



New South Wales

Health Care Liability Bill 2001

Explanatory note

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

Overview of Bill

This Bill:

- (a) makes professional indemnity insurance compulsory for medical practitioners and regulates the manner in which insurers provide that insurance, and
- (b) protects medical practitioners, nurses and certain other health practitioners from any civil liability when voluntarily providing health care to injured persons in an emergency, and
- (c) imposes certain limitations on the recovery of damages for injury or death caused by health care providers (eg medical practitioners and public hospitals) in providing health care.

The specific objects of this Bill are as follows:

- (a) to facilitate access to fair and sustainable compensation for persons who sustain severe injuries from the provision of health care,

- (b) to keep the costs of medical indemnity premiums sustainable, in particular by limiting the amount of compensation payable for non-economic loss in cases of relatively minor injury, while preserving principles of full compensation for those with severe injuries involving ongoing impairment and disabilities,
- (c) to promote the reasonable distribution across the medical indemnity industry of the costs of compensation for persons who sustain severe injuries from the provision of health care,
- (d) to facilitate the effective contribution by medical indemnity providers to risk management and quality improvement activities in the health care sector,
- (e) to enable the medical profession and the community to be better informed as to the costs of compensation for, and developing trends in, personal injury claims arising from the provision of health care.

Outline of provisions

Part 1 Preliminary

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 the date of assent (except for Part 3 which will commence on a day to be appointed by proclamation).

Clause 3 sets out the objects of the proposed Act (as stated in the above overview). Clause 3 also requires the proposed Act to be construed in a way that would best promote the objects of the proposed Act.

Clause 4 defines certain words and expressions used in the proposed Act. The term *health care provider* means a medical practitioner (references to which in the proposed Act include a medical practitioner's practice company), a public health organisation (eg an area health service) or the licensee of a private hospital or day procedure centre (but only if the regulations provide for any such licensee to be a health care provider for the purposes of the proposed Act). The term *health care claim* means a claim, in any civil action, for damages against a health care provider in respect of an injury or death caused wholly or partly by the fault of the health care provider in providing health care.

Part 2 Awarding of damages in health care claims

Division 1 Application of Part

Clause 5 provides that Part 2 applies to an award of damages in respect of a health care claim. The Part extends to an award of damages that relates to an injury (or death resulting from an injury) received before the date of assent, but the Part does not apply to or in respect of court proceedings that have already been commenced or to any awards that have already been made.

Clause 6 excludes certain awards of damages from the operation of Part 2.

Clause 7 makes it clear that the Part does not give rise to any cause of action to recover damages (ie the Part only relates to the awarding or recovery of damages).

Clause 8 provides that a court cannot award damages (or interest on damages) contrary to the proposed Act.

Division 2 Damages for economic loss

Clause 9 limits the amount of damages that may be awarded for past or future economic loss (eg loss of earnings or deprivation or impairment of earning capacity).

Clause 10 provides for damages for future economic loss to be determined in accordance with the claimant's prospects.

Clause 11 requires the application of a discount rate in assessing lump sum damages for future economic loss.

Clause 12 specifies the circumstances in which damages for attendant care services (such as domestic help or nursing) that are provided on a gratuitous basis may be awarded.

Division 3 Damages for non-economic loss (general damages)

Clause 13 provides for the determination of damages for non-economic loss (eg pain and suffering, loss of amenities of life, loss of expectation of life and disfigurement). No such damages are to be awarded unless the severity of the non-economic loss is at least 15% of a most extreme case. A limit on the amount of damages for non-economic loss is imposed (\$350,000), but that maximum amount is to be awarded only in a most extreme case. Once the 15% threshold is passed, damages for non-economic loss are to be assessed in accordance with the Table to the proposed section as a percentage of the maximum amount.

Clause 14 provides for the indexation, by order of the Minister published in the Gazette, of the maximum amount that may be awarded as damages for non-economic loss.

Division 4 Other matters

Clause 15 makes provision with respect to the interest payable on damages. No interest is payable on damages awarded for non-economic loss.

Clause 16 deals with contributory negligence in health care claims that are brought under the *Compensation to Relatives Act 1897*.

Clause 17 prohibits the awarding of punitive or exemplary damages.

Clause 18 enables a court to make consent orders for structured settlements in relation to health care claims.

Part 3 Professional indemnity insurance

Clause 19 provides that a person is not entitled to practise as a medical practitioner unless the person is covered by approved professional indemnity insurance. The New South Wales Medical Board will be empowered to cancel the registration of (or suspend) an uninsured medical practitioner, and practising as a medical practitioner without approved professional indemnity insurance will constitute unsatisfactory professional conduct for the purposes of the *Medical Practice Act 1992*.

Clause 20 provides that professional indemnity insurance is *approved* if the kind and extent of the insurance are approved by the Minister by order published in the Gazette (such an order is referred to in the proposed Act as an *insurance approval order*).

Clause 21 provides that an insurer who provides approved professional indemnity insurance must comply with specified data collection and reporting requirements and have in place a comprehensive risk management program.

Clause 22 provides that the Minister may, by order published in the Gazette, impose requirements on insurers who provide approved professional indemnity insurance.

Clause 23 contains provisions relating to insurance approval orders and insurance regulation orders.

Clause 24 enables the Minister by order published in the Gazette to prohibit an insurer from providing approved professional indemnity insurance if the Minister is satisfied that the insurer has failed to comply with any of the requirements imposed on the insurer by or under the proposed Act. It will be an offence for the insurer to provide approved professional indemnity insurance in contravention of such a prohibition order.

Clause 25 provides that certain classes of health practitioners are also not entitled to practise unless they are covered by some form of professional indemnity insurance.

Part 4 Provision of emergency health care—protection from liability

Clause 26 provides that Part 4 applies to medical practitioners, nurses and other health practitioners prescribed by the regulations.

Clause 27 provides that if a person to whom Part 4 applies provides health care to an injured person in an emergency situation, then the person cannot be subject to any civil action, liability, claim or demand so long as the health care was provided in good faith and on a voluntary basis without fee or reward.

Part 5 Miscellaneous provisions

Clause 28 provides for the determination of the amount of the contribution that may be recovered by a third party from a health care provider where both the health care provider and the third party are at fault. The proposed section also provides for the reduction of damages recoverable by the claimant in respect of an injury or death where the third party is a health care professional.

Clause 29 provides for powers of entry, inspection and investigation by authorised officers for the purposes of determining whether there has been compliance with or a contravention of the proposed Act or for obtaining information and documents for purposes connected with the administration of the proposed Act.

Clause 30 provides that a natural person is not excused from producing a document or statement, or from answering a question, under proposed section 29 on the ground that the document, statement or answer might incriminate the person.

Clause 31 provides for the manner in which proceedings for offences under the proposed Act are to be dealt with.

Clause 32 provides for the admissibility of certificate evidence of certain matters in proceedings relating to health care claims.

Clause 33 provides that the proposed Act binds the Crown.

Clause 34 is the general regulation-making power.

Clause 35 is a formal provision giving effect to the amendment to the *Private Hospitals and Day Procedure Centres Act 1988* set out in Schedule 1 to the proposed Act.

Clause 36 provides for the proposed Act to be reviewed by the Minister after 5 years.

Schedule 1 Amendment of Private Hospitals and Day Procedure Centres Act 1988

Schedule 1 amends the *Private Hospitals and Day Procedure Centres Act 1988* to provide that a licence under that Act is subject to the condition that the licensee holds (or is otherwise covered by) such insurance or other liability cover as may be prescribed by the regulations under that Act.



New South Wales

Health Care Liability Bill 2001

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New South Wales

Health Care Liability Bill 2001

No. , 2001

A Bill for

An Act to make provision with respect to the recovery of damages for injury or death caused by medical practitioners and other health care providers; to make professional indemnity insurance compulsory for medical practitioners and to regulate the provision of that insurance; to protect medical practitioners, nurses and certain other health practitioners from liability when providing voluntary health care in an emergency; and for other purposes.

Clause 1 Health Care Liability Bill 2001

Part 1 Preliminary

The Legislature of New South Wales enacts: 1

Part 1 Preliminary 2

1 Name of Act 3

This Act is the *Health Care Liability Act 2001*. 4

2 Commencement 5

(1) This Act commences on the date of assent, except as provided by subsection (2). 6
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(2) Part 3 commences on a day to be appointed by proclamation. 8

3 Objects of Act 9

(1) The objects of this Act are as follows: 10

(a) to facilitate access to fair and sustainable compensation for persons who sustain severe injuries from the provision of health care, 11
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(b) to keep the costs of medical indemnity premiums sustainable, in particular by limiting the amount of compensation payable for non-economic loss in cases of relatively minor injury, while preserving principles of full compensation for those with severe injuries involving ongoing impairment and disabilities, 14
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(c) to promote the reasonable distribution across the medical indemnity industry of the costs of compensation for persons who sustain severe injuries from the provision of health care, 19
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(d) to facilitate the effective contribution by medical indemnity providers to risk management and quality improvement activities in the health care sector, 22
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(e) to enable the medical profession and the community to be better informed as to the costs of compensation for, and developing trends in, personal injury claims arising from the provision of health care. 25
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(2) In the application and administration of this Act and the regulations, it must be recognised:	1
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(a) that medical indemnity providers have a role in keeping the cost of premiums within reasonable bounds by having in place appropriate standards in relation to risk management and claims handling procedures, and	3
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(b) that the law (both the enacted law and the common law) relating to the assessment of damages of the kind to which Part 2 applies should be interpreted and applied in a way that acknowledges the clear legislative intention to restrict the level of compensation for non-economic loss.	7
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(3) In the interpretation of a provision of this Act and the regulations, a construction that would promote the objects of this Act or the provision is to be preferred to a construction that would not promote those objects. This subsection does not limit the generality of section 33 of the <i>Interpretation Act 1987</i> .	12
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4 Definitions	17
(1) In this Act:	18
<i>approved professional indemnity insurance</i> means professional indemnity insurance that is approved for the time being under an insurance approval order.	19
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<i>claimant</i> means a person who makes, or is entitled to make, a health care claim.	22
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<i>court</i> , in relation to a health care claim, means any court by or before which the claim falls to be determined.	24
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<i>damages</i> includes any form of monetary compensation.	26
<i>fault</i> includes an act or omission.	27
<i>health care</i> means any care, treatment, advice, service or goods provided in respect of the physical or mental health of a person.	28
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<i>health care claim</i> means a claim, in any civil action, for damages against a health care provider in respect of an injury or death caused wholly or partly by the fault of the health care provider in providing health care.	30
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health care provider means:	1
(a) a medical practitioner:	2
(i) who is covered by approved professional indemnity insurance or, until such time as Part 3 commences, by any kind of professional indemnity insurance, or	3 4 5
(ii) who is of a class of medical practitioner prescribed by the regulations for the purposes of this definition, or	6 7
(b) a public health organisation, or	8
(c) subject to subsection (2), the licensee of a licensed facility,	9
and includes:	10
(d) in respect of an injury or death occurring before the date of assent to this Act that gives rise to a health care claim—a person:	11 12
person:	13
(i) who was a medical practitioner at the time of the injury or death, and	14 15
(ii) whose civil liability for that injury or death is covered by any kind of professional indemnity insurance, or	16 17
(e) in respect of an injury or death occurring after the date of assent to this Act that gives rise to a health care claim—a person:	18 19
person:	20
(i) who was a medical practitioner at the time of the injury or death, and	21
(ii) whose civil liability for that injury or death is covered by approved professional indemnity insurance or, until such time as Part 3 commences, by any kind of professional indemnity insurance.	22 23 24 25
Note. Section 21 (1) of the <i>Interpretation Act 1987</i> provides that the expression “medical practitioner” means a medical practitioner registered under the <i>Medical Practice Act 1992</i> .	26 27 28
health practitioner means a person (other than a medical practitioner) who provides health care.	29 30
injury means personal or bodily injury, and includes:	31
(a) pre-natal injury, and	32
(b) psychological or psychiatric injury, and	33
(c) disease.	34
insurance approval order means an order under section 20.	35
insurance regulation order means an order under section 22.	36

<i>licensed facility</i> means a private hospital or day procedure centre that is licensed under the <i>Private Hospitals and Day Procedure Centres Act 1988</i> .	1 2 3
<i>non-economic loss</i> means any one or more of the following:	4
(a) pain and suffering,	5
(b) loss of amenities of life,	6
(c) loss of expectation of life,	7
(d) disfigurement.	8
<i>practice company</i> means:	9
(a) in the case of a medical practitioner—a corporation (however incorporated) that is controlled or conducted by the medical practitioner and by means of which the medical practitioner conducts his or her medical practice, or	10 11 12 13
(b) in the case of a health practitioner—a corporation (however incorporated) that is controlled or conducted by the health practitioner and by means of which the health practitioner conducts his or her health practice.	14 15 16 17
<i>professional indemnity insurance</i> means insurance against civil liability arising out of the provision of health care, and includes an agreement or arrangement for discretionary indemnity in respect of that liability.	18 19 20 21
<i>public health organisation</i> has the same meaning as in the <i>Health Services Act 1997</i> .	22 23
<i>registration</i> includes enrolment or any other means by which a health practitioner is entitled to practise.	24 25
(2) The licensee of a licensed facility is a health care provider for the purposes of this Act:	26 27
(a) only if the regulations so provide, and	28
(b) only to the extent that the licensee conducts the licensed facility.	29 30
(3) In this Act:	31
(a) a reference to a medical practitioner includes, if the medical practitioner conducts his or her practice by means of a practice company, a reference to the medical practitioner's practice company, and	32 33 34 35

Clause 4 Health Care Liability Bill 2001

Part 1 Preliminary

- (b) a reference to a health practitioner includes, if the health practitioner conducts his or her practice by means of a practice company, the health practitioner's practice company, and 1
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- (c) a reference to a public health organisation includes a reference to a person for whose acts the public health organisation is liable, and 4
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- (d) a reference to the licensee of a licensed facility includes a reference to a person for whose acts the licensee is liable (but only to the extent that those acts are related solely to the conduct of the licensed facility). 7
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- (4) A reference in this Act to the provision (however expressed) of health care includes a failure to provide health care. 11
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- (5) A reference in this Act to the provision (however expressed) of professional indemnity insurance includes a reference to the offering or renewing of any such insurance. 13
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- (6) Notes included in this Act do not form part of this Act. 16

Part 2 Awarding of damages in health care claims	1
Division 1 Application of Part	2
5 Awards of damages to which this Part applies	3
(1) This Part applies to an award of damages in respect of a health care claim.	4 5
(2) In its application to such awards, this Part applies to an award of damages that relates to an injury received, or to a death resulting from an injury received, whether before or after the date of assent to this Act.	6 7 8 9
(3) However, this Part does not apply to or in respect of:	10
(a) any proceedings that have been commenced in a court before the date of assent to this Act to recover damages in respect of a health care claim, or	11 12 13
(b) an award of damages made before the date of assent to this Act.	14
6 Awards of damages excluded from this Part	15
(1) The provisions of this Part (or such provisions of this Part as are specified in the regulations) do not apply to or in respect of an award of damages of a class excluded by the regulations from the operation of this Part or from the operation of those specified provisions.	16 17 18 19
(2) Without limiting subsection (1), the regulations may exclude from the operation of this Part the following:	20 21
(a) awards of damages that are made against a particular class of medical practitioner or other health care provider,	22 23
(b) awards of damages that relate to a particular type of medical service or other type of health care.	24 25
(3) For the avoidance of doubt, the following awards of damages are excluded from this Part:	26 27
(a) an award of damages under the <i>Fair Trading Act 1987</i> , or	28
(b) an award comprising compensation under the <i>Workers Compensation Act 1987</i> , the <i>Victims Support and Rehabilitation Act 1996</i> or the <i>Anti-Discrimination Act 1977</i> ,	29 30 31

Clause 6	Health Care Liability Bill 2001	
Part 2	Awarding of damages in health care claims	
Division 1	Application of Part	
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	(c) an award of damages arising out of a health care provider's liability as the owner of land or as the occupier of land or premises.	1 2 3
7	Part does not give rise to any cause of action	4
	This Part does not create or confer any cause of civil action for the recovery of damages in respect of an injury or death caused by the fault of a health care provider in providing health care.	5 6 7
8	General regulation of court awards	8
	A court cannot award damages, or interest on damages, to a claimant contrary to this Act.	9 10
Division 2	Damages for economic loss	11
9	Damages for past or future economic loss—maximum for loss of earnings etc	12 13
	(1) This section applies to an award of damages:	14
	(a) for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity, or	15 16
	(b) for future economic loss due to the deprivation or impairment of earning capacity, or	17 18
	(c) for the loss of expectation of financial support.	19
	(2) In the case of any such award, the court is to disregard the amount (if any) by which the claimant's net weekly earnings would (but for the injury or death) have exceeded \$2,603.	20 21 22
	(3) The annual adjustment under section 146 of the <i>Motor Accidents Compensation Act 1999</i> of the amount applying under section 125 of that Act applies to and in respect of the amount referred to in subsection (2). Accordingly, an amount declared for the time being under section 146 of the <i>Motor Accidents Compensation Act 1999</i> applies to the exclusion of the amount referred to in subsection (2).	23 24 25 26 27 28

10	Future economic loss—claimant’s prospects and adjustments	1
(1)	A court cannot make an award of damages for future economic loss unless the claimant first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant’s most likely future circumstances but for the injury.	2 3 4 5 6
(2)	When a court determines the amount of any such award of damages for future economic loss it is required to adjust the amount of damages for future economic loss that would have been sustained on those assumptions by reference to the percentage possibility that the events might have occurred but for the injury.	7 8 9 10 11
(3)	If the court makes an award for future economic loss, it is required to state the assumptions on which the award was based and the relevant percentage by which damages were adjusted.	12 13 14
11	Damages for future economic loss—discount rate	15
(1)	If an award of damages is to include any component, assessed as a lump sum, for economic loss that is referable to the future, the present value of that future economic loss is to be determined by adopting the prescribed discount rate.	16 17 18 19
(2)	The <i>prescribed discount rate</i> is:	20
(a)	a discount rate of the percentage prescribed by the regulations, or	21 22
(b)	if no percentage is so prescribed—a discount rate of 5%.	23
(3)	Except as provided by this section, nothing in this section affects any other law relating to the discounting of sums awarded as damages.	24 25
12	Damages for gratuitous attendant care services	26
(1)	In this section:	27
	<i>attendant care services</i> means any of the following:	28
(a)	services of a domestic nature,	29
(b)	services relating to nursing,	30
(c)	services that aim to alleviate the consequences of an injury.	31
	<i>gratuitous attendant care services</i> means attendant care services:	32
(a)	that have been or are to be provided by another person to a claimant, and	33 34

- (b) for which the claimant has not paid or is not liable to pay. 1
- (2) No damages may be awarded to a claimant for gratuitous attendant care services unless the court is satisfied that: 2
 - (a) there is (or was) a reasonable need for the services to be provided, and 3
 - (b) the need has arisen (or arose) solely because of the injury to which the health care claim relates, and 4
 - (c) the services would not be (or would not have been) provided to the claimant but for the injury. 5

Division 3 Damages for non-economic loss (general damages) 10
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13 Determination of damages for non-economic loss 12

- (1) No damages may be awarded to a claimant for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case. 13
- (2) The maximum amount of damages that may be awarded to a claimant for non-economic loss is \$350,000, but the maximum amount is to be awarded only in a most extreme case. 14
- (3) If the severity of the non-economic loss of the claimant is equal to or greater than 15% of a most extreme case, the damages for non-economic loss are to be determined in accordance with the following Table: 15

Table 23

Severity of the non-economic loss (as a proportion of a most extreme case)	Damages for non-economic loss (as a proportion of the maximum amount that may be awarded for non-economic loss)	
15%	1%	24
16%	1.5%	25
17%	2%	26
18%	2.5%	27

Severity of the non-economic loss (as a proportion of a most extreme case)	Damages for non-economic loss (as a proportion of the maximum amount that may be awarded for non-economic loss)	
19%	3%	1
20%	3.5%	2
21%	4%	3
22%	4.5%	4
23%	5%	5
24%	5.5%	6
25%	6.5%	7
26%	8%	8
27%	10%	9
28%	14%	10
29%	18%	11
30%	23%	12
31%	26%	13
32%	30%	14
33%	33%	15
34%–100%	34%–100% respectively	16

Clause 13	Health Care Liability Bill 2001
Part 2	Awarding of damages in health care claims
Division 3	Damages for non-economic loss (general damages)

(4)	An amount determined in accordance with subsection (3) is to be rounded to the nearest \$500.	1 2
	Note. The following are the steps required in the assessment of non-economic loss in accordance with this section:	3 4
	Step 1: Determine the severity of the claimant's non-economic loss as a proportion of a most extreme case. The proportion should be expressed as a percentage.	5 6
	Step 2: Confirm the maximum amount that may be awarded under this section for non-economic loss in the case of a most extreme case. This amount is indexed each year under section 14.	7 8 9
	Step 3: Use the Table to determine the percentage of the maximum amount payable in respect of the claim. The amount payable under this section for non-economic loss is then determined by multiplying the maximum amount payable in a most extreme case by the percentage set out in the Table.	10 11 12 13
	Where the proportion of a most extreme case is greater than 33%, the amount payable will be the same proportion of the maximum amount.	14 15
14	Indexation of maximum amount relating to non-economic loss	16
(1)	The Minister is, on or before 1 October 2002 and on or before 1 October in each succeeding year, to declare, by order published in the Gazette, the amount that is to apply, as from the date specified in the order, for the purposes of section 13 (2).	17 18 19 20
(2)	The amount declared is to be the amount applicable under section 13 (2) (or that amount as last adjusted under this section) adjusted by the percentage change in the amount estimated by the Australian Statistician of the average weekly total earnings of full-time adults in New South Wales over the 4 quarters preceding the date of the declaration for which those estimates are, at that date, available.	21 22 23 24 25 26
(3)	An amount declared for the time being under this section applies to the exclusion of the amount under section 13 (2).	27 28
(4)	If the Australian Statistician fails or ceases to estimate the amount referred to in subsection (2), the amount declared is to be determined in accordance with the regulations.	29 30 31
(5)	In adjusting an amount to be declared for the purposes of section 13 (2), the amount determined in accordance with subsection (2) is to be rounded to the nearest \$500.	32 33 34

Division 4	Other matters	1
15	Interest on damages	2
(1)	A court cannot order the payment of interest on damages awarded for non-economic loss.	3 4
(2)	If a court is satisfied that interest is payable on damages other than damages for non-economic loss, the amount of interest is to be calculated:	5 6 7
(a)	for the period from when the loss to which the damages relate was first incurred until the date on which the court determines the damages, and	8 9 10
(b)	in accordance with the principles ordinarily applied by the court for that purpose, subject to subsection (3).	11 12
(3)	The rate of interest to be used in any such calculation is:	13
(a)	such interest rate as may be determined by the regulations, or	14
(b)	if no such rate is determined by the regulations— the relevant interest rate as at the date of determination of the damages.	15 16
(4)	For the purposes of subsection (3), the <i>relevant interest rate</i> is the rate representing the Commonwealth Government 10-year benchmark bond as published by the Reserve Bank of Australia in the <i>Reserve Bank of Australia Bulletin</i> (however described) and as applying:	17 18 19 20
(a)	on the first business day of January of each year (in which case the rate is to apply as the relevant interest rate for the period from 1 March until 31 August of that year), or	21 22 23
(b)	on the first business day of July of each year (in which case the rate is to apply as the relevant interest rate for the period from 1 September of that year until the last day of February of the following year).	24 25 26 27
(5)	Nothing in this section affects the payment of interest on a debt under a judgment or order of a court.	28 29
16	Contributory negligence—claims under the Compensation to Relatives Act 1897	30 31
(1)	In a health care claim brought under the <i>Compensation to Relatives Act 1897</i> , the court is entitled to have regard to the contributory negligence of the deceased person.	32 33 34

Clause 16 Health Care Liability Bill 2001

Part 2 Awarding of damages in health care claims

Division 4 Other matters

(2) Section 13 of the <i>Law Reform (Miscellaneous Provisions) Act 1965</i> does not apply so as to prevent the reduction of damages by the contributory negligence of a deceased person in respect of a health care claim.	1 2 3 4
17 Exemplary or punitive damages	5
A court cannot award exemplary or punitive damages in an action for the award of damages.	6 7
18 Court may make consent order for structured settlement	8
(1) This section applies where the parties to a health care claim agree to settle the claim by making a structured settlement and apply to the court for an order approving of or in the terms of the structured settlement.	9 10 11 12
(2) The court may make the order even though the payment of damages is not in the form of a lump sum award of damages.	13 14
(3) For the purposes of this section, a <i>structured settlement</i> is an agreement that provides for the payment of all or part of an award of damages in the form of periodic payments funded by an annuity or other agreed means.	15 16 17 18

Part 3 Professional indemnity insurance

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19 Medical practitioners must be covered by approved professional indemnity insurance

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(1) A person is not entitled to practise as a medical practitioner unless the person is covered by approved professional indemnity insurance.

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(2) Accordingly, the Medical Board:

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(a) must not register a person as a medical practitioner unless the Medical Board is satisfied that the person will, while practising as a medical practitioner, be covered by approved professional indemnity insurance, and

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(b) may cancel the registration of a person as a medical practitioner (or suspend a person from practising medicine) if the Medical Board is satisfied that the person is not covered by approved professional indemnity insurance while the person is practising as a medical practitioner.

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(3) Practising as a medical practitioner without being covered by approved professional indemnity insurance is, for the purposes of the *Medical Practice Act 1992*, unsatisfactory professional conduct.

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(4) This section does not apply to or in respect of a medical practitioner:

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(a) who is an employee of a public health organisation (but only to the extent that the medical practitioner practises as such an employee), or

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(b) who is exempt under the regulations from the requirement to be covered by approved professional indemnity insurance.

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(5) This section has effect despite any provision of the *Medical Practice Act 1992*.

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20 Approved professional indemnity insurance

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For the purposes of this Act, professional indemnity insurance with respect to the civil liability of a medical practitioner is **approved** if the kind and extent of the insurance (including any particular terms and conditions) are approved by the Minister for the time being by order published in the Gazette.

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Note. Section 43 (2) of the *Interpretation Act 1987* provides that if an Act confers a power on any person to make an order, the power includes power to amend or repeal any order made in the exercise of that power.

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21	Mandatory requirements relating to data collection, reporting and risk management	1
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	An insurer who provides approved professional indemnity insurance must:	3
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	(a) comply with such data collection and reporting requirements as are specified in an insurance regulation order applying in respect of the insurer, and	5
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		7
	(b) have in place a comprehensive risk management program that:	8
	(i) identifies potential problems in relation to individual medical practitioners and particular categories of medical services, and	9
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		11
	(ii) provides strategies to effectively deal with those problems.	12
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	Note. One of the purposes of the requirement referred to in paragraph (a) is to enable the medical profession and the community to be better informed as to the costs of compensation for, and developing trends in, personal injury claims arising from the provision of health care.	14
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22	Requirements that may be imposed by insurance regulation order	18
	(1) The Minister may, by order published in the Gazette, impose requirements (in addition to those referred to in section 21) on an insurer who provides approved professional indemnity insurance.	19
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	(2) Without limiting the requirements that may be imposed by an insurance regulation order, such an order may require an insurer to do any one or more of the following:	22
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	(a) to provide professional indemnity insurance in respect of all categories of specialty medical practice,	25
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	(b) to avoid engaging in conduct that would discourage medical practitioners of a particular category of specialty medical practice from obtaining professional indemnity insurance from the insurer,	27
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	(c) to provide professional indemnity insurance in accordance with specified rate relativities between different categories of medical practitioner,	31
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		33
	(d) to comply with such arrangements as may be specified for the distribution between insurers of the cost of covering the civil liability of medical practitioners (who are covered by approved professional indemnity insurance) in relation to health care	34
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claims of a specified category (for example, claims involving substantial care costs for severe injury), including the making of contributions between insurers to enable the distribution of that cost,	1 2 3 4
(e) to refuse or withdraw professional indemnity insurance only in such circumstances as are described or referred to in the order,	5 6
(f) to comply with specified standards (including standards relating to risk management and claims handling).	7 8
23 General provisions relating to orders	9
(1) An insurance approval order or an insurance regulation order may:	10
(a) apply generally or be limited in its application by reference to specified exceptions or factors, or	11 12
(b) apply differently according to different factors of a specified kind.	13 14
(2) An insurance approval order or an insurance regulation order takes effect:	15 16
(a) on the day it is published in the Gazette, or	17
(b) on a later date specified in the order.	18
(3) An insurance approval order or an insurance regulation order may contain provisions of a savings or transitional nature consequent on the making of the order.	19 20 21
24 Minister may prohibit person from providing approved professional indemnity insurance	22 23
(1) The Minister may, by order published in the Gazette, prohibit a person to whom the order applies (<i>the insurer</i>) from providing approved professional indemnity insurance if the Minister is satisfied that the insurer has failed to comply with any of the requirements imposed on the insurer under section 21 or by an insurance regulation order.	24 25 26 27 28
(2) An order under this section (a <i>prohibition order</i>) may:	29
(a) prohibit the insurer from providing approved professional indemnity insurance from the date, or for a period, specified in the order, or	30 31 32
(b) prohibit the insurer from providing (from the date, or for a period, specified in the order) approved professional indemnity insurance to any person not covered by such insurance at the	33 34 35

- time the order takes effect (in which case the order does not operate to prevent the insurer from renewing any approved professional indemnity insurance that was in force at the time the order took effect). 1
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- (3) The Minister may not make a prohibition order in respect of an insurer unless: 5
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- (a) the insurer has been given: 7
- (i) notice of the Minister's intention to make the order (including the reasons for making the order), and 8
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- (ii) a reasonable opportunity to make submissions to the Minister with respect to the proposed order, and 10
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- (b) the Minister has considered any such submission. 12
- (4) An insurer must not provide approved professional indemnity insurance in contravention of a prohibition order. 13
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- Maximum penalty: 15
- (a) in the case of a corporation—400 penalty units for a first offence or 800 penalty units for a second or subsequent offence, or 16
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- (b) in any other case—200 penalty units for a first offence or 400 penalty units for a second or subsequent offence. 19
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- (5) If a continuing state of affairs is created by an offence under subsection (4), the offender is, in addition to the penalty specified in that subsection, liable to a maximum penalty of: 21
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- (a) 100 penalty units in the case of a corporation, or 24
- (b) 50 penalty units in any other case, 25
- in respect of each day on which the offence continues. 26
- (6) A contravention of subsection (4), or the making of a prohibition order, does not annul or otherwise affect any professional indemnity insurance provided by the insurer or the liability of the insurer to any person covered by the insurance. 27
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- (7) A medical practitioner is covered by approved professional indemnity insurance even if the insurance was provided in contravention of a prohibition order. 31
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(8) If a prohibition order is made:	1
(a) the Minister is to notify the Medical Board of the terms of the order, and	2 3
(b) the Medical Board is to notify those medical practitioners that the Board considers would be affected by the order.	4 5
25 Professional indemnity insurance for certain other health practitioners	6
(1) This section applies to or in respect of a person who is a health practitioner only if the regulations have declared that this section applies to the class of health practitioner of which the person is a member.	7 8 9 10
(2) A person is not entitled to practise as a health practitioner unless the person is covered by professional indemnity insurance.	11 12
(3) Accordingly, the appropriate registration authority:	13
(a) must not register a person as a health practitioner unless the authority is satisfied that the person will, while practising as a health practitioner, be covered by professional indemnity insurance, and	14 15 16 17
(b) may cancel or suspend the registration of a person as a health practitioner if the authority is satisfied that the person is not covered by professional indemnity insurance while the person is practising as a health practitioner.	18 19 20 21
(4) Practising as a health practitioner without being covered by professional indemnity insurance is, for the purposes of the relevant health registration Act, unsatisfactory professional conduct.	22 23 24
(5) This section does not apply in respect of a health practitioner who is exempt under the regulations from the requirement for professional indemnity insurance.	25 26 27
(6) This section has effect despite the relevant health registration Act under which a health practitioner is registered.	28 29
(7) In this section:	30
<i>appropriate registration authority</i> , in relation to a health practitioner, means the person or body who has the function, under the relevant health registration Act, of determining any matter relating to the registration of the health practitioner under the health registration Act.	31 32 33 34

Clause 25 Health Care Liability Bill 2001

Part 3 Professional indemnity insurance

relevant health registration Act, in relation to a health practitioner, 1
means the Act under which the health practitioner is registered or is 2
otherwise entitled to practise. 3

Part 4 Provision of emergency health care—protection from liability	1 2
26 Persons to whom this Part applies	3
This Part applies to the following persons:	4
(a) a medical practitioner,	5
(b) a registered nurse,	6
(c) a health practitioner who is of a class prescribed by the regulations for the purposes of this Part.	7 8
27 Provision of voluntary health care in an emergency	9
(1) If a person to whom this Part applies provides health care to an injured person in circumstances of emergency:	10 11
(a) at or near the scene of the incident or other occurrence constituting the emergency, or	12 13
(b) while the injured person is being transported from the scene of the incident or other occurrence constituting the emergency to a hospital or other place at which medical care is available,	14 15 16
the person cannot be subject personally to any civil action, liability, claim or demand in respect of the provision of that health care.	17 18
(2) Subsection (1) applies in respect of a person to whom this Part applies only if the health care was provided by the person:	19 20
(a) in good faith, and	21
(b) on a voluntary basis without fee or reward or expectation of fee or reward.	22 23

Part 5 Miscellaneous provisions

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28 Determination of contribution to third party

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(1) This section applies when:

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(a) a claimant is entitled to recover damages in respect of an injury or death from a person other than a health care provider (the *third party*), and

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(b) the injury or death was partly caused by the fault of a health care provider in providing health care, and

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(c) the third party is entitled to recover a contribution from the health care provider (whether at the same time as, or subsequent to, the proceedings brought by the claimant).

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(2) In determining the amount of the contribution to be recovered by the third party from the health care provider, the court must:

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(a) determine such percentage as the court thinks just and equitable (having regard to the extent of the responsibility of the health care provider and the third party, respectively, for the claimant's damages), and

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(b) determine the amount of damages to which the claimant is, or would be, entitled in accordance with Part 2, and

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(c) fix the amount of the contribution by applying the percentage determined under paragraph (a) to the amount of damages referred to in paragraph (b).

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(3) If the third party is a health care professional who partly caused the injury or death in providing health care, the amount of damages that may be recovered by the claimant from the third party is to be reduced by the difference between:

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(a) the amount of the contribution to which the third party would have been entitled (but for this Act) from the health care provider, and

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(b) the amount of the contribution calculated in accordance with subsection (2).

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(4) For the purposes of this section, *health care professional* means:

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(a) a health practitioner who is registered under a health registration Act within the meaning of the *Health Care Complaints Act 1993*, or

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(b)	a health practitioner of such other class as may be prescribed by the regulations.	1 2
29	Powers of entry, inspection and investigation by authorised officers	3
(1)	In this section:	4
	<i>authorised officer</i> means a person appointed by the Minister as an authorised officer for the purposes of this Act.	5 6
	<i>insurer</i> means a person who provides, or who formerly provided, professional indemnity insurance, and includes any insurance broker or commission agent engaged in the business of professional indemnity insurance in respect of health care.	7 8 9 10
	<i>premises</i> includes any structure, building, aircraft, vehicle and place (whether built on or not).	11 12
(2)	Powers may be exercised by an authorised officer under this section for the following purposes:	13 14
(a)	for determining whether there has been compliance with or a contravention of this Act (including the requirements imposed by an insurance regulation order),	15 16 17
(b)	for obtaining information and documents for purposes connected with the administration of this Act.	18 19
(3)	An authorised officer may do any or all of the following:	20
(a)	on production of his or her authority, enter at any reasonable hour any premises used, or that the authorised officer reasonably suspects to be used, by an insurer for the conduct of the insurer's business or the storage or custody of any document,	21 22 23 24 25
(b)	on production of his or her authority, enter at any reasonable hour any premises in or on which the authorised officer knows, or reasonably suspects, an insurer to be,	26 27 28
(c)	remain in or on those premises while exercising any power conferred by this section,	29 30
(d)	require an insurer or any other person in or on those premises to produce any such document that is in his or her possession or under his or her control and is capable of being produced,	31 32 33
(e)	require an insurer or any other person having possession or control of any such document that is not written, or is not written in the English language or is not decipherable on sight,	34 35 36

to produce a statement, written in the English language and decipherable on sight, of the information contained in the document,	1
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	3
(f) inspect, or make copies of or take extracts from, a document produced pursuant to paragraph (d) or a statement produced pursuant to paragraph (e), or retain such a statement,	4
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(g) require an insurer or any other person in or on those premises to answer questions relating to the observance of this Act (including the requirements imposed by an insurance regulation order),	7
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(h) require an insurer or any other person, by notice in writing served on the person, to produce to the authorised officer for inspection (in accordance with the notice) any document that the authorised officer has reasonable grounds to believe that the person is capable of producing in relation to a possible contravention of this Act (including the requirements imposed by an insurance regulation order).	11
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(4) A person must not:	18
(a) refuse or fail to allow an authorised officer to enter premises under this section, or	19
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(b) wilfully obstruct or delay an authorised officer when exercising powers under this section, or	21
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(c) unreasonably refuse or fail to produce a document or statement to an authorised officer under this section, or	23
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(d) if an authorised officer informs a person that by virtue of this Act the person is obliged to answer questions relating to any matter referred to in subsection (3) (g):	25
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	27
(i) refuse or fail to answer such a question, or	28
(ii) give an answer to such a question that the person knows is false or misleading in a material particular.	29
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Maximum penalty: 50 penalty units.	31
(5) The powers of entry conferred by this section are not exercisable in relation to any part of premises used only for residential purposes except:	32
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(a) with the permission of the occupier of the premises, or	35
(b) under the authority conferred by a search warrant.	36

30	Protection from incrimination	1
(1)	A natural person is not excused from a requirement under section 29 to produce a document or statement or to answer a question on the ground that the document, statement or answer might incriminate the person or make the person liable to a penalty.	2 3 4 5
(2)	However, any answer given by a natural person in compliance with a requirement under section 29 is not admissible in evidence against the person in criminal proceedings (except proceedings for an offence under section 29) if:	6 7 8 9
(a)	the person objected at the time to doing so on the ground that it might incriminate the person, or	10 11
(b)	the person was not warned on that occasion that the person may object to giving the answer on the ground that it might incriminate the person.	12 13 14
(3)	Any document or statement produced by a person in compliance with a requirement under section 29 is not inadmissible in evidence against the person in criminal proceedings on the ground that the document or statement might incriminate the person.	15 16 17 18
(4)	Further information obtained as a result of a document or statement produced or an answer given in compliance with a requirement under section 29 is not inadmissible on the ground:	19 20 21
(a)	that the document, statement or answer had to be produced or given, or	22 23
(b)	that the document, statement or answer might incriminate the person.	24 25
31	Proceedings for offences	26
(1)	Proceedings for an offence under this Act are to be dealt with summarily:	27 28
(a)	before a Local Court constituted by a Magistrate sitting alone, or	29 30
(b)	before the Supreme Court in its summary jurisdiction.	31
(2)	The maximum pecuniary penalty that may be imposed by a Local Court in proceedings for an offence under this Act is 100 penalty units.	32 33

32 Evidentiary certificates	1
A certificate issued by the Director-General of the Department of Health stating that, on a date or during a period specified in the certificate, professional indemnity insurance (as provided by an insurer and as described in the certificate) is approved professional indemnity insurance is admissible in any proceedings relating to a health care claim and is evidence of the matters so certified.	2 3 4 5 6 7
33 Act to bind Crown	8
This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.	9 10 11
34 Regulations	12
The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.	13 14 15 16
35 Amendment of Private Hospitals and Day Procedure Centres Act 1988 No 123	17 18
The <i>Private Hospitals and Day Procedure Centres Act 1988</i> is amended as set out in Schedule 1.	19 20
36 Review of Act	21
(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.	22 23 24
(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.	25 26
(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.	27 28

Schedule 1	Amendment of Private Hospitals and Day Procedure Centres Act 1988	1 2
	(Section 35)	3
[1]	Section 15 Conditions of licence	4
	Insert at the end of section 15:	5
	(2) A licence is subject to the condition that the licensee must, in respect of the conduct of the establishment concerned, hold or otherwise be covered by such insurance or other liability cover as may be prescribed by the regulations.	6 7 8 9
[2]	Section 21 Amendment of licences	10
	Insert “(other than the condition referred to in section 15 (2))” after “subject” in section 21 (1) (d).	11 12