

# Health Care Liability Act 2001 No 42

[2001-42]



New South Wales

## Status Information

### Currency of version

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Does not include amendments by**
  - [Private Health Facilities Act 2007 No 9](#) (not commenced)
  - [Miscellaneous Acts \(Local Court\) Amendment Act 2007 No 94](#) (not commenced)

### Authorisation

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# Health Care Liability Act 2001 No 42



New South Wales

An Act to make provision with respect to the recovery of damages for injury or death caused by medical practitioners and other health care providers; to make professional indemnity insurance compulsory for medical practitioners and to regulate the provision of that insurance; to protect medical practitioners, nurses and certain other health practitioners from liability when providing voluntary health care in an emergency; and for other purposes.

## Part 1 Preliminary

### 1 Name of Act

This Act is the *Health Care Liability Act 2001*.

### 2 Commencement

- (1) This Act commences on the date of assent, except as provided by subsection (2).
- (2) Part 3 commences on a day to be appointed by proclamation.

### 3 Objects of Act

- (1) The objects of this Act 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.

- (2) In the application and administration of this Act and the regulations, it must be recognised:
- (a) that medical indemnity providers have a role in keeping the cost of premiums within reasonable bounds by having in place appropriate standards in relation to risk management and claims handling procedures, and
  - (b) that the law (both the enacted law and the common law) relating to the assessment of damages of the kind to which Part 2 applies should be interpreted and applied in a way that acknowledges the clear legislative intention to restrict the level of compensation for non-economic loss.
- (3) In the interpretation of a provision of this Act and the regulations, a construction that would promote the objects of this Act or the provision is to be preferred to a construction that would not promote those objects. This subsection does not limit the generality of section 33 of the [Interpretation Act 1987](#).

#### 4 Definitions

- (1) In this Act:

**approved professional indemnity insurance** means professional indemnity insurance that is approved for the time being under an insurance approval order.

**claimant** means a person who makes, or is entitled to make, a health care claim.

**court**, in relation to a health care claim, means any court by or before which the claim falls to be determined.

**damages** includes any form of monetary compensation.

**fault** includes an act or omission.

**health care** means any care, treatment, advice, service or goods provided in respect of the physical or mental health of a person.

**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.

**health care provider** means:

- (a) a medical practitioner:
  - (i) who is covered by approved professional indemnity insurance or, until such time as Part 3 commences, by any kind of professional indemnity insurance, or

- (ii) who is of a class of medical practitioner prescribed by the regulations for the purposes of this definition, or
  - (b) a public health organisation, or
  - (c) subject to subsection (2), the licensee of a licensed facility,
- and includes:
- (d) in respect of an injury or death occurring before the date of assent to this Act that gives rise to a health care claim—a person:
    - (i) who was a medical practitioner at the time of the injury or death, and
    - (ii) whose civil liability for that injury or death is covered by any kind of professional indemnity insurance, or
  - (e) in respect of an injury or death occurring after the date of assent to this Act that gives rise to a health care claim—a person:
    - (i) who was a medical practitioner at the time of the injury or death, and
    - (ii) whose civil liability for that injury or death is covered by approved professional indemnity insurance or, until such time as Part 3 commences, by any kind of professional indemnity insurance.

**Note—**

Section 21 (1) of the [Interpretation Act 1987](#) provides that the expression “medical practitioner” means a medical practitioner registered under the [Medical Practice Act 1992](#).

**health practitioner** means a person (other than a medical practitioner) who provides health care.

**injury** means personal or bodily injury, and includes:

- (a) pre-natal injury, and
- (b) psychological or psychiatric injury, and
- (c) disease.

**insurance approval order** means an order under section 20.

**insurance regulation order** means an order under section 22.

**licensed facility** means a private hospital or day procedure centre that is licensed under the [Private Hospitals and Day Procedure Centres Act 1988](#).

**non-economic loss** means any one or more of the following:

- (a) pain and suffering,
- (b) loss of amenities of life,
- (c) loss of expectation of life,
- (d) disfigurement.

**practice company** means:

- (a) in the case of a medical practitioner—a corporation (however incorporated) that is controlled or conducted by the medical practitioner and by means of which the medical practitioner conducts his or her medical practice, or
- (b) in the case of a health practitioner—a corporation (however incorporated) that is controlled or conducted by the health practitioner and by means of which the health practitioner conducts his or her health practice.

**professional indemnity insurance** means insurance against civil liability arising out of the provision of health care, and includes an agreement or arrangement for discretionary indemnity in respect of that liability.

**public health organisation** has the same meaning as in the [Health Services Act 1997](#).

**registration** includes enrolment or any other means by which a health practitioner is entitled to practise.

- (2) The licensee of a licensed facility is a health care provider for the purposes of this Act:
  - (a) only if the regulations so provide, and
  - (b) only to the extent that the licensee conducts the licensed facility.
- (3) In this Act:
  - (a) a reference to a medical practitioner includes, if the medical practitioner conducts his or her practice by means of a practice company, a reference to the medical practitioner's practice company, and
  - (b) a reference to a health practitioner includes, if the health practitioner conducts his or her practice by means of a practice company, the health practitioner's practice company, and
  - (c) a reference to a public health organisation includes a reference to a person for whose acts the public health organisation is liable, and
  - (d) a reference to the licensee of a licensed facility includes a reference to a person for whose acts the licensee is liable (but only to the extent that those acts are

related solely to the conduct of the licensed facility).

- (4) A reference in this Act to the provision (however expressed) of health care includes a failure to provide health care.
- (5) A reference in this Act to the provision (however expressed) of professional indemnity insurance includes a reference to the offering or renewing of any such insurance.
- (6) Notes included in this Act do not form part of this Act.

## **Part 2**

### **5-18 (Repealed)**

## **Part 3 Professional indemnity insurance**

### **19 Medical practitioners must be covered by approved professional indemnity insurance**

- (1) A person is not entitled to practise as a medical practitioner unless the person is covered by approved professional indemnity insurance.
- (2) Accordingly, the Medical Board:
  - (a) must not register a person as a medical practitioner unless the Medical Board is satisfied that the person will, while practising as a medical practitioner, be covered by approved professional indemnity insurance, and
  - (b) may cancel the registration of a person as a medical practitioner (or suspend a person from practising medicine) if the Medical Board is satisfied that the person is not covered by approved professional indemnity insurance while the person is practising as a medical practitioner.
- (3) Practising as a medical practitioner without being covered by approved professional indemnity insurance is, for the purposes of the [Medical Practice Act 1992](#), unsatisfactory professional conduct.
- (4) This section does not apply to or in respect of a medical practitioner:
  - (a) who is an employee of a public health organisation (but only to the extent that the medical practitioner practises as such an employee), or
  - (b) who is exempt under the regulations from the requirement to be covered by approved professional indemnity insurance.
- (5) This section has effect despite any provision of the [Medical Practice Act 1992](#).

### **20 Approved professional indemnity insurance**

For the purposes of this Act, professional indemnity insurance with respect to the civil liability of a medical practitioner is **approved** if the kind and extent of the insurance



(including any particular terms and conditions) are approved by the Minister for the time being by order published in the Gazette.

**Note—**

Section 43 (2) of the *Interpretation Act 1987* provides that if an Act confers a power on any person to make an order, the power includes power to amend or repeal any order made in the exercise of that power.

## **21 Mandatory requirements relating to data collection, reporting and risk management**

An insurer who provides approved professional indemnity insurance must:

- (a) comply with such data collection and reporting requirements as are specified in an insurance regulation order applying in respect of the insurer, and
- (b) have in place a comprehensive risk management program that:
  - (i) identifies potential problems in relation to individual medical practitioners and particular categories of medical services, and
  - (ii) provides strategies to effectively deal with those problems.

**Note—**

One of the purposes of the requirement referred to in paragraph (a) is 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.

## **22 Requirements that may be imposed by insurance regulation order**

- (1) The Minister may, by order published in the Gazette, impose requirements (in addition to those referred to in section 21) on an insurer who provides approved professional indemnity insurance.
- (2) Without limiting the requirements that may be imposed by an insurance regulation order, such an order may require an insurer to do any one or more of the following:
  - (a) to provide professional indemnity insurance in respect of all categories of specialty medical practice,
  - (b) to avoid engaging in conduct that would discourage medical practitioners of a particular category of specialty medical practice from obtaining professional indemnity insurance from the insurer,
  - (c) to provide professional indemnity insurance in accordance with specified rate relativities between different categories of medical practitioner,
  - (d) to comply with such arrangements as may be specified for the distribution between insurers of the cost of covering the civil liability of medical practitioners (who are covered by approved professional indemnity insurance) in relation to health care claims of a specified category (for example, claims involving

substantial care costs for severe injury), including the making of contributions between insurers to enable the distribution of that cost,

- (e) to refuse or withdraw professional indemnity insurance only in such circumstances as are described or referred to in the order,
- (f) to comply with specified standards (including standards relating to risk management and claims handling).

### **23 General provisions relating to orders**

- (1) An insurance approval order or an insurance regulation order may:
  - (a) apply generally or be limited in its application by reference to specified exceptions or factors, or
  - (b) apply differently according to different factors of a specified kind.
- (2) An insurance approval order or an insurance regulation order takes effect:
  - (a) on the day it is published in the Gazette, or
  - (b) on a later date specified in the order.
- (3) An insurance approval order or an insurance regulation order may contain provisions of a savings or transitional nature consequent on the making of the order.

### **24 Minister may prohibit person from providing approved professional indemnity insurance**

- (1) The Minister may, by order published in the Gazette, prohibit a person to whom the order applies (***the 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 under section 21 or by an insurance regulation order.
- (2) An order under this section (a ***prohibition order***) may:
  - (a) prohibit the insurer from providing approved professional indemnity insurance from the date, or for a period, specified in the order, or
  - (b) prohibit the insurer from providing (from the date, or for a period, specified in the order) approved professional indemnity insurance to any person not covered by such insurance at the time the order takes effect (in which case the order does not operate to prevent the insurer from renewing any approved professional indemnity insurance that was in force at the time the order took effect).
- (3) The Minister may not make a prohibition order in respect of an insurer unless:
  - (a) the insurer has been given:

- (i) notice of the Minister's intention to make the order (including the reasons for making the order), and
    - (ii) a reasonable opportunity to make submissions to the Minister with respect to the proposed order, and
  - (b) the Minister has considered any such submission.
- (4) An insurer must not provide approved professional indemnity insurance in contravention of a prohibition order.
- Maximum penalty:
- (a) in the case of a corporation—400 penalty units for a first offence or 800 penalty units for a second or subsequent offence, or
  - (b) in any other case—200 penalty units for a first offence or 400 penalty units for a second or subsequent offence.
- (5) If a continuing state of affairs is created by an offence under subsection (4), the offender is, in addition to the penalty specified in that subsection, liable to a maximum penalty of:
- (a) 100 penalty units in the case of a corporation, or
  - (b) 50 penalty units in any other case,
- in respect of each day on which the offence continues.
- (6) A contravention of subsection (4), or the making of a prohibition order, does not annul or otherwise affect any professional indemnity insurance provided by the insurer or the liability of the insurer to any person covered by the insurance.
- (7) A medical practitioner is covered by approved professional indemnity insurance even if the insurance was provided in contravention of a prohibition order.
- (8) If a prohibition order is made:
- (a) the Minister is to notify the Medical Board of the terms of the order, and
  - (b) the Medical Board is to notify those medical practitioners that the Board considers would be affected by the order.

## **25 Professional indemnity insurance for certain other health practitioners**

- (1) This section applies to or in respect of a person who is a health practitioner only if the regulations have declared that this section applies to the class of health practitioner of which the person is a member.
- (2) A person is not entitled to practise as a health practitioner unless the person is

covered by professional indemnity insurance.

- (3) Accordingly, the appropriate registration authority:
- (a) must not register a person as a health practitioner unless the authority is satisfied that the person will, while practising as a health practitioner, be covered by professional indemnity insurance, and
  - (b) may cancel or suspend the registration of a person as a health practitioner if the authority is satisfied that the person is not covered by professional indemnity insurance while the person is practising as a health practitioner.
- (4) Practising as a health practitioner without being covered by professional indemnity insurance is, for the purposes of the relevant health registration Act, unsatisfactory professional conduct.
- (5) This section does not apply in respect of a health practitioner who is exempt under the regulations from the requirement for professional indemnity insurance.
- (6) This section has effect despite the relevant health registration Act under which a health practitioner is registered.
- (7) In this section:

**appropriate registration authority**, in relation to a health practitioner, means the person or body who has the function, under the relevant health registration Act, of determining any matter relating to the registration of the health practitioner under the health registration Act.

**relevant health registration Act**, in relation to a health practitioner, means the Act under which the health practitioner is registered or is otherwise entitled to practise.

## **Part 4**

### **26, 27 (Repealed)**

## **Part 5 Miscellaneous provisions**

### **28 (Repealed)**

### **29 Powers of entry, inspection and investigation by authorised officers**

- (1) In this section:

**authorised officer** means a person appointed by the Minister as an authorised officer for the purposes of this Act.

**insurer** means a person who provides, or who formerly provided, professional indemnity insurance, and includes any insurance broker or commission agent engaged

in the business of professional indemnity insurance in respect of health care.

**premises** includes any structure, building, aircraft, vehicle and place (whether built on or not).

- (2) Powers may be exercised by an authorised officer under this section for the following purposes:
- (a) for determining whether there has been compliance with or a contravention of this Act (including the requirements imposed by an insurance regulation order),
  - (b) for obtaining information and documents for purposes connected with the administration of this Act.
- (3) An authorised officer may do any or all of the following:
- (a) on production of his or her authority, enter at any reasonable hour any premises used, or that the authorised officer reasonably suspects to be used, by an insurer for the conduct of the insurer's business or the storage or custody of any document,
  - (b) on production of his or her authority, enter at any reasonable hour any premises in or on which the authorised officer knows, or reasonably suspects, an insurer to be,
  - (c) remain in or on those premises while exercising any power conferred by this section,
  - (d) require an insurer or any other person in or on those premises to produce any such document that is in his or her possession or under his or her control and is capable of being produced,
  - (e) require an insurer or any other person having possession or control of any such document that is not written, or is not written in the English language or is not decipherable on sight, to produce a statement, written in the English language and decipherable on sight, of the information contained in the document,
  - (f) inspect, or make copies of or take extracts from, a document produced pursuant to paragraph (d) or a statement produced pursuant to paragraph (e), or retain such a statement,
  - (g) require an insurer or any other person in or on those premises to answer questions relating to the observance of this Act (including the requirements imposed by an insurance regulation order),
  - (h) require an insurer or any other person, by notice in writing served on the person, to produce to the authorised officer for inspection (in accordance with the notice) any document that the authorised officer has reasonable grounds to believe that

the person is capable of producing in relation to a possible contravention of this Act (including the requirements imposed by an insurance regulation order).

(4) A person must not:

- (a) refuse or fail to allow an authorised officer to enter premises under this section, or
- (b) wilfully obstruct or delay an authorised officer when exercising powers under this section, or
- (c) unreasonably refuse or fail to produce a document or statement to an authorised officer under this section, or
- (d) if an authorised officer informs a person that by virtue of this Act the person is obliged to answer questions relating to any matter referred to in subsection (3) (g):
  - (i) refuse or fail to answer such a question, or
  - (ii) give an answer to such a question that the person knows is false or misleading in a material particular.

Maximum penalty: 50 penalty units.

- (5) The powers of entry conferred by this section are not exercisable in relation to any part of premises used only for residential purposes except:
- (a) with the permission of the occupier of the premises, or
  - (b) under the authority conferred by a search warrant.

### **30 Protection from incrimination**

- (1) A natural person is not excused from a requirement under section 29 to produce a document or statement or to answer a question on the ground that the document, statement or answer might incriminate the person or make the person liable to a penalty.
- (2) However, any answer given by a natural person in compliance with a requirement under section 29 is not admissible in evidence against the person in criminal proceedings (except proceedings for an offence under section 29) if:
  - (a) the person objected at the time to doing so on the ground that it might incriminate the person, or
  - (b) the person was not warned on that occasion that the person may object to giving the answer on the ground that it might incriminate the person.
- (3) Any document or statement produced by a person in compliance with a requirement

under section 29 is not inadmissible in evidence against the person in criminal proceedings on the ground that the document or statement might incriminate the person.

- (4) Further information obtained as a result of a document or statement produced or an answer given in compliance with a requirement under section 29 is not inadmissible on the ground:
  - (a) that the document, statement or answer had to be produced or given, or
  - (b) that the document, statement or answer might incriminate the person.

### **31 Proceedings for offences**

- (1) Proceedings for an offence under this Act are to be dealt with summarily:
  - (a) before a Local Court constituted by a Magistrate sitting alone, or
  - (b) before the Supreme Court in its summary jurisdiction.
- (2) The maximum pecuniary penalty that may be imposed by a Local Court in proceedings for an offence under this Act is 100 penalty units.

### **32 Evidentiary certificates**

A certificate issued by the Director-General of the Department of Health stating that, on a date or during a period specified in the certificate, professional indemnity insurance (as provided by an insurer and as described in the certificate) is approved professional indemnity insurance is admissible in any proceedings relating to a health care claim and is evidence of the matters so certified.

### **33 Act to bind Crown**

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

### **34 Regulations**

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

### **35 (Repealed)**

### **36 Review of Act**

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

- (2) The review is to be undertaken as soon as possible after the period of 1 year from the date of assent to this Act.
  - (3) A report on the outcome of the review is to be tabled in each House of Parliament within 6 months after the end of the period of 1 year.
  - (4) If a House of Parliament is not sitting when the Minister seeks to table the report, the Minister may present copies of the report to the Clerk of the House concerned.
  - (5) The report:
    - (a) on presentation and for all purposes is taken to have been laid before the House, and
    - (b) may be printed by authority of the Clerk of the House, and
    - (c) if printed by authority of the Clerk, is for all purposes taken to be a report published by or under the authority of the House, and
    - (d) is to be recorded:
      - (i) in the case of the Legislative Council—in the Minutes of the Proceedings of the Legislative Council, and
      - (ii) in the case of the Legislative Assembly—in the Votes and Proceedings of the Legislative Assembly,
- on the first sitting day of the House after receipt of the report by the Clerk.

## **Schedule 1 (Repealed)**