

# **CIVIL LIABILITY BILL 2003**

## **EXPLANATORY NOTES**

### **General Outline**

#### **Purpose of legislation**

The main purpose of this Act is to further facilitate the ongoing affordability of insurance through clarification of some basic principles within the substantive law and sustainable awards of damages for personal injury.

The Act contains fundamental changes to the law of negligence.

#### **Reasons for the objectives and how they will be achieved**

Over the last eighteen months, major problems have emerged with the availability and affordability of public liability insurance. Insurance premiums for professional groups including doctors, accountants and engineers have also increased significantly and in the case of the medical profession, the situation has been worsened by the failure of United Medical Protection (UMP), the largest medical insurance provider in Queensland.

In June 2002, the Queensland Government introduced the first stage of law reforms designed to reign in burgeoning insurance costs and provide more affordable premiums. The Personal Injuries Proceedings Act 2002 contains a range of measures including restrictions on legal advertising, bans on jury trials, caps on economic loss and pre-court procedures designed to avoid lengthy court battles and delays.

Following the Ministerial Meeting of Treasury and Finance Ministers on 30 May 2002, Commonwealth, States and Territory governments jointly agreed to appoint a panel of eminent persons to examine and review the law of negligence, including its interaction with the *Trade Practices Act 1974* (Cth).

The Panel was chaired by The Honourable Justice David Ipp of the Supreme Court of New South Wales. Other members were Professor Peter Cane from the Australian National University, Associate Professor Donald

Sheldon from the Council of Procedural Specialists and Mr†Ian Macintosh, the Mayor of Bathurst.

On 2 October 2002, the Panel delivered the Review of the Law of Negligence Final Report (“the Ipp Report”). The Ipp Report contains 61 recommendations that address the Panel’s Terms of Reference including aspects of negligence generally (foreseeability, standard of care, causation and remoteness of damage, contributory negligence, assumption or risk, non-delegable duties and vicarious liability), mental harm, liability of public authorities, proportionate liability and damages. The Ipp Report can be electronically accessed at—

<http://revofneg.treasury.gov.au/content/home.asp>.

On 5 December 2002 a consultation draft of the Civil Liability Bill 2002 was tabled in the Parliament. Public submissions upon that draft were received and considered.

The draft Bill implements relevant recommendations of the Ipp Report, subject to pertinent submissions, and includes provisions modelled on the New South Wales *Civil Liability Amendment (Personal Responsibility) Act 2002*, which was the first legislation of any Australian jurisdiction that implemented recommendations contained in the Ipp Report.

### **Administrative cost to Government of implementation**

There are no financial implications for the Government in the Bill.

The joint communiqué following the Ministerial meeting on public liability insurance held in Brisbane on 15 November 2002 noted that actuarial advice on the impact of the Ipp Report’s recommendations indicated that the package could reduce public liability insurance premiums by around 13.5 per cent. Significant reductions in medical indemnity insurance premiums of between 15 and 18 per cent were also estimated for most jurisdictions.

However, in the absence of Commonwealth regulation of insurance pricing, whether these savings are passed on to consumers will be contingent on the decisions of the insurance industry.

### **Fundamental legislative principles**

The Bill gives rise to a breach of the fundamental legislative principles that legislation should not adversely affect the rights of individuals retrospectively.

Retrospective application of the Civil Liability Bill 2003 to commence from 2 December 2002 may adversely affect the rights of persons injured in the period between 1 December 2002 and commencement of the Bill.

The potential adverse affect on individuals must be balanced against the interests of the community in achieving the affordability of insurance to enable the ongoing provision of health care to injured persons, and the affordability of public liability insurance generally.

### **Consultation**

There has been consultation on the Bill with the following:

- Australian Medical Association Queensland;
- Insurance Council of Australia;
- Queensland Law Society;
- Bar Association of Queensland;
- Australian Plaintiff Lawyers' Association;
- Individual lawyers;
- Government Departments and agencies; and
- Local Government Association of Queensland.

Further, as a result of the tabling of the consultation draft of the Civil Liability Bill 2002, written submissions were received from the following:

AAMI (Australian Associated Motor Insurers Ltd)	Allianz Australia Ltd (PI Division CTP Qld)
AMAQ (Queensland Branch of the Australian Medical Association)	Australian Pensioners' and Superannuants' League Qld Inc.
Australian Plaintiff Lawyers Association (APLA)	Bar Association of Queensland
Careflight Queensland Air Medical & Rescue Service	Civil Justice Foundation
Energex Community Rescue (Sunshine Coast Helicopter Rescue Service Ltd)	Local Government Association of Queensland (LGAQ)

Mr Michael Gabour	Institution of Engineers, Australia
Insurance Council of Australia (ICA)	Insurance Reform
Law Reform Commission	Mr Chris Meibusch, Meibusch Lawyers
NRMA Insurance Ltd	Professions Australia (Australian Council of Professions Ltd)
Queensland Asbestos Related Disease Support Society	Queensland Outdoor Recreation Federation Inc.
Queensland Law Society	RACQ Insurance
Suncorp Insurance	The Honourable Mr James Thomas AM QC
Tort Reform Institute	Youth Advocacy Centre Inc.

## **NOTES ON PROVISIONS**

### **CHAPTER 1—PRELIMINARY**

#### **PART 1—INTRODUCTION**

*Clause 1* states the short title of the Act.

*Clause 2* provides that the Act is to have taken to have commenced on 2 December 2002 except for certain provisions. Those provisions which are being transferred from the *Personal Injuries Proceedings Act 2002* in to the Act will commence on the date of assent to ensure no overlap of the law occurs. Further, the provisions relating to liability of volunteers, intoxication and criminal behaviour are to commence on assent. The

provisions relating to proportionate liability will commence on a date to be proclaimed.

*Clause 3* provides that a note in the text of the Act is part of the Act.

## **PART 2—APPLICATION OF ACT**

*Clause 4* sets out the application of the Act. It applies to all claims for damages for harm. Harm is defined to include all possible types of loss, including personal injury, damage to property and pure economic loss other than those excluded by clause 5.

The clause is drafted to include, through the definition of “claim”, all breaches of a duty of care in tort, those duties in contract that, whether express or implied, can be considered of the same effect as a duty to take reasonable care at the same time as would be found in tort, and any other duty, whether expressed under statute or otherwise, that likewise can be considered of the same effect as a duty to take reasonable care.

*Clause 5* sets out the exclusions to the application of the Act. Excluded from the application of the Act are matters involving “injuries” as defined under the *WorkCover Queensland Act 1996*, except those injuries which are identified in sections 36(c) and 37 of that Act. This exclusion will result in liability for those injuries in which employment is likely to be a significant factor being decided in accordance with the law as current before commencement of the Act. An example is provided of the multitude of claims from one incident that may be excluded from application of the Act.

The exception of those injuries identified by sections 36(c) and 37 from the exclusion will result in liability for those injuries in which employment is less likely to be a significant factor being decided in accordance with the law as modified by the Act.

The provision does not affect any pre-claim procedure under any of the *Personal Injuries Proceedings Act 2002*, the *WorkCover Queensland Act 1996* or the *Motor Accident Insurance Act 1994*. Further, the provision will not affect an employee’s right to obtain statutory benefits through the *WorkCover Queensland Act 1996*.

The provision also excludes injuries which result from smoking, or the use of or exposure to tobacco products, and also dust-related diseases.

*Clause 6* provides that the Act is binding on the State, the Commonwealth and other States to the extent that they can be bound.

*Clause 7* states the Act does not create or confer any cause of civil action. Further, the Act apart from Chapter 3 does not restrict a person's right to make express provision for their rights under contract. It also notes that the provision of the Act do not codify the law relating to civil claims for damages. Accordingly, the development of the law of negligence in those areas not referred to can continue, in accordance with the recommendations of the Ipp Report.

## **PART 3—INTERPRETATION**

*Clause 8* provides that the definition of words used in the Act is set out in the dictionary in Schedule 2 to the Act.

## **CHAPTER 2—CIVIL LIABILITY FOR PERSONAL INJURY AND PARTICULAR DAMAGE TO PROPERTY, AND RELATING TO ECONOMIC LOSS**

### **PART 1—NEGLIGENCE**

#### *Division 1—General standard of care*

*Clause 9* sets out in sub-clause (1) the general principles to be taken into account in assessing the appropriate standard of care to be taken by a person in precaution against a risk of harm eventuating to another person.

Further, sub-clause (2) requires consideration of certain factors, not exclusive to any other circumstance of a particular case, in assessing the precaution/s that would be taken by a reasonable person in that case. These

principles are in accordance with the considerations outlined at pages 101 to 106 of the Ipp Report and also recommendation no.28 of the Panel.

*Clause 10* specifies that, in actions for negligence, certain principles are to apply. Firstly, the risk of injury is not to be considered in abstract. It must be considered as a part of all similar risks of harm to which a reasonable response must be made. Secondly, the mere fact that a different way of responding to the risk exists does not alone create liability or affect any existing liability. It is for the Plaintiff to prove that the method used was an unreasonable response in all the circumstances, including the existence of the different method. Finally, an action by a person subsequent to the incident to prevent similar harm occurring does not of itself create liability or affect an existing liability. Similarly, action subsequent to an incident to remove a risk does not constitute an admission of liability.

### ***Division 2—Causation***

*Clause 11* sets out the elements and general principles to be taken into account in assessing whether the conduct of a person has caused harm to another person. Whether a person has caused harm requires consideration of the facts of the case in two ways - firstly, whether the harm suffered would not have occurred but for the actions of the person claimed to be at fault, described as “factual causation”, and secondly, whether in all the circumstances of the particular case, it is appropriate that the liability of the person considered at fault should include the harm that eventuated, described as “scope of liability”.

Further, the clause provides for cases where the facts are so unusual or extraordinary that, while factual causation can not be found, a breach of duty which was a material contribution to the harm still exists. In such circumstances, the clause requires the court to apply the tests developed at common law for such cases to decide whether or not, subjectively, a person should be responsible for the harm suffered. As part of this, the court is to consider why in all the circumstances the person should be held responsible. The Court is then still required to move to the objective test for the scope of liability.

Also in relation to determining factual causation under the provision, the clause provides that in instances where the hypothetical conduct of the person who suffered harm in the absence of the negligent act is relevant, the conduct is to be developed and assessed subjectively, as opposed to that of a reasonable person. In relation to statements made by the person after

they suffered harm, only a statement adverse to that person is admissible in the process.

Finally, the clause provides that, in assessing the scope of a person's responsibility, the court is to consider why in all the circumstances the person should be held responsible.

*Clause 12* provides that the onus of proof for negligence is always upon the plaintiff, and each fact relevant to causation must be proven on the balance of probabilities.

### ***Division 3—Assumption of Risk***

*Clause 13* sets out the meaning of “obvious risk” for this division. An obvious risk does not include risks which manifest themselves because of some action which is not itself an obvious risk. For example, while it may be an obvious risk of riding a horse that a rider may fall off the horse, it would not be an obvious risk that the rider may fall off due to the saddle not being securely fastened.

*Clause 14* establishes a presumption that a person who suffers harm is presumed to be aware of any obvious risk of harm. The presumption is rebuttable, but exists where the person has a general knowledge of the risk, not necessarily knowledge of the precise risk.

*Clause 15* provides that no proactive duty exists to warn of an obvious risk. A duty to warn of obvious risks exists in certain circumstances by way of exception to this general rule. These exceptions are where the person who suffers harm raises the risk with the person who but for this section had a duty to ward of the risk, where a person is required to inform of an obvious risk by legislation, and where a professional person, other than a doctor, may cause the death or personal injury of a person. Whilst a doctor is exempted by this clause, the doctor's duty to warn of all risks is maintained by clause 21.

*Clause 16* provides that no liability exists for personal injury suffered as a result of an inherent risk. An inherent risk is defined. This is a restatement of the position at common law. The clause does not exclude liability in connection with a duty to warn of a risk.



***Division 4—Dangerous recreational activities***

*Clause 17* sets out the application of the division. It applies to liability for personal injury suffered during a dangerous recreational activity only.

*Clause 18* sets out the meanings of “obvious risk” and “dangerous recreational activity” for this division. “Obvious risk” has the same meaning as in Division 3. “Dangerous recreational activity” is confined to those activities which, while primarily engaged in for enjoyment, relaxation or leisure, involve a significant degree of risk of physical harm.

Any consideration of a significant degree of risk of physical harm would necessarily require consideration of factors including, but not limited to, the type of activity, the probability of harm occurring, the severity of the injury and the characteristics of the person who suffered injury.

*Clause 19* provides that no liability exists for any personal injury suffered during a dangerous recreational activity if that injury occurred as a result of an obvious risk actually occurring.

***Division 5—Professional Negligence***

*Clause 20* sets out the meaning of “a professional” for this division.

*Clause 21* provides that a doctor continues to have a duty to advise their patient of information relevant to any risk of personal injury to that patient. The information must be sufficient to enable the patient to make an informed decision about whether to undergo the treatment and must also include information of the type that the doctor knows or should know the patient wants. It is immaterial whether or not the patient seeks or requests the information. The duty extends to providing information to a person responsible for making any decision on behalf of a patient.

*Clause 22* sets out the standard of care for professionals generally. The standard by which the conduct of a professional is to be assessed is conduct accepted by peer professional opinion as competent. The opinion is to be widely accepted geographically and also is to be accepted by a significant number of those peers. Acceptance by a significant number of peers does not necessarily mean that it must be the only opinion accepted as competent, neither does it mean that it must be the majority opinion that is accepted as competent. If a number of differing opinions are widely accepted by significant numbers of peers, then all of those opinions may be

relied upon to establish the relevant appropriate conduct in any particular case. However, a court may discount the peer opinion if the Court considers that opinion to be clearly outside the bounds of community expectation.

### ***Division 6—Contributory negligence***

*Clause 23* provides that the same principles that apply in deciding a matter to which this Act applies, also apply in deciding contributory negligence. The standard of care a person must take for the care of their own safety is to be the same standard a reasonable person would take if the reasonable person was aware of the same information that the person who actually suffered injury, loss or damage, knew or ought to have known.

*Clause 24* states that a claim of contributory negligence can defeat a claim for breach of a duty by way of a reduction of damages by 100%.

### ***Division 7—Enhancement of public safety***

*Clause 25* sets out the meaning of “person in distress” for this division.

*Clause 26* relocates section 71 of the *Personal Injuries Proceedings Act 2002*. This section is to be relocated at this time so as all relevant statutory provisions may be brought within the one piece of legislation.

*Clause 27* expands the indemnity provided under clause 26 to those organisations for which a volunteer is performing duties. This indemnity only extends to those situations where the organisation is involved, through its volunteer, in the provision of first aid or similar assistance and is acting in good faith.

## **PART 2—PROPORTIONATE LIABILITY**

*Clause 28* sets out the application of this part. The part applies to claims for economic loss or damage to property where the damages exceed \$500,000. It does not apply to claims that originate as a result of a personal injury.

*Clause 29* defines “defendant” for the proceeding. Such a definition and term is necessary as the focus of the provision is apportionment of damages subsequent to liability of multiple parties being found, meaning a court has decided upon the evidence in the matter.

*Clause 30* provides that the liability of a person to which this part applies is restricted to the portion of loss that is assessed by a court as being the responsibility of the person. Further, the clause directs that, should a court consider that liability is attributable to a party that is not joined in the proceedings, then for the purposes of apportioning damages the Court can not take this factor into account. The provision does not prevent the Court from making comment as to the parties’ liability, but for the purposes of recovery, the Court must apportion the damages between those parties who are joined to the action. The only exception to this requirement is where the party not joined is deceased, if a person, or wound up, if a corporation.

*Clause 31* sets out four exceptions to the application of clause 30. Defendants will remain liable for the total damages awarded against them as defendants where they have formed a common intention to cause the damage or loss suffered. Also, a principal will remain liable for the damages awarded against another defendant if that award is made against the other defendant in the capacity of agent to that principal. The third exception is where the advice of a defendant, who is a professional, has been found to cause or contribute to the loss in circumstances where that defendant was engaged to advise on that specific type of loss. The last exception is that a defendant who is found to be fraudulent, to have mislead or deceived, will be liable for all damages awarded. Defendants in an action involving defendants to which these exceptions apply will remain liable for their apportioned damages only should the plaintiff seek to enforce judgment against them.

*Clause 32* provides that the rights in relation to contributing to the damages payable in an action, between both defendants to actions, and those parties who are not joined to actions and defendants, are untouched by the Part.

*Clause 33* provides that the law of vicarious liability is unaffected by the Part. Further, the law of contribution as between partners in a partnership is unaffected. Finally, the right of any defendant to claim contributory negligence against a Plaintiff is also unaffected.

## **PART 3— LIABILITY OF PUBLIC AND OTHER AUTHORITIES AND VOLUNTEERS**

### *Division 1—Public and other authorities*

*Clause 34* sets out the definitions relevant to this division.

*Clause 35* specifies certain principles that are to apply when assessing whether a public authority has breached a duty of care. These principles are peculiar to public and similar authorities, and relate to the decision making power required to allocate resources in circumstances where the authority has certain functions.

It is to be accepted that the functions of a public authority are necessarily limited by the financial and other resources available to that authority. Accordingly, the allocation of those resources generally is not open to challenge. Further, in assessing the duty of care of a public authority, the fact that the authority has more than one function to which the proceedings relate is to be taken into consideration, along with the content of those functions.

Finally, the clause provides that a public authority may rely upon evidence of appropriate general actions when exercising its functions as evidence of the proper exercise of those functions in a specific instance.

*Clause 36* provides that the mere fact that a public or other authority undertakes a certain activity under a statutory power, or does not undertake a certain activity despite holding a statutory power to do so, of itself does not mean the authority must act in the same way in each circumstance. However, if the actions of the public authority are manifestly unreasonable in the circumstances, those actions may constitute a wrongful act or a failure to act. The standard by which the actions of the public authority are to be considered is that of a reasonable public authority.

*Clause 37* reinstates the defence of non-feasance for road authorities except in circumstances where the authority has knowledge of the specific risk prior to the incident. The effect will be that a highway authority will be able to make use of the protections and immunities that it was considered to have at law before the judgments of the High Court in *Brodie v. Singleton Shire Council* and *Ghantous v Hawkesbury City Council*. The law as it stood before those judgments will be effectively reinstated for all incidents that occur between (and including) the date of commencement and 31 December 2005. However, in circumstances where the authority had knowledge, the section will not apply and the authority will be subject

to the law as otherwise modified by the Act. The authority is not automatically liable for any damages as a result of the section not applying.

### ***Division 2—Volunteers***

*Clause 38* sets out the definitions relevant to this division. “Community organisation” is defined to mean a corporation (thereby extending to incorporated associations and companies) that is not carried on for the profit or gain of its individual members, but rather which directs or coordinates community work by volunteers. “Community work” is widely defined, to encourage the continuation of community spirit, but does not extend to political activity. A “volunteer” is defined as a person doing community work who is not paid for their work, or who only recovers their out-of-pocket expenses incurred as a result of that work. Finally, “work” is defined to mean community work done on a voluntary basis or done only for reimbursement of reasonable expenses.

*Clause 39* provides an indemnity to individual volunteers, either engaged in community work for community organisations or as an office holder of such an organisation, from liability in negligence for their own actions. The conduct of the volunteer must be in good faith, and without reckless disregard for the safety of any other person.

*Clause 40* provides that the indemnity does not extend to situations where the volunteer is engaged in a criminal act.

*Clause 41* provides the volunteer must not be intoxicated, as defined under the Act, and failing to exercise due care and skill at the time of doing the work.

*Clause 42* provides that indemnity is not provided if the volunteer is acting outside the activities of the body. In addition, if the volunteer ignores instructions given by the organisation, the indemnity does not extend to their actions.

*Clause 43* states that, if a policy of insurance is required to be held by law in relation to the volunteer work, the indemnity does not apply.

*Clause 44* states that, if a policy of compulsory third-party motor vehicle insurance applies to cover the liability, the indemnity does not apply.

## **PART 4—EXCLUSION FROM CLAIMING DAMAGES BECAUSE OF CERTAIN BEHAVIOUR**

### *Division 1—Criminal Behaviour*

*Clause 45* excludes persons from claiming damages if the injury or loss was suffered while engaged in activity which, on the balance of probabilities, is an indictable offence. The court may still award damages in such cases if satisfied that in the circumstances the exclusion would be harsh or unjust. If the Court decides to award damages, then a minimum reduction of 25% is to apply. The exclusion does not require the conduct of the person to have been considered by a criminal court or otherwise.

### *Division 2—Intoxication*

*Clause 46* sets out the principles that apply in assessing the duty of care owed to persons who suffer personal injury while intoxicated. In deciding whether a duty of care exists and the standard of care, the fact that a person is intoxicated is irrelevant. The provision does not apply if the conduct alleged to give rise to or breach a duty of care occurs upon licensed premises. Accordingly, the conduct of persons on licensed premises will be assessed in the absence of the changes to the law within the section.

*Clause 47* establishes a presumption that, if an injured person was intoxicated at the time of the injury, the person was contributorily negligent. The presumption may be rebutted if the intoxication was not a factor in the occurrence of the injury or the intoxication was not self-induced. If not rebutted, the court is required to reduce any damages assessed by a minimum of 25%. If the injury is suffered as a result of the injured person driving a motor vehicle, the minimum reduction of damages is increased to 50% where the person is found either to have a blood/alcohol level of 150 mg or more of alcohol in 100 ml of blood or to be incapable in the court's opinion of exercising actual control of the vehicle.

*Clause 48* provides that, where the injured person was firstly over the age of 16 years, secondly relying upon the care and skill of an intoxicated person, and thirdly aware of the intoxication, then the injured person is presumed to be contributorily negligent. For the presumption to arise, the incident must be caused by the negligence of the intoxicated person, and

the person against whom negligence is claimed must allege the contributory negligence of the injured person.

In relation to the knowledge of the injured person as to the intoxication of the defendant, if the injured person was intoxicated, the knowledge is to be assessed on the basis of what they ought to have known if they had not been intoxicated.

The presumption may be rebutted if the injured person can establish on the balance of probabilities either that the intoxication did not contribute to the accident or that the person who suffered injury could not reasonably be expected to have avoided the risk of being injured. If the presumption is established, any award of damages is to be reduced by a minimum of 25%.

*Clause 49* provides that the reduction in damages in clause 48 is increased to a minimum of 50% in circumstances where the injured person was a passenger in a motor vehicle driven by a person who is intoxicated to a blood/alcohol level of 150 mg or more of alcohol per 100 ml of blood or to be incapable in the court's opinion of exercising actual control of the vehicle. Further, the clause excludes the defence of voluntary assumption of risk in circumstances to which the clause applies.

## **CHAPTER 3—ASSESSMENT OF DAMAGES FOR PERSONAL INJURY**

### **PART 1—PRELIMINARY**

*Clause 50* sets out the application of this part. It applies to an award of personal injury damages, whether made in contract, tort, under statute or otherwise.

*Clause 51* sets out certain definitions for this part.

*Clause 52* provides that, in any assessment of damages where an injured person has received, or is to receive a benefit, as a result of that injury, then the assessment is to take account of that benefit on a "like for like" basis. The section does not apply to benefits received by way of charity, social security or health care benefits, any benefit received under a life insurance policy or benefits repayable under an insurance policy upon any award of damages. The Court is to assess the damages that would be payable to an

injured person, and to then deduct by way of set off against the appropriate head of damage any amount received by way of benefit.

## **PART 2—EXEMPLARY AND SIMILAR DAMAGES**

*Clause 53* relocates section 50 of the *Personal Injuries Proceedings Act 2002*. This section is to be relocated at this time so that all relevant statutory provisions may be brought within the one piece of legislation.

## **PART 3—ASSESSMENT OF DAMAGES**

*Clause 54* relocates sections 26 and 49 of the *Personal Injuries Proceedings Act 2002*. These sections are to be relocated at this time so as all relevant statutory provisions may be brought within the one piece of legislation.

*Clause 55* provides that damages for loss of earnings per week for any injured person are to be limited to an amount of three times the average weekly earnings. “Average weekly earnings” is defined.

*Clause 56* provides that, in circumstances where a court is to award damages by way of a global amount for economic loss, the Court must only award damages if it is satisfied the person has suffered or will suffer that loss as a result of the injury. The provision details the considerations the Court must make in its assessment. It is irrelevant whether the loss is future or past loss. Secondly, in awarding damages, the Court must detail its reasons for awarding the damages, outlining any assumptions it has made in arriving at the value of the damages. Finally, any amount of damages awarded globally can not exceed the limit set in clause 55.

*Clause 57* provides that damages for loss of superannuation entitlements, if awarded, are limited to the amount of employer contributions. The maximum payable is the minimum percentage contribution required by law for that specific person applied to the damages awarded for loss of earnings in accordance with this part.



*Clause 58* relocates section 52 of the *Personal Injuries Proceedings Act 2002*.

*Clause 59* relocates section 53 of the *Personal Injuries Proceedings Act 2002*.

*Clause 60* relocates section 54 of the *Personal Injuries Proceedings Act 2002*. Minor amendments have been made to ensure the provision continues to apply appropriately to dependency claims.

*Clause 61* relocates section 55 of the *Personal Injuries Proceedings Act 2002*. In addition it provides that interest on general damages cannot be awarded.

*Clause 62* provides a new method for the assessment of general damages for personal injury. The method involves a 100-point scale upon which the court must assess the degree of injury. In order to assess where an injury lies on the injury scale, the court is to consider the injury scale values prescribed under a regulation and the injury scale values attributed to similar injuries in prior proceedings.

*Clause 63* provides the formula for the calculation of general damages subsequent to assessment of the injury scale value by the Court.

## **PART 4— STRUCTURED SETTLEMENTS**

Part 4 facilitates the making of consent orders for structured settlements. It replaces section 61 of the *Personal Injuries Proceedings Act 2002*.

*Clause 64* sets out the meaning of “structured settlement” for the Part.

*Clause 65* requires a court, prior to making any award of damages for future economic loss, future medical expenses or future general expenses that exceed a total of \$100,000, to advise the parties to the action of the intended award. The Court is required to list the amount of each head of damage proposed.

*Clause 66* provides the Court with power to make an order that details the terms of an agreed structured settlement. The result of such an order is that it will be enforceable under the rules of Court.

*Clause 67* places an obligation upon lawyers to advise their clients of the ability to negotiate a structured settlement in circumstances where their

client is the plaintiff of a personal injuries action. Further, the advice must extend to the desirability of obtaining independent financial advice about structured settlement, as opposed to lump sum settlement, of a claim.

*Clause 68* provides that an offer of a structured settlement will be considered by the Court in relation to any costs orders upon final hearing of a claim. The Court is to consider whether, in accordance with the *Uniform Civil Procedure Rules 1999*, any judgment was not more favourable than the structured offer to settle, having regard to any cost to the defendant in making the offer.

## **CHAPTER 4—MISCELLANEOUS**

### **PART 1—EXPRESSIONS OF REGRET**

*Clause 69* states that this part only applies to claims made as a result of personal injury.

Clauses 70 to 73 relocate sections 44 to 46 of the *Personal Injuries Proceedings Act 2002*.

*Clause 70* sets out certain definitions for this part.

*Clause 71* sets out the purpose of part 1. It is to allow individuals involved in an incident to express regret about the incident without being concerned that their expression of regret may be used as an admission of liability.

*Clause 72* sets out the meaning of “expression of regret”. If the expression of regret contains an acknowledgment of fault on the part of an individual it would not be inadmissible.

*Clause 73* provides that an expression of regret made before the commencement of a court proceeding in relation to the incident is not admissible in the court proceeding.

## **PART 2—JURY TRIALS**

*Clause 74* provides that a proceeding in a court based on a claim must be heard and determined by a court sitting without a jury. It relocates section 58 of the *Personal Injuries Proceedings Act 2002*.

## **PART 3—GENERAL**

*Clause 75* sets out the power to make Regulations under this Act.

*Clause 76* enables the regulations under this Act to contain transitional provisions, including provisions having retrospective effect to a date not earlier than commencement of the Act and in accordance with legislative standards.

## **CHAPTER 5—TRANSITIONAL PROVISIONS**

*Clause 77* provides that, until a regulation is made under the Act, the entities prescribed under the *Personal Injuries Proceedings Act Regulation 2002* are the entities to be taken as prescribed for sections 26 and 27 of the Act.

*Clause 78* provides that, if a matter in which a jury trial was selected either has had trial dates allocated or remains within the appeal process, the trial may still be heard with a jury. Any remission of the matter back from appeal for re-hearing, however, will not result in a jury trial.

*Clause 79* provides that the amendments made to the *Personal Injuries Proceedings Regulation 2002* within the Act are able to be amended at any later time by the Governor in Council. Such amendments are made in the Act to ensure the appropriate application of the Regulation upon introduction of the two-stage notification process introduced through the amendments to the *Personal Injuries Proceedings Act 2002* in Chapter 6 of the Act.

## **CHAPTER 6—AMENDMENT OF ACTS**

### **PART 1—AMENDMENT OF PERSONAL INJURIES PROCEEDINGS ACT 2002**

*Clause 80* provides that the part amends the *Personal Injuries Proceedings Act 2002*.

*Clause 81* amends the *Personal Injuries Proceedings Act 2002* by amending section 6 of the *Personal Injuries Proceedings Act 2002* to ensure that all personal injury actions are required to undergo a form of pre-procedure prior to commencing legal proceedings. The prior provision may have allowed proceedings to be commenced in instances where no pre-procedure had been entered into. The section also makes amendments consequential to the relocation of section 58 of the *Personal Injuries Proceedings Act 2002*.

*Clause 82* makes amendments consequential to the insertion of division 1A of the *Personal Injuries Proceedings Act 2002* by section 92 of the Act

*Clause 83* amends section 9 of the *Personal Injuries Proceedings Act 2002* to allow for the pre-procedure to be broken into two distinct parts. The first stage (Part 1) is to be completed within the notification time frames under the pre-amended *Personal Injuries Proceedings Act 2002*, with the second stage (Part 2) to be completed within two months of the time by which a respondent must, or has, replied to the initial notification of the claim. The two-stage pre-procedure will afford claimants appropriate time in which to collect and collate relevant economic and health information, whilst still ensuring claims are notified at early stage.

The clause also amends section 9 so that a party does not have to provide copies of documents that are already held by another person. Further, the clause amends section 9 so that, where a person is claiming against the State of Queensland, the person must nominate the department they consider is responsible for their injury. As a result of that nomination, the department is considered to be the person to whom notice of a claim is given for the purposes of the *Personal Injuries Proceedings Act 2002*.

*Clause 84* makes amendments consequential upon introduction of the two-stage pre-procedure process.

*Clause 85* inserts a subsection to ensure that, in circumstances where a policy of insurance is involved, the rights of the parties to that policy of

insurance are not affected by a response as required under the *Personal Injuries Proceedings Act 2002*.

*Clause 86* makes amendments consequential upon introduction of the two-stage pre-procedure process.

*Clause 87* makes amendments consequential upon introduction of the two-stage pre-procedure process.

*Clause 88* makes amendments consequential upon introduction of the two-stage pre-procedure process.

*Clause 89* makes amendments consequential upon introduction of the two-stage pre-procedure process.

*Clause 90* makes amendments consequential upon introduction of the two-stage pre-procedure process.

*Clause 91* makes amendments consequential upon introduction of the two-stage pre-procedure process.

*Clause 92* inserts special provisions into the *Personal Injuries Proceedings Act 2002* for the notification of claims in relation to injuries to children. The Government recognises the vulnerable position of children in the community. The purpose of this Division is to encourage the early notification of claims on behalf of children, while ensuring that the rights of children to claim damages for personal injury are protected.

The new division provides that a parent or guardian of an injured child may give Part 1 of a notice of claim on behalf of the child. The Part of the notice of claim must be given either within 6 years of the date when the parent or legal guardian knew or ought reasonably to have known that the personal injury had occurred or within 1 year of the date the parent or guardian first sought legal advice on the possibility of seeking damages for the child's injury.

Failure by a lawyer acting for a parent or legal guardian to give Part 1 of the notice is unprofessional conduct or practice.

If Part 1 of the notice of claim is not given by the earlier of the two dates, a respondent may apply to the Court for an order that the claim not be allowed to proceed. In making a decision whether or not to provide such an order, the Court is to consider the justice of the case by having regard to various defined factors. These factors are designed to ensure a balance is achieved between the rights of a child who is unable to protect his or her own rights, and the need for certainty in assessing exposure to risk and in application of the law.

The court may decline to make the order sought by the respondent, but instead order that the claimant is not entitled to recover any amount for specific damages incurred prior to the date of giving notice. The damages that may be excluded are costs incurred by the parent or guardian for medical or other expenses, plus any amount for gratuitous services provided by the parent or legal guardian and also any legal expenses incurred up to that time.

Further, the new division provides specific notice requirements in relation to claims by children for injury where the parents or guardians of the child have been provided with written notice of an adverse event by a medical practitioner. The written notice of the adverse event has no further value other than in determining the time by which the parent or legal guardian knew or ought reasonably to have known that the injury occurred. If Part 1 of the notice of claim in such cases is not provided within that time, then the claim can only continue with the leave of the court. The claimant holds responsibility for seeking the leave of the court prior to delivering Part 1 of the notice of claim.

In determining an application for leave to proceed with a claim where notice of an adverse incident has been provided, the court again must have regard to the justice of the case through various defined factors designed to balance the rights of the child against the need for certainty in application of the law. If the court decides to make the order sought by the claimant, it must order that the claimant is not entitled to recover any amount for specific damages incurred prior to the date of giving notice.

The damages that may be excluded are costs incurred by the parent or guardian for medical or other expenses, plus any amount for gratuitous services required and also any legal expenses incurred up to that time.

*Clause 93* omits section 26 from the *Personal Injuries Proceedings Act 2002* as it has been transferred into the Act.

*Clause 94* amends section 27 to require that any documents provided by a respondent must relate to either of the questions of liability or damages payable.

*Clause 95* inserts a new section 29A to require any respondent or contributor required to provide documents under the *Personal Injuries Proceedings Act 2002* to offer the party they are to provide the documents to an opportunity to inspect those documents where there are more than 200 pages of documents to be delivered before providing copies to the person. Further, the respondent or contributor is required to provide copies of the documents selected by the person, and may charge a rate of \$0.50 for

each page copied and provided above 200 pages. No charge may be claimed for the first 200 pages.

*Clause 96* amends section 34 of the *Personal Injuries Proceedings Act 2002* to provide that no requirement exists upon a respondent to provide information already held by the claimant.

*Clause 97* makes amendments consequential upon introduction of the two-stage pre-procedure process.

*Clause 98* makes amendments consequential upon introduction of the two-stage pre-procedure process.

*Clause 99* omits Chapter 2 part 2 of the *Personal Injuries Proceedings Act 2002* as it has been transferred to the Act.

*Clause 100* omits sections 49 to 55 of the *Personal Injuries Proceedings Act 2002* as they have been transferred to the Act.

*Clause 101* makes amendments consequential upon introduction of the two-stage pre-procedure process.

*Clause 102* makes amendments consequential upon introduction of the two-stage pre-procedure process.

*Clause 103* omits Chapter 2 part 4 of the *Personal Injuries Proceedings Act 2002* as it has been transferred to the Act.

*Clause 104* inserts a new section 67A in the *Personal Injuries Proceedings Act 2002* to exempt from prosecution for breach of the touting provisions industrial organisations, such as unions, and community legal services where any information that would otherwise breach the *Personal Injuries Proceedings Act 2002* is approved by, and provided on behalf of, the organisation.

*Clause 105* inserts a new section 73A in the *Personal Injuries Proceedings Act 2002* to allow the Attorney-General or the Attorney-General's authorised delegate to prosecute parties for breaches of the *Personal Injuries Proceedings Act 2002*.

*Clause 106* omits section 77 as it has been transferred to the Act.

*Clause 107* inserts transitional provisions in to the *Personal Injuries Proceedings Act 2002* to facilitate the change from a one-stage pre-procedure to a two-stage pre-procedure.

*Clause 108* makes amendments consequential upon introduction of the two-stage pre-procedure process.

**PART 2—OTHER AMENDMENTS**

*Clause 109* provides that Schedule 1 amends the Acts it mentions.

**SCHEDULE 1****MINOR AMENDMENTS*****LAW REFORM ACT 1995***

A new section 4A is inserted to clarify that the application of Part 3 — Tortfeasors Contribution and Contributory Negligence, is subject to the *Civil Liability Act 2002*.

***MOTOR ACCIDENT INSURANCE ACT 1994***

This Act is amended as a consequence of the application of the *Civil Liability Act 2003* to claims under that Act. The amendments remove all damages provisions from that Act. All provisions relating to the substantive law and assessment of damages that are applicable to a motor vehicle accident are now in this Act.

***PERSONAL INJURIES PROCEEDINGS REGULATION 2002***

This Regulation is amended to facilitate commencement of the two-stage pre-procedure process.



## **SCHEDULE 2**

### **DICTIONARY**

The schedule contains a dictionary defining the terms used in the Act.