

[Act 2001 No 42]



New South Wales

Health Care Liability Bill 2001

Explanatory note

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

Overview of Bill

This Bill:

- (a) makes professional indemnity insurance compulsory for medical practitioners and regulates the manner in which insurers provide that insurance, and
- (b) protects medical practitioners, nurses and certain other health practitioners from any civil liability when voluntarily providing health care to injured persons in an emergency, and
- (c) imposes certain limitations on the recovery of damages for injury or death caused by health care providers (eg medical practitioners and public hospitals) in providing health care.

* Amended in committee—see table at end of volume.

The specific objects of this Bill are as follows:

- (a) to facilitate access to fair and sustainable compensation for persons who sustain severe injuries from the provision of health care,
- (b) to keep the costs of medical indemnity premiums sustainable, in particular by limiting the amount of compensation payable for non-economic loss in cases of relatively minor injury, while preserving principles of full compensation for those with severe injuries involving ongoing impairment and disabilities,
- (c) to promote the reasonable distribution across the medical indemnity industry of the costs of compensation for persons who sustain severe injuries from the provision of health care,
- (d) to facilitate the effective contribution by medical indemnity providers to risk management and quality improvement activities in the health care sector,
- (e) to enable the medical profession and the community to be better informed as to the costs of compensation for, and developing trends in, personal injury claims arising from the provision of health care.

Outline of provisions

Part 1 Preliminary

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 the date of assent (except for Part 3 which will commence on a day to be appointed by proclamation).

Clause 3 sets out the objects of the proposed Act (as stated in the above overview). Clause 3 also requires the proposed Act to be construed in a way that would best promote the objects of the proposed Act.

Clause 4 defines certain words and expressions used in the proposed Act. The term *health care provider* means a medical practitioner (references to which in the proposed Act include a medical practitioner's practice company), a public health organisation (eg an area health service) or the licensee of a private hospital or day procedure centre (but only if the regulations provide for any such licensee to be a health care provider for the purposes of the proposed Act). The term *health care claim* means a claim, in any civil action, for damages against a health care provider in respect of an injury or death caused wholly or partly by the fault of the health care provider in providing health care.

Part 2 Awarding of damages in health care claims

Division 1 Application of Part

Clause 5 provides that Part 2 applies to an award of damages in respect of a health care claim. The Part extends to an award of damages that relates to an injury (or death resulting from an injury) received before the date of assent, but the Part does not apply to or in respect of court proceedings that have already been commenced or to any awards that have already been made.

Clause 6 excludes certain awards of damages from the operation of Part 2.

Clause 7 makes it clear that the Part does not give rise to any cause of action to recover damages (ie the Part only relates to the awarding or recovery of damages).

Clause 8 provides that a court cannot award damages (or interest on damages) contrary to the proposed Act.

Division 2 Damages for economic loss

Clause 9 limits the amount of damages that may be awarded for past or future economic loss (eg loss of earnings or deprivation or impairment of earning capacity).

Clause 10 provides for damages for future economic loss to be determined in accordance with the claimant's prospects.

Clause 11 requires the application of a discount rate in assessing lump sum damages for future economic loss.

Clause 12 specifies the circumstances in which damages for attendant care services (such as domestic help or nursing) that are provided on a gratuitous basis may be awarded.

Division 3 Damages for non-economic loss (general damages)

Clause 13 provides for the determination of damages for non-economic loss (eg pain and suffering, loss of amenities of life, loss of expectation of life and disfigurement). No such damages are to be awarded unless the severity of the non-economic loss is at least 15% of a most extreme case. A limit on the amount of damages for non-economic loss is imposed (\$350,000), but that maximum amount is to be awarded only in a most extreme case. Once the 15% threshold is passed, damages for non-economic loss are to be assessed in accordance with the Table to the proposed section as a percentage of the maximum amount.

Clause 14 provides for the indexation, by order of the Minister published in the Gazette, of the maximum amount that may be awarded as damages for non-economic loss.

Division 4 Other matters

Clause 15 makes provision with respect to the interest payable on damages. No interest is payable on damages awarded for non-economic loss.

Clause 16 deals with contributory negligence in health care claims that are brought under the *Compensation to Relatives Act 1897*.

Clause 17 prohibits the awarding of punitive or exemplary damages.

Clause 18 enables a court to make consent orders for structured settlements in relation to health care claims.

Part 3 Professional indemnity insurance

Clause 19 provides that a person is not entitled to practise as a medical practitioner unless the person is covered by approved professional indemnity insurance. The New South Wales Medical Board will be empowered to cancel the registration of (or suspend) an uninsured medical practitioner, and practising as a medical practitioner without approved professional indemnity insurance will constitute unsatisfactory professional conduct for the purposes of the *Medical Practice Act 1992*.

Clause 20 provides that professional indemnity insurance is *approved* if the kind and extent of the insurance are approved by the Minister by order published in the Gazette (such an order is referred to in the proposed Act as an *insurance approval order*).

Clause 21 provides that an insurer who provides approved professional indemnity insurance must comply with specified data collection and reporting requirements and have in place a comprehensive risk management program.

Clause 22 provides that the Minister may, by order published in the Gazette, impose requirements on insurers who provide approved professional indemnity insurance.

Clause 23 contains provisions relating to insurance approval orders and insurance regulation orders.

Clause 24 enables the Minister by order published in the Gazette to prohibit an insurer from providing approved professional indemnity insurance if the Minister is satisfied that the insurer has failed to comply with any of the requirements imposed on the insurer by or under the proposed Act. It will be an offence for the insurer to provide approved professional indemnity insurance in contravention of such a prohibition order.

Clause 25 provides that certain classes of health practitioners are also not entitled to practise unless they are covered by some form of professional indemnity insurance.

Part 4 Provision of emergency health care—protection from liability

Clause 26 provides that Part 4 applies to medical practitioners, nurses and other health practitioners prescribed by the regulations.

Clause 27 provides that if a person to whom Part 4 applies provides health care to an injured person in an emergency situation, then the person cannot be subject to any civil action, liability, claim or demand so long as the health care was provided in good faith and on a voluntary basis without fee or reward.

Part 5 Miscellaneous provisions

Clause 28 provides for the determination of the amount of the contribution that may be recovered by a third party from a health care provider where both the health care provider and the third party are at fault. The proposed section also provides for the reduction of damages recoverable by the claimant in respect of an injury or death where the third party is a health care professional.

Clause 29 provides for powers of entry, inspection and investigation by authorised officers for the purposes of determining whether there has been compliance with or a contravention of the proposed Act or for obtaining information and documents for purposes connected with the administration of the proposed Act.

Clause 30 provides that a natural person is not excused from producing a document or statement, or from answering a question, under proposed section 29 on the ground that the document, statement or answer might incriminate the person.

Clause 31 provides for the manner in which proceedings for offences under the proposed Act are to be dealt with.

Clause 32 provides for the admissibility of certificate evidence of certain matters in proceedings relating to health care claims.

Clause 33 provides that the proposed Act binds the Crown.

Clause 34 is the general regulation-making power.

Clause 35 is a formal provision giving effect to the amendment to the *Private Hospitals and Day Procedure Centres Act 1988* set out in Schedule 1 to the proposed Act.

Clause 36 provides for the proposed Act to be reviewed by the Minister after 5 years.

Schedule 1 Amendment of Private Hospitals and Day Procedure Centres Act 1988

Schedule 1 amends the *Private Hospitals and Day Procedure Centres Act 1988* to provide that a licence under that Act is subject to the condition that the licensee holds (or is otherwise covered by) such insurance or other liability cover as may be prescribed by the regulations under that Act.