



PARLIAMENT OF NEW SOUTH WALES

**Report Of The  
PUBLIC BODIES REVIEW COMMITTEE**

**Public Liability Issues  
Facing Local Councils**

**November 2000**

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## **Functions Of The Committee**

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To examine the annual reports of all public bodies and to enquire into and report on:

- a. the adequacy and accuracy of all financial and operational information;
- b. any matter arising from the annual report concerning the efficient and effective achievement of the agency's objectives;
- c. any other matter referred to it by a minister or the Legislative Assembly.

## COMMITTEE MEMBERSHIP

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*Mr Milton Orkopoulos MP*

*– Chairman -*

*Mr John Bartlett MP*

*Mr Alan Ashton MP*

*Mr Daryl Maguire MP*

*Mr Michael J. Richardson MP*

### ***Secretariat:***

*Ms Catherine Watson – Committee Manager*

*Ms. Christina Thomas – Project Officer*

*Ms Susan Want – Committee Officer*

*Ms Glendora Magno – Asst. Committee Officer*

## **Terms of Reference of the Inquiry**

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To inquire into and report on:

- (a) the current and future public liabilities of NSW local councils;
- (b) the current insurance arrangements undertaken by NSW local councils;
- (c) preventative measures undertaken by NSW local councils to address their public liability risks;
- (d) attempts to address the issue in other jurisdictions;
- (e) any other related issues.

## CHAIRMAN'S FOREWORD

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The impetus for this inquiry came from discussions the Committee had with local councils during the Committee's inquiry into government trusts. Local councils currently manage a great deal of Crown Land on behalf of the State government via these type of arrangements. However, councils are reluctant to have ultimate responsibility for any of this land devolved to them on a permanent basis because of the additional public liabilities involved.

After digging deeper into the issue the Committee discovered that there was real cause for councils' concern about their present level of public liability exposure. Councils in New South Wales have a very high rate of exposure due to the wide variety of services and facilities they offer to their communities and the close link between the users of those services and facilities and the council itself.

It is clearly in the public interest that persons who are injured on council land should be able to seek compensation in instances where the council has been found negligent in its responsibilities. However, this must be balanced with the competing public interest that public money is not expended on litigation to an extent that other services and facilities offered by the council suffer.

The Committee therefore looked for an option which was equitable for all parties. A solution which offered plaintiffs relief, where appropriate, yet provided incentives for councils to proactively manage their risks.

It firstly examined other jurisdictions to see what had been attempted there and how effective it had proved to be. The Committee quickly ascertained that complete immunities are not in the best interests of public health and safety. Councils need to have pressure kept on them to effectively risk manage. Accidents will always happen but they should be prevented where it is possible.

Various administrative arrangements which have been implemented elsewhere to promote early settlement such as cooling off periods and placing more onerous obligations on both parties to a claim at the time of filing have some limited merit.

However, the Committee felt that the best option for relief was one which rewarded councils for effective risk management yet was still flexible enough to recognise the very different risk environments between councils. It has therefore recommended a method based on the existing model in place in relation to flood prone land.

The Committee has also recommended that a central agency receive, collate, analyse and distribute information on claims for risk assessment purposes.

This has proved to be a fascinating inquiry for the Committee to undertake and I would like to thank all those people and organisations who provided us with information and gave us their time and expertise.

Lastly, I would like to take this opportunity to thank my fellow Committee Members for all their efforts as well as the Committee secretariat.

Milton Orkopoulos MP  
Chairman



## Summary of Key Issues

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After consideration of all the evidence put before it during this inquiry the Committee considered that local councils in New South Wales are facing onerous public liability exposure due both to the large array of services and facilities which they offer and through their close links to the community.

There appears to be clear evidence that the number and cost of claims against councils are increasing. Further, all predictions are that the insurance market is “hardening” and councils will be forced to pay much more for their insurance in the foreseeable future.

Council money is public money and council funds which are spent on insurance and handling, investigating, defending and settling claims are diverted from important council services and facilities, particularly within a system of rate pegging. Further, councils are being forced to cut back on some facilities and services through fear of litigation. This has a clear impact on the quality of what they can offer to their communities.

The Committee feels that it is problematic to offer councils relief for catastrophic injuries such as quadriplegia, paraplegia and brain damage which result from activities such as diving into shallow water. These cases are relatively rare and the nature of the injuries themselves mean that statutory immunities and capping would serve to unfairly disadvantage the plaintiff as well as merely cost shift onto other government services.

It is felt that councils can be best helped by gaining relief in the area where they receive the most numerous claims; trips and falls on footpaths and other council prepared and maintained surfaces. Although these claims usually involve the lower end of the scale of awards or settlements, the administrative and other associated costs are significant. Further, the amounts involved in many of these claims fall below the council insurance excess and must be directly met by councils themselves.

The need to provide relief to councils in this area must be balanced with public health and safety. As discussed previously, systems of complete tort law immunity can be inequitable to plaintiffs and take pressure off councils to properly manage their risks.

Councils as the payers of insurance premiums are not subject to standards enforceable by an external agency. Standards, such as risk management programs for core council activities have been developed by councils and by insurance pools in cooperation with councils but these standards are not mandatory and in some cases have not been implemented.

The statutory provision of measures which provide financial relief to councils should, therefore, occur only in tandem with statutorily imposed standards subject to some independent external scrutiny.

The Committee therefore proposes that a good faith immunity be enacted similar to that which currently operates for contaminated and flood prone land.

Similarly, the Committee considers that the principle of non feissance for the repair of roads should remain in place or that statutory immunity from liability for the repair of roads should be provided subject to councils meeting a reasonable standard of maintenance agreed by an external authority. The non-feissance immunity of councils is being reviewed by the High Court which heard two cases together in September 2000: Brodie and Loday Pty Ltd v Singleton Shire Council (S44 of 1999) and Brodie and Ghantous v Hawkesbury City Council (S69 of 1999). The High Court has reserved its judgement but is likely to make its judgement by March 2001. It is not in the public interest for councils to be subject to liability claims which endlessly push up the standard of maintenance of public thoroughfares such that other facilities must be downgraded or not provided.

The Committee finds that there is not a sufficiently strong argument to justify legislative change to provide relief from public liability for other core areas of councils' activities at this time. However, it should be reviewed again in the future if litigation claims in these areas become more onerous. In particular, the immunities offered to local councils in California in relation to hazardous recreational activities recognise that individuals who choose to undertake such activities should bear their own risk. It may be pertinent to apply the good faith immunity model to these in the future, if it is found to be warranted.

The Committee understands that the insurance pools are now keeping a Statewide central register of public liability claims against councils for risk assessment purposes. Such a register allows for trend analysis in claims; identification of areas, surfaces and new techniques and technologies which present a high risk for litigation; and identification of clusters of types of claims in particular geographic regions etc. All this information would be extremely useful if fed back directly to councils for risk assessment and risk management purposes. It is also in the interests of public health and safety if future types of accidents can be prevented once council becomes aware of a problem.

The Committee also believes that there is merit in introducing a system of notification of accidents to the relevant council within a given period, say three months, in line with the existing provisions of the *Motor Accidents Act*. This will allow councils to prepare for the claim and conduct inspections of the place of the accident while the surface remains the same. It may also encourage earlier settlements and dismissals. Further, it introduces more rigour into the system by putting an onus on a plaintiff to show why they did not report an incident at the time of filing a subsequent claim.

## Summary of Recommendations

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### RECOMMENDATION 1:

*That the Local Government Act 1993(NSW) is amended to provide exemption from public liability for damage, loss or injury sustained by pedestrians tripping or falling on property under the control of councils provided that the council has acted in good faith.*

### RECOMMENDATION 2:

*That the test of good faith for immunity from liability for trips and falls in pedestrian access areas on property under the control of councils in NSW is that action in relation to pedestrian access areas was taken, or was omitted to be taken, in relation to a recognised standard.*

### RECOMMENDATION 3:

*That a standard be devised on which councils can rely as a defence to tort claims for trips and falls in pedestrian access areas by relevant stakeholders including the Department of Local Government and the Local Government and Shires Association.*

### RECOMMENDATION 4:

*That the operation of good faith immunity from liability for damage, loss or injury to pedestrians on pedestrian access areas on property under the control of local councils in NSW is reviewed after five years by the Attorney-General's Department and Department of Local Government to establish whether the legislation has been successful in reducing the costs of public liability insurance for councils and reducing the number and level of injuries on pedestrian access areas. That if the legislation is found to be successful consideration is given to the expansion of the model into other areas of non-profit making council activity.*

#### **RECOMMENDATION 5:**

*That council insurance pools providing public liability insurance to councils in NSW structure their formula for contributions by member councils to offer a significant financial incentive to councils who implement high quality risk management programs.*

#### **RECOMMENDATION 6:**

*That the central claim register currently being operated by the insurance pools report information on trends in claims to local councils on a regular basis for risk management purposes.*

#### **RECOMMENDATION 7:**

*That the central claims register continue to monitor trends in claims, compensation settlements and court decisions in relation to injuries sustained on council land through the pursuit of hazardous recreational activities with a view to deciding whether a further good faith immunity needs to be recommended for councils in relation to these activities in the future.*

#### **RECOMMENDATION 8:**

*That there be a legislative requirement that people who have fallen and injured themselves on council pedestrian access areas notify the council within three months of the date of the accident if there is any question that they may intend to subsequently make a claim.*

#### **RECOMMENDATION 9:**

*That the principle of non feasant for the repair of roads remain in place or that statutory immunity from liability for the repair of roads should be provided subject to councils meeting a reasonable standard of maintenance agreed by an external authority.*

# Chapter 1: Public Liability Exposure of Local Councils

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## *Introduction*

Local councils have a very large exposure to claims due to their expansive range of duties, functions and responsibilities in tandem with their close contact with the general public through the provision of facilities and services.

Throughout the course of this inquiry councils and their insurers argued to the Committee that the costs resulting from litigation are rising substantially due to increasing levels of claims received and more generous awards of compensation to plaintiffs.

Tort law actions against government authorities are an important aspect of our legal system. Individuals are able to seek redress for injuries received as a result of authorities not fulfilling their duties. Therefore costs for the injury are shared amongst taxpayers rather than unfairly falling upon the individual. It provides an incentive for authorities to improve their standards.

However, while it is in the public interest to maintain a torts law system there has been a shift over time to a public recognition that there needs to be a reining in of monies paid out for litigation where these costs are too onerous. Government money is public money. Funds channelled into litigation are taken away from other government services and infrastructure which benefit the community as a whole.

As a result our current common law and statutory compensation system imposes different financial burdens for the same injury depending upon the circumstances in which the injury is sustained. The Motor Accident and Workcover Schemes, for instance, attempt to limit liability by either providing a threshold before common law actions can be entertained or providing deductible levels through which claim levels can be reduced proportionally.

Councils in New South Wales argued to the Committee that they should be provided with similar relief. They pointed out that the financial burden can be much higher for a council for accidents occurring on their land than if the same injury was sustained in a workplace or in a motor vehicle accident.

Most States of the United States have enacted varying degrees of immunities for councils in relation to their public land and facilities.

## ***Public & Professional Liability***

Councils are obliged under section 382 of the *Local Government Act 1993* to make arrangements for “adequate insurance” against public liability and professional indemnity.

Under the common law rules and principles of negligence (torts law) councils can be sued for damage caused by a negligent performance of its activities or by a negligent failure to act (‘omission’) when it is under a duty to act.

Public liability insurance is intended to cover a council’s legal liability to the general public for bodily injury and property damage caused by a negligent act or omission by the council, its councillors, employees or agents and the council’s legal liability as owner of leased premises to the general public for bodily injury caused as a result of the state of the premises or its surrounds.

Professional liability insurance is intended to cover the council’s legal liability in relation to actionable “professional negligence” claims.

Councils are also liable under torts law for a breach of statutory duty (eg negligently issuing an building certificate).

Councils are given statutory functions in over 90 pieces of legislation and these functions include:

- landowner, occupier or provider of facilities and services;
- provider of information and advice;
- planning authority;
- approval or consent authority;
- building controller and regulator;
- roads authority;
- special statutory liability and rights.

Councils in New South Wales are currently provided with some relief from legal liability in relation to selected activities.

The *Environmental Planning and Assessment Amendment Act 1993* limits council liability in respect of building work and subdivision by private certifiers to a maximum of ten years commencing from the issue of the certificate of occupation, subdivision or compliance. Previously, the period of ten years commenced from the time a latent defect became apparent. This Act also introduced a scheme of proportional liability which

shares the burden between the architect, engineer, builder and certifier. Under the previous scheme of joint and severable liability, the burden fell upon the certifier responsible for checking defects, usually the council.

Statutory immunities have also been introduced with respect to councils' role in dealing with flood-prone land, contaminated land and coastal land. To receive immunity councils must prove that they acted in good faith. This is determined by whether councils have acted in accordance with specific risk management strategies. However, compliance with a strategy does not automatically confer a finding of good faith and conversely non-compliance does not necessarily mean a finding of lack of good faith.

The main area of current concern for councils are the costs of public liability claims arising from councils' role as landowner, occupier of land or provider of services and facilities. The cost of claims against councils arises predominantly from bodily injury to members of the public involved in accidents on footpaths, roads, beaches, rivers, cliffs, in parks, playgrounds, community halls, swimming pools and other sporting and leisure facilities. Councils have a duty of care to anyone in these areas. Further, these are areas where accidents can easily happen and which have a large volume of human traffic.

The Local Government and Shires Association (LGSA) told the Committee that they felt the extent of local government public liability exposure was far too wide:

*Councils are not **bad** insurance risks. However, the problems they face are associated with the fact that they have such far reaching duties, functions and responsibilities and in providing those services are in extremely close contact with the general public. There is no doubt that Councils have a stronger interaction with the community than any other sphere of government, and because of this they are held more **directly** accountable by the public. Councils do have a very large exposure to claims. (LGSA Submission p14)*

Like all government entities, local councils are seen to have "deep pockets" by solicitors and the courts. The fact that they are jointly and severably liable means that they may unfairly carry the burden of a claim in which there is more than one defendant.

## ***Rising Litigation***

Litigation levels have been gradually rising in New South Wales. One reason is probably the changes to solicitors' regulations which allow them to advertise their services on a 'no win, no pay' basis. This means that if the plaintiff loses the case, he/she does not have to pay their own solicitor's costs. However, council insurance pools said that they found that it is often not being made clear to clients that if the lawyer loses the case they may still be required to pay the council's costs in defending the matter.

Often councils that win a case are unable to recover their costs because plaintiffs have no money. In some of these cases the costs are considerable because the plaintiff's lawyer may have taken the case to three court hearings. There are normally two or three steps to a claim. First, one can go to arbitration to reduce the time in court. If an arbitrator decides the merits of the case as he/she sees it and awards in favour of the council, the claimant, through a solicitor, may wish to pursue the matter through a court. If the court awards in favour of council, the claimant may choose to take the matter to

the Court of Appeal. Therefore three courts could effectively hear one case and even if the council wins each time, ultimately the plaintiff may have no ability to pay the council's costs.

### ***Councils' Duty of Care***

Three elements must be established for a plaintiff to bring a successful negligence action:

- that the council owed the plaintiff a duty of care;
- that the council failed to observe the required standard of care; and
- that this breach of the standard of care caused the damage.

In order to establish that the council had a duty of care, a relationship of reliance ('proximity') between the council and the plaintiff must be established. This means that the council assumed responsibility to prevent injury, loss or damage to the plaintiff or their property or that the plaintiff relied on the council assuming this responsibility in circumstances where the council ought to have known of that reliance.

The damage arising from an act, or failure to act, also has to be shown to be reasonably foreseeable by the council.

Policy considerations may negate, reduce or limit the scope of the duty of care, the class of person to whom it is owed, or the damages to which a breach of duty may give rise.

Damages may be reduced or denied altogether if a court can establish contributory negligence by the plaintiff or that the plaintiff had voluntarily assumed the risk.

Damages can be awarded for:

- personal injury (loss of income, out-of-pocket medical and other expenses, pain, suffering and loss of enjoyment);
- property damage;
- pure economic loss.

Earlier it was stated that one of the objectives of torts law, as it applies to public authorities, is that successful litigation "*provides incentives for improving the standard of official conduct*". Councils, their insurers and the LGSA informed the Committee that over the last twenty-five years court decisions have had the effect of expanding the areas in which councils have a duty of care while also eroding some of the defences previously available to councils against litigation.



## ***Occupier's Liability***

The development of the law relating to occupier's liability has also impacted on councils, as in a negligence action, the same principles which apply to private individuals apply to public authorities.

Private individuals have a duty of care as occupiers of premises to people entering those premises. Councils' occupier's liability has been held by the courts to apply to not only to public facilities such as community halls and swimming pools but also such areas as roads, parks, reserves and foreshores.

This legal avenue appears to have been first opened in the case of Aiken v Kingborough Municipality (1939) 62 CLR 179 where the private law duty of care to eliminate "*dangers arising from the state or condition of the premises which are not apparent and are not to be avoided by the exercise of ordinary care*" was extended to public premises. This case involved a public wharf but the test in the case has been extended over time to apply to open spaces.

This test was followed and extended by the High Court case Schiller v Mulgrave Shire Council (1972) 129 CLR 116 where Barwick CJ, held that the duty of a council with control of a public recreation area is more extensive than the duty of a private occupier who invites a person onto their premises for some purpose beneficial to the occupier.

## ***Extension of Duty of Care to Open Spaces***

This extension of councils' duty of care to open spaces lead to a significant increase in the quantum of compensation that could be awarded. Until 1972 the highest quantum awarded against any government authority in Australia was \$100,000. In 1972 a young woman successfully sued Warringah Shire Council for damages of \$982,000 for injuries she sustained in a tidal pool. Prior to that case, Councils had not considered open spaces such as beaches and rivers to be facilities for which they could be liable.

Similarly, in the High Court case of Nagle v Rottnest Island Authority 177 CLR 423 the authority was found liable for the injuries of a person who dived into a rock pool because it failed to erect warning signs about the presence of submerged rocks. The test was that it was under a duty of reasonable care to safeguard entrants against foreseeable risks of injury.

The significance of this case was that the test in the Aiken case was extended to dangers which are apparent. In the Aiken case the duty of care of councils was limited to eliminating "*dangers arising from the state or condition of the premises which are **not apparent** and are not to be avoided by the exercise of ordinary care*"

In the Nagle case the rocks in the rock pool into which the plaintiff dived were clearly visible and the danger should have been "apparent".

In the recent High Court judgement in Romeo v Conservation Commission of the Northern Territory (1998) the majority of the judges took the view that a government authority was not liable for a remote risk associated with falling off a cliff. However, two dissenting judges felt that the cliff line should have been fenced.

It was pointed out by the *Law Society Journal* that:

*.....this case illustrates how judicial minds differ over the limits of the duty of care test and the amorphous standard of reasonableness. (LSJ May 1998 p.45)*

### ***Erosion of the Principle of Non-Feasance***

The principle of non-feasance is a long established rule of law that provides immunity against liability to highway authorities for any loss or damage caused to a person by the state of disrepair of roads. It only extends to normal wear and tear, such as the development of potholes after rainfall. This principle was established so that highway authorities could afford to provide roads for the majority of people rather than first-rate roads for only a minority. It is recognised that the provision of an extensive network of highways in Australia would not be economically viable if highway authorities were expected to keep the network in a state of perfect maintenance.

Highway authorities do not have immunity from liability where they carry out road repairs in a negligent manner which causes loss or damage. This is ‘misfeasance’.

The case Hughes v Hunters Hill Municipal Council (1992) 78 LGERA 415 removed councils’ immunity regarding damage to footpaths caused by trees. The plaintiff sustained an injury on a footpath when the plaintiff tripped over broken asphalt caused by a tree root. The NSW Court of Appeal held that a tree is “an artificial structure” and that the council had been negligent in planting it when it was foreseeable that it would dislodge pavers over time and pose a danger to pedestrians.

Mahoney, J commented on this in his NSW Court of Appeal judgement in Hughes v Council of the Municipality of Hunters Hill (1992)

*It may be that there is a tendency in more recent times to require the adoption of higher standards of care for individuals using public facilities [emphasis added] notwithstanding that the adoption of them will require the expenditure of additional moneys or the diversion of moneys to those areas of public activity selected by the courts for such protection .....*

*It may be that, in future, the present principle may warrant reconsideration. It may be sufficient, for example, to clarify or modify the principle so that that which the council must do is more closely and directly accommodated to, eg, its financial resources, the*

*exigencies of time and the competing demands of other works. Or it may be that the principle itself and its continued existence will be reconsidered. There may well be a difficulty in a principle which requires a highway authority to bear immediate and direct responsibility for every danger from non-repair of a highway. Such a responsibility would be onerous. In practical terms and subject to the principle in Shirt’s case, the law*

*of negligence requires that every risk which is not far fetched be provided against and it imposes the sanction of unlimited damages for failure to do so.(21:1997)*

The erosion of the principle of non-feasance is probably the most costly of all the changes to liability brought about by court cases, given the percentage of claims against councils which relate to accidents on footpaths.

The non-feasance immunity of councils is currently being reviewed by the High Court which heard two cases together in September 2000: Brodie and Londay Pty Ltd v Singleton Shire Council (S44 of 1999) and Brodie and Ghantous v Hawkesbury City Council (S69 of 1999). The High Court has reserved its judgement but is likely to make its judgement by March 2001.

## Chapter 2: Council Insurance

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### *Introduction*

During the 1970s there were many insurance companies providing public liability and professional indemnity insurance to local government. These companies included: Baltica Skandinavia Insurance Company, FAI Insurance Group, GIO Australia, HIH Winterthur, MMI, Mercantile Mutual, NZI, QBE, South British United Insurance Company, Preservatrice Skandia, UAP, and Lloyds and London Insurance Companies.

In 1972 the highest amount awarded against local government authority in Australia was \$100,000. As previously discussed, following a landmark decision in 1979 where a woman was awarded \$982,000 for an injury sustained in a tidal pool in the Warringah local government area, the range of facilities for which councils were liable was greatly extended.

One of the consequences of this decision seemed to be a withdrawal of reinsurers from insurance in local government. Without the protection of reinsurers, insurers were not prepared to underwrite councils and the number available to the market retracted sharply.

During the 1980s the cost of insurance premiums increased from thousands of dollars to tens of thousands of dollars for most councils and hundreds of thousands of dollars for some larger councils.

Councils and their insurers informed the Committee that public liability insurance is particularly hard to manage because of the long “tail”. Councils’ past claims experience effects what they will pay for future insurance. However, while incidents occur in a given insurance policy year, the injured person may not make a claim for several years. This causes difficulties in budgeting for the cost of insurance. Public liability insurers work on a ten year cycle as it may be this long before all claims in a given period will be finalised.

### *Withdrawal of Insurers*

During 1984 and 1985 Australian insurance companies withdrew from providing cover to larger councils. Councils had no other option but to arrange insurance in London at higher prices than had previously been obtained. The LGSA informed the Committee that this was a global phenomenon and that in other countries where local government could no longer afford cover they were forced to operate without it.

After 1985, a number of new schemes were introduced to reduce premiums to reasonable levels. One such scheme was Municipal Mutual which, in 1988, commenced underwriting local government insurance exclusively. However, some of these schemes were short-lived. By 1992, Municipal Mutual Insurance Company withdrew after sustaining heavy losses.

LGSA informed the Committee that after Municipal Mutual's withdrawal from the market, the three remaining local underwriters entered an agreement which had the effect of increasing premiums by up to 300% and introducing a minimum excess of \$5,000 on all claims.

With the withdrawal of Australian insurers from the market only four of the larger councils were able to obtain primary insurance in London (Sydney, Bankstown, Wollongong and Ku-ring-gai) (LGSA p6). The remainder had no alternative other than to form self insurance mutuals to obtain affordable cover.

*LGSA:*

*The extent of the liability problem for local councils in New South Wales is enormous. There are currently no insurance companies in Australia prepared to offer primary public liability and professional indemnity insurance cover to councils. It is only in the case of some of the larger councils that overseas insurers in London will offer cover (10:1997)*

### ***Insurance Pools***

Larger Sydney metropolitan councils formed into three pools: Premsure, Westpool and Metropool. Five similar pools subsequently formed in regional areas: Norsure, Norpool, Orana, Rivsire and Southern Tablelands. Each pool set the level of insurance it was able to carry. Cover in excess of that self-insured retention was underwritten by HIH Winterthur (up to \$20m) and beyond that amount by Lloyds syndicates and other London based insurers.

According to the LGSA the driving factor behind the hardening of the insurance market was the trend to higher court awards for compensation:

*...the fact is that the cost of claims was the element that was driving premiums upwards. The continually higher and higher court awards for compensation, mainly for minor injuries, resulted in insurers having to constantly seek higher and higher premiums to carry the risk. Councils were also forced into the situation of requiring increased indemnity limits to protect against these increased payouts, resulting in further premium increases. In the 12 years since 1985, indemnity limits have increased from \$1,000,000 for the majority of Councils to \$100,000,000 today.*

*(submission p7)*

The NSW Statewide Mutual Liability Scheme commenced on 31 December, 1993. This self insurance mutual has 156 members in NSW, including 140 councils. In 1997, it provided limits of liability of \$100,000,000 on public and products liability and \$50,000,000 on professional indemnity, with deductibles ranging from \$5,000 (minimum) to in excess of \$100,000.

David Ferris, the National Account Manager of American Reinsurance informed the Committee that pools are insurance-broker driven and that there were two insurance brokers in the local government market. AON Risk Services predominantly deal in the

Sydney metropolitan pools and some of the regional pools. Jardine Lloyd Thompson Pty Ltd deals in ninety five per cent of Australia's council business.

Jardine Lloyd Thompson Pty Ltd act as insurance brokers to the LGSA and fund managers to State-wide Mutual and the other five country regional insurance pools. They have 80 per cent cover of councils in NSW. Jardine Lloyd Thompson informed the Committee that they have organised similar schemes in other Australian states in conjunction with local government associations. The Committee was informed by Mr Leo Demer, Insurance Broker to the LGSA, that it is likely that a number of the smaller pools which are having financial difficulties will become members of Statewide Mutual and that the Rivsure and Southern Tablelands pools have already joined.

The Premsure pool disbanded in October 1999 due to financial difficulties and the withdrawal from the fund of the two largest member councils, Wollongong and South Sydney. Mr Williams, Legal and Risk Branch Manager of Wollongong City Council explained that larger councils tend to subsidise smaller councils in pool arrangements and that the amount of cross-subsidisation when Wollongong Council was a member of Premsure was inversely proportional to the size of each member council.

Westpool and Metropool jointly buy insurance on the London market. Member councils cover the first \$10,000 of any claim themselves. Previously, the pool covered \$10,001 - \$200,000 as self-insurance within the group and then amounts over that were covered by underwriters in the London insurance industry. However, the insurance market has been 'softer' in the last few years and Metropool does not currently operate as a self-insurance pool, as it was able to afford to buy insurance for claims over \$10,000.

Westpool	Blacktown, Blue Mountains, Fairfield, Hawkesbury, Liverpool and Penrith	Self-insurance pool
Metropool	Auburn, Baulkham Hills, Botany, Drummoyne, Holroyd, Hunters Hill, Lane Cove, Marrickville, Rockdale	Self insurance pool
Premsure	Manly, Randwick, Waverley and Woollahra	Self insurance pool
Statewide	140 member councils.	Self insurance pool
Norpool	Byron Bay, Grafton, Lismore, Richmond River and Ulmarra	Self insurance pool
Norsure	Armidale, Barraba, Glen Innes, Guyra, Manilla, Moree Plains, Narrabri, Nundle, Quirindi, Tamworth	Self insurance pool

Oranapool	Cabonne, Central Tablelands, Cobar Shire, Cobar Water, Dubbo, Narromine, Parkes, Wellington	Self insurance pool
Sydney City Council		Self insured
Bankstown		Self insured
Ku-ring-gai		Self insured
Wollongong		Self insured

Insurance pooling is undertaken extensively in the United States by local government entities. Pools usually handle both risk financing and risk management. The approach offers a number of key advantages for councils. The principal aim is to keep insurance affordable for members. Because pools are not insurance companies they can avoid some of the costs of doing business that insurers bear.

However, there are disadvantages for some councils in relation to insurance pooling. In a softer insurance market larger councils with good risk management records may find it cheaper to buy their insurance individually.

Further, pools need to have clear exiting and entry policies to protect their existing members. There was some criticism of the New South Wales pools' failure to properly take account of the individual risk management policies and claims histories of their members and to adjust premiums accordingly.

The LGSA claim that the cost of insurance may impact on the range and quality of services which councils can deliver. Councils and their insurers claim that this is particularly the case because rate pegging legislation means that councils cannot compensate for increased insurance cost by increasing rates. The LGSA reported in their submission that:

*Unfortunately, claim numbers and quantum have continued to spiral, as is evidenced elsewhere in this report. If the various Mutual Liability Schemes within this State fail to succeed, the last remaining underwriter of local government insurance is the London market. If London underwriters are the only insurers available and they are able to dictate the terms and conditions offered, it is envisaged that the cost of insurance will escalate by proportions which the majority of councils would not be able to afford without sacrificing some of the services which they currently operate.*

According to the LGSA, as a result of these rising costs some councils are entering into entrepreneurial activities in an effort to find avenues to raise funds. This in turn may have the unfortunate consequence of exposing councils to even further claims of a professional indemnity nature.

## Chapter 3: Council Risk Management

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### *Introduction*

Risk management is integral to reducing councils' liability exposure by systematically identifying and reducing hazards which may injure members of the public and by ensuring standards of performance of staff in professional areas. The adoption of risk management processes and council endorsed policies is also likely to provide some defence in liability cases. If councils have a risk management program they can demonstrate that they have carefully examined foreseeable risks and taken reasonable measures to reduce them. If the risk management program is also covered by a policy of council it demonstrates that elected representatives have made a political decision which balances risk reduction with budgetary constraints. Larger councils tend to have a full-time risk manager. Insurance pools are very active in promoting increased risk management by member councils.

### **Statewide Mutual**

Statewide Mutual audited member councils on their risk management processes prior to their joining the scheme. The audit looked at councils' policies and procedures and the types of control measures in place. The Board of Management of Statewide benchmarked councils on their risk management processes across a range of core council activities. The audit results were correlated with each council's claims data. The outcome demonstrated the need for a standard approach to be adopted in a number of important core council activities. The three or four councils who had the best risk management systems for particular core council activities were selected to develop Best Practice Manuals on *Footpaths, Nature Strips and Medians, Roads, Certificates and Applications, Trees and Tree Roots, Gathering Information, and Signs as Remote Supervision*.

These manuals have been distributed to all councils, not only to Statewide members. The manuals provide guidance to councils on how to establish their own procedures and standards by determining the types of hazards that require repair and the time-frame in which this should take place. A process of taking complaints from users about hazards and ensuring that this information is fed into the inspection program is also suggested. This process involves all staff in an organisation from the reception desk to the inspection and maintenance areas.

The Manuals are based on Australian Standard AS/NZ 4360:1996 Risk Management (Footpaths, Nature Strips and Medians pp2 – 3). The actual standard implemented by councils varies according to the budget and demographics of individual councils. Mr Barnes, Risk Manager for the LGSA informed the Committee that North Sydney Council spends \$1.6 million on footpaths compared with Coolamon Shire Council which spend \$20,000 because of the different quantity involved.



Statewide Mutual provided a training program for councils on the best practice manuals. However, the Board of Management of Statewide Mutual advised that while it is not able to monitor implementation of the manuals by 154 member organisations itself, in 1999 it established 14 regional risk management groups to assist member councils with the implementation of the best practice manuals. These groups are geographically based to make meetings practicable and to also group together councils with similar hazards. The coastal councils of the NSW north coast have, for instance, been organised into one group sited at Port Macquarie whilst the councils of the New England tableland form another group.

Statewide Mutual has given member councils until the end of September 2000 to implement the best management practices or standards to their best of their ability and it will then conduct a second audit.

### **Metropool**

Metropool comprises nine member councils. Each council has a risk manager and these risk managers meet monthly to share information on the types of programs member councils are implementing. There is a common risk management strategy which is a benchmark for councils to work towards. This benchmark is regularly revised and member councils are audited to ensure that they are implementing the strategy and to determine where they require assistance to improve their performance. As 30 per cent of the formula for the payment of premiums is based on claims experience, those who do not implement effective risk management programs pay higher premiums.

### **Wollongong City Council**

Wollongong City Council withdrew from a pool arrangement with Premsure. As a large council with a budget of around \$130 million, it has been able to arrange its own insurance for claims over \$25,000.

Wollongong City Council has a sophisticated risk management system for which it has won the Australian Public Risk and Insurance Managers Association (APRIMA) inaugural risk management excellence award in 1996, Statewide Mutual's Commendation for Excellence in Risk Management in 1997 and 1997 and the Risk Manager of the Year for the public sector award in 1998.

Council has employed three officers to fulfil the roles of insurance officer, claims manager and risk manager. Risk management responsibilities have become part of the core business of the council.

A data-base has been developed to provide quality information on which to base management decisions. Council developed a computerised Corporate Assets Protection system to identify its risks. These are quantified in dollar value terms and expressed in descending order of costs. This allows Council to compare the risk, for instance, in the community services division with that of the engineering division. Management uses this information to determine how and when each risk should be treated to reduce the overall risk. This is particularly important for strategic risk management where an issue may

involve several Divisions and does not fall within the responsibility of a single line manager. If funding has to be secured from outside of the Division to address the risk, the data helps management to determine the costs and benefits of doing so.

This system also provides a consistently applied method to analyse, identify and treat operational and strategic risks across the whole organisation.

Council's management and staff have been trained in risk management awareness and teams have been trained in the methodology of the system. Sessions have been held for each Division to identify hazards and evaluate the risks, which are then prioritised and treated systematically. Action taken to reduce risks has been documented and this in turn provides Council with a defence based on evidence of due diligence.

Risks identified by ad hoc means such as by council staff in the course of their duties or by complaints from the public, are evaluated and entered into Council's formal risk management database in order to allow treatment through the established formal system.

This risk identification and avoidance system is also applied to projects. Mr Iliffe informed the Committee that the Council is building a new road bridge next to a beach and has worked closely with the project managers to ensure that they address public liability and occupational health and safety issues.

The system has a set of performance indicators against which to evaluate progress. These include:

- the percentage of sites within each Division that have been assessed and those yet to be assessed;
- the number of Council staff who have participated in the program;
- the number of hazards identified;
- the total value of the Council's risks identified annually, in dollar terms;
- the treatment of risks and the evaluation of the effectiveness of this treatment;
- total value of risk reduction achieved to date.

By March 1998, 86 sessions had been held to identify hazards with an estimated 27 sessions still to be held, and a total of 76 per cent of the organisation assessed by Legal and Risk Branch. 7,320 risks were identified with an estimated value of \$82,618,736. (submission p9, information folder)

An example of the treatment of risk included in the submission by Wollongong City Council is in Lifeguard Services, where heavy metal signage was replaced with lightweight PVC poles and cloth flags in order to reduce manual handling injuries and injuries to members of the public if signs blow over. The cost of this treatment is \$2,000 per annum and has been estimated to reduce the value of the risk by \$86,197. During the winters of 1996 and 1997 Lifeguards produced a standard procedures manual covering the use of equipment, dress code, sun protection and standard duties.

Responsibility and accountability for risk management have become part of the duties of all staff. The Risk Manager has been responsible for effecting this work place culture change, for coaching and educating staff, for developing a organisational risk

management program, for coordinating hazard identification and risk analysis, developing software to communicate risk information and for monitoring and reporting regularly and providing advice to staff.

Councillors are provided with audit and risk management information to assist them to make corporate governance decisions.

Mr Iliffe informed the Committee that the successful outcomes of the Council's risk management approach were readily identifiable in both the culture change amongst staff and on premiums:

*....we have credibility within the Council and this leads to officer willingness to participate in risk management sessions and to come and ask advice. They are not scared. They understand the issues, so they will come and ask advice. They will throw ideas around, and that shows me that they are thinking about the issues because they have to help the people off the ground, they have to fill the pothole in.*

*Reductions in risks have been achieved through the implementation of treatments and controls.....We regularly monitor risk reduction activities and progress and we communicate this to all stakeholders, be it executive management, divisional management or the teams that have participated in putting the information together. This has resulted in, for us, stabilisation of insurance premiums.*

*Insurers recognise the Council's efforts and have provided us with a three-year term policy with fixed premiums so it is not a year-to-year proposition for us with the fear of increasing premiums. We know that for the next three years our premiums are fixed at this level.*

*Transcript, 6 April 2000, p 27*

Whilst this model is excellent, it should be noted that it is beyond the reach of many small rural councils where self-insurance is not possible without pool arrangements and where it would not be possible to fund three separate staff members to risk manage and handle insurance and claims.

## ***Implementation of Risk Management Programs***

The Committee found that although self-insurance mutuals had developed risk management approaches, the implementation of such approaches by member councils was not uniformly high. In evidence to the Committee, Mr Barnes, Risk Manager to the LGSA acknowledged that the Best Practice Manuals developed by State-Wide Mutual have not been implemented by all councils:

*But, if you asked "Where are we all at?" we would have to say that we have councils that have not even opened the book and councils that are signing off policies left, right and centre.*

*Transcript, 20 April 2000, p7*

Mr Barnes informed the Committee that 14 out of 16 coastal councils had adopted the water safety signage in the *Best Practice Manual, Signs as Remote Supervision*, following a recommendation by the Premier's Water Safety Taskforce that the signage

be used as a standard across NSW. Statewide Mutual then encouraged councils to adopt policies to cover the water safety signage programs as this provides some legal defence against claims that the signage is not adequate. Mr Barnes informed the Committee that only 20 per cent of member councils had adopted such a policy, 70 per cent were working towards that and 10 per cent of councils indicated that they were not interested.

The Committee gained the impression that Statewide Mutual and other insurance pools have limited powers to ensure compliance by member councils. Statewide Mutual were equivocal on the subject of whether they had the power to ensure compliance with best practice manuals:

**Mr Richardson:** *What happens if they have not complied by September [2000]?*

**Mr Barnes:** *The Board of Management has agreed upon a course of action that has the old carrot and stick approach. If council X, being a member of the mutual, said it had no intention of complying—after the series of steps that we have introduced, such as encouragement, offer of assistance etcetera—then the penalties will be applied by the members of the scheme. Why should councils that are participating ultimately pay for the claims of a council that is not participating?*

*Transcript, 20 April 2000, p6*

However, later in the hearing, the Committee was informed that:

**Mr Barnes:** *We have no stick to force council. Even though they are a member of Statewide, they still have the ability to do what they wish to do. If they decide to ignore the best practice manuals, that is still within their authority to do so.*

**Chair:** *Surely there is a capacity within your risk management groups to enforce some sort of standard response. There would be a level of cross-subsidy in the premiums that councils pay.*

**Mr Barnes:** *That is what we are working on. The regional group is peer pressure to make those that do not perform, perform but their standard answer is: “Why spend so much money on this particular exercise when there is no guarantee that we would win a claim?” If I can say that there is a guarantee, then we would be able to say to council, “Now you are making a decision that you will pay because if you do not do it and you go down, it is really your problem.”*

**Chair:** *Why do you think it has taken so long to even get to this stage of regional councils getting the manuals together, getting it down to their level and coming up with some sort of stick and carrot approach. It is taking quite some time and still some recalcitrant councils are unwilling to acknowledge the benefit of the defence of having incorporated into their council’s policy a standard that has been accepted by the entire State.*

**Mr Demer:** *When Statewide was started up in 1994 the claims did not look too bad for the first two or three years, but now we have the late notification of claims. With the statute of limitations being the way it is, a person has six years in which to bring a claim. Over the last couple of years we have people who were injured three, four or five years ago putting in claims now.*

*Transcript, 20 April 2000, p18*

It is clear from the transcript of evidence quoted above that when the cost of public liability becomes onerous councils become more focussed on risk management because of pressure from insurers. However, there may still be insufficient economic motivation to for councils to bring in “state of the art” risk management programs. The National Accounts Manager of American Reinsurance, was of the view that the structure and approach of self-insurance pools in Australia does not currently encourage risk management.

*The gaps I see here are that there is very little accountability back to councils with respect to their particular performance on risk evaluation and identification and actual controls put in place to mitigate against those potential losses.*

*Transcript, 6 April 2000, p2*

*In Australia, the Jardines pools are basically just an insurance mechanism. There are no what we call equitable formulas. A pool works if your council has an allocation to premium based on your particular exposures. If you work hard to minimise those exposures, then you should be rewarded in the premium allocation that you make to the pool. That tends not to happen in Australia. There is no real incentive for anybody to minimise their risk exposures out in the field because it really does not affect your contribution of premiums.*

*Transcript, 6 April 2000, p5*

Wollongong Council, which withdrew from the Premeure pool, informed the Committee that contributions were based on the rates income of a particular council rather than its claims experience and that the rates revenue has little correlation with the incidence and severity of claims.

The Executive Officer of Metro Pool informed the Committee that since the withdrawal of Wollongong Council from Premeure, Metro pool and Westpool have addressed this situation by revising their formulas. Contributions are now determined 70 per cent on the basis of size and 30 per cent on the basis of claims experience. The claims experience component is increasing as a proportion of the formula over a five year period as an incentive to councils to reduce their risks.

## Chapter 4: Other Jurisdictions

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As part of this inquiry Committee delegations undertook studies of various jurisdictions including: Canada; the United States; United Kingdom and New Zealand.

The Committee's *Study of International Jurisdictions* Report provides a detailed account of the meetings the delegations undertook and information it received.

### *United States*

Tort liability is huge in the United States. An estimated 80 per cent of American lawyers make their living in this field. Statutory immunities for government are considered a necessity. When the Supreme Court rescinded the doctrine of sovereign immunity some years ago it was left up to the states themselves to enact legislative tort law immunities. States such as Texas offer extensive statutory immunities to government. Other States such as California and New Jersey have more limited immunities.

California and New Jersey have virtually identical municipal tort law immunities. Section 831.7 of the Government Code gives immunities for prescribed hazardous recreational activities such as skateboarding, surfing, tree climbing, water skiing, whitewater rafting and rock climbing.

Councils are also exempted for injuries that occur in environments which are in their natural state. In this respect, the less councils tamper with unimproved land the less that they are likely to be liable for injuries sustained on that land. One California Council told the Committee delegation about a very dangerous rock which protrudes from a river which is used for kayaking and whitewater rafting. This rock has claimed several lives. However, Council's legal advice is that they should leave the rock untouched.

Councils are further exempted for divergences in footpaths under 3/4 of an inch. Trips and falls on footpaths make up the bulk of claims against councils.

In California all tort liability claims must be presented to Council before proceeding to court. Council is given six months in which to respond to the claim and attempt to either dismiss or settle it.

### *Canada*

Canadian municipal governments face largely the same public liability exposure as councils in New South Wales. However, a recent amendment to the British Columbian *Occupiers Liability Act* has lowered councils' duty of care in relation to hiking trails, wilderness areas etc. when used for recreational purposes.

In Canada councils' greatest area of exposure is building applications. Unlike New South Wales, they are still held to be jointly and severably liable regarding faulty buildings. Water damage is a particular problem in rainy states such as British Columbia. Councils are liable for buildings from the time the latent defect is detected so this type of claim represents a huge unfunded liability.

Council insurers in Canada are seeing significant increases in payments for soft tissue injuries, broken limbs and paralysis. These are tripling in relation to cost of living increases.

### ***United Kingdom***

Trips and falls make up the majority of public liability claims against councils in the UK. Section 552 of the *Highways Act 1990* (UK) offers a defence for liabilities arising from deviations in footpaths and potholes. To rely on this defence councils must have evidence that regular inspection systems are in place. Generally, councils are liable for divergences in footpaths of over 3/4 of an inch.

The Wolfe Reforms in relation to local government introduced a new system of public liability claim lodgement which placed an upfront onus on the plaintiff to provide evidence of the injury at time of lodgement. Council is then given 90 days to respond.

The basis of this initiative is to discourage speculative claims and it seems to have had some success. However, councils are finding it extremely difficult to keep to the 90 day deadline.

### ***New Zealand***

New Zealand has a government run no-fault accident compensation scheme. The Accident Compensation Corporation insures New Zealanders for all non-work injuries on a 24 hour, no fault basis. Amounts awarded for various injuries are capped.

A Committee delegation met with both councils and their insurers while in New Zealand in June 2000. It was told that New Zealand councils had little interest in risk management as there was no financial consequence for them as the result of an accident on their property.

### ***Conclusion***

It is clear through the Committee's study that, with the exception of Canada, all the jurisdictions discussed offer some statutory tort law immunities to their councils.

However, models which involve complete immunities, no fault liability and capping appear to negate the need for councils to properly manage their risks and thus largely

work against the public interest in that systems are not necessarily put in place to minimise accidents in the first place. Complete immunities and capping of compensation can also be inequitable to plaintiffs in cases of genuine severe injury and probably, in reality, just shift the cost to social service organisations.



## Chapter 5: The Extent Of The Problem

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This chapter discusses the costs to councils of their current level of public liability exposure and where those costs lie.

### *Council Costs*

The costs of litigation do not equate merely to amount of compensation paid. This is often one of the smaller costs associated with a claim. Insurers quoted studies to the Committee that indicated that associated costs outweigh direct costs by a ratio of around eight to one.

Direct costs include claims payments, legal costs and insurance costs. These are discussed in greater detail below. Indirect costs include the diversion of staff from their normal duties to investigate claims, research records, write reports and attend court appearances. Investigation of a claim concerning a trip and fall can easily involve not only a risk manager but an engineer and a parks and gardens supervisor.

Some councils also invest heavily in risk management programs. Larger councils are employing risk managers, claims managers and insurance experts. Likewise insurers are becoming increasingly proactive. Metro Pool informed the Committee that in four years it had doubled the amount of money spent on education and risk management with its nine member councils.

The data in Table 3.1 show that the number of claims going to local government insurers has doubled in the period 1988 to 1999 whilst the actual cost of these claims has more than doubled.

**Table 3.1: The number and cost of public liability and professional indemnity claims reported for all NSW local government liability pools combined**

<b>Fund Year</b>	<b>Number of Claims</b>	<b>Cost of Claims</b>
1988/89	2,287	9,233,000
1989/90	2,487	9,602,000
1990/91	2,414	8,989,000
1991/92	2,150	7,966,000
1992/93	2,014	9,791,000
1993/94	2,204	8,138,965
1994/95	3,061	19,865,815
1995/96	3,689	25,282,211
1996/97	4,016	19,373,426
1997/98	4,465	19,020,804
1998/99	4,638	20,703,502
1999/00*	1,542	9,817,629

Source: KPMG Actuaries for State-wide Mutual, Local government liability and professional indemnity claims analysis tables 3.1 and 3.2

Notes:

The figures for Statewide Mutual are actual and an estimate of costs and claim numbers has been used for other funds after 1997/98.

\*The figures for 1999/00 include only the first 6 months of this Fund year. Claims greater than \$500,000 have been excluded to reduce distortion.

As claims will be received for an average of three years after the year in which the injury occurred, the most recent three years are too immature to draw conclusions from and should be given low credibility.

Table 3.2 shows that the number of small, medium and large claims has grown during the period 1988 – 1999. The majority of claims are for less than \$10,000. However, there is a trend towards medium-sized claims and away from small claims as a proportion of the total number of claims. In 1988/89 medium sized claims comprised 6% of all claims, while the figure for 1996/97 was 9% of all claims. The table 3.3 shows the effect on costs.

**Table 3.2: Number of claims reported by local government self-insurance pools in NSW by Fund year and claim size**

<b>Claim size band</b>						
<b>Fund Year</b>	<b>&lt;\$10,000</b>		<b>\$10,000 - \$100,000</b>		<b>&gt;\$10,000</b>	
	<b>Amount</b>	<b>%</b>	<b>Amount</b>	<b>%</b>	<b>Amount</b>	<b>%</b>
1988/89	2,121	93%	143	6%	23	1%
1989/90	2,306	93%	161	6%	20	1%
1990/91	2,192	91%	206	9%	16	1%
1991/92	1,966	91%	175	8%	9	0%
1992/93	1,763	88%	234	12%	17	1%
1993/94	2,022	92%	171	8%	11	0%
1994/95	2,770	90%	265	9%	26	1%
1995/96	3,327	90%	329	9%	33	1%
1996/97	3,615	90%	366	9%	35	1%
1997/98	3,952	89%	490	11%	23	1%
1998/99	3,863	83%	770	17%	5	0%
1999/00*	1,146	74%	395	26%	1	0%

Source: KPMG Actuaries for State-wide Mutual, Local government liability and professional indemnity claims analysis table 3.1

Notes:

The figures for Statewide Mutual are actual and an estimate of costs and claim numbers has been used for other funds after 1997/98.

\*The figures for 1999/00 include only the first 6 months of this Fund year. Claims greater than \$500,000 have been excluded to reduce distortion.

As claims will be received for an average of three years after the year in which the injury occurred, the most recent three years are too immature to draw conclusions from and should be given low credibility.

**Table 3.3: Reported cost of claims to local government self-insurance pools in NSW by Fund year and claim size**

<b>Claim size band</b>						
<b>Fund Year</b>	<\$10,000		\$10,000 - \$100,000		>\$10,000	
	Amount	%	Amount	%	Amount	%
1988/89	720,000	8%	4,248,000	46%	4,255,000	46%
1989/90	832,000	9%	4,384,000	46%	4,386,000	46%
1990/91	952,000	11%	5,841,000	65%	2,196,000	24%
1991/92	898,000	11%	5,332,000	67%	1,736,000	22%
1992/93	852,000	9%	6,563,000	67%	2,376,000	24%
1993/94	628,625	8%	5,285,842	65%	2,224,498	27%
1994/95	1,359,754	7%	12,643,100	64%	5,862,961	30%
1995/96	1,688,581	7%	14,971,868	59%	8,621,762	34%
1996/97	1,350,293	7%	11,710,486	60%	6,312,647	33%
1997/98	1,470,068	8%	14,271,262	75%	3,279,474	17%
1998/99	2,958,294	14%	16,809,724	81%	935,484	5%
1999/00*	1,753,449	18%	7,935,148	81%	129,039	1%

Source: KPMG Actuaries for State-wide Mutual, Local government liability and professional indemnity claims analysis table 3.2

Notes:

The figures for Statewide Mutual are actual and an estimate of costs and claim numbers has been used for other funds after 1997/98.

\*The figures for 1999/00 include only the first 6 months of this Fund year. Claims greater than \$500,000 have been excluded to reduce distortion.

As claims will be received for an average of three years after the year in which the injury occurred, the most recent three years are too immature to draw conclusions from and should be given low credibility.

The data in Table 3.3 shows that not only have costs increased because of an increasing number of claims, the size of claims has also increased throughout the period 1988-1999. In the early 1990s medium-sized claims grew as a proportion of the total cost of claims. In the late 1990s the growth of medium-sized claims has been overshadowed by the growth in large claims.

There appears to be a trend towards courts awarding larger damages awards for minor injuries leading to insurers raising premiums and increased indemnity limits. In 1985 there was an indemnity limit of \$1m for most councils but in 1997 the limit for most councils was \$100m (LGSA p7).

## ***Community Costs***

Council money is public money and it can be argued that costly litigation diverts funds from other council resources. As a result, the community ultimately receives a lesser quality of infrastructure and services from their councils.

Councils and their insurers told the Committee that councils are unable to off-set the costs of rising insurance by increasing rates because of rate pegging legislation. The General Manager of Lane Cove Council informed the Committee that rates had been pegged to increases of only 1.7 to 2.7 per cent for the last four years. This means that councils have two options, they can venture into commercial activities to raise funds and/or they can reduce the scope and quality of services provided to the community.

In their submission to the Committee the LGSA quoted the Second Reading Speech of the then Attorney-General, Hon John Dowd MP, who acknowledged these problems when introducing a Personal Injuries Damages Bill in Parliament in 1991 which ultimately lapsed:

*A recent survey, undertaken by the Local Government Ministers of Australia and New Zealand indicates that 31.7% of local councils in New South Wales have withdrawn or are considering the withdrawal of many services, including parks and public facilities, pools, patrolled beaches, skateboard facilities, community advice and information, support for voluntary community organisations and refuse depots. Such withdrawals of services are expressed to be a direct response to perceived exposure to liability and to the cost of insurance associated with providing the service.*

*(submission p8)*

Councils argue that risk management is taking precedence over the provision of amenities and fostering community development. Insurance pools have begun to employ risk managers who have instituted programs of regular inspection to identify and reduce potential risks. Unfortunately, some of the amenities which the community enjoys expose councils to liability claims and changes to, or removal of, these amenities is part of some risk management programs.

The General Manager of Lake Macquarie Council told the Committee that Council has had to turn down offers from local community groups who wanted to raise money for playgrounds:

*It is virtually impossible now for a community group like Rotary or Apex or something like that to come along and have a working bee to create a playground. What used to cost \$1,000 and be a magnificent service for under-privileged communities we now will not let them do. Those playgrounds cost \$30,000. They are pre-moulded plastic and are so boring that the kids will not go near them.*

*Transcript, 15 April 2000, p 33*

Community groups are also often prevented from using council facilities for meetings unless they are able to afford their own insurance. The General Manager of Lake Macquarie Council explained that:

*We have self-help community groups that used to meet in community halls. Perhaps they were elderly people. Those who could drive would take those who could not drive to do their shopping once a week. They did not call upon any level of government for anything. But now if they meet on a regular basis they need to take out their own insurance or council needs to insure them, so they no longer meet in our community hall. They meet in someone's lounge room. Other members of the community do not get to find out about them and the group dies out with the people, with the members of that group. The responsibility for looking after those people then falls, usually, to some level of government.*

*We are making it very difficult to run those services because of this spiralling cost of risk. It means we are being driven purely by the economic side, and councils increasingly, when they set their budgets set them based on the cost of risk or minimising their liability rather than being driven by providing social outcomes.*

*Transcript, 15 April 2000, p33*

Councils currently manage a great deal of Crown Land for the State Government. There is also often pressure from communities on government to provide land to the community that has been in government use and is no longer required, rather than selling the land to the private sector. This is particularly the case with areas of natural bushland, reserves and beaches. If Government Departments such as Sydney Water provide parcels of land, such as the crown land they manage to councils, councils must accept liability for injury or losses occurring on that land. Statewide Mutual which has 140 member councils, advises their members not to accept additional land due to increased liability exposure:

*Our risk management approach is to say "Don't take it. You can't afford the additional exposure that Crown land is going to give you." We have been discussing this with a few of the councils on the North Coast that are trying to be given more Crown land on reserves and beaches, cliff faces and the like. Risk management-wise when they come to me I say to them not to take them.*

*Transcript, 20 April 2000, p16*

It is also possible that outer metropolitan and rural councils may avoid public liability claims by not providing footpaths on some sections of road. The Committee asked the insurers for the LGSA whether there is a disincentive for council to provide footpaths on the basis of liability claims. Whilst the insurers had not examined this matter, they did acknowledge that there are far fewer claims from the public relating to unformed footpaths.

Communities across NSW may face a loss of environmental and social amenities unless the issue of the cost of public liability insurance is finally addressed. Previous attempts to bring about legislative change have been aborted due to the difficulty of balancing the right of individuals to seek compensation for damages with the ability of councils, and ultimately communities, to fund compensation payments.

## ***Types of Claims Which Cost Councils the Most***

Claims made by members of the public who have sustained injuries in trips and falls on footpaths, council facilities or natural areas account for the majority of claims made. In an analysis of claims lodged with Statewide Mutual over a three month period, 62 per cent of all claims were for trips and falls.

Footpaths are the most common site for trips and falls with 45 per cent of all claims made to Statewide Mutual in a three month period being specifically for trips and falls on footpaths. Councils have cited damage to footpaths caused by tree roots as the most common cause of falls on footpaths.

The Committee was informed by Mr Attenborough, insurance consultant to the LGSA, that the next most common causes of liability claims are accidents on roads and the negligent issuing of building and development approvals. The largest claims involve accidents during recreational activity in water:

*The major source of claims that we get are trips and falls, particularly footpaths, caused in the main by tree roots lifting the footpath, creating the trip point. The bigger claims tend to come from roads—road reconstruction, road works or incorrect issue of 149 certificates, building applications, development applications. They are at the top end of the scale. Three of our biggest claims have come from dives into swimming pools, creeks and lakes, and they are quadriplegics. They cost a few million. Transcript, 20 April 2000, p 3*

It is important to recognise that although large claims attract media attention it is the small claims which account for the largest proportion of the costs. The Legal and Risk Branch Manager for Wollongong City Council explained this to the Committee:

*I am responsible for paying \$400,000 a year out in below-excess payments that is a two-to-one relationship. Insurers may be paying \$120,000 on top of that. If someone does something foolish and breaks their neck in the surf or dives into a shallow rock pool .....we see that happening probably once every 10 years, so if it cost us \$2 million in total, that is \$200,000 a year.*

*Take that into relevance with what we are already paying out and my personal opinion is that is quite manageable. I do not really have to spend too much time worrying about that type of incident. My focus, is by necessity, and the dollars tell me, to be in the trips and falls area, making the environment safer for all people.*

*Transcript, 6 April 2000, p 34*

Statewide Mutual commissioned KPMG Actuaries to prepare an analysis of liability claims. Included in the analysis is data specifically on the proportion of the cost of claims accounted for by claims for falls on footpaths. The data in Table 3.4 show that footpath falls comprise 30% of all claims made member councils in the Statewide Mutual pool. The number has not changed significantly over four years but the cost has.

**Table 3.4: Reported cost of footpath claims vs total cost of claims to Statewide Mutual**

<i>Fund Year</i>	<i>Footpath Claims</i>	<i>Total Claims</i>	<i>Footpath proportion</i>
<b>1993/94</b>	1,276,382	7,493,291	17%
<b>1994/95</b>	4,978,434	15,605,910	32%
<b>1995/96</b>	5,388,876	17,710,271	30%
<b>1996/97</b>	6,114,371	16,430,575	37%
<b>1997/98</b>	6,611,031	21,992,334	30%
<b>1998/99</b>	6,610,486	16,045,214	41%
<b>1999/00*</b>	3,273,012	7,608,663	43%

Source: KPMG Actuaries for State-wide Mutual, Local government liability and professional indemnity claims analysis tables 3.4

Notes:

\*The figures for 1999/00 include only the first 6 months of this Fund year.

Claims greater than \$500,000 have been excluded to reduce distortion.

As claims will be received for an average of three years after the year in which the injury occurred, the most recent three years are too immature to draw conclusions from and should be given low credibility.

The data show that the cost of public liability claims for injuries sustained on footpaths and nature strips comprises almost a third of the cost of all claims to NSW local government. The data for 1998/99 and 1999/2000 may indicate increasing costs in this type of claim.

Metropool and Westpool's incidence of claims for footpath falls is higher than for Statewide Mutual with 67.9% of all claims over ten year period being for footpath falls (Transcript, 15 April 2000, p11).

The data provided to the Committee on average cost per claim for trips and falls varies across insurance pools. This is partly explained by how the figure is calculated. Wollongong City Council informed the Committee that the average damages payments for trips and falls is between \$0 and \$10,000. This suggests that most of these claims have been settled without recourse to the courts.

The average pay-out for the LGSA's self insurance pool was reported to be \$38,000 per slip, trip and fall. This figure includes the legal costs but does not factor in payments made under the excess by member councils and claims larger than those handled by the self-insurance pool which are managed by Jardine Lloyd Thompson.

The data from councils and their insurers are consistently showing that trips and falls are the single most expensive cause of public liability claims.

## *Inequalities Between Areas of Government Liability*

Councils and their insurers argued to the Committee that the current situation for paying compensation for personal injuries sustained under the occupier's liability doctrine is inequitable given that the amounts claimed and paid out are unlimited. This contrasts sharply with the amount of compensation awarded for personal injuries which were sustained at work or arose out of the use of a motor vehicle.

According to the LGSA and Jardine Lloyd Thompson the two State agencies which have public liability exposures similar to, but narrower than, councils were given statutory assistance by limiting the liability.

Transcover, the motor accidents insurance scheme which preceded the Compulsory Third Party scheme, faced a situation similar to that now faced by councils. The Motor Accidents Act 1998 and the 1995 amendments were introduced to balance the compensation of accident victims with continued viability of the compensation fund and affordable premium levels for motorists.

The assertion by councils that Transcover faced a situation similar to theirs for which it was given relief is supported by a reading of the Act. Section 2 on the objects of the Act states:

(2) *It must be acknowledged in the application and administration of this Act:*

*(a) that participants in the scheme under this Act have shared and integrated roles with the overall aim of benefiting all members of the motoring public by keeping the overall costs of the scheme within reasonable bounds so as to keep premiums affordable, and*

*(b) that the law (both the enacted law and the common law) relating to the assessment of damages in claims made under this Act should be interpreted and applied in a way that acknowledges the clear legislative intention to restrict the level of non-economic loss compensation in cases of minor injuries, and that:*

*(i) the premium pool from which each insurer pays claims consists at any given time of a finite amount of money, and*

*(ii) insurers are obliged under this Act to charge premiums that will fully fund their anticipated liability, and*

*(iii) the preparation of fully funded premiums requires a large measure of stability and predictability regarding the likely future number and cost of claims arising under policies sold once the premium is in place, and*

*(iv) the stability and predictability referred to in subparagraph (iii) require consistent and stable application of the law.*



It can be argued that the same elements are relevant to councils' situation. As the law currently stands, courts do not have to consider that council funds are finite. Neither does the law provide predictability in regard to premiums, as the duty of care of councils is continually being expanded in judgements. The cost of claims and their long tail has caused a flight of underwriters from the market and increased premiums.

Similarly, Workcover and self-insurers have been given relief from public liability by the *Workers Compensation Act*. This legislation modifies the award of common law damages by inter alia, preventing unlimited payment of damages to plaintiffs by use of a Table of Maims. The table provides specific benefits for total or percentage loss of usage of specific parts of the human body. Section 151G states:

*151G Damages for non-economic loss*

(1) *(Repealed)*

(2) *The amount of damages to be awarded for non-economic loss is to be a proportion, determined according to the severity of the non-economic loss, of the maximum amount which may be awarded.*

(3) *The maximum amount which may be awarded for non-economic loss is \$204,000, but the maximum amount may be awarded only in a most extreme case.*

(4) *If the amount of non-economic loss is assessed to be \$36,000 or less, no damages for non-economic loss are to be awarded.*

A third example of a public policy of providing immunity is electricity supply agencies and water supply agencies, which have statutory immunity from prosecution for the failure to provide core activities.

## ***Previous Attempts to Address the Issue of the Costs of Public Liability for Councils***

Previous attempts to address the issue of the costs of public liability for councils and the provision of some relief from this liability have not resulted in change.

### ***Personal Injuries Bill 1991***

In 1991 a Personal Injuries Bill was introduced into Parliament which aimed to introduce a system of capping for all personal injury claims. The Bill was modelled on limits to the common law claims imposed by the Motor Accidents Authority 1988. The Bill did not proceed. There had been concerns voiced about the application of limits to all personal injury claims and arguments put forward that the Bill was not balanced by other considerations such as requirements for compulsory insurance, rehabilitation and risk management which are part of other schemes to limit liability such as the Motor Accidents Authority, Workers Compensation Act and Professional Standards Act, 1994.

## ***Interdepartmental Working Party Report on Local Government Public Liability and Professional Indemnity***

The Department of Local Government informed the Committee that an Interdepartmental Working Party on Local Government Public Liability and Professional Indemnity was established by the Minister for Local Government and the Attorney-General in 1997 in response to representations from local councils concerning the cost of insurance cover.

The Working Party was directed to focus on the extent of the liability problem, possible legislative solutions, insurance arrangements, mechanisms to promote risk management and court-based reforms.

There was an acknowledgement by the Working Party that councils are facing real problems with the amount of public liability exposure that they are carrying. The Working Party's considerations are ongoing.

## Chapter 6: Options For Relief

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In considering any proposals to provide councils with relief from public liability for trips and falls, the key issue is to attempt to balance the public interest of maintaining an individual's rights to full compensation for injuries received on council owned or operated property against the public interest in ensuring that rising liability awards and insurance payments do not become unmanageable for councils. Another key issue is to ensure that any arrangements to limit liability do not provide a disincentive to implement appropriate standards of maintenance of council property, natural areas and footpaths.

### *Methods promoting earlier settlement*

As discussed in Chapter Two the Californian legislation gives councils a six month period to try and settle or dismiss a claim before court action commences. The LGSA felt that there was merit in this scheme and asked that the Committee consider it.

Similarly, the United Kingdom Wolfe Reform initiative of placing the onus on plaintiffs to provide upfront evidence of injury and negligence may cut down on speculative claims and the ninety day response obligations on councils may lead to earlier settlements and dismissals.

However, the "cooling off period" scheme may actually serve to delay claim settlements as lawyers wait through this period merely to get to court filing.

The United Kingdom 90 day response scheme seems to have placed an onerous obligation on councils which they are finding difficult to meet administratively. UK councils also informed the Committee that speculative claims were still getting through. Despite these problems the scheme does have merit.

### *No fault liability schemes*

As discussed in Chapter Two New Zealand currently runs such a scheme. While such schemes offer financial relief for councils they can disadvantage the severely injured in that they are usually capped and also take away a major incentive for councils to effectively manage their risks to prevent accidents in the first place which is clearly against the public interest.

This type of universal no-fault insurance is also immensely expensive.

### *Capping*

The LGSA proposed in its submission that legislation be enacted to ensure that all personal injury claims are dealt with in a like fashion. As discussed in Chapter Three,

the amount of compensation payable to victims of work accidents or motor vehicle accidents is subject to fairly stringent limits. In the case of the *Motor Accidents Act, 1988*, these limits were brought in to ensure that the compensation fund remained viable and that premiums were affordable. Compensation for minor injuries is capped to ensure that full compensation could be paid in more serious accidents.

A *Personal Injury Damages Bill* was proposed by the then New South Wales government in 1991 but lapsed. The Bill aimed to introduce a system of capping personal injury claims and was modelled on the *Motor Accidents Act 1988*.

As discussed in Chapter Three, the situation of councils is not directly comparable to that of employers under the *Workers Compensation Act* or motorists under the *Motor Accidents Act*. In both those cases, there are standards imposed by independent external agencies, i.e. agencies which are not paying the insurance premiums.

As councils are elected bodies, with the right to determine the priorities for expenditure, it is not feasible to expect an independent statutory authority to be established to inspect the standard of council footpaths.

The majority of trips and falls in council areas result in relatively minor injuries. If compensation for minor injuries was capped in the absence of legislated standards there would be no real obligation on councils to maintain the standard of footpaths and other pedestrian areas. This is clearly against public health and safety.

This undesired outcome could be negated by the proposal by Jardine Lloyd Thompson, who proposed that there be a statutory code in relation to contributory negligence which would reduce damages by at least 25 per cent for each proved instance of contributory negligence. Whilst in some cases presented to the Committee by councils and their insurers, there was an onerous expectation of duty of care on councils by the courts, the Committee remains of the view that that it is necessary to retain the capacity of courts to determine the degree of contributory negligence on a case by case basis.

### ***Total statutory immunities***

The most extreme solution to the difficulties experienced by councils is total statutory immunity from liability for their functions. As discussed in Chapter Two, this level of immunity operates in some parts of the United States.

The LGSA acknowledged that it would not be reasonable for councils to have immunity from liability for commercial activities, but argued that it would be reasonable to give councils statutory immunity from liability for the exercise of their core functions.

The LGSA submits that this would be an extension of the statutory immunity which is already provided to councils in the following areas:

- The *Local Government Act 1993* provides councillors and council staff with immunity from prosecution where they have acted 'bona fide'.

- The *Environmental Planning and Assessment (Contaminated Land) Act 1996* provides statutory exemption from liability for planning authorities when carrying out certain functions, including: the making of planning instruments, the making of development control plans, the processing of development applications, the processing of modifications of consents and the giving of advice in Section 149 Certificates.
- The legal principle of non-feasance provides exemption from liability for damage caused to individuals or their vehicles by the normal wear and tear of roads.

In the same manner that the non-feasance rule was introduced to facilitate the provision of a vital road service, it was argued that the same principle should be extended to the provision of vital core services provided by councils.

The vital core services were identified by the LGSA as: accidents on footpaths, control and maintenance of natural areas, performance of extraordinary duties and responsibilities following and resulting from natural disasters.

In supplying core services to the community, councils should not be required to “adopt(ion) a higher standard of care for individuals using public facilities” [Hughes v Council of the Municipality of Hunters Hill] and to the contrary, should see an extension of the principle of non-feasance to lower the standard of care as an alternative to not having a facility at all.

The Joint Metropolitan Liability Pools also proposed that:

*The opportunity for Local Authorities being provided with immunities within qualified areas of its services to the communities, for example over footpaths or roads, or natural features, would immediately reduce the burden upon authorities and allow further provision of services and attention to risk management principles to ‘site specific Council services such as swimming pools, playgrounds etc*

However, it must be added that the provision of a blanket statutory immunity for particular core areas of council activities provides a disincentive to maintain particular standards of risk management. It was demonstrated in Chapter One that the development of risk management programs by councils has been economically driven and that not all councils are implementing the best practice manuals published by Statewide Mutual.

Any proposal for immunity would therefore need to operate hand-in-hand with provisions ensuring adoption of best practice standards.

### ***Agreed Upon Best Practice Standards***

Councils and their insurers have argued that there is little incentive to implement best practice standards in the current environment as these standards are not accepted by the courts. The LGSA notes in their submission that if standards were legislated and

councils given immunity for implementing these standards, this would be a real impetus for effective risk management:

*If a Council can rely on a set of “Standards”, compliance with which will, prima facie, deem the Council to have acted reasonably (ie giving rise to a presumption in law of having acted properly and not negligently) this will clearly be the strongest mechanism to promote risk management in local government.*

The LGSA proposed that the standards in the Best Practice Manuals produced by Statewide Mutual provide the basis for the standard in legislation. The Manuals are based on Australian Standards specifications, where they exist.

Whilst the Manuals are very useful, there is clearly a conflict of interest in allowing insurers and councils to determine the relevant standard. In order to be acceptable to the community, any standard needs to be endorsed by an independent body or a process that is free from any vested interest. The relevant standard needs to balance the needs of the community in terms of safety and accuracy of advice with the economic and administrative capacities of councils and would at the same time be acceptable to relevant technical experts.

Councils and insurers do mount a convincing argument that setting a single standard, as applies in California, a trip-point of a maximum of  $\frac{3}{4}$  of an inch or weekly inspection of all signage is neither practical nor necessarily in the public interest.

LGSA:

*It is clearly impractical for Councils to ensure that all footpaths in their areas are totally satisfactory and in some senses the courts, by allowing a variation of 20 millimetres before Council will be held to be liable, accept that proposition. However, such a minor change in level between adjacent footpath slabs, or “trip point”, is an extremely onerous indicator of negligence on the part of a Council. Many millions of dollars will continue to be paid for relatively minor tripping injuries [strains, sprains, at worst breaking of limbs] unless some form of immunity from or protection from this type of claim is provided to the Councils.*

*(submission p23)*

Rather than an exactly specified measure, it has been argued that there would be a greater public benefit if the maximum trip point varies with geography, demography and budget. Speaking in relation to the Best Practice Manuals, Mr Barnes, Risk Manager to the LGSA informed the Committee that:

*We allow councils to move within a reasonable variation. We do not say that 5 millimetres is the minimum, and we do not say that 15 millimetres is the minimum, but we are strong in our suggestion that a council that thought of making the standard 300 millimetres would be so far outside community expectations that we would not accept it, ..... We have councils that have set a range in high traffic areas. We are not just measuring the trip hazard; we are getting councils to understand the demographics of their population. Who uses the streets? Statistically, women over 55 are our major*

*claimants. We are now asking: Where do they go? Where do they walk? We are starting to track where our major claimants seem to go. Obviously, there is no point in having a 25 millimetre standard in their areas because they will fall, so we must set the standard at 10 millimetres or 12 millimetres etc.*

Similarly, the frequency with which a sign should be inspected to make sure that it has not been covered up by graffiti depends on a number of factors. In summer, water safety signage needs to be inspected more frequently than in winter.

Mr Barnes, Risk Manager to the LGSA explained that:

*There is maintenance and a whole package surrounding the sign. Because Coolamon cannot afford to spend the same amount of money as North Sydney, we cannot have a single standard that says "you will inspect the site every week." You cannot do that.*  
Transcript, 20 April 2000, p11

*A 5 millimetre trip hazard outside a nursing home might as well be a 50 millimetre trip hazard because the residents there are not able to move around as easily. So one has to be careful not to set for a particular area a standard that is unattainable or which in a court of law would be deemed impractical.* Transcript, 20 April 2000, p 6.

It was pointed out to the Committee that grinding machines used in some jurisdictions to remove trip points may actually cause footpath falls by creating a slippery surface.

## ***Good faith immunity***

Legislation which recognises a "good faith" defence could constitute an approach which provides some immunity and encourages effective risk management without imposing a single standard.

If councils were to agree upon best practice standards this could form the basis for a legislative defence based on "good faith". This is an approach providing immunity without imposing one single standard but encouraging risk management.

A useful model of good-faith immunity exists in Section 733 of the Local Government Act which gives exemption from liability for flood liable land and land in coastal zones. One of the objectives of the Government's Flood Policy is to ensure that development is not unnecessarily restricted in flood-prone areas. Section 733 (4) and (5) state:

*(4) Without limiting any other circumstances in which a council may have acted in good faith, a council is, unless the contrary is proved, taken to have acted in good faith for the purposes of this section if the advice was furnished, or the thing was done or omitted to be done, substantially in accordance with the principles contained in the relevant manual most recently notified under subsection (5) at that time.*

*(5) For the purposes of this section, the Minister for Planning may, from time to time, give notification in the Gazette of the publication of:*

*(a) a manual relating to the management of flood liable land, or*

*(b) a manual relating to the management of the coast line.*

*The notification must specify where and when copies of the manual may be inspected.*

The Floodplain Development Manual published in December 1986 sets out the process that Councils must follow. Councils are required to establish a Floodplain Management Committee to assist council in developing and implementing a floodplain management plan. Committees comprise councillors, council staff, local community representatives, planners from the Department of Environment and Planning, engineers from the Public Works Department or the Water Resources Commission and representatives from State Emergency Services. Officers from other Government agencies such as Department of Land and Water Conservation and Department of Urban Affairs and Planning are sometimes coopted to the Committee.

The Committee must then carry out a flood study to define the problem and its severity. The flood study is usually funded in partnership with the Department of Land and Water Conservation. The flood study provides information about social, economic and ecological considerations which must be balanced against the possible consequences of flooding. The flood study provides the basis for the selection of a flood standard. This determines the area of land that should be subject to flood-related development and building controls. This may mean that building is not permitted in some areas or that minimum floor levels are set for developments. The Committee must advise council on the level of risk which should be accepted in the Flood Management Plan, for instance one in a hundred years or one per cent. If too low a standard is adopted new developments in areas above the flood standard may be damaged frequently and if too high a standard is adopted land that is rarely flooded will be subject to unnecessary controls.

The Committee carries out floodplain management studies to identify the particular measures to implement to reduce the risk of flood damage. These measures can be structural such as the construction of levees or non-structural such as flood warnings and land-zoning.

All of this information is used to inform the Floodplain Management Plan which describes how the flood prone land is to be used and managed, the specific measures which will apply and the means and timing by which the plans will be implemented.

The Floodplain Management Plan must have the knowledge and support of the whole community. It is required to be exhibited and public comment to be sought prior to being endorsed by the council.

This model is useful as good faith immunity is provided only where councils have followed particular processes and adopted a particular standard. The process followed is

transparent and the standard is based on consultation with technical experts and the community. These standards adopted by councils are flexible and take into account local factors and cost.



Another positive feature of this model is that the Manual is periodically reviewed allowing the Government to require higher standards to be systematically implemented over time. The current Manual allows councils to claim good faith immunity for having in place an interim floodplain management plan. This means that councils have not gone through the full process described in the Manual. A revised Floodplain Development Manual was on public display in March to June 1999. It is currently awaiting Cabinet approval. One feature of the new manual is that it is no longer acceptable to sit on an interim plan.

Good faith immunity can still be tested in court and if courts find that councils have not acted in good faith they will be liable for damages. In their submission to the Attorney-General's Department the Joint Metropolitan Liability Pools describe the case of Mid Density v Rockdale Council 1993 44 FCR 290.

In this case, the court considered that the concept of good faith called for more than "honest ineptitude". The claimant purchased a commercial property relying upon a certificate issued in accordance with Section 149 (5) of the *Environmental Planning and Assessment Act*. The Certificate had been incorrectly issued and the land was liable to flooding. The officer dealing with the matter had relied on his knowledge and had given an incorrect answer to the question on the Certificate which asked "has the Council information which would indicate that the land is subject to, inter alia, the risk of flooding or tidal inundation." The Council certificate also included a rider that "the above information has been taken from the Council's records and Council can not accept any responsibility for inaccuracy." Clearly, however, the Council did have information that indicated that the land was flood-prone and either the information was inaccessible or the officer did not check.

The Commonwealth *Disability Discrimination Act 1992* also provides a similar model and one with which councils would be familiar. Local Councils must comply with the Disability Discrimination Act as employers, providers of goods and services and in granting building and development approvals. Possible areas of discrimination include access to premises. Section 23 of the Act requires non-discriminatory access to premises which the public or a section of the public is entitled or allowed to use.

Premises include:

- Public footpaths and walkways;
  - Parks;
  - Public swimming pools;
  - Shops;
  - Government service offices;
  - Public transport facilities;
  - Cinemas and sports venues;
  - Libraries and other information and advice centres;
- 
- Other premises the public or a part of the public is entitled or allowed to enter or use.

Approval of a development which is inaccessible to people with disabilities may result in a complaint. The complaint may halt a development or lead to modifications which

are costly to the developer. The developer may then sue the council for compensation for losses. Alternatively, a complainant may bring a complaint against the council for indirect discrimination.

Organisations are encouraged by the Human Rights and Equal Opportunities Commission (HREOC) to register action plans.

Action plans outline how disability discrimination will be eliminated. The implementation of an action plan is a voluntary and pro-active approach to compliance with the *Disability Discrimination Act*.

HREOC has produced guides to developing Disability Discrimination Action Plans, including a guide for local government. According to HREOC's web-site at 20 September 2000, 22 councils in NSW had registered action plans.

The registration of an action plan can provide a defence in the event of a complaint but only where HREOC judges the actions taken to be effective. The action plan may be used in conciliation or in a defence of unjustifiable hardship. According to HREOC's web-site unjustifiable hardship includes "financial circumstances, technical limits and likely benefits or detriments arising from making something accessible." HREOC states that:

*If an Action Plan establishes the respondents commitment to do everything possible to eliminate discrimination within a reasonable period of time and if the respondent is implementing the Action plan, then the Commission may find that it would be unjustifiably hard to require the respondent to do more. However, the mere existence of an action plan does not constitute a defence.*

*Because of this requirement it would not be appropriate for the Commission to determine the acceptability of any Action Plan prior to or in the absence of a complaint. The Commission does not 'approve' an Action Plan when it registers it.*

*So far there has been no complaint go to a hearing in which an Action Plan has been submitted as part of the defence. However, the Acting Disability Discrimination Commissioner considers that a Hearing Commissioner would carefully consider the content and implementation of an Action Plan and the process involved in developing a plan as part of a section 11 defence. If an Action Plan was developed without reference to service users, if priorities for change were not relevant to service users or prospective service users, if the Action Plan did not adopt reasonable time lines and if there was no evidence that the plan was actually being implemented, it is unlikely the Action Plan will be effective in contributing to a defence. (HREOC web-site, 29/9/00)*

As with the Floodplain Development Manual, the guides to developing action plans do not specify a particular standard but rather set out principles, methods and mechanisms which may be adapted to the unique circumstances of different organisations. Unlike the

Floodplain Development Manual, the guides themselves do not have a legal status. Section 61 of the Act provides that service providers may lodge an action plan with HREOC for full compliance with the Act.

An approved standard on which councils can rely for a good faith immunity defence in relation to pedestrian access areas will need to suit the unique engineering aspects of

footpath construction. The Committee does not have the technical expertise to decide which approach would be best and believes that it should be left to relevant stakeholders to decide in consultation with qualified experts.

### ***Notification of Accidents to Council Within a Specified Period***

The *Motor Accidents Act* (NSW) requires persons who have been injured in a motor accident to notify the Motor Accidents Authority within three months of the date of the accident if they may intend to make a third party claim in the future. The Committee feel that a similar provision requiring notification of councils regarding accidents on footpaths would be useful.

Such a systems will allow councils to prepare for the claim and conduct inspections of the place of the accident while the surface remains the same. It may also encourage earlier settlements and dismissals. Further, it introduces more rigour into the system by putting an onus on a plaintiff to show why they did not report an incident at the time of filing a subsequent claim.

## Chapter 7: Findings And Recommendations

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After consideration of all the evidence put before it during this inquiry the Committee considered that local councils in New South Wales are facing onerous public liability exposure due both to the large array of services and facilities which they offer and through their close links to the community.

As previously discussed, it has been considered necessary to give statutory relief to councils in other jurisdictions. Further, other areas such as workers compensation and motor vehicle accidents have provided agencies with relief in New South Wales. Likewise, in 1997 the New South Wales government introduced a table of injuries into its Victims Compensation Scheme to rein in expenditure of public monies in compensation to victims of crime .

There appears to be clear evidence that the number and cost of claims against councils are increasing. Further, all predictions are that the insurance market is “hardening” and councils will be forced to pay much more for their insurance in the foreseeable future.

Council money is public money and council funds which are spent on insurance and handling, investigating, defending and settling claims are diverted from important council services and facilities, particularly within a system of rate pegging. Further, councils are being forced to cut back on some facilities and services through fear of litigation. This has a clear impact on the quality of what they can offer to their communities.

The Committee feels that it is problematic to offer councils relief for catastrophic injuries such as quadriplegia, paraplegia and brain damage which result from activities such as diving into shallow water. These cases are relatively rare and the nature of the injuries themselves mean that statutory immunities and capping would serve to unfairly disadvantage the plaintiff as well as merely cost shift onto other government services.

It is felt that councils can be best helped by gaining relief in the area where they receive the most numerous claims; trips and falls on footpaths and other council prepared and maintained surfaces. Although these claims usually involve the lower end of the scale of awards or settlements, the administrative and other associated costs are significant. Further, the amounts involved in many of these claims fall below the council insurance excess and must be directly met by councils themselves.

The need to provide relief to councils in this area must be balanced with public health and safety. As discussed previously, systems of complete tort law immunity can be inequitable to plaintiffs and take pressure off councils to properly manage their risks.

Councils as the payers of insurance premiums are not subject to standards enforceable by an external agency. Standards, such as risk management programs for core council activities have been developed by councils and by insurance pools in cooperation with councils but these standards are not mandatory and in some cases have not been implemented.

It was established in Chapter Three that the risk management measures implemented by councils have been economically driven. The statutory provision of measures which provide financial relief to councils should, therefore, occur only in tandem with statutorily imposed standards subject to some independent external scrutiny.

The Committee therefore proposes that a good faith immunity be enacted similar to that which currently operates for contaminated and flood prone land.

Similarly, the Committee considers that the principle of non-feasance for the repair of roads should remain in place or that statutory immunity from liability for the repair of roads should be provided subject to councils meeting a reasonable standard of maintenance agreed by an external authority. The non-feasance immunity of councils is being reviewed by the High Court which heard two cases together in September 2000: Brodie and Londay Pty Ltd v Singleton Shire Council (S44 of 1999) and Brodie and Ghantous v Hawkesbury City Council (S69 of 1999). The High Court has reserved its judgement but is likely to make its judgement by March 2001. It is not in the public interest for councils to be subject to liability claims which endlessly push up the standard of maintenance of public thoroughfares such that other facilities must be downgraded or not provided.

The Committee finds that there is not a sufficiently strong argument to justify legislative change to provide relief from public liability for other core areas of councils' activities at this time. However, it should be reviewed again in the future if litigation claims in these areas become more onerous. In particular, the immunities offered to local councils in California in relation to hazardous recreational activities recognise that individuals who choose to undertake such activities should bear their own risk. It may be pertinent to apply the good faith immunity model to these in the future, if it is found to be warranted.

The Committee understands that the insurance pools are now keeping a Statewide central register of public liability claims against councils for risk assessment purposes. Such a register allows for trend analysis in claims; identification of areas, surfaces and new techniques and technologies which present a high risk for litigation; and identification of clusters of types of claims in particular geographic regions etc. All this information would be extremely useful if fed back directly to councils for risk assessment and risk management purposes. It is also in the interests of public health and safety if future types of accidents can be prevented once council becomes aware of a problem.

The Committee also believes that there is merit in introducing a system of notification of accidents to the relevant council within a given period, say three months, in line with the existing provisions of the *Motor Accidents Act*. This will allow councils to prepare for the claim and conduct inspections of the place of the accident while the surface

remains the same. It may also encourage earlier settlements and dismissals. Further, it introduces more rigour into the system by putting an onus on a plaintiff to show why the did not report an incident at the time of filing a subsequent claim.

The Committee therefore recommends the following:

#### **RECOMMENDATION 1:**

*That the Local Government Act 1993(NSW) is amended to provide exemption from public liability for damage, loss or injury sustained by pedestrians tripping or falling on property under the control of councils provided that the council has acted in good faith.*

#### **RECOMMENDATION 2:**

*That the test of good faith for immunity from liability for trips and falls in pedestrian access areas on property under the control of councils in NSW is that action in relation to pedestrian access areas was taken, or was omitted to be taken, in relation to a recognised standard.*

#### **RECOMMENDATION 3:**

*That a standard be devised on which councils can rely as a defence to tort claims for trips and falls in pedestrian access areas by relevant stakeholders including the Department of Local Government and the Local Government and Shires Association.*

#### **RECOMMENDATION 4:**

*That the operation of good faith immunity from liability for damage, loss or injury to pedestrians on pedestrian access areas on property under the control of local councils in NSW is reviewed after five years by the Attorney-General's Department and Department of Local Government to establish whether the legislation has been successful in reducing the costs of public liability insurance for councils and reducing the number and level of injuries on pedestrian access areas. That if the legislation is found to be successful consideration is given to the expansion of the model into other areas of non-profit making council activity.*

#### **RECOMMENDATION 5:**

*That council insurance pools providing public liability insurance to councils in NSW structure their formula for contributions by member councils to offer a significant financial incentive to councils who implement high quality risk management programs.*

#### **RECOMMENDATION 6:**

*That the central claim register currently being operated by the insurance pools report information on trends in claims to local councils on a regular basis for risk management purposes.*

#### **RECOMMENDATION 7:**

*That the central claims register continue to monitor trends in claims, compensation settlements and court decisions in relation to injuries sustained on council land through the pursuit of hazardous recreational activities with a view to deciding whether a further good faith immunity needs to be recommended for councils in relation to these activities in the future.*

#### **RECOMMENDATION 8:**

*That there be a legislative requirement that people who have fallen and injured themselves on council pedestrian access areas notify the council within three months of the date of the accident if there is any question that they may intend to subsequently make a claim.*

#### **RECOMMENDATION 9:**

*That the principle of non feasant for the repair of roads remain in place or that statutory immunity from liability for the repair of roads should be provided subject to councils meeting a reasonable standard of maintenance agreed by an external authority.*

