Speech by

GEOFF WILSON

MEMBER FOR FERNY GROVE

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CIVIL LIABILITY BILL

Mr WILSON (Ferny Grove—ALP) (3.24 p.m.): I will not dare say I am going to make a brief contribution, because it might take 20 minutes! I am pleased to speak in support of this bill. The issue of insurance premiums going through the roof in the last three years and the inability of community organisations and professionals, including doctors, to obtain affordable insurance, let alone any cover at all, has been a matter of comment on many occasions over the last several years. Insurance premiums have increased for many reasons, including increases in the number of claims and the level of payouts, the collapse of HIH and UMP, low investment returns for insurers and new Commonwealth APRA solvency requirements. In relation to UMP, I spoke previously in the House, I think late last year, about the gross incompetence displayed by the senior management of UMP such that they failed to disclose $500 million worth of liability to their members. When that emerged in the situation of the failure of HIH, UMP itself then hit the wall. As a result of mismanagement such as that in a range of insurance companies, confined not only to HIH and UMP and a range of others, insurance premiums in a number of areas, including public liability and professional indemnity, rose dramatically.

State governments throughout the country have no power to dictate to private insurance companies the amount they charge for premiums but have stepped in to try and protect key groups in society such as the groups I mentioned before, community organisations and such like. In this regard the Queensland government has been particularly proactive in working towards a group insurance scheme for community organisations and calling for reforms to the law of negligence. It must be stressed here that it is the Commonwealth government that has the constitutional right and obligation to regulate the insurance industry—not any of the state governments. For example, the ACCC can examine whether prices are artificially inflated, and APRA is responsible for overseeing the financial viability of insurance companies. One of the factors that influenced insurance premiums, though, has in fact been the level of compensation awarded by the courts.

The courts operate within the legal system as prescribed by each state government and within the laws that apply to the common law of negligence. In this area, the state government can act as it has the power to legislate in relation to negligence and to arrange a framework that influences competition payments. It is in that area that this state government has been at the forefront of taking action to address the risk environment and the legal system that operates in that risk environment to take the pressure, to the extent reasonable, off the premium rises brought about by the insurance companies. That has happened in two stages. The first stage, as we know, occurred via the Personal Injuries Proceedings Act of 2002. There were 14 or more major law reforms introduced in that legislation, including mandatory early notification of claims, the restriction on illegal advertising, putting limits on legal costs that could be claimed, identifying minimum thresholds for various claims, capping claims for economic loss, and excluding—and this is a key change—juries from hearing personal injury trials. As was indicated at that time, that was to be the first stage of reform.

It was foreshadowed that there would be a phase 2 and that that would be a national working party which would work toward producing the reforms to the area of negligence law throughout Australia but in a way that maximised the uniformity of those changes that might be adopted by any particular state government; bearing in mind that in this area of vital law reform it became apparent that it would be highly counterproductive for any state to legislate in a knee-jerk way for reforms that were significantly different state by state, because that in fact would only compound the complexity for insurance companies which actually operate not only on a national basis but an international basis

when underwriting risk. The objective of the exercise is to minimise the nature of regulation and the features of regulation that add to the risk.

The Civil Liability Bill, the bill before the House, is the government's response to the second stage of law reform. There are a number of major areas in which there has been law reform further introduced. One of the key areas is in the prescription of what constitutes medical negligence. The bill provides that the test for determining medical negligence will be that a medical practitioner is not negligent if treatment was in accordance with an opinion widely held by a significant number of respected practitioners in the field unless a court considers that the opinion is irrational. At the time that the insurance crisis first hit—and particularly the medical indemnity insurance crisis—I organised in my electorate a series of meetings with doctors. They raised a whole range of issues, many of which were dealt with in the personal proceedings legislation to which I referred before that was our response to the first stage.

One of the issues they kept raising was that over many years, such was their view, the law had changed such that, in effect, the definition of 'medical negligence' had been widened by the courts, and many medicos argued that there ought to be independent assessors with medical backgrounds involved in these personal injuries proceedings to give a true and impartial view about what constitutes medical negligence. Instead of going down that track, this government, as have other governments, has modified the definition of 'medical negligence' to give greater certainty to the law on negligence in this area and, consequently, to insurers about what standards will in fact be applied in measuring whether or not in a particular instance a medical practitioner's conduct constituted negligence.

Another area in which changes are introduced in this bill is in identifying that there will be a duty owed by doctors to inform their patients about risks and to give them information that a reasonable medical practitioner would know or ought to know that the patient wants or needs to be given.

A further area of reform is in the area of recreational activity. This issue was often taken up with me locally, as it was by the AMA and other organisations at a state level. The issue is that many activities of a recreational nature are undertaken by people on a voluntary basis and predominantly for their own enjoyment. In that regard, participants are really embracing the level of risk that is inherent in that activity. So this bill provides that there will be no requirement on an operator of a recreational activity to warn a member of the public of any obvious risk or to take action to prevent any consequence of an obvious risk. This in fact will affirm the principle that people do need to take a certain level of responsibility for their own activity and their own conduct.

A third area relates to specific rules dealing with a duty to warn of obvious risks. The bill provides that there is no general duty to warn of obvious risks. A further area involves codifying the law of negligence, particularly in relation to the standard of care in assessing negligence, determining reasonable foreseeability, causation and contributory negligence. These areas are intended to largely reflect the operation of existing common law. Codifying these areas is designed to ensure that there is consistent application by the lower courts and also to give greater certainty to insurance companies that are writing insurance in this area.

Specific rules covering the liability of public authorities are dealt with. The decision in the recent High Court case—it overturned the established common law position regarding the absence of any liability in local government authorities for negligence in the nature of nonfeasance—has been overturned until 2005 to enable local authorities time to adjust their practices and procedures to be better placed to assume that risk when that period expires.

This bill will provide that proportionate liability—this does not deal with the situation in personal injuries cases but in all other cases dealing with damages that are assessed in excess of $500,000—can be allocated between two or more defendants in proceedings. Whilst it is problematic whether or not this will produce some reduction in the pressure on insurance premiums, for the sake of better caution this step has been taken.

A range of measures is introduced to restrict the quantum of damages paid. That has also come out of the national working party, otherwise known as the Ipp report. That includes a cap on general damages at $250,000, a graduated scale of general damages, a cap on gratuitous services at full-time average weekly earnings, no prejudgment interest on damages for non-economic loss and a number of other things.

There is one final area that I want to draw attention to. Of course, there are many areas in this fairly complex and involved area of legislative reform. That other area is the requirement for early notification of claims by children relating to medical negligence. This was an issue raised by doctors in my area, around which they were vigorous in the prosecution of the view, promoted by the AMA, that the cause of action for children ought to be limited to three years. That was their position. That would be three years from the time at which the injury occurred or the time at which it became apparent that the injury had occurred.

We have not gone down that track, because we believe it is important to protect the rights of children. The alternative track we have gone down is that of providing that there be an early notification system for claims regarding children in the case of medical negligence and that that notification period be six years. If notification of the existence of the claim is not made within six years then the applicant has to make application to the court for leave to actually commence the proceedings. In that situation the judge has a discretion to exercise—whether in all of the circumstances it is appropriate to permit the case to commence.

I conclude by reiterating that it is the federal government that has the responsibility to tighten up the regulation of the insurance industry. It is up to the insurance companies now to reflect in their premium setting practices the fact that the risk environment has been significantly improved by the alterations to the legal system, to the legal rights and to the legal costs involved in the civil liability area and the personal injuries area particularly. That has been brought about by the legislation introduced by this government last year and also by this bill. I commend the bill to the House.