

**ASBESTOS DISEASES COMPENSATION BILL 2013**

*Second Reading*

Resumed from 20 February.

**HON MICHAEL MISCHIN (North Metropolitan — Attorney General)** [10.14 am]: On the last occasion I went through several specific issues with the Asbestos Diseases Compensation Bill 2013 that the current drafting does not address and that the policy, as it has so far been stated, does not deal with. I come to the point about what is known as the discount rate. The bill in its current form does not state anything about the discount rate and does not deal with that aspect in respect of Sullivan v Gordon damages.

By way of explanation, damages for future economic loss are awarded in the form of a lump sum rather than as an income stream. An integral component of valuing these lump sums is what is known as a discount rate, which is used to bring the future cash flows to a present value. By way of illustration, it is assumed that the sum awarded based on current-day values will be invested in a lump sum and that the plaintiff will receive a stream of income from that investment. As a result, to ensure that the complainant does not receive too much money into the future beyond appropriate compensation, the sum of the expected total future losses and expenses needs to be reduced by using a discount rate to calculate its present value. According to section 5 of the Law Reform (Miscellaneous Provisions) Act 1941, the discount rate of six per cent is fixed for the purposes of that calculation for personal injury claims and for the present value of future loss that is referable, firstly, to loss or impairment of the capacity to earn; secondly, loss or diminution of future possible earnings; or, thirdly, a liability to incur expenditure into the future. The proposed Sullivan v Gordon-type damages that are foreshadowed by the bill would not fall into these categories. Therefore, were they to be legislatively permitted, consideration would have to be given to the discount rate to this head of damages and whether the six per cent discount rate ought to be applied to them, but the bill does not address that issue.

A further issue is that at common law actions for damages die with the person who has been wronged. The patent unfairness of this has been ameliorated by every jurisdiction, including Western Australia. If a person dies without resolving, either by settlement or judgement, a claim for damages actions can be brought by the deceased's estate or the deceased's dependent relative in their own right. There is nothing in the bill to indicate how this issue of provisional damages or Sullivan v Gordon damages are to be dealt with in the context of a claim by a deceased's estate or a deceased's dependent relatives.

Moving on to a further point on that last issue, it should be noted that asbestos disease claims are already being treated favourably by the law on several fronts—for example, by virtue of section 3A of the Civil Liability Act 2002. Provisions of part 2 of that act are inapplicable to damages relating to personal injury that resulted from the inhalation of asbestos. Accordingly, damages in claims relating to asbestos disease are not subject to certain restrictions and awards of damages that are applicable to many other plaintiffs who have contracted diseases. One does not begrudge asbestos disease claimants the benefits they receive, but there is no reason in principle or logic that asbestos claimants and their estates and dependants are afforded through these exceptions more generous legislative treatment than that afforded to other injury victims. The bill seeks to make them a special case without any indication of why. In short, for the several reasons I have advanced, the bill should not proceed in its current form.

I have indicated that I and the government have sympathy towards the objectives that inform the key elements of the bill, but the detail and the implications of those elements should be further considered. It should be done with the input of RiskCover and other insurers, as it would plainly be desirable for there to be an actuarial analysis of the impact that the adoption of these measures would have, including specifically on the state given that government agencies are frequently defendants to asbestos claims. In any event, the bill needs to be redrafted by Parliamentary Counsel's Office. I note that Hon Kate Doust on several occasions in the last debate on this bill suggested that the government could put up amendments if it thought there were problems with the bill. I think I indicated on that occasion that it is not up to the government to redraft or to properly draft a private member's bill. I note that in the interim the honourable member has not foreshadowed any amendments to address any of the several issues that were brought to her attention on the last occasion. One would have thought those were issues upon which she would have taken some advice so that she would be able to give this house some information and some guidance on the policy thinking that she has in mind with these matters. We are left with a bill that the government cannot in conscience or reason support in its present form. I will come to potential solutions to the problem, given that there may be some significant merit in the objectives that the bill intends to achieve.

Before concluding, I should make mention of the situation in other jurisdictions. Firstly, that of provisional damages: the Australian Capital Territory has made some legislative provision for the award of provisional

damages generally; New South Wales and South Australia have made legislative provision for the award of provisional damages in relation to dust-related claims; Victoria has made legislative provision for the award of provisional damages in relation to asbestos-related diseases other than pleural plaques; Tasmania will shortly permit the award of provisional damages in relation to asbestos-related diseases; and Queensland and the Northern Territory have no legislation on the subject. Therefore, the suggestion that Western Australia, by enacting this particular bill, whether in its current form or otherwise, will be brought into line with every other Australian jurisdiction is simply wrong. As to *Sullivan v Gordon* damages, Queensland, subject to certain limits, and the Australian Capital Territory permit all plaintiffs to seek this head of damages; Tasmania will shortly permit all plaintiffs to seek this head of damages subject to certain limits; Victoria seemingly permits such damages, although dust-related claims are not subject to limits otherwise imposed; South Australia permits such damages to be awarded for dust-related claims; New South Wales permits such damages to be awarded for dust-related claims subject to certain limitations; and the Northern Territory does not permit such claims. There are also variations in the manner in which states and territories deal with the discount rate, which is an issue I have already raised, and the degree that it applies to *Sullivan v Gordon* damages where they are available. In short, there is no uniformity of approach among the jurisdictions and none of the issues appear, in the case law that I have had made available to me, to have been dealt with in any robust fashion to be altered by the courts as to how *Sullivan v Gordon* damages are to be assessed or any of the several other issues I have raised.

Before I conclude, since the last debate there was an article published in *WAtoday* under the headline “Push to close WA’s asbestos compensation loophole” on 14 April. I have to say that I am not sure that it is a loophole we are dealing with; it is simply general principles of compensation and common law as modified by statute. No deficiency has been identified regarding it; this is an attempt at a law reform to enhance certain benefits rather than to close off any potential loophole. Anyway, the article proceeds to state —

It is a cruel irony that for a state with one of the highest rates of people dying from asbestos-related diseases worldwide, Western Australia has some of the weakest laws protecting its victims.

I have to take issue with that; it may be journalistic licence. I am not sure how compensation laws actually protect victims rather than provide compensation after the event. I am not sure that any legislation of this character can protect people as opposed to assisting them with the consequences of the disability, but we will leave that aside as journalistic licence. The article continues —

Now a private members bill to bring the state in line with the rest of Australia and allow West Australians to claim further compensation for asbestos-related diseases is fighting for its own survival.

Which is very dramatic, but as I have pointed out, this legislation will not bring the state in line with the rest of Australia because there are variations among the jurisdictions and some jurisdictions have not adopted any of the principles or some of the principles that have been advanced in the bill. The article goes on —

The Asbestos Diseases Compensation Bill 2013, if passed, will allow West Australians diagnosed with additional asbestos-related diseases the legal right to seek further damages—in line with similar legislation in other states.

I have already addressed that issue to show that that is not correct. Then there are some comments from Hon Kate Doust as to what she seeks to achieve by this bill. Later the article states —

Ms Doust said she was not confident the bill would be supported by the government.

I think that by then I had made plain that the bill could not be supported by the government in its current form. Hon Kate Doust is then quoted as saying the following —

“I think Michael Mischin is trying to find a whole heap of reasons not to support this bill.”

I do not have to look very far for reasons to not support this bill. I would have hoped that the issues I have raised would have alerted the honourable member to the significant issues that need to be addressed by the bill and that are not addressed by it in its current form, and have not been touched on in the second reading speech introducing the bill or the explanatory memorandum. There are numerous policy decisions that have to be made along the way and I am at a loss to know which way the honourable member was thinking when she was drafting this bill. No doubt she will enlighten us about each of the matters I have raised to date. The article then goes on to quote me summarising the government’s position on the issue and its concerns regarding the elements of the bill. Then the article goes on to state —

Ms Doust said the additional compensation for claimants would come from monies set aside by manufacturer James Hardie.

I do not know where she got the information from, but that is not the sole compensating defendant. Further in the article she is quoted as saying —

“There is no cost to the government... there is no criticism from insurers,” ...

I have not yet been enlightened, nor has the house, as to what level consultation has been conducted regarding this bill, but to say that there is no cost to the government is not correct. As the honourable member is aware, or if she is not I will enlighten her, in cases arising out of exposure to asbestos and the contraction of asbestos-related diseases in the township of Wittenoom, the state is a defendant and contributes to the settlement of those claims. That burden is borne not only by the company that was mining the asbestos and its successors in title, but also shared among the state government—so there are public funds devoted to that settlement—and the local government. Therefore, it is not strictly true to say that there is no cost to government. As for there being no criticism from insurers, perhaps we will hear about that in due course. In the article Hon Kate Doust goes on to say —

“How much more time do we want to waste on the semantics? Let’s give some comfort to these people.

...

“Why would WA be left behind the rest of the country?”

I have indicated how that is simply wrong as a proposition, but I would suggest that there is much more than semantics involved in this. If the honourable member considers that the issues I have raised are simply semantics, no doubt she will be able to address them quite easily and in detail in her reply and persuade the house that these issues have at least been considered and consulted on before the house is expected to vote on them. I have said that in summary the sentiment informing the bill is worthy and the intent of the bill is well-meaning, but there are so many potential difficulties that may arise that have not been identified that it cannot proceed in its current form. The government will need to ascertain the detailed implication of the bill’s two elements and to consider the views of all those who are interested parties in it.

As I mentioned, the drafting is unsatisfactory; the local concepts integral to the bill are novel and require greater and more careful exploration. If passed in its current form, the bill is likely to have unforeseen and undesirable consequences. The policy of the bill raises the issue of why its operation ought to be limited to the circumstances of asbestos-related diseases and not be of more general application. The bill will create a new and retrospective liability for damages that may create a financial burden that will work against those it is intended to help. In any event, the bill ought to be redrafted and it would be appropriate that that be done by Parliamentary Counsel’s Office, and I propose a way forward.

I have already indicated the various issues, and I have taken steps to address those. I foreshadowed this with the honourable member before the debate on the bill began and have taken steps to further advance what I have foreshadowed. I am instructing the Law Reform Commission of Western Australia to inquire into the compensation regime not only for persons suffering from asbestos-related diseases but also to see whether the matters ought to be extended to litigants generally. I have settled the reference to the Law Reform Commission and, as I understand it, that inquiry will begin in the new financial year with a view to a report dealing with all the issues being ready by 30 June 2015.

The inquiry will deal with whether, as a matter of principle, the proposal of provisional damages awards should be supported; whether they should be confined as proposed by the bill to victims of asbestos-related diseases or whether the availability should be extended to all plaintiffs or at least a broader class of plaintiffs than asbestos victims and, if so, according to what criteria. If provisional awards are to be permitted, the reference will deal with how the assessment of the ultimate award is to be approached by the court: should, for example, damages be completely reassessed upon a further asbestos-related disease developing, with allowance being made for the earlier damages; over what periods and whether time limits should be prescribed; whether an application should be permitted for further damages whenever a further asbestos disease develops or only when a very serious disease, such as mesothelioma or lung cancer, occurs; whether an application for further damages should be made within a certain time limit following the plaintiff becoming aware that he or she has contracted a further asbestos disease; and the implications of the modification of the once-and-for-all rule generally. Similarly, the Law Reform Commission will look at the question of *Sullivan v Gordon*-type damages; whether they should be allowed, what their criteria ought to be; whether they ought to apply to only asbestos-related victims or more generally; and so forth. It will also deal with the question of whether the present value of any future *Sullivan v Gordon* services damages should be subject to the six per cent discount rate provided for by the Law Reform (Miscellaneous Provisions) Act.

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In summary, the government cannot support the bill in its current form. The government has sympathy for the purposes of the legislation. Having had it brought to the government's attention I have taken steps to have the Law Reform Commission look at the proposals and their implications and to come up with recommendations by 30 June 2015 on what action ought to be taken in this regard. I look forward to seeing to what degree the issues that I have raised will be addressed by Hon Kate Doust. Even if they cannot persuade the government to support the bill in its current form or an amended form, they will nevertheless be valuable in informing the Law Reform Commission of a way of thinking on these several issues that may assist it in its deliberations and not only formulate some worthwhile recommendations down the track, but also inform the character of those recommendations. On that note, I conclude my address and look forward to hearing a reply in due course.

**HON RICK MAZZA (Agricultural)** [10.35 am]: I rise today to support the Asbestos Diseases Compensation Bill 2013 introduced by Hon Kate Doust. In its day, asbestos was considered to be a very valuable product due to its thermal and durable qualities. It was used for myriad applications—everything from fencing to house cladding, brake shoes and other industrial applications. We have all heard of the asbestos suit that could be worn by someone walking into a raging fire while the person remained unscathed. It was a unique product with many valuable uses. I remember in the late seventies as a young apprentice working for Westrail in Bunbury that blue asbestos was used for brake shoes on large machinery. I was an apprentice heavy-duty mechanic at that time. Being a government department, we would think that Westrail had most safety issues covered. But I am here to tell members that in the 1970s, as a 17-year-old apprentice, I was trained to clean those brake shoes with compressed air. There was no breathing apparatus; not even a dust mask. That entire workshop and the 50 or so people who worked there were enveloped in blue asbestos dust—everyone from the mechanics, the apprentices and the people who cleaned the buses to the administration staff. Members, I even remember using rolls of asbestos string. That is how valuable this stuff was. The string was called lagging, which was used to wrap around exhaust pipes and other heat-preventive uses.

It was used extensively. A lot of tradespeople besides mechanics were exposed to it. Carpenters were exposed to it in buildings. In the 1950s and 1960s whole suburbs built by the then State Housing Commission used asbestos cladding on roofing, in bathrooms or wherever the case may have been. A lot of those houses remain today. Plumbers also used cladding for hot-water pipes and shipbuilders used it. It would be a wonderful product if it were not so deadly. I am sorry to say this, but, unfortunately, I would be very surprised if there was one person within this chamber who, at some stage in their life, has not been exposed to asbestos. It is a very, very insidious product.

The Attorney General has given a very thorough, technical and comprehensive commentary on the structure of this bill. In fact, more than I thought possible on a three-page bill, but such is the oratorical prowess of our Attorney General. I accept that the law is steeped in precedent that goes back decades or even centuries, even to the *Fitter v Veal* case, 1701, which goes back hundreds of years. That is a cornerstone of once only-type compensation payments. I feel, however, that asbestos-related disease is unique. It is one of those afflictions that is not just a single affliction, it is a multistage affliction. There is asbestosis, where there is scarring of the lungs—that is one injury. That may or may not develop further and a person could live their life out with that affliction. Compensation may be payable for that particular level of injury to that person. But with asbestosis, it can progress to mesothelioma. That is a separate injury. In my mind, that is a two-tiered injury. If it progresses to mesothelioma, compensation should be reconsidered. I know that Hon Kate Doust is particularly referring to people who may develop mesothelioma, who have dependants or carers; therefore their circumstances may require more compensation to take care of that.

Prima facie, I see that Western Australia is probably one of the most affected states, seeing that Wittenoom is here and that asbestos was an easily accessible product. I believe the bill has merit. The jurisdictions of Queensland and New South Wales, and I think South Australia, now support the idea of having separate compensation for different asbestos-related diseases.

In closing, I reiterate that the bill has merit. I would really like to see the bill worked through. If amendments need to be looked at and if a lot of the deficiencies that the Attorney General referred to need to be rectified, let us work through those things and not dismiss this bill out of hand.

**HON STEPHEN DAWSON (Mining and Pastoral)** [10.42 am]: I, too, rise to make some comments about the Asbestos Diseases Compensation Bill 2013. I congratulate Hon Kate Doust for introducing this bill to this place. I appreciate the comments made by previous speakers. Indeed, I recognise the contribution made by Hon Rick Mazza today. He is right when he says that there probably is not one of us in this place who does not know of someone suffering from, or been touched by, an asbestos-related disease. I was not in the chamber for the whole of the Attorney General's contribution, but I believe I heard a concession, and potentially a begrudging acknowledgement, that there is an asbestos issue in this state and that this bill, perhaps not in its "current

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form”—in his words—deserves consideration. I think I also heard the Attorney General say that he believes the issue warrants further consideration. He said that he would bring back a piece of work. However, I look forward to reading *Hansard* at a later stage.

**Hon Michael Mischin** interjected.

**Hon STEPHEN DAWSON:** There are a few other speakers. I will not take interjections; I am happy to talk to the Attorney General afterwards.

The reality is that this is a tragic issue. Tragically, Australia has one of the highest rates of asbestos-related disease in the world. That includes mesothelioma, asbestosis and lung cancer. In preparing some notes for this issue, I found an article in *The Sydney Morning Herald* that captures the issue quite well. The article, published on 19 February this year, is entitled “Still breathing the devil’s dust”. In part, it states —

The number of mesothelioma cases is rising in Australia—which already has the highest per capita rate in the world—as the so-called “third wave” of victims is diagnosed.

First came the miners, many from the deadly Wittenoom blue asbestos mine in Western Australia’s Pilbara, which closed in 1967. Next were the people who worked directly with asbestos, in factories, unloading it at the docks, or as builders, plumbers, electricians and carpenters.

Now, the third or “bystander” wave is engulfing people ... and includes home renovators and women who washed their husband’s dust-laden overalls.

Those few words from that article capture how big an issue it is. The fact we are now looking at a third wave of cases of asbestosis or mesothelioma is a real concern.

As members have already said, asbestos has not been used in Western Australia since 1987. It was phased out in the years before that. Whether asbestos is in our houses or offices, we know that the material still exists. It is a concern. In my office in South Hedland, it is something that I worry about regularly. We are in an old office in a shopping centre. There are stickers on the corner of the wall that say “Don’t put a nail in this wall” because there is asbestos in the wall. To hang a picture on the office wall, we need to seek approval beforehand. That is a concern. I am certainly concerned for my staff. We do not hang things on the office walls very often but, being in the north west, we experience storms. Occasionally, water has come through the roof and run down the wall. There was a time last year when I looked at the wall and thought I saw fraying asbestos fibres. That is a concern. But that is not why I am talking about this today; it is not about me or my staff.

One concern I have had since I have taken on this job relates to that third wave of innocent people, or “bystanders”. I am on the record in this place talking about the issue of asbestos in remote Aboriginal communities. I have asked the Minister for Aboriginal Affairs, the Leader of the House, a number of questions about buildings in remote communities that have asbestos in them. I have to give the minister credit: when those issues were brought to my attention and I raised them in this place, including a school building in Beagle Bay and a disused building in Bayulu outside Fitzroy Crossing, the Minister for Aboriginal Affairs ensured that these buildings were removed from those communities. There are a number of similar buildings around the state. The concern was not simply that there was a disused building in a community; the concern was there were Aboriginal children, four to six years old, playing in these buildings—kicking balls against walls. Kids being kids, they play. It is very hot in these communities and sometimes there are no shaded areas. There may also be a derelict building at the edge of the community where kids play. In some of these buildings, there was fraying asbestos fibres and it was a real concern.

Fleshing out that concern, I have a real fear that in 30 to 40 years we will have another epidemic of people suffering from mesothelioma or asbestosis. There will be a cohort of Aboriginal people in their 40s who have lived in remote communities in Western Australia, who never worked in Wittenoom and never unloaded material at docks, but simply by being born into a community and playing in a community as kids, they too will somehow suffer from this terrible disease in the future.

I gave the minister credit in relation to Bayulu and Beagle Bay. I have also asked some questions in this place about the Wangkatjunga community, a community that is about an hour away from Fitzroy Crossing, where there is also a disused asbestos building. I know that people who came to town for sporting carnivals et cetera stayed in there. I know there is fraying particles of asbestos in that building. I am yet to hear that that building has been removed. I am yet to see any action on that building.

A number of years ago the Western Australian Auditor General reported into the management of asbestos-related risks by government agencies. This was about 2007. When the issue was raised about asbestos being found in some buildings in remote Aboriginal communities, I wrote to the Auditor General asking him to do another analysis on this issue. Successive governments have dropped the ball on this issue and there should be some sort

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of register that lists the buildings in Aboriginal communities throughout the state that have asbestos in them. There should also be some sort of process to ensure that there is regular monitoring of these buildings, and if it looks as if there are holes in the walls, or if Aboriginal children—or any children—have been playing or staying in these places, the risk should be removed. In many cases, the only way to remove the risk is to knock these buildings down and to remove them safely from those communities.

This is a real shame; there are still about 250 people a year in Western Australia dying from asbestos-related diseases, and they are horrible, horrible diseases. That is not to say that any disease is nice, but these diseases are particularly nasty and take a horrible toll on people. Our lungs are very vital organs that work overtime, but they cannot get rid of asbestos fibres, and asbestos fibres on the lungs are what cause these painful, debilitating diseases.

The former town of Wittenoom is in my electorate, and a number of members have referred to the fact that blue asbestos was mined in Wittenoom for a number of years, from the 1940s to the 1960s. A fact sheet put out by either the Asbestos Diseases Society of Australia Inc or the National Health and Medical Research Council—I cannot recall which—talks about how about 20 000 men, women and children lived in the asbestos at Wittenoom. Certainly, when I travel around my electorate I hear stories about asbestos being used on racetracks or sporting fields in the town, and about children in sporting carnivals having sack races in bags that had been used to contain asbestos. This was a situation in which people just thought, “Well, kids do these things”, but no-one knew the risks then. This is why I particularly fear for Aboriginal children in some communities who are still playing in asbestos buildings, because even now they are unaware of the risks, and it is very likely that we will see an asbestosis epidemic in 30 years’ time.

Hon Kate Doust spoke about what this bill means and the difference it could make to people with asbestos-related diseases, so I will not pursue that further today, but I would like to acknowledge the work of Bernie Banton, the social justice campaigner who, in the early 2000s, really put this issue on the map. Some members might remember an ABC TV series, *Devil’s Dust*, which portrayed Bernie’s fight not only against James Hardie, but also to put this issue on the agenda and to ensure that people who worked in asbestos mines or who had handled asbestos for work-related purposes over the years and had contracted asbestos-related diseases as a consequence got appropriate compensation.

The late Bernie Banton was some years ago made a Member of the Order of Australia for his work in this area and for service to the community, particularly as an advocate for people affected by asbestos-related illnesses. It was Bernie’s championing of this issue that ensured that many states around the country moved on it, and I really hope that Western Australia, either through this legislation or through legislation that the Attorney General might bring into this place in the future, will move in the right direction to ensure that people with asbestosis or asbestos-related diseases can gain better access to compensation. I also acknowledge the work of Greg Combet, the former secretary of the Australian Council of Trade Unions. Both the ACTU and the Australian Manufacturing Workers’ Union have been vocal on this issue and gave Bernie Banton their support over the years.

The issues of asbestos in buildings, the removal of asbestos and the removal of disused buildings containing asbestos in my electorate are issues that I will continue to raise in this place. I really hope the government has listened to this, and that the Minister for Aboriginal Affairs will take up my suggestion and request the government to better manage asbestos-related risks in government and non-government buildings in regional communities. As I have said previously, too many people have died because of these horrible, horrible diseases, and I certainly do not want to see, in 30 or 40 years, another cohort of people dying because of these diseases. With those comments, I will now sit down.

**HON COL HOLT (South West — Parliamentary Secretary)** [10.57 am]: I rise on behalf of my colleagues to make a contribution to this debate. I, like most people in this house, have some stories about growing up in asbestos homes and being exposed, during various stages of my life, to asbestos. I know that my daughter, as we speak, is living in and renovating an old asbestos home in Harvey. This issue is absolutely important and one that we should address. My brother-in-law and his family actually grew up in Wittenoom and lived there for many years, until the town was closed, and I suspect that he thinks about that every day, and how it might in the future affect his own health and that of his siblings and parents. Fortunately, at this time, none of them has been afflicted; but as we know with these diseases, there is little rhyme or reason for the ways in which they manifest themselves or for who actually contracts them.

It is the view of the National Party that this is an important issue that we need to address. We need to find a solution to providing proper compensation to those people who contract these diseases. The bill we have before us is one possible solution and a way forward, and Hon Kate Doust should be congratulated for bringing it to the house so that we can have this debate and find a way forward. When we received this bill, we sought advice

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from a number of different sections of the community to help inform our debate and inform how we might consider voting on it and/or potentially find a way forward to address this issue as a government and a state.

We approached the Australian Insurance Law Association and the Law Society of Western Australia's personal injuries and workers' compensation committee, and asked them to provide us with some comments on what they thought about the bill before us. We thought that was a fairly diligent thing to do to help us guide our thoughts on the bill. Unfortunately, both organisations came back to us with a view of "no comment", and that was it, really—a "no comment" on what they both thought of this bill or the issue in general. I can only assume they considered it and thought that the most appropriate response to us was a "no comment".

**Hon Nick Goiran:** Did they say they would respond or —

**Hon COL HOLT:** No. They responded with a "no comment".

**Hon Michael Mischin:** Did they give a reason for that?

**Hon COL HOLT:** No, that was basically it.

**Hon Michael Mischin** interjected.

**Hon COL HOLT:** Basically, no comment came back, which I thought was pretty disappointing, asking the Law Society —

**Hon Darren West:** There was no objection to the bill.

**Hon Sally Talbot** interjected.

**Hon COL HOLT:** We asked the Australian Insurance Law Association and the Law Society of Western Australia's personal injuries and workers' compensation committee, which we thought was probably an appropriate place to start to get some information on. Given that no comment came back, we were left to consider the legislation.

At that point in time, we obviously had a contribution from the Attorney General who put forward the government's opinion on the bill. In a long speech, he pointed out many of the concerns that he has raised from an implementation viewpoint as well. We have come to the conclusion that we want to find a way forward to address this issue and we want a bipartisan approach to the issues that both sides of this house can agree to and take forward as a united Parliament to ensure that any future changes to the legislation have the correct effect. We were very pleased to hear from the Attorney General that he is asking the Law Reform Commission of Western Australia to review this piece of legislation, and that its reporting back time frame, I think, was June 2015, which is yet another year to wait; we understand that. But we would be hoping to have a way forward from that point on that says to members of this Parliament, sitting on both sides of the house, that we have found a solution to this burgeoning issue, and we would like to, at that point in time, see the report that comes back from the Law Reform Commission and some plans about implementing some legislation.

**Hon Sue Ellery:** Do you support a committee referral now?

**Hon COL HOLT:** I am saying that we are supporting what the Attorney General is going to do. We will wait to hear what comes back from the Law Reform Commission. We want to see a way forward, as I have said, and we would like to see members from both sides of this house support a way forward. We believe at this point in time that is the more appropriate way to go. We look forward to the report coming back and a planned way forward from the Attorney General to address this issue.

**HON DARREN WEST (Agricultural)** [11.04 am]: I think, certainly in my mind, this debate on the Asbestos Diseases Compensation Bill 2013 has reinforced the reason that I am proud to be a member of a progressive political party. I commend Hon Kate Doust for bringing in a wonderful piece of legislation that will positively affect the lives of thousands of people—some of our most vulnerable in society. However, what do we get from the dreary old conservatives? "Oh, it's all a bit too hard; perhaps, we better wait for a few years until a few more of the victims have passed away, because we couldn't possibly have cottoned on to a progressive idea that might possibly have an impact".

It is disgraceful; it is cold; it is heartless; it is awful. I think the contributions from those opposite will make interesting reading in *Hansard*. I know the members from the Nationals have hopped on the fence there a bit and will make some comments that will certainly look good in a press release—as will, similarly, the Attorney General—but ultimately they do not support the bill put forward by Hon Kate Doust.

I do welcome the support of Hon Rick Mazza. I think it is generally accepted that he is probably more conservative than progressive in his views and very rarely do we see him support the progressive side of the Parliament, but it is great that he has in this instance. It has not happened very often, which clearly demonstrates

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the importance of this piece of legislation. The fact that Hon Rick Mazza has broken off, if you like, by coming over to support Hon Kate Doust's bill, I think is very significant. Rather than say it is all too hard and that it is someone else's job to sort out a piece of legislation and a way forward for victims, Hon Rick Mazza is quite prepared to put forward his support, and, I hope, his vote, on such a good initiative. It certainly looks, from the comments that we have heard so far and, I suggest, from a value that is held, like the Liberal-National government is turning its back and walking away—abandoning the victims of asbestos-related diseases. That certainly is what I think anyone listening to this debate would take away.

I note that Hon Stephen Dawson mentioned the late Bernie Banton. As I understand it—this may be at some level correct because I am going a fair way back into the crevices of my memory—I think I remember that it was a lawyer called Julie Bishop who was on the other side of the argument from Bernie Banton, and his fight against, I think it was, James Hardie at the time. Did that not serve her well! She is the only woman in the federal cabinet as a result of that excellent piece of work. I may not be 100 per cent correct about that, but it is certainly as I recall.

The National members also told us that it is a very, very important issue but that “We're going to let a few more victims pass away and get increasingly sicker before we are prepared to show them any meaningful support.” Without sounding too much like Hon Phil Edman, I was fortunate enough to go on a family holiday with mum and dad and all of us kids. We packed up into a caravan in 1979. We travelled all around Australia, and we spent a few days in Wittenoom. I remember, as a 14-year-old boy, the discussions we had with some friends who were living in Wittenoom. The big issue in town at the time was: why is it that some of the residents are contracting mesothelioma and other asbestos-related diseases and some are not? There was an awareness and certainly a fear of the effects of asbestos as early as 1979, and it is now 2014. I think that is worth keeping in people's minds. From 1979 to 2014—that is, 35 years—people have been talking about some sort of recognition, compensation and support for asbestos victims, but it is all still too hard for all the government members over there, who say that we had better wait a few more years.

I also have, like many people, and as Hon Rick Mazza pointed out, experience of some of the immediate effects of the vile nature of asbestos in my immediate family. My mother, to whom I am very close, is a twin, and her twin sister, Aunty Robyn, who lived in the Kimberley and in the north for a long time, has relatively recently been diagnosed and has spent the last two years as a victim of mesothelioma. This certainly does arouse everybody's interest when it affects one personally. Certainly, it does arouse my interest in finding out more and researching about the effects of asbestos diseases and also to get some more information about what support is available to victims of asbestos diseases. I have learnt things about how we can only claim compensation once, and that if someone goes on to get a subsequent illness from exposure to asbestos, then that is too bad; people are on their own. The compensation claim had to cover all of the person's medical expenses; people do not get paid out from their private health fund because compensation has been received. Other various irregularities are associated with only those people who claim compensation from exposure to asbestos.

There is an anomaly. A lot of money was made out of asbestos by some companies, and I think it is perhaps true to say that the state government had a role. Compensation for asbestos victims is well overdue. I accept that the Attorney General has made some comments that, maybe, there are aspects of the bill that he, as the Attorney General, would perhaps like to see changed. Why not come and have the conversation, and say “Look, we agree with what you are trying to do, we think it is great that you have progressive ideas and that finally, after 35 years, we are dealing with this matter, but we would like to see X, Y and Z in the legislation.” That conversation has not occurred. All we get are the measly words, “Well, the bill does not really suit exactly what we like and we do not really want to support it, but we will give some rationale as to why we are not supporting it”; rather than any genuine concern for the victims of asbestos.

**Hon Michael Mischin** interjected.

**Hon DARREN WEST:** I will not take interjections, Attorney General, because I do not have very long and I know there are other people who want to make a contribution. I will finish off with this —

Several members interjected.

**Hon DARREN WEST:** I know there are other people who want to contribute to this debate. I think it is only fair that everybody gets to have their say, rather than me taking up all of the time. So I will not take interjections at the moment.

One of the reasons we have this problem is that we have a culture in Australia whereby asbestos companies, just like cigarette companies, uranium companies and now opponents of climate change, mislead the community that there is nothing wrong. This leads to an apathetic approach to asbestos, cigarettes or uranium in the community; that it is all going to be fine. I can remember people saying, “What is the matter with you? Just cut that asbestos

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with that angle grinder; you will be fine". That attitude comes from a belief that it is all safe and good. "The company has said there is nothing wrong with cigarettes, they will not hurt you; we have been smoking for years"; that has proven to be erroneous. Uranium companies have said nothing will ever go wrong, and we have had some good examples of things going wrong. The same thing is happening now with people saying climate change is all a load of—I think the Prime Minister's word was one that I cannot use here, but we know what it is. People have exposed themselves to asbestos voluntarily because of this apathetic, lackadaisical culture that has been created by asbestos companies, and the media has gone along for the ride. It has also caused many of these exposures later on. As Hon Stephen Dawson pointed out, there are second and third wave exposures, not just people who have directly handled the raw material at mines, docks and the like. Sadly, Australia boasts one of the highest rates of asbestos-related diseases in the world including mesothelioma, asbestosis and lung cancer. So why is it that after 35 years, the opposition has put something forward, an idea to compensate asbestos disease victims, and the government's response is to take it away and get someone else to look at it. Can we please engage—I accept the Attorney General's comments that he wants to take this legislation to the Law Reform Commission, which is good—but we need to do this sooner rather than later. People are dying and getting sicker by the week —

**Hon Michael Mischin:** Put up some amendments.

**Hon DARREN WEST:** Perhaps we can have a conversation about amendments; that would be great. I look forward to that. We have not seen any amendments; all we have had is "No, we do not support the bill". That is all we have had. If members read *Hansard*, they will see that is all we have had.

Several members interjected.

**The ACTING PRESIDENT (Hon Liz Behjat):** Order! I do not want to start naming people, but I will.

**Hon DARREN WEST:** I think I have made my point here today and other people wish to make their points. This is not a funny matter, Hon Jim Chown. This is not a bit funny. There should be some meaningful compensation for asbestos victims in Western Australia. It is not a bit funny. I do not think anyone should be laughing during this debate.

**Hon Jim Chown:** But I think you're funny.

**Hon DARREN WEST:** The member can if he wishes, but I do not think this is funny. I am speaking about the Asbestos Diseases Compensation Bill 2013 and it is not funny. I think that is what members on the other side of the chamber think it is; I do not think they are serious about this piece of legislation at all. I commend Hon Kate Doust for bringing the bill to the house, and I hope that it has, albeit in amended form, a successful passage. I commend Hon Rick Mazza for supporting the victims of asbestos diseases in his electorate and for his personal stories about how he was required to clean asbestos brake drums with compressed air. That was the culture and practice at the time, but we now know better than that. People who went to work every day to earn a living to feed their families and have now succumbed to the consequences of those actions need meaningful compensation.

**HON NICK GOIRAN (South Metropolitan) [11.15 am]:** I commend Hon Kate Doust for bringing this bill to the attention of the house. My heart goes out to her this morning, because I think the debate had been progressing quite well—the Attorney General made some important comments and there were heartfelt comments from members of the other parties, including the honourable member's front bench colleague—but regrettably, Hon Darren West's last display is spectacularly unhelpful for the consideration of this legislation. One matter raised by the last speaker that I do agree with is that this is a serious matter. Because it is a serious matter, if members wish to contribute to the debate they should make sure they actually know what they are talking about.

This bill is not complicated in a sense, because it covers two matters. Hon Kate Doust's legislation is asking us to enable for the first time a provision for provisional and *Sullivan v Gordon* damages in these claims. I have quite a lot of sympathy for the idea of provisional damages. On its face, I do not find that concept objectionable. The reason I cannot presently support the legislation—I will get to *Sullivan v Gordon* damages in a moment—is because it is restricted to a particular class of people. The idea behind provisional damages is that some claimants have a short life expectancy and are under pressure when they bring their claims before the court to settle and get something as soon as possible, despite the fact they may be better off going through a protracted litigation process and getting a wholesome claim and full judgement with respect to the injury that they have sustained. It is the nature of litigation that it is protracted and these people do not have time to spare. They are left in the unenviable position of effectively being coerced or forced to settle for a less wholesome claim in a short period of time, at least getting something while they are alive, or running the risk of going for full compensation and potentially not surviving to see the end of the litigation. The survival issue is significant

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because if the claimant dies during the course of their claim, the majority of their claim falls away. I do not think that the last speaker understands this. That is why Hon Kate Doust has brought this issue to the house's attention. This bill is effectively saying that we need a capacity for these people to be awarded damages at the first instance—quickly if you like—and then to allow what would normally be described as “a second bite of the cherry”, assuming they are able to survive that process. That is an important and appropriate thing to do. There was an outrageous attack on my colleague Hon Col Holt and his comments that suggested that somehow we are pleased to wait for more people to die—I ask that honourable member to reflect on those comments, and if appropriate, perhaps later in members' statements to apologise to Hon Col Holt.

The issue I have is that it is only this particular class of people who will be able to access these provisional damages. In my former life as a solicitor I regrettably had more than one case when my client died during the course of their claim. They were not asbestos diseases compensation matters. Without divulging matters of client confidentiality, albeit that the clients are now deceased, one of those matters was a medical negligence claim. In my view there was gross negligence on the part of this particular doctor and my client suffered as a result. My client was left in the unenviable position of trying to progress a claim through the courts. Naturally, the medical insurer was quite happy for the case to take as long as possible because the longer it takes, the person may well die and, as I say, most of the claim falls away at that point.

I do not think that the member who last spoke understands that, so I want to outline some of the categories of compensation that exist and some of the things that fall away. For example, general damages is for pain and suffering, loss of enjoyment of life and loss of amenity. If the person dies before the conclusion of their claim, there is no claim for general damages anymore. That is often the biggest part of a claim. The executor of the deceased estate cannot claim for general damages, pain and suffering or loss of enjoyment of life—that is a matter of law. There are other categories, including, for example, economic loss. A person who may have sustained some form of injury—let us assume it is an asbestos diseases sufferer—and is unable to work can make a claim for past and future economic loss. When that person dies, only the past economic loss can be claimed and not the future economic loss, but often the future economic loss is the significant component. Similarly, past and future medical expenses can be claimed, but, once again, the future claim falls away. Often what happens is that the claims end up being uncommercial to pursue. That is why, Hon Kate Doust, the idea of provisional damages has merit, but we need to make sure that if we are going to go down this path it applies to all of those claimants who have this short life expectancy as a result of the very matter they are before the courts for. I cannot support the idea that it would only apply to the sufferers of asbestos diseases, albeit those people are one of the categories of people to whom it quite obviously ought to apply. Despite what the last speaker said, I cannot support Hon Kate Doust at this point in time because I want to see what the Law Reform Commission is going to say about this. I commend the Attorney General, despite once again the outrageous attack of the last speaker, for the approach he has taken on this. It is entirely appropriate that this matter goes to the Law Reform Commission. It needs to consider this issue. If the previous speaker had bothered to listen to what the Attorney General had said, he would understand that a range of issues need to be considered. They are not just straightforward matters; these are complex legal matters and if we do not get them right continuing injustices will occur.

Regrettably, I have only limited time but I want to quickly touch on the issue of *Sullivan v Gordon* damages. I want to say to Hon Kate Doust in respect of this issue that it is not without merit but I am probably not as excited about this category as I am about the provisional damages category because the High Court has decided that there is no common law right to what has become known as *Sullivan v Gordon* damages. *Sullivan v Gordon* damages is the idea that if I am the injured person and I provide some, if you like, gratuitous service to some member of my household and I am unable to undertake those duties anymore as part of the compensation I should be able to access a sum that would cater for the services that I would otherwise provide. Why? Because since I cannot provide it I would then be able to, if you like, hire somebody to undertake those services on my behalf. There is a similar category of compensation that does exist at common law—gratuitous services—but that is where somebody is providing a service to me, and that is able to be claimed.

The difficulty I have on this one, Hon Kate Doust, is that over the course of time this Parliament and many Parliaments around Australia have continued to erode the common law rights of individuals once they have been injured. A great example of that is the issue of general damages that I spoke about earlier. In this state the first \$19 000 of general damages is unclaimable for the majority of people. Why is that? Because this Parliament stuck its big nose into the common law system and decided that in its wisdom—well before my time in this place, I might add—we would ensure that there would be this threshold or deductible. We cannot even get right one of the matters which, as a matter of common law, people are entitled to; we have actually interfered and got that wrong. What we are trying to do here is add a new statutory head of damages that does not exist at common law. It is not that I completely object to the idea of *Sullivan v Gordon* damages, but I am concerned that we are going to add a new category of compensation when we are not even getting the other ones right. I would much

rather ensure that matters like general damages are properly provided to injured people—to people with life-limiting conditions as a result of some cause of action. I would much rather we get that right than try to add new categories of compensation that the High Court, in its wisdom, has collectively said does not exist at common law. I am happy to be persuaded on that issue, but, again, I think it is a matter appropriately dealt with by the Law Reform Commission. It can look at all of these matters in their entirety and make sure that people are being properly compensated.

The other issue in relation to *Sullivan v Gordon* damages is that if that is contrasted with what is normally known as gratuitous services there is a threshold of \$6 500 in place in Western Australia. It is not clear to me whether that applies in this instance. I have argued for a while that with regard to general damages and this outrageous deductible of \$19 000, one small step in the right direction would be to make it a threshold—in other words, if a general damages claim for pain and suffering and loss of enjoyment of life is more than \$19 000, a person should get the whole lot. That is what happens with a gratuitous services claim. If a gratuitous claim is \$10 000, it is ahead of the \$6 500, so therefore a person gets the whole lot. That is a threshold in contrast to a deductible.

Under general damages, it is a deductible. I do not think that it should exist at all, but if it does exist, it should have a threshold at least so that if a general damages claim is, for example, \$25 000 for the pain and suffering and loss of enjoyment of life, loss of amenity, a person gets the \$25 000, not \$6 000. I think that to the extent that I am pleased that Hon Kate Doust has brought this matter before the house, I think it is an opportunity for us to have a serious conversation around compensation generally and make sure that we get it right and people are properly compensated if they have serious injuries or even life-limiting illnesses as a result of some cause of action. There are circumstances where it is appropriate for the Parliament to intervene and to inject itself into the system where the common law inadequately deals with a situation. A great example of that in this state is criminal injuries compensation. Common law allows a person who has been injured as a result of a criminal act by another person to sue that person civilly. The great problem with that, of course, is there is no insurance company at the back of that, often the offender has no funds from which to pay any compensation, it is very stressful on the victim of crime, and so, appropriately, the Parliament in the state has decided to set up a statutory scheme—that is, the criminal injuries compensation scheme that goes some way to try to address that unjust circumstance.

I am sure Hon Kate Doust is very aware of the circumstances in the area of workers' compensation whereby the Parliament has decided to establish a scheme to ensure that, regardless of whether the injury is the fault of the worker, some form of compensation is available to them. Why? It is so that they can be rehabilitated and get back to work, because it is for the benefit of all of us in society that a person is able to go back to work and continue to contribute in that format rather than having to be forever injured and forever subject to compensation. There are circumstances in which that approach is appropriate. I do not rule out considering whether it is appropriate that *Sullivan v Gordon* damages be a new category of a head of damage, but we absolutely have to get the other categories right.

In this state the Insurance Commission of WA makes massive profits and we still allow circumstances in which the first \$19 000 of general damages claims cannot be given to the injured person. How can that ever be said to be satisfactory? I will continue to advocate for something to be done about that, as I will continue to advocate for the rights of workers, funnily enough, who are injured at work to be properly compensated, because this Parliament has interfered too much with their common law rights. Yes, we have injected a compensation scheme for those people who are injured at work through their own fault, but we have restricted the rights of those who are not at fault to what would otherwise be available to them. I will continue to advocate for criminal injury compensation to be fair and just for the victim of crime.

I ask Hon Kate Doust to consider whether it might be appropriate to defer consideration of this bill until such time as we have the benefit of the recommendations of the Law Reform Commission. If the Law Reform Commission were to say that provisional damages is a good concept and it should apply to a broader range of people, I will have a great amount of sympathy towards that idea and I will be in a better position to support the progression of this bill, but I cannot support it in its current form. The Attorney General has quite rightly outlined in detail some of the difficulties. It is not a criticism of Hon Kate Doust because she does not have the benefit of the resources of government as the Attorney General does. I am much more confident that we will get to an appropriate conclusion of this matter with the benefit of the recommendations of the Law Reform Commission. I ask Hon Kate Doust to consider that as the second reading debate of this bill progresses.

Debate adjourned, pursuant to standing orders.