



New South Wales

# Civil Liability Legislation Amendment Bill 2008

## Explanatory note

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

## Overview of Bill

The object of this Bill is to amend the *Civil Liability Act 2002* (***the Act***) as follows:

- (a) to require a person who may have a claim for damages against a ***protected defendant*** (the Department of Corrective Services and certain other public sector defendants) in respect of an injury to an offender in custody:
  - (i) to notify the protected defendant within 6 months of the incident that gives rise to the claim, and
  - (ii) to provide certain information about the incident to the protected defendant,
- (b) to provide that Part 2A of the Act (Special provisions for offenders in custody) extends to a claim in relation to a tort for which the protected defendant is vicariously liable,
- (c) to make it clear that the general limitation on the Act's application to intentional acts does not interfere with the operation of Part 2A (in particular the operation of that Part in respect of victim claims that involve intentional acts),

- (d) to make changes to the system under which a victim of an offender can make a claim against damages awarded to the offender against a protected defendant, including:
  - (i) increasing the period within which a victim can make such a claim from 6 months from the date the offender was awarded damages to 12 months from that date, and
  - (ii) authorising the Commissioner of Police to provide information to the protected defendant about persons who may have a victim claim against the offender, and
  - (iii) replacing the requirement that the protected defendant must notify victims within 28 days after damages are awarded to the offender with a requirement that the notification be given as far as practicable within 28 days (so as to facilitate the notification of victims who are identified outside the 28-day period), and
  - (iv) providing that offender damages are to be held in trust by the Public Trustee (rather than the protected defendant),
- (e) other minor and miscellaneous amendments.

The Bill also amends the *Civil Liability Act 2002*, the *Motor Accidents Act 1988* and the *Motor Accidents Compensation Act 1999* to make it clear that damages are to be awarded for gratuitous attendant care services only if the services are provided (or to be provided) for at least 6 hours per week and for at least 6 consecutive months. The amendment overcomes the effect of the Court of Appeal decision in *Harrison v Melhem* [2008] NSWCA 67.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** is a formal provision that gives effect to the amendments to the *Civil Liability Act 2002* set out in Schedule 1.

**Clause 4** is a formal provision that gives effect to the amendments to the Acts set out in Schedule 2.

**Clause 5** provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

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

### **Offender damages claims**

**Schedule 1 [6]** inserts new provisions into the Act in relation to claims for damages against a protected defendant in respect of injuries received by a person while the person was an offender in custody.

The amendments require the claimant to notify the protected defendant in writing of an incident that may give rise to a damages claim within 6 months of the incident. The written notice must specify the date of the incident, describe the incident and state that the incident may give rise to a claim against the protected defendant.

The protected defendant will be entitled to request certain information and documents from the claimant that will enable the protected defendant to assess the merits of the claim and any liability and make a settlement offer where appropriate. The claimant must comply with any reasonable request.

However, an offender is not required to comply with such a request for information if the offender is considered a *vulnerable offender*. An offender is considered a vulnerable offender if the offender has a reasonable apprehension that his or her safety will be put at risk if he or she notifies the protected defendant or complies with the request for information, and has applied to be placed in protective custody or transferred to another correctional facility. Once the offender has been either placed in protective custody or transferred, or if the offender's application is rejected or the offender declines to be placed in protective custody or transferred, the offender ceases to be considered a vulnerable offender and must comply with the protected defendant's request for information.

A protected defendant against whom court proceedings for offender damages have been commenced will be able to apply to the court to have the proceedings dismissed on the basis that the claimant has not complied with the new requirements. Such an application must be made within 2 months of the statement of claim being served on the protected defendant. The court must dismiss the proceedings unless the claimant has a satisfactory explanation for his or her non-compliance with the requirements.

The amendments do not apply to a claim for damages if the incident giving rise to the claim occurred before the commencement of the amendments.

### **Victim claims against damages awarded to offenders**

Currently, a protected defendant holds any personal injury damages awarded to an offender in trust (in a *victim trust fund*) and the Public Trustee holds that money on behalf of the protected defendant. **Schedule 1 [7]** provides that the Public Trustee itself will hold the damages in trust in a victim trust fund. **Schedule 1 [15]–[21]** make consequential amendments.

**Schedule 1 [8]** makes it clear that while offender damages are held in a victim trust fund, the liability of a protected defendant to pay those damages is suspended.

**Schedule 1 [9]** extends the period during which a victim can commence proceedings against an offender in respect of damages held in a victim trust fund from 6 months from the date the damages were awarded to the offender to 12 months from that date.

At present, the protected defendant must notify each person who may have a claim against an offender in respect of damages held in a victim trust fund and must do this within 28 days after the award of damages. **Schedule 1 [10]** removes the requirement to notify within 28 days and **Schedule 1 [12]** requires that the notification be sent as far as practicable within 28 days (without preventing persons from being notified outside that period).

**Schedule 1 [14]** authorises the Commissioner of Police to provide to the protected defendant information that the protected defendant may reasonably require to determine whether a person has a victim claim against an offender and to identify and contact any such victim. **Schedule 1 [11] and [13]** make consequential amendments. The amendments relating to victim claims extend to a victim claim that arose before the commencement of the amendments.

#### **Application of Part 2A (Special provisions for offenders in custody)**

**Schedule 1 [1]** makes it clear that the general limitation on the Act's application to intentional acts does not interfere with the specific operation of Part 2A of the Act. This will remove any doubt about the operation of that Part in respect of victim claims (which involve intentional acts by the offender).

**Schedule 1 [5]** provides that Part 2A of the Act extends to awards of damages against a protected defendant in respect of the death of or personal injury to an offender in custody when the award is based on the vicarious liability of the protected defendant for the tort of some other person. Currently the Part is limited to claims arising from the negligence of the protected defendant.

#### **Damages for gratuitous attendant care services**

**Schedule 1 [2]** amends the Act in relation to damages for gratuitous attendant care services to make it clear that such damages are to be awarded only if the services are provided (or to be provided) for at least 6 hours per week and for at least 6 consecutive months. The amendment extends to liabilities that arose before the commencement of the amendment but does not apply to proceedings determined before that commencement.

#### **Miscellaneous**

The Act currently provides that an amount of damages determined under the Act is to be rounded to the nearest \$500. **Schedule 1 [3] and [4]** clarify that an amount of \$250 or \$750 is to be rounded up.

#### **Savings and transitional provisions**

**Schedule 1 [22]** provides for the making of savings and transitional regulations consequent on the enactment of the proposed Act.

**Schedule 1 [23]** inserts savings and transitional provisions consequent on the amendments.

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

**Schedule 2.1 [1] and 2.2 [1]** amend the *Motor Accidents Act 1988* and the *Motor Accidents Compensation Act 1999* in relation to damages for gratuitous attendant care services to make it clear that such damages are to be awarded only if the services are provided (or to be provided) for at least 6 hours per week and for at least 6 consecutive months.

**Schedule 2.1 [2] and [3], and 2.2 [2] and [3]** provide for the making of savings and transitional regulations consequent on the amendments and provide that the amendments extend to liabilities that arose before the commencement of the amendments but do not apply to proceedings that were determined before that commencement.



First print



New South Wales

# Civil Liability Legislation Amendment Bill 2008

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New South Wales

# Civil Liability Legislation Amendment Bill 2008

No. , 2008

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## A Bill for

An Act to amend the *Civil Liability Act 2002* and other Acts to make further provision in respect of offender damages, victim claims, indexation of damages, and damages for gratuitous attendant care services.

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<b>The Legislature of New South Wales enacts:</b>	1
<b>1 Name of Act</b>	2
This Act is the <i>Civil Liability Legislation Amendment Act 2008</i> .	3
<b>2 Commencement</b>	4
This Act commences on a day or days to be appointed by proclamation.	5
<b>3 Amendment of Civil Liability Act 2002 No 22</b>	6
The <i>Civil Liability Act 2002</i> is amended as set out in Schedule 1.	7
<b>4 Amendment of other Acts</b>	8
The Acts specified in Schedule 2 are amended as set out in that Schedule.	9 10
<b>5 Repeal of Act</b>	11
(1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.	12 13
(2) The repeal of this Act does not, because of the operation of section 30 of the <i>Interpretation Act 1987</i> , affect any amendment made by this Act.	14 15

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<b>Schedule 1</b>	<b>Amendment of Civil Liability Act 2002</b>	1
	(Section 3)	2
<b>[1]</b>	<b>Section 3B Civil liability excluded from Act</b>	3
	Insert at the end of section 3B (1) (a) (ii):	4
	and	5
	(iii) Part 2A (Special provisions for offenders in custody),	6
<b>[2]</b>	<b>Section 15 Damages for gratuitous attendant care services: general</b>	7
	Omit section 15 (3). Insert instead:	8
	(3) Further, no damages may be awarded to a claimant for gratuitous attendant care services unless the services are provided (or to be provided):	9
	(a) for at least 6 hours per week, and	10
	(b) for a period of at least 6 consecutive months.	11
<b>[3]</b>	<b>Section 16 Determination of damages for non-economic loss</b>	12
	Omit “rounded to the nearest \$500” from section 16 (4).	13
	Insert instead “rounded to the nearest \$500 (with the amounts of \$250 and \$750 being rounded up)”.	14
<b>[4]</b>	<b>Section 17 Indexation of maximum amount relating to non-economic loss</b>	15
	Omit “rounded to the nearest \$500” from section 17 (5).	16
	Insert instead “rounded to the nearest \$500 (with the amounts of \$250 and \$750 being rounded up)”.	17
<b>[5]</b>	<b>Section 26B Application of Part</b>	18
	Omit “being an injury caused by the negligence (that is, the failure to exercise reasonable care and skill) of a protected defendant” from section 26B (1).	19
	Insert instead “being an injury caused by the negligence (that is, the failure to exercise reasonable care and skill) of the protected defendant or caused by the tort (whether or not negligence) of another person for whose tort the protected defendant is vicariously liable”.	20
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<b>[6] Part 2A, Division 1A</b>	1
Insert after Division 1 of Part 2A:	2
<b>Division 1A Duties of claimant for offender damages</b>	3
<b>26BA Protected defendant must be given notice of incident giving rise to claim</b>	4 5
(1) A person (referred to in this Division as a <i>claimant</i> ) who makes or is entitled to make a claim against a protected defendant for an award of personal injury damages to which this Part applies must give the protected defendant notice of the incident that gives rise to the claim within 6 months after the relevant date for the claim.	6 7 8 9 10
(2) The relevant date for the claim is the date of the incident that gives rise to the claim unless the claim is made in respect of the death of a person, in which case the relevant date is the date of the person's death.	11 12 13 14
(3) Notice of an incident must be in writing and must:	15
(a) specify the date of the incident, and	16
(b) describe the incident (in ordinary language), and	17
(c) state that the incident may give rise to a claim against the protected defendant.	18 19
(4) Notice given to an officer or employee of a protected defendant is taken to have been given to the protected defendant.	20 21
(5) Time does not run for the purposes of this section while the claimant is a vulnerable offender under section 26BC.	22 23
<b>26BB Claimant must comply with requests for information</b>	24
(1) A claimant must comply with any reasonable request by the protected defendant to furnish specified information, or to produce specified documents or records, for the purpose of providing the protected defendant with sufficient information:	25 26 27 28
(a) to be satisfied as to the validity of the claim and, in particular, to assess whether the claim or any part of the claim may be fraudulent, and	29 30 31
(b) to be able to make an early assessment of liability, and	32
(c) to be able to make an informed offer of settlement.	33
(2) The reasonableness of a request under this section may be assessed having regard to criteria including the following:	34 35

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(a)	the amount of time the claimant needs to comply with the request,	1 2
(b)	whether the information sought is cogent and relevant to a determination of liability or quantum of loss, having regard to the nature of the claim,	3 4 5
(c)	the amount of information that has already been supplied to or is available to the protected defendant to enable liability and quantum of loss to be assessed and an offer of settlement made,	6 7 8 9
(d)	how onerous it will be for the claimant to comply with the request,	10 11
(e)	whether the information is privileged,	12
(f)	whether the information sought is sufficiently specified,	13
(g)	the time of the request and whether the claimant will be delayed in commencing proceedings by complying with the request.	14 15 16
(3)	A claimant is not required to comply with a requirement under this section while the claimant is a vulnerable offender under section 26BC.	17 18 19
(4)	The duty under this section applies only until court proceedings are commenced.	20 21
<b>26BC</b>	<b>Vulnerable offenders</b>	22
(1)	An offender in custody is considered to be a vulnerable offender for the purposes of this Division if:	23 24
(a)	the offender has a reasonable apprehension that the offender's safety will be put at risk if the offender gives notice as required by section 26BA or complies with a request of the protected defendant under section 26BB, and	25 26 27 28 29
(b)	the offender has (as a result of that reasonable apprehension) applied to be placed in protective custody or transferred to another correctional facility.	30 31 32
(2)	The offender ceases to be a vulnerable offender when any of the following happens:	33 34
(a)	the offender is transferred to another correctional facility or placed in protective custody in response to the offender's application,	35 36 37

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(b)	the offender declines an offer to be transferred to another correctional facility or be placed in protective custody in response to the offender's application,	1 2 3
(c)	the offender's application is rejected on the ground that the offender has failed to establish that the application is made on reasonable grounds.	4 5 6
<b>26BD</b>	<b>Dismissal of court proceedings for failure to give notice or co-operate on claim</b>	7 8
(1)	A protected defendant against whom court proceedings for an award of damages to which this Part applies are commenced may apply to the court to have the proceedings dismissed on the grounds of a failure to comply with section 26BA or 26BB in connection with the claim concerned.	9 10 11 12 13
(2)	An application under this section cannot be made more than 2 months after the statement of claim is served on the protected defendant.	14 15 16
(3)	On an application under this section, the court must dismiss the proceedings unless the court is satisfied that:	17 18
(a)	section 26BA has been complied with in respect of the claim or the claimant has a full and satisfactory explanation for non-compliance with that section and the required notice of the incident was given to the protected defendant within a reasonable period in the circumstances, and	19 20 21 22 23 24
(b)	the claimant has complied with section 26BB in respect of the claim or has a reasonable excuse for any non-compliance with that section.	25 26 27
<b>[7]</b>	<b>Section 26L Offender damages to be held in trust as victim trust fund</b>	28
	Omit section 26L (1) and (2). Insert instead:	29
(1)	The protected defendant liable to pay offender damages awarded to an offender is to pay those damages to the Public Trustee to be held in trust for the offender and paid out only as authorised by this Division.	30 31 32 33
(2)	Offender damages held in trust for an offender under this Division comprise a <i>victim trust fund</i> for victims of the offender. The protected defendant liable to pay those damages is <i>responsible</i> for the fund.	34 35 36 37

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<b>[8] Section 26L (6)</b>	1
Insert after section 26L (5):	2
(6) While offender damages are held in a victim trust fund, the liability of a protected defendant to pay those damages is suspended.	3 4 5
<b>[9] Section 26M Victim trust fund available to satisfy eligible victim claims</b>	6
Omit “6 months” from section 26M (3). Insert instead “12 months”.	7
<b>[10] Section 26N Notice to persons entitled to make victim claim</b>	8
Omit “, within 28 days after the award date for the damages concerned,” from section 26N (1).	9 10
<b>[11] Section 26N (1)</b>	11
Omit “official records”. Insert instead “information”.	12
<b>[12] Section 26N (1A)</b>	13
Insert after section 26N (1):	14
(1A) The notice must be sent as far as practicable within 28 days after the award date for the damages concerned (but this subsection does not prevent the notice from being sent more than 28 days after the award).	15 16 17 18
<b>[13] Section 26N (2)</b>	19
Omit “shown in official records”.	20
Insert instead “disclosed by any information”.	21
<b>[14] Section 26N (5)</b>	22
Insert after section 26N (4):	23
(5) The Commissioner of Police is authorised to provide a protected defendant with any information in the Commissioner’s possession that the protected defendant may reasonably require for:	24 25 26 27
(a) identifying and contacting persons who may have a victim claim against the offender, or	28 29
(b) determining whether a person appears to have a victim claim against the offender.	30 31

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<b>[15] Section 26Q Orders for payment of damages out of money held in trust for victims of offender</b>	1 2
Omit section 26Q (5). Insert instead:	3
(5) The payment of an amount out of a victim trust fund in accordance with an order of a court under this section is taken to be a payment made at the direction of the offender and operates as a discharge, to the extent of the payment, of:	4 5 6 7
(a) the liability of the protected defendant to pay the amount to the offender concerned as offender damages, and	8 9
(b) the obligation of the Public Trustee to hold the amount in trust for the offender concerned.	10 11
<b>[16] Section 26R Payment to offender of trust fund surplus</b>	12
Omit section 26R (3). Insert instead:	13
(3) If a protected defendant responsible for a victim trust fund determines and certifies to the Public Trustee that there is a surplus in the fund, the Public Trustee must pay the certified surplus to or at the direction of the offender concerned.	14 15 16 17
<b>[17] Section 26S Functions of the Public Trustee</b>	18
Omit section 26S (1).	19
<b>[18] Section 26S (2)</b>	20
Omit “this section”. Insert instead “this Division”.	21
<b>[19] Section 26S (3) and (4)</b>	22
Omit the subsections.	23
<b>[20] Section 26S (5) and (6)</b>	24
Omit the subsections. Insert instead:	25
(5) The fees and expenses payable to the Public Trustee in connection with the exercise of functions by the Public Trustee under this Division are payable out of the victim trust fund in connection with which those functions are exercised.	26 27 28 29
(6) The certificate of the Public Trustee as to the fees and expenses payable to the Public Trustee in connection with the exercise of functions by the Public Trustee under this Division is sufficient authority for the payment of the relevant amounts out of the victim trust fund concerned.	30 31 32 33 34

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<b>[21] Section 26V Protection from liability</b>	1
Omit “on behalf of a protected defendant” from section 26V (2).	2
<b>[22] Schedule 1 Savings and transitional provisions</b>	3
Insert at the end of clause 1 (1):	4
<i>Civil Liability Legislation Amendment Act 2008</i>	5
<b>[23] Schedule 1, Part 11</b>	6
Insert after Part 10 of Schedule 1:	7
<b>Part 11 Provisions consequent on enactment of Civil Liability Legislation Amendment Act 2008</b>	8 9 10
<b>31 Definition</b>	11
In this Part:	12
<i>2008 amending Act</i> means the <i>Civil Liability Legislation Amendment Act 2008</i> .	13 14
<b>32 Restrictions on damages for gratuitous attendant care services</b>	15
An amendment made to section 15 by the 2008 amending Act extends to civil liability arising, and to proceedings commenced, before the commencement of the amendment but does not apply to any proceedings determined before that commencement.	16 17 18 19
<b>33 Indexation of non-economic loss damages</b>	20
The amendments made by the 2008 amending Act to sections 16 and 17 are taken to have had effect on and from the commencement of those sections.	21 22 23
<b>34 Vicarious liability of protected defendant</b>	24
The amendment made by the 2008 amending Act to section 26B extends to civil liability arising, and any award of damages in respect of such civil liability made, before the commencement of the amendment, but not so as to affect any final determination of legal proceedings made by a court or tribunal before the commencement of the amendment.	25 26 27 28 29 30

<b>35</b>	<b>Duties of claimant for offender damages</b>	1
	Division 1A of Part 2A does not apply in relation to an award of damages if the incident giving rise to the claim occurred before the commencement of that Division.	2 3 4
<b>36</b>	<b>Operation of Part 2A in respect of intentional torts</b>	5
	The amendment made by the 2008 amending Act to section 3B extends to civil liability arising, and any award of damages in respect of such civil liability made, before the commencement of the amendment, but not so as to affect any final determination of legal proceedings made by a court or tribunal before the commencement of the amendment.	6 7 8 9 10 11
<b>37</b>	<b>Eligibility period for victim claims</b>	12
	The amendment made by the 2008 amending Act to section 26M extends to an eligibility period under that section that had commenced to run, but that had not expired, before the commencement of the amendment.	13 14 15 16
<b>38</b>	<b>Notification of persons entitled to make victim claim</b>	17
	An amendment made by the 2008 amending Act to section 26N extends to a victim claim that arose before the commencement of the amendment.	18 19 20
<b>39</b>	<b>Offender damages held on trust by Public Trustee</b>	21
(1)	An amendment made by the 2008 amending Act to section 26L, 26Q, 26R or 26S extends to a victim claim that arose before the commencement of the amendment.	22 23 24
(2)	Offender damages held on trust by a protected defendant under section 26L immediately before the commencement of the amendments to that section by the 2008 amending Act are, on and from that commencement, taken to be held on trust under that section by the Public Trustee.	25 26 27 28 29

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<b>Schedule 2</b>	<b>Amendment of other Acts</b>	1
	(Section 4)	2
<b>2.1</b>	<b>Motor Accidents Act 1988 No 102</b>	3
<b>[1]</b>	<b>Section 72 Maximum amount of damages for provision of certain home care services</b>	4
	Omit section 72 (2). Insert instead:	5
	(2) Further, no compensation is to be awarded unless the services are provided (or to be provided):	6
	(a) for at least 6 hours per week, and	7
	(b) for a period of at least 6 consecutive months.	8
<b>[2]</b>	<b>Schedule 4 Savings, transitional and other provisions</b>	9
	Insert at the end of clause 1 (1):	10
	<i>Civil Liability Legislation Amendment Act 2008</i>	11
<b>[3]</b>	<b>Schedule 4, Part 13</b>	12
	Insert after Part 12 of Schedule 4:	13
	<b>Part 13 Provision arising from the enactment of the Civil Liability Legislation Amendment Act 2008</b>	14
	<b>36 Restrictions on compensation for home care services</b>	15
	An amendment made to this Act by the <i>Civil Liability Legislation Amendment Act 2008</i> extends to liability arising, and to proceedings commenced, before the commencement of the amendment but does not apply to any proceedings determined before that commencement.	16
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<b>2.2</b>	<b>Motor Accidents Compensation Act 1999 No 41</b>	19
<b>[1]</b>	<b>Section 128 Damages for economic loss—maximum amount for provision of certain attendant care services</b>	20
	Omit section 128 (3). Insert instead:	21
	(3) Further, no compensation is to be awarded unless the services are provided (or to be provided):	22
	(a) for at least 6 hours per week, and	23
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	(b) for a period of at least 6 consecutive months.	1
<b>[2]</b>	<b>Schedule 5 Savings, transitional and other provisions</b>	2
	Insert at the end of clause 2 (1):	3
	<i>Civil Liability Legislation Amendment Act 2008</i>	4
<b>[3]</b>	<b>Schedule 5</b>	5
	Insert at the end of the Schedule with appropriate Part and clause numbering:	6
<b>Part</b>	<b>Provision arising from the Civil Liability Legislation Amendment Act 2008</b>	7 8
	<b>Restrictions on compensation for attendant care services</b>	9
	An amendment made to this Act by the <i>Civil Liability Legislation Amendment Act 2008</i> extends to liability arising, and to proceedings commenced, before the commencement of the amendment but does not apply to any proceedings determined before that commencement.	10 11 12 13 14