



Department of Local Government Circular to Councils

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CIVIL LIABILITY AMENDMENT (PERSONAL RESPONSIBILITY) ACT

The NSW Government has set in place a two-stage reform package for public liability in New South Wales. Stage One involved legislation limiting general damages as well as setting maximum amounts for loss of earnings and earning capacity. This legislation is the Civil Liability Act 2002.

Stage Two involved further fundamental changes to the law of negligence, which were included in the Civil Liability Amendment (Personal Responsibility) Act 2002.

The majority of the provisions of the Stage Two amending Act will commence by Proclamation published in the Government Gazette on Friday 6 December 2002, including Part 5 relating to the liability of public authorities (which includes local councils). A brief summary of the provisions that will commence on that day follows, while a more detailed description of all the reforms is attached. The commencing reforms will:

- limit the scope of reasonable foreseeability and set out rules for “causation”;
- limit when plaintiffs can recover for injuries caused by obvious or inherent risks or their own contributory negligence;
- limit liability for recreational activities where there is a risk warning;
- provide a new “profession focused” defence for professional negligence;
- limit liability in tort of public authorities, including roads authorities (eg local councils);
- prevent plaintiffs succeeding when their injury is due to their intoxication;
- prevent plaintiffs succeeding when their injury is in the course of a serious crime;
- protect people who act in self-defence to a criminal act;
- protect good Samaritans from liability for their good faith acts;
- protect individual volunteers and volunteer rescue organizations from liability for their good faith acts;
- limit availability of damages for nervous shock;
- prevent apologies being used as evidence of liability or fault; and
- introduce a new rule for calculating the limitation period for personal injury claims.

The provisions that are yet to be proclaimed are:

- Part 1, clause 5N, Waiver of contractual duty of care for recreational activities;
- Part 2, Division 7, Non-delegable duties and Structured Settlements; and
- Part 4, Proportionate Liability.

The Act can shortly be expected to be viewed at www.legislation.nsw.gov.au or in Bill form via the NSW Parliament website.



Garry Payne
Director General

CIVIL LIABILITY AMENDMENT (PERSONAL RESPONSIBILITY) ACT

Limit the scope of reasonable foreseeability

- A possibility has to be “not insignificant” before it can be considered reasonably foreseeable.*
- A court cannot rely solely on hindsight, evidence of subsequent remedial action, or the mere fact that a risk was easily avoidable in determining liability.

Limit claims from an inherent or obvious risk or plaintiffs' own contributory negligence

- Presumption that a person is aware of obvious risks.*
- No duty to warn of an obvious risk, providing any applicable NSW or Commonwealth safety laws are complied with.*
- No liability for the obvious risks of dangerous sports and other activities.*
- No liability for inherent risks.
- Allow courts to find that a person's conduct should mean they are 100% responsible for their own injuries. *

Limit liability arising from recreational activities: risk warnings and waivers

- No liability for injury, death or property damage resulting from a risk of a recreational activity in respect of which a risk warning has been given.
- A participant in a recreational activity will be able to waive the requirement that services be provided with due care and skill (combined effect with expected amendment to the *Trade Practices Act 1974* (Cth)).
- The new protection will be subject to compliance with any applicable NSW or Commonwealth safety laws.

Prevent plaintiffs succeeding when their injury is due to their intoxication

- A defendant will not owe a plaintiff who was intoxicated any higher standard of care than if the plaintiff was sober.
- No personal injury damages will be available for an intoxicated person unless the accident was likely to have occurred even if the person had not been intoxicated.
- If the accident is likely to have occurred anyway, the intoxicated person's damages will still be reduced on a presumption of contributory negligence of 25% (or more if appropriate) unless the person's intoxication played no part in the accident.

Limit criminals recovering damages for injuries received while committing a crime

- General rule is that no damages are payable where the injured person was engaged in conduct constituting a serious offence (ie. offence where the potential penalty is over 6 months).
- No damages where the criminal was injured through reasonable self-defence. Also, no damages where the criminal injured even through “excessive” self-defence, unless the court considers the circumstances are exceptional.
- No damages at all for “pain and suffering” for any criminal injured through self-defence.

Introduce a new defence for professionals accused of negligence

- Additional defence to alleged professional negligence if the professional acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice.*
- Court can still find that peer opinion was irrational where warranted.*
- No change to the duty of any professional to advise, inform or warn about any risks in the provision of services such as health care, beauty therapies, tattooing etc.

Introduce proportionate liability for certain claims

- Proportionate liability will be introduced for claims for economic loss or property damage (other than in personal injury claims).
- A person jointly responsible with some other person(s) will be liable only to the extent of their responsibility.

Limit liability in tort of a public or other authority

- Court must take into account principles relating to financial and other resources available to the authority, the general responsibilities of the authority, and its compliance with general practices and applicable standards.
- No liability for a public or other authority for breach of statutory duty, unless it has acted irrationally; or for a regulatory authority that has not exercised a function, unless it could have been compelled to exercise a function; or for a roads authority who has not exercised a function, unless it knew about the particular risk.

Protect good samaritans from liability for their acts

- No liability for good faith actions of good samaritans who come to the assistance of a person in danger.
- No liability for volunteer rescue organisations, such as surf lifesaving clubs, in connection with a rescue.

Protect volunteers from liability for their acts

- No liability for good faith actions of volunteers doing work for community organisations.

Limit availability of damages for nervous shock

- The only people who can recover for nervous shock are victims of or others present at an accident, or a family member of a victim.
- Damages for nervous shock will not be available, however, if the person who was injured in the first place (eg. the criminal) could not have claimed damages themselves.
- Damages will be reduced if the victim was also contributorily negligent.*

Prevent apologies by certain persons being used as evidence of liability or fault

- An apology by or on behalf of the defendant will not constitute an admission of liability, and will not be relevant to the determination of fault or liability, in connection with civil liability.

Facilitate structured settlements in personal injury cases

- The court will notify the parties of the terms of any proposed award so as to give the parties a reasonable opportunity to negotiate a structured settlement.
- Failure to make a structured settlement may lead to an adverse costs award.
- Plaintiff's lawyer to certify that the plaintiff was advised of the option of a structured settlement.

Create a new way of calculating the limitation period for personal injury cases

- The Ipp report recommends that personal injury actions should not be brought more than three years after the date of "discoverability". *
- This new time period will run against children and disabled people, unless: (i) they have no capable parent or guardian to look after their interests (ii) the injury was

caused by a person in a close personal relationship with the child or the child's parents and (iii) the parents "irrationally" fail to bring a claim on the injured child's behalf.

Application of the reforms

- Subject to some exceptions, the amendments will not generally apply to civil liability in respect of intentional criminal acts, dust diseases claims, tobacco smoking claims, motor accidents and workers compensation.

Commencement of reforms

- The Bill is divided into Parts. The only Parts of the Bill that will commence "retrospectively" on 3 September are the nervous shock and criminals Parts.
- Otherwise, the changes to the *Civil Liability Act* will only apply to claims filed after the relevant Part has commenced, which will be on Proclamation.
- Those changes will, however, apply to injuries or damage suffered before Proclamation. The key date will be when the claim is filed.
- The changes to the *Limitation Act* will only apply to future injuries.

* Denotes provision modelled on a particular recommendation in the Ipp Report.