

Introduced by the Hon E B Nile, MLC

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New South Wales

Sexual Offence Damages Bill 1995

Explanatory note

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

Overview of Bill

The object of this Bill is to allow the recovery of damages in respect of the death of or injury to a person resulting from or arising out of an act constituting a sexual offence (such as rape) from persons who produce, distribute, exhibit, broadcast, disseminate or sell pornographic material which motivated the offender to commit the offence.

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 3 months after assent, unless commenced sooner by proclamation.

Clause 3 defines the term *offensive sexual material* to mean material (including books, magazines and films) which depicts or describes sexual behaviour and which is obscene, or depicts a child in an offensive way or depicts a person being subjected to violence in a sexual context. Clause 3 also defines *sexual offence* to mean a prescribed sexual offence under the *Crimes Act 1900* (such as sexual assault) and any violent offence committed at or about the time of that offence. This will include the offence which used to be known as rape in New South Wales but which is now dealt with by New South Wales law as a form of sexual assault.

Clause 4 provides that an action may be brought against a person responsible for offensive sexual material for damages in respect of the death of or injury to a person caused by or arising out of an act constituting a sexual offence which was caused by the offensive sexual material. In such an action the person responsible is liable as if that person had committed the offence. Accordingly, the damages recoverable from the person responsible are the same as would be recoverable in an action against the person who committed the offence (such as damages for pain and suffering and economic loss). The person responsible for the offensive sexual material has a defence if he or she can prove that he or she did not foresee and could not reasonably be expected to have foreseen that the material would cause the offence.

Clause 5 provides that a "person responsible" for offensive sexual material is a person who, in the course of business, produced or distributed the material or exhibited, broadcast, disseminated or sold the material to the person who did the act constituting the sexual offence.

Clause 6 provides that offensive sexual material is considered to have caused an offence if the person who did the act constituting the offence was exposed to the material and it motivated the person to commit the offence.

Clause 7 provides that a claim under the proposed Act may be made even if the person who committed the sexual offence cannot be identified or found, or is dead, and whether or not criminal proceedings have been taken or proven in respect of the offence.

Sexual Offence Damages Bill 1995

Explanatory note

Clause 8 sets out certain types of evidence (including expert opinion) which may be admitted as evidence that the offensive sexual material caused the act constituting a sexual offence.

Clause 9 makes it clear that the standard of proof in proceedings under the proposed Act is proof on the balance of probabilities.

Clause 10 provides that each director and person concerned in the management of a corporation which is the subject of a liability under the proposed Act is subject to the same liability (jointly and severally with the corporation) unless that person can prove the offensive sexual material concerned was produced, distributed, exhibited, broadcast, disseminated or sold without his or her knowledge or consent.

Clause 11 allows the award of exemplary (punitive) damages in a case where the victim of the sexual offence has died before the proceedings are taken.

Clause 12 provides for a 6 year limitation period on an action commenced under the proposed Act. A court has discretion under the *Limitation Act 1969* to extend the limitation period.

Clause 13 makes it clear that a person can be liable under the proposed Act only in respect of something done after the commencement of the proposed Act. It also provides that a person can be liable under the proposed Act in respect of offensive sexual material distributed, exhibited, broadcast, disseminated or sold after the commencement of the proposed Act even if the material was produced before that commencement.



New South Wales

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Contents

	Page
1 Name of Act	2
2 Commencement	2
3 Definitions	2
4 Right of action against persons responsible for offensive sexual material	3
5 Who is person responsible for material	3
6 When is material considered to have caused an offence	3
7 Claim can proceed without offender or criminal proceedings	3
8 Evidence	4
9 Proof on balance of probabilities	4
10 Liability of directors etc of corporations	4
11 Exemplary damages may be awarded	4
12 6 year limitation period for claim	5
13 Transitional	5



New South Wales

Sexual Offence Damages Bill 1995

No. , 1995

A Bill for

An Act to provide for the recovery of damages in respect of the death of or injury to a person resulting from rape or other sexual offence from persons who produce, distribute, exhibit or sell offensive sexual material which motivates the offender to commit the offence.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Sexual Offence Damages Act 1995*.

2 Commencement

This Act commences 3 months after the date of assent, unless 5
commenced sooner by proclamation.

3 Definitions

In this Act:

film includes film and computer games as defined in the *Film 10
and Computer Game Classification Act 1984* and video games.

offensive sexual material means any printed or pictorial matter
or a film that describes or depicts sexual behaviour and:

- (a) is obscene, or
- (b) depicts a person (whether or not engaged in sexual activity 15
or otherwise) who is, or who is apparently, a person who
has not attained the age of 16 years in a manner that is
likely to cause offence to a reasonable adult, or
- (c) depicts a person being subjected to violence in a sexual
context.

sexual offence means: 20

- (a) a prescribed sexual offence within the meaning of the
Crimes Act 1900 (which includes the offence formerly
known as rape), and
- (b) any other offence involving violence (such as murder) 25
committed against the victim of an offence referred to in
paragraph (a) at or about the time of the commission of
that offence.

4 Right of action against persons responsible for offensive sexual material

- (1) An action may be brought against a person who is responsible for offensive sexual material for the recovery of damages in respect of the death of or injury to a person caused by or arising out of any act that constitutes a sexual offence which was caused by the offensive sexual material concerned. 5
- (2) In respect of such an action, the person responsible for the offensive sexual material is liable as if that person were the person who did an act that constitutes the sexual offence. 10
- (3) A person responsible for offensive sexual material is not liable as referred to in this section if the person proves that he or she did not foresee and could not reasonably be expected to have foreseen that the material concerned would cause the sexual offence concerned. 15

5 Who is person responsible for material

A person is considered to be responsible for offensive sexual material that caused an offence if in the course of business the person:

- (a) produced or distributed the material, or 20
- (b) exhibited, broadcast, disseminated or sold the material to the person who did the act that constitutes the offence.

6 When is material considered to have caused an offence

Offensive sexual material is considered to have caused an offence if the person who did an act that constitutes the offence was exposed to the material and the material motivated the person to do the act. 25

7 Claim can proceed without offender or criminal proceedings

An action may be brought under this Act even if the person who did the act that constitutes the sexual offence concerned cannot be identified or found or is dead and whether or not criminal proceedings have been taken or proven in respect of the sexual offence. 30

8 Evidence

In any proceedings on a cause of action arising under this Act:

- (a) the opinion of an expert as to whether or not exposure to offensive sexual material caused a person to do an act is admissible in evidence, and 5
- (b) any testimony given by a person in criminal proceedings against the person in respect of an offence with which the proceedings are concerned is admissible as evidence of what caused the person to do an act that constitutes the offence, but only if the defendant has an opportunity to cross-examine the person as to that testimony, and 10
- (c) evidence of similarities between an activity depicted in the offensive sexual material concerned and the acts constituting the sexual offence concerned is admissible as evidence that the material caused those acts. 15

9 Proof on balance of probabilities

To remove doubt, it is declared that the standard of proof in proceedings on an action arising under this Act is proof on the balance of probabilities.

10 Liability of directors etc of corporations

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- (1) If a corporation is subject to a liability as a result of this Act, each person who is a director of the corporation or is concerned in the management of the corporation is subject to the same liability, jointly and severally with the corporation.
- (2) This section does not apply to a person if he or she establishes that the corporation produced, distributed, exhibited, broadcast, disseminated or sold the offensive sexual material concerned without his or her knowledge or consent. 25

11 Exemplary damages may be awarded

Despite section 2 (2) (a) of the *Law Reform (Miscellaneous Provisions) Act 1944*, the damages recoverable for the benefit of the estate of a deceased person on a cause of action arising under this Act may include exemplary damages. 30

12 6 year limitation period for claim

A cause of action arising under this Act is a cause of action founded on a breach of duty for the purposes of the *Limitation Act 1969* except that:

- (a) the reference in section 18A of that Act to a limitation period of 3 years is taken to be a reference to a limitation period of 6 years, and 5
- (b) if a claim is made against, or for the benefit of, a deceased person, the reference in section 19 of that Act to a limitation period of 3 years is taken to be a reference to a limitation period of 6 years. 10

13 Transitional

- (1) A person does not incur a liability under this Act in respect of anything done by the person before the commencement of this Act. 15
- (2) This Act extends to apply in respect of the distribution, exhibition, broadcasting, dissemination and sale of offensive sexual material even if the material was produced before the commencement of this Act.