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Introduction

The past 5 years has seen the biggest metamorphosis of torts law in Australia’s history.

In the opinion of the various legislative bodies, the changes were necessitated by the rapidly increasing insurance premiums for liability policies, which were being felt throughout the community.

Prior to the reforms, the media produced regular reports of the effects of the increased premiums, including cancellation of charitable and social events, closure of public swimming pools and playgrounds, and essentially cancellation or reduction of many activities that involved a risk of someone being injured.

The increasing insurance premiums became a ‘political football’ and a ministerial meeting on public liability was held between the Ministers of the Commonwealth, States and Territories, who appointed an inquiry to review the law of negligence. The panel was chaired by the Honourable Justice Ipp of the New South Wales Court of Appeal and the Ipp Report was completed and released in September 2002.

The Ipp Report recommended a national approach to tort reform, suggesting sweeping legislative changes to tort law. The recommendations included caps on damages and placing more onus on personal responsibility, to restrict the circumstances in which an injured party is entitled to damages.

The States and Territories missed a golden opportunity for a uniform scheme of legislation applying throughout the country as recommended by the Ipp report, when on 15 November 2002, the Federal, State and Territory Governments, rejected uniform tort law reform. The main barrier to uniform legislation was the inability of the various Ministers for the States and Territories to reach agreement on a number of the key Ipp recommendations.

Rather than a uniform approach by the States and Territories, each State and Territory released its own raft of legislation incorporating many of the Ipp recommendations and in some cases, going even further than the initiatives recommended by the Ipp Report.

Despite the various States and Territories opting to individually legislate in the area of tort reform, it is becoming increasingly evident that the States and Territories are complying with many of the Ipp Report recommendations, developing a somewhat consistent approach across various jurisdictions.

There remains a significant imbalance between the jurisdictions in relation to the various potential damages awards. In the current environment, a person will be entitled to a larger or smaller damages payout depending on what State or Territory an accident occurs in, whether the accident occurs as a result of the use of a motor vehicle, occurs at a person’s work, or if public liability, depending on what entity is potentially responsible, as governments can be absolved in many incidences.

This paper will look at the various reforms and analyse whether tort law reform has been a success in reducing public liability and professional indemnity insurance premiums and attempt to predict what the future holds.
Legislative developments by the States and Territories

The various pieces of legislation initiated are as follows:

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<tr>
<th>Australian Capital Territory</th>
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<tr>
<td>Civil Law (Wrongs) Amendment Act (No.2) 2003</td>
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<td>Civil Law (Wrongs) Amendment Bill 2005</td>
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<tr>
<th>New South Wales</th>
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<tr>
<td>Civil Liability Act 2002</td>
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<td>commenced after that time.</td>
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<tr>
<td>Civil Liability Amendment (Mental Illness) Bill 2006</td>
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<th>Northern Territory</th>
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# A Comprehensive Guide to Tort Law Reform throughout Australia

## Queensland

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<tr>
<th>Act</th>
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<tr>
<td>Civil Liability (Dust Diseases) &amp; Other Legislation Amendment Act</td>
<td>14 October 2005.</td>
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<tr>
<td>Civil Liability Act 2003</td>
<td>Applies retrospectively from 2 December 2002, with some exceptions (protection of volunteers, claims made by plaintiffs who engaged in criminal behaviour or were intoxicated, and structured settlements), which commenced on 9 April 2003.</td>
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## South Australia

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<th>Act</th>
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<tr>
<td>Civil Liability (Solatium) Amendment Bill 2006</td>
<td>Second reading stage.</td>
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## Tasmania

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<th>Act</th>
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<tr>
<td>Civil Liability Act</td>
<td>1 January 2003.</td>
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### Victoria

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### Western Australia

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<th>Act</th>
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<tbody>
<tr>
<td>Volunteers (protection from Liability) Amendment Bill 2006</td>
<td>2nd reading stage.</td>
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Categories Of Tort Law
States and Territories Compared
There were a number of components of tort law codified by the various jurisdictions. Below, each of the major changes is touched upon and any significant variations between the jurisdictions have been noted.

Negligence – duty and standard of care
A majority of jurisdictions provide that a person is not negligent for failing to take precautions against a foreseeable risk unless:
- the risk is ‘not insignificant’; and
- a reasonable person in the same position would have taken precautions (taking into consideration: the probability, likely seriousness, the burden of taking risks and the social benefit of the risk-creating activity).

The Northern Territory is yet to legislatively address this area.

Defence – assumption or risk
A majority of jurisdictions provide that there may be no finding of negligence where the risk or kind of risk in question was obvious to a reasonable person. An obvious risk includes risks that are patent or matters of common knowledge. A risk may be obvious even though it is of low probability.

In Victoria, a person is taken to be aware of an obvious risk unless the person proves on the balance of probabilities that the person was not aware of the risk.

This is yet to be addressed by the Northern Territory.

Standards of care – professionals
A majority of jurisdictions provide that 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 care should be determined by reference to what could reasonably be expected of a person professing that skill at the date of the alleged negligence.
An exception exists if the Court considers that the opinion of the defendant professional or any of their expert witnesses is ‘irrational’. Professional opinion does not have to be universally accepted to be considered widely accepted.

Recreational services
A majority of jurisdictions protect recreational service providers by providing that a party should not be liable for personal injury or death suffered as a result of obvious risk.

In South Australia, providers of recreational services may apply to the Minister to have a Code of Practice registered governing particular recreational services. Such a Code may modify the duty of care owed by the service providers to consumers.

This has not been addressed for the Northern Territory while the ACT does not give specific protection for recreational service providers.
Negligence of medical practitioners
A majority of jurisdictions provide that a medical practitioner will not be negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field (referred to as the Bolam principle), unless the opinion is irrational.

In New South Wales, a person practising in a profession does not incur a liability in negligence arising from the provision of a professional service, if it is established that the professional acted in a manner that, at the time this service was provided, was widely accepted in Australia by peer professional opinion as competent professional practice, except where the Court considers that opinion to be irrational. Peer professional opinion does not have to be universally accepted to be considered widely accepted.

This practice is broadly followed in South Australia, although in this jurisdiction, the principle does not extend to a failure to give a warning of the risk of death or injury associated with the provision of a healthcare service.

Again, this has not been addressed by the Northern Territory to date.

Medical practitioner’s duty to inform/warn
Many jurisdictions provide that medical practitioners are subject to a legislatively prescribed duty to inform, both proactively and reactively, on the basis that they must take reasonable care to provide such information to enable the patient to make an informed decision whether or not to undergo treatment.

New South Wales and Victoria say that the defence of widely acceptable professional opinion does not apply to liability arising from the giving of – or failure to give – a warning, advice or other information about the risk of death or injury to a person in cases where that risk is associated with the provision of a professional service.

Queensland holds that patients are to be informed about risks of medical treatment which a reasonable person would require to make an informed decision about the treatment, which the doctor knows, or ought reasonably to know, the patient wants to be given. Tasmania provides an exception where a medical practitioner has to act promptly to avoid serious risk to the life or health of the patient.

South Australia, Western Australia, Northern Territory and the ACT have not directly addressed this area to date.
Apologies/Expressions of Regret
All jurisdictions provide that an apology or expression of regret does not constitute an express or implied admission of fault or liability by an individual in respect of the subject matter of the apology or expression of regret – nor is it relevant to the determination of fault or liability in connection with that subject matter.

Evidence of an apology is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with those proceedings.

Contributory negligence
A majority of jurisdictions provide that the test is whether a reasonable person in the plaintiff’s position would have taken precautions against the risk of harm, having regard to what the plaintiff knew or ought reasonably should have known, taking into consideration categories including:
- probability of harm;
- seriousness of harm;
- burden of taking precautions; and
- the social benefit of the activity undertaken at the time of the negligence.

The majority of jurisdictions provide that a Court is entitled to reduce a plaintiff’s damages by 100 percent where it is just and equitable to do so.

This has not been addressed by the Northern Territory to date.

Causation
A majority of jurisdictions provide that a plaintiff bears the burden of proof to establish both:
- factual causation; and
- the scope of liability encompassing legal causation, foreseeability, remoteness and common sense causation.

South Australia provides that where there are multiple causes and it is not possible to assign responsibility for causing the harm to any one or more of them:
- the Court must consider the position of each defendant individually and state the reasons for bringing the defendant within the scope of liability; and
- the Court may continue to apply the established principle under which responsibility may be assigned to the defendants for causing harm.

This has not been addressed by the Northern Territory.

Proportionate liability
All jurisdictions provide that in relation to claims for negligently caused personal injury and death, the doctrine of solidarity liability (where multiple wrongdoers are severally liable and can be held liable for the full amount of any damages awarded to the plaintiff) should be retained and not replaced with a system of proportionate liability.
The majority of jurisdictions provide that in relation to claims for economic loss and/or property damage, the liability of a defendant who is a concurrent wrongdoer in relation to a claim, is to be limited to an amount reflecting that proportion of the loss or damage claimed that the Court considers just, having regard to the extent of the defendant’s responsibility for the loss or damage. Where judgment is obtained against a defendant in relation to an apportionable claim, that defendant is not required to further contribute to the damages recovered, or those which are recoverable from another concurrent wrongdoer in the same proceedings, and can not be required to indemnify any such wrongdoer.

**Liability for mental harm**

A majority of jurisdictions provide that there is no liability if the mental harm is not a recognised psychiatric illness.

The majority of jurisdictions also provide that the tort feasor must have been able to foresee psychiatric harm in a person of normal fortitude. Relevant factors include:

- whether the injury arose from plaintiff witnessing a sudden shock or its aftermath;
- the nature of the relationship between the plaintiff and the defendant, including whether was a pre-existing relationship between the plaintiff and the defendant; and
- nature of relationship between plaintiff and any person killed, injured or put in peril.

This has not been addressed to date in Queensland and the Northern Territory.

**Limitation of actions**

All the jurisdictions impose a limitation period of three years starting from the date of discoverability and/or when the cause of action accrued – that is to say, from when the plaintiff knew or ought to have known of the injury caused by the defendant and that injury is significant enough to warrant proceedings.

The majority of jurisdictions provide for extensions of limitation period in cases involving minors or people with disabilities.

**Non-economic loss/general damages – thresholds**

The minimum threshold of each jurisdiction is as follows:

- New South Wales – no damages for injury below 15% of ‘a most extreme case’;
- Queensland – no thresholds. Injuries to be assessed on a ‘100 point scale’ and by reference to similar injuries in prior proceedings;
- Victoria – general damages only recoverable where a claimant has sustained a ‘significant injury’, which is defined in the Wrongs Act;
- South Australia – damages are calculated by reference to a scale value reflecting gradations of non-economic loss, the scale value is applied according to a series of multipliers;
- Western Australia – minimum threshold for general damages for the year commencing 1 July 2004 is $13,000;
A Comprehensive Guide to Tort Law Reform throughout Australia

- Tasmania – the minimum threshold for general damages for the year ending 30 June 2005 is $4,000 and then various phases after that. Courts may refer to earlier decisions in determining tariffs for non-economic loss;
- Northern Territory – a minimum threshold at $15,000; and
- ACT – in medical claims, damages must not be awarded for non-economic loss unless the assessed non-economic loss is over $12,000. A specific formula is used for those amounts falling between $12,000 and $20,000.

Non-economic loss – caps
Most jurisdictions impose a cap on the maximum damages recoverable for non-economic loss.

The non-economic loss cap for each jurisdiction is as follows:
- New South Wales – $427,000;
- Queensland – damages capped at three times the average weekly earnings;
- Victoria – capped at $389,940. In the case of injury (other than psychiatric injury), impairment must be more than 5% and in the case of psychiatric injury, impairment must be more than 10%, otherwise no entitlement. In each case, impairment must be permanent to qualify;
- South Australia – capped at $256,480;
- Western Australia – for the year ending 30 June 2005, where damages are assessed at less than $39,500 but more than $13,000, damages to be capped at $13,000;
- Tasmania – not addressed;
- Northern Territory – capped at $264,000;
- ACT – not addressed.

Loss of earning capacity
The majority of jurisdictions provide a cap at three times the average weekly earnings.

South Australia capped the loss of earning capacity at $2.2 million, including damages for economic loss awarded for the benefit of the defendant of a deceased person, while Tasmania caps loss of earning capacity at 4.25 x the adult average weekly earnings.

Discount rate
The discount rate for the various jurisdictions is as follows:
- New South Wales – 5%;
- Queensland – 5%;
- Victoria – 5%;
- South Australia – prescribed discount rates;
- Western Australia – discount rate fixed by the Government by order, or otherwise 6%;
- Tasmania – 5%;
- Northern Territory – 5%; and
- ACT – not addressed.
Interest on non-economic loss
The majority of jurisdictions provide no interest is recoverable on past non-economic loss and damages for attendant care provided free of charge.

This has not been addressed by Western Australia or the ACT.

Exemplary and punitive damages
New South Wales, Queensland, the Northern Territory and the ACT have abolished exemplary and punitive damages for negligence claims, while the other jurisdictions have not addressed this to date.

Homecare services provided free of charge
The majority of jurisdictions provide that damages for home care services provided free of charge should only be allowed when home care services is provided for more than 6 hours per week for more than 6 months – at an hourly rate linked to full time adult ordinary time earnings.

New South Wales, Victoria, Western Australia and Northern Territory provide that damages for gratuitous services are not to exceed the average weekly earnings if they exceed more than 40 hours care per week.

In all jurisdictions, the Court must be satisfied that there was a reasonable need for the services and the need arose solely because of the injury.

Legal costs
The different jurisdictions approaches to legal costs are as follows:

- New South Wales – for claims up to $100,000, maximum legal costs are:
  - for services provided to a plaintiff, the greater of 20% of the amount recovered or $10,000;
  - for services provided to a defendant, the greater of $20,000 of the amount sought, or $10,000;
- Queensland – dependent upon the mandatory final offer. Limited recovery where damages are less than $30,000. The amount recoverable is limited where damages fall between $30,000 and $50,000. Over $50,000, the normal ‘loser pays’ rule applies.
- Victoria – Not addressed;
- South Australia – Not addressed;
- Western Australia – Not addressed;
- Tasmania – Not addressed;
- Northern Territory – dependent on award of damages in relation to final offer with a sliding scale applying; and
- ACT – for personal injury claims in which damages are less than $50,000, a lawyer is not entitled to be paid more than 20% of the amount recovered. For personal injury claims of up to $100,000, a lawyer’s costs are limited to the greater of $10,000 or 20% of the claim. A Court has discretion to allow additional costs.
Protection to rescuers/good samaritans/not for profit organisations

A good samaritan does not incur any personal civil liability in respect of any act or omission done or made by the good samaritan in an emergency when assisting a person who is apparently injured or at risk of being injured, except where the good samaritan is impaired by drugs or alcohol, or not exercising reasonable care and skill.

A good samaritan is defined as a person acting without expectation of payment or other consideration, who comes to the aid of a person (usually includes a medical practitioner).

A volunteer does not incur any personal civil liability in respect of any act or omission done or made by the volunteer in good faith when doing community work organised by a community organisation, or as an office holder of a community organisation. There are certain exclusions such as impairment or where the volunteer is required to have insurance.

Effect of the amendments on the number of claims in the Courts

A recent report commissioned by the Law Council of Australia and written by Professor E W Wright (‘the Report’), has examined the effect of the reforms on the number of claims relating to negligence that are now initiated in Courts throughout Australia.

The Report found that in most jurisdictions, there has been an appreciable, and in some cases a dramatic, decline in litigation since the tort reforms were enacted.

The Report examines data from a period of 1996 to 2005 and notes a significant decrease in tort law litigation from 2003 onwards.

The Report may be slightly misleading. In 2002, there was a dramatic increase in claims initiated in the Courts as solicitors protected their clients, ensuring their rights would not be diminished or expelled by impending tort law reform legislation. The fact that so many claims were lodged in 2002, means that any statistics for claims in years 2003 and 2004 will be skewed dramatically in the negative. Most parties who had a legitimate cause of action as at 2002, would have initiated proceedings, rather than wait until later in the limitation period, as often occurs.

The National Claims & Policies Database’s ‘Overview Of Professional Indemnity And Public And Product Liability Insurance’ issued on 20 July 2006 (‘the Overview’), reveals that the average amount of claims is beginning to decrease. In 2005, the number of public liability policies increased by 2.7%, while the number of claims in the first year decreased by 28%. Whether this statistic is representative of a trend for the future, remains to be seen.

Nonetheless, the Report cites a decline of about 60% in the claiming rates in 2004 and 2005, with Victoria, Queensland and New South Wales being the States that recorded the most significant decreases. While it may take a few more years before accurate trends as to level of litigation reduction caused by the tort reform can be reliably measured, it is apparent in practice that there has been a significant decrease in the number of claims in New South Wales. The legislation has certainly led to a decrease in spurious and speculative claims that were more apparent prior to 2002. This may be attributed to an inability of plaintiff law firms to recover significant costs unless negligence is found and the damages amount to over $100,000. The fact that plaintiff law firms now have to sign off on whether any action has a ‘reasonable prospect of success’ or face potential costs consequences, has also led to a more cautious approach in claims being initiated.
Professor Wright has suggested in the Report that there is little or no evidence of a significant increasing trend in claims prior to the Ipp inspired reform. The Professor concludes that the data demonstrates that there was no evidence of a general increase in personal injury litigation between 1995 and 2002, when the Ipp Review was commissioned to address the insurance crisis. It is further stated by Professor Wright that there was little empirical confirmation of the fact that personal injury claims were becoming increasing successful and were resulting in increasingly larger rewards.

In this author’s view, change was needed to halt the rapidly escalating insurance premiums. Claim numbers have now certainly decreased, but whether claims have decreased as high as 60% as concluded in the Report, remains to be seen. The number of claims lodged in anticipation in the tort reform legislation has certainly skewed results, so it may take few more years before the true effects of the tort reform legislation are accurately realised.

**Effect of the reforms on damages payouts**

Courts still seem to be sympathetic towards claimants when it comes to awarding damages. In this regard, damages are awarded by way of a reference to a scale, and it would appear that some courts are finding for claimants up to a generous range on the prescribed scale.

The Commonwealth Government looked to curtail what were becoming increasingly innovative pleadings aimed at circumventing the State and Territory amendments with the introduction of the *Trade Practice Amendment (Personal Injuries & Death) Act* 2004. This legislation was aimed to prevent individuals from bringing civil actions under contraventions of Part 5, Division 1 of the *Trade Practices Act 1974* (Cth) for damages in relation to personal injury and death. This division includes misleading and deceptive conduct, false and misleading misrepresentations, harassment and coercion.

Despite all the reforms throughout the country, the big claims will almost certainly still remain. The shifting on the onus on persons to assume a greater personal responsibility for their own safety and the introduction of caps for the majority of heads of damage in the majority of jurisdictions, is beginning to limit the incidences where large payouts will be awarded.

There have been a number of reports examining the effect of the legislative developments on claims where proceedings are issued, damages payouts and the resulting effect on premiums for public liability and professional indemnity insurance.

The ACCC *Public Liability And Professional Indemnity Insurance Fourth Monitoring Report* (‘Fourth Monitoring Report’) stated that insurers noted that the average size of claims settled decreased by 11% between the year ending 31 December 2003 and half year ending 30 June 2004. This decrease resulted from a fall in the average size of personal injury and death claims, rather than property damage claims, but the recent introduction of proportionate liability in the various jurisdictions in relation to property claims may address this imbalance.

The Fourth Monitoring Report also noted that between 31 December 2003 and the half year ending 30 June 2004, the average size of professional indemnity insurance claims settled increased by 21%.

The Overview revealed that the change in average claims incurred from the 2004 to 2005 underwriting year for all jurisdictions was a reduction of 23.9%, to $90,300.
The Overview also notes that the average claims incurred for public liability insurance fell by 16.3% from the 2004 to 2005 underwriting year, to $7,175.

In professional indemnity, claims on events occurring during 2005 that were finalised in the second half of the year had average claim payments of $4,900, while claims from events in 2003 that were finalised in the same period had average payments of $34,000. Claims finalised during the final 6 months of 2005, which related to accident years from 1996 or earlier, had an average claim payment of $297,000.

Is the insurance premium crisis abating?
The reforms do seem to have had a positive effect in their stated purpose of reducing insurance premiums for professional indemnity and public liability insurance, if the most recent statistics published in the Overview are anything to go by.

The Overview reveals that all States and Territories recorded a drop in average written premium for professional indemnity insurance from the 2004 to 2005 underwriting year.

The national average written premium for professional indemnity insurance fell by 6%, on top of a 12% reduction the year before.

Significantly, average written premium for New South Wales risk, which makes up almost half of the professional indemnity business written, fell by only 0.8%, while Victoria and Queensland, the next two largest States by gross written premium, had reductions in average written premium of 5.7% and 8.9% respectively.

The average written premiums for public liability insurance has fallen significantly from 2004 to 2005. Most States showed reductions in average written premium of 11% or higher when compared to the 2004 underwriting year, with the national average falling by 13.4%. This compares with a 6.9% fall the previous year.

The average written premium for New South Wales risks fell by 12.9%, although it remained the highest average written premium for public liability business of all of the States.

The national average written premium for professional indemnity risks written in 2005 underwriting year was $4,861.

The average written premium for risk written in 2005 underwriting year for public liability business was $801, down from $994 in the 2003 underwriting year.

The average written premium per risk decreased for most professional indemnity product types from 2004 to 2005. Directors and officers premiums fell by 10%, professional indemnity and errors and omissions by 8% and medical malpractice only by 0.2%, following the steepest reduction from 2003 to 2004 of 21.4%.

The three largest professional indemnity product types by gross written premium and professional indemnity in errors and omissions, medical malpractice, and directors and officers insurance, which together make up 93% of gross written premium, had average written premiums of $4,880, $5,300 and $5,980 respectively.
The average written premiums for public liability insurance is written in the form of three product types with the following premiums:

(a) mixed public/products cover of $908;
(b) pure public liability of $690; and
(c) pure product liability of $393.

These categories make up more than 90% of public liability insurance.

All other public liability insurance products reported significantly higher average written premiums per risk in 2005, including construction liability at $2,085 and excess liability risk at $18,000 per risk written in 2005.

The National Claims & Policies Database asserts that there are faults with the data presented in the ACCC monitoring reports and claims to have more reliable quality and quantity of information.

**Have the reforms gone too far?**

Numerous commentators, including numerous Judges from a number of jurisdictions, have argued that the sweeping tort reforms have gone too far and that many of the changes were unnecessary. Commentators suggest that the major impact of the reforms has been to erode the rights of persons who were previously entitled to compensation.

The Law Council claims that there was no evidence that reforms to personal injury laws were needed to halt the apparent litigation explosion in Australia. It concludes that many of the tort reforms were hastily introduced and ill thought out and were a knee jerk reaction to a problem that had little or nothing to do with litigation rates.

As previously discussed, much of the Law Council’s data in relation to falling litigation rates for 2003 and 2004 is potentially skewed, due to the vast number of claims that were instituted prior to the reforms in 2001 and 2002. A more meaningful analysis will take a number of years.

Criticism of the reforms has also come from the Honourable J J Spigelman AC, Chief Justice of New South Wales, who believes that the statutory changes have gone too far and in some instances, as in New South Wales, have gone further than the recommendations of the Ipp Report.

Justice Spigelman cites a considerable flow of judgments interpreting the new legislation in various jurisdictions, which include critical comment by Judges about the anomalies and injustices arising from the application of the legislation.

In particular, Justice Spigelman states that the changes in New South Wales have fundamentally altered the ability of citizens to sue the government and its agencies.

His Honour highlights the self interest from governments, noting that in part, the concern of governments was motivated by the liability of government directly as a major employer, property owner and provider of services, particularly in education, health and transport. Justice Spigelman alludes to the fact that in many cases, the government was a backstop for private insurers, as a reinsurer of last resort, when other parties could not be sued or did not have the funds available.
Controversial changes in NSW

In the Civil Liability Act 2002 (NSW) (the Act), proceedings against public or other authorities based on breach of statutory duty are restricted to situations where an act or omission of the authority was, in the circumstances, so unreasonable that no organisation having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.

The Act also provides that a road authority is not liable in proceedings for civil liability for harm arising from a failure of the authority to carry out roadwork, or to consider carrying out roadwork, unless at the time of the alleged failure, the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.

It is arguable that road work includes maintenance to footpaths, which will severely limit an injured party's ability to gain compensation from a Council for problems with the footpath, unless the Council is given previous notice of any defects.

The changes go much further than that recommended by the Ipp Report and make it extremely difficult for a plaintiff who has suffered actual harm at the fault of a council or other public authority, from gaining any compensation.

A plaintiff in such circumstances will likely attempt to commence proceedings against another party who may not be the party primarily at fault.

These measures will result in a substantial decrease in claims due to an inability of an injured party to commence proceedings against a Council or public authority in many instances.

The legislative changes to tort law have also substantially increased the onus on a party to be personally responsible for their own safety. The Act prescribes that in determining liability for negligence, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless a person proves on the balance of probabilities that he or she was not aware of the risk.

An 'obvious risk' is defined as a risk that, in the circumstances, would have been obvious to a reasonable person in a position of that person. A risk can be an obvious risk even though it has a low probability of occurring or even if the risk is not prominent, conspicuous or physically observable.

The Act goes further, holding that a person does not owe a duty of care to another person to warn of an obvious risk unless:

(a) the plaintiff has requested advice or information about the risk from the defendant, or
(b) the defendant is required by written law to warn the plaintiff of the risk, or
(c) the defendant is a professional and the risk is a risk of death or a personal injury to the plaintiff from the provision of a professional service by the defendant.

The Act also provides that a person is not liable in negligence for harm suffered by another person as a result of a materialisation of an inherent risk. An 'inherent risk' is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.

The Act holds that a person is not liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff. This section applies whether or not the plaintiff was aware of the risk.

'Dangerous recreational activity' means a recreational activity that involves a significant risk of physical harm. 'Recreational activity' includes:
(a) any sport (whether or not the sport is an organised activity), and

(b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and

(c) any pursuit or activity engaged in at a place (such as a beach, party or other public open space) where people ordinarily engage in sport or any pursuit or activity for enjoyment, relaxation or leisure.

If a risk warning is provided to a person engaging in a recreational activity, a person engaging in such an activity is unable to sue another person in negligence if the risk materialises.

In essence, these sweeping changes substantially decrease the plaintiff’s rights to commence proceedings against councils, sporting bodies, recreational providers and community groups.

The reforms therefore leave a substantial gap where individuals who are injured will not be entitled to compensation.

Justice Spigelman states that even prior to the developments, a clear theme to emerge in recent Australian case law was the renewed emphasis on individuals taking responsibility for their own actions. His Honour notes limits to the extent to which personal responsibility can operate and the need to balance holding parties personally responsible, with other social values such as, compassion, the understanding of personal failings and the social need to maintain mutual communal responsibility, particularly for the seriously injured. His Honour states that the statutory changes occurred without a full appreciation of the extent to which judicial attitudes had already changed and were continuing to change.

In essence, His Honour is indicating that the Courts were already placing more responsibility on individuals for their own safety, but the statutory changes went too far, especially changes in New South Wales, who fundamentally altered the ability of citizens to sue the government and its agencies.

The New South Wales Government has stated that it will not unwind public liability reforms, because insurance premiums would rise by almost one third.

The Legislative Council General Purpose Standing Committee No 1 Report into Personal Injury Compensation offered 26 recommendations, but most of them were rejected.

The New South Wales Government maintains that an appropriate balance currently exists between the right to compensation for injured people and the community’s ability to pay. Any recommendations aimed at scaling back tort reform would destabilise this balance. The Insurance Council of Australia (ICA) welcomed the Government’s response to the report and stated that the report recognises its civil liability reforms are achieving their objectives.

The ICA says that public liability insurance has been made more affordable and available and that premiums fell 10% in New South Wales over 2003 and 2004, with further reductions reported in industry surveys. The ICA refuted assertions by the legal profession that there have been few or no reductions in premiums and that insurers are simply making bumper profits from public liability insurance.
**Conclusion**

Evidence suggests that the tort law reforms have succeeded in reducing the number of claims and insurance premiums. Although it will be another year or two before the full effect of tort reforms on the number of claims initiated can be reliably measured, the legislative changes have certainly placed a greater onus on the potential plaintiff to be responsible for their own actions.

Governments, sporting organisations, event organisers, recreational activity providers and community groups now enjoy significantly more protection from being successfully sued then they have ever had in the past. Accordingly, they pay lower premiums.

Have the reforms gone too far? It depends on which group you ask.

Obviously the potential plaintiff who, is unable to recover any damages for a catastrophic injury that was genuinely not solely his or her fault, will tell you that some of the reforms should be scaled back and that the damages caps should be increased.

Conversely, the insurance company who, for a number of years, has been lambasted over increasing premiums for public liability and professional liability insurance will argue that the reforms have been successful in reducing damages payouts, resulting in decreased premiums.

The New South Wales Government has stated that it will not be scaling back tort law reforms, believing it has achieved the balance between the right to compensation for injured people and the community's ability to pay.

The reforms probably did go marginally too far as is suggested by Justice Spigelman, in protecting the government and various organisations. It is also disappointing that there is not a uniform system Australia wide, as a person injured in one State or Territory will get significantly different damages awards and in sum cases, even a different result on liability, than a person injured in identical fashion in another State or Territory.

Despite the protests by some quarters, tort law reform has succeeded in lowering insurance premiums, so it appears likely that the reforms are here to stay.

The developments in the past five years tend to suggest though, that a uniform system of tort law throughout Australia, as recommended in the Ipp Report, may never be realised.