

Civil Liability Legislation Amendment Bill 2008

Explanatory note

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

Overview of Bill

The object of this Bill is to amend the *Civil Liability Act 2002* (**the Act**) as follows:

- (a) to require a person who may have a claim for damages against a **protected defendant** (the Department of Corrective Services and certain other public sector defendants) in respect of an injury to an offender in custody:
 - (i) to notify the protected defendant within 6 months of the incident that gives rise to the claim, and
 - (ii) to provide certain information about the incident to the protected defendant,
- (b) to provide that Part 2A of the Act (Special provisions for offenders in custody) extends to a claim in relation to a tort for which the protected defendant is vicariously liable,
- (c) to make it clear that the general limitation on the Act's application to intentional acts does not interfere with the operation of Part 2A (in particular the operation of that Part in respect of victim claims that involve intentional acts),
- (d) to make changes to the system under which a victim of an offender can make a claim against damages awarded to the offender against a protected defendant, including:
 - increasing the period within which a victim can make such a claim from 6 months from the date the offender was awarded damages to 12 months from that date, and
 - (ii) authorising the Commissioner of Police to provide information to the protected defendant about persons who may have a victim claim against the offender, and replacing the requirement that the protected defendant must notify victims within 28 days after damages are awarded to the offender with a requirement that the notification be given as far as practicable within 28 days (so as to facilitate the notification of victims who are identified outside the 28-day period), and
 - providing that offender damages are to be held in trust by the Public Trustee (rather than the protected defendant),
- (e) other minor and miscellaneous amendments.

The Bill also amends the *Civil Liability Act 2002*, the *Motor Accidents Act 1988* and the *Motor Accidents Compensation Act 1999* to make it clear that damages are to be awarded for gratuitous attendant care services only if the services are provided (or to be provided) for at least 6 hours per week and for at least 6 consecutive months. The amendment overcomes the effect of the Court of Appeal decision in *Harrison v Melhem* [2008] NSWCA 67.

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 *Civil Liability Act 2002* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the Acts set out in Schedule 2.

Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of Civil Liability Act 2002

Offender damages claims

Schedule 1 [6] inserts new provisions into the Act in relation to claims for damages against a protected defendant in respect of injuries received by a person while the person was an offender in custody.

The amendments require the claimant to notify the protected defendant in writing of an incident that may give rise to a damages claim within 6 months of the incident. The written notice must specify the date of the incident, describe the incident and state that the incident may give rise to a claim against the protected defendant. The protected defendant will be entitled to request certain information and documents from the claimant that will enable the protected defendant to assess the merits of the claim and any liability and make a settlement offer where appropriate. The claimant must comply with any reasonable request.

However, an offender is not required to comply with such a request for information if the offender is considered a **vulnerable offender**. An offender is considered a vulnerable offender if the offender has a reasonable apprehension that his or her safety will be put at risk if he or she notifies the protected defendant or complies with the request for information, and has applied to be placed in protective custody or transferred to another correctional facility. Once the offender has been either placed in protective custody or transferred, or if the offender's application is rejected or the offender declines to be placed in protective custody or transferred, the offender ceases to be considered a vulnerable offender and must comply with the protected defendant's request for information. A protected defendant against whom court proceedings for offender damages have been commenced will be able to apply to the court to have the proceedings dismissed on the basis that the claimant has not complied with the new requirements. Such an application must be made within 2 months of the statement of claim being served on the protective defendant. The court must dismiss the proceedings unless the claimant has a satisfactory explanation for his or her non-compliance with the requirements. The amendments do not apply to a claim for damages if the incident giving rise to the claim occurred before the commencement of the amendments.

Victim claims against damages awarded to offenders

Currently, a protected defendant holds any personal injury damages awarded to an offender in trust (in a **victim trust fund**) and the Public Trustee holds that money on behalf of the protected defendant. **Schedule 1 [7]** provides that the Public Trustee itself will hold the damages in trust in a victim trust fund. **Schedule 1 [15]–[21]** make consequential amendments.

Schedule 1 [8] makes it clear that while offender damages are held in a victim trust fund, the liability of a protected defendant to pay those damages is suspended.

Schedule 1 [9] extends the period during which a victim can commence proceedings against an offender in respect of damages held in a victim trust fund from 6 months from the date the damages were awarded to the offender to 12 months from that date. At present, the protected defendant must notify each person who may have a claim against an offender in respect of damages held in a victim trust fund and must do this within 28 days after the award of damages.

Schedule 1 [10] removes the requirement to notify within 28 days and **Schedule 1 [12]** requires that the notification be sent as far as practicable within 28 days (without preventing persons from being notified outside that period).

Schedule 1 [14] authorises the Commissioner of Police to provide to the protected defendant information that the protected defendant may reasonably require to determine whether a person has a victim claim against an offender and to identify and contact any such victim.

Schedule 1 [11] and [13] make consequential amendments. The amendments relating to victim claims extend to a victim claim that arose before the commencement of the amendments.

Application of Part 2A (Special provisions for offenders in custody)

Schedule 1 [1] makes it clear that the general limitation on the Act's application to intentional acts does not interfere with the specific operation of Part 2A of the Act. This will remove any doubt about the operation of that Part in respect of victim claims (which involve intentional acts by the offender).

Schedule 1 [5] provides that Part 2A of the Act extends to awards of damages against a protected defendant in respect of the death of or personal injury to an offender in custody when the award is based on the vicarious liability of the protected defendant for the tort of some other person. Currently the Part is limited to claims arising from the negligence of the protected defendant.

Damages for gratuitous attendant care services

Schedule 1 [2] amends the Act in relation to damages for gratuitous attendant care services to make it clear that such damages are to be awarded only if the services are provided (or to be provided) for at least 6 hours per week and for at least 6 consecutive months. The amendment extends to liabilities that arose before the commencement of the amendment but does not apply to proceedings determined before that commencement.

Miscellaneous

The Act currently provides that an amount of damages determined under the Act is to be rounded to the nearest \$500. **Schedule 1 [3] and [4]** clarify that an amount of \$250 or \$750 is to be rounded up.

Savings and transitional provisions

Schedule 1 [22] provides for the making of savings and transitional regulations consequent on the enactment of the proposed Act.

Schedule 1 [23] inserts savings and transitional provisions consequent on the amendments.

Schedule 2 Amendment of other Acts

Schedule 2.1 [1] and 2.2 [1] amend the *Motor Accidents Act 1988* and the *Motor Accidents Compensation Act 1999* in relation to damages for gratuitous attendant care services to make it clear that such damages are to be awarded only if the services are provided (or to be provided) for at least 6 hours per week and for at least 6 consecutive months.

Schedule 2.1 [2] and [3], and 2.2 [2] and [3] provide for the making of savings and transitional regulations consequent on the amendments and provide that the amendments extend to liabilities that arose before the commencement of the amendments but do not apply to proceedings that were determined before that commencement.