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Civil Liability Amendment (Offender Damages) Bill 2007

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CIVIL LIABILITY AMENDMENT (OFFENDER DAMAGES) BILL 2007

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Bill introduced, and read a first time and ordered to be printed on motion by Mr John Hatzistergos.

Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, and Minister for Justice) [4.32 p.m.]: I move:

That this bill be now read a second time.

The object of the Civil Liability Amendment (Offender Damages) Bill 2007 is to amend the Civil Liability Act 2002 to make a number of amendments to part 2A of that Act, which makes special provision for offenders in custody. Last year the Government made amendments to this Act, among others, when it introduced the Crimes and Courts Legislation Amendment Act 2006. The second reading speech to that bill noted that these amendments arose from the Supreme Court case of *Bujdoso v State of New South Wales*, and that the amendments would be expected to overturn that decision.

The Court of Appeal judgment in *Bujdoso* found that one of the limbs of the Supreme Court judgment, relating to section 3B of the Act, was erroneous, but decided the matter in favour of *Bujdoso* on reasoning that was outside the scope of the other amendments to section 26A. A subsequent matter, *State of New South Wales v Napier Keen Pty Ltd*, was decided based on the Court of Appeal decision in *Bujdoso*. The offender damages trust fund provisions of the Civil Liability Act 2002 were inserted in 2005 to introduce a scheme to quarantine awards of damages and compensation made by a court to offenders, into a trust fund, thereby enabling victims to lodge claims against them in the knowledge that the offender would not be able to dissipate the award of damages in order to avoid a claim.

The Act that introduced these provisions, the Civil Liability Amendment (Offender Damages Trust Fund) Act 2005 contained savings and transitional provisions for the amendments to apply to all awards of offender damages that had not been satisfied before the commencement of the amendments—which commenced upon assent on 29 October 2005—including awards in respect of proceedings commenced and causes of action that arose before the commencement of the amendments, and regardless of whether the litigation that led to the award of damages was conducted under the Civil Liability Act 2002 or at common law. The second reading speech to the Civil Liability Amendment (Offender Damages Trust Fund) Bill 2005 noted that, "This bill introduces a Government initiative that is the first of its kind in Australia." It is evident that the initiative has provided courts with scenarios that are the first of their kind in Australia, and some subsequent court decisions have failed to adhere to the intention of the amendments as advised to Parliament in the second reading speech.

This present bill seeks to make it unquestionably clear that the provisions of division 6 of part 2A of the Act apply to all awards of personal injury damages to offenders, without exception, from the date of assent. Division 6 provides for offender damages trust funds, while part 2A makes special provisions for offenders in custody. For the purposes of division 6 of Part 2A of the Civil Liability Act 2002, the bill also clarifies when proceedings are finally determined so that the clock may begin to run on the period when damages awarded to an offender may be held in a trust fund, to enable a victim of the offender to begin a victim claim against the offender, if the victim so chooses. I now turn to the detail of the bill.

Section 26A of the Act, which defines terms used in part 2A, is amended to include definitions of "injury" and "personal injury damages". Although these terms are currently defined in another part of the Act, the inclusion of definitions of these terms within part 2A makes it clear that the limitations on the operation of that other part do not also extend to these terms when used in part 2A. Amendments to section 26M and 26R and new clause 1A of schedule 1 are intended to make it clear, for the purposes of part 2A and the savings and transitional provisions of the Act, that proceedings are not finally determined until any period for bringing an appeal has expired and any pending appeal has been disposed of. Two of the judges in *Bujdoso* criticised the existing expressions of "any final determination of legal proceedings" in division 6 of part 2A of the Act.

The intention of the 2005 legislation was that "final determination of legal proceedings" referred to the legal proceedings between the parties that finally determine the issue of negligence and the amount of damages. One

Court of Appeal judge held, however, that the "final determination of legal proceedings" occurred when the Supreme Court determined the most recent of all proceedings which led to the appeal before the Court of Appeal: the proceedings that concerned what was to happen to the damages awarded upon the determination of negligence. It is only upon final determination of legal proceedings between the parties, when a court judgment is given and damages are awarded, that the offender damages trust fund provisions may be invoked. If there are any subsequent proceedings pending between the parties whereby liability or quantum of damages are challenged—such as an appeal—then the proceedings between the parties are not finally determined to enable invocation of the offender damages trust fund provisions, notwithstanding the recognition in case law that judgments are final and determinations of the rights of the parties, even though there may be a right of appeal, are not interlocutory determinations pending the exercise of the right of appeal.

Legal challenges to the application of the offender damages trust fund provisions—that is, questions about what happens to the damages that have already been finally determined, or whether an offender is subject to those provisions—are separate proceedings that do not finally dispose of the rights of the parties between each other since that disposition has already occurred. The Bujdoso matter in the Supreme Court and the Court of Appeal was such a matter: liability and quantum of damages had previously been finally determined in the District Court and the new proceedings concerned Bujdoso's challenge to being subject to the offender damages trust fund provisions.

Therefore, this bill replaces existing clauses 25 (5) and 26 (4) of schedule 1 of the Act with new more specific clauses to clarify the operation of the transitional provisions relating to the 2006 amendments to the Act dealing with offender damages trust fund provisions so that it will be absolutely clear that the amendments extend to cases in which offender damages were awarded before the commencement of the amendments.

New section 26D (3A) makes it clear that a dispute about whether the degree of permanent impairment of an injured offender is at least 15 per cent—which is the threshold for an award of offender damages—cannot be referred for medical assessment unless the offender has provided a medical practitioner's report that assesses permanent impairment to be at least 15 per cent. The need for this amendment has been highlighted by the Supreme Court case of *Hiron v State of New South Wales*. In this matter, the offender submitted medical evidence that did not contain an assessment of whole-person impairment in satisfaction of section 25C of the Act. The Government provided medical evidence including an assessment below the 15 per cent threshold.

The offender contended that the Government's medical evidence was incorrect, that this contention constituted a medical dispute, and that he was therefore entitled to an assessment by an approved medical specialist. The court found for the offender, holding that the definition of "medical dispute" contemplates a dispute between the parties, and not a dispute between medical practitioners, about a specified matter or a question about any of them—these matters being of a medical nature—and that there was therefore a medical dispute in this matter.

In fact, the WorkCover Guidelines—which are incorporated into part 2A of the Civil Liability Act 2002 by section 26D—contemplate that an assessment of permanent impairment is to be exercised by a medical professional and not to be as asserted by a litigant or legal practitioner unsupported by medical evidence. Any party needs to provide medical evidence in support of whatever contention the party proffers. On a proper construction of the guidelines, in order for there to be a medical dispute, there needs to be competing medical reports.

The ramifications of the Hiron decision are that, without the amendments proposed in this bill, offenders and their solicitors could file process seeking damages for personal injury, cause the Government to expend significant legal and medical costs in investigating the claim, both medically and on the issue of liability, not serve any medical evidence, and then simply apply for the Workers Compensation Commission to determine the threshold question of whether the 15 per cent whole-person impairment threshold has been reached. If the assessment were determined in the Government's favour, the Government would have little prospect of recouping costs expended in relation to work done in investigating the claim, since most offender plaintiffs are impecunious. Costs incurred can be quite substantial. For that reason I commend the provision. I also commend the bill to the House.

Debate adjourned on motion by the Hon. John Ajaka and set down as an order of the day for a future day.

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