Legislative Assembly for the Australian Capital Territory

Standing Committee on Legal affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

scrutiny report no. 20

11 November 2002

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON LEGAL AFFAIRS

(PERFORMING THE DUTIES OF A SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION COMMITTEE)

MR BILL STEFANIAK MLA (CHAIR), MR JOHN HARGREAVES MLA,
MS KERRIE TUCKER MLA

MR WAYNE BERRY, MLA
SPEAKER
LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY
CANBERRA ACT 2601

DEAR MR SPEAKER

PLEASE FIND ENCLOSED A COPY OF REPORT NO. 20 OF THE STANDING COMMITTEE ON LEGAL AFFAIRS (PERFORMING THE DUTIES OF A SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION COMMITTEE). UNDER ITS RESOLUTION OF APPOINTMENT, THE COMMITTEE IS EMPOWERED TO SEND A REPORT TO YOU WHILE THE ASSEMBLY IS NOT SITTING SO THAT YOU MAY GIVE DIRECTIONS FOR ITS PRINTING, CIRCULATION AND PUBLICATION. I SEEK YOUR APPROVAL TO PRINT, PUBLISH AND CIRCULATE REPORT NO. 20.

YOURS SINCERELY

BILL STEFANIAK MLA
CHAIR

11 NOVEMBER 2002

APPROVED
WAYNE BERRY MLA
SPEAKER

11 NOVEMBER 2002

Terms of reference

The Standing Committee on Legal Affairs (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:

(a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and or disapproval by the Assembly (including a regulation, rule or by-law):

  (i) is in accord with the general objects of the Act under which it is made;

  (ii) unduly trespasses on rights previously established by law;

  (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or

  (iv) contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly;

(b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee

(c) consider whether the clauses of bills introduced into the Assembly:

  (i) unduly trespass on personal rights and liberties;

  (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

  (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

  (iv) inappropriately delegate legislative powers; or

  (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(d) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

Members of the Committee

Mr Bill Stefaniak, MLA (Chair)
Mr John Hargreaves, MLA (Deputy Chair)
Ms Kerrie Tucker, MLA

Legal Adviser: Mr Peter Bayne
Secretary: Mr Tom Duncan
(Scrutiny of Bills and Subordinate Legislation Committee)
Assistant Secretary: Ms Celia Harsdorf
(Scrutiny of Bills and Subordinate Legislation Committee)

Role of the Committee

The Committee examines all Bills and subordinate legislation presented to the Assembly. It does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation. These traditions have been adopted, without exception, by all scrutiny committees in Australia. Non-partisan, non-policy scrutiny allows the Committee to help the Assembly pass into law Acts and subordinate legislation which comply with the ideals set out in its terms of reference.

LEGAL AFFAIRS – STANDING COMMITTEE
(PERFORMING THE DUTIES OF A SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION COMMITTEE)

RESPONSES

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
REPORTS – 2001-2002	
Report No. 1, dated 12 December 2001	
Nil	
Report No. 2, dated 19 February 2002	
Crimes Amendment Bill 2001 (No. 2) **(PMB)**	
Act citation: Crimes Amendment Act 2002 **(Passed 5.3.02)**……..	**No. 5 of 2002**
Crimes (Abolition of Offence of Abortion) Bill 2001 **(PMB)**……..	
Health Regulation (Maternal Health Information) Repeal Bill 2001 **(PMB)**……	
Land (Planning and Environment) Legislation Amendment Bill 2001 **(PMB)**……	
Supreme Court Amendment Bill 2001 (No. 2) **(PMB)**……..	
Subordinate Law No 40 –Building Regulations Amendment…….	**No. 8 of 2002**
Subordinate Law No 41 – Building and Construction Industry Training Levy Regulations 2001…….	
Subordinate Law No 42 – Crimes Regulations 2001……..	
Subordinate Law No 43 – Dangerous Goods Regulations Amendment	
Subordinate Law No 44 – Road Transport (Driver Licensing) Regulations Amendment……	**No. 8 of 2002**
Subordinate Law No 45 – Road Transport (Public Passenger Services Regulations 2002…….	**No. 8 of 2002**
Subordinate Law No 46 – Road Transport Amendment Regulations 2001……	
Subordinate Law No 47 – Maternal Health Information Regulations Repeal 2001…….	**No. 10 of 2002**
Health Professions Board (Procedures) Act – Determination No 221 of 2001……..	**No. 10 of 2002**
Health Professions Board (Procedures) Act – Determination Nos. 216-220, 222, 225 to 237 of 2001…….	**No. 10 of 2002**
Independent Pricing and Regulatory Commission Act - Determination No. 291 of 2001…….	**No. 8 of 2002**
Legislative Assembly (Members' Staff) Act - Determination No. 292 of 2001…….	
Residential Tenancies Act – Determination Nos. 301 to 304 of 2001….	

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Rehabilitation of Offenders (Interim) Act 2001 - Determination No. 305 of 2001…….	
Commissioner for the Environment Act - Determination No. 315 of 2001…….	**No. 8 of 2002**
Psychologists Act - Determination No. 318 of 2001……..	**No. 10 of 2002**
Auditor-General Act – Determination No. 323 of 2001…….	
Drugs of Dependence Act – Determination No. 328 of 2001……	**No. 10 of 2002**
National Exhibition Centre Trust Act - Determination Nos. 330 and 331 of 2001…….	**No. 8 of 2002**
Appointment to the Racing Tribunal……..	**No. 8 of 2002**
Report No. 3, dated 21 February 2002	
Rehabilitation of Offenders (Interim) Amendment Bill 2002 **(Passed 21.2.02)**……	
Report No. 4, dated 5 March 2002	
Inquiries Amendment Bill 2002 **(PMB)**…….	
Gene Technology Bill 2002……	**No. 12 of 2002**
Legislation Amendment Bill 2002 **(Passed 15.4.02)**…….	**No. 9 of 2002**
Subordinate Law No 49 – Road Transport (Offences) Regulations 2001……	**No. 8 of 2002**
Road Transport (Safety and Traffic Management) Regulations 2000 – Disallowable Instrument No 4……..	**No. 8 of 2002**
Road Transport (Driver Licensing) Regulations 2000 – Disallowable Instrument No 7……..	**No. 8 of 2002**
Health and Community Care Services Act – Determinations Nos 5 and 15…….	
Report No. 5, dated 5 March 2002	
Nil	
Report No. 6, dated 7 March 2002	
Nil	
Report No. 7, dated 27 March 2002	
Drugs of Dependence Amendment Bill 2002 **(Passed 14.5.02)**…….	**No. 10 of 2002**
Duties Amendment Bill 2002 **(Passed 11.4.02)**……	**No. 8 of 2002**
Fair Trading Amendment Bill 2002 **(PMB) (Passed 29.08.02)**…….	
Subordinate Law 2002 No 1 – Radiation Regulations 2002……..	**No. 10 of 2002**
Report No. 8, dated 1 May 2002	

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Discrimination Amendment Bill 2002 **(PMB) (Passed 5.6.02)…**……	
Gaming Machine (Women's Sports) Amendment Bill 2002 **(Passed 4.6.02)**…….…….	**No. 10 of 2002**
Subordinate Law No. 3 – Road Transport (Public Passenger Services) Regulations 2002…….	**No. 15 of 2002**
Subordinate Law No. 4 – Community Title Regulations 2002……..	**No. 15 of 2002**
Road Transport (Public Passenger Services) Regulations 2002 – Disallowable Instruments Nos 12 and 18……..	**No. 15 of 2002**
Road Transport (General) Act – Disallowable Instrument No. 20…….	**No. 15 of 2002**
Public Place Names Act – Disallowable Instrument No. 24……..	
Report No. 9, dated 7 May 2002	
Nil	
Report No. 10, dated 14 May 2002	
Building Amendment Bill 2002 **(Passed 16.5.02)**…….	**No. 16 of 2002**
Report No. 11, dated 14 May 2002	
Nil	
Report No. 12, dated 16 May 2002	
Justices of the Peace Act – Disallowable Instrument No. 25…….	
Residential Tenancies Act – Disallowable Instrument No. 26…….	
Report No. 13, dated 29 May 2002	
Cemeteries and Crematoria Bill 2002…….	**No. 15 of 2002**
Duties (Insurance Exemptions) Amendment Bill 2002……..	**No. 15 of 2002**
Road Transport Legislation Amendment Bill 2002…….	**No. 16 of 2002**
Report No. 14, dated 4 June 2002	
Statute Law Amendment Bill 2002 **(Passed 29.08.02)**……	**No. 15 of 2002**
Report No. 15, dated 20 June 2002	
Workers Compensation (Acts of Terrorism) Amendment Bill 2002….	**No. 17 of 2002**
Remuneration Tribunal Act – Disallowable Instrument No. 34…….	
Hotel School Act – Disallowable Instrument No. 35…….	**No. 18 of 2002**
Road Transport Act – Disallowable Instrument No. 39…….	**No. 17 of 2002**
Commissioner for the Environment Act No. 38…….	**No. 17 of 2002**

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Report No. 16, dated 25 June 2002	
Maternal Health Legislation Amendment Bill 2002 **(PMB)**…….	
Medical Practitioners (Maternal Health) Amendment Bill 2002 **(Passed 21.08.02**) **(PMB)**……	
Health and Community Care Services Act –	
Disallowable Instrument No. 41……	**No. 19 of 2002**
Public Place Names Act –	
Disallowable Instrument No. 43……	**No. 17 of 2002**
Disallowable Instrument No. 44……	**No. 17 of 2002**
Building Act – Disallowable Instrument No. 50……	**No. 17 of 2002**
Report No. 17, dated 9August 2002	
Justice and Community Safety Legislation Amendment Bill 2002 **(Passed 22.08.02)**…….	
Magistrates Court (Refund of Fees) Amendment Bill 2002……..	
Planning and Land Bill 2002 ……	**No. 20 of 2002**
Plant Diseases Bill 2002……	**No. 18 of 2002**
Revenue Legislation Amendment Bill 2002 **(Passed 22.08.02)** …….	**No. 18 of 2002**
Subordinate Law 2002 No. 11 – Custodial Escorts Regulations 2002...	
Land (Planning and Environment) ACT Heritage Council Appointments 2002 (No 1) - DI 2002—56……..	**No. 20 of 2002**
Roads and Public Places (Fees) Revocation and Determination 2002 (No 1) - DI 2002—71……	**No. 19 of 2002**
Roads and Public Places (Fees) Revocation and Determination 2002 (No 2) - DI 2002—72……	**No. 19 of 2002**
Roads Transport (General) (Fees) Revocation and Determination 2002 – DI2002—73……	**No. 19 of 2002**
Hawker (Fees) Revocation and Determination 2002 – DI2002—74….	**No. 19 of 2002**
Roads and Public Places (Fees) Revocation and Determination 2002 (No 3) – DI2002-75……	**No. 19 of 2002**
Water Resources (Fees) Revocation and Determination 2002 – DI2002-76……..	**No. 19 of 2002**
Stock (Fees) Revocation and Determination 2002 (No 1) – DI2002-77	**No. 19 of 2002**
Stock (Fees) Revocation and Determination 2002 (No 2) – DI2002-78	**No. 19 of 2002**
Pounds (Fees) Revocation and Determination 2002 – DI2002-79…….	**No. 19 of 2002**
Nature Conservation (Fees) Revocation and Determination 2002 – DI2002-80……..	**No. 19 of 2002**
Lakes (Fees) Revocation and Determination 2002 – DI2002-81…….	**No. 19 of 2002**
Environment Protection (Fees) Revocation and Determination 2002 – DI2002-82……..	**No. 19 of 2002**
Domestic Animals (Fees) Revocation and Determination 2002 – DI2002-83……..	**No. 19 of 2002**

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Animal Welfare (Fees) Revocation and Determination 2002 – DI2002-84……..	**No. 19 of 2002**
Animal Diseases (Fees) Revocation and Determination 2002 – DI2002-85……..	**No. 19 of 2002**
Road Transport (General) (Parking Permit Fees) Revocation and Determination 2002 – DI2002-86……..	**No. 19 of 2002**
Road Transport (General) (Vehicle Impounding and Seizure/Speed Tests) Revocation and Determination 2002 – DI2002-89…….	**No. 19 of 2002**
Report No. 18, dated 27August 2002	
Cooperatives Bill 2002……..	
Report No. 19, dated 20 September 2002	
Adventure Activities (Liability) Bill 2002 **(PMB)**	
Civil Law (Wrongs) Bill 2002	**No. 20 of 2002**
Injuries Compensation Framework Bill 2002 **(PMB)**	
Prostitution Amendment Bill 2002	
Disallowable Instrument DI 2002—99 being the Machinery (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—102 being the Architects (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—103 being the Building (Fees) Revocation 2002	
Disallowable Instrument DI 2002—104 being the Building (Fees) Determination 2002	
Disallowable Instrument DI 2002—105 being the Community Title (Fees) Determination and Revocation 2002	
Disallowable Instrument DI 2002—106 being the Construction Practitioners Registration (Fees) Determination and Revocation 2002	
Disallowable Instrument DI 2002—109 being the Water and Sewerage (Fees) Revocation 2002	
Disallowable Instrument DI 2002—110 being the Water and Sewerage (Fees) Determination 2002	
Disallowable Instrument DI 2002—111 being the Land (Planning and Environment) (Fees) Revocation 2002	
Disallowable Instrument DI 2002—112 being the Land (Planning and Environment) (Fees) Determination 2002	
Disallowable Instrument DI 2002—113 being the Surveyors (Fees) Revocation 2002	
Disallowable Instrument DI 2002—114 being the Surveyors (Fees) Determination 2002	
Disallowable Instrument DI 2002—115 being the Unit Titles (Fees) Revocation 2002	

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Disallowable Instrument DI 2002—116 being the Unit Titles (Fees) Determination 2002	
Disallowable Instrument DI 2002—120 being the Plumbers, Drainers and Gasfitters Board (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—128 being the Scaffolding and Lifts (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—129 being the Occupational Health and Safety (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—130 being the Workers' Compensation (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—131 being the Dangerous Goods (Fees) Revocation and Determination 2002	
Disallowable Instrument DI2002—107 being the Electricity (Fees) Revocation 2002	
Disallowable Instrument DI2002—108 being the Electricity (Fees) Determination 2002	
Disallowable Instrument DI2002—144 being the Cultural Facilities Corporation Appointment 2002	
Disallowable Instrument DI 2002—137 being the Agents Act 1968 – Board Appointments 2002 (No. 1)	
Disallowable Instrument DI 2002—138 being the Agents Act 1968 – Board Appointments 2002 (No. 2)	
Disallowable Instrument DI2002—142 being the Gungahlin Development Authority Appointment 2002 (No 1)	
Disallowable Instrument DI2002—140 being the Waste Minimisation (Fees) Revocation and Determination 2002	

BILLS

Bills - No Comment

The Committee has examined the following Bills and offers no comment on them.

Domestic Animals Amendment Bill 2002

This Bill would amend the *Domestic Animals Act 2000* to address operational issues that have arisen since that Act came into force in June 2001.

Lakes Amendment Bill 2002

This Bill would amend the *Lakes Act 1976* to allow the Minister to recognise and accredit interstate powerboat licence holders as being able to use the Molonglo Reach without having to apply for a further authorisation (licence) within the ACT.

Planning and Land (Consequential Amendments) Bill 2002

This Bill would amend various Acts (in particular the *Land (Planning and Environment) Act 1991*) and regulations as a consequence of the enactment of the *Planning and Land Act 2002*. The Bill also makes a number of minor technical and corrective amendments. The principal amendments to the Acts and regulations aim to maintain the power of the Executive and the Minister in terms of setting broad policy directions. The Planning and Land Authority is to assume responsibility for management of many of the functions governed by the Land Act.

Bills - Comment

The Committee has examined the following Bills and offers these comments on them.

Civil Law (Wrongs) Amendment Bill 2002

This Bill would amend the *Civil Law (Wrongs) Act 2002* by the insertion of a new Part 3.3 to the effect that it would abolish liability for death or injury caused by acts of terrorism, where the death or injury arises out of the use of a motor vehicle and the act of terrorism is committed before 1 October 2004. The Bill would not remove the liability of someone who commits or promotes the act of terrorism; or of an employer to pay compensation under the *Workers Compensation Act 1951*.

Para 2(c)(i) – undue trespass on rights and liberties

It should be noted that the amendments would not be retrospective.

A key concept is the notion of "death or injury … arising out of the use of a motor vehicle if the death or injury … are caused by an act of terrorism". It is not easy envisage just what kinds of situations will be affected. It may refer to a case where a person using a motor vehicle is then "caused by an act of terrorism" to use it in a

particular way that in turn causes some other person to suffer death or injury". It would assist an understanding of the Bill if a specific example was given.

The effect would be that the person using a motor vehicle would not be liable in respect of the death or injury to the other person. Thus, an insurer of the driver would not be liable. It may be that the drafters of the Bill had in mind cases where the driver of the vehicle had not been negligent.

The proposal may cover a case where the driver, through negligence, had placed her or himself in a position where the act of terrorism had the effect of causing the driver to injure another person. Is it intended that there be no liability in such cases too? Legislation that deprives a person of their right to sue in negligence raises a rights issue; see Report 19 of 2002.

The definition of "act of terrorism" might also be explained. It may cover "the use or threat" of action that is a by-product of street demonstrations such as have occurred at intervals in Australian political history (such as the recent "S11" demonstrations); see para 31A(1)(b) and para 31A(2)(b).

Criminal Code 2002

This is a Bill for an Act for the *Criminal Code 2002*. The Code would state a number of general principles of criminal responsibility (in Chapter 2 of the Code), and in Chapter 4 make provision for a number of offences relating to property damage, and to computer damage and sabotage.

Comment

It is useful to begin by noting the general purpose of the Bill, and, in particular, that it would copy into Territory law provisions of a Commonwealth law. The Explanatory Memorandum says:

> The Criminal Code 2002 (the Bill) is the second stage in the progressive reform of the ACT's criminal legislation. The process commenced in September last year when the Legislative Assembly passed the *Criminal Code 2001* (the 2001 Code). The 2001 Code sets out some but not all of the general principles of criminal responsibility in Chapter 2 of the Model Criminal Code developed by the national Model Criminal Code Officers Committee ("MCCOC"), established by the Standing Committee of Attorneys-General. The Bill comprises Chapters 1, 2 and 4 of the Model Criminal Code. …
>
> The Commonwealth was the first Australian jurisdiction to enact Chapter 2 of the Model Criminal Code and the Bill is substantially similar to that passed by the Commonwealth in 1995. …
>
> The Commonwealth prepared a very detailed Explanatory Memorandum for its Bill, which included a discussion of the case law from which the Code provisions were derived. This Explanatory Memorandum reproduces extracts from its Commonwealth counterpart, … .

Para 2(c)(i) – undue trespass on rights and liberties

A number of the provisions in Chapter 2 are identical to the provisions in the *Criminal Code 2001* and will not be the subject of comment in this Report.

The provisions of the Bill are of great significance to the community. They state some fundamental principles of criminal responsibility. It is evident at least from newspaper debate that many citizens are interested in questions of the criminal responsibility of the person who, for example

- in a drunken state, assaults someone; or
- injures or kills someone found criminally trespassing on the person's property; or
- kills another (such as a spouse) who it is alleged had battered the person over a long period of time; or
- pleads that they were insane when they assaulted or killed someone.

The question of the attribution of criminal responsibility (or not) in such cases is not a matter for legal expertise alone (or even primarily). The law on these issues reflects the kind of society we are (or want to be). The rights dimensions are also clear. The rights of the person who might be punished, or not punished, must be weighed against the rights of the victims, and the right of the community as a whole to live in a society free of the threat of violence.

In relation to all of the examples given above, and in the issues raised in the rest of this Report, the Committee feels that the Explanatory Memorandum has not provided sufficient justification, for the purposes of promoting an informed debate, of the relevant clauses of the Bill. It is understood that this has come about because the Bill seeks to state in the law of the Territory the law as it has been adopted in Commonwealth law. Thus, it has apparently been felt sufficient to merely reproduce parts of the Explanatory Memorandum to the Commonwealth Bill.

Nevertheless, the issues raised by the Bill are for the Assembly to determine. While this is an example of 'national scheme' law, it is to be noted that the subject-matter is one on which there has always been variance between the States and Territories of Australia. The content of the criminal law has generally been regarded as one lying particularly within the realm of the State and Territory legislatures. Diversity between these jurisdictions reflects the diversity of the history, culture and populations of the components of the federation.

Clauses 25 and 26 - the capacity of children to commit crime

In combination, these provisions establish two rules.

First, that a child under 10 years cannot be criminally responsible for an offence at all.

Secondly, that child aged 10 years or older, but under 14 years old, can be criminally responsible only if the child knows that his or her conduct is wrong. It is for the prosecution to prove that a child knows that his or her conduct is wrong. (The standard of proof would be beyond reasonable doubt.)

These provisions impinge on rights of those affected by the otherwise criminal conduct of the child. They may, for example, preclude the victim from obtaining criminal injuries compensation. They may have the effect of encouraging adults to use children as the instrument of a crime (such as stealing), and the higher the age of criminal irresponsibility of children, the more such tactics are feasible.

The issue for the Assembly is whether these ages of criminal irresponsibility are justifiable. The Explanatory Memorandum points out that clauses 25 and 26 state the position as it is under existing ACT law.

There are no provisions in any of the international human rights laws that state a clear proposition about the appropriate age of criminal responsibility. Article 40 of the *United Nations Convention on the Rights of the Child* merely states that State parties "shall seek" to provide in law for "the minimum age below which children shall be presumed not to have the capacity to infringe the penal law" (Art 40.3(a)). Apparently the view was taken that "the minimum age criminal responsibility differs widely among countries due to historical and cultural reasons" (S Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 701).

It may be noted that in the United Kingdom, the law has been changed to the effect that a child of 10 and above "is now treated as having the same criminal intent and maturity as adult offenders" (C Hamilton and M Roberts, "State Responsibility …", in D Fottrell, *Revisiting Children's Rights* (2000) 144. This reform followed a government paper entitled *No More Excuses* which stated that "to prevent offending and reoffending by young people, we must stop making excuses for youth crime. Children above the age of criminal responsibility are generally mature enough to be accountable for their actions and the law should recognise this" (ibid at 144). This approach has been criticised on the ground that:

> A 10-year old child is not considered sufficiently mature enough to consent to medical treatment …, to vote, enter into sexual relationships, marry, manage his or her financial affairs and so on. … It is difficult to see how a child who is considered in need of protection from the consequences of bad choices when it comes [to such matters as just stated] can be held fully responsible in criminal law for bad choices and decisions that produce offending behaviour: ibid at 143.

This line of thought would suggest that a 10 year old, (and perhaps it is implicit that this applies to 10-14 year olds), should not be criminally responsible at all. But the UK reform merely removed the presumption that a 10-14 year old could not form the requisite criminal intent. In a case involving two 11 year olds who were charged with the murder of a 2 year old boy, the European Court of Justice did not find that the attribution of criminal responsibility to the 11 year olds breached any provision of the European Convention on Human Rights; (see U Kilkelly, "The Impact of the Convention …", in D Fottrell, *Revisiting Children's Rights* (2000) 98).

If the Act were to follow this UK reform, clause 26 of the Bill would be deleted. Deletion of clause 26 would not mean that a child of 10-14 could not raise the issue of whether he or she had the criminal intent required to commit the crime charged. If this issue was raised, and there was some evidence to support it, then the prosecution

would have to persuade the jury that lack of intent was not a finding that was reasonably open on the evidence. Deletion of clause 26 would mean that the prosecution would not have to rebut the presumption that the child did not have the requisite intent.

The Committee is *not suggesting* that clause 26 be deleted. The point of the above is to draw attention to the fact that there is room for debate about the need for clause 26. Similarly, the retention of 10 years as the minimum age of criminal responsibility may also be debatable.

Clause 28 - the insanity defence re-stated

As the Explanatory Memorandum notes:

> This clause provides that a person is not criminally responsible for an offence if, at the time of the relevant conduct, the person was suffering from a mental impairment that had the effect that (a) the person did not know the nature and quality of the conduct; or (b) that the person did not know that the conduct was wrong; or (c) that the person was unable to control the conduct. A mentally impaired person is not criminally responsible if any one of these effects is present at the time of his or her conduct.

The third arm of the test extends the common law and makes it easier for a defendant to run an "insanity" defence. Under clause 28, a defendant can argue that even if they did know the nature and quality of the conduct; or that they were aware that their conduct was wrong, they are not guilty because they were "unable to control the conduct". The Explanatory Memorandum, quoting the Commonwealth Explanatory Memorandum, notes that some law reform bodies have been split as to whether this is desirable.

It is disappointing that the Explanatory Memorandum did not pursue this issue, given the existence of contrary, and reasoned, recommendations to the contrary.

This issue was addressed by the Law Reform Commission of Victoria, in *Report No 34, Mental Malfunction and Criminal Responsibility* (1990). This Commission responded to the suggestion that the compulsive behaviour (sometimes, although inaccurately, called irresistible impulse) be a basis for the insanity defence in this way:

> The difficulty with compulsive behaviour is to distinguish impulses which are irresistible from those which were simply not resisted. In the light of the potential difficulties, the Commission does not believe that the insanity defence should be covered to include irresistible impulse: ibid at 11.

In its *Discussion Paper No 14, Mental Malfunction and Criminal Responsibility* (1988), at 19, the Commission noted that "the test is not in fact restricted to impulsive actions. It applies to a general lack of capacity to control conduct"

In its *Discussion Paper*, the Commission noted that some cases of 'irresistible impulse' would fall under the traditional test; see at 7. That is, the defendant may

argue that he or she had so lost control that they did not know what they were doing was wrong. The Commission noted however,

> This would not avail a defendant who could think calmly about the wrongness of his or her actions but was unable to resist. Under the legislation operating in some States, such a person *would* have an insanity defence. The problem of allowing the insanity defence in such cases - where there is no evidence of overwhelming emotion - is to distinguish them from cases of callous, blameworthy conduct: ibid.

The Commission elaborated its objections; (see ibid at 18-20). Notwithstanding this reasoned perspective, the drafters of the Code have provided for a defence of 'compulsive impulse' as part of the insanity defence. The Explanatory Memorandum provides no justification for so doing.

Clause 31 - intoxication as a defence

The Explanatory Memorandum notes:

> This clause provides that evidence of intoxication that is self-induced cannot be considered in determining whether the defendant intended to carry out the conduct (or intended to omit carrying out the conduct) that constituted the offence.

It is to be noted, however, that this basic rule is qualified in the direction of enabling a defendant to take advantage of her or his intoxication as a means to avoid criminal responsibility.

First, as the Explanatory Memorandum notes,

> [sub-clause 31(1)] does not prevent the court from considering evidence of self-induced intoxication in relation to a fault element of intention with regard to a result or a circumstance. For example, in the case of an assault, evidence of self-induced intoxication cannot be used to show that the defendant lacked the “basic” intent to carry out the act of punching the victim but such evidence can be used to show that the defendant lacked the intention to bring about the result of inflicting grievous bodily harm on the victim.

This limitation may reflect existing case-law, (as noted in the Explanatory Memorandum), but why is it desirable?

Secondly, by clause 31(2), this provision "does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental. This may apply to the drunk who stumbles into another person lying in the street as opposed to the drunk who kicks the other person".

There is no explanation of why this is a desirable position.

Thirdly, by subclause 31(3), this provision "does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed".

There is no explanation of why this is a desirable position.

Clause 42 - self-defence

The Explanatory Memorandum notes:

> The general principle is set out in subclause 42(1), which provides that a person is not criminally responsible for an offence if his or her conduct is carried out in self-defence.

The test in subclause 42(2) is twofold: first, the person must subjectively believe that their conduct is necessary for an objective stated in para (a) (such as, (i) to “defend himself or herself or someone else", and (iv) "to prevent criminal trespass to land or premises"), and secondly, that the person's response is objectively a "reasonable response in the circumstances as the person perceives them". (This second arm of the test appears to require the fact-finder (the jury or the judge, as appropriate) to take a view on what it was that the defendant perceived the circumstances facing her or him to be, and then to assess what a reasonable person so placed would do.)

Battered women syndrome and the scope of the defence

The Explanatory Memorandum, quoting from the Explanatory Memorandum to comparable Commonwealth law, draws specific attention to how s 42(2) will enable a woman to rely on expert evidence about "battered women's syndrome" to support a defence of self-defence. It is said:

> expert evidence could be admitted to show that women who have suffered "habitual domestic violence are typically affected psychologically to the extent that their reactions and responses differ from those which might be expected by persons who lack the advantage of an acquaintance with the results of those studies."

This evidence would thus enable the woman defendant to establish how she subjectively perceived the circumstances facing her. The jury would then still need to measure whether her response was what a reasonable person so placed would do.

Although the Explanatory Memorandum draws attention to this particular kind of expert evidence and how it might be used by a woman, such evidence might also be available where the defendant was a man. That is, there is no reason why there might not be a field of expertise in relation to what some kinds of "battered men", or "battered youth", etc might perceive as to the nature of a threat they faced in certain circumstances. This may explain why the Commonwealth Explanatory Memorandum says

> The approach of drawing the rules relating to defences in a way that would fairly accommodate the responses of women and men was preferred to an approach which would make such syndromes free-standing defences.

The approach as reflected in the Bill is well-supported by commentators, including many women; see generally, S Bronitt and B McSherry, *Principles of Criminal Law* (2000) 306ff. The Explanatory Memorandum acknowledges, however, that there is a view that the position of the battered woman cannot be protected adequately unless there is a free-standing defence to cover their situation. It is fair to say that there is no obvious alternative, and this branch of the law is in a state of flux.

But the issue having been raised in the Explanatory Memorandum, it needs to be better explained. Just what alternatives were considered, if any?

There is a view that the position of the battered woman cannot be protected adequately unless there is a free-standing defence to cover their situation.

The Explanatory Memorandum does not justify the position as it is reflected in the Bill.

Action to prevent criminal trespass and the scope of the defence

The Explanatory Memorandum notes:

> [Subclause 42(3)] restricts the defence to ensure it does not apply to force that involves the intentional infliction of death or really serious injury for the purpose of protecting property rights.

A house-holder may be faced with a situation in which he or she determines, or feels compelled, to defend her or himself by conduct they perceive to be necessary "to prevent criminal trespass to land or premises", (which is a stated basis for acting in self-defence: para 42(2)(a)(iv)). Such a person is not, however, well-placed to make a judgment as to whether the force they are proposing to use is such that a jury would later characterise it as having involved "the intentional infliction of death or really serious injury": para 42(3)(a)). The house-holder's reaction will often be by way of instinct and not after considered judgement. In this respect, it should be borne in mind that householder's conduct must (that is, even if s 42(3) were deleted) still satisfy the test in para 42(2)(b) - that is, her or his conduct must be "a reasonable response in the circumstances as the person perceives them".

There is another problem with subclause 42(3). It is to be noted that the Explanatory Memorandum states that "[i]t was decided not to define "really serious injury". These words are the equivalent to "grievous bodily harm", a term the courts have been reluctant to define". It might be said that if the courts will have trouble defining "really serious injury", the householder faced with a criminal trespasser will have more difficulty. This underlines the uncertainty surrounding just what subclause 43(2) means. This uncertainty may point to the undesirability of using the phrase "really serious injury" at all.

It may be argued that the issue of what is a "really serious injury" may be left to the trial judge when instructing the jury, in the light of whatever other courts may have said about what that phrase means.

In this particular context, but also generally speaking in relation to situation where the content of a criminal offence of stated by reference to vague phrases, it is well to note observations by the High Court (speaking about an analogous statutory provision) in *Taikato v The Queen* (1996) 70 ALJR 960:

> One purpose of s 545E is to protect the public from the use of certain dangerous weapons which are analogous to, but not as dangerous as, guns. It strikes at the person who goes into a public place armed with such a weapon. To achieve this purpose it uses language which arguably catches some pharmaceutical and domestic items that are most unlikely to be used to cause harm to members of the public even when they are carried in a public place. Without a defence of reasonable excuse or lawful purpose the reach of the section would be intolerable in a free society. But having regard to the width of the language of s 545E(1) and its evident purpose, determining what constitutes a "reasonable excuse" is not easy. …
>
> The chief difficulty in a court interpreting "reasonable excuse" in s 545E(2) to cover possession for use in case of attack is to find a principled way of distinguishing cases where the legislature could not conceivably have envisaged such a defence arising and those where it may well have envisaged such a defence being available. …
>
> If the rule of law is to have meaning, a criminal law should operate uniformly in circumstances which are not materially different. Consequently, even if in some circumstances a well-founded fear of attack is a necessary but not decisive criterion of "reasonable excuse", courts will have to formulate various conditions which disqualify some, but not all, individuals or groups from taking advantage of the "reasonable excuse" protection afforded by s 545E(2). That means that, under the label "reasonable excuse", the courts will have to make what are effectively political judgments by looking for material differences justifying the distributive operation of the criminal law in a variety of circumstances which have many, sometimes almost identical, similarities with each other. Put at its lowest, the courts will have to make value judgments as to what circumstances giving rise to a well-founded fear of attack entitle a person to arm him or herself with a prohibited article or thing. …
>
> … the reality is that when legislatures enact defences such as "reasonable excuse" they effectively give, and intend to give, to the courts the power to determine the content of such defences. Defences in this form are categories of indeterminate reference that have no content until a court makes its decision. They effectively require the courts to prescribe the relevant rule of conduct after the fact of its occurrence. That being so, the courts must give effect to the will of Parliament and give effect to their own ideas of what is a "reasonable excuse" in cases coming within s 545E even when it requires the courts to make judgments that are probably better left to the representatives of the people in Parliament to make.

The vagueness of the phrase "really serious injury" creates a similar problem.

More generally, the Committee notes that there is no justification given as to why action taken to protect property rights should be regarded as less justifiable as a basis for a defence of self-defence.

The Committee wishes the Government to address these issues.

Subordinate Legislation - No Comment

The Committee has examined the following items of subordinate legislation and offers no comment on them.

Subordinate Law SL2002-23 being the Road Transport (Driver Licensing) Amendment Regulations 2002 (No 1) made under the *Road Transport (Driver Licensing) Act 1999* amends the Road Transport (Driver Licensing) Regulations 2000 by clarifying the applicability of demerit points where there is a crossover from a provisional licence to a full licence. The regulations also clarify the number of applicable demerit points for different types of provisional licence holders.

Disallowable Instrument DI2002—159 being the Dental Technicians and Dental Prosthetists (Fees) Determination 2002 (No 1) made under section 73 of the *Dental Technicians and Dental Prosthetists Registration Act 1988* revokes all previous determinations for fees payable under the Act and determines the fees set out in the Schedule to be the fees for the Act.

Disallowable Instrument DI2002—160 being the Physiotherapists (Fees) Determination 2002 (No 1) made under section 54 of the *Physiotherapists Act 1977* revokes all previous determinations for fees payable under the Act and determines the fees set out in the schedule to be the fees for the Act.

Disallowable Instrument DI2002—162 being the Environment Protection Declaration of non-application of section 50 2002 (No. 1) made under section 50 (7) of the *Environment Protection Act 1997* exempts the Environment Protection Authority from publicly notifying the grant of an environmental authorisation to ACT Workcover in relation to burning fireworks seized under the *Dangerous Goods Act 1975*.

Disallowable Instrument DI2002—163 being the Podiatrists (Fees) Determination 2002 (No 1) made under section 54 of the *Podiatrists Act 1994* revokes the fees determined by Instrument No. 241 of 1997 (notified in S319, dated 24 October 1997 and news new fees in accordance with the Schedule.

Disallowable Instrument DI2002—164 being the Gaming Machine (Required Community Contributions) Determination 2002 (No 1) made under section 60G of the *Gaming Machine Act 1987* sets the Serbian Cultural Club's required community contribution for the 2001-2002 financial year at zero.

Disallowable Instrument DI2002—165 being the Gungahlin Development Authority Appointment 2002 (No 3) made under section 14 (2) of the *Gungahlin*

Development Authority Act 1996 **appoints specified persons as part time members of the Gungahlin Development Authority until 1 July 2003.**

Disallowable Instrument DI2002—166 being the Road Transport (Public Passenger Services) Approval of Taxi Security Camera Standards 2002 made under regulation 156 (1) of the Road Transport (Public Passenger Services) Regulations 2002 approves the Taxi Security Camera Standards as set out in the Schedule.

Disallowable Instrument DI2002—169 being the Radiation (Fees) Determination 2002 (No 1) made under section 77 of the ***Radiation Act 1983*** **revokes Determination No 277 of 2001, dated 3 September 2001 and determines fees for the purposes of the Act.**

Disallowable Instrument DI2002—170 being the Commissioner for the Environment 2003 Report Determination 2002 made under section 19 (5) of the ***Commissioner for the Environment Act 1993*** **specifies that the reporting period for the next ACT State of the Environment Report will commence on 1 July 2000 and end on 31 June 2003. The Determination further specifies that the reporting date by which the Commissioner of the Environment shall submit his report to the Minister shall be 31 December 2003.**

Disallowable Instrument DI2002—171 being the Public Place Names 2002, No. 11 (Street Nomenclature – Gungahlin) made under section 3 of the ***Public Place Names Act 1989*** **details the names, origins and significance of new street names in the Division of Gungahlin.**

Disallowable Instrument DI2002—172 being the Road Transport (General) – Declaration that the road transport legislation does not apply to certain roads and road related areas 2002 (No. 6) made under section 12 of the ***Road Transport (General) Act 1999*** **declares that the road transport legislation does not apply to the ACT roads and road related areas used when vehicles are competing in two of the time special stages of the Brindabella Motor Sport club 2002 Caltex Airport Starmart Rally on 14 September 2002. The event is held under the auspices of the Confederation of Australian Motor Sport.**

Subordinate Legislation - Comment

The Committee has examined the following items of subordinate legislation and offers these comments on them.

Disallowable Instrument DI2002—161 being the Community and Health Services Complaints – Community and Health Rights Advisory Council – Appointment 2002 (No 1) made under section 63 of the *Community and Health Services Complaints Act 1993* appoints specified persons to be acting members of the Community and Health Rights Advisory Council for a period of 3 months commencing on 26 August 2002.

No confirmation by relevant Committee of agreement to appointments

The Committee notes the explanatory statement for the above instrument states "Legislative Assembly consultation is not required for acting appointments for 6 months or less". As these appointments are for a 2nd or subsequent consecutive period section 227 (2) (b) of the *Legislation Act 2001* is relevant and provides as follows:

227 Application of div. 19.3.3 (SAA s4 (1), s 6)

"(2) However, this division does not apply to an appointment of—

(b) a person to act in a statutory position for no longer than six months unless the appointment is of a person to act in the position for a 2nd or subsequent consecutive period; …".

Disallowable Instrument DI2002—167 being the Nurses Board Appointments 2002 (No. 1) made under section 6 of the *Nurses Act 1988* appoints specified persons as Chair and members of the Nurses Board.

Is this instrument disallowable?
Instrument made under incorrect Act

The Committee notes that the explanatory statement for the above instrument of appointment states the instrument makes an appointment to which the *Legislation Act 2001*, division 19.3.3. applies. However, no indication is given as to whether or not the appointees are public servants. The instrument also makes an appointment for a period of less than 6 months. An instrument appointing a public servant and an instrument appointing a person for less than 6 months is not a disallowable instrument under section 227 (2) (a) and section 227 (2) (b) of the *Legislation Act 2001*, respectively.

The Committee also notes that the above instrument was made under section 6 of the ***Nurses Act 1988***. Appointments to the Nurses Board are made under section 5 of the *Health Professions Boards (Procedures) Act 1981*.

Disallowable Instrument DI2002—168 being the Physiotherapists Board of the ACT Appointments 2002 (No. 1) made under section 6 of the *Physiotherapists Act*

1977 **appoints specified persons as Chairperson and members of the Physiotherapists Board.**

Is this instrument disallowable?
Instrument made under incorrect Act

The Committee notes that the explanatory statement for the above instrument of appointment states the instrument makes an appointment to which the *Legislation Act 2001*, division 19.3.3. applies. However, the explanatory statement also states that some of the appointees are public servants. The instrument also makes appointments for a period of less than 6 months. An instrument appointing a public servant and an instrument appointing a person for less than 6 months is not a disallowable instrument under section 227 (2) (a) and section 227 (2) (b) of the *Legislation Act 2001*, respectively.

The Committee also notes that the above instrument was made under section 6 of the ***Physiotherapists Act 1977.*** Appointments to the Physiotherapists Board are made under section 5 of the *Health Professions Boards (Procedures) Act 1981*.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses in relation to comments from:

- The Attorney-General, dated 24 September 2002, in relation to comments in Scrutiny Report No. 19 regarding the Civil Law (Wrongs) Bill 2002.
- The Minister for Planning, dated 16 September 2002, in relation to comments in Scrutiny Report No 17 regarding the Planning and Land Bill 2002 and Disallowable Instrument DI2002-56 – ACT Heritage Council appointments.

Copies of the responses are attached.

The Committee thanks the Attorney-General and the Minister for Planning for their helpful responses.

Further comments

The Committee offers these further comments in relation to the Planning and Land Bill 2002, and the Civil Law (Wrongs) Bill 2002.

Civil Law (Wrongs) Bill 2002

The Committee notes, and commends, the preparation of a new Explanatory Memorandum. This should be of considerable benefit to the legal profession, and indeed to members of the public who may wish to understand this Bill (or, more particularly, the *Civil Law (Wrongs) Act 2002*, as the Bill has now become).

In Report No 19, the Committee noted that the categories of "community work" may be extended by the Minister making a regulation to that effect under para 7(1)(b), and raised a question as to whether it is, in such a critical respect, appropriate to delegate legislative power to the Minister. The Minister's response is that he does not envisage that regulations will be necessary but considers that "it is necessary to have some flexibility built into the legislation". An alternative view is that if it becomes apparent that some extension of the already very broad concept of "community work" is required, the Act may then be amended. It is to be borne in mind that an exercise of the regulation-making power under para 7(1)(b) will have an effect on the rights of persons to recover damages in negligence. It may be argued that this is a matter that is appropriate for the Assembly.

The Committee notes the responses of the Minister in relation to the general policy laying behind the provisions concerning good Samaritan and volunteers, and that in particular they are designed to encourage persons to act in these capacities by reducing their exposure to legal action where they inflict harm on others by their negligence. The Committee's point is that this reduction in the rights of those harmed must be weighed in the calculus of whether the legislation is in the interest of the public. Against the possibility that reducing the exposure to legal action of Samaritans and volunteers will encourage them to act, (which is speculative), is the possibility that persons who so regard themselves may act more carelessly, (which is also speculative). Even if the first effect is more likely, its benefits must be weighed against the loss of rights or injured persons (which losses are contemplated by the Bill, although on what scale is speculative).

The Committee notes the responses of the Minister in relation to the shifting of liability from a volunteer to a community organisation, but is still concerned about the possibility that the community organisation will not have funds to meet any liability.

It is also noted that the Minister has not addressed the Committee's concerns about the width of the definitions in relation to the provisions concerning volunteers.

The Committee notes the Minister's response in relation to clause 34, concerning persons who are injured while committing offences. The Committee raised concerns about whether those aspects of the law of evidence that would apply on a criminal trial are to be applicable where a court makes a judgment under clause 34. It would appear not, and in this lays a concern about the rights of the injured person. It is noted that the Minister's response does not address this concern.

The Committee notes the Minister's response in relation to clause 161, and in particular that it is the Minister's view that he does not envisage that regulations will

be necessary but considers that "it is necessary to have some flexibility built into the legislation".

The Committee understands this point, but wishes to register a general concern that this reason may be advanced for conferring legislative power on a Minister (or, and more particularly, on any other person of body). It is of course convenient for government to be carried on by laws made by Ministers. The process is quick, and much less expensive, that law-making by the Assembly. The Assembly may disallow *some* (but not all) such laws, but, even where the Assembly can so act, the laws are generally effective in law up to the point of disallowance.

Subordinate laws should be seen as the exceptional way of making laws. This protects the position of the Assembly, which is elected by the people, as the law-maker. Another way to state the point is to say that it is a principle of our system that laws are made by the legislative branch - the Assembly - and that it is a breach of separation of powers to permit a member of the executive branch to make law. (It is acknowledged that our system does permit executive branch law-making, although the High Court has left open the issue of whether there are some limits to the extent of this power.)

In other words, the convenience of conferring legislative power on a Minister is not, stated simply as such, a good reason for conferring that power.

Planning and Land Bill 2002

The Committee notes the comments of the Minister in relation to clause 21.

In Report No 17, Committee expressed its concern that the rights of the chief planning executive may be affected in an unacceptable way given that:

- There is no obligation on any person or body to accord any form of natural justice (procedural fairness) to the chief planning executive;
- The effect of an Assembly debate, even if in the end it did conclude in the passing of a resolution of dismissal, might well be to cause irreparable damage to the reputation of the chief planning executive in a situation where the executive would have no direct means of redress; and
- It will be very difficult, if not impossible, for the executive to challenge the validity of a resolution of dismissal. The courts are very reluctant to intervene in the internal management of a legislature, or more broadly in the exercise of its powers. Apart from considerations of 'separation of powers', it is very difficult for a court to make findings of fact about the reasons, or motives, of a deliberative body that is not obliged to give any reasons; see *Yates (Arthur) & Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37.

The Committee notes that the Minister's response does not address several of these concerns.

There is no apparent reason why the law cannot state explicitly, and provide in some detail, for the nature of the procedure that should be followed by the Executive, and perhaps by the Assembly, when these bodies are involved in an exercise of their

respective powers to dismiss a CPE. It is very common for legislation to prescribe a procedure according to which a power must be exercised, and often in regard to powers of much less significance than the dismissal of a public officer. The difficulty of prescribing a procedure to be followed in such a case by a deliberative legislative body such as the Assembly, comprised of persons elected by the community, underlines the problematic nature of giving the Assembly such power.

The Minister refers to the Assembly having 'jurisdiction' to determine whether to dismiss the chief planning executive (CPE). This language is appropriate, but it points to the problem - why in respect of this officer is the Assembly given a power (here, an adjudicative power), normally exercised by an executive body? A legislative body is far less amenable to judicial review than an executive body, and, even where the Assembly accords natural justice etc, it is the publicity attending the debates that will cause damage, even if the CPE is not dismissed.

The Committee acknowledges that this procedure fetters the power of the Executive. It is this that gives rise to the possibility that a CPE in whom the Executive has lost confidence may remain in office if the Assembly refuses to dismiss the CPE. This is an odd result in a system of responsible government. This point does not, moreover, address any of the Committee's concerns about guarantees of natural justice, or the adverse effects on the CPE of a public record of concerns about her or his performance. It should also be noted that privilege would attach to any republication of the record of the assembly's debates.

The Committee’s general point remains – a CPE is placed in a particularly vulnerable position by clause 21, and there is no apparent justification for treating this public officer in this way.

Bill Stefaniak MLA
Chair

November 2002

Simon Corbell MLA

MINISTER FOR EDUCATION, YOUTH AND FAMILY SERVICES
MINISTER FOR PLANNING MINISTER FOR INDUSTRIAL RELATIONS

MEMBER FOR MOLONGLO

RECEIVED
25 SEP 2002

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
London Circuit
CANBERRA ACT 2601

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No.17 of 2002. I offer the following response in relation to the matters raised by your Committee.

Planning and Land Bill 2002

Para 2 (c) (i) – undue trespass on rights and liberties. (Clause 21)
The Committee is concerned about the adequacy of appropriate checks and balances surrounding the possible dismissal of the chief planning executive (CPE). The main issue raised by the Committee concerns the lack of ability to challenge the Assembly's resolution for dismissal.

While this is true, it must be considered in light of the importance of s21(1). A prerequisite to the Assembly having jurisdiction to debate the alleged misdeeds of the chief planning executive is that the Executive must first suspend him/her, for contravention of one of the three stated grounds.

The decision by the Executive to suspend is certainly challengeable, on all the usual grounds - natural justice, lack of evidence, etc. Therefore the CPE has the full protection of the law even though it is not expressed in the Bill.

If the suspension decision is challenged successfully, there is no suspension and the Assembly would have no jurisdiction to entertain any motions under s21(3); and any resolution would be of no effect. If one were passed without jurisdiction, the Supreme Court would have no hesitation in granting the CPE an injunction against any attempt by the Executive to comply with the resolution.

Parliamentary Counsels Office (PCO) advise that the Bill actually prevents the Executive from directly 'sacking' the CPE, and is forced to argue its case before the Assembly in order to dismiss him/her. The Assembly, with its powers of inquiry, is therefore a fetter on the power of the Executive to dismiss the CPE.

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It is also noted that the drafting of this part of the Bill was modelled on the current provisions relating to the Commissioner for Land and Planning rather than the provisions in the legislation governing the Clerk of the Assembly.

Drafting Point
In relation to the "Drafting Point", it is advised that the difference between sections 11 and 51 is necessary because of the way the two bodies, the authority and the land agency, must behave. The Minister may only direct the authority about its policies, and not its principles, because in respect of the latter the authority is governed directly by the Bill; see s 8 (3), which sets out the principles with which the authority must comply (sustainable development, defined in s 73). In contrast, the Bill does not articulate those principles to guide the land agency.

Disallowable Instrument DI 2002-56 – ACT Heritage Council appointments.

Is this instrument disallowable?
The appointees to the ACT Heritage Council contained in the Disallowable Instrument 56 are not public servants. Reference to this in the Explanatory Statement was inadvertently omitted and will be included in future explanatory statement.

Missing attachments
The resumes of each appointee, referred to in the explanatory statement, were inadvertently omitted and will be attached to future explanatory statements.

No confirmation by relevant Committee of agreement to the above appointment
The appointments continued in Disallowable Instrument 56 were referred to the Standing Committee on Planning and the Environment on 7 June 2002. The Committee advised on 14 June 2002 that they were in agreement to the proposed appointments. Reference to this will be included in future explanatory statements.

Yours sincerely

Simon Corbell MLA
Minister for Planning
16-9-02

Jon Stanhope MLA
CHIEF MINISTER
ATTORNEY GENERAL MINISTER FOR HEALTH MINISTER FOR COMMUNITY AFFAIRS
MINISTER FOR WOMEN
MEMBER FOR GINNINDERRA

Mr Bill Stefaniak
Chairperson
Standing Committee on Legal Affairs
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Mr Stefaniak

Thank you for your Scrutiny of Bills Report No.19 of 2002. I offer the following responses in relation to the matters raised by your Committee on the Civil Law (Wrongs) Bill 2002 (the Bill).

The report identified defects in the Explanatory Memorandum, and in particular that the Explanatory Memorandum did not give sufficient explanation of the provisions clause by clause. To address the concerns of the Committee, I will shortly be tabling a replacement Explanatory Memorandum for the Bill. The replacement Explanatory Memorandum contains a detailed clause-by clause analysis of all of the new reforms contained in the Bill. I anticipate that this will address some of your concerns regarding the clauses on volunteers, exclusion of liability if conduct an offence and damages for loss of earnings. A copy of the replacement Explanatory Memorandum is attached.

The provisions in the Bill relating to Good Samaritans will curtail the rights of persons injured through the negligence of Good Samaritans (as defined in the bill) to recover compensation from the Good Samaritan. In the ACT there is no legal obligation on persons with particular skill and ability to render aid to those in need of assistance. Indeed under the current law, a Good Samaritan may be personally liable to compensate a person for any injuries caused by their assistance, and this acts as a deterrent to such acts. On the other hand, the law does not punish people who do not render assistance. For example, under the current law, a doctor can come across a serious car accident and can avert his eyes and move on without fear of legal sanction. Part 2.1 of the Bill recognizes the important role that Good Samaritans play within our community and affirms their social value. The Bill extends protection from personal

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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 to Good Samaritans.

Part 2.2 of the Bill does not curtail the rights of injured persons to recover compensation for injuries caused by a volunteer. Rather, this part transfers the liability from an individual volunteer to the community organisation for which they act. This transfer of liability recognises that the community organisation is a better risk distributor then an individual volunteer. Of relevance is that it is usually easier and cheaper for a community organisation to obtain insurance. In addition, this part removes a potential deterrent to people performing volunteer services, and recognises the wide range of services that volunteers provide in the ACT.

The Committee has queried whether paragraph 7(1)(b) of the Bill, which allows the Executive to declare work to be community work through regulations, is appropriate. I do not envisage that regulations will be made under paragraph 7(1)(b) of the Bill, as the definition of *community work* in paragraph 7(1)(a) is quite thorough. However, it is necessary to have some flexibility built into the legislation, especially in the current insurance climate, and this paragraph serves that purpose.

Subclause 11(1) of the Bill allows the Minister to give directions to community organisations about the taking out of insurance. There are no penalties for non-compliance with a direction, however, under clause 10 of the Bill mandatory compliance with a direction may be a prerequisite for the Territory assuming liability of a community organisation.

The report queried whether clause 34 of the Bill would be an undue trespass on the rights of persons engaged in an indictable offence. I believe that the Bill contains sufficient protection of rights of persons committing an indictable offence in subclause 34(2). However, this clause also sends the important message to criminals, and would-be criminals, that it is not appropriate for them to be compensated for injuries that are the direct result of the commission of a serious crime. Further, persons who sustain injury while committing serious offences should bear their own losses. The Committee has also expressed concerns about the consideration of criminal liability in a civil case. I am advised that similar formulations exist under the *Proceeds of Crime Act 1991* and the *Coroners Act 1997.* I assure you that a civil court being satisfied that an indictable offence was committed does not jeopardise a person in their criminal trial.

Clause 38 of the Bill limits the weekly damages for a loss of earning to three times the average weekly wage for the ACT. This cap on damages for weekly earnings will reduce the burden on those adjudged to have legal liability for these.

The report highlights the committee's concerns with respect to codification of the common law in regard to occupiers liability. While I note the Committee's concerns, I do believe it is desirable to codify the law in this area, in order to provide an accessible, accurate statement of the present law. A clear and concise statement of obligations will also assist parties in resolving disputes.

The Committee has questioned the introduction of new neutral evaluation provisions and has commented that it may simply add to the cost of litigation. Neutral evaluation is a mechanism for having a 'trusted' objective observer examine the evidence possessed by both parties. The aim of neutral evaluation is to actually lower the cost of litigation, by having cases resolved prior to litigation. Where cases continue to litigation, it is anticipated that neutral evaluation will clarify and reduce the issues that are contended.

Procedural change should not be undertaken lightly - these amendments are no exception. As I indicated when I presented the Bill, it will be necessary to ensure that properly trained persons are available to undertake the type of evaluations proposed in the scheme. I propose that the provisions not commence until the appropriate arrangements have been made, and to this end, I will also be proposing further amendments to the provisions to enable the appointment of persons outside the Court to undertake these evaluations. I understand that this is a relatively common practice in other comparable jurisdictions, including New South Wales, and it will certainly aid the introduction of these provisions in this jurisdiction.

The Committee's concerns with regard to clause 161 are noted. This clause allows the regulations to modify the operation of part 12 of the Bill, relating to transitional matters. I do not envisage that regulations will be made under clause 161 of the Bill, however, it is necessary to have some flexibility built into the legislation, to allow quick modification of any transitional provisions that are having an unintended effect, such as retrospective action.

I will be moving Government amendments to the Bill, in response to discussions with the legal profession. I understand that these have been provided to you. The Government amendments also correct the anomaly that the report highlighted with clause 120.

I hope this information addresses the Committee's concerns about the Civil Law (Wrongs) Bill 2002.

Yours sincerely

Jon Stanhope MLA
Attorney General
24/9/02

2002

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

CIVIL LAW (WRONGS) BILL 2002

EXPLANATORY MEMORANDUM

Circulated by authority of the
Attorney General
Mr Jon Stanhope MLA

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 Seltsam 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 seems 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 is 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 then 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 then 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.