



New South Wales

# Civil Liability Amendment (Offender Damages) Bill 2004

## 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* to impose special restrictions on the damages that can be recovered by a person for personal injury resulting from the negligence of a ***protected defendant*** suffered while the person was an ***offender in custody***.

An ***offender in custody*** is a prison inmate, periodic detainee, home detainee or person performing a community service order. ***Protected defendants*** are the Crown, Government departments and public health organisations and their employees, and other persons exercising official functions with respect to offenders in custody. The Bill extends to children in detention centres and the staff of those detention centres and to children performing work under community service orders.

The special restrictions are as follows:

- (a) No damages can be awarded unless the injury results in the death of the offender or in a degree of permanent impairment of at least 15% (with degree of impairment being assessed in the same way as it is under the *Workplace Injury Management and Workers Compensation Act 1998*).
- (b) Damages for economic loss for past and future loss of earnings will be limited in the same way as those damages are limited under the *Workers Compensation Act 1987* for damages for workplace injury.
- (c) In assessing future loss of earnings, earning capacity after age 65 is to be disregarded (in line with similar provisions for damages for workplace injury).
- (d) Damages for non-economic loss are limited to the equivalent statutory workers compensation that would be payable for workplace injury.

The new restrictions will extend to existing claims unless proceedings on the claim were commenced before 15 January 2004 (being the date of the Minister's announcement of the proposed restrictions) or an award of damages has been made on the claim before the date of assent. If the claim concerns an injured child, the new restrictions will not apply if proceedings were commenced before introduction of this Bill into Parliament.

The Bill also:

- (a) enacts provisions that allow a protected defendant to withhold and deduct from the damages payable to an offender any amount payable by the offender pursuant to an order for restitution under the *Victims Support and Rehabilitation Act 1996*, and
- (b) amends the *Crimes (Administration of Sentences) Act 1999* to make it clear that the work that offenders can be ordered to perform is any work considered suitable (without the need to formally assess offenders as to the work that is suitable for their capacity), and
- (c) enacts consequential savings and transitional provisions, and
- (d) makes clarifying and consequential amendments to the *Children (Community Service Orders) Act 1987* and the *Crimes (Administration of Sentences) Act 1999*.

## 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 other Acts set out in Schedule 2.

## **Schedule 1 Amendment of Civil Liability Act 2002**

**Schedule 1 [3]** inserts a new Part 2A in the *Civil Liability Act 2002* (the *Principal Act*). The new Part imposes restrictions on the damages that can be awarded for the death of or injury to an offender in custody caused by the negligence of a protected defendant, as outlined in the Overview. The new Part will not restrict an award of damages to relatives of a deceased offender under the *Compensation to Relatives Act 1897* or an award of damages to a third person for nervous shock arising from the incident that resulted in the offender's injuries (so long as the third person was not an offender in custody at the time of the incident). Part 2 of the Principal Act already provides for limitations on damages for personal injury and the provisions of the new Part will operate in addition to the existing provisions of Part 2. **Schedule 1 [1]** provides that Part 2 of the Principal Act applies subject to the new Part. **Schedule 1 [2]** makes a consequential amendment.

**Schedule 1 [4]** amends the Schedule of savings and transitional provisions in the Principal Act to provide power to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

**Schedule 1 [5]** enacts a transitional provision that provides for new Part 2A to extend to injury or death occurring before the commencement of the amendments, but not so as to apply to proceedings commenced before 15 January 2004 or to an award of damages made before the date of assent to the proposed Act. In the case of injury or death of a person injured while a child detained in a detention centre or performing community service work, new Part 2A will not apply if proceedings on the claim were commenced before the date of introduction of this Bill.

## **Schedule 2 Amendment of other Acts**

**Schedule 2.1** amends the *Children (Community Service Orders) Act 1987* to delete a provision of that Act dealing with limits on common law damages that will be made redundant by the proposed new provisions restricting recovery of damages by offenders.

**Schedule 2.2 [1]–[4]** amend provisions of the *Crimes (Administration of Sentences) Act 1999* dealing with the work that offenders can be ordered to perform. The amendments make it clear that an offender can be ordered to perform work considered to be suitable for the offender, without the need for any

formal assessment of an offender's capabilities for work. At the same time it is made clear that an offender is not required to carry out work that the offender is not capable of carrying out.

**Schedule 2.2 [6]** amends the *Crimes (Administration of Sentences) Act 1999* to delete a provision of that Act dealing with limits on common law damages that will be made redundant by the proposed new provisions restricting recovery of damages by offenders.

**Schedule 2.2 [7]–[9]** amend the *Crimes (Administration of Sentences) Act 1999* to clarify the operation of a provision that protects certain correctional centre staff from personal liability.

**Schedule 2.2 [5]** makes a minor law revision amendment.

First print



New South Wales

# Civil Liability Amendment (Offender Damages) Bill 2004

## Contents

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	Page
1 Name of Act	2
2 Commencement	2
3 Amendment of Civil Liability Act 2002 No 22	2
4 Amendment of other Acts	2
Schedule 1 Amendment of Civil Liability Act 2002	3
Schedule 2 Amendment of other Acts	10





New South Wales

# **Civil Liability Amendment (Offender Damages) Bill 2004**

No. , 2004

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## **A Bill for**

An Act to amend the *Civil Liability Act 2002* to make special provision in connection with certain claims for damages for negligence for death or injury suffered by offenders in custody; and for other purposes.

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<b>The Legislature of New South Wales enacts:</b>	1
<b>1 Name of Act</b>	2
This Act is the <i>Civil Liability Amendment (Offender Damages) Act 2004</i> .	3 4
<b>2 Commencement</b>	5
This Act commences on a day or days to be appointed by proclamation.	6 7
<b>3 Amendment of Civil Liability Act 2002 No 22</b>	8
The <i>Civil Liability Act 2002</i> is amended as set out in Schedule 1.	9
<b>4 Amendment of other Acts</b>	10
Each Act specified in Schedule 2 is amended as set out in that Schedule.	11 12



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## Schedule 1 Amendment of Civil Liability Act 2002

(Section 3)

### [1] Section 11A Application of Part

Insert after section 11A (3):

- (4) In the case of an award of damages to which Part 2A (Special provisions for offenders in custody) applies, this Part applies subject to Part 2A.

### [2] Section 19 Third party contributions

Insert “, including any other Part of this Act” after “law” in section 19 (4).

### [3] Part 2A

Insert after Part 2:

## Part 2A Special provisions for offenders in custody

### Division 1 Preliminary

#### 26A Definitions

- (1) In this Part:

*CAS Act* means the *Crimes (Administration of Sentences) Act 1999*.

*offender in custody* or *offender* means each of the following:

- (a) an inmate within the meaning of the CAS Act, namely a person to whom Part 2 (Imprisonment by way of full-time detention) of that Act applies,
- (b) an offender within the meaning of Part 3 (Imprisonment by way of periodic detention) of the CAS Act,
- (c) an offender within the meaning of Part 4 (Imprisonment by way of home detention) of the CAS Act,
- (d) a detainee under the *Children (Detention Centres) Act 1987*,

- (e) a person performing community service work under a community service order or children's community service order, as provided by the CAS Act or the *Children (Community Service Orders) Act 1987*, whether or not the person is an offender in custody under any other paragraph of this definition, 1  
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- (f) a person in custody who is in the keeping of a correctional officer, as provided by Part 13 (Custody of persons during proceedings) of the CAS Act. 7  
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**protected defendant** means each of the following: 10

- (a) the Crown (within the meaning of the *Crown Proceedings Act 1988*) and its servants, 11  
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  - (b) a Government department and members of staff of a Government department, 13  
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  - (c) a public health organisation (within the meaning of the *Health Services Act 1997*) and members of staff of a public health organisation, 15  
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  - (d) 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, 18  
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  - (e) a management company or submanagement company (within the meaning of the CAS Act) and members of staff of such a company. 22  
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- (2) Other expressions used in this Part have the same meanings as in Part 2. 25  
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**26B Application of Part** 27

- (1) This Part applies to and in respect of an award of personal injury damages against a protected defendant in respect of: 28  
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- (a) an injury to a person received while the person was an offender in custody, or 30  
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  - (b) the death of a person resulting from or caused by an injury to the person received while the person was an offender in custody, 32  
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- being an injury caused by the negligence (that is, the failure to exercise reasonable care and skill) of a protected defendant. 35  
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- (2) This Part does not apply to:
    - (a) an award of damages pursuant to an action under the *Compensation to Relatives Act 1897*, or
    - (b) an award of damages for mental harm (within the meaning of Part 3) to a person who was not an offender in custody at the time of the incident that resulted in the mental harm.
  - (3) Part 2 is subject to this Part.
  - (4) Section 19 (Third party contributions) extends to an award of damages to which this Part applies as if that section were a provision of this Part.
  - (5) A reference in Divisions 2–5 to an offender includes a reference to a person who, subsequent to the injury concerned, ceases to be an offender.

**Division 2      Damages subject to 15% permanent impairment threshold**

**26C      No damages unless permanent impairment of at least 15%**

No damages may be awarded (whether for economic or non-economic loss) unless the injury results in the death of the offender or in a degree of permanent impairment of the offender that is at least 15%.

**26D      Assessment of permanent impairment using WorkCover Guidelines**

- (1) The degree of permanent impairment that results from an injury is to be assessed as provided by this Part and Part 7 (Medical assessment) of Chapter 7 of the *Workplace Injury Management and Workers Compensation Act 1998* (the **1998 WC Act**).
- (2) Part 7 of Chapter 7 of the 1998 WC Act extends to an assessment of degree of permanent impairment for the purposes of this Part and for that purpose applies as if:
  - (a) an assessment under this Part were an assessment under and for the purposes of that Part of the 1998 WC Act, and
  - (b) a reference in that Part of the 1998 WC Act to a worker were a reference to an offender, and

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- (c) a reference in that Part of the 1998 WC Act to a worker's employer were a reference to the Crown. 1  
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- (3) If there is a dispute about the degree of permanent impairment of an injured offender, a court may not award damages unless the degree of permanent impairment has been assessed by an approved medical specialist in accordance with the 1998 WC Act. 3  
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- (4) A court may, at any stage in proceedings on a claim for damages, refer the matter for assessment of the degree of permanent impairment by an approved medical specialist in accordance with the 1998 WC Act. 8  
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- (5) Section 151H (No damages unless permanent impairment of at least 15%) of the *Workers Compensation Act 1987* applies for the purposes of an assessment under this Part of whether the degree of permanent impairment resulting from an injury is at least 15%. 12  
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**Division 3 Damages for economic loss** 17

**26E Damages for past or future loss of earnings** 18

- (1) This section applies to an award of damages: 19
- (a) for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity, or 20  
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- (b) for future economic loss due to the deprivation or impairment of earning capacity. 22  
23
- (2) In awarding damages, the court is to disregard the amount (if any) by which the injured or deceased offender's net weekly earnings would (but for the injury or death) have exceeded the amount that is the maximum amount of weekly payments of compensation under section 35 of the *Workers Compensation Act 1987* (even though that maximum amount under that section is a maximum gross earnings amount). 24  
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- (3) The maximum amount of weekly payments of compensation under section 35 of the *Workers Compensation Act 1987* for a future period is to be the amount that the court considers is likely to be the amount for that period having regard to the operation of Division 6 (Indexation of amounts of benefits) of Part 3 of that Act. 31  
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<b>26F</b>	<b>Retirement age</b>	1
	In awarding damages for future economic loss due to deprivation or impairment of earning capacity, the court is to disregard any earning capacity of the injured offender after age 65.	2 3 4 5
<b>26G</b>	<b>Future economic loss—assumption about release on parole</b>	6
	In making an assessment for the purposes of an award for future economic loss about future earning capacity or other events on which an award is to be based in respect of an offender eligible for release on parole, a court is to assume that the offender is likely to be released when the offender becomes eligible for release on parole.	7 8 9 10 11 12
<b>Division 4</b>	<b>Damages for non-economic loss</b>	13
<b>26H</b>	<b>Restriction on damages for non-economic loss</b>	14
	A court is not to award damages for non-economic loss except as permitted by this Division.	15 16
<b>26I</b>	<b>Non-economic loss damages limited to workers compensation amount</b>	17 18
(1)	A court may award damages for non-economic loss up to a maximum of the total amount to which a worker would be entitled as compensation under Division 4 (Compensation for non-economic loss) of Part 3 of the <i>Workers Compensation Act 1987</i> if the worker had received an injury that entitled the worker to compensation under that Act and that resulted in a degree of permanent impairment that is the same as the offender’s degree of permanent impairment.	19 20 21 22 23 24 25 26
(2)	When determining the amount to which a worker would be entitled as compensation under a provision of the <i>Workers Compensation Act 1987</i> , the amount is to be determined under the provision as it was in force when the injury to the offender was received.	27 28 29 30 31

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**Division 5 Victims support payments owed by offender**

**26J Authority for deduction from damages**

- (1) A protected defendant who is liable to pay damages to an offender pursuant to an award to which this Part applies is entitled to deduct from those damages the amount of any victim support payment required to be paid by the offender.
- (2) A *victim support payment* is an amount ordered to be paid by the offender by an order for restitution under Division 8 of Part 2 of the *Victims Support and Rehabilitation Act 1996*.
- (3) In the case of an amount ordered to be paid by the offender pursuant to a provisional order for restitution under Division 8 of Part 2 of the *Victims Support and Rehabilitation Act 1996*, the protected defendant may (while the provisional order is pending) withhold that amount from the damages payable to the offender.
- (4) The protected defendant is to pay an amount deducted under this section to the person to whom the order for restitution requires payment be made.
- (5) Payment made by a protected defendant pursuant to this section is, to the extent of the amount paid, taken to be a payment to the offender in satisfaction of the obligation to pay the damages concerned.

**[4] Schedule 1 Savings and transitional provisions**

Insert at the end of clause 1 (1):

*Civil Liability Amendment (Offender Damages) Act 2004*

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<b>[5] Schedule 1</b>	1
Insert at the end of the Schedule:	2
<b>Part 5 Provisions consequent on enactment of Civil Liability Amendment (Offender Damages) Act 2004</b>	3
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<b>16 Application of offender damages provisions to existing injuries and pending claims</b>	6
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(1) Part 2A of this Act extends to an award of personal injury damages that relates to an injury received, or to a death resulting from an injury received, whether before or after the commencement of that Part.	8
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(2) However, Part 2A of this Act does not apply to or in respect of:	12
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(a) an award of damages in proceedings commenced in a court before 15 January 2004, or	14
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<b>Note.</b> 15 January 2004 is the date of the Minister's announcement of the proposal to enact Part 2A.	16
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(b) an award of damages in proceedings commenced in a court before the date of introduction into Parliament of the Bill for the <i>Civil Liability Amendment (Offender Damages) Act 2004</i> if the award is in respect of an injury (or death resulting from an injury) to a person received while the person was a detainee under the <i>Children (Detention Centres) Act 1987</i> or while performing community service work under a children's community service order as provided by the <i>Children (Community Service Orders) Act 1987</i> , or	18
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(c) an award of damages, or settlement or consent order in respect of damages, made before the date of assent to the <i>Civil Liability Amendment (Offender Damages) Act 2004</i> .	28
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<b>Schedule 2 Amendment of other Acts</b>	1
(Section 4)	2
<b>2.1 Children (Community Service Orders) Act 1987 No 56</b>	3
<b>Section 26E Limits to common law damages for injury to offender</b>	4
Omit the section.	5
<b>2.2 Crimes (Administration of Sentences) Act 1999 No 93</b>	6
<b>[1] Section 6 Work performed by inmates</b>	7
Omit “carry out work suitable to the inmate’s capacity” from section 6 (1).	8
Insert instead “carry out such work as the governor considers suitable”.	9
<b>[2] Section 6 (3)</b>	10
Insert after section 6 (2):	11
(3) An inmate is not required to carry out work that the inmate is not capable of carrying out.	12 13
<b>[3] Section 84 Participation in activity or work</b>	14
Omit “carry out community service work suitable to the offender’s capacity” from section 84 (1) (b).	15 16
Insert instead “carry out such community service work as the Commissioner considers suitable”.	17 18
<b>[4] Section 84 (1A)</b>	19
Insert after section 84 (1):	20
(1A) An offender is not required to carry out community service work that the offender is not capable of carrying out.	21 22
<b>[5] Section 120 Act or omission of offender performing community service work</b>	23 24
Omit “towards any person” from section 120 (1).	25
Insert instead “on the part of any person”.	26
<b>[6] Section 122 Limits to common law damages for injury to offender</b>	27
Omit the section.	28



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<b>[7] Section 263 Exclusion of personal liability</b>	1
Omit section 263 (1) (c). Insert instead:	2
(c) by a correctional officer or by any other person on	3
whom functions are conferred or imposed by or under	4
this Act, or	5
<b>[8] Section 263 (1)</b>	6
Omit “execution of this Act or any other Act”.	7
Insert instead “execution of this Act or of any other Act that confers or	8
imposes any functions on a correctional officer”.	9
<b>[9] Section 263 (3)</b>	10
Insert after section 263 (2):	11
(3) In this section:	12
<i>correctional officer</i> includes a person holding an authority	13
under section 240 to perform custodial duties.	14