

FIRST PRINT

SEXUAL OFFENCE DAMAGES BILL 1994

NEW SOUTH WALES



EXPLANATORY NOTE

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

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

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides for the commencement of the proposed Act 3 months after assent, unless commenced sooner by proclamation.

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

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

Sexual Offence Damages 1994

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

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

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

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

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

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

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

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

Clause 13 provides that the proposed Act applies only to the production, distribution, exhibition, sale etc. of offensive sexual material that takes place after the commencement of the proposed Act.

FIRST PRINT

SEXUAL OFFENCE DAMAGES BILL 1994

NEW SOUTH WALES



TABLE OF PROVISIONS

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

SEXUAL OFFENCE DAMAGES BILL 1994

NEW SOUTH WALES



No. , 1994

A BILL FOR

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

Sexual Offence Damages 1994

The Legislature of New South Wales enacts:**Short title**

1. This Act may be cited as the Sexual Offence Damages Act 1994.

Commencement

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

Definitions

3. In this Act:

10 **"film"** includes film as defined in the Film and Video Tape Classification Act 1984, video games and computer games;

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

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

20 **"sexual offence"** means:

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

Right of action against persons responsible for offensive sexual material

- 30 4. (1) An action may be brought against a person who is responsible for offensive sexual material for the recovery of damages in respect of the death of or injury to a person caused by or arising out of any act that constitutes a sexual offence which was caused by the offensive sexual material concerned.

Sexual Offence Damages 1994

(2) In respect of such an action, the person responsible for the offensive sexual material is liable as if that person were the person who did an act that constitutes the sexual offence.

(3) A person responsible for offensive sexual material is not liable as referred to in this section if the person proves that he or she did not foresee and could not reasonably be expected to have foreseen that the material concerned would cause the sexual offence concerned.

5

Meaning of "person responsible" for material

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

10

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

When is material considered to have "caused" an offence

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

15

Claim can proceed without offender or criminal proceedings

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

20

Evidence

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

- (a) the opinion of an expert as to whether or not exposure to offensive sexual material caused a person to do an act is admissible in evidence; and

25

- (b) any testimony given by a person in criminal proceedings against the person in respect of an offence with which the proceedings are concerned is admissible as evidence of what caused the person to do an act that constitutes the offence, but only if the defendant has an opportunity to cross-examine the person as to that testimony; and

30

Sexual Offence Damages 1994

- (c) evidence of similarities between an activity depicted in the offensive sexual material concerned and the acts constituting the sexual offence concerned is admissible as evidence that the material caused those acts.

5 Proof on balance of probabilities

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

Liability of directors etc. of corporations

- 10 10. (1) If a corporation is subject to a liability as a result of this Act, each person who is a director of the corporation or is concerned in the management of the corporation is subject to the same liability, jointly and severally with the corporation.

- 15 (2) This section does not apply to a person if he or she establishes that the corporation produced, distributed, exhibited, broadcasted, disseminated or sold the offensive sexual material concerned without his or her knowledge or consent.

Exemplary damages may be awarded

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

6 year limitation period for claim

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

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

Sexual Offence Damages 1994

Transitional

13. (1) A person does not incur a liability under this Act in respect of anything done by the person before the commencement of this Act.

(2) This Act extends to apply in respect of the distribution, exhibition, broadcasting, dissemination and sale of offensive sexual material even if the material was produced before the commencement of this Act.
