

FIRST PRINT

## OCCUPATIONAL LIABILITY BILL 1990

NEW SOUTH WALES



### EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament).

The object of this Bill is to provide a general means whereby the civil liability of professionals and others may be limited.

The Bill establishes 2 schemes. They are to be available as alternatives. Neither scheme is compulsory. If a person who is able to do so does not take advantage of either scheme, the person's civil liability will be determined in accordance with the principles ordinarily applicable.

The first scheme limits liability to a specified amount if insurance against civil liability is held to that amount or if business assets are retained to that amount. The second scheme limits liability to a multiple of the cost of providing the service from which the liability has accrued.

A class of persons will not have the benefit of either scheme until the class is brought within the proposed Act. This can only be done by an amending Act to ensure that the proposal is subject to Parliamentary scrutiny.

The Bill also constitutes the Occupational Standards Council. The Council is to assist professionals and others to improve their occupational standards and is to make recommendations as to the classes of persons who should be brought within the proposed Act.

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### PART 1 - PRELIMINARY

**Clause 1** specifies the short title of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a proclaimed day or days.

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**Clause 3** contains definitions for the purposes of the proposed Act. "Occupational association" is defined so as to include a body such as a professional society or association.

**Clause 4** provides that the proposed Act does not apply to limit liability arising from:

- \* the death of or personal injury to a person
- \* a breach of a fiduciary duty
- \* fraud or dishonesty.

**Clause 5** provides that the proposed Act binds the Crown.

### **PART 2 - LIMITATION OF LIABILITY**

#### **Division 1 - Limitation of liability by specified monetary ceiling**

**Clause 6** provides that Division 1 is to apply to the persons specified in Schedule 1 to the proposed Act.

**Clause 7** limits the civil liability of a person to whom the Division applies to the amount specified in Schedule 1 in respect of the person if the person has insurance cover to that amount.

**Clause 8** limits the civil liability of a person to whom the Division applies to the amount specified in Schedule 1 in respect of the person if the person has business assets, or a combination of business assets and insurance cover, to that amount. "Business assets" is defined to mean property of the person which may be taken in proceedings to enforce a judgment of a court, but does not include property which is not used in performing the person's occupation.

**Clause 9** enables different amounts to be specified in Schedule 1 for different classes of persons within an occupational association.

#### **Division 2 - Limitation of liability by multiple of charges**

**Clause 10** provides that Division 2 is to apply to the persons specified in Schedule 2 to the proposed Act.

**Clause 11** limits the civil liability of a person to whom the Division applies to the multiple specified in Schedule 2 of a reasonable charge for the services provided by the person, or which the person failed to provide, and from which the liability arises if the person has insurance cover to that amount. A "reasonable charge" is defined to mean:

- the ordinary scale charge; or
- if there is no scale, the amount that a competent person of the same qualifications and experience would be likely to charge in the same circumstances.

The clause will not operate so as to limit an amount of damages which is less than an amount specified for the purpose in Schedule 2.

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Clause 12 enables different multiples to be specified in Schedule 2 for different classes of persons within an occupational association.

### **Division 3 - Miscellaneous**

Clause 13 precludes a member of an occupational association from having the benefit of both schemes at the same time.

Clause 14 requires an insurance policy to be of a kind which complies with standards determined by the occupational association concerned.

Clause 15 provides that the limitation of liability is a limitation of the amount of damages which may be awarded for a single claim and is not a limitation of the amount of damages which may be awarded for all claims arising out of a single event.

Clause 16 provides for a limitation of damages where proceedings are brought against more than one defendant in respect of the same event.

Clause 17 provides that a person may be granted the benefit of the schemes contained in the proposed Act only after Parliamentary approval and that, once the benefit has been granted, it may only be removed by Parliamentary determination. The clause provides that Schedules 1 and 2 to the proposed Act may only be amended, substituted or repealed by an Act of Parliament, except that a regulation, made on the recommendation of the Council, may increase an amount or multiple specified in Schedule 1 or 2.

Clause 18 requires a person whose civil liability is limited under the proposed Act to notify that fact on all official correspondence ordinarily used by the person in the performance of the person's occupation. Contravention of the clause is made a summary offence punishable by a maximum penalty of 50 penalty units. Under section 56 of the Interpretation Act 1987, one penalty unit is currently equivalent to \$100.

## **PART 3 - THE OCCUPATIONAL STANDARDS COUNCIL**

### **Division 1 - Constitution of the Council**

Clause 19 constitutes a body corporate to be known as the Occupational Standards Council.

### **Division 2 - Membership and procedure of the Council**

Clause 20 enables the Minister to appoint the Council's members. Membership is part-time. The number of members who may be appointed is not specified. A person, in order to be appointed as a member, must have appropriate experience, skills and qualifications.

Clause 21 is a formal provision which gives effect to Schedule 3. That Schedule contains detailed provisions relating to the appointment, term of office, tenure of office and remuneration of members.

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Clause 22 is a formal provision which gives effect to Schedule 4. That Schedule contains detailed provisions relating to the procedures and determinations of the Council.

### **Division 3 - Functions of the Council**

Clause 23 specifies the functions of the Council. The Council is:

- to advise the Minister concerning the operation and amendment of the proposed Act
- to assist, in a variety of ways, in the improvement of occupational standards
- to collect information concerning, and to monitor the occupational standards of, persons to whom the proposed Act applies.

Clause 24 enables an occupational association to apply to the Council for the making of a recommendation to the Minister that its members have the benefit of the limitation of liability provided by the proposed Act. The Council, after due consideration of the application, may make the recommendation or decline to make the recommendation.

### **Division 4 - Miscellaneous**

Clause 25 enables the Council to require persons to supply it with information it needs in order to exercise its functions.

Clause 26 enables the Council to establish committees to assist it in the exercise of its functions.

Clause 27 enables the Council to make use of the services of the staff of government departments or public authorities.

Clause 28 requires the Council to prepare an annual report and provides for the tabling of the report in Parliament.

### **PART 4 - MISCELLANEOUS**

Clause 29 provides that the proposed Act is to have effect despite any other law to the contrary.

Clause 30 prevents certain persons from contracting out of the provisions of the proposed Act.

Clause 31 provides that the proposed Act does not limit the insurance arrangements a person may make apart from those made for the purposes of the proposed Act.

Clause 32 provides for the summary prosecution before a Local Court of offences against the proposed Act or the regulations.

Clause 33 enables the Governor-in-Council to make regulations for the purposes of the proposed Act.

Clause 34 enables rules of court to be made concerning matters arising under Part 2 of the proposed Act.

**SCHEDULES**

**Schedule 1** may, if amended by a future Act of Parliament, include:

- \* a description of the members of occupational associations whose civil liability is to be limited by the making of appropriate insurance arrangements or by the retention of business assets
- \* a specification of the maximum amount of the liability.

**Schedule 2** may, if amended by a future Act of Parliament, include:

- \* a description of the members of occupational associations whose civil liability is to be limited by reference to a multiple of charges
- \* a specification of the multiple
- \* a specification of the amount of damages below which there is to be no limitation of civil liability.

**Schedule 3** contains provisions relating to the members of the Council.

**Schedule 4** contains provisions relating to the procedure of the Council.

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**OCCUPATIONAL LIABILITY BILL 1990**

NEW SOUTH WALES



No. , 1990

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**A BILL FOR**

An Act to provide for the limitation of liability of members of occupational associations in certain circumstances.

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The Legislature of New South Wales enacts:

**PART 1 - PRELIMINARY**

**Short title**

1. This Act may be cited as the Occupational Liability Act 1990.

**Commencement**

2. This Act commences on a day or days to be appointed by proclamation.

**Definitions**

3. (1) In this Act:

"Council" means the Occupational Standards Council constituted by this Act;

"damages" includes:

- (a) interest which may be payable in respect of an amount which may be awarded as damages; and
- (b) legal costs and expenses which may be ordered to be paid in connection with an award of damages;

"judgment" includes a judgment given by consent;

"occupational association" means a body corporate:

- (a) which represents the interests of persons who are members of the same occupational group; and
- (b) the membership of which is limited principally to members of that occupational group;

"occupational group" includes a professional group and a trade group;

"occupational liability" means civil liability arising (in tort, contract or otherwise) from anything done or omitted by a member of an occupational association acting in the performance of his or her occupation.

(2) In this Act:

- (a) a reference to a court includes a reference to an arbitrator; and
- (b) a reference to a judgment of a court includes a reference to an award of an arbitrator.

(3) In this Act:

- (a) a reference to a function includes a reference to a power, authority and duty; and
- (b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

**Types of liability to which this Act does not apply**

4. This Act does not apply to or in respect of liability for damages arising from any of the following:

- (a) the death of or personal injury to a person;
- (b) a breach of a fiduciary duty;
- (c) fraud or dishonesty.

**Act binds the Crown**

5. This Act binds the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

**PART 2 - LIMITATION OF LIABILITY**

**Division 1 - Limitation of liability by specified monetary ceiling**

**Application of Division 1**

6. (1) This Division applies to such of the members as are specified in Schedule 1 of an occupational association so specified.

(2) A specification of members of an occupational association may specify all members or a class of members.

**Effect of application of Division 1 - insurance arrangements**

7. If a person to whom this Division applies is, at the time at which a judgment is to be given by a court in respect of a cause of action against the person for occupational liability, able to satisfy the court that the person has an insurance policy:

- (a) insuring the person against that occupational liability; and
- (b) under which the amount payable in respect of the occupational liability relating to that cause of action is not less than the

amount of the monetary ceiling specified in relation to the person in Schedule 1,  
the court may not award damages against the person in relation to that cause of action in excess of the amount so specified.

**Effect of application of Division 1 - business assets**

8. (1) If a person to whom this Division applies is, at the time at which a judgment is to be given by a court in respect of a cause of action against the person for occupational liability, able to satisfy the court:

- (a) that the person has business assets, the net current market value of which is not less than the amount specified in relation to the person in Schedule 1; or
- (b) that:
  - (i) the person has business assets and an insurance policy insuring the person against that occupational liability; and
  - (ii) the net current market value of the assets and the amount payable under the insurance policy in respect of the occupational liability relating to that cause of action, if combined, would total an amount that is not less than the amount of the monetary ceiling specified in relation to the person in Schedule 1,

the court may not award damages against the person in relation to that cause of action in excess of the amount so specified.

(2) In this section, "business assets" means the property of a person which is able to be taken in proceedings for enforcement of a judgment of a court, other than property which is not used in the performance of the person's occupation.

**Specification of different amounts for different persons**

9. Different amounts may be specified in Schedule 1 for different classes of persons within an occupational association.

**Division 2 - Limitation of liability by multiple  
of charges**

**Application of Division 2**

10. (1) This Division applies to such of the members as are specified in Schedule 2 of an occupational association so specified.

(2) A specification of members of an occupational association may specify all members or a class of members.

**Effect of application of Division 2**

11. (1) If a person to whom this Division applies is, at the time at which a judgment is to be given by a court in respect of a cause of action against the person for occupational liability, able to satisfy the court that the person has an insurance policy:

- (a) insuring the person against that occupational liability; and
- (b) under which the amount payable in respect of the occupational liability relating to that cause of action is not less than an amount (in this section called the "**limitation amount**"), being a reasonable charge for the services provided by the person or which the person failed to provide and to which the cause of action relates, multiplied by the multiple specified in Schedule 2 in relation to the person,

the court may not award damages against the person in relation to that cause of action in excess of the limitation amount.

(2) In this section, a reference to a reasonable charge is a reference to:

- (a) the amount that would ordinarily be charged in accordance with a scale of charges accepted by the occupational association of which the person is a member; or
- (b) if there is no such scale, the amount that a competent person of the same qualifications and experience as the person would be likely to charge in the same circumstances.

(3) This section does not operate so as to limit an amount of damages awarded against a person which is less than the excluded amount specified in Schedule 2 in relation to the person.

**Specification of different multiples for different persons**

12. Different multiples may be specified in Schedule 2 for different classes of persons within an occupational association.

**Division 3 - Miscellaneous**

**Alternative limitations**

13. If both Division 1 and Division 2 apply to a person at the same time in respect of the same occupation, then Division 1 is taken not to apply to the person.

**Insurance to be of requisite standard**

14. For the purposes of this Part, an insurance policy must be a policy, or a policy of a kind, which complies with standards determined by the occupational association whose members may be insured under such a policy, or a policy of such a kind.

**Limitation of amount of damages**

15. A limitation of an amount of damages imposed by this Act is a limitation of the amount of damages which may be awarded for a single claim and is not a limitation of the amount of damages which may be awarded for all claims arising out of a single event.

**Several defendants**

16. If proceedings arising out of the same event are brought by a plaintiff against more than one defendant and each defendant is a person to whom Division 1 applies, or each defendant is a person to whom Division 2 applies, the maximum amount of damages that may be recovered in the proceedings is the maximum amount recoverable under Division 1 or Division 2, as the case requires, from a single defendant.

**Amendment of Schedules 1 and 2**

17. (1) Schedules 1 and 2 may only be amended, substituted or repealed by an Act of Parliament, except as provided by this section.

- (2) The regulations may amend Schedule 1 or 2:
  - (a) to increase an amount specified in Schedule 1 or 2; and
  - (b) to increase a multiple specified in Schedule 2.
- (3) Any such regulation may contain provisions of a savings or transitional nature consequent on the amendment.
- (4) Any such regulation must not be made except on the recommendation of the Council.

**Notification of limitation of liability**

18. (1) If a person's occupational liability is limited in accordance with this Part, all official correspondence ordinarily used by the person in the performance of the person's occupation is to carry a statement to that effect.

(2) A person who contravenes subsection (1) is guilty of an offence. Maximum penalty: 50 penalty units.

(3) The regulations may prescribe a form of statement for the purposes of this section.

(4) A person does not commit an offence against this section if the statement carried on the person's official correspondence is in the prescribed form.

**PART 3 - THE OCCUPATIONAL STANDARDS COUNCIL**

**Division 1 - Constitution of the Council**

**Constitution of the Council**

19. There is constituted by this Act a body corporate with the corporate name of the Occupational Standards Council.

**Division 2 - Membership and procedure of the Council**

**Membership of the Council**

20. (1) The Council is to consist of such part-time members as may be appointed by the Minister.

(2) The persons appointed must have such experience, skills and qualifications as the Minister considers appropriate for them to make a contribution to the work of the Council.

**Provisions relating to members of the Council**

21. Schedule 3 has effect with respect to the members of the Council.

**Provisions relating to procedure of the Council**

22. Schedule 4 has effect with respect to the procedure of the Council.

**Division 3 - Functions of the Council**

**Functions of the Council**

23. (1) The Council has the following functions:

- (a) to give advice to the Minister concerning:
  - (i) the operation of this Act;
  - (ii) the amendment of this Act by the insertion into Schedule 1 or 2 of members or classes of members of occupational associations to whom, in the opinion of the Council, this Act should apply;
  - (iii) any other matter relating to the occupational liability of members of occupational associations;
- (b) to give advice to occupational associations concerning policies of insurance for the purposes of Part 2;
- (c) to encourage and assist in the improvement of occupational standards of members of occupational associations;
- (d) to encourage and assist in the development of self-regulation of occupational associations, including the giving of advice and assistance concerning the following:
  - (i) codes of ethics;
  - (ii) codes of practice;
  - (iii) quality management;
  - (iv) risk management;
  - (v) resolution of complaints by clients;
  - (vi) voluntary mediation services;
  - (vii) membership requirements;
  - (viii) discipline of members;
  - (ix) continuing occupational education;
- (e) to monitor the occupational standards of persons to whom this Act applies;



- (f) to publish advice and information concerning the matters referred to in this section;
- (g) to conduct forums, approved by the Minister, on issues of interest to members of occupational groups;
- (h) to collect, analyse and provide the Minister with information on issues and policies concerning the standards of occupational groups.

(2) The Council is not empowered to give advice concerning occupational standards contained in any other Act or statutory instrument.

(3) Any advice given to the Minister by the Council may be given either at the request of the Minister or without any such request.

(4) The Council has such other functions as are conferred or imposed on it by or under this or any other Act.

#### **Applications by occupational associations for inclusion in this Act**

24. (1) An occupational association may apply to the Council for the making of a recommendation by the Council to the Minister that specified members of the association be included in Schedule 1 or 2.

(2) The Council, in considering the application, is to have regard to the matters set out in section 23.

(3) After considering the application, the Council may make a recommendation to the Minister for the inclusion of specified members of the association in Schedule 1 or 2 or it may decline to make such a recommendation.

(4) In making a recommendation, the Council may also recommend the making of amendments to other Acts relating to the members of the occupational association concerned.

#### **Division 4 - Miscellaneous**

##### **Requirement to supply information**

25. (1) The Council may, by notice in writing, require an occupational association whose members are specified in Schedule 1 or 2 or which has made an application under section 24 to furnish information to it which may reasonably be required by the Council for the purpose of enabling it to exercise its functions.

(2) An occupational association which does not comply with a notice under this section is guilty of an offence.

Maximum penalty: 5 penalty units.

#### **Committees of the Council**

26. (1) The Council may, with the approval of the Minister, establish committees to assist it in connection with the exercise of any of its functions.

(2) It does not matter that any or all of the members of a committee are not members of the Council.

(3) The procedure for the calling of meetings of a committee and for the conduct of business at those meetings is to be as determined by the Council or (subject to any determination of the Council) by the committee.

#### **Staff of the Council**

27. The Council may, with the approval of the Minister, arrange for the use of the services of any staff or facilities of a government department, an administrative office or a public or local authority.

#### **Annual report**

28. (1) As soon as practicable after 1 January, but before 31 March, in each year, the Council must prepare and forward to the Minister a report on its work and activities for the previous year.

(2) The Minister is required to lay the report or cause it to be laid before both Houses of Parliament as soon as practicable after receiving the report.

### **PART 4 - MISCELLANEOUS**

#### **Application of this Act**

29. This Act has effect despite any other law to the contrary.

#### **No contracting out of this Act**

30. This Act applies in relation to a person to whom Division 1 or 2 of Part 2 applies despite any contract to the contrary, whether the contract was made before or after the date on which the person

became a person to whom Division 1 or 2 of Part 2, as the case requires, applies.

**No limitation on other insurance**

31. Nothing in this Act limits the insurance arrangements a person may make apart from those made for the purposes of this Act.

**Proceedings for offences**

32. Proceedings for an offence against this Act or the regulations are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

**Regulations**

33. (1) 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.

(2) Without limiting the generality of subsection (1), the regulations may make provision for or with respect to the following:

- (a) the fees for applications under section 24;
- (b) the annual fee to be paid to the Council by an occupational association whose members are specified in Schedule 1 or 2.

(3) A regulation may create an offence punishable by a penalty not exceeding 50 penalty units.

**Rules of court**

34. (1) Rules of court may be made with respect to any matter arising under Part 2.

(2) This section does not limit the rule-making powers conferred by the Supreme Court Act 1970.

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**SCHEDULE 1 - LIMITATION OF LIABILITY BY SPECIFIED  
MONETARY CEILING**

(Secs. 6-9, 13, 17)

Members of occupational associations	Monetary ceiling

**SCHEDULE 2 - LIMITATION OF LIABILITY BY MULTIPLE  
OF CHARGES**

(Secs. 10-13, 17)

Members of occupational associations	Multiple of charge	Excluded amount

**SCHEDULE 3 - PROVISIONS RELATING TO MEMBERS OF  
THE COUNCIL**

(Sec. 21)

**Chairperson and Deputy Chairperson of the Council**

1. (1) Two of the members of the Council are (in and by their respective instruments of appointment or in and by other instruments executed by the Minister) to be appointed as Chairperson and Deputy Chairperson of the Council, respectively.

(2) The Minister may remove a member from the office of Chairperson or Deputy Chairperson of the Council at any time.

(3) A person holding office as Chairperson or Deputy Chairperson of the Council vacates that office if the person:

- (a) is removed from that office by the Minister; or
- (b) resigns that office by instrument in writing addressed to the Minister; or
- (c) ceases to be a member.

**Deputies of members**

2. (1) The Minister may, from time to time, appoint a person to be the deputy of a member, and the Minister may revoke any such appointment.

(2) In the absence of a member, the member's deputy:

- (a) is, if available, to act in the place of the member; and
- (b) while so acting, has all the functions of the member and is taken to be a member.

(3) The deputy of a member who is Chairperson or Deputy Chairperson of the Council does not (because of this clause) have the member's functions as Chairperson or Deputy Chairperson.

(4) A person while acting in the place of a member is entitled to be paid such allowances as the Minister may from time to time determine in respect of the person.

**SCHEDULE 3 - PROVISIONS RELATING TO MEMBERS OF  
THE COUNCIL - *continued***

**Terms of office**

3. Subject to this Schedule, a member holds office for such period (not exceeding 3 years) as may be specified in the member's instrument of appointment, but is eligible (if otherwise qualified) for re-appointment.

**Allowances**

4. A member is entitled to be paid such allowances as the Minister may from time to time determine in respect of the member.

**Vacancy in office of member**

5. (1) The office of a member becomes vacant if the member:

- (a) dies; or
- (b) completes a term of office and is not re-appointed; or
- (c) resigns the office by instrument in writing addressed to the Minister; or
- (d) is removed from office by the Minister under this clause or by the Governor under Part 8 of the Public Sector Management Act 1988; or
- (e) is absent from 4 consecutive meetings of the Council of which reasonable notice has been given to the member personally or in the ordinary course of post, except on leave granted by the Council or unless, before the expiration of 4 weeks after the last of those meetings, the member is excused by the Council for having been absent from those meetings; or
- (f) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit; or
- (g) becomes a mentally incapacitated person; or
- (h) is convicted in New South Wales of an offence which is punishable by penal servitude or imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence which, if committed in New South Wales, would be an offence so punishable.

SCHEDULE 3 - PROVISIONS RELATING TO MEMBERS OF  
THE COUNCIL - *continued*

(2) The Minister may remove a member from office for incompetence or misbehaviour.

**Filling of vacancy in office of member**

6. If the office of a member becomes vacant, a person may, subject to this Act, be appointed to fill the vacancy.

**Effect of certain other Acts**

7. (1) The Public Sector Management Act 1988 does not apply to the appointment of a member and a member is not, as a member, subject to that Act (except Part 8).

(2) If by or under any Act provision is made:

(a) requiring a person who is the holder of a specified office to devote the whole of his or her time to the duties of that office;  
or

(b) prohibiting the person from engaging in employment outside the duties of that office,

the provision does not operate to disqualify the person from holding that office and also the office of a member or from accepting and retaining any remuneration payable to the person under this Act as such a member.

(3) The office of a member is not, for the purposes of any Act, an office or place of profit under the Crown.

**Personal liability of members**

8. A matter or thing done or omitted by the Council, a member or any person acting under the direction of the Council or a member does not, if the matter or thing was done or omitted in good faith for the purpose of executing this or any other Act, subject the member or a person so acting personally to any action, liability, claim or demand.

**SCHEDULE 4 - PROVISIONS RELATING TO PROCEDURE OF  
THE COUNCIL**

(Sec. 22)

**General procedure**

1. The procedure for the calling of meetings of the Council and for the conduct of business at those meetings is, subject to this Act and the regulations, to be as determined by the Council.

**Quorum**

2. The quorum for a meeting of the Council is a majority of the members for the time being.

**Presiding member**

3. (1) The Chairperson of the Council or, in the absence of the Chairperson, the Deputy Chairperson of the Council or, in the absence of both, another member elected to chair the meeting by the members present is to preside at a meeting of the Council.

(2) The person presiding at any meeting of the Council has a deliberative vote and, in the event of an equality of votes, has a second or casting vote.

**Voting**

4. A decision supported by a majority of the votes cast at a meeting of the Council at which a quorum is present is the decision of the Council.

**First meeting**

5. The Minister is to call the first meeting of the Council in such manner as the Minister thinks fit.

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