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Reform of Negligence Law – The Queensland Response: The draft Civil Liability Bill 2002

In December 2002, the Queensland Government released a consultation draft Civil Liability Bill 2002 to implement many recommendations of the Negligence Review Panel in the Review of the Law of Negligence Final Report (Ipp Report). A number of provisions are modelled on the New South Wales Civil Liability (Personal Responsibility) Act 2002 that appears to have led the way in substantive negligence law reform.

Research Brief 2003/01 will examine the major proposals contained in the Queensland draft Bill. It will do so in the context of considering, under relevant headings, reform of substantive negligence principles and related matters recommended by the Ipp Report. The proposals include modification to principles relating to standard of care (particularly for professionals and local government); restrictions on general damages awards; notification periods for claims involving children; and assumption of risk for dangerous recreational activities.

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1 INTRODUCTION

This Brief will provide an update to responses by Governments, in particular, by the Queensland, New South Wales and Commonwealth Governments, to the public liability insurance difficulties being experienced by Australian consumers, small business and non profit organisations. The June 2002 Research Brief, *Time for Tort Law Reform?* (RB19/2002), discussed the initial packages of reforms introduced by the Queensland and NSW Governments to address rising costs of public liability and medical indemnity insurance.

Particular reference was made in RB19/2002 to the NSW *Civil Liability Act 2002* upon which Queensland's *Personal Injuries Proceedings Act 2002* is modelled. Both pieces of legislation seek to address the contribution made by personal injuries damages claims to spiralling insurance costs through measures that include capping and restricting some components of damages awards; restricting costs awards for small claims; mandatory pre-court procedures to attempt early resolution (particularly featured in the Queensland Act); abolition of jury trials; and restricting lawyer advertising.

The Queensland and NSW Premiers both flagged the introduction of further and more substantive reforms of the law of negligence that have been recommended by the Negligence Review Panel in the *Review of the Law of Negligence Final Report* (the Ipp Report). The Report was supported by the joint meeting of senior Commonwealth, State and Territory Ministers in November 2002.

In December 2002, the Queensland Government released a consultation draft Civil Liability Bill 2002 (draft CLB) to implement many recommendations of the Ipp Report. A number of provisions are modelled on the New South Wales *Civil Liability Amendment (Personal Responsibility) Act 2002* that appears to have led the way in substantive negligence law reform. This Brief will examine the major proposals contained in the Queensland draft Bill. It will do so in the context of considering, under relevant headings, reform of substantive negligence principles and related matters recommended by the Ipp Report. The proposals include modification to principles relating to standard of care (particularly for professionals and local government); restrictions on general damages awards; notification periods for claims involving children; and assumption of risk for dangerous recreational activities.

2 UPDATE ON BROADER NATIONAL DEVELOPMENTS

The following provides a general overview of developments at a national level since the publication of RB19/2002 in June 2002.

2.1 REVIEW OF THE LAW OF NEGLIGENCE FINAL REPORT (IPP REPORT)

RB19/2002 reported the outcome of the second meeting of Commonwealth, State and Territory senior Ministers on 30 May 2002. The meetings occurred on the premise that any substantive reforms to negligence laws could occur only at a state rather than federal level, and that a consistent national approach was required.

One of the proposals at the May meeting was for a review of tort law by a panel of experts to inform future legislative reforms by state and territory governments. This was fuelled by growing community dissatisfaction with rising insurance costs and the perception that insurance claims and court damages awards had grown significantly in recent years, adding to the insurance crisis. Indeed, some damages payouts for actions that many would regard as being due to lack of care or responsibility by the injured person have fostered the belief that some sense of balance needs to be restored.¹

Accordingly, a Negligence Review Panel, chaired by The Hon Justice David Ipp of the NSW Supreme Court and comprising of three other members (an Australian National University Professor, an Associate Professor from the Council of Procedural Specialists, and the Mayor of Bathurst), was established in July 2002.

The [Terms of Reference](#) stated that it had become desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death. The terms were quite broad and included the request to inquire into elements of negligence law (especially in relation to professions) and address the principles applied to limit liability of public authorities, and to consider proportionate liability. Interaction with the *Trade Practices Act 1974* (Cth) in the context of proposed amendments to enable recreational activity companies to exclude liability was also to be reviewed. A further term of reference was to consider options for statute of limitation periods.

The Review Panel consulted as widely as possible and considered reforms in other countries. The [Review of the Law of Negligence Final Report \(the Ipp Report\)](#) was delivered on 3 October 2002 and contained 61 recommendations.²

2.1.1 Key Recommendations

The overall recommendation was for the proposals to apply to personal injury however it occurs – tort, contract or otherwise. The key recommendations cover principles to be applied in determining elements of the law of negligence and

¹ This issue was discussed in RB19/2002.

² The Report can be found at <http://revofneg.treasury.gov.au/content/Report2/PDF/Contents.pdf>

revising criteria for the assessment of certain heads of damage for personal injury. The main recommendations are discussed in detail under headings below.

2.1.2 Actuarial Assessment of the Ipp Report Recommendations

In November 2002, Pricewaterhouse Coopers produced the [*Actuarial Assessment of the Ipp Report Recommendations – Report to the Insurance Issues Working Group of Heads of Treasuries*](#).³ The assessment noted that most of the Ipp Report recommendations were difficult to cost and that the potential financial effect of only a limited number of recommendations could be provided. Of those which could be formally assessed, it was found that the net effect will be to reduce costs of public liability claims by 14.7%, comprising an approximate 19.6% decline in personal injuries claims cost. Reductions in insurance premiums of around 13.5% on average may result but this was dependent upon a number of issues such as reinsurance costs and operation of the market. It was believed that behavioural change would lead to larger savings over time. In relation to medical indemnity insurance, it was estimated that claims costs could drop by around 20%, translating to a reduction in premiums of between 15%-18%.

It was considered that approximately half of the savings generated would be an indirect result of implementing recommendations for eliminating small claims via the general damages threshold and cost restrictions on smaller claims. The need for ongoing monitoring of claims experience and for comprehensive data was highlighted.

2.1.3 Approval by Senior Ministers

The [*Joint Communiqué of the Ministerial Meeting*](#) on 15 November 2002 agreed with the tenor of the reforms recommended in the Ipp Report and that the key recommendations should be implemented on a nationally consistent basis by each jurisdiction as soon as possible. The Ministers observed the abovementioned Pricewaterhouse Coopers actuarial assessment. It noted that the NSW Government had implemented most of the recommendations in its new Bill (now the *Civil Liability Amendment (Personal Responsibility) Act 2002*) and that it provided a model for reform. It was agreed that necessary legislation would be introduced in each jurisdiction and the Commonwealth would amend the *Trade Practices Act 1974* to complement the new legislation.

³ *Actuarial Assessment of the Ipp Report Recommendations – Report to the Insurance Issues Working Group of Heads of Treasuries*, 7 November 2002. At <http://assistant.treasurer.gov.au/atr/content/publications/2002/20021115.asp>

The Ministers also questioned insurance industry representatives and received assurances that the proposed reforms would make insurance more available and that cost savings would be passed on to consumers.⁴

Following the meeting, the federal Assistant Treasurer, the Hon Helen Coonan MP, said that all Ministers had agreed to introduce laws to implement the majority of the Ipp Report recommendations. She urged all governments to maintain the momentum for reform and urgently introduce the relevant legislation.⁵

The meeting of the Council of Australian Governments (COAG) on 6 December 2002 confirmed the importance of implementing the key Ipp Report recommendations in a nationally consistent and timely manner and endorsed the program by Ministers to pursue effective damages regimes. COAG noted that professional indemnity reforms would be further considered by Ministers in April 2003.

2.1.4 Some Stakeholder Responses

While the Insurance Council of Australia (ICA) agreed with the Pricewaterhouse findings about likely reductions in claim costs and premiums resulting from proposed reforms, the Australian Plaintiff Lawyers' Association (APLA) argues that there is no undertaking by insurers that premiums will fall and queries how Pricewaterhouse has determined that would happen.⁶ Former founding president of APLA, Peter Semmler QC, argues that while the Ipp Report recommended a single piece of legislation to be copied in all jurisdictions there will be many inconsistencies, including varying thresholds and caps on damages awards, which will make risk management at a national level a very complicated exercise. He considers that the reforms are a mere 'knee jerk' reaction to a non-existent crisis with no guarantee that premiums will fall, and the opportunity to create a uniform national system of negligence laws has been lost.⁷

The Australian Competition and Consumer Commission (ACCC) [Second Insurance Industry Marketing Pricing Review](#) has also cast doubt on the ability of tort reform to bring down insurance premiums, stating that the legal system may

⁴ Hon Senator Helen Coonan MP, Minister for Revenue and Assistant Treasurer, 'Meeting gives tick to national negligence package', *Press Release*, 15 November 2002.

⁵ 'Meeting gives tick to national negligence package', *Press Release*, 15 November 2002.

⁶ Scott Emerson, 'Liability policies may fall by 13pc', *Australian*, 16 November 2002, p 3.

⁷ Peter Semmler, 'Law changes will be unfair to victims', *Australian Financial Review*, 29 November 2002, p 59.

have increased insurance costs but it was not the root cause of the public liability problems. The insurance industry was at least partly to blame. In relation to constructive measures to address high costs and reduced availability of public liability and professional indemnity insurance, the ACCC said that lack of empirical data on the ‘so-called litigation explosion’ and the complexity of various factors that influence long-tail liability insurance markets meant that significant policy reforms should be approached cautiously.⁸

3 COMMONWEALTH MEASURES

While the Commonwealth has no constitutional power to undertake substantive tort law reform, it has recognised that it can carry out a range of supportive measures to strengthen, support, and facilitate initiatives taken by the states and territories. Commonwealth actions taken since June 2002 include –

- passage through both Houses of Parliament of the Taxation Laws Amendment (Structured Settlements and Structured Orders) Bill 2002 to remove tax disincentives to entering into structured settlements (discussed further below);
- introduction of the *Trade Practices Amendment (Liability for Recreational Services) Act 2002* to amend the *Trade Practices Act 1974* enabling corporations providing recreational services to exclude liability for personal injury or death arising from the supply of such services (discussed below);
- commencement of new regulations requiring increases in minimum capital reserves held by insurers and stringent risk management procedures, all to be monitored by the Australian Prudential Regulation Authority (APRA);
- release of the ACCC’s [Second Insurance Industry Marketing Pricing Review](#) in September 2002, outlining the structure of the insurance industry and assessing its recent performance, particularly that of the public liability and professional indemnity insurance sectors. It reported that –

*the outlook for the Australian general insurance industry for the 2002-03 financial year is positive despite the effects of 11 September 2001, the collapse of HIH and successive years of significant underwriting losses in the 1990s. Large and sustained premium increases over the past three years have restored most classes of insurance business to profitable levels. In addition, continued premium increases during 2001-02 are expected to turn around the profitability of professional indemnity, and products and public liability.*⁹

⁸ ACCC, [Second Insurance Industry Marketing Pricing Review](#), September 2002, p xiv. At http://www.accc.gov.au/pubs/publications/industry/Insurance_report_Sept2002.pdf

⁹ [Second Insurance Industry Marketing Pricing Review](#), Summary, p xiv.

It found that it was difficult to determine the cost drivers of public liability and professional indemnity insurance premiums and that a number of problems can occur in both markets impacting on small business and not-for-profit bodies;

- recommendations of the Senate Economics References Committee, in October 2002, that the ACCC be given stronger powers to ensure that the insurance industry passed on any savings from tort reforms and that policy holders must be given 14 days' notice if the insurer wishes to revise the terms of renewal or to refuse to reinsure;
- announcement of a medical indemnity framework and package on 23 October 2002 to ensure a sustainable market, assist with premium affordability, and safeguard the continued provision of medical services. An extension of the guarantee of United Medical Protection's liabilities for another year with a levy imposed upon doctors over a 5 year period to fund incurred but not reported claims of up to \$500m was also announced. The most controversial elements of the short-term package are reported as being subsidised premiums for high risk practitioners (eg obstetricians and GPs delivering babies in rural areas) and the promise to meet half of claims over \$2m. Assistance to doctors is conditioned upon them taking steps to reduce the risk of claims by engaging in special programs;¹⁰
- request by Treasury Parliamentary Secretary, Senator the Hon Ian Campbell MP, that the ACCC maintain an informal monitoring role in relation to costs and premiums in the public liability and professional indemnity insurance sectors of the insurance market on a 6-monthly basis over the next 2 years. The ACCC was asked to consider the impact on premiums by negligence law reforms and to improve data available to insurers to evaluate and price risk;
- interim authorisation was given by the ACCC in November 2002 to a new joint venture – 'Community Care' – between Allianz, NRMA Insurance and QBE Insurance to provide public liability to NSW and ACT based not-for-profit organisations such as amateur sporting clubs and community groups (given that the NSW Government's reforms largely implement the Ipp Report recommendations). It is expected that operations will extend into other states and territories once similar reforms are implemented;
- commitment to amend the *Trade Practices Act* to underpin State and Territory law reform consistent with the Ipp Report recommendation to ensure that the same rules apply to any action, regardless of whether it is brought under tort, contract, or statute;

¹⁰ Editorial, 'Doctors not the only winners', *Australian Financial Review*, 24 October 2002, p 70.

- APRA is conducting preliminary work on establishing a national claims data set; and the Productivity Commission is conducting a benchmarking study into Australian insurers' claims management practices against world standards.

4 QUEENSLAND RESPONSE

As noted in RB19/2002, the Queensland Government established a group insurance scheme to provide affordable insurance for the not-for-profit community groups, which commenced in late 2002. It appears that Suncorp is negotiating with the Government to underwrite the scheme that proposes to offer premiums as low as \$480 pa to low-risk bodies in exchange for a 3 year commitment to the scheme. The Suncorp managing director has indicated that the measures in the *Personal Injuries Proceedings Act 2002* (Qld) were vital to the viability of the proposal.¹¹ In October 2002, the Government announced that stamp duty on public liability insurance for not-for-profit groups would be removed, thus enabling a saving of 8.5% on premiums.¹²

RB19/2002 foreshadowed the passage of the *Personal Injuries Proceedings Act 2002* (Qld) (*PIP Act*) in June 2002. That legislation introduced some measures to address the difficulties being experienced by the community due to the rising cost of public liability insurance. Many provisions are similar to the NSW *Civil Liability Act 2002* but did not go as far as capping general damages (ie damages for pain and suffering etc). It was considered that Queensland did not have the same history of large court damages awards as NSW. It was also believed that the Queensland approach attempted to tackle the root cause of the insurance cost problems created by multiple small claims by curbing lawyer advertising, imposing restrictions on legal costs for small claims, and encouraging early resolution of claims.¹³

¹¹ Chris Jones, 'Insurer joins public liability bailout', *Courier Mail*, 28 August 2002, p 6.

¹² Chris Jones, 'Groups win stamp duty exemption', *Courier Mail*, 3 October 2002, p 7.

¹³ Chris Merritt, 'Others must follow NSW, Qld on tort reform', *Australian Financial Review*, 26 July 2002, p 55.

4.1 *PERSONAL INJURIES PROCEEDINGS ACT 2002*

The key features of the [PIP Act](#) (many of which have been transferred to the draft CLB) are –

- capping economic loss, and loss of consortium and servitium damages to three times average weekly earnings and requiring damages for future loss to be discounted at a rate of 5% (relocated as **cls 51, 52, 53** of the draft CLB);
- excluding of awards of exemplary and punitive damages (now **cl 48** draft CLB);
- imposing a threshold requirement for payment of gratuitous services (relocated as **cl 54** draft CLB);
- requiring a plaintiff to take reasonable steps to mitigate damages or else having the court reduce damages to an extent that reflects such failure (now **cl 49** draft CLB);
- preventing proceedings being heard by a jury (now **cl 63** draft CLB);
- banning costs and outlays on payouts of less than \$30,000 and restricting costs and outlays where payouts are less than \$50,000 (now **cl 48** draft CLB). This approach was recommended for national adoption by the Ipp Report as a simple method that deals with a large category of cases where much of the cost is attributable to legal expenses (p 185 of the Ipp Report));
- enabling a person involved in an incident to express regret without fearing that it be used as an admission of liability. However, if the expression contains an acknowledgment of fault, it would not be inadmissible (now **cls 60-62** draft CLB);
- restricting lawyer advertising;
- facilitating structured settlements (now **cl 58** draft CLB);
- protecting persons performing duties to enhance public safety in emergency circumstances (now **cl 27** draft CLB);

Many of the above matters will be discussed later.

A number of pre-court procedures are mandated by the *PIP Act*. These are modelled on the procedural provisions contained in the *Motor Accident Insurance Act 1994* which, it is understood, has led to around 99% of claims being settled out of court and a significant reduction in legal costs.¹⁴ The provisions include –

¹⁴ Editorial, 'Insurance reforms to cut costs', *Courier Mail*, 20 June 2002, p 14.

- requiring notification of claims within a prescribed timeframe unless there is a reasonable excuse for delay;
- timeframes for respondents to attempt to resolve a claim through the taking of reasonable steps in relation to matters such as whether to accept or deny liability and making offers to settle;
- open exchange of information (eg doctors' reports; investigative reports) even if otherwise protected by legal professional privilege or else an offence is committed; and
- compulsory conferences (which may include a mediator) before any court proceedings can be commenced (except in certain urgent circumstances). If no settlement is reached at the conference, the parties must exchange mandatory final offers.

Amendments were made in July 2002 to enable the *PIP Act* to apply retrospectively regardless of when the injury occurred, unless a person has, before 30 June 2002, commenced a court action or where either party to a potential claim has made a written settlement offer. Protection for some costs incurred prior to 1 July 2002 is given. In addition, acts done with intent to cause personal injury and sexual assaults and other sexual misconduct are excluded. The amendments were intended to make the Queensland approach to such issues consistent with NSW.¹⁵

4.2 VOLUNTARY ASSUMPTION OF RISK BILL

On 5 September 2002, Opposition Justice Spokesman, Mr Lawrence Springborg, introduced the [Voluntary Assumption of Risk Bill](#) into the Queensland Parliament as a Private Member's Bill.¹⁶ The Bill failed its second reading on 28 November 2002. The intention of the Bill was to enable persons participating in recreational activities to waive their right to sue organisers for injuries received during those activities, provided they have been properly warned of inherent risks. It would not remove the ability to claim if the equipment was badly designed or manufactured or the service provider acted in reckless disregard to the participant's health or safety. The Attorney-General, the Hon Rod Welford MP, expressed concern that the Bill sought to apply to an inappropriately broad range of activities and would also impact significantly upon rights of children as it would enable parents to sign

¹⁵ Hon R J Welford MP, Attorney-General and Minister for Justice, Personal Injuries Proceedings Amendment Bill 2002 (Qld), Second Reading Speech, *Queensland Parliamentary Debates*, 30 July 2002, pp 2292-2293.

¹⁶ At http://www.legislation.qld.gov.au/Bills/50PDF/2002/VolAssRkB02_P.pdf

waivers of liability on behalf of the child, effectively depriving a child from claiming for injuries sustained through a provider's negligence.¹⁷

4.3 DRAFT CIVIL LIABILITY BILL

In November 2002, the Queensland Government announced a further stage of its reform of the law of negligence. The reforms have been included in a consultation draft Civil Liability Bill (draft CLB), released in December 2002 for introduction into Parliament in early 2003. The reforms are, as recommended in the Ipp Report, intended to apply to damages for injury or loss whether the claim is brought in tort, contract, under statute, or otherwise. They are discussed in detail below.

5 NEW SOUTH WALES PACKAGE

As noted in RB19/2002, significant reforms were made to damages claims for personal injuries in New South Wales by the *Civil Liability Act 2002* that commenced operation with retrospective effect from 20 March 2002. This legislation formed Stage 1 of the reforms intended to respond to the public liability insurance problems. The more wide-reaching Stage 2 reforms, to deal with more fundamental aspects of the law of negligence, were introduced in the *Civil Liability Amendment Act (Personal Responsibility) Act 2002* which commenced (apart from some provisions) on 6 December 2002.

5.1 STAGE 1 REFORMS

Prior to the introduction of the *Civil Liability Act*, the NSW Government passed a Regulation to curb lawyers' advertising (discussed in RB19/2002).

The changes made by the *Civil Liability Act* are discussed in RB19/2002. However, in brief, they include caps on general damages at \$350,000 in extreme cases and a threshold (so that the severity of the loss must be at least 15% when the amount awarded is assessed on a sliding scale); caps on damages for lost past earnings and future loss of earning capacity to three times the amount of average weekly earnings; restricting awards for gratuitous attendant care services; encouraging structured settlements; restricting legal costs for damages up to \$100,000; and imposing costs on lawyers for unmeritorious claims.

¹⁷ Hon R J Welford MP, Attorney-General and Minister for Justice, Voluntary Assumption of Risk Bill, Second Reading stage, *Queensland Parliamentary Debates*, 27 November 2002, p 4912.

5.2 STAGE 2 REFORMS

The New South Wales Premier, Mr Bob Carr, indicated that the second stage of the tort law reform process would go much further with the aim of restoring ‘sense and balance in litigation, the law of negligence in particular’.¹⁸

The *Civil Liability Amendment (Personal Responsibility) Act 2002 (Personal Responsibility Act)* commenced on 6 December 2002 to implement those reforms through making a number of amendments to the *Civil Liability Act (CLA)*. A consultation draft of the legislation was made publicly available in September 2002. The Bill, as introduced into the NSW Legislative Assembly on 23 October 2002, was amended to draw on recommendations of the Ipp Report. The NSW Government decided to press ahead with its Bill despite other governments wishing to give detailed consideration to the Ipp Report with a view to a consistent national approach. However, it is understood that the Act, as passed, is in harmony with the Ipp Report recommendations with the NSW Premier stating that this should ensure greater national consistency.¹⁹

The Commonwealth Assistant Treasurer is reported as saying that the senior Ministers supported NSW moving quickly on tort reform because they considered that NSW comprised the largest share of the insurance market.²⁰

6 NEGLIGENCE REFORMS AND ASSOCIATED MEASURES

This Brief will now consider the Queensland proposals for reform outlined in the consultation [draft Civil Liability Bill 2002](#) (draft CLB (Qld)) in the context of the [Ipp Report](#) recommendations, many of which it seeks to implement. Many of the same measures are contained in the recently enacted NSW *Personal Responsibility Act*.

6.1 LAW OF NEGLIGENCE

The elements that establish the tort of negligence at common law are: there must be a duty of care owed by the defendant to the plaintiff (ie the defendant could

¹⁸ Hon R J Carr MP, ‘Public Liability’, Question without Notice, *NSW Legislative Assembly Hansard Online*, 7 May 2002.

¹⁹ Linda Morris, ‘Revised negligence Bill hints at national accord’, *Sydney Morning Herald Online*, 23 October 2002.

²⁰ ‘Linda Morris’, ‘Leaders unite for national liability laws’, *Sydney Morning Herald Online*, 3 October 2002.

reasonably be expected to have foreseen that if they do not take care, the plaintiff would suffer injury or death); breach of that duty (sometimes called standard of care); causation; and remoteness of damage.

There appears to be some perception that the courts tend to apply negligence concepts, particularly standard of care, causation and remoteness of damage, in ways favourable to the plaintiff. In line with the recommendations of the Ipp Report, the Queensland draft CLB proposes to statutorily modify those elements. The NSW *Personal Responsibility Act* takes a similar approach. Note, however, that in many cases, the statutory provisions essentially restate the common law, acting as a ‘reminder’ to courts tempted to depart from the relevant principles.

6.1.1 General Standard of Care

At common law, whether a defendant has met the standard of care to avoid harm to the plaintiff to whom he or she owes a duty of care depends upon –

1. whether the risk of harm was one which was foreseeable to a reasonable person and,
2. if it was foreseeable, whether a reasonable person should reasonably be expected to have taken precautions to prevent the harm from occurring.

Foreseeability of risk is a necessary precondition to a finding of a breach of a standard of care and, therefore, negligence. A person cannot be negligent by failing to take precautions against an unforeseeable risk. It must be a risk that a reasonable person in the circumstances knows or ought to have known about. The Ipp Report noted that there tends to be confusion between foreseeability and probability. However, even an event of low probability can be a foreseeable one. Conversely, an event of high probability may not necessarily be foreseeable. It depends if a reasonable person knew or ought to have known about it.²¹

Merely because a risk is foreseeable does not necessarily mean that a person is liable if they fail to take precautions against it occurring. Whether, and what type of precautions a reasonable person would have taken depends upon the balancing of factors: the probability that the harm would occur and the likely seriousness of the harm as against the cost of the precautions and the social utility of the risk creating activity.

The courts have tended to find that a person is not in breach of their duty if they do not take steps to guard against a risk that is ‘far-fetched or fanciful’ although

²¹ Ipp Report, p 104 citing comments by Dixon J in *Chapman v Hearse* (1961) 106 CLR 112, 115.

foreseeable.²² However, as the Ipp Review Panel noted, the other side of the equation was that if a risk was not ‘far-fetched or fanciful’, the court finds that it was a breach of duty not to have taken precautions. This then (wrongly) bypasses the need for the balancing of the factors outlined above. The Ipp Report noted that there was wide belief that such an approach has brought the law of negligence into disrepute and may have contributed to the current insurance problems (p 105).

The Ipp Report recommended a solution which has been adopted by **cls 9-10** of the draft CLB (Qld). A person is not negligent in failing to take precautions against risk of personal injury unless the risk was foreseeable and was ‘not insignificant’ and in the circumstances, a reasonable person in the person’s position would have taken the precautions. Thus, the foreseeable risk must be one that has a higher degree of probability of harm than one which is ‘far-fetched or fanciful’ but not as high as a ‘substantial risk’ or a ‘significant risk’ (pp 105-107).

Clause 9(2) states that in determining whether a reasonable person in the person’s position would have taken the precautions, the court is to consider the probability that the harm would occur; the likely seriousness of the harm; the burden of taking the precautions (which includes the burden of taking precautions to avoid similar risks for which the person may be responsible); and the social utility of the risk-creating activity. This reflects the Ipp Report view that once it is found that the risk is ‘not insignificant’, a statutory provision was needed to require the court to apply the balancing of relevant factors outlined above.

The draft CLB (Qld) makes it clear that the fact that the risk could have been avoided by doing something a different way does not, of itself, affect liability nor does the subsequent taking of action to avoid such risk in the future.

6.1.2 Causation and Remoteness of Damage

Even if a breach of the relevant standard of care is found, there is no negligence unless the defendant’s act or omission has caused the harm (causation) and the harm must not be too remote from the act or omission (remoteness of damage). Both concepts have proved troublesome for courts.

Causation (‘factual causation’)

Establishing causation – whether the negligence of the defendant was a necessary condition of the harm (which the Ipp Report calls ‘factual causation’) – depends upon whether it can be said that the harm would not have occurred *but for* the conduct of the defendant (the ‘but for’ test). The issue tends to arise in the context

²² *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

of a hospital or practitioner failing to treat an injured person who subsequently dies and the question is then whether the failure to treat caused the death of the person. If the person would have died in any event, causation is not established. The Ipp Report did not consider that the ‘but for’ test needed to be altered.

The Review Panel noted controversial issues can arise, particularly where there are two or more factors that create the harm but it is difficult to determine the relative contribution each has to the total harm suffered. For example, an employee contracts a disease from asbestos exposure over a long period during which the employee works for different employers but it cannot be said with certainty, in relation to any one of the employers, that *but for* that employer’s negligence, the harm would not have occurred. In such circumstances, the court asks if the negligent conduct has made a ‘material contribution’ to the total harm.

The Ipp Report supported the ‘material contribution’ approach. However, it considered legislative provisions should state that, when deciding whether proof that conduct that materially contributed to the risk of harm should suffice as proof of causation, it is relevant to take into account whether and why responsibility should be imposed on the defendant and whether and why the harm should fall on the plaintiff (pp 110-111). The draft CLB (Qld) appears to have adopted the thrust of this approach, as evidenced by **cl 11(2)**, to provide for exceptional cases.

Note that **cl 12** of the draft CLB adopts the suggestion of the Ipp Report that the onus of proof of any fact relevant to causation must always rest with the plaintiff – ie restating the actual common law position (pp 111-112). The Panel noted judicial gravitation towards an approach that once a finding of breach of duty by the defendant had been made, the onus of proof of facts relevant to causation then shifted to the defendant. The Panel considered this to be an onerous burden in exceptional cases where there were evidentiary gaps and needed to be discouraged by a clear legislative statement.

In some situations, it may be necessary to ask what a plaintiff would have done if the defendant had not acted negligently. The example given in the Ipp Report was of an employer not providing a worker with a safety helmet which would have prevented the relevant injury and the employer argues that the worker would not have worn it if it had been provided. The question is to be determined subjectively by asking what the plaintiff actually would have done if the defendant had not been negligent. For a number of reasons set out in the Report, the Review Panel considered that a subjective approach was correct but (because of the difficulties created by hindsight bias) should be decided on the basis of the circumstances of the case and that statements made by the plaintiff about what they would have done should not be admissible (pp 113-114). **Clause 11(3)** of the draft CLB (Qld) adopts this recommendation.

Remoteness of Damage ('scope of liability')

To establish factual causation (ie that the negligence was a necessary condition of the harm occurring) is necessary but not sufficient to establish liability. However, as the Ipp Report found, there was a danger that a finding of causation might be thought to justify a result that the defendant was liable to pay damages for *all* of the harmful consequences. The Panel considered that some uncertainty in negligence law has come about because of the failure to distinguish between causation of the harm and the normative question of what consequences the defendant should bear. It recommended that legislation provide that factual causation and scope of liability were two separate elements to be addressed (pp 114-115). **Clause 11(1)** of the draft CLB (Qld) does this.

The Ipp Report noted a perception by some that courts tend to impose liability for quite remote consequences. However, it was difficult to set out guidelines about this issue. A balance was needed to ensure certainty yet allow flexibility. It proposed that legislative guidance be given by way of stating that, in determining scope of liability, the court should consider whether or not and why responsibility should be imposed on the defendant. This may eliminate some of the uncertainties and direct a focus on personal responsibility (p 115-117). **Clause 11(4)** of the draft CLB (Qld) provides this guidance.

6.2 PROFESSIONAL NEGLIGENCE STANDARD OF CARE

Specialists, particularly highly trained neurosurgeons and obstetricians, throughout Australia are withdrawing their services due to prohibitive professional indemnity insurance premiums and apprehension of being sued. It has been reported that a study of four large indemnity funds by Insurance Statistics Australia shows that a third of the 32 medical negligence payouts greater than \$2m involved obstetrics and gynecology.²³

Many practitioners fear being found personally liable through being held to, what they consider to be, unrealistic standards of care applied with hindsight by the courts. The Ipp Report noted that many medical practitioners were somewhat confused about negligence laws and, therefore, had unnecessary concerns about the risk of being sued. It reported that many concepts of personal injuries laws as applied to practitioners did not warrant change but would benefit from being stated in legislation so that they could be more readily known and understood (p 44). However, there were some aspects requiring revision, as indicated below.

²³ Darren Gray, 'Payouts surge for malpractice', *Age Online*, 12 October 2002.

The standard of care to be observed by medical practitioners in relation to treatment (as opposed to warnings and information, dealt with below), was, until 1992, as set out in the English case of *Bolam v Friern Hospital Management Committee*.²⁴ This was that a doctor is not negligent if he or she acts in accordance with a practice accepted as proper by a responsible body of medical opinion, even if there is a body of opinion that would take a contrary view. The Ipp Report noted that there was controversy about whether the court should be the ultimate judge of what is a reasonable standard to be applied in the case before it or whether it must defer to medical opinion. In general negligence cases it is ultimately for the court to decide the relevant standard to be applied and whether or not to defer to expert views. The *Bolam* rule requires deference to responsible medical opinion (p 38).

In the 1992 High Court case of *Rogers v Whitaker*,²⁵ a doctor was found to be negligent for failing to warn a patient about to undergo an eye operation about the risk of sympathetic ophthalmia. The risk was inherent but far from obvious, thus enhancing the need for the doctor to tell the patient about it. Although that case was a 'failure to warn' situation as opposed to performing medical treatment, courts appear to be applying the standard of care for doctors more rigorously and have been more reluctant to defer to medical opinion, leading to a call for a reinstatement of the *Bolam* rule in its original form.

The Ipp Report noted that there were problems with the *Bolam* rule, particularly that it tended to give undue weight to opinions that might be extreme and narrowly held or held only by one institution although there might be a substantial majority of opinion taking a different view (pp 39-40). Thus, it recommended that the *Bolam* rule should be modified by legislation to ensure that the practice adopted is in accordance with an opinion widely held by a significant number of respected practitioners. To address the problem regarding deference to medical opinion, in rare cases where the court believes that the expert opinion is irrational, it should be able to intervene.

The Ipp Report did not form any conclusions about whether the modified rule was restricted to the medical profession or had wider application to other professions, regarding it as a matter for government.

Clause 22 of the draft CLB (Qld) adopts the above recommendation by providing that a professional (as prescribed by Regulation) is not negligent if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice, unless the

²⁴ [1957] 1 WLR 582.

²⁵ (1992) 175 CLR 479.

court considers the opinion is irrational. It thus appears that the provision extends to a wider group of professionals (as prescribed) than medical practitioners. The NSW *Personal Responsibility Act* protects professionals in a similar manner.

Some organisations, including APLA and the LCA, are critical of the proposal to reintroduce the concept of ‘peer acceptance’ as disadvantageous for Australian consumers, particularly if extended to all professionals. The LCA considers that standards would be lowered and would enable the pursuit of practices which are flawed and encourage complacency within a profession. On the other hand, bodies such as the ICA support the reforms.

Clause 21 applies specifically to medical practitioners in relation to their duty to provide information to patients about treatment (the *Rogers v Whitaker* type cases). The provision adopts the thrust of the Ipp Report recommendations. As the law regarding the provision of information by other professions is still developing, the Ipp Report believed it desirable to legislate about such duties only in the context of doctors (p 46).

The Ipp Report noted that the giving of information is integral to the right of individuals to decide their own fate and it is for *the court* to decide whether the information provided was sufficient information to enable the patient to make an informed decision. It should be a duty to take ‘reasonable care’ to inform which requires consideration of all of the circumstances. For example, a general practitioner in a country area might be asked to perform a procedure that would normally be performed by an obstetrician, and the GP would not have the same knowledge as the specialist about the risks involved in order to inform the patient. The duty is only to exercise reasonable care in providing information about risks, not give whatever information can be obtained. Thus, doctors should be reassured that they are not required to adhere to unrealistic standards, only to take reasonable care to give the patient information necessary to provide informed consent (p 47).

Clause 21 notes the two types of duties on doctors to provide information before a patient undergoes treatment that will involve a risk of personal injury. The first (encompassed in **cl 21(1)(a)**) is a *proactive duty* to inform, requiring the provision of such information that places the patient in a position to make an informed decision about whether or not to undergo treatment, the nature of that information depending on the circumstances of each case. Generally it would include matters such as material risks inherent in the procedure. **Clause 21** refers to ‘information about risk’. The Ipp Report appears to indicate that the obligation is not limited to information about risks alone. What information is required would be judged at the time the patient is making the decision not at a later time with the benefit of hindsight (pp 48-49).

The second information duty, essentially encompassed by **cl 21(1)(b)**, is a *reactive duty* to inform – a duty to take reasonable care to inform the particular patient about risks inherent in treatment which the practitioner knows or reasonably ought

to know the patient wants to be given before making a decision about treatment or following advice – usually because the patient asks for it or otherwise indicates a desire for it.

The NSW legislation contains similar provisions.

6.2.1 Protection of Good Samaritans

Concern has been expressed by persons, such as surf lifesavers and other volunteers, that they risk personal exposure to liability for ‘not helping well enough’ in emergency situations. Presently, negligence laws do provide protection for ‘good Samaritans’ by placing the standard of care to be observed at a lower level because of the emergency nature of the circumstances and the ordinary skills of the good Samaritan. The Ipp Report declined to provide a complete exemption for good Samaritans from being found negligent on the basis that the common law already provides sufficient protection and that a complete exemption would tip the scales of personal responsibility too heavily against the injured person (p 108).

In Queensland, Part 5 of the *Law Reform Act 1995* protects medical practitioners, nurses and other prescribed persons rendering gratuitous assistance to injured persons in emergency situations, provided it was carried out without gross negligence. The *PIP Act* protects persons performing ‘duties to enhance public safety’ in the course of rendering first aid or other assistance in emergency circumstances to an injured person from liability for negligence. This is provided the action was in good faith and without reckless disregard for the injured person’s safety (now relocated as **cl 27** of the draft CLB). Thus, surf lifesavers are covered by the measures.

The NSW *Personal Responsibility Act* seeks to protect good Samaritans (seemingly a wide class of persons who voluntarily come to the aid of a person) who assist in emergency situations and also protects volunteers engaged in community work from personal liability provided they act in good faith.

6.3 CONTRIBUTORY NEGLIGENCE

The law of negligence requires that where a plaintiff has failed to take reasonable care for their own safety, damages be reduced to the extent of the plaintiff’s failure. Courts have a considerable discretion in making this determination. The Review Panel noted instances of courts seeming to indulge plaintiffs by applying a lower standard of care for contributory negligence than that applied to determining negligence of the defendant. That approach flies in the face of community expectations that people will generally take responsibility for their own safety (p 123). It was considered that the same standard of care should be applied to

contributory negligence as for negligence. This would still enable regard to be had to the identity of the plaintiff (eg a child) or the ability of one party to better avoid the harm (eg an employer). **Clause 25** of the draft CLB (Qld) essentially adopts the Ipp Report recommendation in relation to personal injury or property damage.

Clause 26 of the draft CLB (Qld) enables the court to reduce damages by reason of the plaintiff's contributory negligence by 100%, if just and equitable to do so. The NSW legislation does this also. The High Court recently held that courts must not reduce damages by 100% as it amounts to a finding that the plaintiff is wholly responsible (p 127). The Panel, however, considered that apportionment of damages is concerned with remedy not liability and that it does not mean that the defendant is not negligent just because the plaintiff is denied any damages – just that both parties are at fault and the plaintiff should bear full responsibility for the harm (p 128).

6.4 ASSUMPTION OF RISK

The defence of voluntary assumption of risk on the part of the plaintiff applies where there has been a breach of a duty of care by a defendant but the plaintiff has known about and assumed the risk. It provides a complete defence. Its use has become less common with the courts inclined towards using the concept of contributory negligence because it allows them to apportion damages so the plaintiff will recover something. The Ipp Review Panel noted that the courts tend to apply the voluntary assumption of risk defence very tightly. For example, a court might find that a plaintiff cannot have freely accepted the relevant risk in a workplace location where there is little control over the situation. It believed, however, that making it easier to establish the defence would promote the objectives of its Terms of Reference (p 129).

Note, however, a 2001 case in which the NSW Court of Appeal found that a club was not liable for the economic loss sustained by a chronic gambler where the loss followed his own deliberate and voluntary act.²⁶

The Ipp Report recommended that legislation provide that it would be *presumed* that the plaintiff was actually aware of an *obvious risk* unless the plaintiff can prove, on the balance of probabilities, that he or she was not actually so aware. An obvious risk is one that, in the circumstances, would have been obvious to a reasonable person in the plaintiff's position, or risks that are patent or matters of common knowledge, and may even be one of low probability.

²⁶ *Reynolds v Katoomba RSL All Service Club Ltd* [2001] NSWCA 234 (20 September 2001).

Currently, the court must find that the plaintiff was *actually* aware of the risk. The Report noted that it should not matter that the plaintiff is not aware of the precise nature, extent or manner of occurrence of the risk provided they are aware of the type or kind of risk (again a departure from the present position where a court may say that while the person might know that they may suffer an injury by undertaking an activity, they may not have known that they would do so in a particular way) (p 130).

Clauses 13 and 14 of the draft CLB (Qld) follow the above recommendation. Note, however, that in defining ‘obvious risk’ it is made clear that a risk from something will not be an obvious risk if it was created by the failure of a person to properly maintain, replace, repair or care for the thing that otherwise seems in good condition (eg a cracked frame in a go-cart) unless that failure itself is an obvious risk.

Note also that **cl 15** provides that the defendant does not have a proactive duty to *warn* the plaintiff of an obvious risk. There is only a need to warn of such obvious risk if the plaintiff has requested advice or information about such risk; or the law requires the defendant to provide such warning; or in cases where the defendant is a professional (but not a doctor because cl 21 applies) and the risk is that of death or personal injury. The Ipp Report noted that this may avoid courts holding councils liable in negligence for failing to warn persons of the dangers of diving off a cliff into shallow water (p 68).

In addition, **cl 16** provides that a defendant will not be liable for the materialisation of an *inherent risk* ie a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill. This reflects the current law. However, there may still be a duty to warn of an inherent risk.

The NSW *Personal Responsibility Act* contains similar provisions to the above.

6.4.1 Dangerous Recreational Activities

The Ipp Review Panel considered that recreational activities where a significant element of physical risk is an integral part should, in general, enable the defence of voluntary assumption of risk to be raised in relation to obvious risks. That is because people who participate in them generally do so voluntarily and the community expects that they should take personal responsibility for, and bear the risks of, the activity that would, in the circumstances, be obvious to the reasonable person in the person’s position. It is irrelevant whether the plaintiff was actually aware of the risk provided the risk carried by the activity would be obvious to the reasonable person (p 66). In non-recreational activity situations where the defence of voluntary assumption of risk is raised, the plaintiff is (under the new proposals) taken to be aware of the obvious risk unless the plaintiff proves that they were not so aware.

The proviso ‘in the circumstances’ takes into account that children and some other persons may need more protection from risks than a fully able adult. The Report noted that where the undertaking of such activities is not voluntary (eg school activities, workplace ‘team building’ exercises) any rules limiting liability should not apply (p 63).

In accordance with the Ipp Report recommendation in this regard, **cl 19** of the draft CLB (Qld) provides that a defendant is not liable in negligence for personal injury suffered by a plaintiff as a result of the materialisation of an obvious risk (whether or not the plaintiff was aware of it) of a dangerous recreational activity (defined in **cl 18**) engaged in by the plaintiff. Note, however, that the Ipp Report confined the limitation of liability in this context to recreational services providers only whereas cl 19 appears to be broader. In addition, it is made clear that the defence of voluntary assumption of risk generally can apply in this context. It may be that while there is no proactive duty to warn of an obvious risk, such duty may be imposed in the situations outlined in **cl 15**.

Exclusion Clauses and Risky Activities

Before engaging in a sporting or recreational activity, there may be a sign, notice or ticket at the point of sale warning the consumer of the potential risks involved and it may also include a clause excluding liability of the operator.

In the ordinary common law, an exclusion clause (as described above) may operate to exempt a person from liability although they have been negligent. The courts have tended to construe such clauses very strictly against the person seeking to rely upon them. They must be clearly worded and expressly exclude negligence before they operate, unless the court can find the words are broad enough to do so.

Australian jurisdictions have introduced legislation to protect consumers from the impact of the operation of such clauses where they would, at common law, be construed to exclude liability. Section 74 of the Commonwealth *Trade Practices Act 1974* (TPA) provides that in every contract for the supply by a corporation, in the course of business of services, to a consumer, there is an implied warranty that such services will be rendered with due care and skill and any materials supplied in connection therewith will be reasonably fit for the purpose for which they are supplied. Section 68 then goes on to provide that any contract that excludes, restricts or modifies the operation of the TPA provisions (such as s 74) is void.

The *Trade Practices Amendment (Liability for Recreational Services) Act 2002* amends the TPA by inserting a new s 68B. It provides that a contractual clause used by a corporation providing a recreational service is not void under s 68 by reason only that the term excludes, restricts or modifies (or has the effect of doing so) liability for personal injury or death arising from the supply of such services. It

would appear to exclude not only liability for obvious risks but also for any, even inherent, risks of the activity.

APLA is understood to support reforms that would allow waiver of liability for inherently risky activities provided that rights of children and persons with a mental disability are protected and that the risks involved are fully explained to persons undertaking the relevant activities. The Law Council of Australia is generally supportive but has expressed some reservations.²⁷

On the other hand, the ACCC is concerned that the amendments may result in risks of recreational and similar activities being inappropriately allocated to consumers. It fears that operators may not take sufficient care and, also, that many consumers may not be as well placed as operators to adequately gauge the extent of the risks involved and/or to insure against them.²⁸ The Ipp Report stated that the Bill does not significantly reduce consumer protection because while it enables the waiver of warranties implied by s 74, the stringent contractual rules will apply instead. It supported the notion that recreational service providers should not be liable to voluntary participants in respect of the materialisation of an obvious risk and that a person is not liable for failure to warn of a risk that would, in the circumstances, have been obvious to the reasonable person (pp 82-84).

The NSW *Personal Responsibility Act* provides that a contract for the supply of recreational services can exclude, restrict or modify liability for harm resulting from failure to exercise reasonable care and skill. In addition, no liability arises in relation to harm resulting from a risk of a recreational activity that was the subject of a risk warning. The Queensland draft CLB does not contain similar provisions.

6.5 LIABILITY OF PUBLIC AND OTHER AUTHORITIES

In 2001, the High Court abolished the immunity given to local governments and other road authorities in relation to failure to repair roads. In *Brodie v Singelton SC* the High Court said that a finding of liability would, from then on, be based on ordinary principles of negligence.²⁹ The Ipp Report noted that there was a widespread view among councils that negligence laws were being applied in a way as to allow decisions about the allocation of scarce resources between competing

²⁷ Davis R, APLA, 'APLA cautious on public liability reform', *Media Release*, 30 May 2002; LCA, *Submission to the Negligence Review Panel*, 2 August 2002, pp 29-31.

²⁸ ACCC, *Second Submission to the Negligence Review Panel*, August 2002, p 2.

²⁹ [2001] HCA 29 (31 May 2001). The issue is discussed in N Dixon, 'High Court Abolishes Negligence Immunity for Highway Authorities', *Research Brief*, Queensland Parliamentary Library, RB16/2001.

priorities, to provide the basis for findings of liability. It was argued that this adversely impacted on their ability to perform their functions (p 151).

For example, a local authority might not have repaired a pothole that it does not know about. It may be responsible for the upkeep of 10,000 km of roads and, given budgetary constraints, cannot inspect the roads any more than once every six months. The decision not to inspect would appear to be a ‘policy’ one. Should that found liability on the part of the authority?

The NSW Premier expressed concern that while it may not be a good approach to fully reinstate the immunity, care must be taken to protect public authorities from unrealistic standards imposed with hindsight by the courts. Mr Carr stated that action would be taken to ensure that the mere existence of a power in an authority does not imply a duty to exercise it unless explicitly made clear by Parliament.³⁰ The Ipp Review Panel also said that the immunity should not be restored but some of the consequences of its removal needed to be addressed. This was particularly regarding decisions about allocation of resources and making social policy.

The Ipp Report recommended that legislation should embody the principle that in any action regarding the negligent performance or non-performance of a public function (ie one that requires the authority to balance the interests of individuals against the wider public interest, or to take account of competing demands on resources), a policy decision (ie one based on financial, economic, political or social factors or constraints) cannot support a finding of negligence unless it was so unreasonable that no reasonable public authority in the defendant’s position would have made it.

The requirement that allows the defendant to rely on the policy defence unless it is unreasonable in the sense described does not restore the immunity against liability but it does assist the authority in giving it more choice in determining how to exercise its functions than would be the case if the normal ‘reasonable care’ concept of negligence applied (pp 157-158).

Chapter 2, Part 3 of the draft CLB (Qld) implements the tenor of the Ipp Report recommendation in relation to civil liability in tort even if sought in a breach of contract action or other action. **Clause 36** sets out the principles concerning resources and financial constraints, competing functions etc of a public or other authority that apply in determining duty of care and breach of duty. **Clause 37** states that an act or omission of the authority does not constitute a wrongful exercise or failure unless it was, in the circumstances, so unreasonable that no authority having the functions of the authority in question could properly have considered it to be a reasonable exercise of its function.

³⁰ Hon B Carr, NSW Premier, ‘Public Liability’, *Media Release*, 11 June 2002.

However, **cl 38** is very broad and effectively restores immunity for road authorities regarding repair, upkeep and inspection that was removed by the High Court in *Brodie*. However, it will expire at the end of 2005. The NSW *Personal Responsibility Act* is more general in that the roads authority will not be liable unless it actually knew about the risk, in which case it can rely upon the ‘resources and constraints’ proviso that would otherwise apply (which is similar to the abovementioned cl 36 of the Queensland draft Bill). Note also that the NSW legislation protects an authority that has not exercised a regulatory function (eg to close down premises) unless it could have been legally compelled to do so.

6.6 NOTIFICATION PERIODS FOR MINORS

The draft CLB (Qld) proposes to amend the *Personal Injuries Proceedings Act* by inserting provisions regarding notification of claims for injuries to children.³¹

The Ipp Report noted that although limitation periods have a procedural character, they do affect substantive rights and liabilities by preventing persons from commencing proceedings after the effluxion of a specified time period. They must therefore be fair and workable and strike an appropriate balance between the right of a plaintiff to determine that they have a cause of action and that of a defendant to properly defend a claim long after the relevant event when records and witnesses may be lost (p 85). Under the Queensland *Limitation of Actions Act 1974*, the time in which an action for damages for personal injuries must be brought is within 3 years from the day on which the cause of action arose.

The Ipp Report recommended that a 3 year limitation period apply, commencing on the date when the plaintiff knows or ought to know that the personal injury had occurred and was attributable to the negligence of the defendant and was sufficiently significant to warrant the bringing of proceedings. This ‘date of discoverability’ would replace the ‘date of accrual of cause of action’ approach that applies in places such as Queensland. This recommendation echoes that made by the Queensland Law Reform Commission’s 1998 Report *Review of the Limitation of Actions Act 1974 (Qld)* and has been adopted by the NSW *Personal Responsibility Act*.

In most jurisdictions, limitation periods are suspended for minors and incapacitated persons (eg in Queensland, minors can sue until age 21). This has created concern among some insurers that they are unable to forecast, and therefore have difficulty underwriting, the making of a claim many years in the future. The recent highlighting of a \$14m damages award to a woman born with cerebral palsy due to the negligence of her obstetrician in procuring her delivery in 1979 has made many

³¹ **Proposed new Chapter 2, Part 1, Division 1A** of the *Personal Injuries Proceedings Act 2002*.

obstetricians fearful of one day being sued for something they did long before. In addition, obstetricians and other key specialists have faced insurance premiums exceeding \$100,000 pa over the past year.³²

The Ipp Report noted that legislation in some states (NSW and Tasmania) reflects the view that the community expects that parents/guardians should take the necessary steps to initiate proceedings on behalf of minors and incapacitated persons within the same time limits that apply generally. The Review Panel considered that limitation periods and long-stop periods (ie a period applying to situations where a condition manifests itself long after the occurrence of the event, or in a form difficult to detect) should apply to both classes of plaintiffs, except in situations when there is no person looking after the minor or incapacitated person. Generally, however, the limitation period should be 3 years from the date when the parent, guardian or administrator should or ought to have known that the injury or death has occurred and was attributable to negligence of the defendant, and was sufficiently significant (p 96). The NSW *Personal Responsibility Act* provides for the normal time limit to run against all persons with the exceptions outlined by the Ipp Report. For example, if a child's parents 'irrationally' fail to bring a claim on the injured child's behalf, the court can extend the limitation period for up to 1 year.

The new Queensland provisions relate to child claimants who suffer personal injury arising out of the provision of medical treatment only. They are expressed not to limit or affect the *Limitation of Actions Act 1974*. The amendments to the *PIP Act* encourage the early notification of claims on behalf of children, while ensuring that the rights of children to claim damages for personal injury are protected.³³ The effect of the changes is that a minor will still be able to sue up to the age of 21 but their parents are encouraged to make a claim as early as possible on the basis that, by not doing so, they may later miss out on recovering medical and other costs incurred by them prior to the relevant time.

As noted earlier, for the rest of the community, claims for damages are commenced by a notice of claim being given to the alleged respondent within 9 months of the incident or first appearance of the relevant symptoms. If a lawyer is consulted, a 1 month limit applies. A timeframe for response is also imposed upon the respondent, including the time in which settlement offers must be made.

The new requirements applying to children are that the parent/legal guardian (parent) must give notice of a claim before the earlier of either –

³² See Beth Quinlivan, 'Errors in the system', *Business Review Weekly Online*, 27 June 2002 and Tim Colebatch, 'Canberra forced to step in on medical insurance crisis', *The Age Online*, 22 April 2002.

³³ Draft Civil Liability Bill 2002 (Qld), *Explanatory Notes*, p 16.

- the day 6 years after the day when the parent knew or ought reasonably to have known that the personal injury has occurred and was attributable to the negligent conduct of the defendant; or
- the day 1 year after the day the parent first consults a lawyer about the possibility of seeking damages and the person against whom the proceedings are proposed is identified. The lawyer so acting must give the relevant notice as soon as practicable after being so instructed to do so by the parent or else face a charge of unprofessional conduct or practice.

Where the notice of claim is given after the abovementioned time, the respondent may apply to the court for an order that the claim not proceed. The court must consider the justice of the case having regard to a set of factors including prejudice to the defendant as a result of the delay (eg records going missing, witnesses' disappearing or forgetting facts). Even if the claim is permitted to proceed, the claimant cannot recover certain costs in relation to any period before giving the notice, unless the court orders otherwise.

Certain requirements regarding time for making a claim will also apply to situations in which a person providing medical treatment gives a parent a notice of adverse incident arising out of that treatment. That notice can, if the practitioner so wishes, be accompanied by an expression of regret or an offer to remedy any harm, or both an apology and offer. As explained above, the *PIP Act* enables persons to express regret about an incident that may give rise to a claim without fearing that such may be construed or used as an admission of liability. Expressions of regret made after 18 June 2002 are inadmissible in any subsequent court proceedings. Similarly, a notice of adverse incident is not an admission of liability and is inadmissible in any subsequent court proceedings.

If a notice of adverse incident is given, the notice of claim must be delivered within 6 years after the day when the parent knows or ought to have known about the personal injury and was attributable to the defendant's negligence; or, if a lawyer is consulted, within 1 year. If the relevant time has expired, the claimant must seek leave of the court to proceed with the claim and the court will consider the factors mentioned above in deciding whether or not it should proceed.

Even if the claim is permitted to proceed, the claimant cannot recover certain costs in relation to any period before giving the notice, unless the court orders otherwise.

The Queensland Premier has noted that without reform, doctors in the private health sector may cease performing some procedures on children, and women in regional areas may have to travel to the southeast of the State for delivery of their babies.

6.7 DEFENCES WHERE PLAINTIFF INTOXICATED OR INJURED WHILE COMMITTING A CRIME

The draft CLB (Qld) also contains provisions (in **Chapter 2, Part 4**) that depart from the Ipp Report recommendations to some extent. Part 4 will prevent persons relying upon the fact they were intoxicated while carrying out an activity during which they suffer injury by providing that the plaintiff's intoxication is not relevant to determining duty of care and does not of itself affect the defendant's standard of care. There is also a rebuttable presumption that an intoxicated person is contributorily negligent (to the extent of at least 25% in non motor accidents and up to 50% in some circumstances involving motor accidents) unless it can be shown that the intoxication did not contribute to the incident or the intoxication was not self induced. The NSW *Personal Responsibility Act* has similar but not identical provisions that apply to such situations. Under the draft CLB there is also a presumption of contributory negligence if the plaintiff has relied on the care and skill of a person known to be intoxicated, which operates in the same way.

In addition, persons will not be able to make a claim if they are injured while committing an indictable offence. In relation to the latter, it should be noted that the common law position is that there is no duty of care owed to a person engaged in a criminal activity. The NSW *Personal Responsibility Act* has a similar provision to prevent recovery if the injured person was engaged in the commission of a serious offence. Thus, a person who breaks and enters a home cannot claim damages if they hurt themselves while doing so. In addition, the NSW Act also provides that the criminal cannot recover damages if they are injured through a person exercising self-defence to protect life or property, even if the action is excessive, unless the court considers the circumstances are exceptional.

6.8 PROPORTIONATE LIABILITY

At present, if there are one or more defendants, each is liable to the plaintiff for the full amount of any damages. Thus, the plaintiff can choose to recover from the defendant against whom it appears most likely there is a chance of full recovery (the one with the 'deepest pockets'). There may be two defendants and only one is solvent or one is a big corporation or government body. The underlying premise is that each defendant was negligent and no one of them should be able to deny that they are liable for the whole of the harm suffered. In addition, each defendant can seek a contribution from any one or more of the others for the damages recovered by the plaintiff. There has been some support for the introduction of a system of 'proportionate liability' on the basis that the present one is unfair and makes it difficult for insurers to assess risks.

Proportionate liability is a system where liability among multiple defendants is apportioned according to their respective responsibilities. If one of the defendants

is unable to be sued or is bankrupt, the plaintiff will not be able to recover that defendant's share of the damages. The Review Panel considered that there were a number of objections to the introduction of a system of proportionate liability for personal injury or death and that it was not a system supported by academic opinion (p 175).

The Ipp Report noted that, under this system, a person harmed by two defendants could be in a worse position than a person harmed by one defendant if one of the two defendants was insolvent or had disappeared. The Panel did not believe that there was any difference between the systems when it came to risk assessment because such assessment would necessarily have to be on the basis that the insured party could well be the sole defendant.

Although the Ipp Report recommended against a system of proportionate liability for claims for personal injuries and death, it did not consider or assess options for its introduction in the context of property damage or pure economic loss. Examples would be damages for negligent financial advice. An APLA paper submitted to the Review Panel argued that studies had shown that while proportionate liability might be appropriately applied to economic loss situations, it should not apply to personal injuries cases because such losses are more difficult to accurately apportion.

Chapter 2, Part 2 of the draft CLB (Qld) introduces proportionate liability for property damage or pure economic loss as well as for claims for contravention of the provisions of the *Fair Trading Act* regarding misleading and deceptive conduct. Virtually identical provisions exist in the NSW *Personal Responsibility Act*. Proportionate liability will not apply to claims for personal injuries. The court will be able to apportion liability between concurrent defendants that reflects the proportion of the damage or loss that the court considers just having regard to the extent of the defendant's responsibility.

Part 2 sets out a number of provisions regarding proportionate liability and deals with a number of related issues such as denial of contribution between defendants.

6.9 ASSESSMENT OF DAMAGES FOR PERSONAL INJURY

As noted above, the Queensland *PIP Act* introduced some caps and restrictions on some heads of damages and in relation to interest on damages. Economic loss payouts are capped at three times average weekly earnings (AWE) and there are restrictions on awards for loss of consortium or servitium and awards for gratuitous services. Also, no punitive, exemplary or aggravated damages are awarded. The assessment of damages provisions are relocated to the draft CLB in order to bring all relevant provisions within the one piece of legislation.

It appears that most jurisdictions (including Queensland) have, or are proposing, a cap on damages for loss of earning capacity at three times AWE (ie \$315,486). Only around 1.4% of Australian employees earn more than this amount,³⁴ meaning that many would not be disadvantaged by the cap. The Ipp Report supported the use of caps as providing an incentive for high income earners to insure against loss of earning capacity but recommended a cap of *twice* AWE as fair as it still covers all but around 2.4% of employees (p 198).

The Ipp Report believed that damages for gratuitous services should be retained, reflecting community acceptance that some compensation for loss of capacity to care for oneself should be made, but that limits needed to be set to curtail the frequently large amounts given under this head (p 200). Accordingly, it considered that the threshold for such damages applying in Queensland should be adopted nationally (ie must be provided in excess of 6 hours per week and for more than 6 months) and that a cap by reference to AWE should be imposed (p 205).

6.9.1 Restrictions on Assessment of General Damages

General damages are defined in the draft CLB (Qld) as damages for pain and suffering; loss of amenities of life (ie the ability to enjoy life), loss of expectation of life (loss of prospective happiness due to loss of life expectancy), and disfigurement. They are, by nature, compensation for intangible loss, and difficult to quantify. This has led to wide jurisdictional variation in the levels of damages awarded under this head. The May 2002 Trowbridge Report to the Insurance Issues Working Group of Heads of Treasuries, [*Public Liability Insurance: Practical Proposals for Reform*](#) commented that because general damages represent 45% of personal injury claims between \$20,000 and \$100,000, reform to this head of damages would have the greatest impact among the range of tort reforms. Queensland does not have the same history of large general damages awards as experienced in NSW and Victoria.

The Review Panel considered that a tariff system – amounts for different types of injury – should be introduced at a national level, similarly to the position in England where there are published guidelines setting out maximum and minimum amounts payable for most types of injuries based on past practice. It appears that the guidelines have been successful in facilitating settlements and achieving predictability in the assessment of general damages and, provided they are regularly updated, should work well in Australia (p 187). The approach has been adopted by the NSW *Personal Responsibility Act*.

³⁴ Ipp Report, p 197 citing ABS statistics as of May 2002, (pub no. 6302.0).

A number of jurisdictions have thresholds or caps or both. Queensland, ACT and Tasmania have neither. The Ipp Report recommended a threshold for awards based on a percentage (15%) of a 'most extreme case', as under the NSW *Civil Liability Act*, given that it appeared to be understood in practice and regarded as reasonably fair. Most cases below the 15% threshold would tend to be relatively minor soft-tissue injuries (pp 192-193). It also recommended that general damages be capped on a national basis at \$250,000. Failing that, each jurisdiction should legislate for a single cap applying to all schemes involving personal injuries within that jurisdiction (p 195).

Clause 56 of the draft CLB (Qld) proposes a new method of assessment of general damages which involves a 100 point scale upon which the court must assess the degree of the injury. The total general damages is assigned a numerical value on a scale ranging from a point where an injury is not severe enough to justify general damages to a point where the injury is of the gravest conceivable kind. In assigning a value, the court will consider the range for prescribed similar injuries and values attributed to similar injuries in earlier proceedings.

Clause 57 then sets out the method for calculating general damages for injuries arising after 1 December 2002. For example, if the scale value is assessed at up to 5, the value is multiplied by \$1,000. The maximum award is that if the scale value is 96-100, then \$233, 250 is added to multiplying \$3,400 by the number by which the scale value exceeds 95.

6.9.2 Loss of Superannuation Entitlements

Under **cl 51** of the draft CLB, it is proposed that an award of damages for loss of employer superannuation contributions will be limited as set out in that provision. This reflects Ipp Report recommendations (p 218).

6.9.3 Collateral Benefits

In assessing damages, it is proposed the court must deduct the value of any collateral benefit received as a result of the personal injury (apart from charitable, statutory social security and health care benefits) on the like-against-like principle (**cl 47**). A collateral benefit is a benefit from a source other than the defendant such as a health care benefit, or an insurance or superannuation payment. The effect of the proposal is that the court assesses damages that would be payable to the plaintiff and then deducts the collateral benefit (eg an income protection insurance benefit) from the head of damage that is of the same nature as the benefit (eg damages for loss of earning capacity).

The Ipp Report noted the inconsistency between jurisdictions regarding the types of collateral benefits that are set off against damages awards and the situations in which there is no set off (eg death claims). Where there is no set off, it gives rise to the criticism that the plaintiff is getting more than full compensation for their loss. On the other hand, where set off does occur, there is a view that the defendant is being advantaged (p 219). The proposed provisions of the draft CLB (Qld) adopt the Report's recommendation that there should be set off in relation to collateral benefits other than charitable benefits. It made no recommendation about offsetting statutory social security or health care benefits (pp 223-224).

6.10 FACILITATION OF STRUCTURED SETTLEMENTS

The concept of structured settlements – where compensation is provided by way of periodic payments (generally funded by an annuity) rather than by a 'once and for all' lump sum award – was discussed in RB19/2002. Under the *PIP Act* (Qld) (to be relocated as **cl 58** of the draft CLB) and the *Civil Liability Act 2002* (NSW), power is given to the courts to make a consent order for a structured settlement. It must be a voluntary agreement between the parties and cannot be forced upon them by the court, reflecting the position in a number of overseas jurisdictions where structured settlements are encouraged but are not mandatory.

In RB19/2002, it was noted that meetings between senior Ministers supported structured settlements and the action to be taken by the Commonwealth Government to amend taxation laws to make structured settlements more favourable.³⁵ Lump sum payments were tax free but annuities used for structured settlements were not.

The Ipp Report considered that structured settlements were advantageous to seriously injured plaintiffs as it relieved them from the need to manage their compensation and provides them with a more secure source of income over a longer term. It noted studies indicating that lump sum awards over long periods often run out before the end of the period, even if wisely invested and managed (p 215). It therefore believed, noting submissions to the Panel supporting structured settlements, that it was in the public interest that in the more serious cases, parties have the incentive and opportunity to reach a structured settlement.

The Commonwealth Taxation Laws Amendment (Structured Settlements and Structured Orders) Bill 2002 has passed both Houses. It will amend Commonwealth taxation laws to encourage structured settlements in personal injuries actions by providing an income tax exemption for annuities and certain

³⁵ Senator The Hon H Coonan, Minister for Revenue and the Assistants Treasurer, *Joint Communiqué – Ministerial Meeting on Public Liability*, Melbourne, 30 May 2002.

deferred lump sums paid as compensation for seriously injured persons under such arrangements. It will also allow for court ordered structured payments to provide for instances where a plaintiff wishes to proceed to a hearing rather than settle out of court. Eligibility criteria must be met, the purpose of which is understood to be the protection of plaintiffs' interests (eg by providing for prudential regulation of the annuities).³⁶ Life insurance companies will also be exempt from tax on income derived from assets supporting the annuities and lump sum. The *Life Insurance Act 1995* will be amended to provide that any commutation or assignment of a tax exempt arrangement will be ineffective. The measures will apply in relation to arrangements entered into after 26 September 2001.

6.11 OTHER PROPOSALS

Some measures are also proposed, in accordance with Ipp Report recommendations, that will not be discussed in this Brief. They include provisions about liability based on non-delegable duties (cl 24). Ipp Report recommendations concerning mental harm are not covered by the draft CLB (Qld) but are by the NSW legislation.

7 LEGISLATIVE REFORM IN OTHER JURISDICTIONS

When introducing the **Western Australian** Civil Liability Bill in August 2002, the WA Parliamentary Secretary to the Premier stated that a milder approach had been taken than that in NSW because there was no real evidence of a claims explosion in WA. Mr McGauran argued that the bulk of claims and greatest cost to the insurance industry came from NSW and because premiums are costed on a national basis, rigorous reforms in NSW should flow on to premiums nationally.³⁷ Other reforms in WA include legislation protecting individual volunteers engaged in community work and insurance legislation to enable the Government to provide insurance cover to eligible not-for-profit and community organisations.

The legislative reforms that have occurred in the **Australian Capital Territory** are contained in the *Civil Law (Wrongs) Act 2002*. In addition to consolidating laws relating to civil wrongs and modifying some common law principles, it also facilitates structured settlements and imposes restrictions on legal costs for smaller claims. On 18 October 2002, the **Northern Territory** Government introduced the

³⁶ Roza Lozusic, 'Public Liability – an update', *Briefing Paper 11/2002*, NSW Parliamentary Library, 4.10.

³⁷ Chris Merritt, 'Tort reform: NSW goes out on a limb', *Australian Financial Review*, 30 August 2002, p 55.

Personal Injuries (Liabilities and Damages) Bill into Parliament which seeks to implement a number of the Ipp Report recommendations.

In October 2002, the **Victorian** Government passed the *Wrongs and Other Acts (Public Liability Insurance Reform) Act*, most of which commenced operation on 23 October 2002. There is a cap on general damages of around \$370,000 and on loss of earnings to three times AWE. Liability of volunteers is transferred to the voluntary organisation; recreational service providers can use waivers; the Victorian Essential Services Commission can collect data from insurers about Victorian risks. Other provisions reflect the Ipp Report recommendations. The Government has also created a group insurance scheme for community bodies and provided grants for risk management activities and programs to the Municipal Association of Victoria and adventure tourism operators.

South Australia passed the *Recreational Services (Limitation of Liability) Act* in September 2002 to enable participants in recreational services to waive the liability of providers of those services provided the providers abide by a code of conduct designed to ensure reasonable protection of consumers. The *Wrongs (Damages for Personal Injury) Act 2002* imposes restrictions in relation to damages awards and makes some other tort reforms. Other separate pieces of legislation allow structured settlements and protect certain classes of volunteers.

Tasmania also has implemented legislation that restricts damages awards and imposes a 3 year statute of limitations period for personal injury claims. The Government is also involved in a range of programs and schemes aimed at assisting not-for-profit organisations. Reforms consistent with the Ipp Report recommendations are being implemented.

8 CONCLUSION

The impact of the various legislative reforms taken by Australian governments will take some time to emerge. Meanwhile, there are fears that the insurance problems may not be rectified by the new measures. In late December 2002, local insurers reported that their international reinsurers were passing on large increases which would have to be reflected in an increase in premiums of around 30% over the next two years before levelling off in 2004. Returns on investment were also poor. Some insurance companies continue to believe that reforms would rein in premium rises but consumers would still face increases over the next 1-2 years. The problem appears to be that Australia is a small part of the global insurance market and international pressures impacted just as significantly as domestic reforms.³⁸

³⁸ Linda Morris, 'Community cover in for another price jolt', *Sydney Morning Herald Online*, 26 December 2002.

However, over that same timeframe, the impact of new tort reforms – positive or negative – should begin to be seen.

APPENDIX A – MINISTERIAL MEDIA STATEMENT

Hon Rod Welford MP, Attorney-General and Minister for Justice

2 December 2002

Common sense insurance proposals to give more certainty to Queensland

The Queensland Government is proposing to cap general damages at \$250,000, under a common sense package that would give more certainty to doctors, local councils, sporting clubs and others.

The proposals, to be tabled in Parliament this week and circulated for consultation, include changes to the test that determines what is negligent.

Premier Peter Beattie said today: "New tort law reforms will aim to settle concerns of people like doctors that they could be easily sued while innocently delivering vital services.

"Attorney-General and Minister for Justice Rod Welford will table a consultation draft of the legislation in Parliament this week.

"I expect the Attorney-General will introduce legislation to the Parliament in February 2003, after thorough consultation.

"The medical profession is warning it will stop performing some procedures on children in the private health sector unless doctors have more security against future lawsuits.

"There is a risk that babies would only be delivered in the southeast corner.

"We want to ensure regional Queensland women can go on giving birth nearer to home.

"We also want to make sure Queenslanders have the continuing service of doctors who perform complex procedures on babies and children.

"Under the reforms, a parent or guardian would be required to notify a doctor of a claim within six years of the day the parent or guardian knew - or should have known - that the child sustained an injury due to the doctor's negligence.

"Additionally, if a parent or guardian sought legal advice about the possibility of claiming damages for medical negligence, the period of notification would be reduced to one year from the time they sought legal advice.

Mr Beattie stressed the six year limit would only apply to medical negligence.

"Other proposed measures would mean professionals, local councils and sporting clubs could go about their business without living in almost constant fear of receiving a writ.

"Professionals such as doctors would not be negligent if they provided treatment in line with an opinion widely held by a significant number of their peers.

"Councils would not be liable for failing to warn about obvious risks - like the risks of surfing beyond a shark net, or of diving into a wading pool.

"And organisations would not be liable for injuries from obvious risks - like a player being hit in the eye during a cricket match," Mr Beattie said.

Mr Welford said these proposals, along with the proposed \$250,000 cap on general damages, would further reduce upward pressure on insurance premiums.

"We want to destroy any last vestige of an excuse by the insurance industry to charge inflated premiums to local councils and sporting organisations," Mr Welford said.

"Our reforms would change the way in which our society interprets negligence and put a sense of personal responsibility back into the equation.

"There would be a balance between the rights of injured people and the community need for affordable insurance cover.

"The reforms would build on our first package, which included procedural changes to cut legal costs, an end to jury trials in personal injury cases and a ban on no-win no fee lawyer advertising," Mr Welford said.

The proposed reforms are in line with recommendations from Justice Ipp, who chaired the National Expert Panel on changes to the law of negligence.

A summary of the proposals is as follows:

- A \$250,000 cap on general damages;
- No liability for failure to warn of obvious risks;
- No liability for injuries arising from obvious risks in the case of recreational activities;
- No liability in cases where the injured person was engaged in criminal activity which contributed to the risk of injury. This will mean that where a court determines, on the balance of probabilities, that a person was engaged in a criminal act, the person will not be entitled to claim damages;
- Restricted claims where a person's intoxication contributed to their personal injury. This will involve the mandatory reduction of damages to a claimant who is intoxicated, and removal of any special duty owed to people simply because they are intoxicated; and
- A change in the standard of care for professional groups, including doctors, to protect against liability for acts performed in accordance with a respected body of professional opinion

The laws of negligence would be further clarified by legislation which would:

- Codify the test for determining negligence, and in particular provide that a person is only required to act to prevent a risk that is "not insignificant";
- Codify legal principles in determining whether a defendant actually caused the plaintiff's injury;
- Codify the test for determining contributory negligence and allow damages to be reduced by 100%;
- Limit the scope of liability of public authorities by allowing the Courts to take into account their financial resources and other factors;
- Introduce proportionate liability for non-personal injury cases so where there are multiple wrongdoers each bears a share of liability in proportion to their share of responsibility for the harm; and
- Disallow pre-judgement interest on damages for non-economic loss.

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APPENDIX B – NEWSPAPER ARTICLES

Title **Child liability move to cut medical claims**
Author **Rosemary Odgers**
Source **The Courier-Mail**
Date Issue **3 December 2002**
Page **7**

Damages payouts for children injured through medical negligence will be reduced if parents fail to lodge their claims within six years, under proposed State Government laws.

State Cabinet yesterday approved the plan in which children would retain the right to sue for negligence until they are 21.

But parents or guardians who fail to act on their behalf within six years of discovering their child's injury would be prevented from claiming any medical or other costs incurred before the writ was lodged.

Lawyers will also be required to bring medical negligence proceedings within a year of parents contacting them, while the test for determining negligence will be tightened.

The six-year limit will apply only to medical negligence and is aimed at encouraging quick resolution of disputes and helping resolve the long-running indemnity insurance crisis.

The proposed laws also cap general damages payouts for all negligence claims at \$250,000 and limit payouts to people who are injured while intoxicated, committing a criminal act or undertaking a dangerous activity.

Councils and sporting clubs will no longer be liable for failing to warn people about obvious risks such as surfing beyond a shark net or diving into a wading pool.

Organisations would also not be liable for injuries from obvious risks, like a player being hit in the eye during a cricket match.

Attorney-General Rod Welford yesterday said the laws would help reduce insurance premiums but ensure Queenslanders were still protected from legitimate negligence.

Mr Welford said the medical negligence reforms would strike a balance between protecting children and preventing an exodus of doctors, by giving parents a financial incentive to provide notice of claims earlier.

"We're sending a clear signal to parents that they have to take responsibility for their children," he said.

Lobby groups generally welcomed the proposed changes which will not become law until early next year to allow for public consultation.

Specialists had been warning for several months that they would withdraw their services from the private health system unless the Government reduced the statute of limitations for children to cut their tail of claims.

Australian Medical Association Queensland president Dr Russell Stitz said he believed the Government had appropriately balanced the need to reduce insurance while protecting children's rights.

Queensland Doctor's Mutual executive officer Peter Marer said the legislation would help contain insurance premiums.

The Australian Plaintiff Lawyers Association said the reforms sacrificed children's rights.

"Those who hurt our kids should be accountable," spokesman Ian Brown said.

"They should not be rewarded by having their liability for compensating those injured cut back."

Opposition Leader Mike Horan welcomed the changes but criticised the Government for not acting sooner.

"We put forward a lot of these proposals months ago and it has taken them months to act," he said.

KEY REFORMS.

- \$250,000 cap on general damages.
- No liability for failing to warn of obvious risks and no liability for injuries arising from obvious risks in recreational activities like bungee jumping.
- No liability for people injured while engaged in criminal acts.
- Restrictions on insurance claims for people injured while intoxicated.
- Statute of limitations on medical negligence involving children stays at 21 years but financial incentives for parents to start action within six years.

Title Queensland plan to put onus of risk on individual
Author Sam Strutt
Source The Australian Financial Review
Date Issue 3 December 2002
Page 9

The Queensland government will table the final stage of the state's most comprehensive shake-up of negligence laws with a package designed to put the onus of responsibility back on individuals.

Under the proposals, from which legislation will be drafted and introduced into state parliament in February, there will be:

- A \$250,000 cap on general damages.
- No liability for failure to warn of obvious risks.
- Restricted claims for those engaged in criminal activities or under the influence of alcohol.
- Limited liability for public authorities by allowing the courts to take into account their financial resources.

Queensland Attorney-General Rod Welford yesterday described the package as historic.

"This is the most comprehensive reform to the law of negligence ever in our state," he said.

"Our reforms would change the way in which our society interprets negligence and put a sense of personal responsibility back into the equation."

Mr Welford said the proposed reforms were in line with the recommendations of the recent Ipp report into the public liability crisis.

Hopes for a national solution to the insurance crisis evaporated last month after the federal and state governments rejected uniform tort law reform.

Instead, finance ministers opted for individual state legislation to be introduced by the first half of next year.

Despite agreeing on a package to implement key recommendations of the Federal Government's review of the law of negligence, chaired by Justice David Ipp and released in September, the Labor states in effect have dumped the review's main proposal for a single piece of legislation to remove legal uncertainty between jurisdictions.

The Queensland government, as part of its state-based reform package to address the crisis in public liability and medical indemnity insurance, has already passed legislation banning jury trials for people seeking personal injury payouts.

Lawyers in Queensland have also been banned from advertising on a no-win, no-fee basis and some personal injury payouts will be capped.

Meanwhile, the state government might push through legislation this week to close a loophole in its anti-terrorism laws.

Title Queensland plan to put onus of risk on individual
Author Sam Strutt
Source The Australian Financial Review
Date Issue 3 December 2002
Page 9

Public liability insurance premiums are tipped to drop by 15 per cent within months after state and federal Treasurers yesterday agreed to a national approach to tort reform.

The treasurers emerged late yesterday from a meeting in Brisbane to announce they agreed with the "thrust of reforms" outlined in Justice David Ipp's review of the law of negligence.

They would introduce laws to implement most recommendations.

Significantly, they agreed to introduce so-called "template legislation" in each state, meaning insurance tort reform laws would be written in as similar terms as possible by each state.

The Federal Government will move immediately to amend the Trade Practices Act to complement the law reform being pursued by the states and territories.

Of the 45 Ipp recommendations - which include voluntary assumption of risk and a three-year limit on the right to sue for negligence - only two were rejected by Treasurers, while 33 were accepted outright.

The act of solidarity came after a report by Price-waterhouseCoopers showed the Ipp package would reduce insurance premiums by 13.5 per cent, with an 80 per cent reduction in the number of small claims.

Assistant Federal Treasurer Helen Coonan said the landmark agreement was good news for consumers, but warned its full effect might take some years to kick in.

"The high price and lack of availability of public liability insurance has hurt many community and sporting groups, business and individuals around the country," Senator Coonan said.

"I urge all state and territory governments to maintain the momentum of reform and bring legislation before their state parliaments as a matter of urgency."

Queensland Treasurer Terry Mackenroth said he would introduce the reforms early next month, to be debated by Parliament in February.

Mr Mackenroth said the Beattie Government was yet to decide on the limitation period it would impose on negligence claims involving children, and about what cap should be placed on court-ordered payouts.

Insurance Council of Australia executive director Alan Mason said the decision by Treasurers would set the scene for greater affordability and availability of public liability insurance.

Mr Mason said insurers agreed with the assessment by PricewaterhouseCoopers of the reduction in the cost of claims and premiums.

"These outcomes will of course depend on the accurate drafting of the legislation, the timetable for the legislation to be passed in each jurisdiction and its interpretation by the courts," Mr Mason said.

"However, the collective commitment to reform by Commonwealth, state and territory governments is to be applauded."

The tort reform package agreed to yesterday will be referred for endorsement to the next Council of Australian Governments meeting, early next month.

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