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LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

CIVIL LAW (WRONGS) BILL 2002

EXPLANATORY MEMORANDUM

Circulated by authority of the
Attorney General
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CIVIL LAWS (WRONGS) BILL 2002

Outline

The Civil Law (Wrongs) Bill 2002 (the Bill) addresses legal issues arising from the recent insurance crisis and aims to improve the ACT civil justice system, by reforming tort law.

Civil law is usually defined as law that does not deal with criminal proceedings. A better definition of civil law is that it includes the law relating to property, contracts and wrongs. This Bill deals specifically with wrongs, which are also known as torts.

Unlike other jurisdictions, the ACT tort law has become fragmented. The statutory provisions dealing with tort law have been scattered through ACT laws such as the *Law Reform (Miscellaneous Provisions) Act 1955* and the *Innkeepers Liability Act 1902*, while much of the applicable law in the ACT remains uncodified common law. Some of this uncodified law, such as the constraints on awards of annuities, is inconsistent with community expectation and contemporary claims management.

The fragmented state of ACT statutory law concerning torts provides an unsatisfactory basis from which to build the types of reforms that are necessary to address the recent insurance crisis and improve the civil justice system.

The Bill serves three main purposes. Firstly, the Bill consolidates the tort law provisions in ACT legislation and sets up a structure for continuous reforms to the civil justice system. Secondly, the Bill adopts a range of technical and procedural changes to ensure that the law reflects current ACT practice. These changes include abolishing civil juries, which were abolished in defamation actions from 1 July 2002 and have not been empanelled in other civil matters in living memory, and provisions permitting neutral evaluation. Thirdly, the Bill adopts various measures that will have a positive impact on civil procedure and access to justice, with a view to quicker and cheaper resolution of disputes.

Chapters 3, 5, 6, 7 and 9 and Parts 2.3, 2.4, 4.2, 4.3, 8.2, 8.3, 11.3, and 11.4 of the Bill are restatements of existing law. As there is no policy change for these Chapters and Parts, the explanatory memorandum does not go through these provisions clause by clause. The remaining Chapters and Parts of the Bill contain new measures that will have a positive impact on civil procedure. The explanatory memorandum details each clause of the new measures. These new measures include:

- abolishing the common law prohibition of annuities, to permit the courts to award damages by periodic payments funded by annuities or by other means. This gives the court flexibility in ordering the payment of damages and in turn gives the parties flexibility in deciding how the funds are to be managed;
- abolishing rules preventing a court from making a determination of liability separate from an order of damages;
- providing protection for Good Samaritans and volunteers, including bushfire volunteers, from liability;
- establishing new presumptions in regards to contributory negligence;
- replacing the common law rules regarding the standard of care an occupier of premises must show to people entering on the premises in relation to any dangers to them;

- capping the legal costs in personal injury cases, where the award of damages is \$100,000 or less;
- prohibiting lawyers from prosecuting a civil claim where there are no reasonable prospects of success; and
- establishing a regime for neutral evaluation of cases, with the view to quicker and cheaper resolution of disputes.

Further, the Bill requires market participants (whether offering insurance or insurance-like products such as mutuals) to provide, in relation to the ACT market, annual returns indicating the quantum of premium taken, claims made, claims paid and claims refused. The reporting requirements in the Bill are harmonized with other ACT reporting requirements, such as provisions relating to building indemnity and taxation. The Bill ensures that the commercial information in the reports is given appropriate protection against public disclosure.

Financial Implications

Nil.

Clause Notes

Chapter 1 – Preliminary – are formal clauses that deal with the name of the Act, its commencement and clarifies the role of the dictionary and notes in the Act.

Chapter 2 – Provisions applying to wrongs generally – sets out the general provisions applying to all wrongs. Specifically, this Chapter relates to Good Samaritans, volunteers, the survival of actions, and proceedings against and contributions between wrongdoers.

Part 2.1 Good Samaritans

The Parable of the Good Samaritan is found only in Luke 10:29-37. Jesus was asked:

"And who is my neighbor?" In reply Jesus said: "A man was going down from Jerusalem to Jericho, when he fell into the hands of robbers. They stripped him of his clothes, beat him and went away, leaving him half dead. A priest happened to be going down the same road, and when he saw the man, he passed by on the other side. So too, a Levite, when he came to the place and saw him, passed by on the other side. But a Samaritan, as he traveled, came where the man was; and when he saw him, he took pity on him. He went to him and bandaged his wounds, pouring on oil and wine. Then he put the man on his own donkey, took him to an inn and took care of him. The next day he took out two silver coins and gave them to the innkeeper. 'Look after him,' he said, 'and when I return, I will reimburse you for any extra expense you may have.' "Which of these three do you think was a neighbor to the man who fell into the hands of robbers?" The expert in the law replied, "The one who had mercy on him." Jesus told him, "Go and do likewise."

Since biblical times, good Samaritans have enjoyed a special place in peoples' consciousness because they are, for the most part, people with specialised skills who choose to act without expectation of reward, sometimes at great personal risk.

In western society, there is no legal obligation on persons of particular skill and ability to render in aid of those who might be in need of assistance. The law does not, for the most part, compel them to stop and render assistance. Thus, a doctor could come upon a serious car accident and simply avert his eyes and move on.

Public policy recognises both the force of the moral compulsion under which the Good Samaritan acted and the social value of the act. While our law does not punish the priest or the Levite, public policy attaches no value to their neglect.

Despite the value of the actions of the Good Samaritan, modern law has extended scant protection to his action. Arguably, the Good Samaritan may be sued for damaged caused by an adverse reaction to the wine, damage to clothing caused by oil stains, bruising caused by the donkey ride, failure to provide sufficient lodgings or negligent misstatement.

This provision remedies this oversight and affirms the social value of the many Good Samaritans within our community.

Clause 5 – Protection of good samaritans from liability – recognises the commitment of Good Samaritans and protects the act of mercy. It acts to protect Good Samaritans from personal civil liability for acts or omissions honestly and without recklessness done or made in assisting or giving

advice about the assistance to be given to a person in apparent need of emergency medical assistance.

The protection from civil liability does not apply if the liability falls within the ambit of a scheme of compulsory third party motor vehicle insurance or if a recreational drug impaired the Good Samaritan at the time.

This clause defines a Good Samaritan as anyone:

- Acting without expectation of payment or consideration, who comes to the aid of another who is in apparent need of emergency medical assistance; or
- With medical qualifications who without expectation of payment or consideration gives advice using telecommunication methods about the treatment of a person who is apparently in need of emergency medical assistance.

Part 2.2 Volunteers

Globally, the threat of legal liability discourages people from offering their services in a voluntary capacity. As a result, voluntary organisations struggle to recruit and retain sufficient human resources; existing volunteers carry the burden of fulfilling increasing demands. National leaders around the world have been discussing this issue for some time. In fact, parliamentarians from the Council of Europe's 41 member states recently adopted a recommendation urging governments to remove those legal obstacles that hinder people from engaging in voluntary roles.

In 1997, Senator Gramm sponsored the world's first Volunteer Protection legislation, the US federal Volunteer Protection Act of 1997.

This Part recognises that volunteers make a major contribution to the Territory and that a major disincentive to volunteering is the prospect of incurring-

- (a) serious personal liability for damages; and
- (b) legal costs in proceedings for negligence.

This Part seeks to achieve a reasonable and expedient balance between the need to protect volunteers against personal liability and the interests of those who suffer injury, loss or damage in the following ways:

1. By limiting the personal liability for negligence of a volunteer who works for a community organisation and transferring the liability that would, apart from this Act, attach to the volunteer to the community organisation; and
2. By limiting the right to bring proceedings against the volunteer personally, and hence reducing the risk to a volunteer of incurring legal costs as a result of the voluntary work.

Clause 6 – Definitions for pt 2.2 – provides definitions for this part of ‘community organisation’, ‘voluntary basis’ and ‘volunteer’. This Part defines a volunteer as a person who carries out community work on a voluntary basis and

- Receives no remuneration for the work; or
- Is remunerated for the work (but within limits fixed by regulation for the purposes of this particular definition).

A person who carries out community work under the order of a court or a condition of a bond is not to be regarded as working on a voluntary basis.

Clause 7 – Meaning of community work – defines ‘community work’ as work for any one or more of the following purposes:

1. For a religious, educational, charitable or benevolent purpose;

2. For promoting or encouraging literature, science or the arts;
3. For looking after, or providing attention for, people who need care because of a physical or mental disability or condition;
4. For sport, recreation or amusement;
5. For conserving resources or protecting the natural environment from harm;
6. For preserving historical or cultural heritage;
7. For a political purpose;
8. For protecting or promoting the common interests of the community generally or a particular section of the community.

Other work may, by regulation, be classified as community work, or excluded from community work, for the purposes of this measure.

Clause 8 – Protection of volunteers from liability – provides that subject to the following exceptions, a volunteer incurs no personal civil liability for an act or omission done or made in good faith and without recklessness, in the course of carrying out community work for a community organisation.

The exceptions are as follows:

1. The immunity does not extend to a liability that falls within the ambit of a scheme of compulsory third-party motor vehicle insurance or a liability for defamation.
2. The immunity does not operate if the volunteer's ability to carry out the work properly was, at the relevant time, significantly impaired by a recreational drug (as defined in clause 3).
3. The immunity does not operate, in the case of a volunteer who works for a community organisation, if-
 - (a) the volunteer was acting, and knew or ought to have known that he or she was acting, outside the scope of the activities authorised by the community organisation; or
 - (b) the volunteer was acting, and knew or ought to have known that he or she was acting, contrary to instructions given by the community organisation.

If a volunteer works for a community organisation, a liability that would, but for this Act, attach to the volunteer, attaches instead to the community organisation.

A person (the injured person) who suffers injury, loss or damage as a result of the act or omission of a volunteer may not sue the volunteer personally unless-

- it is clear from the circumstances of the case that the immunity conferred by this measure does not extend to the case; or
- the injured person brings an action in the first instance against the community organisation but the community organisation then disputes, in a defence filed to the action, that it is liable for the act or omission of the volunteer.

Clause 9 – Liability of community organisations for volunteers – provides that if a volunteer works for a community organisation, a liability that would, but for this Act, attach to the volunteer attaches instead to the community organisation.

A person (the injured person) who suffers injury, loss or damage as a result of the act or omission of a volunteer may not sue the volunteer personally unless-

- it is clear from the circumstances of the case that the immunity conferred by this measure does not extend to the case; or

- the injured person brings an action in the first instance against the community organisation, but the community organisation then disputes, in a defence filed to the action, that it is liable for the act or omission of the volunteer.

Clause 10 – Territory may assume liability of community organisations for volunteers – provides for circumstances in which the government may assume responsibility for the related liabilities of organisations on whose behalf the activity is carried out.

Clause 11 – Directions to community organisations about insurance etc - contemplates provision of written directions to community organisations, as defined, with respect to insurance and risk management. This provision reflects the ACT Government's belief that exemptions from liability must be accompanied by mechanisms within which the incidence of injury or damage is minimised.

Part 2.3 Survival of actions on death

Under the English civil law, while a living plaintiff could recover for any injuries sustained as a result of another's wrongful acts, that cause of action died with the plaintiff. This result is contrary to public policy. Under the common law, a wrongdoer benefits through the death of the plaintiff because the plaintiff's survivors cannot bring an action to recover for the injuries. The common law position has been reversed, in part, since the *Fatal Accidents Act 1846*.

Part 2.3 consolidates sections 4-8 of the *Law Reform (Miscellaneous Provisions) Act 1955*. The Part provides that, on death, all causes of action (except defamation) subsisting against or vesting in the deceased survive against or for the benefit of the estate. Where the act or omission that gives rise to the cause of action has caused death, damages are calculated without reference to any loss or gain to the estate except funeral expenses. This Part also deals with when the liable person dies before or at the time of causing damage.

Part 2.4 Proceedings against and contributions between wrongdoers

At common law no person who had been made liable in damages had any right of contribution or indemnity against any other wrongdoer. This common law rule has been abolished.

Part 2.4 consolidates sections 10-13 of the *Law Reform (Miscellaneous Provisions) Act 1955*. It deals with proceedings against and contributions between wrongdoers. The provisions provide that a wrongdoer can recover part of the judgement from other wrongdoers, provided the sums recovered never exceed the amount of the damages awarded by the judgement.

In *Nominal Defendant v Australian Capital Territory* [1999] FCA 446 the following principles were set out:

"16. The discretion under s 12 of the Act is a broad one and one which requires that considerable latitude be given to the Court in arriving at a judgment as to what is just and equitable: *Pennington v Norris* (1956) 96 CLR 10 at 16; *James Hardie & Co Pty Limited v Seltam Pty Ltd* [1998] HCA 78 at 79 per Kirby J with whom McHugh J agreed. Within the exercise of that broad discretionary judgment the Court is required to compare the culpability of each of the negligent parties, the relative importance of the acts of the negligent parties causing damage and to subject to comparative examination the whole conduct of each party in relation to the circumstances of the events giving rise to the negligently caused loss: *Covacevich v Thomson* [1988] Aust Torts Reports 80-153 (Queensland Full Court) at 67,373. The discretion is not limited to such factors alone. It involves consideration of all relevant matters which go to the issue of what is the just and

equitable sharing of responsibility for the damage suffered by the plaintiff: *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200 at 212-213."

This might be contrasted with apportionment between a plaintiff and a defendant. In *Podrebersek v Australian Iron & Steel Pty Limited* (1985) 59 ALJR 492 at 493-4, the High Court said:

"A finding on a question of apportionment is a finding upon a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion as to which there may well be differences of opinion by different minds: *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197 at 201. Such a finding, if made by a judge, is not lightly reviewed ... The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris* (1956) 96 CLR 10 at 16) and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 682; *Smith v McIntyre* [1958] Tas SR 36 at 42-49 and *Broadhurst v Millman* [1976] VR 208 at 219 and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; ..."

In *Artur Fatur v IC Formwork Services Pty Limited and Civil and Civic Pty Limited* [2000] ACTSC 14 (15 February 2000) the Court stated:

"48. There are contribution proceedings between the defendants. There was but passing reference to this aspect in the addresses of counsel. The proportion of contribution by a tortfeasor is to be as is "just and equitable having regard to the extent of that person's responsibility for the damage": *Law Reform (Miscellaneous Provisions) Act 1955*, s 12. It is notorious that courts have been given and have given almost nothing by way of guidance as to how the power of apportionment of damages among tortfeasors is to be exercised. The subject was touched on by a Full Court of the Federal Court in *Nominal Defendant v Australian Capital Territory* [1999] FCA 446 and in a report of the New South Wales Law Reform Commission, Contribution between persons liable for the same damage, Report 89, March 1999, at 90-91. Where contribution is sought by a defendant from a plaintiff who bears responsibility for contributory negligence, the High Court has said that the test is the respective degrees of departure from what is reasonable: *Pennington v Norris* (1956) 96 CLR 10 at 16. That, however, is not a test in the present case as between the two defendants because negligence has not been established against either of them. The liability of each of those defendants arises from its breach of reg 73(2) under the Scaffolding and Lifts Regulations. The regulations do not distinguish between degrees of duty to provide safe means of access on the part of persons who carry out the building work. It has been held that where liability arises from breach of statutory duty, a tortfeasor will have the right to claim contribution from another tortfeasor: *TAL Structural Engineers Pty Limited v Vaughan Constructions Pty Limited* [1989] VR 545, but in that case it was found that the tortfeasor from whom contribution was sought was liable to the plaintiff for either breach of a common law duty of care or breach of statutory duty. In the absence of any guidance in the statute or from judicial authority or practice or any particular factor to which counsel was able to draw attention, it seems to me that where two tortfeasors are both guilty of a breach of statutory duty, or at least a breach of the absolute duty imposed by reg 73(2), then the only way contribution may be apportioned between them is that each should bear 50 percent of the liability. However, I will not give a final decision in that matter until counsel have had an opportunity to make further submissions. In this respect I allow a further 14 days in which counsel for each of the defendants may make further written submissions on the

amount of contributions and the costs of the contribution proceedings. Again, in the absence of further submissions, I would order that each defendant bear its own costs of the contribution proceedings.”

Chapter 3 – Liability for death or injury – sets out the provisions in relation to wrongful acts and neglect causing death and injury arising from mental or nervous shock.

Part 3.1 Wrongful act or omission causing death

While an action for wrongful death existed under the Roman civil law, English civil law concluded that "the death of a human being could not be complained of as an injury" (Lord Ellenborough CJ in *Baker v Bolton* (1808) 1 Camp. 493, 170 Eng. Rep. 1033 (1808)). The English Parliament intervened to address the problem with the passage of the *Fatal Accidents Act 1846* (commonly known as Lord Campbell's Act).

The purpose behind Lord Campbell's Act was to provide compensation to the family of the deceased in an attempt to prevent the family from falling into poverty. The right to bring an action is strictly dependent upon the rights of the deceased. If no action could have been brought by the deceased if still alive, no right of action exists.

Damages under Lord Campbell's Act are determined by the present worth of the contributions and aid that the deceased probably would have made to the survivors, had the deceased lived. Under this rule a survivor of the deceased can recover the value at the time of trial, of that portion of the sum the deceased probably would have earned but for death, and which probably would have devoted to them or for their benefit. To this amount is added an amount to compensate them for the loss of the advice, assistance, training and companionship that they probably would have received, so far as those things would have had pecuniary value. The total represents the worth of the deceased's life in a pecuniary way to his/her family. In diminution is considered any fact tending to show that the deceased would not have made the contributions normally expected from one in his/her position. Thus it is relevant that the deceased did not live at home, or that he/she had not supported his family and probably would not have done so. (*Restatement (Second) of Torts*)

This Part is a restatement of sections 2,3, 7, 8, 10, 11, 12, 13 and 15 of the *Compensation (Fatal Injuries) Act 1968*, the ACT equivalent of Lord Campbell's Act. The Part allows the relatives of persons whose deaths were caused by wrongful acts, neglect or default to seek compensation. The Part lists the relatives who are eligible to seek compensation and the types of payments that are not taken into account in considering the quantum of damages. Since the time that Law Campbell's Act was introduced, the provisions have been extended to include a "common law widow" and then more generally a surviving "de-facto partner". The Bill makes it clear, that this extends to same sex "de facto partners".

Part 3.2 Injury arising from mental or nervous shock

This Part is a restatement of sections 22-24 of the *Law Reform (Miscellaneous Provisions) Act 1955*. The Part allows the courts to award damages in specific circumstances for nervous shock in the absence of bodily injury. Prior to 1955, ACT courts followed the decision by the Privy Council in *Victorian Railways Commissioner v Coultas* (1888) that provided that there is no remedy for nervous shock in the absence of bodily injury. Windeyer J in *Mount Isa Mines Limited v Pusey* 125 CLR 383 (1970) defined the term nervous shock and held that "sorrow does not sound damages. A plaintiff in an action of negligence cannot recover damages for a 'shock', however grievous, which was no more than an immediate emotional response to a distressing experience sudden, severe and saddening. It is, however, today a known medical fact that severe emotional distress can be the starting point of a lasting disorder of mind or body, some form of psychoneurosis

or a psychosomatic illness. For that, if it be the result of a tortious act, damages may be had. It is in that consequential sense that the term 'nervous shock' has come into law".

The extension of liability under the provisions relates only to cases in which another person has been killed, injured or put in peril. The common law has continued to evolve and may now be also available in some circumstances where there was no physical danger: see, for example, *Barnes v Commonwealth of Australia* (1937) 37 SR (NSW) 511; *Furniss v Fitchett* [1958] NZLR 396, *King and Another v Phillips* [1953] 1QB 429 per Denning LJ at 441; *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* (The Wagon Mound) [1961] AC 388 at 426; *Storm v Geeves and Another* [1965] Tas SR 252 at 261-262; and *Jaensch v Coffey* (1984) 155 CLR 549 at 572-573.

In *Stanley Stergiou and Others v Citibank Savings Limited* [1998] ACTSC 134) Crispin J pointed out that the common law does not recognise any general cause of action for the negligent causation of mental anguish or stress not amounting to or causing physical or psychiatric injury. The judge pointed to cases where this has been recognised in part: *Campbelltown City Council and Others v Mackay and Another* (1989) 15 NSWLR 501; *Graham v Voight* (1989) 89 ACTR 11; and *Private Parking Services (Vic) Pty Ltd & Ors v Huggard* (1996) ATR [81-397].

Chapter 4 – Damages – sets out the exclusions and limitations relating to damages and also provides rules in relation to contributory negligence. Parts 4.2 and 4.3 of this Chapter consolidate provisions of the *Law Reform (Miscellaneous Provisions) Act 1955*. Parts 4.1 and 4.4 contain new provisions.

Contributory negligence

Parts 4.1 and 4.3: General exclusions and limitations about damages and Contributory negligence

At common law, if harm was partially caused by a plaintiff's own negligence (contributory negligence), this was a complete bar to recovery. Contributory negligence was a failure to take reasonable care for one's own safety and well-being which contributes, at least in part, to a subsequent injury.

Part 4.3 consolidates sections 14-18 of the *Law Reform (Miscellaneous Provisions) Act 1955* dealing with contributory negligence. These provisions were enacted to overcome the harsh operation of the common law. Where contributory negligence has occurred the plaintiff's damages are reduced by the amount the Court considers just, having regard to the plaintiff's actions. Contributory negligence was abolished as a defence to a claim for breach of statutory duty by Act No. 73, 1991 following a report of the ACT Community Law Reform Committee (see also *Ian Charles Tucker v. Westfield Design and Construction Pty Limited* [1992] ACTSC 127).

In *Wood v Postnet* [2002] ACTSC 48 the ACT Supreme Court considered the role of the court in relation to contributory negligence:

"51. The function of the court where contributory negligence is made out is, pursuant to s 15 of the *Law Reform (Miscellaneous Provisions) Act 1955*, to reduce the award of damages "to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." The classic explanation of this task is that of Dixon CJ, Webb, Fullager and Kitto JJ in *Pennington v Norris* (1956) 96 CLR 10 where at 16 Their Honours said: "What has to be done is to arrive at a "just and equitable" apportionment as between the plaintiff and the defendant of the "responsibility" for the damage. It seems clear that this must of necessity involve a comparison of culpability. By "culpability" we do not mean moral blameworthiness but degree of departure from the standard of care of the reasonable man."

52. It seems to me, taking into account all of the circumstances of the case, that the plaintiff's conduct here has had a greater impact on his resulting misfortune than the negligence of the defendant in failing to prevent persons from leaving the club and gaining access to the awning. The plaintiff, by walking along the awning, climbing onto the sunshade structure, and then climbing up to the parapet, should it seem to me have departed significantly from the degree of care that a reasonable person visiting a nightclub should be expected to observe. I would attribute responsibility in the proportion of two thirds to the plaintiff and one third to the defendant. ...”

Part 4.1 (General exclusions or limitations relating to damages) provides specific rules when a plaintiff has engaged in particular types of conduct.

Clause 32 – Definitions for pt 4.1 – provides definitions for Part 4.1. This clause provides definitions of ‘accident’, ‘claim’, ‘court’, ‘intoxicated’, ‘motor accident’, ‘motor vehicle’ and ‘personal injury’.

Clause 33 – Application of pt 4.1 – provides that part 4.1 applies to all claims for damages for personal injury, excluding claims under the *Workers Compensation Act 1951*.

Clause 34 – Exclusion of liability if conduct an offence – provides a general exclusion from liability for damages if the court is satisfied that the accident happened while the injured person was engaged in conduct constituting an indictable offence (more serious offences), and that the injured person's conduct made a material contribution to the risk of injury. The exclusion only applies if the injured person's conduct contributed materially to the risk of injury (the exclusion does not apply when the criminal activity is causally irrelevant to the injury and negligence of a defendant – for example, liability would not be excluded if a plaintiff took a supermarket item intending to steal it but then, at some later stage, was injured when a display shelf fell on her. In that instance, an essential element of larceny, that of taking and carrying away, has not manifested).

The court has a discretion to award damages if the circumstances are exceptional and the principle would operate harshly and unjustly (eg, where the plaintiff was a child and a duty of “common humanity” might otherwise exist). Persons who sustain injury while committing serious offences should bear their own losses. (The case under consideration should not be confused with a situation where no duty of care is owed to the plaintiff – eg, High Court, *Romeo v Conservation Commission of the Northern Territory*).

Clause 35 – Presumption of contributory negligence – injured person intoxicated – makes special provision where a person is injured while intoxicated. Clause 35 provides that contributory negligence must be presumed if the injured person was intoxicated at the time of the accident and contributory negligence is claimed by the defendant. The presumption that intoxication contributed to an accident can be rebutted where the plaintiff establishes that the intoxication was not self-induced or had nothing to do with the accident (eg, an intoxicated passenger quietly sitting in the rear seat of a car that is hit by another car that has travelled through a red light, would have little difficulty in rebutting the presumption).

Clause 36 – Presumption of contributory negligence – injured person relying on intoxicated person – provides similar rules to those in clause 35 applying to a person who chooses to rely on the skill and care of a person he/she knows to be intoxicated. The new statutory formulation displaces the common law defence of voluntary assumption of risk and provides a more balanced structural solution that allows both sides more direct opportunities to propound probative evidence. The presumption of contributory negligence can be rebutted if established on the balance of

probabilities that the intoxication did not contribute to the accident or the injured person could not have reasonably been expected to have avoided the risk.

Clause 37 – Presumption of contributory negligence – injured person not wearing a seatbelt etc - provides similar rules to those in clause 35 and 36 applying to a person who does not adhere to specified safety rules (wearing a seatbelt, wearing a required helmet or, being a passenger in or on a motor vehicle with a passenger compartment, not being in the passenger compartment.) The presumption of contributory negligence can be rebutted if it is established on the balance of probabilities that the injuries would have been more serious if the person had been wearing a seatbelt or the injured person could not have reasonably been expected to have avoided the risk.

Clause 38 – Damages for loss of earnings – provides that in assessing damages for loss of earnings the court must disregard earnings above three times the average weekly earnings per week. The Australian Bureau of Statistics determines the average weekly earnings and the determination is seasonally adjusted for the ACT.

Part 4.2 Loss of capacity to perform domestic services

This Part is a restatement of sections 31 and 33 of the *Law Reform (Miscellaneous Provisions) Act 1955*. The Part allows courts in awarding damages for injury to include compensation for the loss of capacity to perform household or domestic services.

Part 4.4 Other provisions - damages

Clause 45 – Court may make consent order for structured settlement - provides that the courts can, with the consent of the parties, award personal injury damages in the form of a structured settlement.

The law presently makes it difficult for a plaintiff to manage large awards of damages. There are two distinct issues:

Firstly, the common law prohibits a Court from making an award of an annuity. The measure in this Bill has the effect of removing this prohibition. This clause permits the courts, with the consent of the parties, to award personal injury damages in the form of a structured settlement. In essence, the defendant, instead of paying a lump sum to the injured party, purchases an annuity from an insurance company. The annuity pays the injured party a set amount at regular intervals, either for life, or up to a set date. Structured settlements provide an alternative to lump sum settlements as a means for personal injury compensation. Structured settlements provide for the lifetime periodic payment of damages to an injured person, reducing the uncertainty that an injured person will live shorter or longer than the average life expectancy of such injured persons. It will reduce the possibility that the compensation awarded will be mismanaged and lost to the plaintiff.

Secondly, the tax disadvantages of receiving the settlement as a periodic payment would have made structured settlements unattractive to plaintiffs. The Commonwealth Government has separately introduced reforms to deal with this through the Taxation Laws Amendment (Structured Settlements) Bill 2002, which would provide a tax exemption for structured settlements, which meet certain eligibility criteria. This may mean that such settlements become more attractive to personal injury litigants in the future.

Removing the prohibition on ordering structured settlements gives the court flexibility in ordering the payment of damages and gives the parties flexibility in deciding how the funds are to be managed. This clause is targeted at seriously injured people who would be reliant on their compensation settlement for the rest of their lives.

Clause 46 – Independent finding of liability and award of damages -clarifies that courts may make a finding of liability on a claim for damages, independently of making an award for damages. In addition, a court may make an award of damages on any claim independently, but after making a finding of liability.

Chapter 5 – Defamation – sets out mechanisms for the resolution of defamation disputes without resort to litigation and also sets out the rules governing litigation of defamation claims. Chapter 8 consolidates the provisions of the *Defamation Act 2001* (the Act) (except Pt 4 relating to criminal proceedings). The provisions also include technical amendments proposed in the *Statutory Law Amendment Bill 2002*.

The 2001 reforms represented a radical departure from Australian defamation law. Previously, the law placed far too much emphasis on monetary damages rather than on timely correction. Often, by the time damages were awarded, the context in which alleged defamatory remarks were made had long since passed. The reform addressed many of the problems with the previous law. It offered tangible relief to a party at a very early stage – before the need to engage a legal practitioner or commence actions.

This Chapter:

- protects innocent publishers and punishes negligent publishers through a radical defence based around negligence. In drawing a distinction between the two, this Chapter establishes an important financial reason for publishers to adopt effective output quality control systems and employ people of integrity to minimise the risk of defamation. This Chapter provides incentives for the media to adopt the practice of giving people who are affected adversely reasonable time to consider the matter and respond.
- provides incentives to the media using the formal amends process included in the Chapter. This process ensures that amends are made quickly.
- provides incentives to provide prominent and timely corrections. This Chapter provides that, if an offer to make amends is not made, or no reasonable offer of amends is made, an aggrieved person may apply for an order to vindicate his or her reputation.

Chapter 6 – Trespass – provides a defence to actions for trespass to land. This defence is a modern restatement of the defence in section 5 of the *Actions for Trespass Act 1623 21 Jas 1 c 16*. Trespass to land specifically occurs when a defendant enters the land of another without lawful authority, such as the permission of the owner. The action of trespass became common at the time of Edward I, and was in the nature of a criminal proceeding, with the court punishing the defendant as well as compensating the plaintiff. This Chapter provides a defence to civil actions for trespass to land. The defence only applies if the defendant establishes that s/he has no interest in the land, the trespass was not negligent or intentional, and the defendant made a reasonable offer to make amends before the plaintiff commenced civil action.

This Chapter also consolidates section 58 of the *Law Reform (Miscellaneous Provisions) Act 1955* which provides that evidence may be given of the condition of the land in an action for damages for the use and occupation of land.

Chapter 7 – Mitigation of strict liability – restates the law relating to liability concerning innkeepers and common carriers in modern form. The common law imposed strict liability on innkeepers and common carriers. The common law was ameliorated by older Imperial Acts. It does not, at this stage, purport to codify the ancient and extensive law that otherwise applies to innkeepers and common carriers.

Part 7.1 Traveller accommodation providers liability

This Part incorporates the provisions of the *Innkeepers Liability Act 1902* (the Act). This Part limits the liability of innkeepers. For the purposes of the law, 'inns' and 'innkeepers' include any establishment that provides accommodation and refreshment for reward (eg, motels, guesthouses, executive apartments etc.). The term 'inn' has been replaced in the Part with the term 'travellers accommodation' and the term 'innkeeper' has been replaced with the term 'accommodation provider'.

The principal objective of the *Innkeepers' Liability Act 1902* was to limit the strict liability of innkeepers in respect of the loss or injury to any guest or lodger's goods or property. This Part provides for the Regulations to set the limit on an accommodation provider's liability. Previously, the Act set this limit at \$40. There are five exceptions to the limitation of liability:

- it does not apply to horses, live animals or gear relating to carriage;
- it does not apply where the loss or injury to the goods or property is due to an act, default or the neglect of the innkeeper or their employee;
- it does not apply if the innkeeper has not displayed the required limitation notice;
- it does not apply to goods and property deposited with the accommodation provider; and
- it does not apply if the accommodation provider refuses to keep the goods in safe custody.

Part 7.2 Common carriers

This Part incorporates the provisions of the *Common Carriers Act 1902* (the Act). The objective of the Act was to limit the strict liability on common carriers that is prescribed by the common law. The common law holds common carriers by land absolutely responsible for the safety of goods which he or she has been entrusted with. The only common law exceptions are where there is an act of God, an act of the Queen's enemies, fraud or fault of the consignor, or an inherent vice in the goods. A common carrier is liable as an insurer, and is liable even where the goods are damaged or lost due to the fault of a person the carrier has no control over, such as thieves. Common carriers are not liable as insurers for the injuries to persons. To protect common land carriers, their liability has been limited by the Act to \$20, except where there has been negligence or default. This limitation of liability has been included in this Part.

Chapter 8 – Other liability provisions

Part 8.1 Occupiers liability

This Part replaces the common law rules about the standard of care an occupier of premises must show to people entering on the premises in relation to any dangers to them.

During the nineteenth century, the courts developed a range of standards that applied to the responsibilities of occupiers for the state of their premises. The standard of care, which was appropriate, was governed by whether the person who suffered the harm was an "invitee", "licensee" or a "trespasser". Further, the common law often divided these categories into additional categories. For example, different standards were developed as between "contractual licensees" and "non-contractual licensees". The emphasis on categorising the claims resulted in unrealistic distinctions and appeals on questions of law that should have been questions of fact.

The purpose of this Part is to remove the emphasis on categories and replace it with general principles on occupiers. These statutory provisions remove the old law relating to occupiers liability and substitute the general law of negligence. The High Court reached the same position in *Australian Safeway Stores v Zaluzna*. More recently, in two leading cases in this sphere, *Pyrenees Shire Council v Day* (1998) 72 ALJR 152 and *Romeo v Conservation Commission of the Northern*

Territory (1998) 72 ALJR 208, the High Court rejected a return to the complexities of the cases concerning occupiers' liability and special legal categories in relation to statutory authorities, in favour of a rigorous analysis under the general law of negligence.

Clause 101 – Liability of occupiers – provides that occupiers have a duty to take all care, that is reasonable in the circumstances, to ensure that people are not injured or damaged due to the state of the premises or things done or not done in relation to the state of the premises. This Part does not require the courts to draw distinctions between the classes of occupiers or entrants. In deciding whether an occupier should be liable for harm in any particular case, the court is to have regard to certain factors. The factors are:

- the gravity and likelihood of the probable injury;
- the circumstances of the entry onto the premises;
- the nature of the premises;
- the knowledge which the occupier has, or should have, of the likelihood of persons or property being on the premises;
- the age of the person entering the premises;
- the ability of the person entering the premises to appreciate the danger; and
- the burden on the occupier of removing the danger or protecting the person entering the premises from the danger, as compared to the risk of the danger to the person.

The approach taken in this clause is in harmony with similar developments in other parts of the common law world. In England a similar provision was introduced in 1957. Similar legislation followed in Scotland in 1960 and New Zealand in 1962.

Part 8.2 Liability for damage caused by animals

This Part sets out the rules relating to damages caused by animals. These provisions are a consolidation of sections 3 and 8 of the *Civil Liability (Animals) Act 1984*. Section 3 of that Act contained interpretation provisions. Section 8 facilitated proof of negligence in certain cases by providing that the fact of an animal's unlawful presence on premises is evidence of a breach of a duty of care owed to the occupier or other person on the premises.

Part 8.3 Liability for fires accidentally begun

This Part is based on Division 12.10 of the *Law Reform (Miscellaneous Provisions) Act 1955*, which was substituted for section 86 of *24 Geo. 3 c 78 (1774)*. This Part provides that actions do not lie against a person where a fire accidentally begun on their property spreads and damages the property of another.

Chapter 9 – Misrepresentation – consolidates the provisions of the *Law Reform (Misrepresentation) Act 1977*. This Chapter allows contracts to be rescinded where there has been a misrepresentation. A contract can be rescinded even if the contract has been exercised, or a conveyance or transfer has been registered as a result of the contract. This Chapter also allows the courts to award damages for misrepresentation, or to award damages instead of rescinding a contract. This Chapter also includes an offence of misrepresentation in trade or commerce for the purpose of inducing a person to enter into a contract, or to cause a person to pay money or transfer property.

Chapter 10 – Limitations on legal costs – provides limits on the costs of legal services in personal injury cases and prohibits lawyers from working on civil cases if they do not believe that there are reasonable prospects of success.

Part 10.1 Maximum costs in personal injury damages matters

This Part limits the maximum costs for legal services in personal injury cases. The maximum costs for the legal services are linked to the amount of personal injury damages received by the plaintiff in the matter.

Clause 113 – Definitions for pt 10.1 – provides definitions of ‘costs’, ‘court’ and ‘personal injury damages’ for the purposes of part 10.1.

Clause 114 – Maximum costs for claims of \$100,000 or less - provides that if the amount recovered on a claim for personal injury damages does not exceed \$100,000, the maximum costs recoverable for legal services provided to the plaintiff or defendant is 20% of the amount recovered or claimed, or \$10,000, whichever is greater (with provision for the regulations to vary these amounts and percentage). The costs that are capped do not include disbursements for services other than legal services or other disbursements. This clause is subject to clauses 115, 116 and 117.

Clause 115 – Costs incurred after offer of compromise not accepted – provides that clause 114 does not prevent the court from awarding costs in circumstances where an offer of compromise on a claim is made and rejected, and the court decides or orders an award that is no less favourable than the terms of the earlier offer. This clause also makes provision for the regulations to require lawyers to give their clients information about the effect of this section. If a lawyer fails to comply with the regulations under this clause, and this results in their client incurring additional liability for costs, then the court can order the lawyer to repay the client or indemnify another person. This clause also provides that the regulations may provide that offers of compromise can only be made under this clause.

Clause 116 – Exclusion of costs unnecessarily incurred etc – provides that the court can exclude costs from the capping in clause 114. Costs can be excluded where the legal services were provided in response to action on the claim by or on behalf of the other party and in the circumstances where the action was unnecessary and was not reasonable to advance the party’s case, or was aimed at delaying or complicating the claim.

Clause 117 – Court discretion to allow additional costs – provides that the court or a taxing officer can allow higher costs where the complexity of a case or the behaviour of a party so requires. This clause also provides that the regulations may deal with orders under this clause.

Clause 118 – Apportionment of costs between lawyers – provides for the legal fees to be apportioned by the court or taxing officer, where more than one lawyer has provided legal services to a party for personal injury damages.

Part 10.2 Costs in civil claims if no reasonable prospects of success

This Part changes the responsibilities of lawyers in connection with all claims for damages (not just personal injury damages) where there are no reasonable grounds for believing a claim or defence has reasonable prospects of success.

The prohibition can be relaxed by a Court where the interests of justice so dictate (eg, to allow the Court to consider a desirable advance within the common law).

Clause 119 – Definitions for pt 10.2 - provides definitions of ‘court’, ‘provable’ and ‘reasonable prospects of success’ for the purposes of part 10.2.

Clause 120 – Application of pt 10.2 – provides that part 10.2 dealing with reasonable prospects of success applies despite any obligation of a lawyer to act in accordance with their client’s

instructions. In addition, this clause provides that this part does not apply to legal services for damages prior to certification under clause 121, and does not apply where the court orders that the claim be continued in the interests of justice.

Clause 121 – Lawyer not to act without reasonable prospects of success – provides that a lawyer must not prosecute a claim or defence of a claim (once a matter is to be set down for hearing) unless they reasonably believe that the claim or defence has reasonable prospects of success. Breaching this prohibition can result in action for professional misconduct or unsatisfactory professional conduct under the *Legal Practitioners Act 1970*.

Clause 122 – Restriction on setting claims down for hearing – provides that a lawyer in a case to which this part applies, must not agree to or allow a court to set a hearing date, unless the lawyer has filed a certificate stating that the claim or defence has reasonable prospects of success. The certificate must state that the lawyer believes, on the basis of provable facts and a reasonably arguable view of the law, that the claim or defence has reasonable prospects of success.

Clause 123 – Costs order against lawyer acting without reasonable prospects of success – provides that the court can order a lawyer to pay their client’s costs or provide an indemnity, if they proceed with a case where there are not reasonable prospects of success.

Clause 124 – Onus on lawyer to show facts provided reasonable prospects of success – provides a rebuttable presumption that a case did not have reasonable prospects of success. The presumption applies where either the trial court or the Supreme Court finds that the facts established by the evidence do not form the basis for a reasonable belief as to the prospects of success. Lawyers can rebut this presumption by establishing that there were reasonable prospects of success at the time the legal services were provided.

Chapter 11 – Miscellaneous – sets out a range of principles regarding tort law that do not fall within the other chapters. This chapter deals specifically with insurance moneys, actions between married persons, and the abolition of a number of common law actions, rules and remedies. This chapter also deals with procedural matters, such as the power to make regulations.

Part 11.1 Neutral Evaluation

This part establishes a process for alternative dispute resolution by neutral evaluation.

Clause 125 – Purpose of pt 11.1 etc – provides that the purpose of this part is to enable courts and tribunals to refer civil matters for neutral evaluation.

Clause 126 – Meaning of *neutral evaluation* and *neutral evaluation session* – defines neutral evaluation as a process of evaluation of a dispute, whereby the evaluator seeks to identify and narrow the issues of fact and law that are in dispute. The evaluator also assesses the relative strengths and weaknesses of each party’s case and can offer opinion on the likely outcome of proceedings.

Clause 127 – Who can be an evaluator – provides that neutral evaluation can be conducted by the:

- Registrar of the Court or Tribunal; and
- Deputy Registrar of the Court or Tribunal.

Clause 128 – Referral by court or tribunal for neutral evaluation – provides that a court can order any civil proceeding before it for neutral evaluation and can appoint an evaluator. Neutral evaluation can be ordered without the consent of the parties to the proceedings.

Clause 129 – Duty of parties to take part in neutral evaluations – requires parties to neutral evaluation to participate genuinely and sincerely.

Clause 130 – Costs of neutral evaluation – provides that the costs of the neutral evaluation are paid by the parties, or as otherwise ordered by the court or tribunal.

Clause 131 – Privilege for neutral evaluations - provides protection for parties to neutral evaluation from civil action for defamation.

Clause 132 – Secrecy by evaluators – provides limits on when an evaluator may disclose information obtained during neutral evaluation. For example, the evaluator may disclose information where the party who disclosed the information consents.

Clause 133 – Protection from liability for evaluators – provides that an evaluator is protected from civil liability for anything honestly done or omitted during the evaluation.

Part 11.2 General reporting requirements of insurers

This Part requires market participants who provide insurance or insurance-like products such as mutuals, to provide the Government with annual returns on the ACT market. The returns will include the quantum of premiums taken, claims made, claims paid and claims refused.

Clause 134 – Who is an insurer for pt 11.2 – provides that an insurer for this part is any person who carries on the business of insurance or is declared to be carrying on the business of insurance under the regulations. This part only applies in relation to property located in the ACT or an act or an omission happening in the ACT.

Clause 135 – Insurers reporting requirements – provides that on or before 31 July each year an insurer must report to the Minister about insurance policies held by the insurer during the financial year. The reports only relate to property located in the ACT or an act or an omission happening in the ACT. The regulations may specify classes of policies covered by this clause. The reports must state, for each of the classes of policy, the premiums paid, the number of claims that were paid, the number of claims refused, and any other information required by the regulations. The regulations can also state how the report is to be given.

Clause 136 – Confidentiality of general reports of insurers – provides that the reports under this part are given commercial protection from public disclosure. The confidential information can only be disclosed if the disclosure does not identify the insurer that supplied the information, the disclosure is made in exercising a function under this Act or is required by another law, the insurer has agreed to the disclosure, the disclosure is made in a legal proceeding at the direction of a court, the information is in the public domain, or as prescribed under the regulations.

Part 11.3 Attachment of insurance money

This Part is a restatement of sections 25-28 of the *Law Reform (Miscellaneous Provisions) Act 1955*. These provisions provide that where a person has entered into a contract of insurance which indemnifies him or her against a liability to pay damages or compensation, on the happening of the event giving rise to the claim for damages or compensation, the amount of the liability is a charge on all insurance moneys payable in respect of the liability. The provisions also provide methods of enforcing a charge.

Part 11.4 Abolition of certain common law actions, rules and remedies

This Part abolishes a range of common law actions, rules and remedies. Much of this Part is a restatement of sections 4, 5 and 7 of the *Married Persons (Torts) Act 1968*. The Part provides that a party to a marriage has the same rights of action in tort against their spouse, as they would have if they were not married to each other. A divorced couple also has the same rights of action in tort against each other as they would have if they were not married. This Part also provides that questions between spouses as to property may be decided in a summary way.

This Part lists common law actions, rules and remedies that have been abolished or (where indicated) are abolished by this law:

- seduction, enticement and harbouring (abolished by this law);
- common law action of cattle-trespass;
- remedy of distress of an animal damage feasant;
- rules relating exclusively to liability for damage by an animal;
- the rule in *Rylands v Fletcher*;
- the rule of common employment;
- husband's liability for wife's torts and premarital obligations;
- action for loss of consortium;
- the rule in *Cavalier v Pope*;
- partial abolition of the rule in *Mocambique*; and
- the common law misdemeanors of criminal libel, blasphemous libel, seditious libel and obscene libel;

Part 11.5 Other provisions

Clause 152 – Approved forms – provides that the Minister may approve forms for this Act, and that if a form is approved for a purpose then it must be used for that purpose.

Clause 153 – Regulation-making power – provides that the Executive may make regulations for this Act.

Clause 154 – Repealed and amended Acts – provides that Schedule 3 repeals or amends the Acts listed in the schedule.

Chapter 12 Transitional provisions

This Chapter sets out when each of the amendments are to commence and provisions relating to how specific parts are to operate in relation to accidents that occurred prior to commencement.

Schedule 1 – Traveller accommodation providers notice – sets out the traveller accommodation notice for the purposes of section 85. The notice sets out the limitations on the liability of traveller accommodation providers.

Schedule 2 – Common carriers –goods subject to special limited liability – lists the goods where a common carrier's liability is limited, unless the value of the goods are disclosed prior to carriage or if an increased charge is paid for carriage of the goods.

Schedule 3 – Repeals and amendments – lists the repeals and consequential amendments as a result of the passing of this Bill.

One such amendment is the abolition of civil juries. Civil juries were abolished in defamation actions from 1 July 2002 and have not been empanelled in other civil matters in the ACT in living memory. This amendment will ensure that the law reflects current ACT practice.