

The Law Reform Commission

Report No 28

COMMUNITY LAW REFORM FOR THE AUSTRALIAN CAPITAL TERRITORY: FIRST REPORT

- **The Community Law Reform Program**
- **Contributory Negligence in Fatal Accident Cases and Breach of Statutory Duty Cases**
- **Funeral Costs in Fatal Accident Cases**

**This Report
reflects the law
as at 1 October 1985**

The Law Reform Commission is established by section 5 of the Law Reform Commission Act 1973 as a permanent law reform agency of the Commonwealth and its Territories. The first Chairman and Members were appointed in 1975. Section 6 of the Law Reform Commission Act sets out the functions of the Commission.

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Commission Reference: ALRC 28

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Terms of Reference

COMMUNITY LAW REFORM PROGRAM FOR THE AUSTRALIAN CAPITAL TERRITORY

I, GARETH EVANS, Attorney-General of Australia, HAVING REGARD TO

- (a) the functions of the Law Reform Commission (the Commission) under the Law Reform Commission Act 1973 (the Act);
- (b) the provision made in section 6 of the Act for the Commission to suggest to the Attorney-General matters to be referred to the Commission; and
- (c) the desirability of involving the community of the Australian Capital Territory in the reform of the laws of that Territory,

HEREBY REFER to the Commission the following program, to be known as the Australian Capital Territory Community Law Reform Program:

1. The Commission is to call for suggestions from members of the public as to laws of the Territory that should be reviewed and for proposals for their reform;
2. The Commission is to consider such suggestions and report on them to the Attorney-General;
3. Where it appears to the Commission that a suggestion relates to a matter on which it is desirable for the Attorney-General to issue to the Commission a specific reference under the Act the Commission is to include in its report a recommendation to that effect;
4. Where it appears to the Commission that a suggestion discloses the desirability of an amendment or amendments to a law of the Territory and a conclusion to that effect is possible without an extensive investigation, the Commission is to report to the Attorney-General to that effect indicating the nature of the amendment or amendments it considers desirable.

DATED this 21st day of February 1984.

Gareth Evans
Attorney-General

Participants

The Commission

For the purposes of the Reference, the President, in accordance with section 27(1) of the Law Reform Commission Act 1973, created a Division comprising members of the Commission.

President (formerly Chairman)

The Hon FX Connor, QC (from May 1985)

The Hon Mr Justice MR Wilcox, LLB (Syd) (Acting) (1984–5)

The Hon Justice MD Kirby, CMG, BA, LLM, BEc (Syd) (Retired 1984)

Commissioner in Charge

Mr Nicholas Seddon, LLB (Melb), BPhil (Oxon) (from 1985)

Commissioners

Professor AD Hambly, LLB (Melb), LLM (Harvard) (Commissioner in charge 1984–5)

Professor MR Chesterman, BA, LLB (Syd), LLM (Lond)

Officers of the Commission

Secretary and Director Research

IG Cunliffe, BA, LLB (ANU)

Legislative Draftsman

Stephen Mason, BA, LLB, MTCP (Syd)

The Commission wishes to acknowledge the assistance of Mr JQ Ewens, QC, CMG, CBE, LLB (Adel), formerly First Parliamentary Counsel, in settling the draft legislation attached to this Report.

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Summary

In February 1984, the Australian Law Reform Commission was asked by the Attorney-General to conduct an Australian Capital Territory Community Law Reform Program. The aims of the Program are:

- to encourage members of the public to suggest reforms;
- to act on suggestions which do not require extensive inquiry; and
- to ask the Attorney-General for specific references in relation to suitable suggestions.

This is the first report under the Program. More than one hundred suggestions have been received. The Commission has examined each of these suggestions to decide whether the substance of the suggestion is suitable for inquiry and report under the Program. In some cases, particular suggestions are already being acted on by other government agencies such as the Attorney-General's Department.

In this report the following suggestions are considered:

- abolition of the defence of contributory negligence in fatal accident cases;
- abolition of the defence of contributory negligence in breach of statutory duty cases; and
- clarification of the assessment of funeral costs in fatal accident cases.

The Commission recommends in this report that the defence of contributory negligence in fatal accident and breach of statutory duty cases in the Australian Capital Territory be abolished. It also recommends that new statutory provisions be enacted to provide more generous and clearer entitlements to families of fatal accident victims for funeral and related costs. The report foreshadows a further report concerning the loss of consortium action, whereby a husband (and only a husband) can sue for the loss of companionship and services he suffers when his wife is injured by the negligence of another, and on the assessment of compensation for the loss of household working capacity — a topic which grew out of the inquiry into loss of consortium.

In addition, as a result of examining the suggestions, the Commission recommends that consideration be given to one or more specific references from amongst the subjects of euthanasia, suicide and related matters, status of children legislation and the provision of medical services to minors.

Finally, two further suggestions are already the subject of specific references from the Attorney-General:

- domestic violence in the Australian Capital Territory; and
- occupiers' liability.

A report on domestic violence in the Australian Capital Territory will be ready in the very near future.

1. The community law reform program

Background

Public suggestions for law reform

1. *Senate Committee.* This is the first report by the Commission under the Community Law Reform Program. The provenance of the program lies in the report by the Senate Standing Committee on Constitutional and Legal Affairs, *Reforming the Law*, on the processing of law reform proposals in Australia.¹ That report was tabled on 10 May 1979. It concluded a detailed examination by the Committee of machinery for law reform in Australia, including the processing of this Commission's reports. One of the recommendations made by the Committee was for a register of law reform suggestions to be compiled by this Commission, based upon material appearing in law reports, periodical literature, parliamentary reports, papers and suggestions communicated by interested organisations and individuals. The Committee recommended that the Commission should report annually to Parliament on the suggestions it had received, or at least those it considered significant or worthwhile.²

2. *Government's response.* On 15 May 1980 the then Attorney-General, Senator PD Durack, tabled the Government's response to the Senate Committee's report. He indicated that in the Government's view the proposed expansion of the Commission's functions to enable it to provide a clearing house for the collection and dissemination of suggestions for law reform had merit and that, as far as the Commonwealth area was concerned, the Government was prepared to adopt this recommendation; insofar as the recommendation would involve the collection and dissemination of material relating to State laws, it was a matter for State governments.³ The Government also accepted the Committee's recommendation that the Commission report annually to the Parliament on the most significant of the law reform suggestions it had received. However, the Attorney-General noted that it would not be appropriate for the Commission to become involved in a major consideration of law reform suggestions for the purpose of determining the most significant suggestions for inclusion in its report.

3. *Law reform suggestions.* From the time of its 1980 Annual Report⁴, the Commission has included law reform suggestions in its Annual Reports. Since that time the Commission has actively sought out law reform suggestions. It has written to members of Parliament, judicial officers, members of the legal profession and others who may have suggestions for law reform to draw their attention to the role of the Commission. It has also contacted the editors of legal publications seeking their assistance in the identification of law reform proposals. A number of the principal law publishers in Australia, including the Law Book Company, Butterworths Australia and CCH Australia, have agreed to assist the Commission in its task. The editors of several law reports have also co-operated both by referring decisions containing judicial suggestions for reform to the Commission and by requesting law reporters specifically to include law reform as a 'catchword' in case headnotes.

1. AGPS, Canberra, 1979.

2. id, para 3.33.

3. Commonwealth of Australia, *Hansard (Sen)* (15 May 1980) 2297.

4. Australian Law Reform Commission, Report No 17, *Annual Report 1980*, AGPS, Canberra, 1980, Appendix A.

New South Wales Program

4. In its 1981 Annual Report the New South Wales Law Reform Commission described a similar role which it could play in relation to law reform suggestions touching areas of New South Wales Government responsibility.⁵ In April 1982 the Chairman of the New South Wales Commission wrote to the New South Wales Attorney-General and suggested that that Commission:

should play an active role in evaluating and, where appropriate, reporting to him on proposals for reform made by judges, legal practitioners and all other members of the community ... [T]his role would benefit the community as a whole and provide evidence that our legal system is capable of meeting changing social needs ... In short, we asked the Attorney-General to approve our undertaking preliminary work on proposals that appear to us to warrant further consideration.⁶

The object of this preliminary work would be to sift out the proposals which did not justify further investigation, for example, because the issues were:

- complex, and consideration would therefore require too many resources;
- under consideration by the Department of the Attorney-General and Justice, or by another Government department or agency;
- the subject of Government policy; or
- otherwise not suitable for examination by the Commission.

The New South Wales Commission proposed that, if the preliminary investigation indicated there was a case for taking the matter further, it would bring it to the Attorney-General's attention so that he could determine whether a formal reference should be made. On 24 May 1982 the New South Wales Attorney-General expressed his support for the concept and gave his approval to the New South Wales Commission giving preliminary consideration to proposals for law reform which were brought to its attention. The New South Wales Commission's 1982 Annual Report adverted to the special need for reports made under the community law reform program to be given prompt attention by the Parliament and the executive government, and to the procedures then recently adopted by the New Zealand Parliament to achieve speedy implementation of minor law reform measures.⁷ Since that time, the New South Wales Commission has received 10 references under its community law reform program and has presented six reports. Three have been implemented.⁸

The Commission's Program

5. *Federal elections.* In March 1983 a new Federal Government was elected and Senator Evans became Attorney-General. The new Government's Law and Justice Policy contained a commitment to ask this Commission to seek and process law reform suggestions and proposals from members of the public and legal profession, on the model of the New South Wales Law Reform Commission's Community Law Reform Project. Following the elections, the Attorney-General consulted with the Commission about the project.

6. *Consultation.* The Attorney-General said that, as a step towards involving the community in law reform, this Commission should examine the New South Wales program and, in the light of its own experience with law reform suggestions, formulate a proposed mechanism to initiate a program of community law reform. Some, but not all, of the proposals for law reform collected in this Commission's Annual Reports could be appropriate for community law reform projects. At that stage it was envisaged that the program would include both federal matters and Australian Capital Territory matters. The Commission suggested that a community law reform program would involve some prelimi-

5. New South Wales Law Reform Commission, *Annual Report 1981*, NSW Govt Printer, Sydney, 1981, V.4.

6. New South Wales Law Reform Commission, *Annual Report 1982*, NSW Govt Printer, Sydney, 1982, para 3.2.

7. *id.*, para 3.4 – 3.5.

8. See *id.*, Appendix B.

nary work on a topic, generally of relatively small proportions, and then a suggestion to the Attorney-General of:

- the scope of the topic;
- the priority to be assigned to it; and
- draft terms of reference.

It suggested that the Attorney-General might then consider the proposal in the light of priorities and other known Government or departmental initiatives. It was envisaged that the program for the Australian Capital Territory would be conducted from the office of the Commission to be established in Canberra and that the Commission would have a useful role in particular in translating law reform proposals developed in the States, especially in New South Wales, to the needs of the Territory. The Attorney-General invited the Commission to consult with its New South Wales counterpart and to prepare a submission for a community law reform program.

7. *Calls for submissions.* On 22 April 1983 the then Chairman of the Commission, Justice Michael Kirby, announced the commitment to establish a community law reform program.

This will mean that instead of law reform projects being necessarily large tasks, taking years and involving the great controversial issues of the day, in the future, one of the activities of the Australian Law Reform Commission will be to look at the complaints of ordinary citizens. Of course, we will be confined to federal laws.

He called on citizens who felt wronged by federal laws to bring their proposals of law reform to the attention of the Commission. He pointed out that it would sometimes be necessary to send suggestions for law reform to other federal bodies such as the Family Law Council, the Administrative Review Council or the Human Rights Commission.

Where a matter of federal law is concerned it is intended that if the proposal for law improvement is a small and self-contained one, the Attorney-General will authorise the Law Reform Commission to proceed promptly to attend to it. In this way, it may be hoped that a series of miscellaneous and small reports come forward quickly with suggestions for improvement of the legal system. Combined with proposals for ensuring that these reports are promptly and attentively examined in Parliament we may hope to see the day when rooting out injustices is an accepted feature of our legal system.

8. *Response.* A considerable amount of correspondence was attracted in relation to both Australian Capital Territory and federal law reform issues. This correspondence was largely dealt with by Justice Kirby, who responded personally to each letter, often referring the person making the approach to the appropriate quarter to obtain assistance or seek review of a decision. In addition, correspondents were informed that the letters would be included with other suggestions for the Community Law Reform Program. They were told that as soon as the program was ratified and resources were available, priorities would be determined amongst the matters which had been raised. Justice Kirby also commonly corresponded with relevant government departments and authorities directly, drawing the problem raised in the correspondence directly to the attention of the body in a position to deal with it.

9. *An Australian Capital Territory program.* After further consultation, the Attorney-General decided to establish a Community Law Reform Program initially for the Australian Capital Territory and to defer for a time a federal program. This decision to defer the federal aspect of the project was apparently based on a number of considerations.

- It was thought better to pilot the program in the Territory before expanding it into federal areas.
- The law reform needs of the Australian Capital Territory are particularly pronounced.
- Whereas administration of the law in the Territory is principally in the hands of two departments – Attorney-General's and Territories – a Community Law Reform Program encompassing all aspects of federal law would deal with laws administered by every federal department or statutory authority. In particular, reven-

ue issues might be raised, as for example in relation to two suggestions made, namely the rights or liabilities of de facto spouses under social security and taxation legislation, and the scope of the exemption given to charities for taxation purposes.

- The Commission's resources for the Community Law Reform Program were limited and it was thought best to commence the project in a small way in the confined environment of the Australian Capital Territory. In this regard, the establishment of the Commission's Canberra Office⁹ would help to provide a focus for suggestions.

The Reference

Terms of Reference

10. The Community Law Reform Program's Terms of Reference were signed on 21 February 1984. The Commission is to call for suggestions from members of the public as to laws of the Australian Capital Territory that should be reviewed and for proposals for their reform. Where reform of a law is possible without extensive investigation, the Commission may, under paragraph 4 of the reference, proceed to investigate and report to the Attorney-General without a further, specific reference. Where it appears to the Commission that a suggestion relates to a matter on which it is desirable for the Attorney-General to issue a specific reference to the Commission, the Commission is to include a recommendation to that effect in its report to the Attorney-General.

Personnel

11. The Commission has been fortunate in having the assistance of Mr Nicholas Seddon to work on the Community Law Reform Program. Mr Seddon is a senior lecturer in law at the Australian National University. He devoted the period of his recent study leave, 1 March to 31 October 1984, to working on the program as consultant to the Commission. He has now been appointed a part-time member of the Commission, from 11 April 1985 to 10 April 1988, and Commissioner-in-Charge of the Community Law Reform Reference. Mr Seddon is well placed to assist the Commission. He was the editor of the *ACT Legal Resources Book* and is President and Treasurer of the Canberra Community Legal Service. Research assistance to Mr Seddon is primarily provided by officers working within the Commission's Canberra Office.

Submissions

12. Over 100 suggestions have been made to the Commission by more than 70 individuals or organizations. The following Table sets out the matters raised in the submissions received.¹⁰

TABLE 1¹¹

-
- | | |
|----|--|
| 1. | <i>Aboriginals</i>
protection of Aboriginal sites |
| 2. | <i>Administrative law</i>
(a) discretionary powers in statutes
(b) judicial administration and lands acquisition
(c) no review under Administrative Decisions (Judicial Review) Act 1976 (Cth) of decisions of the Tourist Commissioner |
| 3. | <i>Animals</i>
(a) keeping of animals in suburban areas |
-

9. See Australian Law Reform Commission, Report No 25, *Annual Report 1984*, AGPS, Canberra, 1985 (ALRC 25) para 132.

10. Some, relating only to the particular circumstances of individual cases and not raising any general issue, have been omitted.

11. These submissions are arranged under the headings used in the *Law Reform Digest*, AGPS, Canberra, 1983.

- (b) liability for straying animals
- (c) unwanted dogs
- 4. *Arbitration*
 - need for arbitration in relation to disputes over defective buildings
- 5. *Aviation*
 - pilot's licences
- 6. *Banks and banking*
 - banking and other practices infringing Islamic law
- 7. *Building control and town planning*
 - (a) enforcement of purpose clauses in residential leases
 - (b) defective building work
 - (c) no power under the City Area Leases Ordinance 1936 (ACT) s 11A to extend time for objections — inadequacy of notice under s 11A.
- 8. *Civil rights*
 - (a) right of assembly on Anzac Day
 - (b) clearance of records of convictions for minor offences
- 9. *Commons, parks and reserves*
 - use of parks in the Australian Capital Territory
- 10. *Companies*
 - partnership and company law — Parliamentary privilege
- 11. *Consumer claims and protection*
 - dumping of end-of-shelf life food in the Australian Capital Territory
- 12. *Contract*
 - unconscionable contracts
- 13. *Copyright and designs*
 - artist's moral right in work
- 14. *Corporations*
 - (a) unincorporated associations — difficulties of forming co-operatives for groups such as unemployed
 - (b) incorporated associations and societies — Associations Incorporation Ordinance 1953 (ACT) and Co-operative Societies Ordinance 1939 (ACT)
- 15. *Costs*
 - need for an appeal fund to cover costs of appeals in certain cases
- 16. *Credit*
 - consumer credit legislation
- 17. *Criminal liability*
 - (a) Chamberlain case
 - (b) child sexual abuse
 - (c) suicide, voluntary euthanasia and related issues
 - (d) withholding of treatment to severely handicapped newborn children
- 18. *Crown*
 - vicarious liability of the Crown for servants exercising independent discretion
- 19. *Damages*
 - (a) cost of headstone in Lord Campbell's Act action
 - (b) loss of consortium
- 20. *Debts and debtors*
 - (a) debt recovery and repossession of goods
 - (b) enforcement of debts under Court of Petty Sessions Ordinance 1930 (ACT) s 162(1)
 - (c) debt recovery by Australian Taxation Office
- 21. *Defamation*
 - (a) Trade Practices Act 1974 (Cth) s 52 — privilege in respect of government press statements
 - (b) qualified privilege and complaints to bodies such as the Law Society and the Consumer Affairs Bureau
- 22. *Easements and prescriptions*
 - right to light
- 23. *Environment protection*
 - (a) litter control
 - (b) noise pollution from dogs
 - (c) noise pollution generally
 - (d) recycling of waste disposal
- 24. *Evidence*
 - admissibility of circumstantial evidence

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25. *Execution of instruments*
witnessing of documents abroad
26. *Executors and administrators*
 - (a) powers of Curator of Deceased Estates
 - (b) scale of charges of Curator of Deceased Estates
27. *Family law*
 - (a) matrimonial property
 - (b) adoption — right of tracing
 - (c) adoption of foreign children
 - (d) advocacy in adoption
 - (e) de facto relationships
 - (f) family violence
 - (g) joint custody after separation
 - (h) maintenance of ex-nuptial children
28. *Firearms and explosives*
gun control
29. *Industrial law*
outlawing of industrial actions in essential services
30. *Infants and children*
 - (a) child welfare legislation
 - (b) consent of minors to medical procedures
 - (c) status of children legislation
31. *Jury*
abolition of jury trials
32. *Landlord and tenant*
Landlord and Tenant Ordinance 1949 (ACT)
33. *Lawyers*
 - (a) legal practitioners' admission to practice and right of Law Society to appear or object
 - (b) solicitor's fees
34. *Licences*
(see item 5)
35. *Liens*
uncollected goods
36. *Liquor*
liquor legislation
37. *Maintenance of dependants*
 - (a) enforcement of maintenance
 - (b) (see item 27(h))
38. *Master and servant*
rule in *Lister v Romford Ice*
39. *Mental illness*
 - (a) Mental Health Ordinance 1982 (ACT) — bed-side court hearings
 - (b) management of infirm person's property
40. *Moneylenders*
 - (a) Moneylenders Ordinance 1936 (ACT)
 - (b) Moneylenders Ordinance 1936 (ACT) and Insurance (Agents and Brokers) Act 1984 (Cth)
41. *Motor traffic law*
speed limits for helmetless motor cyclists — Motor Traffic Ordinance 1936 (ACT)
s 190A(3)(a)
42. *Negligence*
 - (a) contributory negligence in fatal accident cases
 - (b) contributory negligence in breach of statutory duty cases
 - (c) (see item 19(b))
 - (d) (see item 38)
43. *Partnership*
(see item 10)
44. *Perpetuities and accumulations*
reform of law generally
45. *Personal property*
(see item 49(a))
46. *Police offences*
prostitution

47. *Practice and procedure*
difficulties in transferring proceedings from Court of Petty Sessions to Supreme Court
 48. *Public health*
 - (a) bans on tobacco advertising
 - (b) (see item 11)
 49. *Real property and conveyancing*
 - (a) partition applications
 - (b) word 'land' in s 19 of the Conveyancing Act 1898 (NSW) as applying in the Australian Capital Territory does not include 'property'
 - (c) problems under Real Property Ordinance 1925 (ACT) and Moneylenders Ordinance 1936 (ACT) concerning rule against perpetuities
 - (d) problems arising from the law and practice relating to caveats
 50. *Sentencing and prisons*
 - (a) sentencing of federal offenders
 - (b) sentencing in magistrate's courts
 51. *Sex discrimination*
homosexuality in criminal law and as a basis for discrimination
 52. *Social services*
 - (a) repatriation invalid card
 - (b) welfare rights legislation
 - (c) inconsistent treatment of de facto spouses under Social Security Act 1947 (Cth) and Income Tax Assessment Act 1936 (Cth)
 53. *Statutes*
definition of 'income' in different legislation
 54. *Succession*
commorientes provisions of Conveyancing Act 1898 (NSW) as applying in the Australian Capital Territory do not apply if death is presumed under 7-year rule
 55. *Superannuation and pensions*
anomaly under Superannuation Act 1976 (Cth) s 122, involving apparently arbitrary cut-off date
 56. *Taxation*
 - (a) taxation exemption for community welfare organisations
 - (b) (see item 20(c))
 - (c) (see item 52(c))
 57. *Torts*
 - (a) reform of occupier's liability law and abolition of rule in *Cavalier v Pope*
 - (b) (see item 38)
 - (c) (see item 42)
 58. *Wills, probate and administration*
freezing of bank accounts of deceased persons
 59. *Workers compensation*
recess cover
-

Assessing the submissions

13. *Criteria.* Each suggestion received was investigated. In considering whether to recommend to the Attorney-General under paragraph 3 that a reference be issued the Commission has regard to:

- the importance of the issue;
- the potential length of the project and its size; and
- whether the matter is actively being pursued elsewhere, for example in the Attorney-General's Department, the Department of Territories or the Human Rights Commission.

The Commission has also had regard to these factors in deciding whether to take up suggestions for reform under paragraph 4 of the Terms of Reference. The length and size of the project is the main distinguishing feature between paragraph 3 and paragraph 4 matters. Paragraph 3 matters are bigger than those under paragraph 4. Nevertheless, even with paragraph 3 matters, the Commission aims not to get involved with projects of the

size and scope of its general references like matrimonial property, evidence, Aboriginal customary laws or insolvency.

14. *Suggestions dealt with elsewhere.* In some cases, the suggestions related to areas of law which were already under active investigation in government departments or agencies. Examples have included:

- a suggestion that the workers' compensation legislation provide for recess cover of employees (for example, lunch breaks), consistent with legislation in other jurisdictions; and
- a suggestion that adequate and effective notice be given to neighbours and other affected parties when an application is made to change the purpose clause in a tenancy (presently governed by the City Area Leases Ordinance 1936 (ACT) s 11A).

In both cases the Department of Territories was already conducting wider inquiries into the workers' compensation legislation and land use policies, respectively. The Commission provided an analysis of the problem raised in the suggestion to the Department with suggestions for reform. The Commission's suggestions were received and have been taken into account by those conducting the wider inquiries. It was suggested in a Consultative Paper¹² that the period within which a legal claim arising out of a fatal accident must be brought – the limitation period – should be increased from the present three years to six years, which is the period which applies for all other negligence actions. Since that Paper was circulated, the Attorney-General's Department has produced a working paper dealing with all limitation periods in the Australian Capital Territory.¹³ Legislation is being prepared. Accordingly the Commission will make no recommendation on the limitation period in fatal accident cases.

15. *Federal law.* Other suggestions do not fall within the program. Some are outside its scope because they relate to federal law rather than Territory matters.

- 2 administrative law
- 5 pilot's licences
- 6 banking
- 10 companies
- 13 copyright
- 18 vicarious liability of the Crown
- 20(c) Australian Taxation Office
- 21(a) Trade Practices Act 1974 (Cth)
- 27(h) custody of children
- 52 social security
- 53 statutes
- 55 superannuation
- 56 taxation

One other suggestion – 17(a) Chamberlain case¹⁴ – is outside the scope of the Community Law Reform Program because it is an issue of Northern Territory law.

16. *Matters covered by other reports or legislation.* Some suggestions have already been dealt with by the Commission or its Territory predecessor and others are being considered in the course of other references the Commission presently has before it. Others are covered by recent legislation, produced after lengthy work.

12. Australian Law Reform Commission, Community Law Reform Consultative Paper No 2, *Fatal Accidents Legislation in the ACT*, 1984 (ACTLR 2) 9.

13. Attorney-General's Department, Working Paper, *Proposal for the Reform and Modernization of the Laws of Limitations in the Australian Capital Territory*, April 1984.

14. Aspects of law reform issues raised by this case have already been considered by the Commission in its interim report on the laws of evidence: Australian Law Reform Commission, Report No 26, *Evidence: Interim Report*, AGPS, Canberra, 1985 (ALRC 26) and are under review in the Commission's work on its reference on the law of contempt.

- 8(b) clearance of records of convictions for minor offences: this is being dealt with in the Commission's project on expungement of criminal records¹⁵;
- 12 unconscionable contracts: this has been the subject of consideration by the Commonwealth Attorney-General's Department and the Trade Practices Commission and legislation is expected to be introduced in Parliament shortly¹⁶;
- 15 appeal costs fund: this is already the subject of federal legislation which, amongst other proceedings, applies to appeals brought in the Australian Capital Territory Supreme Court¹⁷;
- 16 consumer credit legislation: this has been the subject of recent major legislation¹⁸;
- 17(b) child sexual abuse: this has been considered in the Commission's report into child welfare¹⁹;
- 20 debt procedures: these will be the subject of the Commission's forthcoming report on debt recovery²⁰;
- 21 defamation: the Commission has already reported on this subject²¹;
- 24 evidence: the Commission has just finished its interim report into the laws of evidence²²;
- 27(a) matrimonial property: the Commission is presently engaged on a major review of the law of matrimonial property²³;
- 30(a) child welfare legislation: this has been covered by the Commission's report into child welfare²⁴;
- 37(a) enforcement of maintenance: the Commonwealth Attorney-General's Department recently published a review of the system of maintenance collection and enforcement²⁵; and
- 50 sentencing: the Commission is presently engaged on a major review of the law of sentencing and has already published an interim report.²⁶

Recommendations

17. *Paragraph 3 matters.* The Commission has already received two references under paragraph 3 of the Terms of Reference for the Community Law Reform Program:

- domestic violence; and
- occupier's liability.

The reference on domestic violence was received on 29 May 1984 and the reference on occupier's liability on 18 September 1984. The Commission has also suggested a paragraph 3 reference on de facto relationships. This proposed reference would involve consideration of the application of the report on de facto relationships made by the New

- 15. The project relates to a number of references received by the Commission including Privacy, Child Welfare, Criminal Investigation and Sentencing.
- 16. Attorney-General's Department et al, Discussion Paper, *Trade Practices Act: Proposals for Change*. AGPS, Canberra, 1984; Commonwealth of Australia, *Hansard (Sen)* (23 August 1985) 184. The Commission notes, however, that the proposal would retain the present exclusive jurisdiction of the Federal Court. See para 20 for comment on a possible inquiry in relation to this matter.
- 17. Federal Proceedings (Costs) Act 1981 (Cth).
- 18. Credit Ordinance 1985 (ACT).
- 19. Australian Law Reform Commission, Report No 18, *Child Welfare*, AGPS, Canberra, 1980 (ALRC 18).
- 20. See Australian Law Reform Commission, Discussion Paper No 6, *Debt Recovery and Insolvency*. AGPS, Canberra, 1978.
- 21. Australian Law Reform Commission, Report No 11, *Unfair Publication: Defamation and Privacy*. AGPS, Canberra, 1979.
- 22. ALRC26.
- 23. See Australian Law Reform Commission, Discussion Paper No 22, *Matrimonial Property Law*, AGPS, Canberra, 1985.
- 24. ALRC18.
- 25. National Maintenance Inquiry, Attorney-General's Department, *A Maintenance Agency for Australia*, AGPS, Canberra, 1984.
- 26. Australian Law Reform Commission, Report No 15, *Sentencing of Federal Offenders*, AGPS, Canberra, 1980.

South Wales Law Reform Commission²⁷ to the Australian Capital Territory. It transpired that the Human Rights Commission was giving consideration to the recommendations made by the New South Wales Law Reform Commission. It was decided that the question of a reference being given to the Australian Law Reform Commission be postponed until the Human Rights Commission's work was further advanced. Some of the other suggestions, for example, the law and policy on euthanasia, suicide and related issues, clearly fall into the paragraph 3 category of suggestions requiring extensive investigation. The Commission, after examining suggestions of this kind against criteria of importance of the issue and length and size of project, has established which of these suggestions should in its view have priority as possible subjects for reference to the Commission under the program. Suggestions from Table 1 which fall within paragraph 3 are set out below. Those asterisked are suitable to be the subject of a reference from the Attorney-General under the program.

- 17(c) suicide, voluntary euthanasia and related matters*
- 17(d) withholding of treatment to severely handicapped newborn children*
- 23(c) noise pollution
- 27(c) adoption of foreign children
- 27(d) advocacy in adoption
- 27(e) de facto relationships
- 28 gun control
- 29 outlawing of industrial actions in essential services
- 30(b) consent of minors to medical procedures*
- 30(c) status of children legislation*
- 46 prostitution
- 51 homosexuality

Appendix B contains draft terms of reference for the asterisked items. It is to be noted that items 17(c) and 17(d) are related and are therefore dealt with together.

18. *Work involved.* A short note on the substance of each of these matters follows.

- *Suicide, voluntary euthanasia and related matters:* Suicide and attempted suicide are offences at common law. In a number of States, including New South Wales, the law has been reformed to abolish these offences. These reforms also introduced new offences under which the survivors of suicide pacts may be found guilty of aiding or abetting, or inciting or counselling the suicide or attempted suicide of a person.²⁸ Previously, such persons were liable to be found guilty of murder or manslaughter. Consideration should be given to whether the common law should be similarly reformed in the Australian Capital Territory. Issues include:
 - whether adequate provision exists for ensuring that persons who attempt suicide receive appropriate treatment²⁹;
 - whether survivors of suicide pacts should be liable to criminal proceedings; and
 - whether other areas of law, such as succession and insurance law, would require consequential reform.

A related issue is the question of euthanasia or mercy killing. Under the present law, euthanasia is either murder or manslaughter. In one State a law has been enacted which mitigates the sometimes harsh effects of this approach, for example, where the patient has expressed a wish not to continue to be treated.³⁰ Medical practitioners in particular would welcome a review of the law, even if such a review did no more than clarify the existing law. Euthanasia raises not merely legal issues, but involves moral issues as well. Community attitudes to euthanasia, including the intentional withdrawal of life support systems, would be an integral

27. New South Wales Law Reform Commission, Report No 36, *De Facto Relationships*, NSW Govt Printer, Sydney, 1983.

28. eg Crimes Act 1900 (NSW) s 31C. The maximum penalty is imprisonment for 5 and 10 years respectively.

29. It has been recognised that those who attempt to take their own lives generally require psychiatric treatment: Law Reform Committee of South Australia, *Suggested Amendments to the Law Regarding Attempted Suicide*, SA Govt Printer, Adelaide, 1970.

30. Natural Death Act 1983 (SA).

part of an inquiry into this aspect of the law. Thus the related topic of withholding of treatment to severely handicapped newborn children would be covered in this reference.

- *Provision of medical services to minors:* The provision of medical services to minors raises a number of issues, primarily related to the question of consent. It is an assault to carry out medical procedures, including surgery, upon a person without valid consent. The common law requires that the person giving consent should be capable of understanding the circumstances in relation to which consent is sought. A child's consent will only be valid where he or she has the maturity to give informed consent; otherwise, consent must be given by a parent or guardian. Different but related problems arise in relation to providing contraception advice and services to minors.³¹ The suggestions under the program raise the question whether the common law is satisfactory or requires clarification. One aspect concerns the provision of emergency medical procedures: in some States legislation has been enacted which provides that it is lawful for a medical practitioner to carry out emergency medical procedures upon a child without the consent, or in spite of the refusal of consent, of a parent or guardian where the procedures are considered necessary to save the life of the child.³² The Western Australian Law Reform Commission has a reference on a similar subject and the Commission would co-operate with the Western Australian Commission in its work on this area.
- *Status of children legislation:* In the Australian Capital Territory, illegitimate children have more limited rights than legitimate children. In most other jurisdictions, the status of illegitimacy has been abolished but this has not brought about complete equality of all children before the law regardless of the circumstances of their birth. The adoption of this policy for children in the Australian Capital Territory requires attention. Questions concerning the status of children conceived by in vitro fertilization (IVF) have been specifically referred to the Senate Standing Committee on Constitutional and Legal Affairs³³ as part of a wide-ranging reference on IVF. They would not be covered by the proposed reference. But the status of children conceived by other artificial means (such as artificial insemination) and by surrogate mothering arrangements would be covered. The starting point of the inquiry would be recently enacted legislation in New South Wales.³⁴

This is an imposing program. The Commission does not have the resources to take more than a couple of items on at one time, given existing resource constraints. Nevertheless, it is important for the continuing success of the program that the Commission have an agenda which looks a little way ahead.

19. *Paragraph 4 matters.* Four of the suggestions made to the Commission under the Community Law Reform Program relate to the reform of aspects of the law of negligence and compensation for injuries. They are:

- abolition of the defence of contributory negligence in fatal accident cases;
- abolition of the defence of contributory negligence in breach of statutory duty cases;
- clarification of the assessment of funeral costs in fatal accident cases; and
- abolition of the loss of consortium action and clarification of the assessment of damages for loss of household working capacity.

31. Controversy over this matter has been the subject of litigation in *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 1 All ER 533.

32. eg Emergency Medical Treatment of Children Act 1960 (SA) s 3.

33. Commonwealth of Australia, *Hansard (Sen)* (15 May 1985) 1947.

34. Children (Equality of Status) Act 1976 (NSW); Artificial Conception Act 1984 (NSW). See also Artificial Conception Act 1985 (WA).

The Commission took up these proposals under the program and issued three consultative papers related to them.³⁵ Chapter 2 of this report contains the Commission's recommendations arising out of its consideration of the first three of these suggestions. The Commission is continuing its consideration of the loss of consortium action and the assessment of damages for lost household working capacity. These topics have raised special issues which need to be considered separately and therefore will be the subject of a separate report.

20. *Further work.* As noted below³⁶, most of the suggestions listed in Table 1 fall within paragraph 3. Two possible projects under paragraph 4, however, concern the right of tracing in adoption (item 27(d)) and the jurisdiction of Territory courts in relation to the Trade Practices Act 1974 (Cth).

- In some Australian jurisdictions, reforms have been enacted to allow persons involved in adoption a right of access to information about the other participants in the process.³⁷ These reforms raise a number of privacy-related issues. These include:
 - whether an adopted person should have a right of access to identifying and other information about his or her natural parents and vice-versa;
 - whether the consent of the subject of such information should be required before that information is made available to the requesting party;
 - the extent of records and record keeping practices of adoption agencies;
 - whether parties in adoption should be required to supply up-to-date information throughout their lives for the purposes of adoption agency records.

These and other issues related to information privacy have been the subject of exhaustive general discussion and recommendation in the Commission's report, *Privacy*.³⁸ Building upon these recommendations, the task of the project would be to examine the present law in the Australian Capital Territory and to determine whether similar reforms are justified.

- The Trade Practices Act 1974 (Cth) confers exclusive jurisdiction on the Federal Court of Australia in relation to consumer protection matters within Division 1 of Part V of the Act. Proposals relating to the control of unconscionable contracts³⁹ do not make any recommendations for changing this situation. In relation to the Australian Capital Territory, where the Act applies generally (not just to corporations, as in the States), it has been suggested that the exclusive jurisdiction of the Federal Court operates to deny access to the rights set out in that Division of the Act to many consumers, especially where the value of matters in dispute is small. It is appropriate to consider whether in the Australian Capital Territory jurisdiction should be conferred on the Territory's courts, so as to provide the residents of the Territory with cheaper access to the rights guaranteed in the Act.

Australian Capital Territory law reform agencies

21. *Other bodies.* An account of the Community Law Reform Program is not complete without some attention being given to other ways in which the Commission is involved in law reform for the Australian Capital Territory. The Commission is represented on the following committees concerned with law reform in the Australian Capital Territory:

- the Australian Capital Territory Criminal Law Consultative Committee;
- the Interdepartmental Consultative Committee on Law Reform in the Australian Capital Territory;

35. Australian Law Reform Commission, *Community Law Reform Consultative Papers: Contributory Negligence* (ACTLR 1); *Fatal Accidents in the ACT* (ACTLR 2); *Loss of Consortium* (ACTLR 3).

36. See para 25.

37. eg Adoption Act 1984 (Vic) Part VI.

38. Report No 22, AGPS, Canberra, 1985.

39. See para 16, item 12.

- the Law Reform and Law Review Committee of the Law Society of the Australian Capital Territory.

22. *Australian Capital Territory Criminal Law Consultative Committee.* This Committee was established on the initiative of the Commission and Dr Des O'Connor, a Reader in Law at the Australian National University, in early 1980. The Commission's Annual Reports for 1981 and 1984 described the Committee and its work.⁴⁰ The Committee now publishes its own series of annual reports. The Committee meets approximately monthly in Canberra. It is composed of representatives from:

- the Law Reform Commission;
- the Australian Capital Territory Supreme Court;
- the Australian Capital Territory Bar Association;
- the Australian Capital Territory Law Society;
- the Attorney-General's Department;
- the Department of Territories;
- the Australian Federal Police;
- the Australian National University;
- the Australian Capital Territory Court of Petty Sessions;
- the Department of the Special Minister of State; and
- the Director of Public Prosecutions.

The Committee was established as a result of concern about the inadequacy of the criminal law which applied in the Australian Capital Territory and about lack of action on reform proposals, including the delay in adopting reforms enacted elsewhere, especially in New South Wales. The Committee is advisory, making recommendations to the Minister for Territories and to the Attorney-General. It provides a forum for suggestions for law reform to be raised and discussed by any of the participants and acts as a sounding board for the Attorney-General's Department and the Department of Territories to test proposals for reform. As at the end of 1984, approximately three-quarters of the 58 recommendations made to that date by the Committee had either been implemented or included in draft legislation preparatory to implementation.

23. *Interdepartmental Co-ordinating Committee on Law Reform in the Australian Capital Territory.* This committee is concerned with reform to both the civil and criminal law. It meets approximately quarterly. It is composed not only of representatives of relevant departments but also has representation from the Australian Capital Territory Law Society and the Commission. It provides a forum for discussion of the substance of law reform proposals. It tends to be a committee which merely receives periodic reports of progress of law reform proposals rather than being a vehicle for deliberation, decision and action.

24. *Law Reform and Law Review Committee of the Law Society of the Australian Capital Territory.* The Law Reform and Law Review Committee of the Law Society of the Australian Capital Territory is a committee of the Australian Capital Territory Law Society. Its principal function is to provide government with the profession's views about forthcoming changes to the law. It also draws to the attention of relevant government departments or agencies defects in the law which need to be remedied.

Assessment of the Program

25. The Community Law Reform Program has shown that citizens can participate in law reform. It has also shown that the often-neglected small items can be dealt with with reasonable despatch. The program is still in its early stage and needs to be developed. A most important feature of the program is that it provides the citizens of the Australian

40. Australian Law Reform Commission, Report No 19, *Annual Report 1981*, AGPS, Canberra, para 17-9; ALRC 25, para 130-1.

Capital Territory with a contact point to which to make suggestions and from which information about progress of law reform can be obtained. The Commission's office thus provides a necessary information gathering and dissemination service which previously did not exist. The Commission has found that the public will only make suggestions if prompted by advertisements. These have to be regular and frequent. The program so far has revealed that larger matters under paragraph 3 of the reference are much more plentiful than smaller topics under paragraph 4. This experience is probably not due to the fact that there are few anomalies in the law capable of being dealt with reasonably quickly, so much as due to difficulties in unearthing them. The legal profession is a particularly valuable source for such suggestions and indeed have provided many. But, because of pressure of work, the profession needs to be prompted by reminders from time to time.

2. Aspects of accident compensation

Accident compensation and contributory negligence

Distributing losses: fault

26. Accidents will happen. This fact of life (and death) is ever-present and causes great cost to our community, both in human suffering and in economic losses. The way in which society distributes and absorbs the great costs of personal injuries is a major issue. The law's traditional response to accidents has been, generally speaking, to compensate victims only if they could prove fault – meaning a failure to observe reasonable care in the circumstances – against those who caused the accidents. The loss was absorbed by the faulty person rather than by the victim. 'No liability without fault' was the catch-cry of nineteenth century industrialists in whose factories workers were being injured with great frequency. The law accepted this as the proper basis for paying compensation. With the advent of the motor car, the same system of compensation, based on establishing negligence or fault, was applied to road accident victims.

Distributing losses: 'no-fault'

27. By 1890 it was becoming increasingly accepted that industrial accidents were an inevitable by-product of production and that they should be treated as a cost to be borne by industry (and thus, ultimately, by the consumer). At the same time, it was becoming accepted that to provide compensation only to those workers who could prove fault was unfair to those who could not. A no-fault scheme – the workers' compensation system – was introduced.¹ This scheme provides some compensation for work-related accidents but does not replace the fault-based system. Full compensation is only awarded if fault can be proved. The same kind of thinking has prompted the current debate on no-fault motor accident schemes. Such schemes exist alongside the fault-based negligence system in Victoria² and Tasmania³, while in the Northern Territory a no-fault scheme has largely supplanted the fault-based system.⁴ The New South Wales Law Reform Commission has recommended that a no-fault scheme be introduced in place of the negligence system for all transport accidents⁵, arguing that the money currently spent on third-party premiums would be better spent on providing adequate compensation to all road-accident victims regardless of fault, rather than providing what appears to be high compensation to those road accident victims who are able to prove fault in another. Proponents also suggest that 'no-fault' schemes bring about considerable savings because establishing fault, either in the preliminary stages before a court case, or in court itself, is often expensive. The Commission has been advised by the Department of Territories that, in the Australian Capital Territory, the present policy is to follow New South Wales if it introduces the proposed no-fault scheme. In time, a no-fault scheme could cover all accidents⁶ and, ultimately, all disabilities, whether accident-caused or otherwise. But such extensions are unlikely to occur for a long time.

1. In the Australian Capital Territory, see the Workmen's Compensation Ordinance 1951 (ACT).

2. Motor Accidents Act 1973 (Vic).

3. Motor Accidents (Liabilities and Compensation) Act 1973 (Tas).

4. Motor Accidents (Compensation) Act 1979 (NT).

5. New South Wales Law Reform Commission, Report No 43, *Accident Compensation Final Report: A Transport Accident Scheme for New South Wales*, NSW Government Printer, 1984.

6. As in New Zealand: Accident Compensation Act 1982 (NZ).

Minor reforms

28. In the meantime, it is important to examine the fault-based system — the law of negligence — so that it can be made to work better. Even if the recommendations of the New South Wales Law Reform Commission are adopted in the Australian Capital Territory, so that a no-fault system for transport accidents is introduced, reform of aspects of the fault-based system may still be necessary and desirable. The fault-based system would still apply to accidents other than transport accidents. It might still be applicable to transport accidents if a no-fault scheme is introduced alongside, rather than in substitution for, the fault-based system. This chapter is concerned with three suggestions made to the Commission under the Community Law Reform Program for the Australian Capital Territory for such minor reforms: that contributory negligence should not reduce compensation in actions under fatal accidents legislation; that it should not reduce compensation in actions for breach of statutory duty; and that funeral costs recoverable in fatal accidents cases should include a component to cover costs of headstones, floral tributes and the like.

Contributory negligence defence

29. *Contributory negligence and fault.* The notion of fault in causing accidents cuts both ways. The injured person (the plaintiff) may be able to establish that another person (the defendant) negligently caused the injuries; but equally the defendant may be able to prove that the plaintiff was also partly to blame (contributorily negligent). A typical example is an accident at an intersection. Both parties may have been at fault. Under the present law, the effect of the plaintiff being found to have been contributorily negligent is that his or her compensation is reduced proportionately to the degree of his or her fault. Thus, if the plaintiff was 25% to blame for the accident, he or she will receive only 75% of the amount of compensation which otherwise would have been received. In a fault-based system, it would seem to be logical to take into account, when awarding compensation, the victim's own failure to take reasonable care for his or her own safety.

It is unfair to impose full liability on the negligent defendant when the plaintiff's conduct contributed to the accident or exacerbated his injuries.⁷

30. *Fault as a moral concept.* Some people who wish to maintain the fault-based system argue that it serves an important social purpose: a finding of fault against a defendant vindicates the plaintiff's right in the protection of physical integrity and, at the same time, inculcates a sense of responsibility in the defendant for his or her careless conduct. It is argued that the 'punishment', that is, the obligation to pay compensation, will encourage the defendant and possibly others to act more safely in the future.⁸ In relation to contributory negligence, similar arguments are employed. A person whose compensation is diminished because of his or her own contribution to the accident is treated by the law as an individual who is responsible for his or her own actions. However, such arguments are somewhat anachronistic and are, in the case of defendants, belied by the insurance factor. Faulty defendants do not generally pay for their wrongdoing. Indeed, they may not even know the outcome of 'their' case if it is taken on appeal.⁹ In one important area of insurance, namely, third-party motor accident insurance, premiums are not even adjusted if a particularly unsafe individual causes the insurance company to pay out more often than is expected.¹⁰ Paradoxically, the moral basis for retention of fault does apply more realistically to plaintiffs when they are contributorily negligent because they are *not* insured and, unlike defendants, do in fact bear the burden of their fault. The moral justi-

7. Dr DF Partlett, *Submission* (3 May 1984).

8. *ibid.*

9. *eg.* the defendants in *Geelong Harbour Trust Commissioners v Gibbs, Bright & Co* [1974] AC 810 were unable to provide any comment to journalists on the outcome of their case after it was decided in the Privy Council: H Luntz, AD Hambly & RA Hayes, *Torts: Cases and Commentary*, 2nd edn, Butterworths, Sydney, 1985, para 1.1.14.

10. of the tailoring of premiums or 'excesses' to the risk in some other areas of insurance, *eg.* comprehensive motor vehicle and industrial accident insurance.

fication for a fault-based system is therefore arbitrary and is unfair to accident victims. Finally, the moral basis for fault itself is questionable. Courts are concerned with a very technical notion of fault. For example, a person who applies the brakes a split second later than he or she ought to have may be guilty of negligence in the legal sense. Few people would consider such a person to be morally blameworthy.

31. *Insurance.* Contributory negligence has also been questioned because it overlooks the all important factor of insurance. Most accidents that are the subject of court proceedings for damages occur either in the workplace or on the roads. In both cases the potential defendants (the employer and the other road user) are insured. In fact insurance is compulsory.¹¹ Parliament has required compulsory insurance to spread losses. Fault is the entry to each of the compensation systems. If fault is found, it is not the defendant who actually pays but the insurance company. Losses are passed on by negligent parties to insurers and are ultimately distributed, through premiums, over the whole insuring community. It has been argued by representatives of the insurance industry that insurance should not be seen as a loss spreading mechanism, that is as a mechanism having a welfare function, but instead should be seen for what it is, usually, a way of safeguarding those who are insured against heavy damages claims: loss spreading should be achieved by government initiated schemes using the social security and taxation systems.¹² But the same result is achieved by insurance. Losses that are borne by insurers are passed on, through premium increases, to other insureds. The cost of the goods and services that those other insureds provide reflects, in part, these premium increases. In this way the whole community bears the cost of accidents caused by negligence. Insurance thus has the practical effect of spreading losses arising from accidents. This is, on occasions, explicitly recognised by courts in negligence actions.¹³ Even if it is not explicitly recognised, courts have undoubtedly been influenced by the insurance factor, at least subliminally, when deciding the question of fault.¹⁴ The defendant's ability to absorb losses is usually much greater than the plaintiff's: very few accident victims carry personal accident insurance.¹⁵ Thus, to the extent that a plaintiff is found to have been contributorily negligent, he or she has to absorb that loss.

It is not too much to say that the only significant group of people who are called upon to pay for the consequences of their negligence are accident victims themselves.¹⁶

32. *Effect of contributory negligence.* How significant is contributory negligence in reducing compensation awards to accident victims? The latest figures available come from a survey conducted by the Woodhouse Committee.¹⁷ That survey revealed that in New South Wales slightly over 20% of permanently disabled accident victims had their compensation reduced because of contributory negligence. The figures for three other States – South Australia, Victoria and Queensland – were higher, being 21.3%, 28.3% and 27.1% respectively. The amount by which compensation was reduced because of contributory negligence in the total of surveyed cases in the four States ranged from 49.9% to 30.4%. Overall, the 259 surveyed accident victims who were faced with a successful defence of contributory negligence lost on average 39.5% of the compensation they would have received if the defence had not been available.

11. Workmen's Compensation Ordinance 1951 (ACT) s 18; Motor Traffic Ordinance 1936 (ACT) s 51.

12. Insurance Council of Australia Limited (T De Domenico), *Submission* (20 June 1984).

13. eg *Nettleship v Weston* [1971] 2 QB691, 699–70 (Lord Denning MR); *Griffiths v Kerkemeyer* (1977) 139 CLR 161, 176 (Stephen J). For the more traditional view, see *Davie v New Merton Board Mills Ltd* [1959] AC 604, 626–7 (Viscount Simmonds).

14. *Taouk v Bunt* (1976) 9 ALR 383, 384–5; *Wyong Shire Council v Shirt* (1980) 29 ALR 217, 222–3 (Murphy J). See also Luntz, Hambly & Hayes, para 1.1.15–20; JG Fleming, *The Law of Torts*, 6th edn, Law Book Co Ltd, Sydney, 1983, 10–1; P Atiyah, *Accidents, Compensation and the Law*, 3rd edn, Weidenfeld and Nicolson, London, 1980, 259–74.

15. In the context of industrial accidents, it has been argued that the cost of accident insurance is higher to plaintiffs (employees) than to defendants (employers): G Calabresi, *The Costs of Accidents: A Legal and Economic Analysis*, Yale University Press, New Haven, 1970, 164–5.

16. Atiyah, 144.

17. National Committee of Inquiry on Compensation and Rehabilitation in Australia, *Report*, AGPS, Canberra, 1974, vol 1, para 128–31.

Contributory negligence and fatal accidents

Issues for reform

33. Traditionally, the law did not provide compensation if someone was negligently killed.¹⁸ This rule was changed in 1846¹⁹ so that the dependent family of the accident victim could claim for the economic loss (but not bereavement) which they had suffered as a result of the loss of a family member. This rule now applies in all Australian States and Territories.²⁰ To be entitled to compensation, the dependants have to prove that the deceased died because of the fault of another. Being a type of negligence action, the defendant is entitled to argue that the deceased was at fault. If this defence is successful, compensation is reduced to the extent that the deceased was contributorily negligent. In a sense, the sins of the deceased are visited on the surviving spouse and children. The question which this part of this report is concerned with is this: should contributory negligence continue to operate in this way in fatal accident cases or should it be removed as a defence?

Fault

34. *Fault-based system.* The arguments for and against maintaining the defence of contributory negligence turn ultimately on whether or not a fault-based system, as it operates today, should be seen predominantly as a way of providing compensation to victims of accidents or as a way of bringing home to careless people the error of their ways. In relation to contributory negligence in fatal accident cases, however, the deceased will learn no lessons arising from the legal consequences of his or her negligence. Therefore, retaining contributory negligence in such cases will have no educative value. As to the compensation function of the fault-based system, it has already been pointed out that plaintiffs generally are poor loss absorbers because they are generally not insured against such losses. In the case of fatal accidents, the plaintiffs are penalised not for their own fault but for the fault of another. The argument for retention of contributory negligence therefore comes down to the policy issue: should the insuring public have to pay for fuller compensation (than at present) for the families of fatal accident victims? The insurance industry argues that it should be able to make use of the defence of contributory negligence in fatal accident cases just as it can in other cases. It is further argued that it would be arbitrary to remove the defence in one area but not in others.²¹ A family whose breadwinner has been permanently incapacitated, rather than killed, is in as vulnerable a position as the family of a fatal accident victim, yet in the former case contributory negligence may lessen the compensation available. There are two answers to these arguments. First, the argument for abolition of contributory negligence could indeed be extended to non-fatal cases but such a step would be a major modification of the fault-based system. Secondly, fatal accident cases are different because, as pointed out above, the plaintiffs are deprived of compensation because of someone else's fault, not their own.

35. *Economic and safety arguments.* Some economists argue that one effect of a fault-oriented scheme is to encourage safe conduct. On this view, at least some people may be encouraged to act less safely if the fault element is removed or diminished.²² But generally speaking, people tend to take or ignore safety precautions for reasons other than the possible legal consequences of doing or failing to do so.²³

36. *Contributory negligence if dependant at fault.* It is to be noted that, if the defence of contributory negligence in fatal accident cases is abolished, in certain cases the defence

18. The origin of the rule is by no means certain: see Fleming, 624-5.

19. By the Fatal Accidents Act 1846 (UK), commonly known as Lord Campbell's Act.

20. In the Australian Capital Territory, by the Compensation (Fatal Injuries) Ordinance 1968 (ACT).

21. NRMA Ltd (N King), *Submission* (20 June 1984).

22. R Posner, 'A Theory of Negligence', (1972) 1 *Journal of Legal Studies* 29.

23. CG Veljanovski, '*Economic*' *Myths and Common Law Realities: Economic Efficiency and the Law of Torts*, Working Paper No 5, Centre for Socio-Legal Studies, Oxford, 1979; N Gunningham, *Safeguarding the Worker*, Law Book Co, Sydney, 1984, ch12, 308-10 (industrial accidents).

will nevertheless still apply. Abolition will not prevent a reduction in damages in a situation in which a dependant who was partly to blame for the accident is seeking compensation²⁴, nor will it affect cases in which a dependant is the defendant, for example, where the son is driving the family car and negligently causes the father's death. In such a case the son cannot claim any compensation²⁵, though other dependant relations can. Finally, it will not affect cases in which a deceased's estate is suing in respect of injuries negligently inflicted before death.

Uniformity

37. The Law Reform Commission Act 1973 (Cth) requires the Commission to consider proposals for uniformity in law. In the case of fatal accidents actions, arising mainly from road accidents and industrial accidents, there are powerful arguments of convenience, as well as justice, supporting uniformity between the law in the Australian Capital Territory and New South Wales. In New South Wales, the defence of contributory negligence has been abolished in fatal accidents cases.²⁶ It is anomalous that an accident in Queanbeyan involving a Canberra resident should give rise to different legal consequences than an accident involving the same person 100 metres down the road on the Australian Capital Territory side of the border.²⁷

Effect on premiums

38. Can insurance provide fuller compensation without a marked rise in premiums? Representatives of the insurance industry have answered this question in submissions to the Commission with an emphatic 'no':

If the defence of contributory negligence is abolished, claims must increase and it therefore follows that premiums also increase.²⁸

They said that the contributory negligence rule saves insurance companies a considerable amount of money in compensation paid out. But the submissions were not backed with any figures. The submissions were frank about this and admitted that it was not possible to cost the effect of the proposed change in the law.²⁹ There is no evidence from New South Wales or Victoria which indicates that premiums have been affected by the abolition of the defence in fatal accident cases in those States. This may be because fatal accident cases form a small proportion of all compensable accidents and fatal accident compensation payouts are usually much lower than serious non-fatal accident payouts. This is due to the very heavy costs of nursing and related expenses in non-fatal cases and because the pain and suffering component of damages cannot be claimed in fatal accident cases. It is also possible that abolition of the defence may reduce costs to some extent: contributory negligence is a significant bargaining counter in out-of-court settlements of accident claims. To the extent that this factor can be ignored, the settlement process will be streamlined. 'Abolition can be expected to simplify litigation and reduce legal costs'.³⁰

Recommendations

39. Arguments based on the desirability of maintaining a strictly 'fault-based' system should not be regarded as determinative because of the very technical notion of 'fault' that is employed and because the moral foundation of legal fault is undermined by the insurance factor. Further, the 'fault' for which plaintiffs in fatal accidents cases are penalised is not their own fault. These factors are sufficient to warrant abolition of the defence in fatal accidents cases: the Australian Capital Territory should follow New South Wales

24. *Benjamin v Currie* [1958] VR 259.

25. *Thompson v Mandla* [1976] 2 NSWLR 307, 308 (Yeldham J).

26. Law Reform (Miscellaneous Provisions) Act 1965 (NSW) s 10(4). It has also been abolished in Victoria: Wrongs Act 1958 (Vic) s 26(4).

27. There may also be problems of conflicts of laws and 'forum shopping'.

28. Insurance Council of Australia Ltd, *Submission* (20 June 1984).

29. NRMA, *Submission* (20 June 1984).

30. EF Frohlich, *Submission* (30 May 1984).

and Victoria. There is no evidence to suggest that this will lead to an increase in insurance premiums.

Contributory negligence and breach of statutory duty

Action for breach of statutory duty

40. *Safety regulations.* The law has responded to industrial accidents through the development of negligence law and the workers' compensation system, and by prescribing safety standards (usually in the form of regulations) for particularly dangerous work. Examples of such standards in the Australian Capital Territory include:

The occupier of premises shall securely fence all dangerous parts of machinery which is in or upon the premises.

The saw shall not be used if it is cracked, fractured, warped, has teeth missing or is otherwise defective or in bad condition.³¹

These standards not only impose obligations on employers (and sometimes on employees too) but are also a basis for an action for damages by injured employees.³² If an employee is injured as a result of an employer failing to observe a prescribed safety standard, the employee can sue for damages in an action called 'breach of statutory duty'. This action is distinct from any negligence action which may be pursued by the injured worker.

41. *Relevance of negligence.* Breach of statutory duty actions do not depend on fault in the same way as negligence actions. All that an injured employee need show is a breach of the relevant regulation and consequent injury. As many of the regulations are cast in absolute language (for example, '[t]he occupier of premises shall securely fence ...'), the employee's case is proved simply by showing that the machine was not properly fenced and that the injury was caused in whole or part by the lack of a fence. In other words, proving breach in a breach of statutory duty action is often easier than proving fault in a negligence action. For the defendant to prove contributory negligence, on the other hand, is more difficult. The purpose of many industrial safety regulations is to protect workers against their own folly or inattention. It is recognised that workers who are under pressure to get the job done, who are subjected to environmental stress such as noise, or who have to perform repetitive tasks are from time to time liable to be less than vigilant for their own safety. In every job the worker's attention will wander. For a person sitting at a desk this usually poses no dangers at all. For other workers it can be disastrous or even fatal. Hence the need to provide safety measures to reduce the risks arising from such normal human failings.

Issue for reform

42. The present common law is that contributory negligence is a defence to a breach of statutory duty action in all States and Territories³³ except New South Wales where the rule was revised in 1945.³⁴ Contributory negligence is most likely to reduce a verdict, but could in an extreme case entirely negate it — where the employee is held entirely at fault. The question raised for the Commission is whether the defence should be available to an employer who is sued for damages for breach of statutory duty, if the worker was, for example, inattentive to a degree that amounts to contributory negligence. Should the Australian Capital Territory follow New South Wales and abolish the defence?

The competing arguments

43. *Logical objection.* The action for breach of statutory duty is not an action in negli-

31. Inspection of Machinery Regulations (ACT) reg 13(1), 16(9).

32. *O'Connor v SP Bray Ltd* (1937) 56 CLR 464.

33. *Piro v W Foster & Co Ltd* (1943) 68 CLR 313, following *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152.

34. Statutory Duties (Contributory Negligence) Act 1945 (NSW).

gence.³⁵ It is an action based upon statutory provisions and the standard of care is determined by the relevant provision. As a matter of logic, the defence of contributory negligence is simply inappropriate. If the employer is not guilty of negligence in a breach of statutory duty action, how can a worker be guilty of contributory negligence? Indeed, it is taking liberties with Parliament's intention, as disclosed by the safety regulation, to allow such a defence unless the regulation specifically permits it. On the other hand it must be acknowledged that the courts since *Piro v W Foster & Co Ltd*³⁶ have not acceded to this argument. But that does not detract from the force of the argument.

I would support the abolition of the defence in respect of breach of statutory duty where the statutory duty imposes an absolute obligation on persons. By allowing the defence the courts have in fact by a side-wind introduced fault liability. It is wrong in principle, for the legislature has presumably decided for reasons of safety that certain standards and procedures should adhere regardless of fault. Provided that breach of those regulations causes loss and the other requirements of the action are satisfied damages must be awarded. It is inappropriate for the courts to second guess the legislature and to introduce fault notions. It is not the function of the courts to do a cost benefit analysis when presumably that analysis has been conducted by the legislature or the executive with its greater access to information.³⁷

44. *Responsibility for breach of statutory duty.* The principal argument in favour of reform is that safety regulations are designed to safeguard workers, including against their own carelessness. In a particular case, had the regulation been observed (for example, had the machine been properly fenced), no accident would have resulted. In such a case it is said that it is unfair to allow an employer, who has failed to ensure observance of the relevant regulation, to argue that the employee was at fault too. Or to put the matter another way, it is unfair to deny or reduce recovery by an employee if the employee has 'fallen into a trap' created by the employer's breach of statutory duty.

[O]ne of the reasons for the introduction of safety regulations in the work place was to protect workers against the consequences of their own carelessness. It is a logical conclusion from this approach that contributory negligence has no place in an action for breach of statutory duty.³⁸

It is not the same as an accident at an intersection where, in very many cases, both sides are to blame. In an industrial accident, the employer has not discharged his or her responsibility to obey the statute and provide a safe place of work. The responsibility for the accident must be regarded as primarily that of the employer. This is so even if the worker could have seen whether or not the safety regulations had been observed and, if they had not, could have adjusted his or her behaviour accordingly. It is the employer, not the employee, who is in the strongest position to ensure that the safety standards prescribed by law are observed.³⁹

45. *Insurance and loss distribution.* Arguments relating to insurance and loss distribution in connection with the defence of contributory negligence have already been outlined.⁴⁰ The defence of contributory negligence prevents the transferring of the loss to the extent that the worker is found to be contributorily negligent. In breach of statutory duty cases defendant employers are always insured but the plaintiff workers would carry personal accident insurance only in the rarest instances. In reality, losses are compensated by the employer's insurer and are borne by the community as a whole.⁴¹ The action for breach of statutory duty is simply a point of entry into the compensation system. The fact that insurance by employers against these kinds of losses is compulsory is an indication

35. El Sykes, *Labour Law in Australia*, 2nd edn, Butterworths, Sydney, 1980, vol 1, 140-2.

36. (1943) 68 CLR 313.

37. Dr DF Partlett, *Submission* (3 May 1984).

38. Prof C Phegan, *Submission* (21 June 1984). See *Bourke v Butterfield & Lewis Ltd* (1926) 38 CLR 354 in which the High Court expressed the same view. This was before the court changed its approach in *Piro v W Foster & Co Ltd* (1943) 68 CLR 313.

39. If it is true that behaviour relating to safety will be adjusted according to whether or not legal rules encourage safe conduct (as some economists might argue: see fn22), then it seems more likely that, if the defence of contributory negligence is abolished in breach of statutory duty cases, employers will be more vigilant about safety precautions than that employees will be less vigilant.

40. See para 31, 34, 38.

41. See para 31.

of the importance the legislature places on ensuring compensation in industrial cases (even without the need to find fault in the case of the workers' compensation scheme). Given the peculiar aspects of the action for breach of statutory duty – in particular, that the responsibility for the loss is the insured employers' – the defence is inappropriate and should be abolished.

46. *Insurance and costs.* The insurance industry has submitted to the Commission that the abolition of the defence of contributory negligence in breach of statutory duty cases will cause insurance premiums to rise.⁴² This argument was not backed up by figures. There is no evidence that premiums in New South Wales are higher because of the abolition of the defence of contributory negligence in breach of statutory duty cases. Also, the defence is very rarely successful.⁴³ The courts generally readily accept that breach of the relevant safety regulation is the dominant cause of the accident and that any carelessness or inattention by the worker is trivial by comparison. In other words, the courts have in most cases accepted the arguments against the defence in these cases.

Recommendation

47. An argument against abolition of the defence is that it is so rarely successful. The Commission acknowledges that a change in the law in this particular area will not make any difference in many industrial accident cases. But in some the contributory negligence argument will be available to the employer at least as a bargaining tool. It will be used to try and persuade the employee to accept in settlement a sum less than a court would award. This type of pressure should not be available to an employer who has failed to observe statutory safety measures whose very purpose is to safeguard the worker from the accident which befell him or her. The defence should be abolished in such cases. It will not follow that in all cases an injured worker will recover full damages regardless of fault. There are other defences that can still be used to defeat, in special cases, the claim, for example, the defence of *volenti non fit injuria*.⁴⁴ Finally, the breach of statutory duty action can be employed in cases not concerned with industrial accidents⁴⁵, though such instances are rare. The arguments employed here have been based on the circumstances of an industrial accident. The Commission's recommendations only extend to personal injury cases.

Fatal accidents and funeral costs

Funeral costs: restrictive interpretation

48. *Interpretation.* Under the Compensation (Fatal Injuries) Ordinance 1968 (ACT), the dependants of a deceased person who has been killed as a result of another's negligence can claim compensation for 'the reasonable expenses of burial or cremation of the deceased person'.⁴⁶ The deceased's estate may also recover under this head.⁴⁷ Similar, but wider, provisions appear in the equivalent legislation of all other States and Territories.⁴⁸ A problem identified in the suggestions made to the Commission under the Community

42. Insurance Council of Australia Ltd, *Submission* (20 June 1984); NRMA Insurance Ltd, *Submission* (20 June 1984).

43. RE Williams, *Submission* (1 May 1984).

44. 'That to which a man consents cannot be considered an injury': see *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656. See also on the issue of causation: *Ginty v Belmont Building Supplies Ltd* [1959] 1 All ER 414; *Rushton v Turner Bros Asbestos Co Ltd* [1960] 1 WLR 96; *Sherman v Nymboida Collieries Pty Ltd* (1963) 109 CLR 580; *HC Buckman and Son Pty Ltd v Flanagan* (1974) 133 CLR 422.

45. eg *Anderson v MacKellar County Council* [1968] 2 NSW 217 (regulations dealing with underpinning and shoring of adjoining buildings); *Read v Croydon Corporation* [1938] 4 All ER 631 (water authority's duty to provide pure water); *Thomas v British Railways Board* [1976] QB 912 (railway fencing); *Reffell v Surrey County Council* [1964] 1 WLR 358 (safe school premises); *Nalder v The Commissioner for Railways* [1983] 1 Qd R 620 (duty to provide drainage to lands affected by railway).

46. Compensation (Fatal Injuries) Ordinance 1968 (ACT) s 10(3).

47. Law Reform (Miscellaneous Provisions) Ordinance 1955 (ACT) s 5(c)(i).

48. eg Law Reform (Miscellaneous Provisions) Act 1944 (NSW) s 2(2)(c); Compensation to Relatives Act 1897 (NSW) s 3.

Law Reform Program is that, in the Australian Capital Territory, these words have been interpreted restrictively.

It seems to me that 'burial' connotes the interment of the deceased in the ground and nothing more ...⁴⁹

Thus, for example, the cost of a headstone and floral tributes and other funeral expenses are not allowed. In other States these expenses are included⁵⁰, although in some cases there is some uncertainty.⁵¹ Should entitlements be extended in the Australian Capital Territory?

49. *Least generous legislation.* The Australian Capital Territory has the narrowest funeral benefit provisions in Australia. Everywhere else in Australia the compensation is more generous. The Commission has been told of one case in which the family of the deceased felt great distress and resentment at being told that the costs associated with the funeral, apart from the actual cost of burial, could not be claimed. In another case, the Australian Capital Territory Supreme Court upheld a magistrate's decision to allow only \$628 for the costs of the funeral. A claim for \$3200 for a memorial and \$1000 for a headstone were disallowed.

It is not part of a judge's function to give effect to his sympathy with the plaintiff by altering the law on the ground that decisions more favourable to plaintiffs have been given elsewhere in Australia under corresponding but not identical legislation.⁵²

Recommendations

50. *Narrow interpretation.* The narrowness of available funeral benefits under the Australian Capital Territory legislation is clearly out of step with similar legislation elsewhere in Australia. It is probable that the object of the Ordinance was to enable Territory residents to enjoy similar rights to those enjoyed by residents of other Australian jurisdictions though the drafting has not permitted a wider interpretation. The restrictive interpretation should not continue to represent the law in the Australian Capital Territory. The Compensation (Fatal Injuries) Ordinance 1968 (ACT) should be altered to bring it in line with New South Wales, at least as far as level and type of benefits are concerned.⁵³ For reasons which are outlined below, there is a case for adopting a slightly different drafting approach from that of New South Wales.

51. *What should be covered.* In order to achieve certainty, the items that can be claimed under this head of compensation should be clearly listed in the Ordinance. The Commission suggested, in its Consultative Paper, that such a list should include the death notice, funeral notice, undertaker's services, the coffin, hire of vehicles, floral tribute, wreath, funeral service, burial or cremation and the headstone or tablet.⁵⁴ There was broad support for this approach in the submissions received by the Commission. For example, it was said that '... it would be preferable for the legislation to be more precise.'⁵⁵ The Consultative Paper also suggested that, in view of the multicultural character of Australian society, any such list would have to be supplemented by a 'catch-all' phrase, such as 'other reasonable expenses', to cover other reasonable expenses that might be incurred by the deceased's family in conformity with the particular cultural or religious tradition of the deceased. Such a residual phrase would, to some extent, be contrary to the goal of

49. *Cunningham v The Nominal Defendant* [1971] 17 FLR 61, 63 (Dunphy J).

50. eg Compensation to Relatives Act 1897 (NSW) s 3; *Henderson v Oswald* [1965] WAR 54; *Toth v Wolper* (1973) 7 SASR 574.

51. *Key v Commissioner for Railways* (1941) 41 SR (NSW) 60. As a result of the restrictive interpretation that was employed by the Court in this case, the legislation was amended to include the words 'reasonable cost of erecting a headstone or tombstone over the grave of the deceased person'.

52. Blackburn CJ, reported *Canberra Times* (20 March 1985).

53. Although the costs of the funeral would have to be incurred eventually (the accident has merely accelerated that expense) it has never been accepted that damages should be restricted to the difference between the actual costs of the funeral and the present value of the future funeral costs, assuming the victim to have had a normal life span.

54. ACTLR 2, 4.

55. Hon Justice Gallop, *Submission* (16 July 1984).

achieving certainty. Submissions made to the Commission reflected disquiet at leaving the proposed list of funeral and related benefits open-ended.

...we do question your use of 'reasonable expenses' and (v) 'other reasonable expenses ...'. In our experience the cost of dying in the ACT is as overpriced as many aspects of living.⁵⁶

However, the reason for this disquiet appeared to be not so much an objection in principle to the addition of a residual 'catch-all' phrase but a need to limit the amount that may be recovered under this head. It was suggested that if the phrase 'other reasonable expenses' is to be included, an indexed monetary ceiling would be desirable.

I think any amendment could nominate specific items, including the all embracing 'reasonable expenses', but be tied to a limit, ie 'but not to exceed SX' and SX could be indexed or otherwise regulated.⁵⁷

This ceiling should apply to the entire funeral and related costs not just to the 'other expenses' item. Such an approach would have the added virtue of reducing disagreement on, for example, the cost of a headstone (which can range from approximately \$400 to many thousands of dollars.)

52. *Summary.* In this area, uniformity with New South Wales interpretations, and certainty of approach, are desirable and easily achieved. The Compensation (Fatal Injuries) Ordinance 1968 (ACT) and the Law Reform (Miscellaneous Provisions) Ordinance 1955 (ACT) should both be amended to provide for a statutory list of funeral and related benefits (which should specifically include 'other reasonable expenses'), with an indexed monetary ceiling. Such a ceiling will save insurance companies from unduly burdensome claims and will simplify settlement negotiations. The Commission recognises that in some cases the ceiling will mean that a family will not be fully compensated for funeral and related expenses. Although it has been argued that a negligent defendant must take the victim as he or she is (and so pay higher funeral expenses if the deceased's cultural or religious background calls for it), this argument has to be balanced against the need to recognise that insurance funds are not inexhaustible. Further, funeral expenses are going to be incurred in any case sooner or later: a family which is able to claim from an external source benefits to the extent of the claim.⁵⁸

56. Citizens' Advice Bureau of the ACT Inc (PK Beckwith), *Submission* (14 September 1984).

57. RE Williams, *Submission* (20 July 1984).

58. The logical basis for assessing funeral costs should be the difference between the present value of the costs of the funeral and the discounted value of the future funeral costs. However, this view has not been accepted and, given the amounts involved, is excessively complex. See H Luntz, *Assessment of Damages for Personal Injuries and Death*, 2nd edn, Butterworths, Sydney, 1983, para 9.6.01.

Appendix A

Draft Legislation

- Draft Law Reform (Miscellaneous Provisions) Ordinance 1985 (ACT)
- Explanatory Notes to Draft Law Reform (Miscellaneous Provisions) Ordinance 1985 (ACT)

AUSTRALIAN CAPITAL TERRITORY

**Law Reform (Miscellaneous Provisions)
Ordinance 1985**

An Ordinance to reform the law in certain respects

PART I – PRELIMINARY

Short title

1. This Ordinance may be cited as the *Law Reform (Miscellaneous Provisions) Ordinance 1985*.¹

**PART II – AMENDMENTS OF THE LAW REFORM
(MISCELLANEOUS PROVISIONS) ORDINANCE 1955**

Principal Ordinance

2. The *Law Reform (Miscellaneous Provisions) Ordinance 1955*² is in this Part referred to as the Principal Ordinance.

Damages in actions that survive under this Part

3. (1) Section 5 of the Principal Ordinance is amended by omitting sub-paragraph (c)(i) and substituting the following sub-paragraph:

“(i) shall, subject to the succeeding provisions of this section, be calculated without reference to any loss or gain to the estate of the deceased person consequent upon his or her death;”.

(2) Section 5 of the Principal Ordinance is amended by adding at the end thereof the following sub-sections:

“(2) The damages may include any amount reasonably paid or payable by the estate as a result of the death, including any reasonable cost incurred in relation to—

- (a) the publication of a notice of the death and a notice of the funeral;
- (b) the funeral, including the reasonable cost of—
 - (i) the services of an undertaker;
 - (ii) the hire of vehicles;
 - (iii) wreaths;
 - (iv) the funeral service; and
 - (v) burial or cremation; and
- (c) a headstone or a tablet.

“(3) In determining whether a cost was reasonably incurred by a person for the purposes of sub-section (2), regard shall be had to the religious and cultural circumstances of the deceased and of the members of the family of the deceased.

“(4) The amount awarded under sub-section(2) shall not exceed whichever is the higher of \$2,000 or the amount calculated in accordance with the following formula:

$$\$ \frac{2,000N}{X^3}$$

where N is the All Groups Consumer Price Index number, being the weighted average of the 8 capital cities, published by the Australian Statistician in respect of the quarter immediately before the death of the person.

“(5) For the purposes of sub-section(4), but subject to sub-section(6), if at any time, whether before or after the commencement of this sub-section, the Australian Statistician has published or publishes an index number in respect of a quarter in substitution for an index number previously published by the Australian Statistician in respect of the quarter, the later index number shall be disregarded.

“(6) If at any time, whether before or after the commencement of this sub-section, the Australian Statistician has changed or changes the reference base for the Consumer Price Index, then, for the purposes of the application of sub-section(4) after the change, regard shall be had only to the index number published in terms of the new reference base.”.

4. After section 16 of the Principal Ordinance the following section is inserted:

Contributory negligence not a defence in actions for breach of statutory duty

“16A. (1) Where—

- (a) a person (in this section called ‘the plaintiff’) suffers personal injury partly as a result of his or her own fault and partly as the result of a breach of statutory duty by some other person; and
- (b) the breach renders a person liable to the plaintiff in respect of the injury,

the amount of damages recoverable by the plaintiff in respect of the injury in an action for damages founded on the breach shall not be reduced because of the fault of the plaintiff.

“(2) Sub-section (1) does not apply to or in relation to a cause of action that accrued before the commencement of this section.”.

PART III – AMENDMENTS OF COMPENSATION (FATAL INJURIES) ORDINANCE 1968

Principal Ordinance

5. The *Compensation (Fatal Injuries) Ordinance 1968*⁴ is in this Part referred to as the Principal Ordinance.

Damages

6. Section 10 of the Principal Ordinance is amended by omitting sub-section (3) and substituting the following sub-sections:

“(3) Damages in an action under this Ordinance may include any amount reasonably paid or payable as a result of the death by a person for whose benefit the action is brought, including any reasonable cost incurred in relation to—

- (a) the publication of a notice of the death and a notice of the funeral;
- (b) the funeral, including the reasonable cost of—
 - (i) the services of an undertaker;
 - (ii) the hire of vehicles;
 - (iii) wreaths;
 - (iv) the funeral service; and
 - (v) burial or cremation; and
- (c) a headstone or a tablet.

“(3A) In determining whether a cost was reasonably incurred by a person for the purposes of sub-section (3), regard shall be had to the religious and cultural circumstances of the deceased and of the members of the family of the deceased.

“(3B) The amount awarded under sub-section (3) shall not exceed whichever is the higher of \$2,000 or the amount calculated in accordance with the following formula:

$$\$ \frac{2,000N}{X^1}$$

where N is the All Groups Consumer Price Index Number, being the weighted average of the 8 capital cities, published by the Australian Statistician in respect of the quarter immediately before the death of the person.

“(3C) For the purposes of sub-section (3B), but subject to sub-section (3D), if at any time, whether before or after the commencement of this sub-section, the Australian Statistician has published or publishes an index number in respect of a quarter in substitution for an index number previously published by the Australian Statistician in respect of the quarter, the later index number shall be disregarded.

“(3D) If at any time, whether before or after the commencement of this sub-section, the Australian Statistician has changed or changes the reference base for the Consumer Price Index, then, for the purposes of the application of

sub-section (3B) after the change, regard shall be had only to the index number published in terms of the new reference base.

“(3E) The damages may also include the reasonable medical and hospital expenses of the deceased person in relation to the injury that resulted in the death of the deceased person that are incurred by a person for whose benefit the action is brought.”.

7. Section 11 of the Principal Ordinance is repealed and the following section substituted:

Contributory negligence not a bar to certain actions

“11. (1) Where a person (in this section called ‘the deceased’) dies partly as a result of his own fault and partly as the result of the fault of some other person, the amount of damages recoverable in an action under this Ordinance in respect of the death shall not be reduced because of the fault of the deceased.

“(2) In sub-section (1), ‘fault’ has the same meaning as in PartV of the *Law Reform (Miscellaneous Provisions) Ordinance 1955*.

“(3) Sub-section (1) does not apply to or in relation to a death that occurred before the commencement of this section.”.

NOTES

1. Notified in the *Commonwealth of Australia Gazette* on.
2. No. 3, 1955 as amended by No. 14, 1965; No. 10, 1968; No. 65, 1977; No. 95, 1982.
3. X should be The All Groups Consumer Price Index Number, being the weighted average of the 8 capital cities, published by the Australian Statistician in respect of the quarter immediately before the quarter during which the amending Ordinances commenced.
4. No. 9, 1968 as amended by No. 46, 1978.

**Explanatory notes to Draft Law Reform
(Miscellaneous Provisions)
Ordinance 1985 (ACT)**

OUTLINE

1. This Ordinance implements recommendations made by the Australian Law Reform Commission in its first report under the Community Law Reform program for the Australian Capital Territory (ALRC 28). It deals with three matters:
 - *Fatal injuries claims*: it abolishes the defence of contributory negligence in fatal injuries claims;
 - *Breach of statutory duty claims*: it abolishes the defence of contributory negligence in actions for breach of statutory duty; and
 - *Funeral benefits liberalised*: it overrides a restrictive interpretation of the *Law Reform (Miscellaneous Provisions) Ordinance 1955 (ACT)* and the *Compensation (Fatal Injuries) Ordinance 1968 (ACT)* so as to ensure that the compensation payable to the family of a deceased person includes a number of costs for which compensation is available in other parts of Australia.

NOTES ON CLAUSES

Part I – Preliminary

Clause 1 – Short title

1. This clause sets out the short title of the Ordinance.
2. The Ordinance will come into operation immediately upon notification in the *Gazette* (see *Seat of Government (Administration) Act 1910 (Cth)* s 12(2)(b)(i)).

Part II – Amendments of the Law Reform (Miscellaneous Provisions) Ordinance 1955

Clause 2 – Principal Ordinance

1. This clause declares that the *Law Reform (Miscellaneous Provisions) Ordinance 1955* is the Principal Ordinance in this Part of the Ordinance.

Clause 3 – Damages in actions that survive under this Part

1. *Sub-clause (1)* amends section 5 of the Principal Ordinance by omitting references to 'reasonable expenses of burial and cremation'. It is these words that have been restrictively interpreted by the courts.
2. *Sub-clause (2)* adds at the end of section 5 of the Principal Ordinance a number of new sub-sections designed to ensure that, where an estate can recover damages under the Principal Ordinance for a death, all costs reasonably incurred by the estate as a result of the death are included subject to an indexed ceiling of \$2000. That ceiling only applies to damages recovered under sub-section 5(2) of the Principal Ordinance: other heads of recovery are not affected.
3. *Proposed new sub-section (2)* provides that reasonable costs incurred by the estate as a result of the death may be recovered in an action under the Ordinance. Specific inclusions are the costs of the funeral, headstones and the publication of the usual notices of death.
4. *Proposed new sub-section (3)* directs the court to have regard to the circumstances of the person who is claiming damages, and of the deceased, in determining whether a particular claim is reasonable. This will allow proper account to be taken of different funeral and burial practices within the community.
5. *Proposed new sub-sections (4)–(6)* provide for an indexed ceiling of \$2000 on claims under proposed new sub-section (2). The index is the Consumer Price Index. *Proposed new sub-sections (5)–(6)* provide for the case where the Consumer Price Index base is altered by the Australian Statistician.

Clause 4 – Contributory negligence not a defence in actions for breach of statutory duty

1. Under the present law, damages for breach of statutory duty (for example, in an action by a worker for personal injury caused by a machine that was not operating in accordance with rel-

evant safety regulations) may be reduced in some cases by the defence of contributory negligence on the part of the worker. Given the purpose of safety regulations – in large part to protect workers and others from the consequences of their own inattentiveness – the defence of contributory negligence is not appropriate.

2. This clause abolishes the defence. Its abolition reflects reforms effected in New South Wales in 1945.
3. The defence will still be available in respect of accidents that happened before the commencement of this Ordinance.

Part III – Amendments of Compensation (Fatal Injuries) Ordinance 1968

Clause 5 – Principal Ordinance

1. This clause defines the *Compensation (Fatal Injuries) Ordinance 1968* (ACT) as the Principal Ordinance for the purposes of this Part.

Clause 6 – Damages

1. Section 10 of the Principal Ordinance provides for the calculation of damages in actions arising out of fatal injuries. *Proposed sub-sections (3), (3A), (3B), (3C) and (3D)* to be inserted by this clause compliment the amendments made by cl 3 to the *Law Reform (Miscellaneous Provisions) Ordinance 1955* (ACT).

Clause 7 – Contributory negligence not a defence to certain actions

1. In a fatal injuries claim under the Principal Ordinance, the defendant is entitled to raise as a defence that the deceased person whose death is the basis of the claim was contributorily negligent. This defence is not appropriate and serves merely to reduce the amount of damages claimable by the family of a deceased person from his or her death. *Proposed section 11* abolishes the defence of contributory evidence in these claims. The defence will still be available in relation to claims arising before the commencement of this Ordinance.

Appendix B

Recommended Terms of Reference

- Provision of medical services to minors
- Status of children
- Suicide, euthanasia and related matters

**COMMONWEALTH OF
AUSTRALIA**

Law Reform Commission Act 1973

REFERENCE

AUSTRALIAN CAPITAL TERRITORY:

PROVISION OF MEDICAL SERVICES TO MINORS

I, LIONEL BOWEN, Attorney-General of Australia, HAVING REGARD TO—

- (a) the Australian Capital Territory Community Law Reform Program;
 - (b) concerns that have been expressed in relation to the question of the capacity of minors to give effective consents to medical treatment under the laws of the Australian Capital Territory and other concerns; and
 - (c) the reforms of this law that have been made in other jurisdictions,
- in pursuance of section 6 of the Law Reform Commission Act 1973, HEREBY REFER to the Law Reform Commission, at its suggestion under the Community Law Reform Program, for review and report—
- (a) whether the laws of the Australian Capital Territory in relation to the provision of medical services to minors, including the giving of consent to medical treatment for minors, are adequate and appropriate to modern conditions; and
 - (b) any related matter.

DATED this day of 1985

Attorney-General

**COMMONWEALTH OF
AUSTRALIA**

Law Reform Commission Act 1973

REFERENCE

AUSTRALIAN CAPITAL TERRITORY: STATUS OF CHILDREN

I, LIONEL BOWEN, Attorney-General of Australia, HAVING REGARD TO—

- (a) the Australian Capital Territory Community Law Reform Program;
- (b) the reforms of the law relating to the status of children as legitimate or illegitimate that have been made in other Australian jurisdictions,

in pursuance of section 6 of the Law Reform Commission Act 1973, HEREBY REFER to the Law Reform Commission, at its suggestion under the Community Law Reform Program, for review and report—

- (a) whether the laws of the Australian Capital Territory in relation to the status of children are adequate and appropriate to modern conditions; and
- (b) any related matter,

but excluding matters referred to the Senate Standing Committee on Constitutional and Legal Affairs relating to children conceived by in vitro fertilisation techniques.

DATED this day of 1985

Attorney-General

**COMMONWEALTH OF
AUSTRALIA**

Law Reform Commission Act 1973

REFERENCE

AUSTRALIAN CAPITAL TERRITORY: SUICIDE AND EUTHANASIA

I, LIONEL BOWEN, Attorney-General of Australia, HAVING REGARD TO—

- (a) the Australian Capital Territory Community Law Reform Program;
- (b) alterations that have been made to the law relating to suicide and euthanasia in other Australian jurisdictions; and
- (c) submissions to the Commission under the Community Law Reform Program calling for a review of the law in the Australian Capital Territory as it relates to these and related matters,

in pursuance of section 6 of the Law Reform Commission Act 1973, HEREBY REFER to the Law Reform Commission, at its suggestion under the Community Law Reform Program, for review and report—

- (a) whether the laws of the Australian Capital Territory in relation to suicide and euthanasia are adequate and appropriate to modern conditions; and
- (b) any related matter.

DATED this day of 1985

Attorney-General

Appendix C

Schedule of Written Submissions

Citizen's Advice Bureau of the ACT	30 May 1984
Citizen's Advice Bureau of the ACT	14 September 1984
Council of Social Service of the ACT Inc	5 June 1984
Department of Local Government and Territories	21 November 1984
Frolich, EF, Barrister	30 May 1984
Gallop, Justice JF, ACT Supreme Court	16 July 1984
Human Rights Commission	23 July 1984
Insurance Council of Australia Ltd	20 June 1984
Insurance Council of Australia Ltd	27 August 1984
Law Society of the ACT	26 November 1984
Luntz, Professor H	27 April 1984
NRMA Insurance Ltd	20 June 1984
NRMA Insurance Ltd	9 October 1984
NSW Law Reform Commission	3 August 1984
NSW Law Reform Commission	21 June 1984
NSW Law Reform Commission	11 January 1985
Partlett, Dr DF, ANU	3 May 1984
Phegan, Professor C	21 June 1984
Purnell, FJ, Barrister	2 May 1984
Walmsley, S, Barrister	6 August 1984
Walsh, G, MHA G	7 June 1984
Williams, RE, Barrister	1 May 1984
Williams, RE, Barrister	20 July 1984
Zines, Professor L, ANU	2 April 1984

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Geelong Harbour Trust Commissioners v Gibbs, Bright & Co [1974] AC 810	30
Gillick v West Norfolk and Wisbech Area Health Authority [1985] 1 All ER 533	18
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