



New South Wales

Civil Liability Amendment (Offender Damages) Act 2004 No 29

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New South Wales

Civil Liability Amendment (Offender Damages) Act 2004 No 29

Act No 29, 2004

An Act to amend the *Civil Liability Act 2002* to make special provision in connection with certain claims for damages for negligence for death or injury suffered by offenders in custody; and for other purposes. [Assented to 13 May 2004]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Civil Liability Amendment (Offender Damages) Act 2004*.

2 Commencement

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

3 Amendment of Civil Liability Act 2002 No 22

The *Civil Liability Act 2002* is amended as set out in Schedule 1.

4 Amendment of other Acts

Each Act specified in Schedule 2 is amended as set out in that Schedule.

Schedule 1 Amendment of Civil Liability Act 2002

(Section 3)

[1] Section 11A Application of Part

Insert after section 11A (3):

- (4) In the case of an award of damages to which Part 2A (Special provisions for offenders in custody) applies, this Part applies subject to Part 2A.

[2] Section 19 Third party contributions

Insert “, including any other Part of this Act” after “law” in section 19 (4).

[3] Part 2A

Insert after Part 2:

Part 2A Special provisions for offenders in custody

Division 1 Preliminary

26A Definitions

- (1) In this Part:

CAS Act means the *Crimes (Administration of Sentences) Act 1999*.

offender in custody or *offender* means each of the following:

- (a) an inmate within the meaning of the CAS Act, namely a person to whom Part 2 (Imprisonment by way of full-time detention) of that Act applies,
- (b) an offender within the meaning of Part 3 (Imprisonment by way of periodic detention) of the CAS Act,
- (c) an offender within the meaning of Part 4 (Imprisonment by way of home detention) of the CAS Act,
- (d) a detainee under the *Children (Detention Centres) Act 1987*,

- (e) a person performing community service work under a community service order or children's community service order, as provided by the CAS Act or the *Children (Community Service Orders) Act 1987*, whether or not the person is an offender in custody under any other paragraph of this definition,
- (f) a person in custody who is in the keeping of a correctional officer, as provided by Part 13 (Custody of persons during proceedings) of the CAS Act.

protected defendant means each of the following:

- (a) the Crown (within the meaning of the *Crown Proceedings Act 1988*) and its servants,
 - (b) a Government department and members of staff of a Government department,
 - (c) a public health organisation (within the meaning of the *Health Services Act 1997*) and members of staff of a public health organisation,
 - (d) any person having public official functions or acting in a public official capacity (whether or not employed as a public official), but only in relation to the exercise of the person's public official functions,
 - (e) a management company or submanagement company (within the meaning of the CAS Act) and members of staff of such a company.
- (2) Other expressions used in this Part have the same meanings as in Part 2.

26B Application of Part

- (1) This Part applies to and in respect of an award of personal injury damages against a protected defendant in respect of:
- (a) an injury to a person received while the person was an offender in custody, or
 - (b) the death of a person resulting from or caused by an injury to the person received while the person was an offender in custody,

being an injury caused by the negligence (that is, the failure to exercise reasonable care and skill) of a protected defendant.

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- (2) This Part does not apply to:
 - (a) an award of damages pursuant to an action under the *Compensation to Relatives Act 1897*, or
 - (b) an award of damages for mental harm (within the meaning of Part 3) to a person who was not an offender in custody at the time of the incident that resulted in the mental harm.
 - (3) Part 2 is subject to this Part.
 - (4) Section 19 (Third party contributions) extends to an award of damages to which this Part applies as if that section were a provision of this Part.
 - (5) A reference in Divisions 2–5 to an offender includes a reference to a person who, subsequent to the injury concerned, ceases to be an offender.

Division 2 Damages subject to 15% permanent impairment threshold

26C No damages unless permanent impairment of at least 15%

No damages may be awarded (whether for economic or non-economic loss) unless the injury results in the death of the offender or in a degree of permanent impairment of the offender that is at least 15%.

26D Assessment of permanent impairment using WorkCover Guidelines

- (1) The degree of permanent impairment that results from an injury is to be assessed as provided by this Part and Part 7 (Medical assessment) of Chapter 7 of the *Workplace Injury Management and Workers Compensation Act 1998* (the **1998 WC Act**).
- (2) Part 7 of Chapter 7 of the 1998 WC Act extends to an assessment of degree of permanent impairment for the purposes of this Part and for that purpose applies as if:
 - (a) an assessment under this Part were an assessment under and for the purposes of that Part of the 1998 WC Act, and
 - (b) a reference in that Part of the 1998 WC Act to a worker were a reference to an offender, and

- (c) a reference in that Part of the 1998 WC Act to a worker's employer were a reference to the Crown.
- (3) If there is a dispute about the degree of permanent impairment of an injured offender, a court may not award damages unless the degree of permanent impairment has been assessed by an approved medical specialist in accordance with the 1998 WC Act.
- (4) A court may, at any stage in proceedings on a claim for damages, refer the matter for assessment of the degree of permanent impairment by an approved medical specialist in accordance with the 1998 WC Act.
- (5) Section 151H (No damages unless permanent impairment of at least 15%) of the *Workers Compensation Act 1987* applies for the purposes of an assessment under this Part of whether the degree of permanent impairment resulting from an injury is at least 15%.

Division 3 Damages for economic loss

26E Damages for past or future loss of earnings

- (1) This section applies to an award of damages:
 - (a) for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity, or
 - (b) for future economic loss due to the deprivation or impairment of earning capacity.
- (2) In awarding damages, the court is to disregard the amount (if any) by which the injured or deceased offender's net weekly earnings would (but for the injury or death) have exceeded the amount that is the maximum amount of weekly payments of compensation under section 35 of the *Workers Compensation Act 1987* (even though that maximum amount under that section is a maximum gross earnings amount).
- (3) The maximum amount of weekly payments of compensation under section 35 of the *Workers Compensation Act 1987* for a future period is to be the amount that the court considers is likely to be the amount for that period having regard to the operation of Division 6 (Indexation of amounts of benefits) of Part 3 of that Act.

26F Retirement age

In awarding damages for future economic loss due to deprivation or impairment of earning capacity, the court is to disregard any earning capacity of the injured offender after age 65.

26G Future economic loss—assumption about release on parole

In making an assessment for the purposes of an award for future economic loss about future earning capacity or other events on which an award is to be based in respect of an offender eligible for release on parole, a court is to assume that the offender is likely to be released when the offender becomes eligible for release on parole.

Division 4 Damages for non-economic loss

26H Restriction on damages for non-economic loss

A court is not to award damages for non-economic loss except as permitted by this Division.

26I Non-economic loss damages limited to workers compensation amount

- (1) A court may award damages for non-economic loss up to a maximum of the total amount to which a worker would be entitled as compensation under Division 4 (Compensation for non-economic loss) of Part 3 of the *Workers Compensation Act 1987* if the worker had received an injury that entitled the worker to compensation under that Act and that resulted in a degree of permanent impairment that is the same as the offender's degree of permanent impairment.
- (2) When determining the amount to which a worker would be entitled as compensation under a provision of the *Workers Compensation Act 1987*, the amount is to be determined under the provision as it was in force when the injury to the offender was received.

Division 5 Victims support payments owed by offender

26J Authority for deduction from damages

- (1) A protected defendant who is liable to pay damages to an offender pursuant to an award to which this Part applies is entitled to deduct from those damages the amount of any victim support payment required to be paid by the offender.
- (2) A *victim support payment* is an amount ordered to be paid by the offender by an order for restitution under Division 8 of Part 2 of the *Victims Support and Rehabilitation Act 1996*.
- (3) In the case of an amount ordered to be paid by the offender pursuant to a provisional order for restitution under Division 8 of Part 2 of the *Victims Support and Rehabilitation Act 1996*, the protected defendant may (while the provisional order is pending) withhold that amount from the damages payable to the offender.
- (4) The protected defendant is to pay an amount deducted under this section to the person to whom the order for restitution requires payment be made.
- (5) Payment made by a protected defendant pursuant to this section is, to the extent of the amount paid, taken to be a payment to the offender in satisfaction of the obligation to pay the damages concerned.

[4] Schedule 1 Savings and transitional provisions

Insert at the end of clause 1 (1):

Civil Liability Amendment (Offender Damages) Act 2004

[5] Schedule 1

Insert at the end of the Schedule:

**Part 5 Provisions consequent on enactment of
Civil Liability Amendment (Offender
Damages) Act 2004**

**16 Application of offender damages provisions to existing
injuries and pending claims**

- (1) Part 2A of this Act extends to an award of personal injury damages that relates to an injury received, or to a death resulting from an injury received, whether before or after the commencement of that Part.
- (2) However, Part 2A of this Act does not apply to or in respect of:
 - (a) an award of damages in proceedings commenced in a court before 15 January 2004, or
Note. 15 January 2004 is the date of the Minister's announcement of the proposal to enact Part 2A.
 - (b) an award of damages in proceedings commenced in a court before the date of introduction into Parliament of the Bill for the *Civil Liability Amendment (Offender Damages) Act 2004* if the award is in respect of an injury (or death resulting from an injury) to a person received while the person was a detainee under the *Children (Detention Centres) Act 1987* or while performing community service work under a children's community service order as provided by the *Children (Community Service Orders) Act 1987*, or
 - (c) an award of damages, or settlement or consent order in respect of damages, made before the date of assent to the *Civil Liability Amendment (Offender Damages) Act 2004*.

Schedule 2 Amendment of other Acts

(Section 4)

2.1 Children (Community Service Orders) Act 1987 No 56

Section 26E Limits to common law damages for injury to offender

Omit the section.

2.2 Crimes (Administration of Sentences) Act 1999 No 93

[1] Section 6 Work performed by inmates

Omit “carry out work suitable to the inmate’s capacity” from section 6 (1).

Insert instead “carry out such work as the governor considers suitable”.

[2] Section 6 (3)

Insert after section 6 (2):

- (3) An inmate is not required to carry out work that the inmate is not capable of carrying out.

[3] Section 84 Participation in activity or work

Omit “carry out community service work suitable to the offender’s capacity” from section 84 (1) (b).

Insert instead “carry out such community service work as the Commissioner considers suitable”.

[4] Section 84 (1A)

Insert after section 84 (1):

- (1A) An offender is not required to carry out community service work that the offender is not capable of carrying out.

[5] Section 120 Act or omission of offender performing community service work

Omit “towards any person” from section 120 (1).

Insert instead “on the part of any person”.

[6] Section 122 Limits to common law damages for injury to offender

Omit the section.

[7] Section 263 Exclusion of personal liability

Omit section 263 (1) (c). Insert instead:

- (c) by a correctional officer or by any other person on whom functions are conferred or imposed by or under this Act, or

[8] Section 263 (1)

Omit “execution of this Act or any other Act”.

Insert instead “execution of this Act or of any other Act that confers or imposes any functions on a correctional officer”.

[9] Section 263 (3)

Insert after section 263 (2):

- (3) In this section:

correctional officer includes a person holding an authority under section 240 to perform custodial duties.

[Second reading speech made in—

Legislative Assembly on 18 March 2004

Legislative Council on 4 May 2004]

BY AUTHORITY