That will be in the hands of the meeting.

The Hon. R.D. LAWSON: As a further supplementary question, will the minister ensure that an officer of the State Electoral Office is present at this year's annual general meeting, as there was last year?

The Hon. T.G. ROBERTS: It is not my role to dictate to the APY how they conduct their elections. They can invite somebody from the Electoral Commission, if that is their wish. That is our preference but, if there are other individuals who have experience in monitoring elections, that may be the process that is adopted. I am not privy to the intentions of the APY.

As I have said, our only consideration is that the method of election is such that it conforms with the act and that the majority position is clear cut, that is, 50 per cent plus one. Whichever group is successful, I certainly will engage the new executive very early in the new year to put together the programs that we have announced and funded. We will be working closely with the new executive to ensure that the funding streams are put in to deal with petrol sniffing, alcohol and drug abuse, as well as funding streams for the nutrition and store programs, and we will ensure that they are working properly. The method of election is not prescribed in the legislation. Certainly, there are guidelines, and certain aspects of the legislation must be adhered to, and we will watch that.

ELECTRICITY SUPPLY

The Hon. CAROLINE SCHAEFER: I seek leave to make a brief explanation before asking the Minister for Agriculture, Food and Fisheries a question about electricity prices.

Leave granted.

The Hon. CAROLINE SCHAEFER: Yesterday, in reference to a select committee motion, the minister said:

> The root cause of why South Australian consumers may pay more for power is the Liberal party's privatisation of this state's electricity assets.

My questions are:

1. In the light of these comments, how does the minister reconcile his statement with that made in the Standard and Poor's report of September 2003, in relation to South Australia's financial position that privatisation of the state's electricity assets in 2000-01, which reaped almost $5 billion (most of which was used to pay down debt), was a key factor in the December 1999 ratings upgrade to AA+ from AA?

2. Does the minister consider that he has a better grasp on and interpretation of the economy than Standard and Poor's?

The Hon. P. HOLLOWAY (Minister for Agriculture, Food and Fisheries): I do not see those statements as being contradictory. If you sell your electricity assets for $5 billion gross (but the net figure was somewhat less than that, that is, about $4 billion) and you pay that off your debt, of course your debt position will be improved. However, the point is that it is that process of privatisation that has led to the significant increase in prices to consumers. In the order of $200 million to $300 million per year has been added to the cost for consumers as a consequence of privatisation.

The Hon. CAROLINE SCHAEFER: I have a supplementary question. How does the minister reconcile that comment with the opinion of the Independent Regulator, Lew Owens, that, in real terms, less money is received now than was the case, say, 10 years ago?

The Hon. P. HOLLOWAY: I am not sure in what context those comments were made. However, they may make some sense if Lew Owens was talking about electricity prices in Australia relative to those in the rest of the world. Nevertheless, the point that I made yesterday stands: as a consequence of privatisation, consumers in this state have been paying approximately 25 per cent more for electricity—and that is a statement of fact. There is one thing that I should correct. There was another impact, and that was the GST. I perhaps could have mentioned that as another contributing factor.

GENETICALLY MODIFIED CROPS MANAGEMENT BILL

The Hon. CARMEL ZOLLO: I seek leave to make a brief explanation before asking the Minister for Agriculture, Food and Fisheries a question about the consultation meetings for the government's GM crops management bill.

Leave granted.

The Hon. CARMEL ZOLLO: Recently, cabinet approved the release of the Consultation Draft Genetically Modified Crops Management Bill 2003 for public comment. A six-week consultation period commenced, with written submissions being accepted up to and including 12 December 2003. As part of the consultation period, meetings have been held across the state to inform interested persons of the contents and meaning of the bill and to hear their views. I understand that these meetings have now concluded. Can the minister provide some information regarding the consultation period so far? What have been the general views of the meeting attendees in regard to the government's bill?

The Hon. P. HOLLOWAY (Minister for Agriculture, Food and Fisheries): The bill seeks to regulate which GM crops can be grown where, including their exclusion from some areas, on the basis of managing market risk. In doing so, the bill is not in conflict with the commonwealth Gene Technology Act 2000. It has also been developed to avoid WTO risk and to have minimal anti-competitive outcomes. The purpose of the consultation has been to advise the community of the government's intentions in relation to the regulation of GM crops and to receive feedback on the proposed regulatory process and any anti-competitive consequences and impacts that might occur.

A document package was prepared that included a letter of introduction from me, a copy of the draft bill, an explanatory document that gave a lay overview of the draft bill and a series of questions to assist readers to consider how the bill might impact on their business or industry. It also provided other key background information which included the select committee's recommendations and an overview of the current national regulatory environment for GMOs.

These documents have been made available on the PIRSA web site. Printed copies were also mailed to nearly 300 organisations—for example, primary industry organisations, regional development organisations and organisations that have an interest in GM issues; corporate stakeholders (such as seed companies, bulk handlers, exporters, etc.); and state, commonwealth and local government. Subsequently, an additional 55 copies were posted to people who have contacted PIRSA.

Advertisements announcing the consultation were placed in the Saturday *Advertiser*, *The Stock Journal* and major rural newspapers to appear in the week commencing Saturday, 6 November. Advice was also sent to rural print and radio journalists, which resulted in several comments on ABC as well as several articles in rural papers. Written submissions can be made by post or hand delivered to PIRSA, or sent by fax or email, on or before 12 December 2003. I am advised that, to date, 12 submissions have already been received.

To support the consultation process, a series of nine public meetings was held in the third and fourth weeks of the consultation period. More than 100 people attended the meetings at Adelaide, Cummins, Maitland, Clare, Parndana, Penola, Keith, Woodside (which meeting I was able to attend) and Freeling. In addition, briefings have also been provided to members of parliament, the executive of the SAFF Grains Committee and the Plant Genomics Centre Management. Comments have been made about the timing of the consultation process which, unfortunately, has coincided with hay making and harvest in some districts. The need to have a bill available to introduce by 16 February next year (when parliament resumes), or thereabouts, unfortunately precluded delaying the consultation until after harvest. The development of the bill was, of course, commenced once cabinet had accepted the recommendations of the select committee on GMOs in July.

The general impression gained from the information received to date and from the public meetings is that the general thrust of the bill appears to be supported. Issues have been raised about the composition of the Crop Advisory Committee and the method of appointment. There is general acceptance of the provision of exemptions in section 6, as long as these are not back doors to commercial GM cropping. Some have argued that Kangaroo Island and Eyre Peninsula should not be the only areas with the opportunity for self-determination of GM status and that the process of self-determination by those regions requires further consideration. In conclusion, I am pleased with the process of the consultation to date, and the results of that process will be the introduction of a bill when parliament resumes next year.

The Hon. IAN GILFILLAN: I have a supplementary question. Is the minister aware that at the first meeting on the West Coast there was one farmer in attendance? Board Bis, the newsletter of the Advisory Board of Agriculture, dated 30 November, states:

> GMO meetings around the state. GMO meeting at Cummins was poorly attended. GMO meeting held at Keith, where 15 attended. The majority did not want GMs, nor saw benefits to South Australia in them. They were keen to support a bill to stop the introduction of GMs in the short term and restrict their spread in the longer term.

The Hon. P. HOLLOWAY: I said that a total of about 100 people attended those nine meetings around the state, and

I mentioned the fact that the government would have preferred to have those meetings at a time that did not coincide with the harvest season, but unfortunately, if that process had been delayed, it would have been impossible to finish this process and have the bill introduced early next year, which would be necessary to ensure that there is some regulation and control over the introduction of GM crops for the growing season in 2004.

Nevertheless, from those 100 people there was a wide range of views, and that was certainly the case at the meeting I attended. While those numbers might not have been huge, they were people who had a significant interest and, I must say, understanding of the issues involved in the subject. At the meeting I attended at Woodside, I was pleasantly surprised at the sophistication of the debate and of the understanding of the issues. While the government would have liked a greater level of response to this bill, nevertheless we believe that has been more than made up for by the calibre of the responses to date.

PARACETAMOL

The Hon. SANDRA KANCK: I seek leave to make an explanation before asking the Minister for Aboriginal Affairs and Reconciliation, representing the Minister for Health, a question about paracetamol overdose.

Leave granted.

The Hon. SANDRA KANCK: Paracetamol is the most commonly ingested substance for self-poisoning in Australia. It is available in supermarkets, chemists and shops, with no age restriction for its purchase. Paracetamol poisoning can cause permanent liver damage or debilitating death. Young people who overdose on paracetamol as a means of drawing attention to their depressed state are rarely aware of these consequences. Emergency departments of hospitals are usually the first port of call for people who have overdosed, but a survey of emergency departments in Australian and New Zealand hospitals has found varied responses to cases of paracetamol overdose. My questions are:

1. How many deaths in South Australia have been attributed to paracetamol overdose in the past five years?

2. How many cases of paracetamol overdose have been treated in hospital accident and emergency departments in the past five years? Of those, how many have resulted in death and how many are likely to have resulted in permanent organ damage?

3. What treatment protocols exist for health professionals dealing with paracetamol overdose?

4. Is psychiatric evaluation part of the current treatment protocol of patients who present with intentional overdose?

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): I thank the honourable member for her important question. I will refer it to the Minister for Health in another place and bring back a reply.

DEFENSIVE DRIVING COURSES

The Hon. T.G. CAMERON: I seek leave to make a brief explanation before asking the Minister for Aboriginal Affairs and Reconciliation, representing the Minister for Transport, questions regarding defensive driving courses for young people.

Leave granted.

The Hon. T.G. CAMERON: In yesterday's *Advertiser*, the 2003 BHeard Youth Opinion Survey showed the youth road toll to be rated as the second greatest concern, behind youth suicide, for young South Australians. The poll, a joint project between the Youth Affairs Council and the Minister for Youth, Stephanie Key, received more than 2400 responses from people aged between 12 and 25. The survey also showed that compulsory defensive driving courses and improved education programs are young people's most favoured solutions to reducing fatalities among their own ranks on South Australian roads. Driver education programs receive 78 per cent support; compulsory defensive driving courses receive 55 per cent. The Youth Affairs Council of South Australia Chief Executive, Ms Sam Laubsch, supports driver education programs and was quoted in *The Advertiser* as saying the following:

> Driver education is proving elsewhere to being positive in contributing to the downturn of the road toll. There are a lot of good reasons not to limit young people's access to driving. It is not about age. It is about experience for driving. Why don't we educate young people and give them better opportunities for more experience rather than taking it away from them.

RAA Traffic and Safety Manager Chris Thomson (with whom I do not always agree) was also quoted in the article. He says he was encouraged by the concern among youth, given young drivers are often stereotyped as 'being quite the opposite'. Mr Thomson said the RAA supported elements of defensive driving as being part of driving lessons. My questions to the minister are:

1. Has Transport SA undertaken any recent cost-benefit studies on introducing driver education and compulsory defensive driving courses for people aged 25 or under? If so, what were the recommendations of the studies?

2. Will the government consider incorporating a defensive driving component into the logbook drivers licence test for people aged 25?

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): I will refer those important questions to Minister for Transport in another place and bring back a reply.

RADIOACTIVE MATERIAL AUDIT

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): I lay on the table a copy of a ministerial statement made today in another place by my colleague the Minister for Environment and Conservation.

RAIL TRANSPORT FACILITATION FUND

The Hon. D.W. RIDGWAY: I seek leave to make a brief explanation before asking the Minister for Aboriginal Affairs and Reconciliation, representing the Minister for Transport, a question about the rail transport facilitation fund.

Leave granted.

The Hon. D.W. RIDGWAY: It has come to my attention that the rail transport facilitation fund, created by the act of the same name in 2001 by my former colleague the Hon. Diana Laidlaw, had a balance of $8.732 million carried over from last financial year, making the total balance of the fund $16.233 million. This figure, less payments of $10.08 million, left the fund with its end of financial year balance of $6.150 million as shown on page 71 of the transport and urban planning section of the Auditor-General's Report, 2002-03. However, a closer inspection reveals that, in the main body of the Auditor-General's Report on page 27, the fund is listed as being $6.287 million—a $137 000 difference. My questions to the minister are:

1. Why are the two figures given for the rail transport facilitation fund different? Will the minister explain what has been done with the difference between the two figures?

2. For which projects does the minister intend to use the $6.15 million or the $6.23 million dollars remaining in this facilitation fund?

3. Which rail transport facilitation projects have already been funded by the $10.83 million paid out of this fund in the last financial year?

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): I will refer those important questions to the Minister for Transport in another place and bring back a reply.

MINISTERIAL CODE OF CONDUCT

The Hon. A.J. REDFORD: I seek leave to make a brief explanation before asking the Minister for Agriculture, Food and Fisheries, representing the Premier, a question about the ministerial code of conduct.

Leave granted.

The Hon. A.J. REDFORD: Prior to the last election, the Premier and the Treasurer issued a document entitled, 'Accountability and honesty in government: Labor's 10 point plan'. It promised improvements to the Public Finance Act, improved FOI guidelines and codes of conduct. The document says that strict standards for ministers will be enforced, and it refers to a code of conduct for ministers. At page 15 of the document it states:

> Ministers should establish with their senior departmental and agency managers a mutual understanding of their respective roles and relationships, agree on priorities, directions, targets and expected levels of performance and evaluation of performance.

In line with that, on 13 October this year, I issued an FOI application for each minister, seeking access to documents that fell within that category. These are agreements between ministers and public servants on annual salaries of between $220 000 and $300 000.

The responses were varied and interesting. Some have been the subject of comment in another place in relation to the Minister for Education. She, in fact, tabled a signed document with draft stamped on every page—only she and her $260 000 per annum public servant would know what the effect of that might be. First, I received responses to disclosing performance agreements entered into by Premier Rann and ministers Holloway, Foley, Atkinson, Conlon, Roberts, Lomax-Smith and White; and it would appear that, in so far as the heads of some departments are concerned, they have complied with the code of conduct.

I received acknowledgments from ministers Wright and Weatherill. I have not received any acknowledgment from ministers Stevens, Hill, Key or McEwen, whose CEOs are collectively on packages of more than $1 million per annum. In the case of Premier Rann, there does not appear to be anything in relation to the arts, or, in the case of Minister Lomax-Smith, anything in relation to tourism. In the case of ministers Stevens, Hill, Key, McEwen, Wright and Weatherill, there appears to be no agreement or they are filed somewhere where no-one can find them or they are being written as we speak. Perhaps they are busily signing drafts, as did minister White.

The time for compliance with my request expired on 12 November 2003 and only minister Conlon sought an extension. In light of this, my questions are:

1. Is there such an agreement with the head of Arts SA, either the former head Kathie Massey or the new head Greg Mackie?

2. Can the Premier confirm which of ministers Stevens, Hill, Key, McEwen, Wright or Weatherill are in breach of this so-called tough ministerial code of conduct?

3. If, as I suspect, there is no agreement in relation to six out of his 14 ministers (possibly half of his cabinet when I issued the FOI) what sanctions will he apply to those ministers?

4. Can the Premier assure us that there will be a performance agreement in place before the next departmental agency manager is sacked or resigns?

5. Can the Premier assure us that there will be performance agreements in place before he reshuffles cabinet after Christmas this year?

The Hon. P. HOLLOWAY (Minister for Agriculture, Food and Fisheries): I will refer the relevant questions to the Premier and bring back a reply. If we are to have a code of conduct for ministers, I certainly look forward to a code of conduct for other members of parliament, because we have already seen how the honourable member who asked the question misused the information that he received from FOI.

The Hon. A.J. Redford: I apologised.

The Hon. P. HOLLOWAY: Yes, and we accepted the apology. Of course, the apology was made after the allegations had already gone out to the press. I accept that it was a genuine mistake by the honourable member.

The Hon. R.I. Lucas: Why raise it?

The Hon. P. HOLLOWAY: The honourable member has raised it. The honourable member is talking about FOI and its use. As a result of changes made to the Freedom of Information Act several years ago, this government is providing unprecedented access to information. We are happy to do that, but members are obligated to use that information in the public interest.

FIRE PREVENTION

The Hon. G.E. GAGO: I seek leave to make a brief explanation before asking the Minister for Correctional Services questions about fire prevention in national parks.

Leave granted.

The Hon. G.E. GAGO: I understand that today fire prevention work is being undertaken in Cleland Conservation Park and Belair National Park. I know that prisoners are involved in work in our national parks, performing tasks such as maintaining walking trails and removing feral plants. Can the minister outline what work is occurring today? Specifically, what involvement do prisoners have in these bushfire prevention programs?

The Hon. T.G. ROBERTS (Minister for Correctional Services): I thank the honourable member for her question and her interest in Correctional Services.

The Hon. A.J. Redford interjecting:

The Hon. T.G. ROBERTS: How long after Christmas was it? The honourable member is reliably informed that there is a prevention program going on in the Cleland and Belair National Parks today. It will be a long summer and a season of very high risk in relation to the amount of material in the hills. The present system is being used to clear some of that growth. The Department of Environment and Heritage will conduct several burn offs and will be using some members of Correctional Services. The DCS involvement is that much of the burn-off today has been removed by

prisoners and heaped. Most days two teams from the pre-release centre perform work in nearby national parks. As we speak (you can probably see smoke up there at the moment) the Department of Correctional Services team is probably removing and burning off along the Nookoo track. In addition to the clearing, the prisoners are involved in reducing the amount of material and thereby reducing risk.

CYCLING GROUPS

The Hon. IAN GILFILLAN: I seek leave to make an explanation before asking the Minister for Aboriginal Affairs and Reconciliation, representing the Minister for Transport, a question about the level of access granted by the minister to groups representing cycling.

Leave granted.

The Hon. IAN GILFILLAN: Recently I was involved in discussions among cycling organisations in South Australia about the government's reduced funding commitment to cycling in this state. I take cycling very seriously, both as a cyclist myself and, more recently, having been appointed as the patron of Bicycle SA. I therefore personally have a distinct interest, as do many other members and their staff in this place, in the provision of cycling facilities. Both Bicycle SA and the Bicycle Institute of South Australia have approached me and indicated that the minister is not interested in cycling. These organisations are reporting that it is very difficult—in fact, impossible—with the minister's hectic schedule to even get an appointment to speak to him about the needs of cyclists on our roads.

It is worth noting that there are very good reasons why we in this place should be supporting cyclists: they cost little to support as they have minuscule impact on road surfaces; they have less impact on the environment than any other form of transport, bar walking; the health of cyclists is generally better than average, resulting in a lower burden on the health system; and cycling events are becoming a major tourism drawcard for our state.

The cycling community believes that it is a matter of grave concern that the minister believes cycling to be in decline, while cycling advocacy groups believe that the number of cyclists and the number of trips made on bicycles are significantly on the increase since the mid-1990s. Cycling promotion has been on the ABC on the last 24 hours, indicating a significant rise in the number of bicycle sales and therefore generally in cycling. My questions to the minister are:

1. Is he aware of the frustration felt by both Bicycle SA and BISA in their ability to have any discussion with him?

2. Could he provide the council with an answer on how much time he has made available to consult with cycling advocacy groups and how does that compare with the amount of time he has made available for discussion with representatives of other forms of transport?

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): I will refer those important questions to the Minister for Transport in another place and bring back a reply.

BHEARD YOUTH SURVEY

The Hon. A.L. EVANS: I seek leave to make a brief explanation before asking the Minister for Aboriginal Affairs and Reconciliation, representing the Minister for Youth, a question concerning the 2003 BHeard youth opinion survey.

Leave granted.

The Hon. A.L. EVANS: In today's *Advertiser*, a further instalment of the findings of the 2003 BHeard survey was published. Today's article mentions the results of questions on the topic of sex education. More than 4 200 young South Australians took part in the survey. The survey is jointly undertaken by the Youth Affairs Council of South Australia and the Department for Family and Youth Services. The article mentioned that approximately 40 per cent of respondents had had sex, with the largest percentage coming from the 20 to 25-year age bracket. Respondents also stated that sex was not considered very important in a relationship, with almost half saying that it was not very important or not important at all. My questions are:

1. Of those respondents who stated that they had had sexual intercourse, would the minister advise of the response of each of the age groups between 12 and 25?

2. Of those respondents who stated that they had not had sexual intercourse, would the minister advise of the response of each of the age groups between 12 and 25?

3. Of those respondents who stated that sex was not considered important in a relationship, would the minister advise of the response of each of the age groups between 12 and 25?

4. Would the minister advise whether the survey asked young people whether they believed that medical practitioners should be required to obtain a signed declaration from a woman to confirm that she has been given full disclosure of all the risks associated with having an abortion?

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): I will refer those important questions to the minister in another place and bring back a reply.

LOCAL GOVERNMENT, MUTUAL LIABILITY SCHEME

The Hon. J.F. STEFANI: I seek leave to make a brief explanation before asking the Minister for Aboriginal Affairs and Reconciliation, representing the Minister for Consumer Affairs, a question about the Local Government Association mutual liability scheme.

Leave granted.

The Hon. J.F. STEFANI: Since February 2002, I have been assisting a resident who lives in Payneham and who has suffered substantial property damage caused to her front brick fence by a tree which had been originally planted by the Payneham council. The resident is a ratepayer of the newly merged council of Norwood, Payneham and St Peters. When writing to the ratepayer on behalf of the Norwood, Payneham and St Peters council, the senior claims administrator of the LGA advised the resident that section 245 of the Local Government Act provides as follows:

> The council is not liable for any damage caused to any property which results from the planting of any trees in any street or road, or from the existence of any tree growing in any street whether planted by council or not.

As members would be aware, the Local Government Act was amended to include a provision of liability which would be imposed on local councils under certain conditions. The amendments under section 256(2) of the act provide as follows:

> However, if—
>
> (a) the owner or occupier of property adjacent to the road has made a written request to the council to take reasonable action to avert

a risk of damage to property of the owner or occupier from the tree; and

(b) the council has failed to take reasonable action in response to the request,

the council may be liable for damage to property that would have been averted if the council had taken reasonable action in response to the request.

The amended act came into operation in January 2000. In considering the behaviour of the LGA in relation to this matter, one can only come to the conclusion that it has acted in a devious and misleading manner by selectively quoting a section of the act, and therefore withholding from the resident important information in relation to her rights to claim damages from the council.

I am advised that this is not the first time that the LGA has failed to act in a proper manner in relation to similar circumstances, giving rise to potential council liability. In view of these circumstances, my questions are:

1. Will the Minister for Consumer Affairs investigate the improper conduct of the Local Government Association mutual liability scheme in its dealings with various claimants?

2. Will the minister issue instructions to the LGA to properly inform members of the public of the full provisions of the Local Government Act in relation to their rights when dealing with potential liability claims on behalf of councils?

3. On completion of his investigations, will the minister inform the council on how many occasions the LGA has selectively quoted the Local Government Act when responding to potential claimants since the act was amended in January 2000?

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): I will refer those important questions to the Minister for Local Government in another place and bring back a reply.

JAMESTOWN SALEYARDS

The Hon. J.M.A. LENSINK: I seek leave to make a brief explanation before asking the Minister for Agriculture, Food and Fisheries a question about the Jamestown saleyards.

Leave granted.

The Hon. J.M.A. LENSINK: The Jamestown saleyards is a well established venue for a large number of sheep sales, including store sheep, through some 15 sales a year. Due to the closure of other saleyards in the region at Peterborough, Burra and Crystal Brook, the lack of other venues in the region and the volume of annual sales, they are in high demand. I understand that the minister inspected the saleyards early this year—possibly February—and made a commitment to the region that his department would provide financial assistance towards a feasibility study into the saleyards. Part of the inquiry relates to whether the site should be upgraded or relocated to a greenfields site.

The rural grapevine has been abuzz for several weeks that a decision has been made, but I understand that neither the local Regional Development Board nor the Northern Areas Council have been given formal advice. My questions are:

1. Has a decision been made regarding the feasibility study?

2. How much funding will be provided?

3. In conducting the feasibility study, will the consultant be advised to take into consideration the fact that the Jamestown yards are well utilised as the only locale in the region, and thus concentrate more greatly on the site aspects rather than questions of viability?

4. Will the study also take into consideration the fact that the saleyards at Dublin are for fat stock; in other words, a different market?

The Hon. P. HOLLOWAY (Minister for Agriculture, Food and Fisheries): I am certainly well aware of the issue of the saleyards at Jamestown. The member is correct; I visited them early this year. I also visited them again when we had our community cabinet meeting in Jamestown, and we had the opportunity to speak to the officers from local government there. The offer made earlier this year was that Primary Industry and Resources would provide funds towards a scoping study. The sum was a $10 000 or $15 000 contribution towards that. There were also some discussions from the Department of Business, Manufacturing and Trade in relation to some assistance. I will get the exact details of that and get back to the honourable member.

As I understand it, this had been held up because there was some discussion as to the actual nature of the scoping study with the local development people and the local government who were keen to see these yards expanded. It is the view of the government that, to be effective, any scoping study obviously would have to look at the viability of those saleyards to ensure that they will be attractive to investors, ensuring that they have a future. Of course, there has been some investment in the past by South Australian governments in relation to infrastructure in the Peterborough region.

There is no doubt that, if marketing of sheep in that region has a future, Jamestown is as good as anywhere else to do that. It has the advantage of having some significant infrastructure there; for example, a sealed airport right near the site and also some wash down facilities that were provided for trucks. Of course, significant costs are associated with stockyards. Obviously, that is why, for the sake of any investors in relation to those facilities, there needs to be a viable feasibility study. It was my understanding that those matters had all been resolved when we were up in—

An honourable member interjecting:

The Hon. P. HOLLOWAY: No, the study will be done separately.

Members interjecting:

The Hon. P. HOLLOWAY: I am answering it. I am giving the honourable member a huge amount of detail. As I understood it, the matter was resolved at the time of the visit up there of the community cabinet, and that money was to be provided. It was my understanding that the terms of that scoping study had been agreed amicably between the Regional Development Board and PIRSA. However, where it is now in the system, I will obtain that additional information for the honourable member.

The Hon. A.J. REDFORD: Mr President, I rise on a point of order. Earlier in question time today, the Minister for Aboriginal Affairs and Reconciliation tabled a ministerial statement made in another place concerning the audit of radioactive material in South Australia. The ministerial statement indicates that the audit was tabled in another place, and I note that the audit has not been tabled in this place. Mr President, is it appropriate for me to call for the tabling in the Legislative Council of the audit of radioactive material?

The PRESIDENT: It is a copy of a ministerial statement: it is not part of the business of the day, so I do not think that it falls into that category. As it was tabled in another place, I will take advice in respect of why it would not be tabled here. It is my advice that the usual process is that, if a document is quoted, a member can call for it to be tabled.

However, the document was a ministerial statement and I do not think that there is a point of order on this occasion.

REPLIES TO QUESTIONS

SCHOOLS, SEX EDUCATION

In reply to **Hon. A.L. EVANS** (25 November).

The Hon. P. HOLLOWAY: The Minister for Education and Children's Services has provided the following information:

Lesson five of the Year 8 SHARE curriculum is focused on the topic of male and female reproductive systems. The reference referred to by the honourable member relates to two diagrams in the teachers' resource 'Teach it Like it is'. Each shows the reproductive system in the context of all body parts, including the bladder and anus and pubic bone. These are not taught as being part of the reproductive system and there is no link made between the diagrams and anal intercourse as suggested.

The inclusions suggested by the Honourable Member will be considered, along with all other comments gathered during the pilot phase.

PLANT BREEDING

In reply to **Hon. CAROLINE SCHAEFER** (24 November).

The Hon. P. HOLLOWAY:

1. On 22 February 2002, SARDI contacted the Plant Breeder's Rights (PBR) Office to advise that further details of the FEH-1 variety (Part 2 of the PBR application—submission of variety description) could not be lodged within the nominated 12 month period from the date of acceptance of registration. The reason for this was because some aspects of the 2001 Distinctness, Uniformity and Stability (DUS) trial as required under the PBR Act had failed and would need to be repeated. At the same time the PBR Office was asked whether a formal application for extension was required. In subsequent discussions with the PBR Registrar about the matter no formal application was requested, however, the Registrar indicated that the Part 2 process should not be unduly delayed.

The PBR Office has been kept informed of developments relating to this variety and at no stage has there been any concern expressed by the Office as to SARDI's ability to complete the PBR application process.

In seeking Plant Breeder's Rights registration, it is not uncommon for such delays to occur between initial acceptance and final granting of the rights when details are published.

2. No withholding of intellectual property relating to FEH-1 has occurred or is occurring which could be construed as a breach of the PBR Act.

On 25 November 2003, SARDI contacted the PBR Office to clarify the status of FEH-1 under the PBR Act. The PBR Office confirmed that the application is progressing satisfactorily and that it has no concerns in this regard.

3. SARDI has continued developing this variety in accordance with the GRDC project requirements. As part of the project, industry and the farming community have been kept well informed of developments through extension material, field days, press articles/media releases and adviser updates. Industry feedback on the process for development of FEH-1 has been very positive.

As no breach of the PBR Act has occurred or adverse criticism received by SARDI, there was no reason to brief the Minister. The development of FEH-1 has been and continues to be a routine plant breeding exercise.

4. As outlined in the response to question 2, no breach of the PBR Act has occurred.

ZERO WASTE SA BILL

Second reading.

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): I move:

That this bill be now read a second time.

I seek leave to have the second reading explanation inserted in *Hansard* without my reading it.

Leave granted.

On 22 January 2003 the Government announced its intention of forming a new waste management body, Zero Waste SA. This Bill is to establish that entity. It is a vital part of implementing the Government's election policy on waste management, which promised to establish a new legislative framework to:

(a) supervise a comprehensive statewide waste reduction and re-use strategy
(b) control landfills
(c) deliver a coordinated and mandated approach to waste management and recycling
(d) encourage the application of the latest waste management technologies
(e) better inform consumers and producers
(f) encourage industry to use recycled and renewable products
(g) work with KESAB and producers to reduce litter
(h) promote private sector on site treatment and recycling of waste
(i) increase recycling by government departments
(j) increase the re-use and recycling of construction and demolition waste
(k) develop a "Green Waste Action Plan" to divert garden food and wood waste from landfills
(l) support tough national packaging covenants to reduce unnecessary packaging.

This will be the purpose of Zero Waste SA. It will be an independent statutory body with a board made up of people with skills and experience in local government, environmental sustainability, industry, regional affairs and management. Its chief objectives will be to eliminate waste or its consignment to landfill and advance the development of resource recovery and recycling industries.

The Government has noted the comments of the Economic Development Board in its Draft Economic Plan on the need for waste management infrastructure and is investigating the feasibility of an eco-industrial precinct at Gillman. We need appropriate sites and infrastructure suitable for the recycling and resource recovery industries if we are to turn waste to resources and encourage a more sustainable lifestyle. Zero Waste SA will play a key role in identifying the need for waste management infrastructure and supporting its development.

Zero Waste SA will be funded by an increase in the levy collected on waste going to landfill, collected under the Environment Protection Act. The levy has increased to $10.10 in the city and $5.10 in the country, with 50 per cent of the levy, or such greater amount as may be prescribed, going to the Waste to Resources Fund.

The Local Government Association of South Australia offered its support when the creation of Zero Waste SA was announced, even though it would mean increased costs for councils. This support demonstrates the commitment of the local government sector to the implementation of the best possible waste management practices. This Government is aware that the Local Government Association would like to see even more of the waste levy used for Zero Waste SA. However, some of this revenue will be required for other agencies in the Environment and Conservation portfolio which play a vital role in regulating waste and developing better options for its use – particularly the Environment Protection Authority which has the task of regulating, licensing and monitoring waste activities. As the Bill requires, Zero Waste SA and the Environment Protection Authority will coordinate their activities for the development of waste strategies.

Zero Waste SA will be supported by a small office. It has commenced work on a draft Business Plan ready for the consideration of the board as soon as it is appointed by the Governor under this legislation. This Government has established a short term Ministerial Advisory Committee to guide and inform the activities of the office. It is this Government's hope that some members of the Advisory Committee will eventually be appointed to the board. One of the first key activities of the board and office of Zero Waste SA will be the development of a comprehensive State Waste Strategy.

The Government is moving quickly to implement its policy to reduce the amount of waste going to landfill and improve the recovery of resources from waste. This Bill is a vital plank in that policy. I commend the Bill to the House.

Explanation of Clauses

Part 1—Preliminary
Clause 1: Short title
Clause 2: Commencement

These clauses are formal.

Clause 3: Interpretation

This clause contains definitions of words and expressions used in the Act.

Part 2—Zero Waste SA

Clause 4: Establishment of Zero Waste SA

This clause establishes Zero Waste SA as a body corporate and sets out its powers as such a body and its status in relation to the Crown and the Minister.

Clause 5: Primary objective and guiding principles

Subclause (1) sets out the primary objective of Zero Waste SA, namely the promoting of waste management practices that, as far as possible eliminate waste or its consignment to land fill and advance resource recovery and recycling. Subclause (2) provides that Zero Waste SA is to be guided by the waste management hierarchy, the principles of ecologically sustainable development, best practice methods and standards and principles of openness in communication with local government, industry and the community.

Clause 6: Functions of Zero Waste SA

This clause sets out the functions of Zero Waste SA. The functions principally relate to the development of waste policies and the waste strategy, also Zero Waste SA's role in the development of waste systems, regional waste management, research and other matters.

Clause 7: Powers of Zero Waste SA

This clause enables Zero Waste SA to exercise any powers necessary to perform its functions, including obtaining expert or technical advice and making use of the services of the administrative unit's employees and facilities under certain conditions.

Clause 8: Chief Executive

This clause establishes the office of Chief Executive of Zero Waste SA and provides that the CE is subject to the control and direction of the Board. The clause further provides for matters relating to the appointment of the CE and the appointment of an acting CE.

Clause 9: Board of Zero Waste SA

This clause establishes the Board of Zero Waste SA and sets out criteria for membership of the Board.

Clause 10: Terms and conditions of office

This clause establishes the duration of appointments of Board members and the entitlement of members to remuneration. The clause provides for the removal of members from the Board in certain circumstances. The clause further sets out when an office of a member becomes vacant and how such a vacancy is to be filled.

Clause 11: Proceedings of Board

This clause sets out the proceedings of the Board, including the appointment of a presiding member, the quorum, that a decision of the majority is a decision of the Board, and that the presiding member has the casting vote in the event of equal votes. Further, provision is made for Board meetings by telephone or video conference, and the validation of decisions made otherwise than at meetings in certain circumstances. The clause requires minutes to be kept, provides that persons other than members may, with the Board's consent, be present at meetings and that the Board may determine its own procedures.

Clause 12: Committees and subcommittees of Board

This clause enables the Board to establish committees and subcommittees and provides for the procedures of such committees.

Clause 12A: Conflict of interest

This clause requires members of the Board to disclose conflicts of interest in relation to matters under consideration by the Board or committee or subcommittee and requires members to refrain from engaging in deliberations or decisions where such a conflict exists. Failure to do so is an offence attracting a maximum penalty of $5 000 or imprisonment for 1 year. Members may, however, if charged, rely on the defence that they were unaware of the conflict at the time. Subclause (3) requires disclosures to be recorded in the minutes of the Board.

Clause 13: Business plan

This clause requires Zero Waste SA to submit for approval to the Minister an annual business plan setting out its major projects, goals and priorities for the next 3 years, the budget for the next year and any other matters required by the Minister. The plan is subject to any modifications required by the Minister and must be made available for public inspection on a website and at Zero Waste SA's principal place of business.

Clause 14: Annual report

This clause requires Zero Waste SA to present to the Minister before 30 September in each year its annual report containing details of income and expenditure, directions given by the Minister to Zero Waste SA, the adequacy of the waste strategy and its implementation. The report must be tabled in Parliament.

Clause 15: Use and protection of name

This clause gives Zero Waste SA ownership of the names "Zero Waste" and "Zero Waste SA" as well as any other name prescribed by regulation. Use by persons of these names without the consent of Zero Waste SA is an offence attracting a maximum penalty of $20 000. The forms of redress available to Zero Waste SA in the event of unauthorised use of these names are injunction and compensation, as well as other civil remedies.

Part 3—Waste to Resources Fund

Clause 16: Waste to Resources Fund

This clause establishes the Waste to Resources Fund and sets out the various sources from which the funds are to come. The clause requires the Minister to review, at least annually, the adequacy of the percentage of the solid waste levy paid into the Fund. The clause sets out that the Fund may be applied in accordance with the business plan or any other manner authorised by the Minister for the purposes of implementing the objects of the Act. The clause also enables Zero Waste SA to invest the money in a manner approved by the Treasurer.

Part 4—Waste strategy

Clause 17: Development of waste strategy

This clause provides for the development by Zero Waste SA of a waste strategy. The clause sets out what is to be included in the strategy, namely—

- objectives, principles and priorities,
- an analysis of waste generation levels and waste management practices,
- targets or goals for waste reduction, diversion of waste from landfill, waste management services, public and industry awareness and education, and research
- measures to implement the targets,
- criteria for assessing the adequacy of the strategy and its implementation.

The clause provides that the strategy does not take effect until adopted by Zero Waste SA, and further provides for the consultative arrangements that are required before adoption of the strategy. The first waste strategy is to be adopted within 12 months after the establishment of Zero Waste SA or at such other time as directed by the Minister. Subsequent waste strategies must be developed at intervals of not more than 5 years or at a time directed by the Minister. The clause also provides that the strategy must be made available for public inspection on a website and at Zero Waste SA's principal place of business.

Clause 18: Zero Waste SA and Environment Protection Authority to coordinate activities

This clause provides that Zero Waste SA and the EPA must coordinate their activities for the development and implementation of waste strategies.

Part 5—Miscellaneous

Clause 19: Immunity of persons engaged in administration of Act

This clause provides for immunity of persons engaged in the administration of the Act for acts or omissions done in good faith, and that liability for such acts or omissions lies against the Crown.

Clause 20: Regulations

This clause sets out the regulation making power, allowing any regulations contemplated or necessary or expedient for the purposes of the Act to be made.

Schedule—Related amendments and transitional provision

Part 1—Preliminary

Clause 1: Amendment provisions

This clause is formal.

Part 2—Amendment of Environment Protection Act 1993

Clause 2: Amendment of section 47—Criteria for grant and conditions of environmental authorisations

Clause 3: Amendment of section 57—Criteria for decisions of Authority in relation to the development authorisations

These clauses make consequential amendments to the Environment Protection Act, requiring regard to be had to the waste strategy in environmental authorisations and development authorisations granted under the *Environment Protection Act 1993*.

Part 3—Transitional provision

Clause 4: Payment by EPA to Waste Resources Fund of percentage of waste depot levy paid since 1 July 2003

This clause requires the EPA to pay to the Treasurer for the credit of the Waste to Resources Fund 47.5 per cent of the waste depot levy paid under section 113 of the *Environment Protection Act 1993*

between 1 July 2003 and the date of commencement of the Act in respect of solid waste received at the depots.

The Hon. CAROLINE SCHAEFER secured the adjournment of the debate.

CRIMINAL LAW CONSOLIDATION (IDENTITY THEFT) AMENDMENT BILL

Adjourned debate on second reading.

(Continued from 1 December. Page 779.)

The Hon. IAN GILFILLAN: I rise to indicate the Democrats' support for the second reading. I am pleased to see that the government is wrestling with these issues that have come to light with new technology. Of course, as with many computer crimes (and, in this case, I am talking about identity theft), these are the latest versions of crimes that have existed for some time. It is a standard confidence trick for a person to pretend to be someone that they are not in order to gain access to some benefit for themselves. It is, in fact, the tightening of the net of personal identification that has made it harder for fraudsters to achieve their aims, leading to this modern version of the crime.

Once upon a time, a person could obtain a copy of someone's birth certificate and hide somewhere with a false identity. Now, of course, they need to be able to pass a 100-point identity test with documentation, including bills, their driver's licence and their passport, etc. But many people around the world are prepared to go to lengths to steal enough information to pass themselves off as another person. Simple techniques are used, such as dumpster diving, where scraps of information gleaned from the contents of rubbish or recycling bins are used.

Another example is lodgement of a mail diversion for a short period of time, which can account for all mail, and, at the right time of year, these people can collect credit card renewals, along with a set of utility bills. People are doing these things because the rewards are great. With a small amount of information, a person can obtain a driver's licence in someone else's name. That clean licence affords a degree of protection when dealing with the police on traffic matters, especially for a person who has lost their own licence. That clean licence can also open doors for greater access.

The question is asked: what can a person do with your identity? In the worst case, they can clean out all your bank accounts, gain title to your home and sell it while you are away, open a slew of credit cards in your name and run up enormous bills—especially purchasing goods by mail order on the internet, thus leaving no evidence of themselves except for a temporary delivery address. They could use your identity as a cover while setting up other crimes, thus slipping below the radar of law enforcement agencies. In recent cases in the United States, they have found innocent people on child abuse black lists because predators have used stolen identities in all their dealings with the world. This bill clearly addresses the theft of personal identity for criminal purposes, and even the use of someone else's identity with their permission when the intent is for a criminal purpose.

The Democrats support this bill, but with one small reservation that will be addressed during the committee stage. I have noted that the data encrypted on a person's credit or debit card is included as personal identification information as defined in clause 4. A simple definition of encryption is as follows:

> Any procedure used to convert plain text into cipher text in order to prevent any but the intended recipient from reading that data.

I have taken advice from the Commonwealth Bank that there is no data encrypted on these cards at present, as it is all stored in simple plain text format. This means that anyone with a card reader can see the details of the information stored on the card without any extra effort. In the interests of future-proofing this bill, I am prepared to entertain the idea that data may be encrypted on cards in the future. Accordingly, I will put forward a simple amendment to expand the definition to data 'stored or encrypted' on a debit or credit card. It is a simple amendment, but one that takes out a bit of wiggle room implied by the text. It would be a shame to have the government's good intentions set aside in court because a wily hacker can demonstrate that the data was not encrypted. I indicate support for the second reading and for the bill.

The Hon. P. HOLLOWAY (Minister for Agriculture, Food and Fisheries): I thank honourable members who spoke on this bill, and I thank the opposition and the Hon. Ian Gilfillan for their indications of support. In his contribution the Hon. Mr Lawson referred to the ever increasing levels of research into the behaviour that is sought to be criminalised in these new and original offences. I will not repeat what he said, but merely remark that all of it is real evidence of the necessity for this bill. In his contribution, the honourable member sought to downplay the necessity for this measure, despite the wealth of evidence both here and in the rest of Australia of the need for it. Indeed, the starting point for consideration of the legislation was the enactment of such measures in the United States and, in particular, by the federal government of the United States in the Identity Theft and Assumption Deterrence Act of 1998 (18 US Congress No. 1028).

The Hon. Mr Lawson opined that a large section of such crimes would involve welfare cheats. I do not know on what he bases that opinion. The Attorney-General in another place pointed out that the commonwealth Minister for Justice told him that half of identity fraud cases in Australia involve the falsification of personal documents to steal cash and purchase goods and services. In any event, welfare fraud would be the concern of the commonwealth government. Anecdotal evidence from within SAPOL and the DPP is to the effect that the most common of these offences are fraudulent applications for credit and, in such cases, these proposed offences will really bite. If a person assumes a false identity to apply for credit, what serious criminal offence does that person commit if caught before the contemplated fraud takes place?

I would like to offer two other real examples. The first is a case. In Kerster (2003) 175 CCC (3d) 28, the accused used a false name to exchange emails with another person. In this correspondence, the accused expressed a desire to obtain sexual services from an under-age girl for money. The recipient of the emails agreed to provide the sexual services of an 11-year old girl for this purpose. The accused arrived at the hotel room assigned for the purpose and was there arrested by the recipient of the emails, who happened to be a police officer. The accused was charged with attempting to obtain for consideration the sexual services of a child under 18 and was, in the end, convicted.

The problem that the court faced was the one alluded to by the Hon. Mr Lawson—the problem of proximity in attempt. The court found that the accused was, in this case, proximate enough on the facts. But that need not have been

so. It is notorious that email and chat rooms are home to sexual predators trying to get at under- age children for sexual services—so much so that, in recent months, Microsoft has closed chat rooms for precisely that reason. The law should be able to get at such people before they reach the hotel room. It may not be a police officer at the end of the line.

The second example that I would like to provide is also recent. It is the bank site scam. What happens here is that a fraudster sets up an internet site that is a duplicate of that of a well known bank or financial institution. It then emails customers saying that they should confirm their account details with the bank, and provides a link to the false site. If people send their details and they are defrauded, it is true that existing law will punish the fraud. But we should be able to get at the fake site and emails before that happens, and these provisions will allow us to do that.

I think it necessary to address the question of the exclusion of under-age drinking and the like. The Hon. Mr Lawson labelled this a concession to electoral popularity. This was not the motive for the exclusion. It was really very simple. A similar exclusion appeared in some of the American laws studied in preparation for the bill, and it was thought to be a sensible exclusion. This bill is not seeking to up the ante against the under aged seeking to cheat the regulatory systems put in place to protect them from the vices of tobacco, alcohol and gambling. Those regulatory systems have in place both the offences and enforcement mechanisms thought to be necessary and desirable for their ends. They do not need revisiting in this context.

In his contribution, the Hon. Mr Evans made two points that require some comment. The first is the point about preparatory offences. In consulting Family First, the point was made that the then offences contained in section 144D(2) could be attempted and that, therefore, it was wrong to say, via section 144E, that they could not. The government accepts that position. Parliamentary counsel were instructed to make the necessary change, and that was done in another place. The way it was done was to include offers to give or sell prohibited material in section 144D(2) rather than make the more complex amendment to section 144E. It is difficult to see how one could, for example, attempt to sell prohibited material without offering to sell it. Indeed, it is clear that offering to sell is a wider notion than attempting to sell. The idea always was to accommodate the correct suggestion of Family First.

The Hon. Mr Evans also raised the question of court fees for a certificate. Fees for court documents are set by regulation under the various acts constituting the various courts and are made on the advice of the Courts Administration Authority. They vary widely, but for good reason. For example, some of the fees set under the Magistrates Court (Fees) Regulations 1992 are as follows: filing a civil notice of claim $10; commencement of a minor civil action $74; for issuing investigation or examination summons under the Magistrates Court Act 1991, $11.20; for each request to search and inspect a record of the court, $9.20; and so on. I am confident that the cost of obtaining a certificate would be set at a reasonable rate. I commend the bill to members of the council.

Bill read a second time.

In committee.

Clauses 1 to 3 passed.

Clause 4.

The Hon. IAN GILFILLAN: I move:

Page 3, line 20, after 'data' insert 'stored or'.

I commented in my second reading speech that, although our evidence is that there is not at this stage any encrypted information on a credit or debit card, including this provision embraces the possibility that there will be encrypted information on the card.

The Hon. P. HOLLOWAY: The government believes that this is a sensible amendment suggested by the Hon. Mr Gilfillan and we are pleased to support it.

The Hon. A.L. EVANS: We researched through a very thick dictionary for the word 'encrypted' and could not find it, so we figured it would be a good idea.

The Hon. R.D. LAWSON: I indicate that the opposition, too, will support this sensible amendment.

Amendment carried.

The Hon. IAN GILFILLAN: I note that it is an offence for a person to sell or offer for sale or give or offer to give prohibited material to another person knowing that the other person is likely to use the material for a criminal purpose, to which a maximum penalty of imprisonment for three years applies. What I have not picked up, and it may be that I have not interpreted it correctly, is that, if a person sells or offers to sell or gives or offers to give prohibited material to another person quite genuinely not knowing for what purpose that person might intend to use that material, is that still stipulated as an offence in this bill? If so, what is the penalty?

The Hon. P. HOLLOWAY: I am advised that it is not an offence under this bill. You must have the knowledge. The clause provides that a person who sells or offers for sale or gives or offers to give prohibited material to another person knowing that the other person is likely to use the material for a criminal purpose is guilty of an offence. So that knowledge must be there before an offence can be committed.

The Hon. IAN GILFILLAN: Were I to acquire the minister's personal details and hand it around, and I might be quite generous in how I distributed that material, I would not then be committing an offence?

The Hon. P. HOLLOWAY: Yes, that is correct, without the knowledge that the other person is likely to use the material for a criminal purpose. So, if a person gives their wife or husband their credit card to use, that is not obviously committing an offence.

Clause as amended passed.

Schedule and title passed.

Bill reported with an amendment; committee's report adopted.

Bill read a third time and passed.

STATUTES AMENDMENT (INVESTIGATION AND REGULATION OF GAMBLING LICENSEES) BILL

The House of Assembly agreed to amendments Nos 2 to 29 made by the Legislative Council without any amendment and disagreed to amendments Nos 1 and 30.

Consideration in committee.

The Hon. T.G. ROBERTS: I move:

That the Legislative Council do not insist on its amendments Nos 1 and 30.

The Hon. A.J. REDFORD: I rise to oppose the motion. I would like to make a few comments about some statements that were made regarding this bill, both in another place yesterday and in today's *Advertiser.* In relation to this bill, today's paper states the following:

> Gambling Minister Jay Weatherill has accused the Upper House of tampering with a Money Bill, a form of legislation traditionally passed unamended.
>
> The legislation, introduced in October, aims to make the TAB and SkyCity Casino contribute to the $1.4 million cost of regulating their licences.

In another place, the minister said that it was inappropriate or bordering on unconstitutional for us to move amendments in the form we did. For the benefit of the minister, what I propose to do is provide some small education, given his inexperience in legislative matters. I urge all members to read the South Australian constitution. I know that the Hon. Bob Sneath has read it. Certainly, the Hon. Jay Weatherill does not appear to have read it. It is a document which governs what we do and how we deal with things in parliament. Section 60 refers to money bills. Section 60 (3) states the following:

> For the purposes of the said sections, a bill or a clause of a bill should be taken to deal with taxation if it provides for the imposition, repeal, remission, alteration or regulation of taxation.

Subsection (2) states:

> For the purposes of this and the next three sections, a bill or a clause of a bill shall not be taken to appropriate revenue or public money or to deal with taxation by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties or for the demand or payment or appropriation of fees for licences or fees for services under the proposed act.

In light of this, I suggest that the minister, before he shoots his mouth off about constitutional issues, has a look at the constitution itself, because it is clear. Even a lawyer of the minister's standing would understand that when the act says 'fees for licences or fees for services are not part of taxation', they are not part of taxation. It is exceedingly disappointing that a minister of the Crown can demonstrate such sheer ignorance about the constitutional mores and customs that we have in the Legislative Council. He also said that it was part of the budget. For those of you who have very short memories—I suspect that in this parliament, where there are 69 members, the only person who has a short memory is the minister—the budget was introduced on 29 May this year, six or seven months ago. The legislation before this place was introduced in October. There was a five month gap. How the minister can get up, look anyone in the eye and say that this is a budget measure, beggars belief. This is a minister who is not a minister for gambling but a 'minister for recent invention'.

I will make a general comment about the other issues. The minister brings this problem upon himself. The legislation dealing with freedom of information was dealt with in this place on 24 March 2003. In March this year, we dealt with freedom of information legislation which we sent down to the House of Assembly. This minister, whether he does not want to or does not know how to, has, since that date, refused to engage in any process to resolve the differences between the Legislative Council and the House of Assembly. Mr Chairman, you know very well that deadlock conferences in this parliament have worked exceptionally well for at least the ten years that I have been a member of this parliament and probably for a considerably longer period of time. For reasons that escape me and everybody else in this fair state of ours, this minister seems to be either unable or unwilling to bring a matter to a head by establishing a deadlock conference. This minister for recent invention ought to sit down and get a better understanding of the processes of this place before he starts shooting his mouth off in South Australia's media about what the Legislative Council can or cannot do. His comments yesterday in another place and in the media today are extremely disappointing.

In suggesting that we insist on our amendments, the Legislative Council wanted this body to be encompassed by freedom of information legislation way back in March this year. For the minister to say, in another place, that we tacked this on at the last moment shows that he has either an extremely short memory or a desire to mislead the readers of *Hansard* and the readers of today's paper. It would be disappointing if, in fact, it is the latter. I would prefer to think that this minister would not be deliberately misleading the people of South Australia or members in the other place and that he has basically got a very short memory. Fortunately, we on this side of the chamber and the crossbenchers have memories far longer than that of this minister.

The Hon. NICK XENOPHON: When this bill was before the council two days ago, I supported it in relation to the freedom of information amendments.

The Hon. A.J. Redford: And in March.

The Hon. NICK XENOPHON: And in March. It has been put to me by the government that there may be a prejudice towards problem gamblers under the current legislation in that, in 30 years time, their details may be provided. I think we have plenty of time to sort that out. As a general principle, it is sound that the Independent Gambling Authority be subject to FOI. There are exemptions in the act which would prevent the disclosure of sensitive information, particularly personal information, of problem gamblers. That appears to be very clear.

The Independent Gambling Authority is doing a lot of work at the moment. Given its staff numbers, it has been extremely busy—and I want to be fair to them—in relation to the codes of practice, the machine numbers inquiry and other statutory functions. There has been a lot of work done by the board on codes of practice and I understand that one of those codes will be released shortly. In defence of the Independent Gambling Authority, if there is an issue about FOI taking up resources, that is an issue for the appropriate resourcing of the Independent Gambling Authority. I do not think that it should be used as a reason. According to the principles of openness and accountability they should be exempt from FOI. I am maintaining my previous position and it may well be that there is a deadlock conference. I am very sensitive to the needs of problem gamblers and do not consider that the arguments put by the government in relation to this are reasonable in the circumstances.

The Hon. IAN GILFILLAN: My colleague the Hon. Kate Reynolds handled this and I support her. It is the Democrats' view that our amendments be insisted upon. I do not need to go into the detailed argument. We hold the principle that any enterprise which acts on behalf of the community, in a governmental or semi-governmental role, should be open to FOI scrutiny. That is the basis of our insistence.

The Hon. T.G. ROBERTS: During the committee debate, the Hon. Nick Xenophon asked for some assurance that sensitive, personal information held by the authority (for example, that of problem gamblers) would not be disclosed under FOI. The Hon. Mr Redford read an extract from the relevant FOI Act schedule, being clause 6(1) in relation to exempt documents and which deals with unreasonable disclosure of personal information. Using this provision, he assured the Hon. Mr Xenophon that the privacy of individuals would be protected. What the Hon. Mr Redford failed to do was to read out clause 6(4) which allows the release of any

personal documents, sensitive or not, after a period of 30 years from the date the document came into existence. The honourable member has already stated that it is not a major issue because it may be able to be dealt with. Is that a reasonable assessment?

The Hon. Nick Xenophon interjecting:

The Hon. T.G. ROBERTS: The Legislative Council amendment would thus provide that sensitive information about problem gamblers could be publicly released. A 20 year old problem gambler who sought voluntary barring from the authority at that age could thus be identified as such when they turn 50. The government does not believe that this information should be publicly available. Further, the prevention of the release of information under the FOI Act includes a requirement that it be considered an unreasonable disclosure. This is not an absolute protection for a problem gambler. In addition, the requirement to assess FOI applications would create a resource issue for a small organisation.

This amendment will prevent people from seeking barring orders for fear of subsequent public identification. The government wants to help problem gamblers. The opposition apparently wants to reduce their opportunities for assistance. I also note that the Legislative Council has shown its willingness to amend a budget bill by inserting an unrelated amendment to an act that was not even a subject of the bill. That is not the convention of this parliament but is what has occurred on this occasion.

This bill is part of the government's budget strategy. The provisions of this bill implement a budget announcement and provide for cost recovery of the casino and TAB regulation costs of the Liquor and Gambling Commissioner. This is estimated to raise almost $1.5 million per year: $1.1 million from the casino and $388 000 from the TAB. The opposition has put this revenue in jeopardy. Delaying this bill until parliament returns will cost the government up to $300 000. In addition, the Independent Gambling Authority cannot recover costs of any probity reviews that it may wish to conduct in this period.

That $300 000 could be used for a range of government services. The opposition wishes to cost this government money, potentially reveal the identity of problem gamblers and make it more unlikely that problem gamblers will seek help. This is an unrelated amendment to the government's bill and it even amends a separate act—one that was not open for debate in the original bill. This amendment should be rejected. If members wish to pursue further debate on this separate issue, they should bring it back to parliament as a private member's bill.

The Hon. A.J. REDFORD: The minister just repeated much of the rubbish that was put in another place yesterday. I think it was described as an end-of-session attempt. Just to refresh the minister's memory, because we all know now that it is very poor, it is not an end-of-session attempt. It has been attempted from as far back as March this year. He hinted that I, in some deliberate way, had failed to read out clause 6(4) which allowed the release of personal documents after 30 years. The minister knows full well that I was asked a question by the Hon. Nick Xenophon. I do not have staff sitting next to me. I endeavoured to provide an answer.

The minister may recall, during the course of that debate, that the Hon. Nick Xenophon asked the minister, the one in this chamber, whether he had anything to add. The minister in this chamber said he had nothing to add. So, if there is any criticism of me in another place by the minister, who has a short memory, then that criticism should equally be laid at the feet of his Labor Party colleague. I would deprecate that.

The committee divided on the motion:

AYES (5)

Gago, G. E.	Gazzola, J.
Holloway, P.	Roberts, T. G. (teller)
Zollo, C.	

NOES (14)

Cameron, T. G.	Dawkins, J. S. L.
Evans, A. L.	Gilfillan, I.
Kanck, S. M.	Lawson, R. D.
Lensink, J. M. A.	Lucas, R. I.
Redford, A. J. (teller)	Reynolds, K.
Ridgway, D. W.	Schaefer, C. V.
Stephens, T. J.	Xenophon, N.

PAIR(S)

Sneath, R. K.	Stefani, J. F.

Majority of 9 for the noes.

Motion thus negatived.

SURVEY (MISCELLANEOUS) AMENDMENT BILL

The House of Assembly did not insist on its amendment to which the Legislative Council had disagreed.

LAW REFORM (IPP RECOMMENDATIONS) BILL

In committee (resumed on motion).

(Continued from page 879.)

Clause 27.

The Hon. P. HOLLOWAY: Further to the debate this morning, the Treasurer indicates that he supports in principle an education program in relation to the implementation of this bill and he will look at the details once the bill is passed.

The Hon. A.J. REDFORD: I thank the Treasurer for that: I am not bereft of good ideas.

The Hon. R.D. LAWSON: I move:

Pages 9 and 10, new sections 31 and 32—

Delete new sections 31 and 32 and substitute:

31—Standard of care

(1) Subject to this Part, the liability of a person (the ***defendant***) for causing harm to another person (the ***plaintiff***) will be determined in accordance with the principles of the law of negligence.

(2) In determining the standard of care to be exercised by the defendant, the circumstance of the case to which the court is to have regard include the following:

(a) whether the risk of causing harm was foreseeable (that is, is it a risk of which the plaintiff knew or ought to have known);

(b) the circumstances in which the plaintiff became exposed to the risk;

(c) the age of the plaintiff and the ability of the plaintiff to appreciate the risk;

(d) the extent (if at all) to which the defendant was aware, or ought to have been aware, of the risk;

(e) the measures (if any) taken by the defendant to eliminate, reduce or warn against the risk;

(f) the extent (if at all) to which it would have been reasonable and practicable for the defendant to take measures to eliminate, reduce or warn against the risk;

(g) any other matter that the court thinks relevant.

(3) The fact that a defendant has not taken any measures to eliminate, reduce or warn against a risk does not necessarily show that the defendant has failed to exercise a reasonable standard of care.

(4) Subject to any Act or law to the contrary, a person's standard of care may be reduced or excluded by contract but no contractual reduction or exclusion of the

duty affects the rights of any person who is a stranger to the contract.

(5) Where a person is, by contract or by reason of some other Act or law, subject to a higher standard of care that would be applicable apart from this subsection, the question of whether the person is liable for harm will be determined by reference to that higher standard of care.

(6) This section operates to the exclusion of any other principles on which liability for causing harm to another would, but for this section, be determined in tort.

(7) However, this section does not apply to a case where a person intends to cause harm to another.

The effect of this amendment is to introduce a standard of care to negligence actions generally, which is in virtually identical terms to the standard of care that currently applies in relation to occupiers' liability. It was in 1987 that amendments were made to the Wrongs Act to include part 1B, dealing with the subject of occupiers' liability. Section 17C provides:

(2) In determining the standard of care to be exercised by the occupier of premises, a court shall take into account—

and it lists a number of factors which include, for example:

(e) the extent (if at all) to which the occupier was aware, or ought to have been aware, of—
  (i) the danger; and
  (ii) the entry of persons on to the premises; and
(f) the measures (if any) taken to eliminate, reduce or warn against the danger; and
(g) the extent (if at all) to which it would have been reasonable and practicable for the occupier to take measures to eliminate, reduce or warn against the danger;

These principles reflect the common law of negligence as laid down in various decisions. It is interesting to note also that liability for animals was codified in section 17A of the act in a way which, speaking very generally, defines the standard and duty of care. The reason this amendment is advanced in this way is to endeavour to ensure that the committee has before it at least one alternative statement of the standard of care for consideration. I look forward with interest to the government's response.

The Hon. P. HOLLOWAY: The government opposes this amendment, which would create a new regime of negligence for South Australia alone. It would be different from the common law and different from the law in other Australian jurisdictions that have legislated to adopt the Ipp recommendations. This is highly undesirable, because it would tend to isolate South Australia from the development of the law nationally. Only time would tell how the proposed differences from the common law would play out. The provision is too broad.

By subclause (1) the liability of one person for causing harm to another will be determined in accordance with the principles of the law of negligence. By subclause (6) this proposed new section would exclusively determine tortious liability for harm, except intentional harm. Harm is defined in clause 8 to mean not only personal injury but also property damage, economic loss and loss of any other kind. Tortious liability for harm can arise in other ways apart from negligence. For example, the claim might be for nuisance or for a breach of a statutory duty other than a duty of reasonable care. It might be an action for defamation. At the moment they are separate legal actions which do not proceed on the same principles as the law of negligence.

This section therefore proposes to assimilate these actions to negligence as modified by the provision. An exclusion is given by subclause (7) for cases where the person intends to cause harm to another. However, an intentional tort does not necessarily require an intention to cause harm to another but, rather, an intention to do the wrongful act. It is therefore possible that this section will also assimilate some intentional tort actions to negligence where the act is done intentionally but there is no intention of causing harm. This then is a very far-reaching provision that would substantially change our law of tort. The bill as it stands is not concerned with wider reform of the law of tort but only with negligence, in the broad sense in which the committee uses that term, that is, a breach of a duty of reasonable care however that duty arises. Even if the amendment were restricted to negligence cases, the proposal is contrary to the recommendations.

On the question of foreseeability, the amendment conflates foreseeability with the standard of care required of the defendant—the very error that the Ipp committee is seeking to stamp out. The Ipp committee wanted the law to state specifically that no duty of care arises at all, unless a risk is foreseeable and can be described as not insignificant. Only after those questions are answered should the question of the standard of care, that is, the content of the duty, arise, otherwise there is a danger that courts will proceed from a finding that a risk was foreseeable directly to a finding of negligence. The mere fact that a risk was foreseeable does not, as a matter of common law, mean that the defendant was negligent. There is an intermediate question of what, if anything, the reasonable person would have done about the risk. That is the question that is answered by applying the negligence calculus. That is obscured or perhaps swept away by this amendment.

Although the amendment appears to preserve the requirement to consider whether it would have been burdensome to avoid the risk, it gives no guidance to the courts as to whether they can continue to apply the other factors, or whether those factors are to be given any—and what—importance, compared with the matters listed in the provision. Also, this provision would seem to retain the threshold set in the Shirt case for the point at which a risk cannot be disregarded, that is, the test of whether the risk is far-fetched or fanciful; whereas, the Ipp committee recommended a somewhat higher standard, that is, the question of whether the risk was not insignificant. Other jurisdictions that have adopted the Ipp reforms have used the expression recommended by the committee, and it would be unfortunate to see South Australia deviate from a national regime so as to have its own unique laws of negligence.

Further, the extent and effect of its proposed departures from the common law are unclear. For example, at present, the law is clear that a doctor should warn a patient about all material risks of the proposed treatment. However, this amendment proposes that the defendant's failure to warn of a risk is not necessarily negligent. Will that modify the common law on this point or can they co-exist? How does this rule apply where there is a statutory obligation to warn of the risk? These provisions appear to have been adapted from provisions that deal with the law of occupiers' liability. In that context, they were designed to strike a balance between the interests of occupiers and entrants by applying the law of negligence, subject to some specific provision—

Members interjecting:

The ACTING CHAIRMAN (Hon. J.S.L. Dawkins): Order! Members on my left should conduct their conversation in the lobby.

The Hon. P. HOLLOWAY: Yes; hear, hear! In that context, they were designed to strike a balance between the interest of occupiers and entrants by applying the law of

negligence, subject to some specific provisions that cater to the special situation of dangerous premises. It may be unwise to apply the same rules across the whole spectrum of negligence and, indeed, of tort law, so the government strongly opposes this amendment.

The Hon. R.D. LAWSON: I thank the minister for the very fulsome explanation of why the government is not supporting this amendment. Whilst I do not agree with all the points that he made, I readily acknowledge that there would be a loss of uniformity of the legislation if this amendment were carried, and I also recognise that it is not consistent with the recommendations of the Ipp report. Mind you, not all the Ipp recommendations have been accepted by the government in this bill. Knowing as I do the earnest desire of the committee to progress this bill and pass it today, I seek leave to withdraw the amendment.

Leave granted; amendment withdrawn.

The Hon. IAN GILFILLAN: I move:

Page 9 (new section 31), after line 21—
Insert:

(2) The reasonable person in the defendant's position will be taken to be sober unless—

(a) the defendant was in intoxicated; and

(b) the intoxication was wholly attributable to the use of drugs in accordance with the prescription or instructions of a medical practitioner; and

(c) the defendant was complying with the instructions and recommendations of the medical practitioner and the manufacturer of the drugs as to what he or she should do, or avoid doing, while under the influence of the drugs,

and, in that event, the reasonable person will be taken to be intoxicated to the same extent as the defendant.

It is the opinion of the Law Society that the definition of 'intoxicated' should be clarified in relation to the reference to a 'drug' to make it clear that it is other than a drug taken for therapeutic purposes in accordance with the directions of a medical practitioner. This allows for the very common case whereby a person suffers an unexpected and adverse reaction to a prescribed medication.

The Hon. P. HOLLOWAY: I indicate that the government does not oppose this amendment.

The Hon. NICK XENOPHON: I am disappointed that the Hon. Mr Lawson has withdrawn his amendment in relation to standard of care. The Hon. Mr Holloway made the point that this would put us out of kilter with other states. The fact is there was uniformity before Ipp—or before these proposed changes—and that uniformity was the common law in terms of the High Court of Australia making determinations on cases. Although I saw the Hon. Mr Lawson's amendment as at least a fall back position, it is not so unique, in the sense that it was relying on the principles set out in terms of occupiers' liability law and relied on something that has been tried and tested in the South Australian context for a number of years. In relation to Ipp, at paragraph 7.7 it discusses that, under current Australian law, the concept of negligence has two components; that is, foreseeability of the risk of harm and the so-called negligence calculus.

Foreseeability of the risk of harm is relevant to answering the question of whether the reasonable person would have taken any precautions at all against the risk; and, hence, whether the defendant can reasonably be expected to have taken any precautions. Ipp goes on to say:

> It would not be fair to impose liability on a person for failure to take precautions against a risk of which they had neither knowledge nor means of knowledge. Foreseeability is a pre-condition of a finding of negligence: a person cannot be liable to failing to take precautions against an unreasonable risk. But the fact that a person ought to have foreseen a risk does not, by itself, justify a conclusion that the person was negligent in failing to take precautions against it.

Why is it the case that a person who ought to have foreseen a risk is not negligent in failing to take a precaution against the risk? In terms of new section 31, under standard of care, how different is that from the current common law position? In relation to precautions against risk in new section 32, reference is made to the risk as being 'not insignificant,' and I will discuss that under my amendments, because I have a number of amendments in relation to that.

The Hon. P. HOLLOWAY: New section 31 is a restatement of the common law. However, now that we have accepted Mr Gilfillan's amendment, it will have that slight difference. In relation to new section 32, the Ipp committee made it clear that foreseeability is a prior and separate question from the question of duty of care. That is what new section 32 is all about.

The Hon. NICK XENOPHON: I indicate my support for the Hon. Mr Gilfillan's amendment. It at least ameliorates what I see as a potential problem with this clause. I commend him for moving it, and I support it.

Amendment carried.

The Hon. NICK XENOPHON: I move:

Page 9 (new section 32(1)(b)), line 27—
Delete paragraph (b).

At paragraphs 7.14 and 7.15 of the Ipp report, there is a discussion for changing to a double negative. Although the term 'not insignificant' was recommended by the Ipp report, it does outline that the phrase is problematic and may cause the courts some interpretive difficulties. That is discussed in paragraphs 7.16 and 7.17. Paragraph 7.16 of the Ipp report states:

> In the opinion of the panel, this proposal addresses part of the perceived problem we have identified but by itself it does not address the danger that a court will conclude that, because a risk can be described as not insignificant, it would be negligent not to take precautions against it.

It talks about the difficulties in that regard. Paragraph 7.17 states:

> For this reason, the panel is of the opinion that modifying the Shirt formula in the way suggested is not sufficient on its own.

It goes on to talk about a statutory provision to the effect that whether failing to take precautions against a not insignificant risk of personal injury or death to another was negligent depends on whether, in the opinion of the court, the reasonable person would have taken precautions against the risk. So there is a discussion. That is why I am moving the amendment. I am concerned that it will be problematic and will cause interpretative difficulties.

We have a test in Wyong Shire Council v Shirt, with which this proposal appears to be dealing. The facts of that case are such that in January 1967 Shirt was skiing in a circuit which was used by water skiers. They were signs there talking about deep water on the shoreline of the lake. However, the water was not that deep and, as a result of falling whilst skiing, Mr Shirt sustained a catastrophic injury. He suffered quadriplegic paralysis. That is why in that context I am concerned that cases such as the Wyong case will not succeed if 'not insignificant' is kept in. I would have thought, in terms of equity and fairness, Mr Shirt deserved to succeed, given that there were signs saying 'deep water,' and that in the circumstances the court made a judgment that Mr Shirt should succeed. 'Not insignificant' would deny people such as Mr Shirt who have had catastrophic injury and

where a mistake was made in terms of the signage put around the lake where he was injured from succeeding.

The Hon. A.L. EVANS: Family First will support the amendment. As we see it, it means the injured person or plaintiff may have more chance of being successful in a claim.

The Hon. P. HOLLOWAY: The government opposes this amendment. This clause deals with the duty of care in negligence. Subclause 1(b) sets the threshold below which a person is justified in disregarding a risk. As we have been discussing, the threshold is set at 'not insignificant,' the doubling negative. That is as the Ipp committee recommended. If a risk cannot be classed as insignificant, then a duty of care can arise. The present threshold, fixed by law, is whether the risk is far-fetched or fanciful, which is the phrase that was used in the Shirt case. So, that is the present threshold.

The Ipp committee proposed to change this to 'not insignificant', a phrase denoting a somewhat greater risk that sets the threshold somewhat higher. This same provision has been made in response to the Ipp recommendations in New South Wales, Queensland, Western Australia and Tasmania and is proposed in Victoria. The honourable member's amendment proposes that there should be no criterion at all. This is unworkable and will leave the courts with no guidance as to the point below which a risk can be disregarded. It will create only uncertainty and confusion. For that reason, the government believes that the amendment has no merit and opposes it.

The Hon. NICK XENOPHON: I understand the government's position, but does the minister acknowledge that, if this clause is deleted, the test will be determined by the courts? It is not as though there will be no criteria. It will be the common law that we would rely on, given the circumstances of the case.

The Hon. P. HOLLOWAY: My advice is that that will not necessarily be the case. It will be whatever is left in new section 32.

The Hon. R.D. LAWSON: I indicate that the opposition does not support this amendment, which really seeks to lay the foundation for the following amendment in this amendment sheet which, if it is not carried, would change the formulation from 'the risk was not insignificant' to 'the risk was real'. These are important semantic differences. The mover mentioned the case of Wyong Shire Council v Shirt, from which so much of the debate on this topic has emanated.

In a very interesting article by Chief Justice Spigelman in the July 2002 issue of *The Australian Law Journal*, entitled 'Negligence: the last outpost of the welfare state', at page 441 Chief Justice Spigelman said of that case:

> Issues of likelihood or probability are said to arise in the context of reasonableness of conduct at the level of breach.

He mentions the fact that Justice Wilson dissented in the case, rejecting the idea that a real risk could be identified with a remote possibility. He continued:

> Lawyers tend to continue to refer to the test as being one of 'reasonable foreseeability'. I cannot see that 'reasonableness' has anything to do with the test, which only excludes that which is 'far-fetched or fanciful'. The test appears to be one of 'conceivable foreseeability', rather than 'reasonable foreseeability'.
>
> I am reminded of the observations of George Orwell in his great 1946 essay 'Politics and the English language'.

The quote is perhaps too long with which to detain the committee. He continues:

> The problem is most acute in terms of what a cognitive psychologist would call the hindsight bias. As Sir Owen Dixon expressed it, in the course of argument in Chapman v Hearse—

an appeal in 1961 from South Australia—

> 'I cannot understand why any event which does happen is not foreseeable by a person of sufficient imagination and intelligence.'

The Chief Justice continues:

> The search for a unifying principle in the law of negligence has proved to be as futile as the search for a unifying principle in the laws of physics. There are indications that the High Court will revisit the 'undemanding' nature of the test—

that is, the foreseeability test—

> Whether by High Court decision or by statute, change can be effected. The case law suggests alternative formulations. For example, a negative formulation favoured by Sir Garfield Barwick was whether or not the injury was 'not unlikely to occur'.

I interpose: once again, a double negative test. Chief Justice Spigelman continues:

> We could do a lot worse than adopt the test of Walsh J in Wagon Mound [No. 2]: a test of 'practical foreseeability'.

After extensive analysis of the alternatives, Ipp came up with a suggestion which has been adopted in other jurisdictions. It is a reasonable compromise which has been adopted elsewhere, and we should adopt it. We could debate this issue for years. It is high time parliaments intervened, adopted a test and put an end to the judicial sophistry that has bedevilled numerous cases on this subject. Every one of the cases usually occupies 50 pages of the *Commonwealth Law Report*, usually five (and sometimes seven) judgments, all adopting different approaches from which it is extremely difficult for anyone to discern the test which is being adopted.

The refinements and sophistications have become extreme, and it is our belief that, having engaged Ipp, who is a very learned judge, with other qualified people, to come up with a solution which has been adopted elsewhere, we should adopt that. Certainly, in relation to this quite significant amendment, we should not depart from the national standard. We do not support the honourable member's amendment.

The Hon. NICK XENOPHON: Before we vote on this amendment, will the government clarify, on the issue of the wording of 'not insignificant' (and the minister responded to that in his second reading contribution), whether it is a reasonable person in the defendant or plaintiff's position in terms of this test of 'not insignificant', or is it just a reasonable person in the community?

The Hon. P. HOLLOWAY: It is up to the courts to make the decision. So, it is an objective test.

The Hon. IAN GILFILLAN: I indicate the Democrats' support for the amendment. This query may clarify which draft of amendments we are dealing with. I have amendments by the Hon. Nick Xenophon MLC marked as No. 1 and then another similar one identified as No. 2. On the bottom, No. 1 is dated 27 November 2003 at 9.39 a.m. and No. 2 is the same date but at 9.44 a.m. It is a rather interesting perspective one gains of parliamentary counsel firing off schedules of amendments that change. Will the Hon. Nick Xenophon explain which one we are working from?

The Hon. Nick Xenophon: We are working from amendment sheet No. 2.

The Hon. IAN GILFILLAN: Is that the 9.44 a.m. model?

The Hon. Nick Xenophon: Yes.

The Hon. IAN GILFILLAN: So, the 9.39 a.m. sheet goes into the bin?

The Hon. Nick Xenophon: No; there are some fallbacks, so do not throw that away.

Amendment negatived.

The Hon. NICK XENOPHON: I move:

New Section 32(1)(b), page 9, line 27—
Delete 'not insignificant' and substitute:
real

I note the Hon. Robert Lawson has discussed this to some extent. This amendment is about using the term 'real' instead of 'not insignificant', and meeting this burden of proof should be a precondition of the application of the so-called negligence calculus referred to in the Ipp report. It would be a preferred outcome, and not insignificant. I believe that it would be sufficient to meet the Ipp report's concern about the far-fetched and fanciful rule in Wyong Shire Council v Shirt, and I note that there is a number of references in the Ipp report to the negligence calculus, but this is a term that is not widely used.

I draw the committee's attention to the High Court approach on this formulation in Woods v Multi-Sport Holdings, a 2002 decision of the High Court. Justice Kirby suggests that all that is required is for the risk to be real, that is, such as a reasonable person would not brush it aside as far fetched or fanciful. It is essentially a fall-back position; it would be a more equitable result than simply referring to 'not insignificant'. It would put a fetter on the far-fetched or fanciful decision approach that has been drawn from Wyong Shire Council v Shirt, but it would certainly not go as far as 'not insignificant'.

The Hon. P. HOLLOWAY: The government also opposes this amendment. The Ipp committee considered various formulae for the required threshold. It specifically rejected the terms 'realistic' and 'real' as being too close to the existing standard in the case of Wyong Shire Council v Shirt. This amendment would restore that standard and would, therefore, be contrary to the recommendations of the Ipp committee. It would simply revert to the present law. As Justice Mason said in the Shirt case, 'a risk that is not far-fetched or fanciful is real'. This then would defeat the intention of the Ipp committee.

This amendment would also be at odds with what has been done in New South Wales, Queensland, Western Australia and Tasmania and what is proposed in Victoria. We do not urge uniformity for uniformity's sake. We are prepared to depart from national models when appropriate. However, in these central clauses of the bill we are dealing with the elements of negligence. It is particularly important that we maintain national consistency rather than have our own regime of negligence law for South Australia alone. I hope that members can understand that. For that reason, we oppose the amendment.

The Hon. R.D. LAWSON: We also oppose the amendment. On page 105 of the Ipp report in footnote 4 is contained the statement from which the minister paraphrased. I put it on the record as a quote:

> We did consider using the term realistic but rejected it on the basis that it was too close to real which might be thought too closely associated with the Shirt formula. We decided not to adopt the term 'practical' because of the danger that it might be interpreted as describing not a degree of probability but rather the sort of risk against which the practical or reasonable person would take precautions. If it were interpreted in this latter way it could not operate as we intend namely as a precondition of the application of the negligence calculus.

The Hon. Nick Xenophon referred to the case of Woods v Multi-Sport, which I think highlights the difficulties into which the law of torts has descended. This was an appeal against a Western Australian decision in which it was alleged that a business that conducted indoor cricket should be liable for an injury sustained by a player of indoor cricket. It was the plaintiff's contention that the rules of indoor cricket should have required face masks or helmets to be worn. The courts below did not accept that. In the High Court, a bench of five judges split three to two, three judges saying that they would have dismissed the plaintiff's claim. However, Justice Kirby (the judge to which the Hon. Nick Xenophon referred), with Justice McHugh, would have upheld the appeal and would have required the operator of an indoor cricket stadium to have a warning in a prominent position around the arena which said:

> . . . Warning. Indoor cricket exposes players to a much higher risk of severe head and eye injury than outdoor cricket because:
> · the game is played in a confined space;
> · without protective head gear or a face shield; and
> · with a softer ball that can enter the eye socket.

So, the approach adopted by the minority judges (who are both highly experienced and highly regarded judges) was one that was rejected by the majority and that rejection ought, in our view, be confirmed in statute, as it will be under this test, so that it will not be necessary for the next sport—whether it is a squash court or a swimming stadium—to go to the High Court to have a ruling upon whether a particular sign is required to be erected around their arenas. We believe that the Ipp formulation took those factors into account and is entirely appropriate.

The Hon. NICK XENOPHON: With the greatest respect to the Hon. Mr Lawson, he is basically saying that the common law works; that the plaintiff in that case failed—

The Hon. R.D. Lawson interjecting:

The Hon. NICK XENOPHON: The Hon. Mr Lawson makes the point that he failed 2:3, and the next time it could be the other way. But I think we need to put on the record information that the plaintiff lawyers have provided to me this afternoon, which is that in the last 23 cases involving plaintiffs in the High Court the plaintiffs have lost on 20 of those occasions. So, to say that the High Court is some sort of soft touch with plaintiffs is simply not the case. Rather than saying that there is some sort of judicial trend to make it easy for plaintiffs, in fact, you could say that it goes the other way; that in 20 of the 23 cases plaintiffs have lost.

The committee divided on the amendment:

AYES (5)

Evans, A. L.	Gilfillan, I.
Kanck, S. M.	Reynolds, K.
Xenophon, N. (teller)	

NOES (15)

Cameron, T. G.	Dawkins, J. S. L.
Gago, G. E.	Gazzola, J.
Holloway, P. (teller)	Lawson, R. D.
Lensink, J. M. A.	Lucas, R. I.
Redford, A. J.	Ridgway, D. W.
Roberts, T. G.	Schaefer, C. V.
Sneath, R. K.	Stephens, T. J.
Zollo, C.	

Majority of 10 for the noes.

Amendment thus negatived.

The Hon. NICK XENOPHON: I move:

Page 9 (new section 32 (2)), lines 30 to 36, page 10, line 1—
Delete subclause (2).

I seek to delete all of the subclause because it makes reference to factors such as social utility. Paragraph 7.17 of the Ipp report, in terms of the discussion modifying the Shirt formula, states that this might encourage judges to address their mind directly to the issue of whether it would be reasonable to require precautions to be taken against a particular risk. I suggest that this reference to social utility is unnecessary and in some respects would be confusing, because it is a term that is barely used. I will refer to that now and it will save time in terms of a fallback amendment.

For instance, with respect to social utility, the formulation given for the inclusion of this new section is a statement from Lord Chief Justice Denning in Watt v Hertfordshire County Council, a 1954 decision of the House of Lords, and that is referred to in a footnote in the Ipp report. This has been referred to only briefly by the courts in the 1961 decision of the Board of Fire Commissioners (New South Wales) v Ardouin, a 1961 High Court decision, and as a possible consideration in the recent decision in Woods and Multisport Holdings, although in that case the formulation was not social utility but generally the utility of the propounded act of the defendant.

It is unnecessarily complicating the existing common law and, for that reason, my first position is that this whole subclause be deleted. The fallback position, which I have alluded to, is that at the very least we delete reference to social utility, which does not appear to have any specific legal or judicial meaning in the authorities, and I will stand corrected by the minister if that is not the case.

The Hon. P. HOLLOWAY: The Hon. Nick Xenophon has referred to three amendments all in one, so I will deal with them all. First, the honourable member wants to delete all of subclause (2). The government strongly opposes this amendment because it is entirely contrary to the Ipp committee's recommendation 28D. The negligence calculus is a fundamental part of the common law of negligence. The Ipp committee found that it was not well understood, even among lawyers, and that it should receive a statutory restatement to ensure it was not overlooked. This clause as printed does what it recommended. It makes clear that one cannot just jump from finding that a duty of care existed to finding that there has been negligence. Instead, one must consider what a reasonable person in the defendant's position would have done about the identified risk.

The provision will assist courts and lawyers in making sure that this step is expressly taken. This recommendation is central to the Ipp committee's proposed restatement of the elements of negligence and has been adopted in other jurisdictions. To remove it here would be a substantial departure from the existing common law and the Ipp recommendations. It would go in the direction of creating a special common law of negligence for South Australia alone. For that reason, the government would strongly oppose the deletion of subclause 32.2. As his fall back position, the Hon. Nick Xenophon has two other matters to deal with. He suggests that, on page 9, line 31, we put 'may' instead of 'is to'. The government opposes this.

The negligence calculus is fundamental; it is not an optional extra. It is the key mechanism by which the court decides whether or not the defendant is in breach of a legal duty. This entails looking at how likely the risk was; how much damage might result; how easy or difficult it would have been to take precautions; and the social utility of the activity. It is important that the parliament give the courts clear guidance. There is a requirement to consider these factors, not merely suggest that they can if they like. That would only create confusion because the court could not tell whether the negligence calculus applied or not and what to do in its absence. There needs to be clear direction. We are dealing with a core provision about the tort of negligence. This is a provision that has already been adopted in other jurisdictions and uniformity is particularly important.

The government opposes the amendment as we do the final fall back position of subclause 2.32 where the Hon. Nick Xenophon seeks to delete subclause (d). The amendment would seek to remove, from the negligence calculus, the requirement for the court to consider, among other things, the social utility of the risk creating activity. The government strongly opposes this. This element is essential. The obvious example is the emergency situation. For example, it may not be negligent for an ambulance to exceed the speed limit or proceed against a red light if it is carrying a critically injured person to hospital. This is true even though there is an evident risk of harm to others from this activity. The harm could be serious and it could easily be avoided by driving differently. But, if the fourth element is deleted, the ambulance driver would have to be found negligent if any harm resulted.

Other examples can be found in the field of obstetrics. For example, there are risks associated with a forceps delivery: the child may be injured by the forceps. There are risks associated with caesarean deliveries: the mother might have an adverse reaction to the anaesthetic. Similarly, there are situations in which the use of these procedures is justified because of the danger to the mother or child if delivery is not effected urgently. The social utility of the activity makes it a reasonable activity despite the risks. However, the principle is not confined to emergencies. It applies in any situation where, although entailing a risk, the defendant's action was socially useful or desirable. It is a matter for the court in every case to decide what weight to give this factor in comparison with the other three. It is only one factor to be considered but it would be a grave mistake to discard it as irrelevant. This recommendation has been followed interstate. The government opposes all of Nick Xenophon's attempts to alter new section 32(2).

The Hon. NICK XENOPHON: Could the minister clarify because, vis a vis the risks associated with the ambulance, the forceps delivery or the caesarean section, the courts already take those matters into account. This entire discussion of the negligence calculus that the Ipp report refers to seems to be a very academic concept that is not used in a practical way by the courts in the application of the law of negligence. There seems to be an element of artificiality in the concept of negligence calculus. It seems to be an underlying premise in much of the Ipp report. The ambulance situation, the forceps delivery and the caesarean section: the courts take all of those matters into account now in terms of the utility, risk factors and the alternatives available.

The Hon. P. HOLLOWAY: It is the common law. The reason that the government wants to put it into statute is because the Ipp committee found that, even among lawyers, it was not well understood and that it should receive a statutory restatement to make sure that it is not overlooked.

The Hon. R.D. LAWSON: I indicate that the opposition will not be supporting the amendment being moved or the other two foreshadowed amendments by the honourable member. To delete new subsection (2) altogether would defeat the purpose of this new section which is to state the rules in clear and concise terms. In so far as the honourable member seeks to have deleted 'the social utility of the activity

that creates the risk of harm', I, too, was intrigued by this notion of social utility because it is not an expression which, to my knowledge or understanding, has been used in this area of the law, either in statute law or case law. It is used in the Ipp report. This particular recommendation from the Ipp report has been adopted.

I searched for alternative words and formulae which would express this notion of social utility. I noticed that, in the Tasmanian Civil Liability Amendment Act 2003, the Tasmanian parliament adopted a different formulation. It is section 11(2)(d) in the Tasmanian legislation. They have used the words 'the potential net benefit of the activity that exposes others to the risk of harm'. Rather than use the expression 'the social utility of the activity', they speak of the potential net benefit. However, I do not believe that the Tasmanian formulation, and any other formulation that I have been able to dream up, is preferable to the expression recommended by Ipp. In those circumstances, we would not support the removal of the subsection altogether. We do not believe that there is a better formulation of it. As the minister has mentioned, this has been adopted in other jurisdictions.

The Hon. IAN GILFILLAN: I indicate Democrat support for the amendment. Can the minister give any indication of when he intends to report progress? There are basic requirements.

Amendment negatived.

The Hon. NICK XENOPHON: I move:

Page 9 (new section 32(2)), line 31—
Delete 'is to' and substitute:
may

Amendment negatived.

The Hon. NICK XENOPHON: I move:

Page 10, line 1 (new section 32(2)(d))—Delete paragraph (d).

Amendment negatived.

Progress reported; committee to sit again.

ASYLUM SEEKERS

Adjourned debate on motion of Hon. Kate Reynolds:

That the South Australian Parliament condemns mandatory detention and the Pacific Solution as crimes against humanity,

to which the Minister for Aboriginal Affairs and Reconciliation has moved the following amendment:

Leave out all words after 'That the South Australian Parliament' and insert 'condemns the Pacific solution as a form of detention that slows down the process of assessment and causes asylum seekers significant delays and uncertainty. Further, the South Australian Parliament condemns the policy of returning asylum seekers to countries which do not have genuine and acceptable human rights protections'.

(Continued from 3 December. Page 857.)

The Hon. CARMEL ZOLLO: I move to add the following paragraph to the minister's amendment:

Further, the South Australian Parliament calls on the Commonwealth to release all children held in immigration detention centres in Australia before Christmas.

The commonwealth government's Pacific Solution for the processing of asylum seekers has been found to be costly and to create lengthy delays and uncertainty for the often already traumatised refugees who are currently being detained on Pacific islands. It simply changes the way and location in which asylum seekers are being processed at enormous cost to the Australian taxpayer, although the true cost of this solution has not to date been disclosed by the federal government.

We know that Prime Minister Howard's Pacific Solution has already cost more than half a billion dollars and is budgeted to cost more than that again over the next four years. In the 2002-03 federal budget, the Treasurer, Peter Costello, announced that nearly $1.4 billion would be devoted to a series of measures to prevent asylum seekers from being able to lodge an application for refugee status within Australia's migration zone. This includes $219 million for the construction of a detention facility on Christmas Island; $430 million over four years for the reception and processing of asylum seekers on Nauru and Manus Island; $455 million over four years for reception and processing at Australian External Territories (Christmas and Cocos Islands); $5.6 million for travel; $75.4 million for the regional cooperation agreement, (UNHCR, IOM); $7 million to Ausaid for Nauru under memorandum of understanding; and, $2.1 million for the continuation of the Department of Foreign Affairs and Trade's temporary consulate on Nauru.

This is only part of the picture, as the Howard government refuses to provide any detail of the true cost of the military's support of this policy. It has also consistently refused to tell us the cost of transportation of asylum seekers to and from the third countries. Despite all the spending and the federal government's claims that none of these asylum seekers set foot on Australian soil, over 300 of these people have already been resettled in Australia and more are on their way. The Howard government must know that this huge expenditure is not justified and we call on it to come clean, to be transparent and to tell the Australian people the full cost of the 'Pacific solution'.

The Hon. Kate Reynolds: Including the human cost.

The Hon. CARMEL ZOLLO: Including the human cost. However, the federal government continues to promote this unsustainable program, including the latest attempt to excise thousands of Australia's islands from our migration zone. We are not aware that there is any evidence that this is an effective way to protect our borders, and we know that it does not treat people fairly. The Howard government should concentrate its efforts on dealing with the issue of processing the applications of asylum seekers to ensure speedy resolutions to enable more certainty and confidence.

The processing regime should be fast, fair and transparent so that genuine refugees can settle in the community; and those found not to be genuine can be quickly sent back. The state government continues to voice its concerns regarding asylum seekers in general and, more particularly, the children living in detention centres around Australia. We strongly believe that no child should be held in any form of detention, unless they have been involved in some form of serious criminal activity, and we have called on the federal government to release all children from detention centres.

This government has been working hard behind the scenes to do something for these children who we believe deserve better than the prison the Howard government has put them in. It might make us feel good to posture publicly on the plight of people living in detention centres, but the reality is that this has no impact on commonwealth policies and practices. We believe that more can be achieved through negotiation and the agencies most concerned working closely together to achieve the best possible outcomes. Although the state is limited in terms of its influence on commonwealth policies regarding detention centres, through ongoing consultation and negotiation with the Department of

Immigration and Multicultural Affairs officers, this government has managed to secure a number of memorandums of understanding between the state and commonwealth. We have child protection workers going into Baxter on a regular basis to monitor the health and welfare of the children. This has meant that the children living in the Baxter Detention Centre have been able to attend school in Port Augusta and experience just a small part of the freedom, learning and fun that should be the right of every child.

We have also recently secured through negotiation the release of a number of children into care in the community, and we provide support to these children and families. We are also providing services such as health, housing and schooling for those families who have already been released into the community. We call on the Howard government to provide a fairer and more compassionate system for asylum seekers, especially the children. We also reiterate our federal colleague the shadow minister for immigration Nicola Roxon's call for the Howard government to release all of the nearly 200 children being held in immigration detention before Christmas. We ask it to show some Christmas spirit and allow a little bit of joy into these children's lives at this time of the year. I ask the chamber to support this amendment.

The Hon. R.I. Lucas: Is this without the mothers?

The Hon. CARMEL ZOLLO: I certainly would like to see mothers released with their children as well.

The Hon. R.I. Lucas: Is that part of the motion?

The Hon. CARMEL ZOLLO: It is not part of the motion. We are calling for children—

The Hon. R.I. Lucas interjecting:

The Hon. CARMEL ZOLLO: The amendment does say 'without the mothers', but I mean it would be logical, would it not?

The Hon. R.I. Lucas interjecting:

The Hon. CARMEL ZOLLO: Children being out of there full stop would be good, would it not?

The Hon. Kate Reynolds interjecting:

The Hon. CARMEL ZOLLO: Well, care givers really would be logical.

The ACTING CHAIRMAN (Hon. J.S.L. Dawkins): It is not a conversation. The Hon. Carmel Zollo has the call.

The Hon. CARMEL ZOLLO: We would like their care givers to be with them, yes.

The Hon. KATE REYNOLDS: I am not sure where to start with these amendments on top of amendments. I have to say that, whilst the Democrats have some sympathy for the intent of this most recent amendment, really it will not do much good for the children. Certainly it is not clear whether the ALP wants children to be released with or without their parents, and the Democrats are very clearly on the record as saying that children should be released with their parents. In fact, we know that the Children's Protection Act requires that children not be separated from their parents, unless that is absolutely unavoidable. In this case, clearly it is avoidable should the will of the state government be there. However, it does not appear to be.

I also place on the record part of one minister's answer to a question I received today, which indicates that a total of 41 child protection notifications classified as tier two and involving 64 children have been made to the Department of Human Services since the opening of the Baxter Immigration Detention Centre in September 2002. Certainly, we want to see children out of detention but we do not believe it will be helpful for them to be released without their parents. Without some clarification from the mover of the amendment, it will be difficult for us to support that.

I thank members for their contributions to this debate. I will make a couple of brief comments. The Hon. Andrew Evans wanted further information about the Democrats' solutions. I refer him to my speech of 26 November in which I summarise the suggestions put very eloquently by Father Frank Brennan, which are consistent with Democrat policy and calls made previously, so I will not take up the time of the council restating all that. He also asked for information about what we had done in the federal arena, given that immigration comes under federal law. We have made a number of attempts to humanise both Australian laws and federal government policy, particularly to make them consistent with international treaties. Time and again those attempts have been opposed and blocked by the government and the opposition working together.

I have a few brief comments on some of the Hon. Rob Lucas' lengthy contributions last night. He referred to an article by Russell Skelton from *The Age* newspaper. That information was put as though that story—the story of the Bakhtiyari family (and I do not wish to comment on the Bakhtiyari family specifically)—invalidates the claims of thousands of asylum seekers and as though it justifies Australia's inhumane treatment of people seeking safety in our country. We do not accept that that position can be rightly argued.

In relation to identity, for the sake of brevity, I will just quote from the Hon. Justice Marcus Einfeld, AO QC who wrote in the Amnesty International Annual Report 2002. He said:

> Asylum seekers often have no papers and tell lies to secure their freedom. Some of the people have undoubtedly told untruths to authorities but not all liars are rogues. History has taught us repeatedly that people escaping terror often lie to be free. If the people here who have lied about their origins or some other detail in order save their kids because in their belief the truth might but should not have excluded their rescue, they may still be worthy of listening to.

In relation to people smugglers, again for the sake of brevity, I will quote the same person. Justice Einfeld said in that same journal:

> People smuggling is often an evil and parasitic undertaking. But it is not new and no-one has ever been able to stamp it out. In fact, some people smugglers have been heroes. Those who are not deserve our condemnation and we should do whatever we can to bring them to account. But their sins should not colour or dictate our treatment of the people they have transported. We simply must not blame the victims for the acts of the perpetrators.

The Hon. Nick Xenophon talked about crimes against humanity. I refer honourable members to some of the arguments put by Julian Burnside QC. I covered some of these in my earlier speeches, so I will be brief. (I also note for the record that I am very grateful that I am not a lawyer, because it is sometimes easier to take a stronger moral stand rather than getting tangled up in a legalistic approach to complex issues such as this). Julian Burnside said:

> Following the creation of the International Criminal Court in 2002, Australia introduced into its own domestic law a series of offences which mirror precisely the offences over which the International Criminal Court has jurisdiction.
>
> The Commonwealth of Australia now recognises crimes against humanity, two of which are of particular significance: section 268.12—crime against humanity, imprisonment or other severe deprivation of physical liberty; and section 268.13—crime against humanity, torture.

I refer the Hon. Nick Xenophon and anybody else who has an interest in this to those specific sections of the Australian criminal code.

When speaking to this motion, I have taken the opportunity to place on the record the words of both ordinary Australians and extraordinary human rights campaigners. I also thank my colleague the Hon. Sandra Kanck for her comments and for placing on the record the comments of Dr Louise Newman. Dr Newman is from the New South Wales Institute of Psychiatry, and I know that those members who have expressed privately to me their discomfort with the arbitrary and lengthy detention of children will remember her words. She said:

> Treatment of hundreds of children held in depriving and traumatising conditions under the policy of mandatory detention is inhuman, damaging, abusive and puts us in breach of international human rights obligations. The treatment of these children has implications not only for them and their families but also for all children and, indeed, for the discourse of human rights in this country.

Although there are many more offerings I could make if time permitted and if I thought members were interested, I have just a couple that I would like to make. Last week I received some unsolicited letters from students at Caritas College at Port Augusta. I will quote briefly from a couple of those. Jessie Maule, who is 11 years old, wrote:

> We are in the middle of a unit of work about refugees, why they have come to Australia, how they got here and so on. After learning all this I decided that keeping refugees in a detention centre is really a horrible idea. . .
>
> I have always disagreed on keeping refugees in such a sad place like Baxter. It is cruel unnecessary and disgusting.
>
> I have a good friend at Baxter, and she is as normal as anyone. Why can't people understand that? That's all I want to know. Sure their skins are a different colour and they may believe a different religion but there still people like you and I.

Natasha Sghirripa is 10 years of age. She hopes that Baxter will close down. She wrote:

> All of the people in Baxter come to Australia for peace. But instead they got sent to an unhappy place. They live most of their lives not seeing nature, can't play with their friends and get the same food for 3 months.

Kagan Miklavec is 10 years of age, and wrote:

> I think that keeping refugees locked up is the worst idea I have ever heard. We are the only country who keeps refugees locked up in a detention centre. I want the refugees to be free.

Megan Milde, who is 10 years old, wrote:

> Over here in Port Augusta we have a detention centre near us. The things that these people go through are horrible and I have always disagreed on keeping them locked up. I still don't understand why John Howard is doing this to innocent people? Why are normal people being put in a horrible place like Baxter? It's cruel and disgusting. . .
>
> Also about the top of Australia being cut out of the migration zone. How do you feel about this, that if people land on one of the islands on top of Australia they are towed back to their countries? They are just seeking safety and protection.

Kimberley McIntosh, who is also 10 wrote:

> . . . keeping refugees in Baxter is horrible and extremely cruel. They are humans like us and it should not matter what their religion is or if they are black or white.

Holly Millbank, who is 11, disagrees that refugees should be 'out there', and she said that she thinks they should be let free. Alice Whitelum, who is 10 years of age, wrote:

> John Howard has made a big mistake and he is locking up people that shouldn't be locked up.

Importantly, she says:

> In the National Anthem in the second verse, 'For those who come across the seas, with boundless plains to share.' We are not sharing our land and not welcoming others to Australia. This is a bad thing because then Australia isn't really a free country.

I have one other article, and I hope the Hon. Rob Lucas and his colleagues will indulge me. I have a short article by Rex Jory that was in the Adelaide *Advertiser* of 28 November. It is entitled 'Shameful policy must be overturned.' In part, it states:

> We have become conditioned to the idea and the justification of detention centres for asylum seekers. When small boats first appeared on our northern horizons in the mid-1990s carrying potential refugees from mysterious places like Iraq, Pakistan and Afghanistan, we were frightened by this new and unknown threat.
>
> It was perhaps a natural reaction and to a real extent that fear remains. But is it logical? Is it rational? Or are we locking these desperate people away because we can't—or don't dare—think of an alternative?
>
> In our desperation to maintain some order and normality in the face of an abnormal situation, we have overlooked one factor: these asylum seekers are human beings.
>
> They are not invading monsters. They are not triffids.
>
> This is not *War of the Worlds.* They are essentially people so frightened by unfolding circumstances in their homelands that they are prepared to give up everything and risk the hazards of a perilous sea journey to reach Australia. When they arrive, instead of adopting a proper, humane and Christian stance of helping the underdog, we shuffle them behind razor wire in a semiarid and isolated region of Australia.

As a starting point, all the women and children should be removed from Baxter and assimilated into the wider Australian community. The current housing project in Port Augusta has so many restrictions that it is virtually a prison without walls. They will need financial help and counselling, but at least they will be free. Their children could go to local schools. Men in family groups should also be freed and, eventually, all but the potentially dangerous, ill, or militant should be released.

Politicians (and Labor in opposition was as guilty as the Liberals in government) have meekly followed what they perceive as public opinion—opinion forged from fear and ignorance. They should now lead by example and orchestrate a serious, sensible and controlled national debate about detention centres and the imprisonment of potential refugees.

In the past few years, more than 25 reports and investigations have been undertaken, as well as hundreds of investigations of individual circumstances, which reveal the huge damage being done to children and adults in detention centres. These reports come from parliament, the Human Rights Commission, medical specialists, the United Nations and independent inquiries. Nobody can be surprised that every single one of these reports highlights the trauma, despair and human rights abuses that occur in detention centres.

Every report adds to the case for stopping the policy of mandatory detention of all asylum seekers. As legal experts, such as Julian Burnside QC, have highlighted, Liberal and Labor members must face up to the fact that the arbitrary detention of people and the so-called Pacific solution are illegal under both Australian and international law. No policy that steals the futures of children, forces people to return to unsafe countries and forcibly keeps families apart can seriously be called a success, regardless of other outcomes that might have been achieved.

I am sure that Rex Jory would appreciate the opportunity to have the last word. In the same article of 28 November, he said:

What we have accepted as the proper course, a policy of incarceration, is demonstrably wrong, inhumane and offensive. It is an international embarrassment.

It is time community and political leaders stood up and condemned what is a policy of shame.

Whilst I suspect that I will not have a great deal of success, I urge all honourable members to support the original motion.

The Hon. T.G. Roberts' amendment negatived.

The council divided on the motion:

AYES (3

Gilfillan, I.	Kanck, S. M.
Reynolds, K. (teller)	

NOES (18)

Cameron, T.G.	Dawkins, J. S. L.
Evans, A.L.	Gago, G. E.
Gazzola, J.	Holloway, P.
Lawson, R. D. (teller)	Lensink, J. M. A.
Lucas, R. I.	Redford, A. J.
Ridgway, D. W.	Roberts, T. G.
Schaefer, C. V.	Sneath, R. K.
Stefani, J. F.	Stephens, T. J.
Xenophon, N.	Zollo, C.

Majority of 15 for the noes.

Motion thus negatived.

VICTIMS OF CRIME (CRIMINAL INJURIES COMPENSATION REGULATIONS) AMENDMENT BILL

The House of Assembly agreed to amendment No. 1 made by the Legislative Council without any amendment and disagreed to amendments Nos 2 and 3.

SUMMARY OFFENCES (OFFENSIVE WEAPONS) AMENDMENT BILL

The House of Assembly disagreed to the amendment made by the Legislative Council.

PREVENTION OF CRUELTY TO ANIMALS (PROHIBITED SURGICAL AND MEDICAL PROCEDURES) AMENDMENT BILL

Received from the House of Assembly and read a first time.

CRIMINAL LAW CONSOLIDATION (IDENTITY THEFT) AMENDMENT BILL

The House of Assembly agreed to the amendment made by the Legislative Council without any amendment.

STATUTES AMENDMENT (COMPUTER OFFENCES) BILL

Received from the House of Assembly and read a first time.

SUPPORTED ACCOMMODATION

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): I lay on the table a ministerial statement on supported residential facilities made earlier today by the Hon. Stef Key.

RADIOACTIVE MATERIAL AUDIT

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): I lay on the table the audit of radioactive material in South Australia as part of the ministerial statement that was tabled earlier in the day.

[Sitting suspended from 6.10 to 7.45 p.m.]

CRAIGMORE HIGH SCHOOL

The Hon. P. HOLLOWAY (Minister for Agriculture, Food and Fisheries): Before question time today, I tabled a ministerial statement made by the Minister for Education and Children's Services. I now table the report that was referred to within that document, which was inadvertently not tabled with the ministerial statement.

LAW REFORM (IPP RECOMMENDATIONS) BILL

In committee (resumed on motion).

(Continued from page 901.)

Clause 27.

The Hon. NICK XENOPHON: I move:

Page 10, new section 33(1), line 6—

Delete 'a person of normal fortitude in the plaintiff's position' and substitute:

the plaintiff

My concern is that the words 'a person of normal fortitude in the plaintiff's position' would change the current law quite substantially. Given the current legal principle of the eggshell skull in terms of assessment of damages, it would mean that, if a person had a pre-existing fragility and there was an incident that led that person to sustain a nervous shock or suffer a psychiatric harm, this would be used as a rod by insurers to deny the claim. Simply substituting it to the plaintiff is a fairer way of dealing with people with a mental injury. The threshold that this would impose would simply be too high and too unreasonable. Mr Chairman, it seems to go against the grain of what you were arguing for in the context of workers compensation legislation in relation to stress claims. The principles, in many respects, are the same as those of the Labor Party in the previous parliament in the time of the previous government. That is what my amendment is about.

The Hon. P. HOLLOWAY: This clause is about the duty of care in relation to mental harm to another person. The bill accords with the present common law about when mental harm is foreseeable. One does not have to think whether one's conduct might cause harm to the most vulnerable person in the community. That would be too great a burden. There is nearly always the risk that someone somewhere of special mental sensitivity, like Mrs Tame, might suffer harm but the law does not require us to foresee and avoid that risk. We are only expected to perceive the risk of harm to people of ordinary mental strength.

If we can perceive that our actions might cause mental injury to people of ordinary mental strength then the duty of care arises, and if we breach it we are legally liable. This amendment would introduce a substantial deviation from the common law. The defendant would not owe the same duty that is now owed. Instead, the duty of care would only arise if the defendant has reason to foresee that the plaintiff, that is, the person who ultimately suffers mental harm, might do so. Such cases will be rare because usually the defendant does

not know anything about the mental strength or vulnerability of the plaintiff. The defendant very often does not even know who the plaintiff may be.

In effect, this amendment would mean that the defendant cannot be negligent unless he or she has some personal knowledge of the peculiarities of the person who will become the plaintiff if there is negligence. For instance, in the case of Annetts, the station owners would only have been liable under this rule if they had had enough knowledge of the mental make-up of Mr and Mrs Annetts to be able to foresee that, should their son die in tragic circumstances, these parents would suffer a mental injury. How would the defendant know that? All the defendant can go on is how an ordinary person might reasonably be expected to react. In that case under this amendment there would be no duty of care. The government opposes the amendment.

The Hon. NICK XENOPHON: In Mrs Tame's case, the High Court said she did not have a claim. The common law has worked. In the Annetts case there was a claim. My concern is that this amendment will restrict the operation of the law, and it needs to be put on the record that Mrs Tame lost her case, and by having the words 'the plaintiff' rather than 'a person of normal fortitude', she still would have lost because that is the approach that the High Court took. Let it be said again that in Tame's case the High Court said she did not have a claim. I believe that the clause in its current form is unnecessarily restrictive.

The Hon. P. HOLLOWAY: Yes, Mrs Tame lost the case, but the point is that the government believes that she should have lost and, indeed, this is what—

The Hon. Nick Xenophon interjecting:

The Hon. P. HOLLOWAY: Yes, she did, and that is exactly what the government's clause is all about: ensuring that that is the position.

The Hon. R.D. LAWSON: I cannot help but feel that the Hon. Nick Xenophon misconstrues the law relating to a person of normal fortitude in suggesting in this particular context of mental harm that this is really doing away with the eggshell principle, namely, the principle that a defendant takes the plaintiff as he finds him or her. I think it is worth reading a couple of passages from the High Court's latest edict on this subject handed down on 5 September 2002 in the cases of Tame and Annetts. Justices Gummow and Kirby in a joint judgment said at paragraph 197 under the heading 'Normal fortitude':

> The attention given to this notion by both the Court of Appeal in Tame and the Full Court in Annetts may suggest that a plaintiff has no action unless he or she be an individual of normal fortitude. The concept is said to derive from a passage in the speech of Lord Wright in. . . Bourhill and Young. However, it is plain in that passage that the attention to the notional person of normal fortitude is the application of a hypothetical standard that assists the assessment of the reasonable foreseeability of harm, not an independent pre-condition or bar to recovery.

There is then a citation from Lord Wright, and in paragraph 198 the judgment continues:

> Thus, recovering negligence actions for nervous shock was denied by the Supreme Court of Illinois where the response of a plaintiff of a peculiar sensibility unknown to the defendant to remonstrations by the defendant could not have been reasonably anticipated. Similarly, recovery has been denied to a plaintiff involved in a motor vehicle collision who developed neurosis based on a false belief that she had struck a child on a bicycle; drivers are not obliged to take precautions against the possibility that the plaintiff might unreasonably imagine a state of affairs that does not exist.

It ought to be said that these judges on this question were not in the majority, as I recall. But the majority, comprising Justices Gleeson, Gaudron and McHugh, said the following on this point:

> Normal fortitude of a plaintiff is not a pre-condition to liability. A plaintiff whose personal idiosyncrasies suggest they deviate from the nominal normal fortitude is not precluded from bringing an action in nervous shock. The notional standard of normal fortitude is the application of a hypothetical standard that assists the assessment of reasonable foreseeability of harm, not an independent pre-condition or bar to recovery. The statement that a plaintiff cannot recover for pure psychiatric damage unless the person is of a normal fortitude would suffer psychiatric damage by the negligent act or omission should not be accepted.

So that is the proposition in Tame's case. Listening to the Hon. Nick Xenophon, one would imagine that what is here being introduced is some new or novel test to deny recovery to persons other than those of normal fortitude. We do not support the amendment.

The Hon. NICK XENOPHON: I will put a question, whether it is to the government or the shadow attorney. A person who has a pre-existing psychiatric condition, pre-existing depression or a recognised psychiatric illness witnesses a shocking event. The person next to them who is of normal fortitude witnesses the same event but does not have an adverse reaction or suffer nervous shock. Is the government's position that, if the person with the pre-existing psychiatric depression, for example, suffers a shock, they will be precluded from claiming? I would like to know what is the government's position.

The Hon. P. HOLLOWAY: This clause is not about who can recover; it is about what the person should foresee. If a vulnerable person is injured and it was foreseeable, damages have to be paid to that person. The clause is about the duty of the actions that a person owes and what they foresee if they are the person in that situation. Perhaps the honourable member would like to be more explicit in his question.

The Hon. NICK XENOPHON: Two people witness a serious accident. One of them happens to suffer a pre-existing psychiatric condition such as longstanding depression. The other person does not suffer any such condition but witnesses these disturbing events and does not suffer any mental harm or nervous shock as a consequence. The other person with the pre-existing condition does. Would this clause act as a bar to recovery or would it make it more difficult for the person with the pre-existing psychiatric condition to claim?

The Hon. P. HOLLOWAY: If the defendant is responsible for the events that follow, regardless of whether or not the person is particularly vulnerable, the defendant would be liable. If a person has a duty of care, then they are liable. If they do not have a duty of care, they are not.

The Hon. IAN GILFILLAN: The Democrats do not support this amendment.

The Hon. A.L. EVANS: I support the amendment.

Amendment negatived.

The Hon. NICK XENOPHON: I move:

Page 10, new section 33(2)(a), line 10—
Delete 'is to' and substitute
may

The CHAIRMAN: The honourable member has tested this; does he need to say any more?

The Hon. NICK XENOPHON: We have tested it. I make the same comments as I did previously in relation to precautions against risk so that it is not mandated. I do not intend to divide. Again, I say that we should not be locking the courts in with these particular criteria.

The CHAIRMAN: Your position has not changed, I assume, minister?

The Hon. P. HOLLOWAY: No.

Amendment negatived.

The Hon. NICK XENOPHON: I move:

Page 10, new section 33(2)(a)(ii), lines 13 and 14—
Delete subparagraph (ii)

This amendment relates to deleting subclause (2), which provides:

. . . whether the plaintiff witnessed at the scene a person being killed, injured or put in peril.

I believe that it is unduly restrictive, but there is another fall-back amendment, if you like, which relates to recommendations of the Ipp committee. Essentially, I am concerned that, if this particular subparagraph remains, it could well make a difference in cases such as Lawson v Pham. That is a South Australian case that, as I understand it, went all the way to the High Court on the issue of nervous shock. It appears to be unnecessarily restrictive. In the case of Lawson v Pham, the mother of the young girl who was killed in a motor vehicle accident was not at the scene. She saw her daughter afterwards. I still remember reading the evidence. The nervous shock arose out of what occurred subsequently, and that included the mother changing, cleaning and preparing her daughter for burial. My concern is that that could act as a hurdle that would be used by insurers. I think that, in those sorts of cases, it has the potential to be extremely unfair.

The Hon. P. HOLLOWAY: I think that the honourable member really misunderstands the purpose of the clause. There are a number of factors which the court must take into consideration, and this is just one of them. This provision is not mandatory. It is not a pre-condition for the courts.

The Hon. Nick Xenophon interjecting:

The Hon. P. HOLLOWAY: Yes, they must have regard to it. It is not a pre-condition. This clause, as printed, departs from the text of the recommendations. It is already the law in South Australia that a person cannot recover damages for mental harm unless the person was injured in the accident, or was either a witness at the scene when the accident occurred, or was the parent spouse or child of the person endangered or harmed (I am referring to section 24C). That has been the rule in motor accident cases for some time, and was last year extended to all claims for nervous shock.

The fact that the plaintiff witnessed at the scene a person being killed, injured or put in peril brings that person within the class of persons entitled to claim damages for mental harm if there has been a breach of duty of care. Therefore, that is a relevant circumstance to be considered by the court in deciding whether a duty of care exists. It is logical that the factors to be considered at the duty of care stage should be consistent with those that are relevant in determining whether the plaintiff is entitled to damages. For those reasons, the government opposes the amendment.

The Hon. R.D. LAWSON: I indicate that the opposition also is opposed to the amendment. It was not my belief that Pham and Lawson went to the High Court. I have always thought of it as a decision of the Supreme Court of South Australia.

Amendment carried.

The Hon. NICK XENOPHON: I move:

Page 10, new section 33(2)(a)(iv), lines 17 and 18—
Delete subparagraph (iv)

This amendment relates to what is a departure from the Ipp recommendations. In relation to mental harm at page 144 of the Ipp report, recommendation number 34 is somewhat broader in scope than what the government is proposing. Recommendation 34(a), (b), and (c), sets out five criteria. It appears that whether or not the mental harm was suffered as a result of a sudden shock is the same as it is in the legislation. However, sub-recommendation (ii), dealing with whether the plaintiff was at the scene of shocking events or witnessed them or their aftermath, is somewhat different, and the current bill is narrower. Sub-recommendation (iii) refers to whether the plaintiff witnessed the events or their aftermath with his or her unaided senses.

My concern is that the government is saying: 'We have got to follow Ipp. We have to be nationally consistent.' Yet, with this particular amendment in relation to mental harm—something that the Labor Party campaigned long and hard on in relation to the rights of those workers injured with psychiatric injury in the last parliament—the government is actually taking a narrower approach than that contained in Ipp. I am simply seeking, as a fall back position, to hold the government to the Ipp recommendations.

The Hon. P. HOLLOWAY: This amendment would restore the words of the Ipp recommendation. The problem with doing that in South Australia is that it would compel the court to consider, in deciding whether a duty of care is owed, matters that are irrelevant because the plaintiff cannot recover damages in any event. Witnessing the aftermath is not a sufficient basis for recovery in South Australia. If you were not there when the accident occurred but happened on the scene later, you have no claim. It does not make sense to find that a duty is owed to a person who, as a matter of law, cannot claim. The same is true of the requirement to witness the event with one's own unaided senses. If one were at the scene, that will necessarily occur. For that reason, the government opposes the amendment.

The Hon. NICK XENOPHON: I am surprised at what the government is saying about aftermath. What about a parent who is called to the scene of an accident and witnesses the aftermath—not the actual collision and what immediately occurs but still sees their child horribly disfigured, bleeding or burnt? Does that mean they will not be able to claim? The government is being more restrictive than the Ipp recommendations, and I am concerned that taking this more restrictive approach will mean that there will be tragic cases where, under the current law, people would be able to claim, but they would not be able to claim with this more restrictive definition. When the leader says that it is not accepted at law or that is not the current legal position, that is not my understanding; but you are actually winding things back even further than Ipp.

The Hon. P. HOLLOWAY: I would say first that I hope we are debating the same clause.

The Hon. Ian Gilfillan: I am not sure what amendment we are actually debating.

The Hon. P. HOLLOWAY: I am beginning to wonder if we have the same one. I assume that it is clause 27, new section 33(2)(a)(ii), page 10, lines 13 and 14. Is that the one?

The CHAIRMAN: On your sheet it should have amendment no. 6, Xenophon 1, clause 27, page 10, new section 33(2)(a)(iv). You are deleting sub-paragraph (iv).

The Hon. NICK XENOPHON: This will be music to everyone's ears, but perhaps I could withdraw that amendment. Does that mean that I could go to amendment no. 6 on the 9.44 a.m. sheet?

The CHAIRMAN: Yes, that would be appropriate.

Amendment withdrawn.

The Hon. NICK XENOPHON: I move:

Page 9 (new section 32(1)(b)), line 27—Delete 'not insignificant' and substitute 'real'.

The Hon. Mr Holloway argued against and put the government's position on the amendment I thought I was moving but which I did not move. The government opposes adhering to Ipp and has its own version which is narrower than the Ipp recommendation. If the government and the opposition acknowledge that, it will save me the trouble of recommitting this at the end of the debate. If members find that satisfactory, it can be dealt with.

The Hon. R.D. LAWSON: I do not accept the proposition the honourable member has put as to the effect of his amendment.

The Hon. P. HOLLOWAY: It is narrower. The problem is that, if the Hon. Nick Xenophon's amendment is carried, it would compel the court to consider, in deciding whether a duty of care is owed, matters that are irrelevant because the plaintiff cannot recover damages in any event. So in that sense it is narrower.

Amendment negatived.

The Hon. NICK XENOPHON: I move:

Page 10 (new section 33(3)), lines 22 to 25—Delete subclause (3).

This amendment seeks to delete this subclause where the defendant knew or should reasonably know that the plaintiff is a person of less than normal fortitude. It has been put to me that it may mean that some will take the view that they will not make inquiries as to what is a person's fortitude. It will almost be a positive disincentive for people to determine what is a person's fortitude in the event that they may incur liability. So, from a risk management point of view there will be a totally hands-off approach. I do not intend to divide on this amendment if that is of any comfort to my honourable colleagues. There are a few others on which I would like to divide further down the track.

The Hon. P. HOLLOWAY: This is a puzzling amendment from the honourable member in the light of his contributions to the debate. The clause as printed preserves a duty of care in the case where the plaintiff is of unusual mental vulnerability, and the defendant knows this or should know it. In such a case, even if no duty of care would normally arise because the harm is not reasonably foreseeable, there would still be a duty of care because of the defendant's special knowledge of the plaintiff. For example, in the Tame case the police officer did not owe a duty of care to Mrs Tame because he could not reasonably foresee the reaction that she suffered. But suppose it happened that her treating doctor did something that could harm her. Under the clause as printed, knowing of her vulnerability, the doctor would owe her a duty of care. He or she could not rely on the first subclause for protection because he or she knows (or should know) of her special vulnerability. If this clause is deleted, as the amendment proposes, then Mrs Tame's doctor would stand in no different position than a complete stranger. So the government opposes the amendment.

The Hon. R.D. LAWSON: We also oppose this, because it seems to be inconsistent with the whole thrust of the honourable member's position in relation to the recovery of damages from mental harm.

The Hon. NICK XENOPHON: I must say that I have been convinced by the Hon. Mr Holloway's arguments. I did receive some initial advice on this but, having heard the Hon. Mr Holloway's arguments, I seek to withdraw my amendment. I am not sure whether the Hon. Mr Holloway will reciprocate in the course of this evening and change his views in relation to any of my amendments, but I live in hope. I acknowledge that I was wrong with this particular amendment, and I seek leave to withdraw it.

Leave granted; amendment withdrawn.

The Hon. NICK XENOPHON: I move:

Pages 11 and 12, new part 6, division 3—Assumption of risk (new sections 36 to 39)—

Delete division 3 (comprising the divisional heading and sections 36 to 39).

Much was said in the second reading contribution about what 'obvious risk' means in terms of what is physically observable, that something can be obvious even if it is not prominent, conspicuous or physically observable. New section 37 deals with the issue of volenti, that is, people consenting to risks and that the risk is an obvious risk. New section 37(2) is different from recommendation 32(b) on page 130 of the Ipp report. The Ipp report says that for the purposes of the defence of assumption of risk, first, where the risk in question was obvious, the person against whom the defence is pleaded, the plaintiff, is presumed to have been actually aware of the risk, unless the plaintiff proves on the balance of probabilities that he or she was not actually aware of the risk.

Secondly, an obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the plaintiff's position. Obvious risks include risks that are patent or matters of common knowledge. A risk may be obvious even though it is of low probability. Thirdly, the test of whether a person was aware of a risk is whether he or she was aware of the type or kind of risk, not its precise nature, extent or manner of occurrence.

My first port of call is to delete new sections 36 to 39. Again I put on the record that, in terms of the example given in the second reading explanation about the snake in the national park as distinct from the doorsnake that the government will be giving out to South Australians, if someone is bitten by a snake in a national park—and I am not aware of any cases of someone suing a national park authority—I cannot see how the example given by the government as a justification for this clause has any merit. It is a snaky example. In relation to the Treasurer's example on ABC radio 891 yesterday about someone diving in, hitting a submerged floating log and breaking their neck—

The Hon. Kate Reynolds: Blind Freddy diving in and hitting a submerged log it was.

The Hon. NICK XENOPHON: The Hon. Kate Reynolds makes the point that the Treasurer apparently said 'blind Freddy'. The examples they have given are a furphy: they are not cases that anyone could reasonably win under the current law. Twenty of the last 23 plaintiffs in the High Court in these sort of injury claims have lost. The government is basing a bill on false premises. I am not suggesting that it is in any way deliberate on the part of the government, but it does not seem to accord with what the legal position is.

The Hon. P. HOLLOWAY: The government opposes this amendment. Division 3 is based on Ipp recommendations 14 and 32, which the Hon. Nick Xenophon has just read out. The provisions have three main effects. First, section 38, if a risk is obvious, then the defendant does not have a duty to warn the plaintiff about it. The government thinks that that is commonsense. Why should you have to warn me about something that should be obvious to me? The law should expect people to take reasonable care for their own safety, including looking out for and avoiding obvious dangers.

Secondly, section 37, if a risk is obvious and a defence of voluntary assumption of risk is pleaded, then it is up to the plaintiff to show that he or she did not know of the risk. If that be the case, then the plaintiff can give that evidence. If the court believes the plaintiff, the burden is discharged. Thirdly, section 39 sets out that if the risk is inherent, that is, it cannot be avoided by reasonable care, then no liability arises if injury results when that materialises. Section 39 has been modelled on the New South Wales provision and is already the common law.

These provisions are consistent with the Ipp recommendations, although there are some differences of wording resulting from the government's consultation process. They are not extreme or unreasonable provisions. They reflect a philosophy that the requirement to take reasonable care applies to everyone, that we must accept responsibility to look out for obvious hazards and that we cannot complain if we willingly take risks. The government thinks most South Australians would consider that philosophy quite reasonable, and for that reason we oppose the amendment.

The Hon. IAN GILFILLAN: I will just indicate that, as you identified, sir, the Democrats have an identical amendment on file and acknowledge that the argument put forward by the Hon. Nick Xenophon is adequate for our case. I do not believe we need to research into the bowels of pre-legislation, and analyse what earlier judgments were, or even to look for examples which may or may not substantiate the issue. I believe just a simple reading of the English, which is here for division 3, denies reasonable justice in a system that purports to be fair to people in these circumstances. We support the amendment.

The Hon. A.L. EVANS: I support Mr Gilfillan's amendment. It is my understanding that the defence of the Volenti has not been successfully relied upon for many decades. It is far more appropriate that the plaintiff conduct be assessed in the context of contributory negligence, rather than a voluntary assumption of risk. The definition of an obvious risk in new subsection 2 is an absurdity. Rendering a risk to be an obvious risk, even if it is not prominent or physically observable, is an absurdity. I cannot support a provision which states that the defendant will not have a duty to warn of an obvious risk to the plaintiff under new section 38.

The Hon. R.D. LAWSON: I indicate that the opposition will not support the deletion of proposed sections 36, 37, 38 and 39. I do indicate that, if the Hon. Nick Xenophon's amendment is lost, we will be supporting his proposed amendment, if he moves it, to change the wording of section 36(2). The issue here, notwithstanding the order in which the sections appear, is when there is a duty to warn of an obvious risk. Under the key proposed section 38, a person does not owe a duty of care to another to warn of an obvious risk. The Hon. Nick Xenophon thinks that he has hit a mother lode when he condemns the Treasurer for giving as two examples the possibility of a national park being sued for allowing tourists to walk down snake infested paths, because he says there is no such case on the books. I have not had an opportunity to see whether or not there is such a case. However, it is undoubtedly the case that, if the court were to continue to adopt the principle in Nagle and Rottnest Island, then it would be highly likely that if such a case arose the plaintiff would recover. Probably the plaintiff would recover in the case of diving into a stream in which there were submerged logs passing along it.

As I indicated during my second reading contribution, and as Ipp closely considered, rather than the absurdity the Hon. Andrew Evans speaks of, it is entirely possible to conceive of risks which are obvious but not physically observable. Indeed, many of the risks are obvious but not physically observable. Nagle and the Rottnest Island authority is a good example. This was a case where the plaintiff dived into a rock pool in which there was only 24 centimetres of water. He was aware of the fact that there were rocks in the pool.

I will quote an interesting passage. The argument was that the authority should have put up a sign of warning, which it had not. As Justice Brennan commented at page 443 of the Commonwealth Law Reports:

> A warning which read 'Caution: submerged rocks' would have been quite ineffective, because the plaintiff already knew that caution was required by reason of the existence of submerged rocks lying close to the place from which he dived. Obviously he was not aware, at the moment that he dived, of the position of the particular rock that he struck.

Justice Brennan continued on the following page:

> It would have been practical to erect at this place a sign which said 'Diving from the eastern side is prohibited' or 'Diving from the eastern side is dangerous', or words to similar effect.

As he observes, it is problematic whether such a sign would have deterred the plaintiff, bearing in mind, as I have already indicated, the plaintiff knew there were rocks there. But the specific caution or warning which the judgment of the majority of the High Court (I should say that Justice Brennan was in descent) demanded the erection of such a useless sign.

It is also worth mentioning the case which has been mentioned by the minister in his contributions, Romeo and the Conservation Commission of the Northern Territory. This was a case where a young woman fell 6½ metres from the top of a cliff on to a beach in a nature reserve managed by the Conservation Commission of the Northern Territory. She suffered serious injuries. The fall occurred at night while she was intoxicated. There was a car park surrounded by a low log fence about 3 metres from the edge of the cliff. Between the car park and the cliff edge was open space covered with low vegetation.

The woman fell at a point where there was no gap in the vegetation, and there was no fence or other barrier. The presence of the cliff was obvious. The area was one of natural beauty. The cliff is about 2 kilometres long. During the course of argument, it was advanced by the plaintiff that the standard of care expected of a reasonable person requires them to take account of the possibility of inadvertent or negligent conduct on the part of others. Justice Kirby is recorded as saying:

> Would not that be a horrible rule that, in every part of Australia's continental coastline which is a beauty spot, you have to mar it with a fence against the possibility that one in 200 000 people will drink too much and not take enough care for themselves and fall over the cliff?

What the Hon. Nick Xenophon seeks to do—and this is the effect of this amendment—is really to insist upon the standard that requires of every local government authority in the country to put signs around all the cliffs along the Great Australian Bight and everywhere else where people might go. Whilst we are happy to support the Hon. Nick Xenophon's amendment to some of the nomenclature as I indicated, we do not support the deletion of this division of the bill.

The Hon. NICK XENOPHON: I take issue with the fact that the government appears to have taken a more narrow

approach than that contained in the Ipp recommendations. However, given the intimation of the Hon. Robert Lawson that one of my amendments will be supported, it is simply too tantalising. It will make my week. We will deal with this in due course. I do not resile from my position. I do not accept the Hon. Mr Lawson's position that this means you would have put to put signs throughout our coastline. I do not believe that is what the court would do at all, given recent judgments. I still maintain that the Treasurer's example of a submerged log floating down the River Murray with Blind Freddy is in any way valid.

The Hon. R.D. LAWSON: I should also mention, in support of the position we have adopted in relation to this issue, a dictum of Lord Hoffmann (an English Law Lord) in the case of Reeves v Commissioner of Police decided in 2000 to illustrate the fact that the emphasis these days is being given to the autonomy of the individual. Lord Hoffmann said:

> There is a difference between protecting people against harm caused to them by third parties and protecting them against harm which they inflict upon themselves. It reflects the individualistic philosophy of the common law. People of full age and sound understanding must look after themselves and take responsibility for their actions.

That is a perspective which should not be lost sight of.

Amendments negatived.

The Hon. NICK XENOPHON: I move:

> Page 11 (new Section 36(2)), lines 19 to 21—
> Delete subsection (2) and substitute:
> (2) Obvious risks include risks that are patent or matters of common knowledge (and a risk may be obvious even if it is of low probability).

This is something that I have borrowed from the Ipp report in recommendation 32(b). I note that the Hon. Mr Lawson has put on file a similar amendment. The only difference is that he has it as another new subsection in terms of the low probability issue. I will listen to his more superior legal skills to hear what the difference would be from a statutory interpretation point of view. I welcome his contribution.

The Hon. P. HOLLOWAY: The government is happy with this amendment. We prefer the Lawson amendment because of the neatness of having the two subsections, but we will support either.

The Hon. R.D. LAWSON: I move:

> Page 11 (new section 36(2)), lines 19 to 21—
> Delete subclause (2) and substitute:
> (2) Obvious risks include risks that are patent or matters of common knowledge.
> (3) A risk may be obvious even though it is of low probability.

I do not need to add anything to it. It is consistent with the recommendations of the Ipp report.

The Hon. NICK XENOPHON: I seek leave to withdraw my amendment, given that the Hon. Mr Lawson is proceeding with his amendment.

Leave granted; amendment withdrawn.

Amendment carried.

The Hon. NICK XENOPHON: I move:

> New section 37(1), page 11, line 27—After 'he or she was not' insert 'actually'.

I move this amendment because we seek to shift the onus in terms of volenti. In its current form it would place an unreasonable onus on the plaintiff and it is unduly restrictive.

The Hon. P. HOLLOWAY: We do not oppose the amendment.

Amendment carried.

The Hon. P. HOLLOWAY: I move:

> New section 37(3), page 11, lines 33 and 34—Delete 'not only that the plaintiff was aware of the risk and voluntarily assumed the risk but also'.

This amendment arises out of comment received on this bill which pointed out that it could be unclear how new section 37(3) is intended to interact with new section 37(1) and (2). Proposed subsections (1) and (2) intend that, if the court finds a particular risk to be obvious, in the sense of being a risk that would have been obvious to a reasonable person in the position of the plaintiff, for the purposes of proving a defence of voluntary assumption of risk it will be presumed that the plaintiff knew of the risk. If the plaintiff did not actually know of the risk, he or she can lead evidence to rebut the presumption.

New subsection (2) further provides that a person is aware of a risk, even if not aware of the precise nature, extent or manner of occurrence of the risk. Proposed subsection (3) was added to the bill to address concerns that were raised by some commentators that sometimes it is reasonable for a person to take a risk, even if the risk is obvious. Therefore, the defence of voluntary assumption of risk should be available only if a reasonable person would have taken steps to avoid the risk but the plaintiff did not. If there was nothing a reasonable person would have done to avoid the risk, the defence should not succeed.

The concern arises from the inclusion of the statement in new subsection (3) that, in order to prove the defence, the defendant must not only establish awareness and voluntary assumption of risk but also that a reasonable person would not have avoided it. The reference to establishing awareness and assumption of the risk might be argued to be in conflict with the presumption earlier established. The government intends that the presumption should operate, that is, that new subsections (1) and (2) should be effective. After consultation with parliamentary counsel, it is proposed to remove any doubt by taking the unnecessary words out of new subsection (3), while still leaving in place the stipulation that the defendant must prove that the risk was such that a reasonable person would have taken steps to avoid it.

The Hon. R.D. LAWSON: I indicate the opposition's support for the amendment.

The Hon. NICK XENOPHON: My understanding is that this would not worsen the position of plaintiffs. This amendment arose out of representations from either the Law Society or plaintiff lawyers, as I understand it. Can the minister confirm that?

The Hon. P. HOLLOWAY: It came out of advice, but not from the source suggested by the honourable member. It came out of the legal panel that advises the Motor Accident Commission.

Amendment carried.

The Hon. NICK XENOPHON: I move:

> New section 38, page 11, lines 37 to 39 and page 12, lines 1 to 12—Delete new section 38.

I refer to the comments of the Ipp report at paragraphs 8.36 to 8.37. Paragraph 8.36 provides:

> Duties of protection play a very important part in the law in safeguarding the interests of vulnerable members of society. We think that this area of the law is best left for development by the courts. We think that it is neither necessary nor desirable for us to make any general recommendation about the incidence of protective relationships.

Paragraph 8.37 further discusses that. My understanding is those subsections are pertinent in relation to this amendment.

It is for those reasons, and given what Ipp has discussed, that I am moving this amendment.

The Hon. P. HOLLOWAY: The government opposes this amendment, for the reasons already given. The law should not expect people to warn other people of risks that should be obvious to them. The law can expect people to display some commonsense. The clause is consistent with Ipp recommendation 14 and with provisions that have been adopted in Queensland, Tasmania and Western Australia. Related provisions are contemplated in Victoria. The Victorian bill proposes that, in any case, where the plaintiff is relying on a failure to give warning about a risk the plaintiff must prove that he or she did not know about the risk. If the plaintiff did know about the risk, therefore, the failure to warn about it will be irrelevant.

The government does not think that this clause is in any way unreasonable or unfair. On the contrary, it would be unfair and burdensome to expect people to give warnings to others about hazards that should be obvious to them. The Hon. Robert Lawson has cited a number of cases. In addition to those, one might also refer to the case of Woods versus Multi-Sports Holdings, where the High Court held that an indoor cricket arena was not liable for failing to warn a player that he might be struck by a cricket ball. In the case of Hoyts and Burns, the High Court found that a cinema operator was not liable for failing to warn a patron about the fact that the cinema seats retracted when vacated. So, perhaps we are restating the present law.

The remarkable thing is that, in the cases that I mentioned, and the case of Romeo v Conservation Commission of the Northern Territory, even though one might have thought these risks to be as plain as day, the parties had to go all the way to the High Court to find out whether or not the law had been broken. In the Woods case, the High Court did not even agree on the answer. Two of the judges would have held the arena liable, three not. Further, as I mentioned earlier, some cases do suggest that one should warn of a risk, even though one might have thought the risk to be obvious. The naval case, to which the Hon. Robert Lawson and I have referred today, is an example. Such cases may well lead people to sue in the hope of establishing liability, even in obvious risk cases. An example is the case of the Department of Natural Resources and Energy v Harper, the Victorian case decided in 2000. The plaintiff was visiting a national park on a windy day and a tree fell on her, and she sued the department. The department should have put up a sign saying, in effect, that in windy conditions trees may blow down. The trial judge agreed, and only on appeal was this conclusion overturned.

Similarly, in the case of Franklin Self-serve Pty Ltd v Bozanowska of 1998, a supermarket patron attempted to reach an item on a high shelf by standing on a wire basket which was on the floor nearby. She fell and was injured. She sued, claiming among other things that the supermarket should have put up a sign warning people not to stand on the basket. The trial judge found liability, but the appeal court exonerated the supermarket. In trying to frame the words of the proposed sign, the appeal court speculated that it might say, 'Don't stand on the basket. It is dangerous and might not support your weight.' The court was not persuaded that the supermarket's duty extended to this. One judge said:

> Surely, this was to re-state in written form that which was, or ought to have been, clearly apparent to all but the most short-sighted or stupid customers.

So, one might think (and so the appeal court ultimately found) that obviously the plaintiff must have received advice that, in the present state of law, it was worth a try. All this suggests a need for a clear legislative statement, which is what proposed new section 38 does.

The Hon. NICK XENOPHON: I believe the leader has basically supported my case, which is that the courts get it right. The way the current common law works is that—

An honourable member interjecting:

The Hon. NICK XENOPHON: The way the common law works is that it evolves the community standards, and they got it right. They got it right by saying that in those cases the plaintiffs did not have a good claim. So much else of this bill is so unnecessary, because the courts do get it right.

The Hon. R.D. LAWSON: The Hon. Nick Xenophon was kind enough to remind us of what the Treasurer said about the hypothetical example of someone being bitten by a snake in a national park. I have just noticed the case of Schiller against the Mulgrave Shire Council, a case decided by the High Court at a time when judges were very quick to impose liability for negligence on defendants. The plaintiff was injured when a dead tree fell on him while he was walking along a track in a national park. The council having control and management of the park was held liable by the High Court because it knew or should have known of the danger posed by dead trees and that it should have taken steps to discover and take care of these trees. One would say that that result would not occur today, but it is simply an example of the fact that plaintiffs do recover in quite bizarre circumstances.

The Hon. NICK XENOPHON: The last time I looked, a live snake is a bit different from a dead tree. However, I will not pursue that any further.

Amendment negatived.

The Hon. NICK XENOPHON: I move:

New section 41(1), page 12, lines 37 and 38—

Delete 'by members of the same profession as competent professional practice' and substitute:

as best practice by members of the same profession

This relates to standards of care. This is fundamental on the issue of professional negligence, whether it is doctors, lawyers or other professionals, in terms of the standard of care for professionals, and the discussion in Ipp was quite extensive. It seems that Ipp decided for a modified Bolam principle test, the 1957 House of Lords decision. The Ipp report seems to be suggesting that lawyers set the standard of care and tell doctors what they can and cannot do in terms of safe practices. That is simply not the case.

The court always hears from medical experts as to the practices and procedures or will often defer to this body of evidence, in any event. What the courts do not want is to have their discretion taken from them in weighing this evidence and, with all the other facts, to determine this standard. Even so, Ipp suggests a modified version of the Bolam test and not the complete restatement of it, as in the bill. In relation to that, paragraph 3.4 of Ipp states:

> Although it refers specifically to medical practitioners, there are reasons to think that it may apply to other occupational groups.
>
> (a) The *Bolam* case involved treatment rather than the giving of information about treatment.
>
> (b) Under the rule the defendant will be held to have exercised reasonable care if what was done was in accordance with 'a responsible body of medical opinion'.

Paragraph 3.5 of Ipp states:

> Our consultations suggest that there is a significant body of opinion, especially among the medical profession, in favour of reinstating the *Bolam* rule in its original form. However, the Panel has formed the view, for the reasons which follow, that it should not

recommend the reintroduction of the *Bolam* rule in its original form but rather a modified version of that rule.

The Ipp report discusses the Bolam rule, and states at paragraph 3.8, in part:

A common objection to the *Bolam* rule is that it gives too much weight to opinions that may be extreme and held by only a very few experts, or by practitioners who (for instance) work in the same institution and so are unrepresentative of the views of the larger body of practitioners. The *Bolam* rule also gives added importance to this influence of so-called 'rogue experts'. The problems with the *Bolam* rule in its original form are well illustrated by two instances.

Paragraph 3.9 of Ipp states that the first instance is discussed in Bolilto v City and Hackney Health Authority, a 1998 House of Lords decision by Lord Browne-Wilkinson, referring to Hucks and Cole, a 1993 decision, presumably an English decision, in which a doctor failed to treat with penicillin a patient who had septic spots on her skin even though he knew them to contain certain organisms capable of leading to puerperal fever. It continues:

'A number of distinguished doctors gave evidence that they would not, in the circumstances, have treated [the patient] with penicillin.' Despite this body of supported opinion, the Court of Appeal held the doctor to have been negligent because he had knowingly taken a risk of causing grave danger even though it could have been easily and inexpensively avoided.

Paragraph 3.10 of Ipp refers to the Report of the Committee of Inquiry into Allegations Concerning the Treatment of Cervical Cancer at National Women's Hospital and into Other Related Matters. That report arose out of a research program conducted over the course of almost 20 years at the National Women's Hospital in Auckland, New Zealand, to determine the natural history of carcinoma in situ of the female genital tract. It states:

The program involved leaving untreated women who returned positive Pap smears. A positive Pap smear may be indicative of carcinoma-in-situ, which may develop into invasive cancer. This procedure involved deliberately omitting to treat women in accordance with standards accepted elsewhere, in order to determine whether they would later develop invasive cancer. The approach followed in the program was accepted by many other practitioners, within and outside the hospital, and formed the basis for the undergraduate and post-graduate teaching. According to the Report, several women died as a result of the failure to offer conventionally-accepted treatment. Under a strict application of the Bolam rule as originally formulated, the practitioners involved arguably were not negligent.

There is an ongoing discussion about Bolitho and the Auckland case. My grave concern is that the clause in its current form will mean that we will go back to Bolam's case and Bolitho's case and there will be a lower standard of care among professionals—that is, if there is a widely accepted body of opinion that it is not necessary to treat women with a positive pap smear (that is, it is acceptable to not treat them) as was widely accepted in New Zealand, there is no claim. I find that unconscionable, and it would lead to a lower standard of care. I have moved this amendment so that there is a requirement for best practice so that the medical profession—indeed, all professions—are required to do the best they can for their patients or clients.

It is worth referring to the report of the cervical cancer inquiry by Judge Sylvia Cartwright which related to the belief of doctors that it was reasonable not to treat women who had a positive pap smear and, effectively, these women were left to die and were not even advised of the results, as I understand it. The report is extensive and quite damning, and it seems that we are going down this path in terms of saying that we will accept a lower standard amongst professionals. In the Cartwright inquiry there was a finding that Professor Green, who had responsibilities for teaching on this subject, was widely accepted, even though his teaching papers gave inaccurate information. But under this proposal (the government's clause), because they were widely accepted, a plaintiff could arguably fail, and that is my very serious concern.

There was a similar inquiry in relation to the Gisborne cervical screening case, also in New Zealand, again in relation to cervical smears. That case involved a pathologist in Gisborne who was the owner of a medical laboratory, and again a misreading of smear tests. Women were not informed of results and died. I remember clearly having a conversation with Phillida Bunkle, a former consumer affairs minister in New Zealand, who was actively involved in this matter a number of years ago, and she told me of the devastation and horror involved for these women, some of whom effectively had a death sentence because the doctors did not do the right thing. They did not inform the patients.

It seems that the Ipp report is going down the path of Bolitho v City of Hackney Health Authority, and I think it is important that I put on the record briefly what the facts were in that case. This was a decision of 13 November 1997 of the House of Lords. The facts related to 12-year-old Patrick Bolitho who was admitted to hospital with breathing difficulties. His condition worsened, so a nurse called a doctor who did not come within a reasonable time frame. The young boy suddenly stopped breathing; he had brain damage. It was the accepted practice that people had to wait for treatment, so this young boy suffered brain damage and lifelong injury. In Bolitho's case, the House of Lords said:

These decisions demonstrate that in cases of diagnosis and treatment there are cases where, despite a body of professional opinion sanctioning the defendant's conduct, the defendant can properly be held liable for negligence (I am not here considering questions of disclosure of risk). In my judgment that is because, in some cases, it cannot be demonstrated to the judge's satisfaction that the body of opinion relied upon is reasonable or responsible. In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion. In particular, where there are questions of assessment of the relative risks and benefits of adopting a particular medical practice, a reasonable view necessarily presupposes that the relative risks and benefits have been weighed by the experts in forming their opinions. But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible.

Therefore, it is going down the path of being irrational. I will refer to that shortly. It appears that this particular clause is lowering the standard significantly. I refer to a 1999 High Court decision in Naxakis v Western General Hospital, which again relates to a 12-year-old boy who was struck on the head. He presented to hospital where he fell into a deep and unrousable unconsciousness. He was unresponsive to painful stimuli, there were traces of vomit around the corners of his mouth, and he began to exhibit signs of opisthotonos, a spasm in the muscles of the neck, back and legs and backward contortions of the body. The preliminary diagnosis showed a subarachnoid haemorrhage caused by a blow to the head.

Before that, he presented to hospital and it seemed that a reasonably competent neurosurgeon would have performed an angiogram which would have disclosed that this young lad had a subarachnoid haemorrhage. The opinion of the High Court is that a number of neurosurgeons would have said: 'No, we wouldn't have done an angiogram, we would have sent him home with the symptoms that he presented with.' There was still a body of neurosurgeons, albeit in the minority, that would have said that an angiogram would have

been reasonable. The court adopted the approach that the best practice would have been to conduct the angiogram. In the circumstances it would have meant that this young boy would not have suffered the catastrophic injury caused by the subarachnoid haemorrhage.

This amendment is about best practice and doing the right thing by patients and clients by not lowering the standard of care. Therefore, unreasonably, it seems that we are going back to the House of Lords. I thought that we had abolished appeals to the Privy Council a generation ago. I urge honourable members to support this amendment.

The Hon. P. HOLLOWAY: I propose to remove the proposed defence based on Ipp recommendation 3. It is of no use to provide for a defence of compliance with best practice. The standard required by law has never been perfection; only reasonable care. There is no justification for raising the standard beyond reasonable care. There is a well-known but undesirable tendency for the law of negligence to creep gradually towards the standard of perfection, as does strict liability.

That is an error. Professionals, like other human beings, cannot be expected by the law to deliver perfection. The law does and should expect only reasonable care. That is a standard that can be met by everyone. It is a flexible standard that can take into account particular circumstances. It allows for the difference, for example, between working in a well-equipped city hospital and working in a remote community. The defence of best practice has no work to do and no place in a law that requires only reasonable care. The Hon. Nick Xenophon read out lengthy passages from the Ipp report.

The Ipp report recognised the limitations of the Bolam test. In fact, the provisions that it recommended were designed to remove the deficiencies of the Bolam test, hence the provisions in the bill before us. The government opposes the amendment.

The Hon. R.D. LAWSON: The opposition also opposes this amendment. As the minister just mentioned, the mover read extensive passages from the Ipp report relating to the Bolam case. The honourable member referred to the passages on Bolitho and also the New Zealand committee of inquiry. The honourable member failed to read the very next paragraph (3.11), which states:

> These examples demonstrate that the Bolam rule, when strictly applied, can give rise to results that would be unacceptable to the community. They show the main weakness of the Bolam rule to be that it allows small pockets of medical opinion to be arbiters of the requisite standard of medical treatment, even in instances where a substantial majority of medical opinion would take a different view.

The authors of the report go on to say that they are not adopting Bolam; that they are not proposing a return to Bolam: they are looking for a different standard. The report goes on to justify the third recommendation which is made on page 41 and which has been taken up in the clause we are now considering. It is misstating the position of the mover to suggest that this clause is a return to Bolam. It is not a return to Bolam. To suggest that we insert in lieu of the words 'by members of the same profession as competent professional practice' an expression such as 'best practice' would be a retrograde step.

I must say that, when I hear the words 'best practice'—an expression one so frequently sees in advertising material and brochures prepared by public relations consultants claiming that their clients engage in best practice—I blanch. I do not believe it to be appropriate to put that language into this provision. As the minister said, what the law is on about is providing a reasonable standard of care. That has always been the law. It is the law now, and to endeavour to elevate the standard to some notional idea of best practice would be a retrograde step. We will be opposing this amendment.

The Hon. NICK XENOPHON: My understanding is that the High Court case of Naxakis v Western Australian General Hospital is saying that 'best practice by members of the same profession' is consistent with that. Given the facts of the Naxakis case (the young boy presenting with symptoms and, as a result of not having further investigations, suffers a subarachnoid haematoma and a catastrophic injury), does the government concede that this particular clause in its current form will mean that the young plaintiff in the Naxakis case would not be able to succeed?

It was not widely accepted, but there were some neurosurgeons who said that this is the standard we should strive for in doing the best for our patients. Notwithstanding what both the Hon. Mr Lawson and the Hon. Mr Holloway said about the Bolam principle, my reading of proposed section 41(1) is that it is widely accepted by members as competent professional practice. In relation to the pap smears and cervical screening tragedies in New Zealand, it was widely accepted practice in New Zealand that those women not be treated. That was the reasonable and widely accepted practice at the time. A number of those women died, but there were some in the profession that said they should have been treated and there should have been further investigations. We are going back to that. Whilst Bolam has been distinguished by Ipp, it does not address the issue of Naxakis, as I understand it, and also the New Zealand cases. They are discussed, but my concern is that, if we pass this, we are going to go down the path where there will be horrendous injustices to patients and clients of professionals, given that the standard will be lowered. We will be straying from the path of the Naxakis case.

The Hon. IAN GILFILLAN: The Democrats oppose this amendment. For one thing, it is very difficult to establish what best practice is—it is a subjective assessment that will vary. To claim that negligence exists because a practitioner does not comply with this arbitrary factor of best practice defies logic to me. If the aim of the Hon. Nick Xenophon is to improve the performance of professions, that should be by way of encouragement for research and analysis of performance, but to try to attack it in extending the range of court actions to claim damages from people who, in my view, are certainly not negligent, is futile and an extravagant misuse of our resources.

The Hon. P. HOLLOWAY: In relation to the Hon. Nick Xenophon's question, my advice is that in the Naxakis case the High Court was not asked whether the doctor was negligent but, rather, the High Court considered whether any evidence of negligence ought to have been left to the jury to determine. I am advised that that was the only issue that the court considered.

The Hon. R.D. LAWSON: I would not want my silence on the subject of the Naxakis case to be interpreted in any way. I have not read the case. The Hon. Mr Xenophon has just given me a copy, so I make no comment.

The Hon. NICK XENOPHON: As I understand the Naxakis case—and the minister's advisers are familiar with it—it involved a young boy. He had a head injury and some symptoms. He went to hospital and the doctors sent the boy home. In terms of widely accepted practice, there was evidence by neurosurgeons—in a minority I might add—that they should have performed some further investigations to

ensure that he did not have a more serious injury. In the event, it was a subarachnoid haematoma. Whilst it refers to juries—I acknowledge that—at paragraph 19 of her judgment Justice Gaudron says that, according to the Bolam rule, the doctor is not negligent if he acts in accordance with the practice accepted at the time as proper by a responsible body of medical opinion, even though other doctors adopt a different practice. She goes on to discuss precautionary measures and what should be done.

My question to the government is: does it acknowledge that under this provision and with similar facts there would not be a claim? Most doctors would say that it is widely accepted. With those particular symptoms it is reasonable to send the boy home and that is that, but in some rare cases that person will develop a subarachnoid haematoma and a catastrophic injury. I am trying to get a feel from the government as to whether it acknowledges that this clause will effectively knock out cases such as that.

The Hon. P. HOLLOWAY: I understand that the young person in question was held in hospital for nine days. A CT scan was conducted and that showed some bruising but did not show the aneurism, so the real question was: should they have also done an angiogram, which would have shown the aneurism? The issue that the court was to decide was what is widely held in Australia to be competent practice. Should the angiogram have been conducted? The burden is upon the defendant to prove what the competent practice was.

The Hon. NICK XENOPHON: I am trying to close this line of questioning down, but does the government acknowledge that if this particular clause were enforced that 12 year old boy would not succeed, given the facts of that case; that this is the sort of case that would be knocked out?

The Hon. R.D. LAWSON: I do not accept that that case and the facts outlined by the honourable member would be precluded by this standard now insisted upon, which is the standard, demonstrated by evidence, of the manner that members of the same profession as competent professional practice would adopt. It is easy these days to get an expert on any particular medical question who will say that a particular practitioner could have done something else and that there is some higher standard. That is the easiest evidence to obtain in any particular action.

It is a sad commentary that experts are no longer independent. Experts are called for the purpose of supporting one case or the other, and that is a fact of life. The honourable member, as a legal practitioner, must know that to be the case. I do not accept that the standard of care being imposed by this new provision would preclude the plaintiff in that particular case from recovery. Whether or not he would recover would depend upon the evidence presented to the court.

Amendment negatived.

The Hon. NICK XENOPHON: I move:

Page 12, new section 41(2), line 40—
Delete 'irrational' and substitute:
unreasonable

This is plan B, which involves deleting the words 'by members of the same profession as competent professional practice' and substituting—

The ACTING CHAIRMAN (Hon. J.S.L. Dawkins): You cannot go backwards. The words proposed to be struck out were not struck out, so you cannot substitute more words. The honourable member should be moving amendment No. 10 (Xenophon 1).

The Hon. NICK XENOPHON: Does the opposition have any sympathy for substituting 'by members of the same profession as competent professional practice' with the words 'as competent professional practice according to general community standards and by members of the same profession', which in some senses is a restatement of Chief Justice King's proposal in F v R?

The ACTING CHAIRMAN: We are not able to approach it in that way.

The Hon. R.D. Lawson interjecting:

The Hon. NICK XENOPHON: I am not trying to breach standing orders, but the Hon. Mr Lawson says he would not support it anyway. So, that gives me some cold comfort.

The ACTING CHAIRMAN: My advice is that the appropriate action is to now move amendment No. 10 (Xenophon 1).

The Hon. NICK XENOPHON: I move:

Page 12 (new section 41(2)), line 40—Delete 'irrational' and substitute 'unreasonable'.

As disappointed as I was, and as fearful as I am, given that the previous amendment was not successful, if we leave in the word 'irrational' in the context of this legislation, effectively it will mean a dramatic lowering of the standards required of professionals. Effectively it will mean that anything short of irrational will mean that a plaintiff may not be able to succeed in a claim for professional negligence. It is going way back in the direction of Bolam and in the direction of Bolitho's case. We are throwing out the High Court's judgments in this matter, including Naxakas. I urge honourable members to substitute the word 'unreasonable' rather than 'irrational'. It is unduly restrictive, onerous and unconscionable. I urge honourable members to support the amendment.

The ACTING CHAIRMAN: It may be appropriate for the Hon. Mr Lawson to move his amendment.

The Hon. R.D. LAWSON: I will not move the amendment standing in my name to substitute for the expression 'irrational' the words 'cannot be sustained'. Upon reflection, and upon closer examination of the Ipp Report, I do not believe that would be an improvement to the bill.

The Hon. IAN GILFILLAN: Mr Acting Chairman, you would be aware that I have an identical amendment on file from the Democrats and therefore will support the amendment moved by the Hon. Nick Xenophon for substantially the same reasons he put forward.

The Hon. P. HOLLOWAY: The government opposes the amendment. I am happy to elaborate the reasons if necessary, but given the time I hope that will be sufficient at this stage.

The ACTING CHAIRMAN: I think that the Hon. Mr Xenophon was hoping you were going to elaborate.

The Hon. R.D. LAWSON: The reason we oppose the amendment which would substitute 'unreasonable' for 'irrational' is that in the Ipp report that very question is examined in quite some detail and is rejected. My initial reading, and I think the initial reading of many people, of the Ipp report was that the notion of irrationality was foreign to the thinking of Australian lawyers on this particular question. However, notwithstanding the fact that it is an English decision, the use in Bolitho of the concept of irrational is entirely appropriate. The expression captures what is intended, and the fact that an English court adopted that nomenclature fairly recently should not lead us to reject it because we are now free of the colonial shackles. They have

pointed to a good way in which to formulate this rule. The common law of England will presumably develop, and will expand upon the meaning of irrationality, as will the common law of Australia. So, given the fact that other states have adopted the same principle, given the fact that this is one of the core provisions of the Ipp recommendations, and given the significance of medical negligence issues, it is appropriate in our view that we adopt the same language as has been adopted elsewhere.

The Hon. NICK XENOPHON: Does it acknowledge that the Jayne Kite case may not have succeeded if this provision was in place together with 41(1) and 41(2), and also that it is unlikely that the late Ms Kite would have succeeded if these particular provisions were in place?

The Hon. R.D. LAWSON: I certainly do not accept that this would affect that particular case, which concerned the failure to give warning, advice or information which under subsection (5) is expressly excluded. This section does not apply to liability arising in connection with the giving, or the failure to give, a warning, advice or other information to a patient. In those circumstances, the rule in F & R, the case to which the honourable member is so attracted, would apply. The rule which subsection (2) deals with relates to medical treatment, not to the provision of advice or the giving of warnings or the like. It is where the scalpel is placed, not the warning that is given in relation to undertaking the operation.

The Hon. P. HOLLOWAY: We support that, and I again indicate that we answered that during my second reading reply.

The committee divided on the amendment:

AYES (6)

Evans, A. L.	Gilfillan, I.
Kanck, S. M.	Reynolds, K.
Stefani, J. F.	Xenophon, N. (teller)

NOES (13)

Dawkins, J. S. L.	Gago, G. E.
Gazzola, J.	Holloway, P. (teller)
Lawson, R. D.	Lensink, J. M. A.
Lucas, R. I.	Redford, A. J.
Ridgway, D. W.	Roberts, T. G.
Schaefer, C. V.	Sneath, R. K.
Stephens, T. J.	

Majority of 7 for the noes.

Amendment thus negatived.

The Hon. IAN GILFILLAN: I move:

Pages 13 and 14, new part 6, division 5—Liability of road authorities (new section 42)—

Delete division 5 (comprising the divisional heading and section 42)

The High Court recently said that in law it is difficult enough already to establish a case against a road authority and rationalised it. Section 42 reverses the current law and enables road authorities to avoid liability and reduces the standard of care they owe to persons using the road. Certainly, that logic stands, and as a road user I have an expectation that there will be protection to me and others who are using the road from sloppy attention to protecting my interests, which may be categorised as negligence and, for that reason, we believe that this division is inappropriate in the bill and should be removed.

The Hon. P. HOLLOWAY: It is true that the common law surrounding the rule has been academically criticised, just the same as it embodies an important principle. The principle is that it is for governments and not for the courts to determine how public money shall be spent. Behind the rule was the reasoning that a statute that conferred powers on a public authority to control and maintain roads should not be construed as giving rise to a private right of action in tort for failure to exercise those powers unless such an intention was clearly evident from the statute. This state of the law left it up to the relevant authority to decide what road work should be undertaken and how much money should be spent on road maintenance, compared with competing obligations such as the many obligations of a local council. Without the immunity, it might be that a very substantial part of an authority's budget would have to be diverted to this use to minimise the risk of a suit.

Other equally important functions might be neglected as a result. Road authorities around Australia relied on the rule for many decades in arranging their risk management and insurance. Despite academic critique, Australian governments retained the rule because of its practical importance in the day-to-day work of highway authorities. Then, in 2001, the High Court found the rule no longer exists and, indeed, had not existed for some nine years at least. Chief Justice Gleeson gave a strong dissenting judgment in the Brodie case. He thought that it was up to governments, not to the courts, to retain or remove the rule. He did not think the court was in a position to weigh up the relevant considerations that might influence a government in deciding whether to keep the rule. It was a matter for parliament, not for the courts, he said. The majority, however, did not agree. The government thinks that, despite its faults, the concept behind the rule is the right one. A private right of action in tort should not arise because a road authority has taken no action to maintain or repair a road. This is not to say, of course, that there will be no consequences for a government authority that ignores the state of the roads. The consequences will not be legal, but political.

This measure represents a compromise. The Ipp Committee recommended a more far reaching provision. It proposed a defence for any public authority, not just road authorities, that had taken a policy decision for economic, political or social reasons to perform, or not to perform, a particular public function, as long as it had not acted irrationally.

I refer to recommendation 39. The government received some criticism at this recommendation, and on reflection decided not to adopt it, although it has been adopted in Queensland, New South Wales, Western Australia, the ACT and Tasmania and is proposed in Victoria. It decided instead to restore the highway rule as a compromise solution. If that solution is not acceptable to the parliament, then the Ipp recommendation may have to be further considered. I also point out that New South Wales, Queensland, Victoria, Tasmania and Western Australia have all legislated in addition to adopting recommendation 39, expressly to restore the highway immunity. The government opposes the amendment.

The Hon. NICK XENOPHON: I strongly support the Hon. Mr Gilfillan's amendment, and I believe that this really is a retrograde step. The High Court decision in Brodie's case I thought was fair and balanced. This is a retrograde step, so I support the amendment.

The Hon. R.D. LAWSON: The opposition will oppose this amendment. I should say, we will be supporting the foreshadowed amendment of the Hon. Mr Xenophon to put a sunset clause on this particular provision. As the minister acknowledged, South Australia is going down a somewhat different route in merely adopting a restoration of the

common law rule. Other jurisdictions have adopted other solutions, although some of those solutions are different from each other. It is noteworthy that the Ipp committee recommendation did not support the government's position in relation to this matter. I refer to section 10 of the Ipp report, as follows:

> 10.4 There is evidence to suggest that this problem has become particularly acute since the decision of the Hight Court in Brodie v the Singleton Shire Council where the High Court abolished the rule that a highway authority is not liable for injury or damage resulting from 'non-feasance' (as opposed to 'misfeasance'). . .
>
> 10.5 Submissions have been made to the Panel to the effect that the decision in Brodie should be reversed and the non-feasance rule restored. The Panel, however, is not persuaded that this should be done. The judgments of the majority in Brodie provide compelling justification for the abolition of the non-feasance rule.
>
> 10.6 The Panel, however, is satisfied that the decision in Brodie has given rise to some undesirable consequences that need to be addressed.

We believe that it would be appropriate in the next couple of years in South Australia to address the issue in a more comprehensive way. However, the interim solution which would be effected if the Hon. Mr Xenophon's sunset clause is adopted is an approach we would support.

The Hon. A.L. EVANS: Family First supports this amendment. A road authority should be responsible to maintain and repair roads on the simple ground of community safety. I do not agree with the highways immunity rule in general. So I am glad to support this amendment.

The committee divided on the amendment:

AYES (6)

Evans, A. L.	Gilfillan, I. (teller)
Kanck, S. M.	Reynolds, K.
Stefani, J. F.	Xenophon, N.

NOES (13)

Dawkins, J. S. L.	Gago, G. E.
Gazzola, J.	Holloway, P. (teller)
Lawson, R. D.	Lensink, J. M. A.
Lucas, R. I.	Redford, A. J.
Ridgway, D. W.	Roberts, T. G.
Schaefer, C. V.	Sneath, R. K.
Stephens, T. J.	

Majority of 7 for the noes.

Amendment thus negatived.

The Hon. NICK XENOPHON: I move:

(new section 42), page 14, after line 3—
Insert:
(3) This section will expire on the second anniversary of its commencement.

I do not propose to say anything more than what the Hon. Robert Lawson has set out in terms of this sunset clause. It is a fallback position, but I would rather have this than the government's position.

The Hon. P. HOLLOWAY: The government opposes the amendment, but I accept that we do not have the numbers so I will not divide on it. It is true that in the longer term the government is considering whether a defence based on adherence to road maintenance standards ought to replace the highway rule. However, it does not know whether or when that will come about. For one thing we intend to monitor developments in Victoria, which published a discussion paper some time back mooting such a proposal but which has not yet introduced any legislation.

There are two groups within government looking at this issue, but they are in the early stages. Almost inevitably, sunset clauses, particularly fairly short-term ones such as these, simply lead to subsequent legislation to extend or remove the sunset date. If the parliament accepts the highway rule in principle then there should be no sunset clause. That does not prevent any member from bringing legislation before the council in future, proposing some other regime to replace the rule.

The Hon. IAN GILFILLAN: I indicate Democrats support for this amendment. I do not believe this part of parliament supports the principle; therefore, the sunset clause is a safeguard. At least we do have a chance to revisit it later to find out what its effect has been.

The Hon. R.D. LAWSON: I indicate support.

Amendment carried.

The Hon. IAN GILFILLAN: I move:

Page 14 (new section 43(1)), lines 10 and 11—
Delete 'injured person's conduct contributed materially to the risk of injury' and substitute:
criminal conduct contributed materially to the risk of injury to the person.

I think that members will see that it shifts the emphasis in this new section which is entitled, 'Exclusion of liability for criminal conduct'. To put it in context, the new section provides:

> Liability for damages is excluded if the court—
> (a) is satisfied beyond reasonable doubt that the accident occurred while the injured person was engaged in conduct constituting an indictable offence; and
> (b) is satisfied on the balance of probabilities that the injured person's conduct contributed materially to the risk of injury.

My amendment seeks to delete 'injured person's conduct contributed materially to the risk of injury' and substitute 'criminal conduct contributed materially to the risk of injury', so that it would have to be specifically the criminal conduct which contributed materially to the risk of injury for exclusion of liability to apply in this case.

The Hon. P. HOLLOWAY: The government opposes this amendment. The present provision is slightly broader, in that, if the person is injured whilst engaged in conduct constituting an indictable offence, and the person's conduct contributed materially to the risk of injury, the person will, normally, not recover damages. The relevant question is whether, at the time, the injured person is engaged in committing an offence. Not everything that the person does may necessarily be part of that offence. The amendment proposes that, unless the conduct that contributes to the risk of injury is itself criminal, the rule will not apply. The government thinks that it should be enough to show that the plaintiff was committing an indictable offence and, by his or her conduct, materially increased the risk of injury.

Reckless or dangerous conduct may be involved in the commission of the offence but that is not in itself a crime. However, when a person decides to commit a serious offence and takes steps to carry it out, that person cannot expect the situation to remain safe or that others, who may be affected by the crime, will be able to display the standard of care ordinarily expected. There ought to be a limit to the civil liability of victims of crime towards offenders, and this new section sets that limit fairly.

The Hon. IAN GILFILLAN: I believe the wording that is currently in the bill would let off someone (or some agency) who has been grossly negligent and who would be really culpable in any other context for causing an injury that may be quite grievous. This connection, regardless of whether we support or approve of the criminal conduct of the victim, is not the issue: it is primarily that this new section lets off

scot-free someone who has perpetrated gross negligence and exposed the public to the risk of injury (and possibly serious injury). My amendment would mean that the injury would have to have been related to behaviour that was directly linked to the criminal activity.

The Hon. NICK XENOPHON: I support the Hon. Ian Gilfillan's amendment. I think the causal link to which he refers is reasonable. Therefore, I support the amendment.

The Hon. R.D. LAWSON: The opposition does not support the Hon. Ian Gilfillan's amendment. It seems to us that the introduction of the notion of criminal conduct is an unnecessary complication. The new section contains the conjunctive 'and'. It provides that there must be satisfaction beyond reasonable doubt that the accident occurred whilst conduct was being engaged in which constituted an indictable offence 'and' satisfaction on the balance of probabilities that the conduct (which is not necessarily the criminal conduct) contributed materially to the risk of injury. With those two elements, the additional requirement that the actual conduct which materially contributed to the risk of injury be stigmatised as criminal conduct is unnecessary.

The Hon. IAN GILFILLAN: I think it is worth giving one example, which may or may not persuade other honourable members but which illustrates the reason for my amendment. As we know, high speed car chases take place, and it is quite likely that they would involve young male juveniles who allegedly have stolen a motor vehicle and who may be driving above the speed limit—in other words, it is beyond reasonable doubt that they are engaged in conduct constituting an indictable offence—

The Hon. Nick Xenophon interjecting:

The Hon. IAN GILFILLAN: No. My colleague the Hon. Nick Xenophon says they may not even have to be over the speed limit. But, obviously, they arguably have been involved in an indictable offence. In this case, suppose the highways authority has left road repairs improperly signposted and protected and these kids drive into it and cause an accident which results in either serious injury or death. Under the wording in this bill, the highways authority would be totally free of any blame. I do not believe that that is acceptable.

Amendment negatived.

The Hon. IAN GILFILLAN: Mr Chairman, I have a question that I would like to raise before you put clause 27. I refer the minister to the top of page 13, Section 41(5), 'Standard of care for professionals', which provides:

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

We have had discussions with South Australian representatives of the AMA, and they were quite concerned that this clause is singling out health care professionals and interferes with the existing state of affairs for practitioners giving advice. I took the opportunity to obtain an opinion from the government prior to the debate in this chamber and I was advised that this subclause is to prevent the bill from interfering with the current state of the law for health care workers giving or not giving advice. Can the minister confirm that, so that it is recorded in *Hansard*?

The Hon. P. HOLLOWAY: I am advised that the purpose of the clause is to preserve the decision in the Rogers and Whitaker case. Doctors have to warn patients of all material risks of the proposed procedure. Subsection (5) ensures that that rule remains.

The Hon. R.D. LAWSON: Can I beg the indulgence of the committee to add to the reasons why we opposed the Hon. Ian Gilfillan's amendment in relation to criminal conduct. The section that he sought to amend is in identical terms to the existing section 24I of the Wrongs Act.

The Hon. IAN GILFILLAN: For the AMA's sake as much as anything, I want to check that the advice I passed on to the AMA, which I thought reflected the government's view, is an accurate interpretation of the bill, and that the subclause I referred to does prevent the bill from interfering with the current state of the law for health care workers giving or not giving advice. Is that a reasonable and accurate statement?

The Hon. P. HOLLOWAY: Yes, we believe that is the case.

Clause as amended passed.

Clauses 28 to 39 passed.

New clause 39A.

The Hon. IAN GILFILLAN: I move:

Page 17, after line 2, insert—

39A—Amendment and redesignation of section 24J—Presumption of contributory negligence where injured person intoxicated.

(1) Section 24J(2)—after paragraph (b) insert:

(c)—

(i) the intoxication is wholly attributable to the use of drugs in accordance with the prescription or instructions of a medical practitioner; and

(ii) the injured person was complying with the instructions and recommendations of the medical practitioner and the manufacturer of the drugs as to what he or she should do, or avoid doing, while under the influence of the drugs.

(2) Section 24J—redesignate the section as amended by this section as section 46.

The Hon. P. HOLLOWAY: The government does not oppose this amendment.

The Hon. NICK XENOPHON: I support the amendment.

The Hon. R.D. LAWSON: I support the amendment.

New clause inserted.

Clause 40.

The Hon. IAN GILFILLAN: I move:

Page 17, line 4—

Delete '24J' and substitute:

24K

I think this amendment is consequential.

The Hon. P. HOLLOWAY: We do not oppose it.

Amendment carried.

The Hon. IAN GILFILLAN: I move:

Page 17, line 4—

Delete '46' and substitute:

47

I believe that this amendment is also consequential.

The Hon. P. HOLLOWAY: Yes, we do not oppose it.

Amendment carried; clause as amended passed.

Clause 41.

The Hon. R.D. LAWSON: I move:

Page 17, line 8—delete "delete Division 4" and substitute—

delete Division 4 and substitute:

Part 8A—Apportionment of liability

58A—Application of Part

(1) This Part applies to the following claims (**apportionable claims**):

(a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to exercise reasonable care;

(b) a claim for damages for a contravention of section 56 of the *Fair Trading Act 1987*.

(2) If proceedings involve 2 or more apportionable claims arising out of different causes of action, liability for the apportionable claims is to be determined in accordance with this Part as if the claims were a single claim.

(3) A ***concurrent wrongdoer***, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

(4) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).

(5) For the purposes of this Part, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

(6) This Part does not apply to or in respect of civil liability (and awards of damages in those proceedings)—

(a) for personal injury or death; or

(b) for an intentional tort.

58B—Proportionate liability for apportionable claims

(1) In any proceedings involving an apportionable claim—

(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and

(b) the court may give judgment against the defendant for not more than that amount.

(2) Despite subsection (1), a defendant in proceedings against whom a finding of fraud is made is jointly and severally liable for the damages awarded against any other defendant in the proceedings.

(3) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim—

(a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part; and

(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.

(4) In apportioning responsibility between defendants in the proceedings—

(a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and

(b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.

(5) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.

(6) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise.

58C—Duty of defendant to inform plaintiff about concurrent wrongdoers

(1) In any proceedings involving an apportionable claim, a defendant in those proceedings must provide the plaintiff with such information as is reasonably available to the defendant and as appears likely to assist the plaintiff to—

(a) identify and locate any other person (being a person who is not a defendant in the proceedings) who the defendant knows or believes is a person whose acts or omissions caused, independently of each other or jointly, the damage or loss that is the subject of the claim; and

(b) determine whether and to what extent that other person is or may be liable to the plaintiff in respect of the damage or loss that is the subject of the claim.

(2) If a court hearing proceedings involving an apportionable claim is satisfied that any costs in the proceedings have been wasted as a result of a failure by a defendant in the proceedings to comply with subsection (1), then, unless the court otherwise orders, the plaintiff is entitled to an order against the defendant for those costs taxed on an indemnity basis.

58D—Contribution not recoverable from defendant

A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim—

(a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant); and

(b) cannot be required to indemnify any such wrongdoer.

58E—Subsequent actions

(1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.

(2) However, in any proceedings in respect of any such action, the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

58F—Joining non-party concurrent wrongdoer in the action

(1) The court may give leave for any 1 or more persons to be joined as defendants in proceedings involving an apportionable claim.

(2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

58G—Application of Part

Nothing in this Part—

(a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable; or

(b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or

(c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

This amendment seeks to incorporate in this bill extensive provisions relating to the apportionment of liability. These provisions are based on those that were inserted in the New South Wales civil liability bill. Since the time that I gave instructions for their preparation and approval by my party room, the Treasurer has written, I think to all members of parliament, indicating that the government has in mind to shortly introduce proportionate liability. I was concerned by a report in the *Australian Financial Review* of 14 November under the heading 'Attorneys-General give up on damages' which said that 'the nation's Attorneys-General yesterday abandoned attempts to reach a uniform national approach' on this issue.

It points to what is termed by the author of the article as the 'pro-consumer camp', made up of Queensland, Victoria, the Northern Territory and the ACT. On the other hand, New South Wales, the commonwealth and Western Australia are opposed to a consumer carve-out. This particular provision that I move does not have a consumer carve-out. The position of South Australia was not mentioned in the item in the

Australian Financial Review. Will the government undertake to introduce the legislation foreshadowed by the Treasurer? If so, when, and what is the holdup?

The Hon. P. HOLLOWAY: The government supports in principle the adoption of a regime of proportionate liability for economic loss and property damage claims. However, the government is aware that the provisions enacted interstate may be under review. As far as possible, the government would like to retain consistency with interstate provisions on this point. Discussions are still in progress and the government hopes to bring a measure before the parliament in the autumn session.

The Hon. NICK XENOPHON: I will oppose this amendment and any changes along these lines. I will have a lot more to say about it in the next session when I will refer to Richard Ackland's piece in the *Sydney Morning Herald* of 21 November 2003, but I will not refer to it now. I oppose this amendment and, unless there is a 'consumer carve out', as the Hon. Mr Lawson puts it, there will be the Henry Kaye situation where small investors might not be left with any redress. If there is a ceiling of $400 000 or $500 000, it at least provides some protection for ordinary consumers. That is a debate for another time. My understanding is that the Hon. Mr Lawson will not proceed with these amendments. Perhaps he could assist me with that.

The Hon. R.D. LAWSON: In light of the minister's undertaking to bring legislation in the autumn session, I seek leave to withdraw this amendment.

Leave granted; amendment withdrawn.

Clause passed.

Clauses 42 to 73 passed.

Clause 74.

The Hon. NICK XENOPHON: I move:

Page 21, (new section 45A(7)(a)), line 26—Delete 'medical or'.

This relates to the non-compliance of the section requiring notification of a claim within a certain period of time in relation to children's claims. The current section provides:

> No damages will be allowed in such an action to compensate or allow for medical or gratuitous services provided before the date the action was commenced.

The policy rationale behind it, as I understand it, is that there is an incentive for people to make notification of a claim. I seek to delete the words 'medical or' so that it refers just to gratuitous services because there is some tension with the federal health insurance commission legislation. When I practised extensively in this field, one needed to provide details on the Health Insurance Commission form of whether or not it was a claim for damages. In some cases families do not know. It may also prejudice some families who may not be able to get treatment as issues of liability are very much in contention. A further complicating factor relates to the issue of privacy considerations. How does the government propose to obtain information about Health Insurance Commission declarations for the purpose of the operation of this section? My proposal ensures that by deleting the words 'medical services' it will be fairer to those parents who are uncertain about whether or not their child has a claim. The words 'gratuitous services' are fair enough, even though I am not entirely happy about that. I am concerned that this is simply too onerous.

The Hon. P. HOLLOWAY: The government opposes this amendment. The provision is designed to encourage parents or guardians to notify possible defendants within six years of the date of injury. We do not believe that this is an onerous requirement. There need to be consequences if the requirement is disregarded without good reason. The proposed consequences are that there should be no damages for gratuitous services, medical treatment costs or legal costs incurred before action. If the parents wish to avoid these consequences they can readily do so by giving the required notice.

Amendment negatived.

The Hon. R.D. LAWSON: I move:

Page 21, new section 45A, after line 29—

Insert:

(8) For the purposes of subsection (7), the court will only be satisfied that there is good reason to excuse the non-compliance if it is shown that the non-compliance was due to gross negligence or mental incapacity on the part of the plaintiff's parent or guardian.

This amendment has been suggested by the Australian Medical Association. It was originally suggested in a letter dated 29 April to the Treasurer but was not adopted by him. The concerns of the AMA are reflected in the following passage of the letter to the Treasurer which, in part, states:

> If the bill as proposed were to become legislation, the level of uncertainty for insurers with regard to the ability of children to sue up to the age of 21 remains. We note that the cost of medical treatment and legal work incurred by parents would not be claimable by the defendant, but in reality an insurer would need to factor into their actuarial analysis the principle that a child may sue up until they are 21 years of age. The wording, as we interpret the clause, provides no real inducement for the action to occur within the proposed six years, and as such provides no benefit to insurers and therefore will have negligible impact on the ability to access affordable medical indemnity coverage.
>
> The AMA (SA) is seeking a clear cut legislative response to the statutes of limitations for minors and the bill fails to provide this clarity. Similarly, the statement 'that unless the court is satisfied that there is good reason to excuse the non-compliance' provides a broad opportunity for the court to determine that the reasons for non-compliance were valid. We believe that the wording should more accurately reflect the proposed wording for section 48 whereby the decision about the appropriateness of the extension or non-compliance should be based on clearly codified reasons materially related to the case. 'Good reason' is so broadly worded as to be all encompassing and provides the court with much latitude and therefore makes ineffective the six year statute of limitation. We would recommend that this section be further tightened to reflect that non-compliance would be tolerated only on the grounds of parental or guardian neglect or incapacity and that merely failing to act would not be satisfactory good reason.

The committee will note that the subsection provides the court with the power to excuse non-compliance with this section in circumstances where the court is satisfied that there is good reason. The amendment seeks to insert a provision that tightens up those requirements by providing that the court will be satisfied that there is good reason for excuse of non-compliance only if it is shown that the non-compliance was due to gross negligence or mental incapacity on the part of the plaintiff's parent or guardian. In other words, this is not simply a case of giving notice and not commencing proceedings but applying at some later time for an extension of time.

It is a notorious fact that applications for extension of time under the existing Limitation of Actions Act, which provides for an extension upon the discovery of a new material fact, has become a very easy and non-rigorous test. Extensions are almost automatic, and the fear expressed by the AMA is that good reason would similarly become almost an automatic entry to an extension.

The Hon. P. HOLLOWAY: The government opposes this amendment. It would mean that a child could only establish that there was good reason for the failure to notify the claim in rare circumstances of gross negligence or mental

incapacity on the part of the parents or guardians. The government thinks this is too harsh. For example, there might be a case where the child has not disclosed the injury to anyone. The purpose of stipulating the requirement for good reason is to leave it to the courts to decide whether, in the circumstances, the reason is adequate. This seems to be the fair way of dealing with the diversity of situations that might arise.

The Hon. A.L. EVANS: This amendment is harsh on the infant, particularly in its reference to gross negligence on the part of the parent or guardian. Its effect would be that if a parent or guardian had been negligent, rather than grossly negligent, there would be no excuse for non-compliance with the provisions. This is a harsh outcome for the infant who would be the one who ends up suffering the consequences of their parent's negligence. For that reason, I oppose the amendment.

The Hon. NICK XENOPHON: For the reasons set out by the Hon. Mr Holloway and the Hon. Mr Evans, I, too, oppose this amendment. I am surprised that the Hon. Mr Lawson has moved this amendment. In the case of an infant who has been sexually assaulted, for instance, would the Hon. Mr Lawson's amendment apply in terms of the references made by the Hon. Mr Holloway in cases where the infant did not tell his parents of the incident leading to the injury? I do not want to get into a debate with him, but it seems unduly harsh.

The Hon. R.D. LAWSON: We take the view that this is not unduly harsh. That is a rather savage criticism of it. This amendment seeks to strike a reasonable balance. We must bear in mind that the relatively generous provisions for extension of time for infants have been allowed in these amendments to the Limitation of Actions Act. The sanction dictated in this section is non-recovery of certain costs which are most likely to have been incurred by the parents themselves. However, I do not propose to say anything further in support of the amendment.

The Hon. IAN GILFILLAN: The Democrats oppose the amendment.

Amendment negatived; clause passed.

Clause 75.

The Hon. IAN GILFILLAN: My question follows a discussion I had with the AMA regarding clause 75. This caused the representative of the AMA some concern in the belief that this was a virtually open-ended paragraph. They commented that they are concerned that this makes irrelevant all the preceding limitations. My opinion, and it was confirmed in discussions with government representatives, is that this is a standard provision to allow a court to decide what information it needs to see. I would be grateful if the minister were able to make any observation about the concerns that the AMA has about this paragraph.

The Hon. P. HOLLOWAY: One needs to read clause 75 in two parts. The first part relates to the introduction of new material facts, so that is the first hurdle that has to be crossed. If that hurdle is crossed, then the matter is considered on the justice of the case, and that is where the 'any other relevant factor' comes in. It applies only after that first hurdle has been crossed. That is, there has to be new material fact.

The Hon. R.D. LAWSON: I move:

Page 21, line 32—
After 'material' insert:
in itself

This amendment again is at the suggestion of the Australian Medical Association which, in its letter before quoted to the Treasurer of 29 April, suggested this amendment for the purpose of placing further emphasis on the need for the material fact to be of a greater consequence and thus tightening the limiting of extensions being granted for less serious reasons. The intended purpose of this amendment, which is to insert the words 'in itself' after the word 'material' is to place greater emphasis on the need for the new material fact to be a significant fact.

I mentioned in moving an earlier amendment, which was not carried, that extensions of time upon the discovery of a new material fact are quite commonplace and, whilst we support the tightening of the regime for the granting of extensions of time, it is still not as tight as it could be. Accordingly, we seek to have a nuance of the meaning changed somewhat by the insertion of these words, which will now read:

A fact is not to be regarded as material in itself to the plaintiff's case for the purposes of subsection 3(b)(i) unless it forms an essential element of the plaintiff's cause of action or would have major significance on an assessment of the plaintiff's loss.

The Hon. P. HOLLOWAY: The government opposes the amendment in that we believe it tends to confine the effect of the provision. It certainly is a nuance, as the Deputy Leader of the Opposition has suggested. The words 'in itself' would appear to suggest that this particular fact might have a different meaning if that fact was associated with some other fact. While I am not entirely clear about the purpose of the amendment, we do believe that it could tend to confine the effect of the provision, which is probably not the direction in which the deputy leader would necessarily wish to go.

The Hon. NICK XENOPHON: I oppose the amendment, largely for the reasons set out by the Hon. Mr Holloway. I put on the record that I oppose the tightening up the government is proposing in relation to section 48 of the Limitation of Actions Act. The government's position is the lesser of two evils, and that is my position.

The Hon. IAN GILFILLAN: The Democrats oppose the amendment.

The Hon. A.L. EVANS: Family First opposes the amendment.

Amendment negatived.

The Hon. NICK XENOPHON: I move:

Page 21, line 36—Delete 'major'.

This would delete the word 'major' from paragraph (b) so that it would read 'unless it would have significance on an assessment of the plaintiff's loss'. In other words, requiring it to be of major significance seems unduly onerous. In terms of the example given, in example A it refers to a substantial reduction of a plaintiff's capacity to work. Having 'major' in paragraph (b) and in the example referring to 'substantial' seems to be inconsistent.

The Hon. P. HOLLOWAY: The government opposes the amendment as it would undermine the effect of the clause in that any fact that had any bearing on the assessment of damages could qualify as a new material fact. That would be very similar to the present law. The government's aim is to tighten up the present law because it too readily allows the granting of extensions based, for example, on reports from practitioners who had not previously examined the plaintiff. The Law Society and the AMA made a joint submission on this issue and said:

Judicial definition of a material fact is so wide that almost any piece of evidence relevant in the slightest way to the final disposition of the case constitutes a new material fact.

They made some suggestions as to how to restrict the availability of extensions of time. The government took those suggestions into account in framing these provisions, although it has not adopted the form of words suggested by the joint submission.

The proposed amendment would undermine the intention of this provision by taking us back to a situation where almost any new fact relevant to the assessment of damages could have found an extension of time. New material facts could then be found in almost any new medical report. This is not a sensible or desirable result, and hence we oppose the amendment.

The Hon. NICK XENOPHON: Will the minister indicate why in (3a)(b) it refers to a major significance on an assessment of the plaintiff's loss, but the example given refers to a substantial reduction of the plaintiff's capacity to work? Surely it would be more consistent to refer to a substantial significant assessment of the plaintiff's loss so that it is in keeping with the example given in the government's clause.

The Hon. IAN GILFILLAN: Although we will not be supporting the amendment as moved by the Hon. Nick Xenophon, the word 'major' does seem to be inappropriate and I interpreted Mr Xenophon's previous comment to mean that he believed the word 'substantial' is more appropriate if there is to be any word there, and I would agree with that.

The Hon. P. HOLLOWAY: Paragraph (b) is the operative provision. The example is simply for illustrative purposes, but (b) will be the law.

The Hon. IAN GILFILLAN: What does the word 'major' mean?

The Hon. P. HOLLOWAY: Natural meaning, if that is any help.

Amendment negatived.

The Hon. NICK XENOPHON: I move:

Page 22, line 3—Delete 'significant'.

Again, this seeks to delete the word 'significant' with respect to loss of expectation of life, because I am concerned that the example clearly has work to do in terms of statutory interpretation. If someone has a loss of expectation of life, then I would have thought that that in itself is significant. To require a significant loss of expectation of life seems to be incredibly harsh. Does it mean, for instance, that someone who has been diagnosed with a terminal condition such as mesothelioma—and I should disclose that along with a number of other people, including the Premier, I am a patron of the Asbestos Victims Association in this state—could well be prejudiced in getting an extension of time in the context of this particular requirement? It seems incredibly harsh to require a significant loss of expectation of life: isn't it enough that if, as a result of the wrongdoing of another and you are seeking an extension of time, you have learnt that instead of living another 20 years you are going to live only another 10 or 15 years? I would have thought that losing five years, or even one year, of your life would be significant. And why 'significant'? It just seems incredibly harsh.

The Hon. P. HOLLOWAY: The government opposes this amendment. It seeks to undermine the effect of the proposed provision in that any evidence at all that the injury has had any impact on the plaintiff's expectation of life might ground an extension of time. If there is a loss of expectation of life that is not significant, that is minor or negligible, that should not be a reason to give an extension of time to someone who has let the time limit go by. I might also add that my advice is that in cases of mesothelioma, they would almost never give rise to an extension of time following the case of BHP and Footner, which as I understand it—

The Hon. Nick Xenophon interjecting:

The Hon. P. HOLLOWAY: Yes, would never require one. Because I think the outcome of that decision was that the time does not start to run. So in those cases you would almost never have that problem.

The Hon. IAN GILFILLAN: I indicate Democrat support for the amendment. I think that significance in the context of loss of expectation of life is almost impossible to determine, and that under the circumstances if there is a position put that there could be, or has been, an expectation of loss of life it does not need the word significant, and that detracts from its effectiveness.

The Hon. R.D. LAWSON: I indicate opposition to the amendment. This provision is contained within an example and one can envisage evidence which would establish that as a result of a particular circumstance or event a medical practitioner might say that there is some loss of expectation of life, but could not determine whether it was a day, a week, a month, etc. So, the necessity for significance in the loss is a relevant consideration.

The Hon. A.L. EVANS: I agree with the amendment.

The Hon. J.F. STEFANI: I support the amendment.

Amendment negatived.

The Hon. NICK XENOPHON: I move:

Page 22, lines 8 to 10—
delete paragraph (b)

This amendment proposes to delete paragraph (b) which says:

> In determining whether it is, in all the circumstances of the case, just to grant an extension of time the court should have regard to the desirability of bringing litigation to an end within a reasonable period and thus promoting a more certain basis for the calculation of insurance premiums.

I find it extraordinary that this seems to confirm that this bill is about appeasing the insurance industry rather than doing the right thing by the injured. It just seems an extraordinary basis for the legislation to say that insurance premiums should be way up there as a determining factor for the purpose of an extension of time. The fact that it is included at all just seems quite extraordinary, and it is a further substantial restriction on the rights of the injured to obtain an extension of time in just circumstances.

The Hon. P. HOLLOWAY: The government opposes this amendment. At present, the provision requires the court in deciding whether to grant an extension of time to consider, among other things, the desirability of bringing litigation to an end within a reasonable time, and thus promoting a more certain basis for the calculation of insurance premiums. The amendment would delete this reference.

One of the chief reasons for having time limits is so that defendants and their insurers can know that the risk of suit has ended. This is a proper consideration to be regarded by the court in deciding whether to grant extensions. The Law Society and the AMA in their joint submission expressly proposed that the court should have regard to the desirability of achieving greater certainty as to the potential future liability of medical negligence insurers, among other matters. This provision is an expansion of that suggestion.

The Hon. NICK XENOPHON: Perhaps I should have been a little more succinct. I consider this clause to be farcical and time will tell how the courts will interpret it.

The Hon. IAN GILFILLAN: The Democrats support the amendment. If one looks at subsection (3b)(b), that is, 'the

desirability of bringing litigation to an end within a reasonable period', it is a desirable goal, and were it to pause there it would not have caused us any concern. However, if one of the substantial bases for bringing litigation to an end is for the calculation of insurance premiums, I think someone has got their priorities wrong.

The Hon. R.D. LAWSON: I indicate opposition to this amendment. It is appropriate in examining the circumstances as to whether an extension ought be granted to consider not only the interests of the plaintiff, on the one hand, but also the interests of the defendant. There has been abundant evidence on the public record of medical practitioners who are required to pay heavy premiums for a very long period which cannot be calculated. This is after the practitioner, for example, has retired from practice—they may have been retired from practice for very many years.

It is desirable that there be a more certain basis for the calculation of insurance premiums. This is not one of the significant elements to which the court would have regard, but it is appropriate that it does have regard to that fact and that we in the parliament do remind the courts of the fact that they have to take into account not only the interests of the plaintiff but also the wider interests of defendants and the wider community, that is, the patients and clients of defendants.

The Hon. A.L. EVANS: Family First supports the amendment. We believe it increases the chances of success for the plaintiffs.

Amendment negatived; clause passed.

Remaining clauses (76 to 79) passed.

Schedule 1.

The Hon. R.D. LAWSON: I move:

Insert:

(3) As soon as practicable after the expiration of 3 years from the commencement of this Schedule, the Economic and Finance Committee must investigate and report to the Parliament on the effect of this Act on the availability and cost of insurance to persons.

The provision is similar to section 7 of the Recreational Services (Limitation of Liability) Act passed by this parliament last year, as part of the first tranche of the insurance law reform package. It is appropriate that this parliament examine the effect that this legislation has had on those two important matters of the availability and cost of insurance. Whilst it is true that we could have an inquiry in two or three years or whenever, we consider that it is appropriate to entrench in the legislation the requirement to review this scheme in the public interest. The term of three years was selected. Whilst one might suggest that for base political purposes, it might be more advantageous to have an earlier review, just before an election, say; however, we accept that schemes of this kind take some time to come into operation and for their effect to be fully felt, and any early appraisal is unlikely to be satisfactory and can possibly be misconstrued as a political exercise, which this is not. I urge support for the amendment.

The Hon. P. HOLLOWAY: The government opposes this amendment. The ACCC has a brief from the commonwealth government to prepare six-monthly reports over two years, detailing trends and public liability, and professional indemnity insurance premiums and costs, including the impact of state and territory tort law reforms on these trends. One such report has already been prepared and a further three reports are due to be delivered over the next 18 months. These reports will be in the public domain. Also, the impact of the reforms on insurance are already the subject of ongoing scrutiny, and the proposed amendment will just duplicate this work.

The Hon. A.L. EVANS: Family First supports this amendment. It is a matter of fundamental importance that we assess the impact of these measures on the cost and availability of insurance. I query whether we need to wait for three years. I would have thought that an accurate assessment could be made after two years. That would mirror what is done with the Recreational Services (Limitation of Liability) Act and the Wrongs (Liability and Damages for Personal Injury) Amendment Bill. Those measures provide for review after two years. I understand the government's view is that the ACCC will undertake a similar review, and so a separate review is not necessary. However, a parliamentary committee has the benefit of specifically examining the impact of this act on the cost of insurance in our state. An ACCC report will be national and non-specific. We should have the opportunity of making our own assessments.

The Hon. NICK XENOPHON: I indicate my support for this amendment, and for the reasons set out by the mover of the amendment, the Hon. Mr Evans, but I do raise, along with the Hon. Mr Evans, whether there ought to be a review after two years. I wonder whether the Hon. Mr Lawson could indicate whether he would be amenable to amending his amendment so that there is a review after two years, rather than three years.

The Hon. P. HOLLOWAY: Two years would have been somewhat difficult, I would have thought. This bill will pass in March or April next year.

The Hon. R.D. LAWSON: I am gratified by the expressions of support to date for this amendment. The minister has referred to the ACCC regular trends analyses which are being undertaken. However, as the Hon. Andrew Evans has foreshadowed, those macro reports will not enable this parliament to determine precisely the effect of these amendments on what has happened in South Australia. The fact that the ACCC is conducting these reports will make it very much easier for the Economic and Finance Committee to meet its task quickly. I would imagine that that material would be of great assistance. However, it is more appropriate that we have a focused, parliamentary examination of the effectiveness of the measure. My party room did debate the pros and cons of a review in two, three or four years or whatever. However, we were persuaded that the appropriate length of time in which to see the true effectiveness of measures of this kind is three years. We had hoped that the government would see the wisdom of that proposal and come on board. Apparently, it is not prepared to do that. The point is that, if we are to have a good, effective non-political examination, three years is the most appropriate time.

The Hon. IAN GILFILLAN: The Democrats support the proposal and the amendment and also the time frame of three years. We believe that is a more appropriate time in which to do the review than two years.

Amendment carried.

The Hon. NICK XENOPHON: The transitional provisions refer to an example, as follows:

Suppose that A was exposed to asbestos in 1990 but a resultant illness is not diagnosed until after the commencement of the Ipp Recommendations Act. An action is then brought in negligence in which damages are claimed for personal injury. The amendments made by the Ipp Recommendations Act would not affect the determination of liability or the assessment of damages.

Could the government confirm that if someone is exposed to asbestos after the commencement of this act they would need

to get the extension of time and would need to face the hurdles in this legislation. I say that because I have had some brief discussions with lawyers representing asbestos victims in this regard. They have expressed some concern. This is something that may be taken up by the government with the Asbestos Victims Association, of which the Premier is a co-patron, over the break so that their concerns may be dealt with. It is a fact that a large number of South Australians undertake home renovation work—do it yourself work—and there are still tens of thousands of residences in this state that have asbestos fibre material in them. If disturbed and inhaled, it could be a time bomb for those individuals who inhale it. I put on notice that I believe some further work will be done by the Asbestos Victims Association over the break in the context of this bill now with these amendments. I would like the honourable minister to clarify the question I put to him about transitional provisions.

The Hon. P. HOLLOWAY: My advice is that if the exposure to asbestos is wholly after the bill comes into operation then the new provisions will apply. If there was both past and future exposure then the old provisions would apply. The new provision would apply only if the exposure was wholly after the bill comes into operation.

The Hon. IAN GILFILLAN: I would like to ask a further question, prompted by the AMA. Its concern relates to what may occur with notification of claims in the transitional period. It was proposed to me in conversation that an additional provision could be inserted along the lines, 'Where the possibility of a future action is known now (that is, in the transitional period) that claim should be notified'. This is to allow insurance or related bodies to get a better idea of the value of claims likely to be handled under the existing law. It indicated that a surge of cases were notified in New South Wales and Victoria to get them on the table before there was any legislative change. Will the minister make an observation on that opinion put to us by the AMA?

The Hon. P. HOLLOWAY: I guess the government can think further about that matter. It does raise the issue of the education of parents in respect of their obligations, in terms of the new provisions, and notification. The bill as printed will apply only to future claims.

The Hon. IAN GILFILLAN: Will the minister give some indication of the expected time period of the transitional period?

The Hon. P. HOLLOWAY: There is no transitional period. The bill will come into force from the day it is proclaimed, which, hopefully, will be in the early part of next year when this bill is passed. After that date the new provisions will apply—Mr Xenophon was asking about asbestos—but only to those wholly exposed after the bill comes into operation.

The Hon. IAN GILFILLAN: Does that mean notification after the transitional period when the new legislation is proclaimed? If the notification implies that one of the causes, say, the principal cause of the condition, occurred prior to the proclamation of this legislation, under which legislation would that matter be dealt with?

The Hon. P. HOLLOWAY: The bill is prospective only. It applies only to people whose claims do not now exist.

Schedule as amended passed.

Title passed.

Bill reported with amendments; committee's report adopted.

The Hon. P. HOLLOWAY (Minister for Agriculture, Food and Fisheries): I move:

That this bill be now read a third time.

The Hon. NICK XENOPHON: I reiterate that I oppose this bill. I believe that we should be putting the blowtorch on insurers and their practices rather than on the rights of plaintiffs. I am very concerned about the new provisions that will apply, if this bill is passed by the lower house, in terms of professional standards in the context of professional negligence claims and the test that professional opinion cannot be relied upon if the court considers that the opinion is irrational.

We are going away from High Court decisions that have been developed over the years. Again, in 20 of the most recent 23 High Court decisions involving plaintiff claims, the plaintiffs lost. We are now tugging our forelocks to the House of Lords, having abolished appeals to the Privy Council over a generation ago.

I believe that it is fundamentally wrong and, in the not too distant future, the time will come when we will see cases of great injustice as a result of these changes. I am very sceptical that the benefits of lower premiums to consumers will be achieved.

Bill read a third time and passed.

TRADE AGREEMENT

Adjourned debate on motion of Hon. Ian Gilfillan:

1. That this Council urges the Federal Government to resist the pressure to finalise the free trade agreement with the United States this year on the grounds that any free trade agreement entered into in haste to provide the President of the United States and the Prime Minister of Australia with propaganda material will be at the long-term risk that South Australia and Australia will lose on several issues which could include—
   (a) the Pharmaceutical Benefits Scheme;
   (b) the South Australian Barley Single Desk and the Australian Wheat Single Desk;
   (c) the South Australian automobile industry;
   (d) the ability to support local industry through policies in Government procurement;
   (e) the ability to support local art and culture through local content rule for television and radio;
   (f) the ability to maintain our quarantine laws; and
   (g) the ability to preserve the identity of GE free products.
2. That this Council condemns the lack of transparency in the negotiations and calls on the Commonwealth Government to release the current state of negotiations to State and Local Governments, as well as the Australian public.
3. That this council calls on the Commonwealth Government to halt its pursuit of bilateral trade agreements at the expense of multilateral agreements they can benefit of wider proportion of the international community.

(Continued from 27 November. Page 759.)

The Hon. KATE REYNOLDS: A broad sweeping free trade agreement between Australia and the United States of America will be a disaster for this state. Moreover, the effect of such an agreement will be felt by those tiers of government that have been excluded from the negotiations.

As the Democrats' spokesperson for local government, I am particularly concerned about the effect that this agreement will have on the way local government operates. Councils are already being handed increased responsibility for the delivery of government services, and this is a trend that has been occurring for some time and raises considerable resourcing issues. At the same time, they find themselves increasingly

bound by the state and commonwealth restrictions in how they are able to provide those services.

From development and planning legislation through to the implications of the national competition policy, these restrictions are becoming more onerous and are substantially eroding the role of the community and the choices available to it. A free trade agreement between the United States and Australia will add yet another level of complexity and restriction.

The Democrats are not alone in this concern. In a submission regarding the World Trade Organisation GATS agreement, made to the Senate Foreign Affairs, Defence and Trade Reference Committee, in section 5.47 the Australian Local Government Association stated:

> Whilst supportive of trade liberalisation which leads to improvements in market access for services exporters and improvements in the level and quantum of services provided to local communities, the Australian Local Government Association indicated that it would oppose any proposal that may have the potential to undermine or weaken public governance arrangements in Australia.
>
> Specifically, local government would oppose any proposal that would reduce the capacity of local authorities to make appropriate regulations on behalf of their communities.

One of the problems with discussing the effects of the free trade agreement is the lack of information coming out of the negotiations. While these decisions are being made behind closed doors we are limited in knowing what issues are or are not on the table. However, by looking at other free trade agreements we can build a picture of things to come. The traditional multilateral agreement—as in the WTO Trade in Services (GATS) agreement—is a positive list agreement. This means that governments themselves choose what services are included in the ambit of the agreement. The bilateral FTA that is being negotiated, on the other hand, is a negative list agreement, which means that the agreement includes all government regulations except where they are specifically excluded. This, of course, includes state and local government regulations.

The issue of the FTA agreements on state and local governments was considered in the United States in 1993, when the formation of the North American Free Trade Agreement was debated. In a submission to the United States House of Representatives Committee on Government Operations Subcommittee on Legislation and National Security, the Economic Policy Institute (a Washington based think-tank) stated:

> Aside from the general bias against public investment, NAFTA includes measures which directly block some customary efforts by state and local governments to support their economies. These include rules mandating or favouring procurement of goods from local or US suppliers (Article 1003, Chapter 10, NAFTA agreement). This provision cannot be modified by whatever implementing legislation congress may enact; it is an inescapable feature of the agreement.
>
> A state or local government may wish to contract with suppliers purely for local economic interests. It may wish to register its disapproval with the conditions under which goods from foreign suppliers are produced, say, because of the use of prison labour (as in the People's Republic of China), because of the gratuitous degradation of the environment (as with the slaughter of dolphins in production of Mexican tuna), because of the use of child labour, or whatnot.

These concerns could as easily be expressed about the current Australian-United States Free Trade Agreement. In fact, earlier this year *The Age* reported that, under a free trade agreement, subsidies must be protected. It said:

> Any free trade deal with the United States had to protect public subsidies used by Australian local governments to help their communities, a parliamentary inquiry was told. Ian Chalmers, chief executive of the Australian Local Government Association, said councils were concerned about the impact a US-Australia free trade agreement would also have on environmental services.
>
> 'We believe the commonwealth must negotiate on the basis that the provision of a public subsidy of any sphere of government may not be interpreted as a barrier to trade. Local government will vigorously oppose any agreement that allows any such definition in relation to public subsidies to be enforced by the WTO or any signatory to a bilateral agreement. Mr Chalmers said there were also concerns environmental services, such as the disposal of waste, might also be affected by GATS or the FTA. Local government is concerned to ensure trade liberalisation proposals do not have the potential to weaken or circumvent local environment protection by-laws or regulations,' he said.

In echoing these concerns, I support my colleague's motion.

The Hon. IAN GILFILLAN: I thank those members who have contributed to the debate—although there were a couple who indicated that they would not support the motion, and it is with some qualification that I thank them for their contribution. It is important to study the text of the motion a little more closely than some of the contributors did. The real substance in the first sentence is to urge the federal government to resist the pressure to finalise the free trade agreement with the United States this year. Then we went on to justify the reasons for doing that.

We believe that multi-lateral negotiations for free trade are definitely the way to go. However, I will not expand on that. The following are a couple of examples where mainstream major interests in Australia are still very concerned. I quote from an article in *The Australian* of 27 November, on page 9 in the magazine section, titled 'Interactive domination beats FTA'. Sally Jackson is the byline. The article states:

> The theme of the screen industry conference in Melbourne last week was Live or Let Die, which sounds like a James Bond film. In this script, the part of the villain was assigned to federal Communications Minister, Darryl Williams.
>
> Rather than a stolen nuclear device or rogue space station, the threat the film and television sectors fear is that the US-Australia free trade talks will lead to the dismantling of government protection of the audio-visual industry, causing it to be swamped by US content.
>
> Williams, who opened the conference, was reassuring. 'The Australian Government has invested heavily in the Australian film and television industry,' he reasoned. 'Why would we want to jeopardise that investment?'
>
> But for all the credence many of his listeners gave him, the mild-mannered minister may as well have been Goldfinger ranting: 'No, Mr Bond, I expect you to DIE!'
>
> US film and TV consultant, Mark Pesce, who is here to advise the Australian Film, Television and Radio School on adapting to the 'harsh realities' of the 21st century, expressed the prevailing view when he argued that under the guise of protecting free trade the US was asking Australia to become nothing more than a passive receptacle of overseas programming content. 'America will only be satisfied with an Australia that has become an obedient media colony of slaves,' he warned. In true Bond style, Pesce also proposed a bold and cunning plan to avert that fate. But for it to be effective, first the industry had to 'dominate interactive television,' he urged.

That indicates just how enthusiastic the film and TV industries in Australia are for the FTA deal which is pending and which both President Bush and Prime Minister Howard are so determined to finish by Christmas. The other article I want to refer to is again from *The Australia* of Friday 28 November. It is on page 7 and is titled 'Drug subsidies not a bargaining chip: Vaile', by the Washington correspondent, Christine Wallace. The article states:

> Trade Minister Mark Vaile warned the US yesterday Australia would not weaken the Pharmaceutical Benefits Scheme to secure a free trade agreement.

The hardline stance came in response to emerging details of how highly PBS changes, including higher drug prices, rank on the Bush administration's FTA wish list.

The Medicare bill just passed in Washington forces the Bush administration to report progress to Congress on opening up Australia's PBS system.

US drug industry sources told the *New York Times* the clause of the bill shows how critical it is to the big drug firms that trade agreements be used to challenge foreign price control systems.

It also reported that US trade negotiators are asking Australia to agree to PBS changes including 'higher prices for new medicines and. . . other changes in how it sets the prices on prescription drugs'.

This contradicts months of reassuring statements from lead US trade negotiator Ralph Ives that the US would not target the PBS.

After three days of talks with senior administration officials, Mr Vaile said he expected 'significant progress' towards a deal when negotiators from both countries begin what is scheduled—but unlikely—to be their last round of talks next week in Washington.

Members would have received a letter from the Hon. Mark Vaile (talk about a placebo in writing) accompanying the Australia-United States free trade agreement briefing. One sentence in the penultimate paragraph states:

Not surprisingly there are still some issues that need time and sustained effort to be resolved. I will continue to keep you informed of developments.

That is a promise to keep us informed of developments. I know there are members who are hurt—if not mortally wounded—by our criticising the lack of transparency in the negotiations. I would say it is virtually so obscure that no-one has been able to see through it. For the minister to be saying that he is going to keep us informed of developments is just a con, which I am not falling for and neither are my colleagues.

The second paragraph of the message from the Minister for Trade, who is smiling enormously in the photograph on this deceptive document, states:

Negotiators therefore commenced the fourth round with firm instructions to maintain the momentum of the process with a December deadline in mind.

Why should Australia, the most vulnerable of the two negotiators in these circumstances, be bullied into concluding a free trade agreement by Christmas just to suit the political posturing of both the Prime Minister and the President, given that next year might be a more politically sensitive time for the President of the United States?

I do not intend to go further, but one should check the second article to which I referred, clearly from Washington, which pointed out that the hard line stance from Vaile came after the PBS changes were shown to have been a prime factor for the Americans in their bargaining with Australia. It is all very well for us to say that we are going to take a hard line stance. The point is that no hard line stance from Australia will measure up if the Americans really want something, and I believe that members in this place will send a proper, helpful message to not only the negotiators who will be taking their instructions from the government but also the federal parliament, which is instigating this on everyone's behalf.

If we do not stand up and protest now we will deserve what we get, and it will be bloody painful. In the contributions made to this debate, we have attempted to put before this house the risks that we are taking, and to have it rushed through before Christmas is just morally irresponsible.

The council divided on the motion:

AYES (4)

Gilfillan, I. (teller)	Kanck, S. M.
Reynolds, K.	Xenophon, N.

NOES (11

Dawkins, J. S. L.	Evans, A. L.
Gago, G. E.	Gazzola, J.
Holloway, P. (teller)	Lensink, J. M. A.
Lucas, R. I.	Redford, A. J.
Ridgway, D. W.	Roberts, T. G.
Stephens, T. J.	

Majority of 7 for the noes.

Motion thus negatived.

ADJOURNMENT DEBATE

The Hon. P. HOLLOWAY (Minister for Agriculture, Food and Fisheries): I move:

That the council at its rising adjourn until Monday 16 February 2004.

In moving the motion, I acknowledge the efforts of all members in dealing with a busy legislative program over the past 12 months. A number of important bills have been debated and I thank members for their contributions. I thank you, Mr President, for your guidance in the chamber during the past year. I also thank the leaders of the other parties for their cooperation and, indeed, all members. I thank the whips in particular (John and Carmel) for carrying out their jobs: it is not easy, given the make-up of this council. Also, I thank the table staff—Jan, Trevor, Nolene, Chris and Margaret—and also the messengers and attendants. I also thank the many other parliamentary staff—Hansard, who have stayed here way too long; the messengers and attendants; the kitchen and dining room staff; the security staff; the library staff; and, indeed, everyone else who works in this building.

I also note that during the past year we have had the retirement of Diana Laidlaw and the election of Michelle Lensink to the parliament, whom we have welcomed to the chamber. I thank my staff and other members for their contributions during the year. Obviously, without our staff we would not be able to perform at the level that we do. Finally, I wish all members and their families a very happy and peaceful Christmas and we look forward to coming back here refreshed in the New Year.

The Hon. R.I. LUCAS (Leader of the Opposition): Mr President, I thank you and the whips, the table staff, Hansard staff and all members. I thank the Hon. Nick Xenophon for what I found to be a riveting and inspiring contribution for the bulk of today. I know that my sentiments are shared and supported by all members who are still alive at this stage of the evening. I will not repeat individually all the staff mentioned by the Hon. Mr Holloway, but I thank everyone on behalf of Liberal members in Parliament House. Without their support we would not be able to undertake the tasks that we do. On behalf of Liberal members I thank them. I wish all members and all staff a happy and holy Christmas and we will see you again in February if not before.

The Hon. SANDRA KANCK: I echo those remarks. I would also like to thank everyone in this chamber for the way we have all worked together to progress business in a very smooth fashion. I continue to monitor the progress of legislation in the House of Assembly and I see them spending their time on grievance debates day after day while we wait for legislation. I believe that the way we do things and the standard of our behaviour set the standards for the parliament of South Australia. The Democrats would like to wish you all a happy Christmas and a prosperous new year.

The Hon. NICK XENOPHON: In relation to all that my colleagues (the Hon. Mr Holloway, the Hon. Mr Lucas and the Hon. Sandra Kanck) have said in terms of their thanks and their good wishes for the festive season, I say ditto.

The Hon. A.L. EVANS: This has been a very encouraging year for me; I have gained a little more confidence. I am appreciative of all the kindness shown to me and the friendships which I have formed this year. I wish all of you a very good Christmas, and go to church on Christmas Day.

The PRESIDENT: I, too, join with other contributions in expressing my thanks to the parliamentary staff, in particular. I must pay particular tribute to my personal staff who guide me and who have worked cooperatively with the administration to make my job reasonably comfortable. I believe that we have had a fairly eventful year in the Legislative Council. We have run discreetly through the constitutional conference. I am delighted with the way that honourable members have conducted themselves within the chamber.

I agree with the point made by the Hon. Sandra Kanck about the conduct of the proceedings of the Legislative Council. I endorse her comments. I believe that honourable members in this place should engage in some robust discussion. I am happy about the fact that we have managed to do that, in some circumstances, whilst maintaining the decorum and standards that are expected of Her Majesty's Legislative Council.

There are a couple of things that I want to raise that I want honourable members to be aware of when we come back after the break. During question time, there has been a tendency for members to ask multiple questions. I did raise this matter on one occasion when we had a now famous 13 part question. Honourable members have adjusted well, and I have been given some indication that they are complying. We are starting to get six part questions which have subsections of about three. I ask all honourable members to take particular notice of that when they are framing their questions in the next session. I think we have to tighten it up as it is impossible for ministers to answer 12 part questions, even if it is within the portfolios in this council. I ask you all to pay particular attention to that.

Next week I shall be having a minor operation and I will not be around until after Christmas. So, I will take this opportunity on this occasion to thank all honourable members for their good conduct throughout the year. I wish you all a very merry and joyous Christmas, and I look forward to working with you all again in 2004.

Motion carried.

At 12.05 a.m. the council adjourned until Monday 16 February at 2.15 p.m.