

Police Legislation Amendment (Civil Liability) Bill 2003

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are:

- (a) to amend the *Employees Liability Act 1991* to confirm that police officers are employees of the Crown for the purposes of that Act, and
- (b) to amend the *Law Reform (Vicarious Liability) Act 1983* to require persons seeking damages for torts committed by police officers in the performance or purported performance of their functions as police officers generally to sue the Crown instead of the police officers concerned, and
- (c) to amend the *Police Act 1990* to exclude any member of NSW Police from personal liability for any injury or damage caused by any act or omission of the member in the exercise by the member in good faith of a function conferred or imposed by or under that Act or any other Act or law (whether written or unwritten).

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the Acts specified in the Overview and set out in Schedules 1–3.

Schedule 1 Amendment of Employees Liability

Act 1991 No 4

The *Employees Liability Act 1991* provides that an employer is not entitled to seek any indemnity in contract or a contribution as joint tortfeasor from an employee who has committed a tort for which the employer is also liable. The Act provides that, where the tort victim recovers damages directly from an employee, the employee is entitled to an indemnity from the employer. The Act also abolishes any action in tort that an employer may have to recover damages from an employee based on the loss of the services of any injured fellow employee. However, the Act does not apply to a tort committed by an employee if the conduct constituting the tort was serious and wilful misconduct or did not occur in the course of, and did not arise out of, the employment of the employee. In *Police Service of New South Wales v Honeysett* (2001) 53 NSWLR 592, the New South Wales Court of Appeal held that a police officer was an employee for the purposes of the Act.

Schedule 1 inserts a new section 2A in the Act to confirm that police officers are employees of the Crown for the purposes of the Act.

Schedule 2 Amendment of Law Reform (Vicarious Liability) Act 1983 No 38

Schedule 2 [5] inserts a new Part 4 in the *Law Reform (Vicarious Liability) Act 1983*. The new Part makes provision for how tort claims concerning police officers are to be dealt with by the courts. The proposed Part provides as follows:

Proposed section 9 (When torts committed by police officers)

The proposed section makes it clear that a reference in the new Part to a tort committed, or allegedly committed, by a police officer is to be read as a reference to a tort committed, or allegedly committed, by a person who was a police officer at the time of the tort or alleged tort (whether or not acting in a personal or official capacity).

Proposed section 9A (Part extends to former police officers)

The proposed section makes it clear that the new Part extends to claims against a person who was a police officer at the time of a tort or alleged tort, but who has ceased to be a police officer since that time. This provision ensures that the protections provided to police officers in respect of certain tort claims against them are not lost simply because the officer has ceased to be an officer after the time of the tort or alleged tort.

Proposed section 9B (How can police tort claims be made?)

The proposed section provides that, except as provided by the new Part, a person may not in any legal proceedings make a police tort claim against a police officer, but may instead make the claim against the Crown. A **police tort claim** is a claim for damages for a tort allegedly committed by a police officer (the **police officer concerned**) in the performance or purported performance of the officer's functions as a police officer, whether or not committed jointly or severally with any other person.

Section 8 of the *Law Reform (Vicarious Liability) Act 1983* provides that the Crown is vicariously liable for a tort committed by a person in the service of the Crown in the performance or purported performance by the person of a function if the performance or purported performance of the function:

- (a) is in the course of the person's service with the Crown or is an incident of the person's service (whether or not it was a term of the person's appointment to the service of the Crown that the person perform the function), or
- (b) is directed to or is incidental to the carrying on of any business, enterprise, undertaking or activity of the Crown.

Section 6 of the Act provides that a police officer is a person in the service of the Crown for the purposes of the Act.

The proposed section also provides that a person making a police tort claim in legal proceedings cannot join the police officer concerned as a party to the proceedings unless the Crown denies that it would be vicariously liable for the alleged tort if it were established that the police officer concerned had committed the tort. In that event, the claimant will not be required to file a new originating process (which would attract court filing fees), but may instead amend the existing originating process (which will not attract court filing fees). The *Limitation Act 1969* will not prevent the making of a claim that would otherwise be statute-barred for damages against a police officer in any such amended originating process if the amendment is made within 2 months after the Crown denies vicarious liability.

Proposed section 9C (Court required to make initial determination as to vicarious liability in any legal proceedings where in issue)

The proposed section provides that if the Crown and a police officer are both parties to legal proceedings concerning a claim for damages for a tort allegedly committed by a police officer and the Crown denies that it would be vicariously liable for the tort if it were established that the officer committed the tort, the court will be required to make an initial determination as to whether the Crown would be vicariously liable.

This determination is to be made as soon as is reasonably practicable unless the court considers it impracticable in the circumstances to determine the issue of vicarious liability separately from the issue of whether a tort was committed.

The requirement to make such an initial determination is not limited to proceedings where a police tort claim is made in the originating process. It also extends to proceedings where a police officer is originally sued in a personal capacity, but the vicarious liability of the Crown subsequently becomes an issue in the proceedings. This may occur, for instance, where a police officer's conduct occurred in the course of an undercover operation and the claimant is

not aware of that fact when the claimant commences the proceedings.

Proposed section 9D (When court to strike out or dismiss claims against police officer or Crown)

The proposed section requires a court to dismiss or strike out a claim for damages against a police officer for a tort allegedly committed by the officer if the court makes an initial determination that the Crown would be vicariously liable for the tort if its commission were established or the Crown concedes that it would be vicariously liable for the tort.

The proposed section also requires a court to dismiss or strike out a claim against the Crown for damages for a tort allegedly committed by a police officer if the court makes an initial determination that the Crown would not be vicariously liable for the tort if its commission were established.

Proposed section 9E (Part does not affect certain claims and legal proceedings)

The proposed section ensures that certain claims and legal proceedings concerning police officers are not affected by the new Part. For instance, the proposed Part will not preclude a defendant in proceedings brought by a police officer from making a police tort claim in a cross-claim against the officer. Also, the proposed section makes it clear that the new Part does not preclude the making of claims against police officers for torts committed by them in a personal capacity.

Proposed section 9F (Effect of Part on other laws)

The proposed section provides that the new Part will have effect despite any other Act or law (whether written or unwritten). However, it will not affect the operation of the *Limitation Act 1969*, except as provided by proposed section 9B.

Proposed section 9G (Application of Part to pre-commencement torts)

The proposed section provides that the new Part will extend to torts allegedly committed by police officers before its commencement. Certain provisions of the proposed section will also extend to legal proceedings to which the Crown is a party concerning such torts, but only if they are pending (but no hearing on the merits has yet begun) on that commencement. The provisions to be applied to such pending proceedings will enable the striking out or dismissal of claims against police officers where the Crown concedes vicarious liability and prevent the joinder of police officers to proceedings against the Crown for their alleged torts unless the Crown denies vicarious liability.

Schedule 2 [2] amends section 5 of the Act to insert definitions for certain terms used in the new Part.

Schedule 2 [1], [3], [4] and [6] make amendments to the Act that are consequential on the insertion of the new Part.

Schedule 3 Amendment of Police Act 1990 No 47

Section 213 (1) of the *Police Act 1990* currently provides that a member of NSW Police is not personally liable for any injury or damage caused by any act or omission of the member in the exercise by the member in good faith of a function conferred or imposed by or under that Act or any other Act or law with respect to the protection of persons from injury or death or property from damage.

Schedule 3 [1] re-enacts section 213 of the Act to remove the limitation that the function exercised by the member of NSW Police must be with respect to the protection of persons from injury or death or property from damage for the exclusion from civil liability to apply. The re-enacted section also makes it clear that it extends to functions conferred by the unwritten common law.

The exclusion of personal liability effected by the re-enacted section does not prevent a person from suing the Crown for a tort committed by a member of NSW Police who has the benefit of the exclusion if the Crown is vicariously

liable for that tort. This results from the operation of section 10 of the *Law Reform (Vicarious Liability) Act 1983*, which provides that a statutory exemption from civil liability is to be disregarded in determining whether a person is vicariously liable for the tort of a person who has the benefit of the exemption.

Schedule 3 [2] amends Schedule 4 to the Act to enable the making of savings and transitional regulations consequent on the enactment of the proposed amendments to the Act.

Schedule 3 [3] inserts a new Part in Schedule 4 to the Act to make it clear that the re-enacted section 213 extends to acts or omissions done, or omitted to be done, before its commencement. However, it does not extend to proceedings initiated before that commencement.