

Civil Liability Amendment 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 *Civil Liability Act 2002*:

(i) to preclude a person from recovering damages for non-economic loss and certain kinds of economic loss if the person's losses result from conduct of the person that would have constituted a serious offence if the person had not been suffering from a mental illness at the time of the conduct, and

(ii) to preclude the recovery of damages for the costs of rearing or maintaining a child, or for lost earnings while rearing or maintaining a child, in proceedings where there is civil liability for the birth of a child, and

(iii) to confine further the circumstances in which a public or other authority or a public official is liable for damages in respect of the exercise of public functions, and

(iv) to exclude the civil liability of a person who acts in self-defence if it is in response to conduct of another person that would have been unlawful if that other person had not been suffering from a mental illness, and

(v) to confirm that any provision of the Act that excludes or limits the civil liability of a person for a tort also operates to exclude or limit the vicarious liability of another person for that tort, and

(vi) to make further provision with respect to proportionate liability, and

(b) to amend the *Mental Health Act 1990* to provide that a police officer or health care professional who, in good faith, exercises a function that is conferred or imposed on that person by or under that Act is excluded from personal civil liability for the exercise of that function.

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 Schedules 1–3.

Clause 4 is a formal provision that gives effect to the amendment to the *Mental Health Act 1990* set out in Schedule 4.

Schedule 1 Amendments to Civil Liability Act 2002 concerning public authorities, criminals, mentally ill persons and childbirth

Schedule 1 [1] amends the definition of **public or other authority** in Part 5 (Liability of public and other authorities) of the *Civil Liability Act 2002* to include any person having public official functions or acting in a public official capacity (whether or not employed as a public official), but only in relation to the exercise of the person's public official functions. The amended definition will include, for example, a medical practitioner who is authorised to detain mentally ill persons under the *Mental Health Act 1990*.

Schedule 1 [2] inserts a new section 43A in the Act to provide that the exercise of, or the failure to exercise, a special statutory power by a public or other authority does not give rise to civil liability unless the conduct was in the circumstances so unreasonable that no authority having the special statutory

powers of the authority in question could properly consider the conduct to be a reasonable exercise of its powers. A **special statutory power** is a power that is conferred by or under a statute and that is of a kind that persons generally are not authorised to exercise without specific statutory authority.

Schedule 1 [3] amends section 52 of the Act to provide that self-defence in response to the conduct of another person that would have been unlawful if that other person had not been suffering from a mental illness at the time may operate as a defence to a civil action.

Schedule 1 [4] amends section 54 of the Act to clarify the circumstances in which the conduct of a criminal will preclude the criminal from recovering damages for that conduct.

Currently, section 54 provides that a court cannot award damages if the person whose death, injury or damage is the subject of the proceedings was, at the time of the incident that resulted in death, injury or damage, engaged in conduct that (on the balance of probabilities) constitutes a serious offence and that conduct contributed materially to the risk of death, injury or damage.

Section 54 (as amended) will preclude a court from awarding damages if:

- (a) the death of, or the injury or damage to, the person that is the subject of the proceedings occurred at the time of, or following, conduct of that person that, on the balance of probabilities, constitutes a serious offence, and
- (b) that conduct contributed materially to the death, injury or damage or to the risk of death, injury or damage.

Schedule 1 [5] inserts a new section 54A in the Act to limit the damages that may be awarded in respect of civil liability that arises out of the death of, or injury or damage to, a person where:

- (a) that death, injury or damage occurred at the time of, or following, conduct of the person that, on the balance of probabilities, would have constituted a serious offence if the person had not been suffering from a mental illness at the time of the conduct, and
- (b) that conduct contributed materially to the death, injury or damage or to the risk of death, injury or damage.

The new section generally precludes such a person from recovering damages for non-economic loss. It also generally precludes such a person from recovering damages for economic loss for loss of earnings.

Schedule 1 [6] inserts a new Part 11 in the Act to prevent, in cases where there is civil liability for the birth of a child, the recovery of damages for the costs associated with rearing or maintaining the child or for loss of earnings while rearing or maintaining the child. The new Part abrogates the right to recover damages for rearing and maintaining a child that was recently confirmed by the High Court of Australia in *Cattanach v Melchior* [2003] HCA 38 (16 July 2003). However, the new provisions will not affect civil liability for any personal injury sustained by a child pre-natally or during birth as a result of the conduct of another person. Also, the new provisions will not preclude the recovery of any additional costs associated with rearing or maintaining a child with a disability that arise because of the disability.

Schedule 2 Amendments to Civil Liability Act 2002 concerning proportionate liability

Schedule 1 [5] to the *Civil Liability Amendment (Personal Responsibility) Act 2002* is to insert a new Part 4 (Proportionate liability) in the *Civil Liability Act 2002*. Schedule 1 [5] has not been commenced to the extent that it inserts Part 4.

Schedule 2 makes amendments to proposed Part 4 as part of the process of refining the operation of the proportionate liability provisions currently being undertaken by the States, the Territories and the Commonwealth.

Schedule 2 [1] amends proposed section 34 of the *Civil Liability Act 2002* to

redefine the concept of an apportionable claim for the purposes of proposed Part 4. The new rules for determining the proportionate liability of concurrent wrongdoers will only apply to apportionable claims. An **apportionable claim** will be:

(a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, or

(b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of section 42 of that Act.

Schedule 2 [3] makes a consequential amendment to proposed section 34.

Schedule 2 [2] amends proposed section 34 of the Act to provide that there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action.

Schedule 2 [4] makes a minor amendment to the definition of **concurrent wrongdoer** in proposed section 34 of the Act to confirm that persons may be concurrent wrongdoers even if they acted in concert to cause the damage or loss that is the subject of an apportionable claim.

Schedule 2 [6] inserts a new section 34A to make it clear that certain concurrent wrongdoers in proceedings involving an apportionable claim will not have their liability limited by the new apportionment provisions. The concurrent wrongdoers who will be excluded are:

(a) concurrent wrongdoers who intended to cause the economic loss or damage to property that is the subject of the claim, and

(b) concurrent wrongdoers who fraudulently caused the economic loss or damage to property that is the subject of the claim, and

(c) concurrent wrongdoers whose civil liability was otherwise of a kind excluded from the operation of proposed Part 4 by section 3B.

The new section will ensure that such excluded concurrent wrongdoers will have their liability determined in accordance with any relevant legal rules (apart from those in proposed Part 4). However, the liability of any other non-excluded concurrent wrongdoer will continue to be limited by the apportionment provisions. **Schedule 2 [5]** makes a consequential amendment to proposed section 34.

Schedule 2 [7] inserts a new section 35A in the Act to enable a court to award costs against a defendant in proceedings involving proportionate liability if the defendant fails to notify the plaintiff of the identity of any other concurrent wrongdoers of which the defendant ought to be aware and as a result causes the plaintiff to incur unnecessary costs.

Schedule 3 Other amendments to Civil Liability

Act 2002

Schedule 3 [1] inserts a new section 3C in the *Civil Liability Act 2002* to confirm that any provision of the Act that excludes or limits the civil liability of a person for a tort also operates to exclude or limit the vicarious liability of another person for that tort.

Schedule 3 [2]–[4] make consequential amendments to Part 5 of the Act to maintain consistency of terminology with proposed section 43A to be inserted by Schedule 1 to the proposed Act.

Schedule 3 [5] amends Schedule 1 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 [6] inserts transitional provisions in Schedule 1 to the Act consequential on the enactment of the amendments made by Schedules 1 and 2

to the proposed Act.

In particular, the amendments made by Schedule 2 to the proposed Act relating to proportionate liability will extend to liability arising before the commencement of proposed Part 4 of the *Civil Liability Act 2002* (as amended by the proposed Act), but not to any proceedings commenced before that commencement.

Parts 5 (Liability of public and other authorities) and 7 (Self-defence and recovery by criminals), as amended by the proposed Act, will apply to civil liability whether arising before or after 13 November 2003. The amended Parts will also apply to proceedings commenced before that date. However, those amended Parts will not apply in respect of any decision made by a court before the commencement of the amendments or to any proceedings to which Parts 5 and 7 did not apply immediately before the commencement of those amendments.

Part 11 (as inserted by the proposed Act), which deals with damages for the birth of a child, will apply to civil liability whether arising before or after 13 November 2003, but not to any proceedings commenced before that date.

Schedule 4 Amendment of Mental Health Act 1990

Schedule 4 substitutes section 294 of the *Mental Health Act 1990* to provide that any police officer or health care professional who, in good faith, exercises a function that is conferred or imposed on that person by or under the Act is not personally liable for any injury or damage caused by the exercise of that function.