



The following submission, including attachment, was sent to participants attending the ministerial meeting on public liability insurance in Brisbane on 15 November 2002. The submission was sent on 7 November 2002 to the offices of:

- the Treasurer of NSW;
- the Minister for Finance of Victoria;
- the Treasurer of Queensland;
- the Minister for Government Enterprises of Western Australia;
- the Treasurer of South Australia;
- the Treasurer of Tasmania;
- the Treasurer of the ACT; and
- the President of the Australian Local Government Association.

The submission was sent on 8 November 2002 to the office of the Commonwealth Minister for Revenue and Assistant Treasurer, and the office of the Chief Minister of the Northern Territory.

FOURTH MINISTERIAL MEETING ON PUBLIC LIABILITY INSURANCE BRISBANE, 15 NOVEMBER 2002: LAW COUNCIL BRIEFING

General position

- The Law Council of Australia (“LCA”) wishes to see a constructive series of law reforms which will improve the operation of the law and contribute to a more certain and stable insurance market. For this reason, despite great reservations about its terms of reference and timeframes, the LCA made two major submissions to the Negligence Review Panel (“NRP”) chaired by Justice Ipp, and was asked to appear in person twice before the NRP.
- The LCA has examined the final NRP report as well as the recommendations from the AHMAC Legal Process Reform Group and the attached table summarises the LCA’s response to each recommendation.
- The current spike in insurance costs and reduction in insurance availability has arisen because of insurance market factors. Law reform cannot remove these factors and the proper operation of the law should not be lost in trying to reduce premiums. Tort law plays three principle functions:
 - a compensation function for those injured;
 - a deterrent or normative promotion of good standards of safe behaviour; and
 - a corrective justice function.
- Together these functions establish that the law is about self-responsibility. The responsibility to take care of oneself and the requirement to take responsibility for the consequences of your own actions when those actions cause harm to another person.
- There should be law reform to improve the operation of the law consistent with underlying principle. Wholesale codification is not necessary or desirable. By not examining property damage or economic loss, the NRP recommendations can lead to inconsistency and distorted principles.

Core elements of law reform

Ministers should concentrate on the essential elements of reform which can improve the law and assist in a long term stable environment for insuring risk. It is understood the following NRP recommendations are being considered as core elements for a nationally agreed approach.

- *NRP Recommendation 2: Overarching Recommendation*

The LCA supports in principle, consistency in procedural requirements such as limitation periods applying to all claims for personal injury and death irrespective of the cause of action.

Intentional torts such as battery should be excluded as provided in the proposed section 3B of the *Civil Liability Act 2002* (NSW).

- *NRP Recommendations 3-7: Codification of Professionals' Standard of Care*

The LCA prefers the recommendation of the AHMAC Legal Group that the standard of care for medical professionals need not be codified. If the test is to be codified, then as indicated by the NRP, the effect of the codification in terms of outcome in cases should be equivalent to a restatement of the current common law position.

The LCA proposes a test of “untenable” as opposed to “irrational” in relation to court scrutiny of a professional practice.

- *NRP Recommendations 23-27: Limitation periods*

The Law Council’s view on the “discoverability” versus “accrual” triggers, proposed respectively by the NRP and AHMAC Group, is that both have attractions and limitations.

The Law Council’s detailed submissions to the NRP proposed a 3 year limitation period running from the accrual of the cause of action, with a judicial discretion to extend. The Law Council’s supplementary submission to the NRP noted the “discoverability” trigger could be unfair when combined with the long stop period.

The Law Council would not oppose the NRP’s recommendation 24, provided that the discretion referred to in paragraph (e) of that recommendation also extends to a period that expires after actual discovery, if actual discovery is later than three years from “discoverability”, noting that the court would have power (by paragraph (f)) to take into account the plaintiff’s conduct. The Law Council is concerned particularly here in relation to how the recommendation would affect persons with conditions with long latency periods.

The Law Council recognises that the NRP and AHMAC Group recommendations propose that children’s rights should be supervised and exercised on their behalf by parents or guardians. The Law Council believes that the detriment which may be caused to children not to be outweighed by the community benefit of certainty.

Accordingly, the Law Council maintains that the limitation period for children should not commence until they turn 18 years.

- *NRP Recommendation 28: Codification of Foreseeability Test*

The LCA supports codification of this key test and contends that it would be the most valuable reform proposed. The LCA points to some difficulties in the formulation proposed by the NRP, namely:

- the codification test should apply not simply to the determination of whether a duty of care exists, but also to use of the test in the determination of the standard of care; and
- the test should apply to claims for property damage and pure economic loss.

An inherent difficulty with the NRP's terms of reference is that it resulted in recommendations related solely to personal injury and death. The potential arises for differing legal tests on foreseeability to arise from the one incident but resulting in both personal injury and property damage. The LCA also believes the actual formulation for the codification proposed by the NRP is not the best approach. The LCA's preferred approach is: "it shall not be sufficient that what ought to have been foreseen was only not remote or not fanciful".

Satisfying the reasonable foreseeability test, in itself, does not establish liability. The LCA supports the NRP's recommendation to codify the negligence calculus.

- *NRP Recommendation 29: Causation*

The LCA supports the common sense test as presently developed by the courts as a realistic and practical approach to causation. The LCA considers that it would be difficult to codify this test in a meaningful way, and accordingly opposes the NRP's recommendation, which the LCA considers will, initially at least, lead to additional litigation.

If causation is to be codified then the same amendments should be made in relation to property damage and pure economic loss. It is not clear why there should be one test of causation in relation to property damage or pure economic loss and another in relation to personal injury and death. There would also be additional complexity if different causation tests had to be applied if a person were suing for both personal injury and property damage.

- *NRP Recommendation 39: Policy Defence for Public Authorities*

The LCA believes this recommendation to be unnecessary and undesirable. It is unnecessary if the foreseeability test is codified. It is undesirable as it will defeat the consistency in principle applied by the High Court to public authorities and individuals.

- *NRP Recommendation 45: Legal costs*

The LCA is supportive of the principles in this recommendation. However, the LCA supports the enactment of the entire model as provided in section 56 of the *Personal Injuries Proceedings Act 2002* (Qld).

- *NRP Recommendations 47 and 48: Threshold and cap on general damages*

The LCA opposes the introduction of thresholds. Adoption of the other elements of the NRP's package of recommendations makes thresholds unnecessary. Caps are not desirable in personal injury cases, however it is accepted that caps do feature in various forms within and across jurisdictions. Caps within jurisdictions should be uniform, but this is not necessary between jurisdictions.

Professional Standards Legislation

- In addition to the matters considered by the NRP, the Law Council understands that Ministers will also be considering professional standards legislation ("PSL").
- PSL is both a principled and pragmatic way to balance the interests of persons and organisations suffering financial loss because of negligence of a professional service provider and the interest of the community as a whole.
- The PSL scheme is based upon active risk management and the maintenance of professional indemnity insurance by the participating professional service provider, at levels adequate to meet the quantum of losses which could predictably be suffered by a "mum and dad" client of the professional.
- The limitation on quantum of damages component of the scheme, comes into play at a sufficiently high level that only larger corporate and sophisticated clients of the professional service provider are likely to be affected. Such clients are generally capable of properly assessing and managing risk of financial loss.
- The LCA would emphasise that PSL does not affect the legal test of liability itself, only the amount of damages that would be payable if the professional service provider were found to be negligent. Thus the safety promotion objective of the law of negligence is maintained under PSL.
- The position of business clients of a professional service provider is in contrast to individuals who suffer personal injuries, who are often in relatively weak economic positions. In any event, there is not the same relationship between the level of loss in personal injury and the sophistication of the plaintiff that applies in relation to large commercial transactions. It is for this reason that the LCA believes that PSL is an appropriate policy response about concerns regarding claims for financial loss, but is not an appropriate policy for personal injuries. The LCA notes that PSL currently enacted in New South Wales and Western Australia does not apply to personal injury or death.
- PSL will not be fully effective unless complimentary federal legislative action is taken. This is because actions which might be taken under the Trade Practices Act cannot be affected by State PSL. The overarching recommendation of the

NRP (recommendation 2) is that the reforms proposed by the report should apply to any claim for damages for personal injury or death resulting from negligence regardless of whether the claim is in tort, contract, under a statute or any other cause of action. The LCA supports this recommendation and believes that by analogy the same principle should apply to give full effect to the intent of PSL.

- The LCA submits that Ministers should adopt the following:
 1. That each State and Territory commit to the introduction of a nationally consistent PSL based on the NSW model.
 2. That the Commonwealth commit to national PSL which would recognise the limitation on quantum of damages applying under a scheme which has been approved under a state or territory Professional Standards Act for the purposes of any cause of action under federal law, including the Trade Practices Act.
 3. That Ministers instruct Officers to develop drafting instructions for a model Professional Standards Act for recommended enactment in each state and territory.
 4. That the Commonwealth develop a legislative proposal to compliment and facilitate the operation of the Model State and Territory Professional Standards Act.

Fourth Ministerial Meeting on Public Liability Insurance: Table of Recommendations and Law Council Response

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of <i>Responding to the medical indemnity crisis: an integrated reform package</i> (the AHMAC Legal Process Reform Group report) | Law Council response |
|---|---|--|
| <p>Recommendation 1</p> <p>The Panel's recommendations should be incorporated (in suitably drafted form) in a single statute (that might be styled the <i>Civil Liability (Personal Injuries and Death) Act</i> ('the Proposed Act') to be enacted in each jurisdiction.</p> | <p>Not applicable.</p> | <p>The Law Council opposes the NRP recommendation. It is not necessary that all jurisdictions adopt the same approach as the experience in each state and territory is somewhat different.</p> <p>The Law Council also has a general concern that codification may lead to a rigidity in the law, compared with the ability of the common law to respond to situations in accordance with community values on a case by case basis. The Law Council does not consider that the extensive codification of the law is necessary.</p> |
| <p>Recommendation 2</p> <p>The Proposed Act should be expressed to apply (in the absence of express provision to the contrary) to any claim for damages for personal injury or death resulting from negligence regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action.</p> | <p>Does not appear to specifically address.</p> | <p>The Law Council does not believe extensive codification is necessary or desirable. If codification is adopted by governments, then the Law Council supports in principle consistency in procedural requirements, such as limitation periods, applying to all claims for personal injury or death irrespective of whether the cause of action is brought in tort, contract or under statute.</p> |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
|---|---|--|
| <p>Recommendation 3</p> <p>In the Proposed Act, the test for determining the standard of care in cases in which a medical practitioner is alleged to have been negligent in providing treatment to a patient should be:</p> <p><i>A medical practitioner is not negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field, unless the court considers that the opinion was irrational.</i></p> | <p>No change to the present law.</p> | <p>The Law Council supports the conclusion reached by the AHMAC Group. The NRP recommendation is to codify the law on this point to generally represent the position reached by the High Court in <i>Rosenberg v Percival</i> [2001] HCA 18. The Law Council contends that development of the law in both England and Australia means that a given fact situation would rarely lead to different outcomes in both countries, despite widespread perceptions within the medical community that the English approach gives greater weight to medical opinion.</p> <p>If governments reject the AHMAC Group's recommendation and seek to codify, then the Law Council is not opposed to the NRP's formulation (subject to a comment below on "irrational") as it believes that the recommendation would rarely lead to a different outcome than that which would apply under the present law in <i>Rosenberg v Percival</i>. The Law Council believes that the term "irrational" could be construed too narrowly by courts, and would prefer the term "untenable" as providing the appropriate balance.</p> <p>(continues...)</p> |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
|---|---|---|
| Recommendation 3 (continued) | | The Law Council is concerned as to how “medical practitioners” would be defined, as the Law Council does not believe that the recommendation should apply to professions other than the medical profession as conventionally understood. The NRP’s view was that “the recommended rule in Recommendation 3 should be stated to apply to medical practitioners [ie as defined in the <i>Health Insurance Act 1973</i>], but in such terms as to leave it open to the courts to extend the rule to other occupational groups” (paragraph 3.30 of the NRP’s Final Report, and see further paragraphs 3.25 - 3.31). The Law Council would regard such an approach as too open-ended. |
| <p>Recommendation 4</p> <p>In cases involving an allegation of negligence on the part of a person holding himself or herself out as possessing a particular skill, the standard of reasonable care should be determined by reference to:</p> <p>(a) What could reasonably be expected of a person professing that skill.</p> <p>(b) The relevant circumstances at the date of the alleged negligence and not a later date.</p> | Not applicable. | Subject to its opposition to codification, if governments choose to codify then the Law Council is not opposed to the NRP’s recommendation. |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
|---|--|---|
| <p>Recommendation 5</p> <p>In the Proposed Act, the professional's duties to inform should be legislatively stated in certain respects, but only in relation to medical practitioners.</p> | <p>AHMAC Legal Process Reform Group recommends that:</p> <p>(a) primary medical education and continuing medical education should place emphasis on doctor-patient communication. It should include programs to assist doctors to fulfil their obligations to disclose risks to consumers in a meaningful way.</p> <p>(b) The Committee of Presidents of Medical Colleges, MDOs and consumers should work together to develop Codes of Practice to improve the provision of information on risk, benefits and treatment options, which build on existing policies on informed consent and disclosure of risk.</p> <p>(c) States and Territories should consider legislating to provide for declaration of Codes of Practice governing disclosure of risks for specified procedures. Where the doctor has followed the Code of Practice, this could provide a defence for an action for damages based on failure to warn.</p> | <p>Subject to its opposition to codification, if governments choose to codify then the Law Council is not opposed to the NRP's recommendation.</p> <p>The Law Council is supportive of the AHMAC Group's recommendations.</p> <p>As noted above, in relation to recommendation 3, the Law Council is concerned as to how "medical practitioners" would be defined. The Law Council does not believe that recommendation 5 should apply to professions other than the medical profession as conventionally understood.</p> |
| <p>Recommendation 6</p> <p>The medical practitioner's duties to inform should be expressed as duties to take reasonable care.</p> | <p>See above in relation to NRP recommendation 5.</p> | <p>The Law Council does not oppose the NRP's recommendation, subject to warning of the danger of individual injustice or unfairness consequently inherent in any codification of general principles.</p> <p>The NRP's recommendation should not apply to other professions.</p> |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
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| <p>Recommendation 7</p> <p>The legislative statement referred to in Recommendation 5 should embody the following principles:</p> <p>(a) There are two types of duties to inform, a proactive duty and a reactive duty.</p> <p>(b) The proactive duty to inform requires the medical practitioner to take reasonable care to give the patient such information as the reasonable person in the patient's position would, in the circumstances, want to be given before making a decision whether or not to undergo treatment.</p> <p>(c) The information referred to in paragraph (b) should be determined by reference to the time at which the relevant decision was made by the patient and not a later time.</p> <p>(d) A medical practitioner does not breach the proactive duty to inform by reason only of a failure to give the patient information about a risk or other matter that would, in the circumstances, have been obvious to a reasonable person in the position of the patient, unless giving the information is required by statute.</p> <p>(e) Obvious risks include risk that are patent or matters of common knowledge; and a risk may be obvious even though it is of low probability.</p> <p>(continues...)</p> | <p>See above in relation to NRP recommendation 5.</p> | <p>The Law Council does not oppose the NRP's recommendation, subject to warning of the danger of individual injustice or unfairness consequently inherent in any codification of general principles.</p> <p>The NRP's recommendation should not apply to other professions.</p> |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
|---|--|--|
| <p>Recommendation 7 (continued)</p> <p>(f) The reactive duty to inform requires the medical practitioner to take reasonable care to give the patient such information as the medical practitioner knows or ought to know the patient wants to be given before making the decision whether or not to undergo the treatment.</p> | | |
| <p>Recommendation 8</p> <p>Consideration should be given to implementing trials of a system of court-appointed experts.</p> | <p>Suite of reforms including:</p> <ul style="list-style-type: none"> • requirement to disclose all expert witness reports; • joint conferences of expert witnesses for the purpose of producing a joint report identifying areas of agreement and issues to be resolved; • power to use court appointed experts; • power to use single experts; • the use of “panel presentations”; • allowing experts to summarise their views both before and after cross-examination; and • allowing expert witnesses to be able to ask for directions on carrying out their functions. <p>Also recommends a national system and code of conduct be established to ensure the quality of expert medical witness evidence in medical litigation – this could be developed between the Committee of Presidents of Medical Colleges, the AHMAC Medical Indemnity Working Group and appropriate legal representation.</p> | <p>The Law Council cautiously supports the NRP’s recommendation, but the Law Council believes that the trial will identify problems with court appointed experts that will require work to address, such as:</p> <ul style="list-style-type: none"> • confidence by the parties in the fairness of the process; and • the potential for additional procedural disputes over the appointment process. |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
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| <p>Recommendation 9</p> <p>Consideration should be given to the introduction of a rule requiring the giving of notice of claims before proceedings are commenced.</p> | <p>The introduction of processes designed to resolve as many claims as possible prior to lodgment, such processes must:</p> <ul style="list-style-type: none"> • ensure early notification and clarification of the details of the claim; • ensure early production and sharing of evidence both on liability and quantum; • focus defendants' attention on claim and require them to specify their perspective; • ensure notification of other potential defendants at early stage; • provide informal opportunity for discussion; • provide formal opportunity for offers; • have tight timeframes for response; and • cost penalties or other enforcement mechanisms. | <p>The Law Council supports the NRP's recommendation. The Law Council has general support for the AHMAC Group proposals, and notes that similar requirements already exist in some jurisdictions.</p> |
| <p>Recommendation 10</p> <p>Not-for-profit organisations (NPOs) should not be exempt from, or have their liability limited for, negligently-caused personal injury or death.</p> | <p>Not applicable.</p> | <p>The Law Council supports the NRP's recommendation.</p> |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
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| <p>Recommendation 11</p> <p>The Proposed Act should embody the following principles:</p> <p>The provider of a recreational service is not liable for personal injury or death suffered by voluntary participant in a recreational activity as a result of the materialisation of an obvious risk.</p> <p>(a) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the participant.</p> <p>(b) Obvious risks include risks that are patent or matters of common knowledge.</p> <p>(c) A risk may be obvious even though it is of low probability.</p> | Not applicable. | <p>The NRP’s proposal is superficially attractive, however “obviousness” cannot be readily defined and requires case by case examination, which is what the common law already does.</p> <p>The Law Council would submit that treating “obviousness” as a determinative factor on its own should be avoided. Whether a defendant is liable for negligence should depend on all the circumstances, of which the obviousness of a risk may be only one.</p> |
| <p>Recommendation 12</p> <p>For the purpose of Recommendation 11:</p> <p>(a) ‘Recreational service’ means a service of</p> <p>(i) providing facilities for participation in a recreational activity; or</p> <p>(ii) training a person to participate in a recreational activity; or</p> <p>(iii) supervising, adjudicating, guiding or otherwise assisting a person’s participation in a recreational activity.</p> <p>(b) ‘Recreational activity’ means an activity undertaken for the purposes of recreation, enjoyment or leisure which involves a significant degree of physical risk.</p> | Not applicable. | Consequentially upon its response to NRP recommendation 11, the Law Council opposes this recommendation. |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
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| <p>Recommendation 13</p> <p>The rule contained in Recommendation 11 should not apply in any case covered by a statutory scheme of compulsory liability insurance.</p> | Not applicable. | The Law Council supports the NRP's recommendation. |
| <p>Recommendation 14</p> <p>The Proposed Act should embody the following principles:</p> <p>A person does not breach a proactive duty to inform by reason only of a failure to give notice or to warn of an obvious risk of personal injury or death, unless required to do so by statute.</p> <p>(a) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the person injured or killed.</p> <p>(b) Obvious risks include risks that are patent or matter of common knowledge.</p> <p>(c) A risk may be obvious even though it is of low probability.</p> | See above in relation to NRP recommendation 5. | <p>The NRP's proposal is superficially attractive, however "obviousness" cannot be readily defined and requires case by case examination, which is what the common law already does.</p> <p>The Law Council would submit that treating "obviousness" as a determinative factor on its own should be avoided. Whether a defendant is liable for negligence should depend on all the circumstances, of which the obviousness of a risk may be only one.</p> |
| <p>Recommendation 15</p> <p>The rule contained in Recommendation 14 should not apply to 'work risks', that is, risks associated with work done by one person or another.</p> | Does not appear to have been addressed specifically. | The Law Council supports the NRP's recommendation. |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
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| <p>Recommendation 16</p> <p>There should be no provision regarding the liability of not-for-profit organisations as such for personal injury and death caused by negligence in the provision of emergency services.</p> | <p>Not applicable.</p> | <p>The Law Council supports the NRP's recommendation.</p> |
| <p>Recommendation 17</p> <p>The TPA should be amended to provide that the rules relating to limitation of actions and quantum of damages recommended in this Report, apply to any claim for negligently-caused personal injury or death that is brought under Part IVA in the form of an unconscionable conduct claim.</p> | <p>Does not appear to specifically address.</p> | <p>The Law Council's position in relation to limitation of actions positions is set out below in response to the NRP's Recommendations 23-27, and in relation to quantum of damages see below in response to the NRP's Recommendations 45-61.</p> <p>As regards the relevant rules applying to any claim for negligently-caused personal injury or death that is brought under Part IVA of the TPA in the form of an unconscionable conduct claim, the Law Council supports this extension, even where a recommendation of the NRP is opposed by the Law Council. That is to say, the Law Council believes that further inconsistency of the law would be undesirable. However, the Law Council's substantive positions are as set out in response to the NRP's recommendations below.</p> <p>The Law Council notes the technical drafting issues raised by this recommendation, as the recommendation envisages that, in claims under Part IVA of the TPA which would not also sound in negligence, that the rules absent the NRP recommendations would apply.</p> |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
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| <p>Recommendation 18</p> <p>The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report, apply to any claim for negligently-caused personal injury or death brought under Part IVA of the TPA in the form of an unconscionable conduct claim.</p> | <p>Does not appear to specifically address.</p> | <p>Consistently with what is said above in relation to Recommendation 17, the Law Council supports the extension of the other limitations on liability recommendations of the NRP to any claim for negligently-caused personal injury or death brought under Part IVA of the TPA in the form of an unquestionable conduct claim, should those recommendations be adopted. As regards the Law Council's substantive position on those recommendations, see below.</p> <p>The Law Council notes that the same drafting issues which would attend Recommendation 17 also apply in relation to Recommendation 18.</p> |
| <p>Recommendation 19</p> <p>The TPA should be amended to prevent individuals bringing claims for personal injury or death under Part V Div I.</p> | <p>Does not appear to specifically address.</p> | <p>The Law Council opposes this recommendation.</p> |
| <p>Recommendation 20</p> <p>The TPA should be amended to remove the power of the ACCC to bring representative actions for personal injury and death resulting from contraventions of Part V Div I.</p> | <p>Does not appear to specifically address.</p> | <p>The Law Council opposes this recommendation.</p> |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
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| <p>Recommendation 21</p> <p>The TPA should be amended to provide that the rules relating to limitation of actions and quantum of damages recommended in this Report, apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part V Div 2A or Part VA of the TPA.</p> | <p>Does not appear to specifically address.</p> | <p>The Law Council's position in relation to limitation of action is set out below in response to the NRP's Recommendations 23-27, and in relation to quantum of damages see below in response to the NRP's Recommendations 45-61.</p> <p>As regards the relevant rules applying to any claim for negligently-caused personal injury or death that is brought under Part V Div 1A, Part V Div 2A or Part VA of the TPA, the Law Council supports this extension, even where a recommendation of the NRP is opposed by the Law Council. That is to say, the Law Council believes that further inconsistency of the law would be undesirable. However, the Law Council's substantive positions are as set out in response to the NRP's recommendations below.</p> <p>The Law Council notes the technical drafting issues raised by this recommendation, as the recommendation envisages that in claims under Part V Div 1A, Part V Div 2A or Part VA of the TPA which would not also sound in negligence that the rules absent the NRP recommendations would apply.</p> |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
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| <p>Recommendation 22</p> <p>The TPA should be amended (to the relevant and appropriate extent) to provide that other limitations on liability recommended in this Report, apply to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part V Div 2A or Part VA of the TPA.</p> | <p>Does not appear to specifically address.</p> | <p>Consistently with what is said above in relation to Recommendation 21, the Law Council supports the extension of the other limitations on liability recommendations of the NRP to any claim for negligently-caused personal injury or death brought under Part V Div 1A, Part V 2A or Part VA of the TPA. As regards the Law Council's substantive position on those recommendations, see below.</p> <p>The Law Council notes that the same drafting issues which would attend Recommendation 21 also apply in relation to Recommendation 22.</p> |
| <p>Recommendation 23</p> <p>The Proposed Act should provide that all claims for damages for personal injury or death resulting from negligence are governed by the limitation provisions recommended in this Chapter.</p> | <p>See below in relation to NRP recommendation 24.</p> | <p>The Law Council supports the NRP's recommendation as a principle.</p> |
| <p>Recommendation 24</p> <p>The Proposed Act should embody the following principles:</p> <p>(a) The limitation period commences on the date of discoverability.</p> <p>(b) The date of discoverability is the date when the plaintiff know or ought to have known that personal injury of death:</p> <p>(continues...)</p> | <p>The AHMAC Legal Process Reform Group recommends changes to limitation of actions legislation to:</p> <p>(a) require commencement of an action within three years from the date when the cause of action accrues in the case of adults;</p> <p>(b) require commencement of an action within five years from the date when the cause of action accrues, in the case of a minor, or a person who is incompetent to bring legal action on their own behalf;</p> | <p>The Law Council's view on the "discoverability" versus "accrual" triggers, proposed respectively by the NRP and AHMAC Group, is that both have attractions and limitations.</p> <p>The Law Council's detailed submissions to the NRP proposed a 3 year limitation period running from the accrual of the cause of action, with a judicial discretion to extend.</p> <p>The Law Council's supplementary submission to the NRP noted the "discoverability" trigger could be unfair when combined with the long stop period.</p> |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
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| <p>Recommendation 24 (continued)</p> <ul style="list-style-type: none"> (i) had occurred; (ii) was attributable to negligent conduct of the defendant; and (iii) in the case of personal injury, was sufficiently significant to warrant bringing proceedings. <p>(c) The limitation period is 3 years from the date of discoverability.</p> <p>(d) Subject to (e), claims become statute-barred on the expiry of the earlier of:</p> <ul style="list-style-type: none"> (i) the limitation period; and (ii) a long-stop period of 12 years after the events on which the claim is based ('the long-stop period'). <p>(e) The court has a discretion at any time to extend the long-stop period to the expiry of a period of 3 years from the date of discoverability.</p> <p>(f) If exercising its discretion, the court must have regard to the justice of the case, and in particular:</p> <ul style="list-style-type: none"> (i) whether the passage of time has prejudiced a fair trial of the claim. (ii) the nature and extent of the plaintiff's loss. (iii) the nature of the defendant's conduct. <p>(continues...)</p> | <ul style="list-style-type: none"> (c) in the case of an adult plaintiff who is not under a legal disability, the cause of action accrues when the plaintiff knows or ought to have known that they have suffered an injury which may be due to the negligence of the defendant; (d) in the case of a minor, the cause of action accrues when the child's parent or guardian knew or ought to have known that the child has suffered an injury which may be due to the negligence of the defendant; (e) in the case of a person under a legal disability (for example a person who is mentally ill) the cause of action accrues when the person's guardian or administrator knew or ought to have known that the person has suffered an injury which may be due to the negligence of the defendant; (f) an overall limitation period of 15 years applies, subject to the provisions allowing extension of the limitation period; (g) the court should have power to extend the limitation period when it is in the interests of justice to do so because <ul style="list-style-type: none"> (i) the plaintiff is a minor or a person under a disability who had no parent, guardian or administrator to institute proceedings on the plaintiff | <p>The Law Council would not oppose the NRP's recommendation, provided that the discretion referred to in paragraph (e) of the NRP's recommendation also extends to a period that expires after actual discovery, if actual discovery is later than three years from "discoverability", noting that the court would have power (by paragraph (f)) to take into account the plaintiff's conduct. The Law Council is concerned particularly here in relation to how the recommendation would affect persons with conditions which can have long latency periods, such as for example mesothelioma, asbestosis and other dust diseases.</p> |

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| <p>Recommendation 24 (continued)</p> | <p>(ii) the parent or guardian of the minor or the guardian or administrator of a person under a legal disability is a potential defendant in the legal claim, or has a personal relationship with the potential defendant (for example where they are the spouse (including de facto spouse), parent or child of the potential defendant;</p> <p>(h) the power of the court to extend the limitation period in the case of a minor cannot be exercised more than three years after the minor attained their majority or 15 years after the event on which the claim is based occurred, whichever period is the longer;</p> <p>(i) the power of the court to extend the limitation period in the case of a person under a legal disability cannot be exercised more than 15 years after the event on which the claim is based;</p> <p>(j) in determining whether it is just and reasonable to extend the limitation period under (f) the court must consider whether the passage of time would preclude a fair trial;</p> <p>(continues...)</p> | |

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| <p>Recommendation 24 (continued)</p> | <p>(k) where a person dies after having suffered an injury, the limitation period applicable to an action under survival of actions legislation is three years from when the plaintiff knew or ought to have known that they have suffered an injury which may be due to the negligence of the defendant (subject to (l) below;</p> <p>(l) where a person dies after having suffered an injury in circumstances where they did not know, and ought not to have known, that they suffered an injury which may be due to the negligence of the defendant, the limitation period of three years from the date when the plaintiff's personal representative knew, or ought to have known, that the plaintiff suffered an injury may be due to the negligence of the defendant.</p> | |
| <p>Recommendation 25</p> <p>The Proposed Act should embody the following principles:</p> <p>(a) The running of the limitation period is suspended during any period of time in which the plaintiff is a person under a disability.</p> <p>(b) 'Person under a disability' means:</p> <p>(continues...)</p> | <p>See above in relation to NRP recommendation 24.</p> | <p>The Law Council recognises that the NRP and AHMAC Group recommendations propose that children's rights should be supervised and exercised on their behalf by parents or guardians. The Law Council believes that the detriment which may be caused to children not to be outweighed by the community benefit of certainty. Accordingly, the Law Council opposes the recommendation.</p> |

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| <p>Recommendation 25 (continued)</p> <ul style="list-style-type: none"> (i) a minor who is not in the custody of a parent or guardian; (ii) an incapacitated person (such as a person who is unable, by reason of mental disorder, intellectual handicap or other mental disability to make reasonable judgements in respect of his or her affairs) in respect of whom no administrator has been appointed. (iii) a minor whose custodial parent or guardian is a person under a disability. <p>(c) In the case of minors and incapacitated persons who are not persons under a disability, the relevant knowledge for the purpose of determining the date of discoverability is that of the parent, guardian or appointed administrator, as the case by be.</p> <p>(d) Where the parent or guardian of a minor is the potential defendant or is in a close relationship with the potential defendant, the limitation period (called 'the close-relationship limitation period') runs for 3 years from the date the plaintiff turns 25 years of age.</p> <p>(e) A close relationship is a relationship such that:</p> <p>(continues...)</p> | | |

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| <p>Recommendation 25 (continued)</p> <p>(i) the parent or guardian might be influenced by the potential defendant not to bring a claim on behalf of the minor against the potential defendant; or</p> <p>(ii) the minor might be unwilling to disclose to the parent or guardian the conduct or events on which the claim would be based.</p> <p>(f) If cases dealt with in (d), the court has a discretion at any time to extend the limitation period to the expiry of a period of three years from the date of discoverability.</p> | | |
| <p>Recommendation 26</p> <p>The Proposed Act should embody the following principles:</p> <p>(a) Subject to sub-para (b), the limitation principles contained in Recommendations 24 and 25 should apply to an action brought by the personal representative of a deceased person acting as such.</p> <p>(b) In such a case, the limitation period should begin at the earliest of the following times:</p> <p>(continues...)</p> | <p>See above in relation to NRP recommendation 24.</p> | <p>The Law Council opposes this recommendation, see above in relation to NRP recommendations 24 and 25.</p> |

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| <p>Recommendation 26 (continued)</p> <ul style="list-style-type: none"> (i) when the deceased first knew or should have known of the date of discoverability, if that knowledge was acquired more than three years before death; (ii) when the personal representative was appointed, if he or she had the necessary knowledge at that time; or (iii) when the personal representative first acquired or ought to have acquired that knowledge, if he or she acquired that knowledge after being appointed. | | |
| <p>Recommendation 27</p> <p>The Proposed Act should provide for limitation periods in regard to contribution between tortfeasors.</p> | Does not appear to specifically address. | The Law Council opposes this recommendation, subject to its rationale, and how it would work in practice, being explained. |
| <p>Recommendation 28</p> <p>The Proposed Act should embody the following principles:</p> <ul style="list-style-type: none"> (a) A person is not negligent by reason only of failing to take precautions against a foreseeable risk of harm (that is, a risk of harm of which the person knew or ought to have known). (b) It cannot be negligent to fail to take precautions against a risk of harm unless that risk can be described as ‘not insignificant’. <p>(continues...)</p> | Not specifically addressed. | The Law Council supports the codification of the “reasonable foreseeability” test, so as to strengthen it, and make sure that negligence standards are in line with community expectations of personal responsibility by excluding liability for risks below a certain level of probability. |

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| <p>Recommendation 28 (continued)</p> <p>(c) A person is not negligent by reason of failing to take precautions against a risk that can be described as ‘not insignificant’ unless, under the circumstances, the reasonable person in that person’s position would have taken precautions against the risk.</p> <p>(d) In determining whether the reasonable person would have taken precautions against a risk of harm, it is relevant to consider (amongst other things):</p> <ul style="list-style-type: none"> (i) the probability that the harm would occur if care was not taken; (ii) the likely seriousness of that harm; (iii) the burden of taking precautions to avoid the harm; and (iv) the social utility of the risk-creating activity. <p>(continues...)</p> | | <p>However, caution must be taken so that the pendulum does not swing too far. In his concurring judgement in <i>Wyong Shire Council v Shirt</i> (1980) 146 CLR 40 at 49, Murphy J stated: “the vast majority of events which now ground successful negligence actions would not meet a test of being foreseeable as ‘not unlikely to happen’ and if that test were adopted, the action’s scope would be reduced almost to instances of deliberate harm”. There are many risks which are not highly likely to occur, yet their catastrophic consequences, and the ease of taking precautions against the risk, are such that community views of safety would support liability in negligence applying in those circumstances.</p> <p>The question is, where to draw the line? The Law Council would submit that this question cannot be answered in the abstract. With respect, the Law Council would regard the NRP’s, explication of the difference between, “not insignificant” and “significant” (see the NRP’s Final Report at paragraph 7.15), as underlining the difficulties in legislating for the test of reasonable foreseeability. This is one area where the Law Council submits that less is more.</p> |

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| <p>Recommendation 28 (continued)</p> <p>(continues...)</p> | | <p>The Law Council recommends that the legislative clarification of the reasonable foreseeability test should simply provide that: “it shall not be sufficient that what ought to have been foreseen was only not remote or not fanciful”. The Law Council recognises that the use of the negative formulation may seem difficult, however the intention here is simply to say what the standard of foreseeability should <i>not</i> be, and leave to the courts the task of setting what the standard <i>should</i> be within the new legislative parameter.</p> <p>The satisfaction of the reasonable foreseeability test, in itself, does not establish liability, given the operation of the “negligence calculus”. The Law Council supports the NRP’s recommendation to codify the negligence calculus. Codification should ensure (if it is not the case already) that the negligence calculus is addressed in judgements.</p> <p>Accordingly, the Law Council’s response to recommendation 28 is as follows:</p> <ul style="list-style-type: none"> (a) support paragraph (a): (b) oppose the formulation of sub-paragraph (b), preferring the formulation “it shall not be sufficient that what ought to have been foreseen was only not remote or not fanciful”; (c) the Law Council would support this paragraph in connection with its preferred formulation for paragraph (b), but opposes the present formulation; |

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| Recommendation 28 (continued) | | <p>(d) support sub-paragraph (d).</p> <p>The Law Council wishes to note the difficulties raised by the NRP's proposal being adopted without the same amendments to reasonable foreseeability being made where it applies in other contexts, namely: in relation to duty of care; and (in relation to both duty and standard of care) in relation to property damage and pure economic loss.</p> <p>It is not clear why there should be a more protective foreseeability test (ie one that would give rise to more instances of liability) in relation to duty of care than in relation to standard of care, or in relation to property damage or pure economic loss than in relation to personal injury and death.</p> <p>There would also be some additional degree of complexity if different foreseeability tests had to be applied in relation to the one claim (eg if a person were suing for both personal injury and property damage).</p> <p>The Law Council notes that the NRP's "considered opinion is that these principles [ie in Recommendation 28] are suitable to be applied to all claims for negligently caused harm" (see paragraph 7.19 of the NRP's Final Report). Given that property damage and pure economic loss were outside the NRP's Terms of Reference it is understandable that the issue was not addressed in Recommendation 28 itself.</p> |

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| <p>Recommendation 29</p> <p>The Proposed Act should embody the following principles:</p> <p>Onus of proof</p> <p>(a) The plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.</p> <p><i>The two elements of causation</i></p> <p>(b) The question of whether negligence caused harm in the form of personal injury or death ('the harm') has two elements:</p> <p>(i) 'factual causation', which concerns the factual issue of whether the negligence played a part in bringing about the harm; and</p> <p>(ii) 'scope of liability' which concerns the normative issue of the appropriate scope of the negligent person's liability for the harm, once it has been established that the negligence was a factual cause of the harm. 'Scope of liability' covers issues, other than factual causation, referred to in terms such as 'legal cause', 'real and effective cause', 'commonsense causation', 'foreseeability' and 'remoteness of damage'.</p> <p>(continues...)</p> | <p>The AHMAC Group considers causation at paragraphs 6.50 – 6.64 of their report. They were unable to reach an agreed view on what the test of causation should be, and noted that the issue was being considered by the NRP (see at paragraph 6.63). In relation to the specific question of loss of chance occasioned by failure to warn, the AHMAC Group did not regard it as being necessary to enact legislation on this issue, regarding the issue as one that can be left to be dealt with by the courts.</p> | <p>While acknowledging that a common sense test involving value judgements and experience has its difficulties, the Law Council supports the common sense test as presently developed by the courts as a realistic and practical approach to causation. The Law Council considers that it would be difficult to codify this test in a meaningful way, and accordingly opposes the NRP's recommendation.</p> <p>The Law Council considers that the elaborate, yet ultimately open-ended, nature of the package of principles at paragraphs (a)-(h) will, initially at least, lead to additional litigation.</p> <p>The Law Council also wishes to note the difficulties raised by the NRP's proposal being adopted without the same amendments to causation being made in relation to property damage and pure economic loss.</p> <p>It is not clear why there should be one test of causation in relation to property damage or pure economic loss and another in relation to personal injury and death.</p> <p>There would also be some additional degree of complexity if different causation tests had to be applied in relation to the one claim (eg if a person were suing for both personal injury and property damage).</p> |

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| <p>Recommendation 29 (continued)</p> <p><i>Factual causation</i></p> <p>(c) The basic test of ‘factual causation’ (the ‘but for’ test) is whether the negligence was a necessary condition of the harm.</p> <p>(d) In appropriate cases, proof that the negligence materially contributed to the harm or the risk of the harm may be treated as sufficient to establish factual causation even though the but for test is not satisfied.</p> <p>(e) Although it is relevant to proof of factual causation, the issue of whether the case is an appropriate one for the purposes of (d) is normative.</p> <p>(f) For the purposes of deciding whether the case is an appropriate one (as required in (d)), amongst the factors that it is relevant to consider are:</p> <ul style="list-style-type: none"> (i) whether (and why) responsibility for the harm should be imposed on the negligent party, and (ii) whether (and why) the harm should be left to lie where it fell. <p>(continues...)</p> | | <p>The NRP (understandably, given its Terms of Reference) does not indicate its view on whether its proposed approach to causation should be extended beyond personal injury and death, see at paragraph 7.51 of the NRP’s Final Report: “As in the case of Recommendation 28, this Recommendation is of potential application not just to claims for negligently-caused personal injury and death, but to any claim in which causation is an issue. Consistently with our Terms of Reference, however, we do not propose its extension beyond personal injury law”.</p> |

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| <p>Recommendation 29 (continued)</p> <p>(g)</p> <ul style="list-style-type: none"> (i) For the purposes of sub-paragraph (ii) of this paragraph, the plaintiff's own testimony, about what he or she would have done if the defendant had not been negligent, is inadmissible. (ii) Subject to sub-paragraph (i) of this paragraph, when, for the purposes of deciding whether allegedly negligent conduct was a factual cause of the harm, it is relevant to ask what the plaintiff would have done if the defendant had not been negligent, this question should be answered subjectively in the light of all relevant circumstances. <p><i>Scope of liability</i></p> <p>(h) For the purposes of determining the normative issue of the appropriate scope of liability for the harm, amongst the factors that it is relevant to consider are:</p> <ul style="list-style-type: none"> (i) whether (and why) responsibility for the harm should be imposed on the negligent party; and (ii) whether (and why) the harm should be left to lie where it fell. | | |

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| <p>Recommendation 30</p> <p>The Proposed Act should embody the following principles:</p> <p>(a) The test of whether a person (the plaintiff) has been contributorily negligent is whether a reasonable person in the plaintiff's position would have taken precautions against the risk of harm to himself or herself.</p> <p>(b) For the purposes of determining whether a person has been contributorily negligent, the standard of the reasonable person is the same as that applicable to the determination of negligence.</p> <p>(c) In determining whether a person has been contributorily negligent, the following factors (amongst others) are relevant:</p> <ul style="list-style-type: none"> (i) The probability that the harm would occur if care was not taken. (ii) The likely seriousness of the harm. (iii) The burden of taking precautions to avoid the harm. (iv) The social utility of the risk-creating activity in which the person was engaged. <p>(d) Whether a plaintiff has been contributorily negligent according to the criteria listed in (a) and (c) must be determined on the basis of what the plaintiff knew or ought to have known at the date of the alleged contributory negligence.</p> | <p>Not addressed.</p> | <p>The Law Council opposes this recommendation, which has the potential, by way of pursuing the analogy between contributory negligence and negligence, to over complicate the law. If properly applied, the present law under the Apportionment Legislation should be sufficient to deal with cases appropriately and in a flexible way.</p> |

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| <p>Recommendation 31</p> <p>The Proposed Act should embody the following principle:</p> <p>Under the Apportionment Legislation (that is, legislation providing for the apportionment of damages for contributory negligence) a court is entitled to reduce a plaintiff's damages by 100 per cent where the court considers that it is just and equitable to do so.</p> | Not addressed. | The Law Council opposes this recommendation. |
| <p>Recommendation 32</p> <p>The Proposed Act should embody the following principles:</p> <p>For the purposes of the defence of assumption of risk:</p> <p>(a) Where the risk in question was obvious, the person against whom the defence is pleaded (the plaintiff) is presumed to have been actually aware of the risk unless the plaintiff proves on the balance of probabilities that he or she was not actually aware of the risk.</p> <p>(b) An obvious risk is a risk that , in the circumstances, would have been obvious to a reasonable person in the plaintiff's position. Obvious risks include risks that are patent or matters of common knowledge. A risk may be obvious even though it is of low probability.</p> <p>(c) The test of whether a person was aware of a risk is whether he or she was aware of the type or kind or risk, not its precise nature, extent or manner of occurrence.</p> | Not addressed. | The Law Council supports this recommendation in relation to paragraphs (a) and (b), but opposes this recommendation in relation to paragraph (c). Paragraph (c) seeks to elevate "obviousness" to a level of significance which is unwarranted, particularly given the wide scope of what is "obvious" as provided by paragraph (c). |

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| <p>Recommendation 33</p> <p>A panel of experts (including experts in forensic psychiatry and psychology) should be appointed to develop guidelines, for use in legal contexts, for assessing whether a person has suffered a recognised psychiatric illness.</p> | Not addressed. | The Law Council supports this recommendation, and believes that the proposed guidelines should be developed on a national basis. |
| <p>Recommendation 34</p> <p>The Proposed Act should embody the following principles:</p> <p>(a) There can be no liability for pure mental harm (that is, mental harm that is not a consequence of physical harm suffered by the mentally-harmed person) unless the mental harm consists of a recognised psychiatric illness.</p> <p>(b) A person (the defendant) does not owe another (the plaintiff) a duty to take care not to cause the plaintiff pure mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken.</p> <p>(continues...)</p> | Not addressed. | <p>The Law Council does not see the need for a legislative restatement of the common law position in relation to pure mental harm.</p> <p>If there were to be a restatement of the common law, then the Law Council believes that the phrase “recognised psychiatric illness” should not be employed. The Law Council believes that the common law position, and in any event the preferable position, is “recognisable psychiatric illness”.</p> |

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| <p>Recommendation 34 (continued)</p> <p>(c) For the purposes of (b), the circumstances of the case include matters such as:</p> <ul style="list-style-type: none"> (i) whether or not the mental harm was suffered as the result of a sudden shock; (ii) whether the plaintiff was at the scene of shocking events, or witnessed them or their aftermath; (iii) whether the plaintiff witnessed the events or their aftermath with his or her own unaided senses; (iv) whether or not there was a pre-existing relationship between the plaintiff and the defendant; and (v) the nature of the relationship between the plaintiff and any person killed, injured or put in peril. | | |
| <p>Recommendation 35</p> <p>The Proposed Act should embody the following principle:</p> <p>The rules about when a duty to take reasonable care to avoid pure mental harm arises are the same regardless of whether the claim for pure mental harm is brought in tort, contract, under a statute (subject to express provision to the contrary) or any other cause of action.</p> | Not addressed. | The Law Council supports this recommendation. |

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| <p>Recommendation 36</p> <p>The Proposed Act should embody the following principle:</p> <p>In an action for damages for negligently-caused pure mental harm arising out of an incident in which a person was injured, killed or put in peril as a result of negligence of the defendant, any damages awarded shall be reduced by the same proportion as any damages recoverable from the defendant by the injured person (or his or her estate) would be reduced.</p> | Not addressed. | <p>The Law Council opposes this recommendation. The claimant's action is independent from any action available to the person injured, killed or put in peril as a result of negligence by the defendant. While the claimant's own contributory negligence should be taken into account, it is not justifiable to take into account that of the person injured, killed or put in peril.</p> |
| <p>Recommendation 37</p> <p>The Proposed Act should embody the following principles:</p> <p>(a) Damages for economic loss resulting from negligently-caused consequential mental harm are recoverable only if:</p> <p>(i) the mental harm consists of a recognised psychiatric illness; and</p> <p>(ii) the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken.</p> <p>(continues...)</p> | Not addressed. | <p>The Law Council opposes this recommendation, and supports the common law position.</p> |

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| <p>Recommendation 37 (continued)</p> <p>(b) In determining the question of foreseeability in (a)(ii), the test is whether it was foreseeable, in the light of all the relevant circumstances, including the physical injuries in fact suffered by the plaintiff, that if care was not taken a person of normal fortitude, in the position of the plaintiff, might suffer consequential mental harm.</p> | | |
| <p>Recommendation 38</p> <p>The expert panel referred to in Recommendation 33 should be instructed to develop options for a system of training and accreditation of forensic psychiatric experts.</p> | Not addressed. | <p>The Law Council supports this recommendation, while reserving its position on the options which may be developed by the expert panel. Consistently with the Law Council's response to NRP recommendation 33, the Law Council believes that the proposed options for a system of training and accreditation of forensic psychiatric experts should be developed on a national basis.</p> |
| <p>Recommendation 39</p> <p>The Proposed Act should embody the following principle:</p> <p>In any claim for damages for personal injury or death arising out of negligent performance or non-performance of a public function, a policy decision (that is, a decision based substantially on financial, economic, political or social factors or constraints) cannot be used to support a finding that the defendant was negligent unless it was so unreasonable that no reasonable public functionary in the defendant's position could have made it.</p> | Not applicable. | <p>The Law Council opposes this recommendation. The Law Council submits that it is preferable to maintain the common law approach which has developed in Australia.</p> <p>The legislative restatement of reasonable foreseeability recommended by the Law Council (see above in relation to NRP recommendation 28) is a sufficient response to the issues which this recommendation seek to address.</p> |

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| <p>Recommendation 40</p> <p>In the Proposed Act, the term 'public functionary' should be defined to cover both corporate bodies and natural persons.</p> | Not applicable. | <p>The Law Council agrees that both corporate bodies and natural persons should be covered by any proposed policy defence.</p> <p>However, the Law Council's preferred definitional approach (if a policy defence is adopted, which the Law Council opposes, see recommendation 39) would be focussed on whether a particular act, omission or decision (rather than the body concerned) is of a public nature.</p> |
| <p>Recommendation 41</p> <p>The Proposed Act should embody the following principle:</p> <p>A public functionary can be liable for damages for personal injury or death caused by the negligent exercise or non-exercise of a statutory public function only if the provisions and policy of the relevant statute are compatible with the existence of such liability.</p> | Not applicable. | <p>The Law Council opposes this recommendation. The compatibility in principle is already applied by the courts in relation to novel categories of negligence (see <i>Sullivan v Moody</i> (2001) 183 ALR 404). Applying this approach to negligence claims generally, will require courts to adjudicate on an issue (ie whether a claim should lie) that may never have been squarely addressed in the parliamentary process. This is likely to lead to unsatisfying litigation on the question of compatibility.</p> |
| <p>Recommendation 42</p> <p>The Proposed Act should embody the following principle:</p> <p>In the absence of express provision to the contrary in the relevant statute, any action for damages for negligently-caused personal injury or death made in the form of a claim for breach of statutory duty is subject to the provisions of this Act.</p> <p>(continues...)</p> | Not applicable. | <p>The Law Council's position in relation to limitation of actions is set out above in response to the NRP's Recommendations 23-27, and in relation to quantum of damages see below in response to the NRP's Recommendations 45-61.</p> |

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| Recommendation 42 (continued) | | <p>As regards the relevant rules applying to any claim for negligently-caused personal injury or death that is brought in the form of a claim for breach of statutory duty, the Law Council supports this extension, even where a recommendation of the NRP is opposed by the Law Council. That is to say, the Law Council believes that further inconsistency of the law would be undesirable. However, the Law Council's substantive positions are as set out in response to the NRP's recommendations below.</p> <p>The Law Council notes the technical drafting issues raised by this recommendation, as the recommendation envisages that in claims for breach of statutory duty which would not also sound in negligence, that the rules absent the NRP recommendations would apply.</p> |
| <p>Recommendation 43</p> <p>The Proposed Act should embody the following principle:</p> <p>Liability for breach of a non-delegable duty shall be treated as equivalent in all respects to vicarious liability for the negligence of the person to whom the doing of the relevant work was entrusted by the person held liable for breach of the non-delegable duty.</p> <p>(continues...)</p> | Not addressed. | <p>The Law Council opposes the NRP's recommendation. The Law Council believes there are important reasons for maintaining non-delegable duties as a category distinct from negligence in the recognised situations of extreme vulnerability, namely: schools, hospitals and employer/employee relationships. The Law Council believes there is the need for the special legal protection afforded by non-delegable duties in these situations of vulnerability.</p> |

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| Recommendation 43 (continued) | | The Law Council supports clarifying by way of legislation the standard of care in relation to non-delegable duty. However, it may be premature to legislate in this area before the High Court hands down its decision in <i>Lepore v NSW</i> (which was heard by the court in September 2002), which can be expected to clarify the law in this area. |
| Recommendation 44 In relation to claims for negligently-caused personal injury and death, the doctrine of solidary liability should be retained and not replaced with a system of proportionate liability. | Not addressed. | The Law Council supports the NRP's recommendation. |
| Recommendation 45 The Proposed Act should embody the following principles: (a) No order that the defendant pay the plaintiff's legal costs may be made in any case where the award of damages is less than \$30,000. (b) In any case where the award of damages is between \$30,000 and \$50,000, the plaintiff may recover from the defendant no more than \$2,500 on account of legal costs. | That States and Territories should evaluate the effect of NSW and Qld legislation imposing limits on legal costs in small claims before introducing similar legislation. | The Law Council is supportive of the principles in the NRP's recommendation. However, if the NRP intends that these principles are enacted without the rest of the Queensland model, which includes provision for the award of additional costs in circumstances where a mandatory final offer should have been accepted (see section 56 of the <i>Personal Injuries Proceedings Act 2002</i> (Qld)), then the Law Council would oppose this. The Law Council supports the enactment of the entire Queensland model on legal costs in smaller claims, as provided in section 56 of the <i>Personal Injuries Proceedings Act 2002</i> (Qld). The Law Council supports the monetary amounts in this recommendation being indexed (see below in relation to NRP recommendation 61). |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
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| <p>Recommendation 46</p> <p>The Proposed Act should embody the following principles:</p> <p>(a) In assessing general damages, a court may refer to decisions in earlier cases for the purpose of establishing the appropriate award in the case before it.</p> <p>(b) Counsel may bring to the court's attention awards of general damages in such earlier cases.</p> <p>(c) The Commonwealth Attorney-General, in consultation with the States and Territories, should appoint or nominate a body to compile, and maintain on a regular basis, a publication along the same lines as the English Judicial Studies Board's Guidelines for the Assessment of General Damages in Personal Injury Cases.</p> | <p>Not addressed.</p> | <p>The Law Council supports the NRP's recommendation. However, the Law Council notes that the effectiveness of the recommendation will be undercut to the extent that jurisdictions differ (both as between themselves, and from the position at common law) in relation to the assessment of general damages.</p> |
| <p>Recommendation 47</p> <p>The Proposed Act should impose a threshold for general damages based on 15 per cent of a most extreme case.</p> | <p>The imposition of a threshold on access to non-economic loss based either on:</p> <p>(i) 15% of a most extreme case; or</p> <p>(ii) (the majority position among the AHMAC Group) proof of permanent impairment or disfigurement.</p> | <p>The Law Council opposes both the NRP and AHMAC Group recommendations. The Law Council supports the common law position.</p> |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
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| <p>Recommendation 48</p> <p>(a) The Proposed Act should provide for a cap on general damages of \$250,000.</p> <p>(b) If such a provision is not enacted, each State and Territory should enact legislation providing for a single cap on general damages that will apply to all claims for personal injury and death.</p> | <p>An indexed cap on the maximum level of damages for non-economic loss commencing at \$350,000.</p> | <p>The Law Council opposes the adoption of a cap on general damages, and accordingly opposes both the NRP and AHMAC Group recommendations.</p> <p>Notwithstanding this response, where caps do apply in relation to different schemes (eg motor accident, and workers compensation and liability for personal injury generally) in a jurisdiction, then the Law Council would support those caps being uniform within the jurisdiction (ie internally consistent). To that extent, the Law Council supports paragraph (b) of the NRP's recommendation.</p> <p>The Law Council supports the monetary amount in this recommendation being indexed (see below in relation to NRP recommendation 61).</p> |
| <p>Recommendation 49</p> <p>The Proposed Act should provide for a cap on damages for loss of earning capacity of twice average full-time adult ordinary time earnings (FTOTE).</p> | <p>The adoption of a cap on the weekly amount for loss of earnings at three times average weekly earnings, subject to ensuring the availability of "top up" cover for higher income earners to cover them for the excess loss above the award of damages.</p> | <p>The Law Council's primary position is opposition to a cap on damages for loss of earning capacity. However, if a cap is to be introduced then the relatively low level proposed by the NRP should not be adopted.</p> <p>The Law Council also draws attention to the availability of income protection insurance. The Law Council does not expect that governments would make the adoption of a cap on damages for loss of earning capacity contingent on the availability of "top-up" income protection insurance, as was recommended by the AHMAC Group. However, the Law Council recommends that insurance regulators should examine the issue, and if necessary make recommendations for measures that may be required to facilitate the availability of income protection insurance.</p> |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
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| <p>Recommendation 50</p> <p>The Proposed Act should embody the following principle:</p> <p>For the purposes of assessing damages for health care costs, the issue of reasonableness should be determined by reference to a benchmark constituted by the use of public hospital facilities, and Medicare scheduled fees (where applicable).</p> | <p>Not addressed.</p> | <p>The Law Council is opposed to the NRP's recommendation, as the Law Council does not believe that it adds to the present law in that an award of damages can be made on the basis suggested where it is appropriate in the individual case. However, public hospital facilities and Medicare scheduled fees may often not be appropriate, and in those cases nothing is added by setting such a "benchmark".</p> |
| <p>Recommendation 51</p> <p>The Proposed Act should embody the following principles:</p> <p>(a) Damages for gratuitous services shall not be recoverable unless such services have been provided or are likely to be provided for more than six hours per week and for more than six consecutive months.</p> <p>(b) The maximum hourly rate for calculating damages for gratuitous services shall be one fortieth of average weekly FTOTE.</p> <p>(c) The maximum weekly rate for calculating damages for gratuitous services shall be average weekly FTOTE.</p> <p>(d) Damages for gratuitous services may be awarded only in respect of services required by the plaintiff as a result of the injuries caused by the negligence of the defendant.</p> <p>(continues...)</p> | <p>That where a person who has suffered negligent harm requiring more than one hour a day or 7 hours a week personal care and assistance, solely because of the disability caused by that harm, and that care has been provided without costs, for six months or more, then for the period after the six months, compensation may be claimed by the plaintiff for the number of hours reasonably and necessarily required by him or her, subject to the following conditions:</p> <ul style="list-style-type: none"> • all care is to be paid at an hourly rate equivalent to one fortieth of the Average Weekly Earnings for Full-time Adult ordinary-time earnings as calculated by the ABS [Australian Bureau of Statistics] from time to time; • the total liability of the defendant is the estimated cost of equivalent institutional care, as specified from time to time in the regulations; and | <p>The Law Council opposes any threshold or cap on damages for gratuitous services. The Law Council supports the common law position.</p> <p>The Law Council also opposes the AHMAC Group recommendation that damages for past provision of gratuitous services should be able to be recovered by the provider. The Law Council supports the established position in the Australian common law that the relevant loss to be compensated is the plaintiff's need for services, not the service provider's foregone earnings or lost time.</p> |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
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| Recommendation 51 (continued) | <ul style="list-style-type: none"> the court should be able to order payment of compensation for past care which has been provided to the plaintiff to the person or body who provided those services, on the application of that person or body. | |
| <p>Recommendation 52</p> <p>The Proposed Act should embody the following principles:</p> <p>(a) Damages for loss of capacity to provide gratuitous services for others shall not be recoverable unless, prior to the loss of capacity, such services were being provided for more than six hours per week and had been provided for more than six consecutive months.</p> <p>(b) Such damages are recoverable only in relation to services that were being provided to a person who (if the provider had been killed rather than injured) would have been entitled to recover damages for loss of the deceased's services.</p> <p>(c) The maximum hourly rate for calculating damages for loss of capacity to provide gratuitous services for others shall be one fortieth of average weekly FTOTE.</p> <p>(d) The maximum weekly rate for calculating damages for loss of capacity to provide gratuitous services shall be average weekly FTOTE.</p> | Not addressed. | No response. |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
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| <p>Recommendation 53</p> <p>The Proposed Act should embody the following principles:</p> <p>(a) The discount rate used in calculating damages awards for future economic loss in cases of personal injury and death is 3 per cent.</p> <p>(b) An appropriate regulatory body should have the power to change the discount rate, by regulation, on six months notice.</p> | <p>That discount rates should not be further increased because such a change has its greatest impact on people with the highest levels of disability.</p> | <p>The Law Council opposes any legislative increase in the present discount rates at this time.</p> <p>The Law Council supports the model proposed in paragraph (b) of the NRP's recommendation for the setting of the discount rate in the future. Presently the discount rate varies both across jurisdictions, and (in certain jurisdictions) varies between schemes within the same jurisdiction. Giving the power to set the discount rate to an appropriate regulatory body should ensure that the rate is both technically realistic, and that any variations in the rate are for sound reasons.</p> <p>In case it is not entirely clear from paragraph (b) of the NRP's recommendation, the Law Council confirms that it supports this model in relation to the discount rate generally, not only as it applies to future economic loss.</p> |
| <p>Recommendation 54</p> <p>The Proposed Act should provide that pre-judgment interest may not be awarded on damages for non-economic loss.</p> | <p>Not addressed.</p> | <p>The Law Council's primary position is to oppose the NRP's recommendation. It may be appropriate, however, if pre-judgement interest on damages for non-economic loss is to be available, that consideration be given to a rate of 2-3%.</p> |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
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| <p>Recommendation 55</p> <p>The Proposed Act should embody the following principles:</p> <p>(a) In calculating damages for loss of financial support any amount by which the deceased's earnings exceeded twice average FTOTE shall be ignored.</p> <p>(b) A dependant may not recover damages for the loss of gratuitous services the deceased would have provided unless such services would have been provided for more than six hours per week and for more than six consecutive months.</p> <p>(c) The maximum hourly rate for calculating damages for loss of gratuitous services the deceased would have provided is one fortieth of average weekly FTOTE.</p> <p>(d) The maximum weekly rate for calculating damages for loss of gratuitous services the deceased would have provided is average weekly FTOTE.</p> <p>(e) A dependant shall be entitled to damages for loss only of those gratuitous services that the deceased would have provided to the dependant but for his or her death.</p> | <p>In relation to paragraph (a), this does not appear to be specifically addressed, but attention is drawn to the AHMAC Group's recommendation in relation to loss of earning capacity (see above in relation to NRP recommendation 51).</p> | <p>In relation to paragraph (a), the Law Council's position here is the same as in relation to damages for loss of earning capacity set out above in relation to NRP recommendation 51.</p> <p>The Law Council does not respond to paragraphs (b)–(e) of the NRP's recommendation.</p> |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
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| <p>Recommendation 56</p> <p>The Proposed Act should provide that in a claim by dependants for damages in respect of the death of another as a result of negligence on the part of the defendant, any damages payable to the dependants shall be reduced on account of contributory negligence on the part of the deceased by the same proportion as damages payable in an action by the estate of the deceased person would be reduced.</p> | Not addressed. | <p>The Law Council supports the NRP's recommendation. However, a claimant who is seeking to recover for a wrongful death should not be subject to the possibility of double reduction for contributory negligence. A wrongful death claim is based on an action that would otherwise (ie if the deceased had not died) have been brought by the deceased. To remove the possibility of double reduction, legislation should (along with the NRP's recommendation) also remove the possibility of reduction in damages on the grounds of the claimant's own contributory negligence.</p> |
| <p>Recommendation 57</p> <p>Rules of court in every jurisdiction should contain a provision to the following effect:</p> <p>Before judgment is entered in any action for damages for negligently-caused personal injury or death where:</p> <p>(a) In a case of personal injury, the award includes damages in respect of future economic loss (including loss of superannuation benefits, loss of gratuitous services and future health-care expenses) that in aggregate exceed \$2 million; or</p> <p>(continues...)</p> | Not addressed. | <p>The Law Council supports rules encouraging the use of structured settlements. The Law Council supports the NRP's recommendation (subject to a comment below on paragraph (b)), however the Law Council considers that other rules may be desirable to address cases which may be appropriate for structuring, but which are under the monetary threshold in recommendation 57 (eg a requirement for a claimant to obtain structured settlement advice in cases where the quantum of damages, is or may be, within a certain range).</p> |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
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| <p>Recommendation 57 (continued)</p> <p>(b) In a case of death, the award includes damages for loss of future support and other future economic loss that in aggregate exceed \$2 million,</p> <p>(c) the parties must to attend [sic] mediation proceedings with a view to securing a structured settlement.</p> | | <p>In relation to paragraph (b), the Law Council queries this recommendation. As it stands, the legislation before the Commonwealth Parliament does not confer structured settlement tax benefits for death claims (contrary to the preferred position of the Structured Settlement Group, of which the Law Council is a member). The Law Council would not support paragraph (b) if death claims remain excluded from the Commonwealth structured settlement tax legislation amendments. However, if death claims were to be included, then the Law Council would support paragraph (b).</p> <p>The Law Council supports the monetary amounts in this recommendation being indexed (see below in relation to NRP recommendation 61).</p> |
| <p>Recommendation 58</p> <p>The Proposed Act should embody the following principles:</p> <p>(a) Damages for loss of employer superannuation contributions should be calculated as a percentage of the damages awarded for loss of earning capacity (subject to the cap on such damages).</p> <p>(b) The percentage should be the minimum level of compulsory employers' contributions required under the relevant Commonwealth legislation (the Superannuation Guarantee (Administration) Act 1992 (Cwth)).</p> | Not addressed. | <p>If it is thought that reform should be made to the common law in relation to the assessment of damage for the loss of superannuation, then the Law Council would support the NRP's recommendation. It should be expressly stated in the legislation implementing such reform that there should be no discount on the damages for early payouts actually received by the plaintiff from the superannuation fund.</p> |

| Negligence Review Panel (NRP) Final Report Recommendation | Recommendation of the AHMAC Legal Process Reform Group Report | Law Council response |
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| <p>Recommendation 59</p> <p>The Proposed Act should embody the following principles:</p> <p>(a) In assessing damages in an action under this Act, whether for personal injury or death, all collateral benefits received or to be received by the plaintiff as a result of the injury or death (except charitable benefits and statutory social-security and health-care benefits) should be deducted from those damages on the basis of the like-against-like principle.</p> <p>(b) Collateral benefits should be set off against the relevant head of damages before any relevant damages cap is applied.</p> | <p>The AHMAC Legal Process Reform Group recommends the establishment, through AHMAC and under the auspices of the Council of Australian Governments, of a Commonwealth/State/Territory review to determine rational directions for reform in relation to the allocation of provision of assistance through government funded programs; compensation systems and private contractual arrangements with the aim of ensuring:</p> <ul style="list-style-type: none"> • best use of government funding; • the prevention of “double-dipping”; and • greater certainty and transparency about where costs lie. | <p>The Law Council supports the AHMAC Group recommendation as a longer-term measure.</p> <p>In the short-term, and without precluding the review recommended by AHMAC, the Law Council supports the NRP’s recommendation.</p> <p>The Law Council also supports the implementation of a uniform scheme of subrogation (or right to indemnity) in favour of all providers of collateral benefits (save charitable organisations).</p> |
| <p>Recommendation 60</p> <p>The Proposed Act should contain a provision abolishing exemplary and aggravated damages.</p> | <p>Not addressed.</p> | <p>The Law Council opposes this recommendation. The Law Council supports the common law position.</p> |
| <p>Recommendation 61</p> <p>The Proposed Act should provide that the fixed monetary amounts referred to Recommendations 45, 48 and 57 should be indexed to the CPI.</p> | <p>The AHMAC Group recommended cap for general damages was indexed (see above in relation to NRP recommendation 48).</p> | <p>The Law Council supports the NRP’s recommendation.</p> |