

# Law Reform (Vicarious Liability) Act 1983 No 38

[1983-38]



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.

### Authorisation

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# Law Reform (Vicarious Liability) Act 1983 No 38



New South Wales

An Act with respect to the vicarious liability of masters and of the Crown in respect of the commission of certain torts.

## Part 1 Preliminary

### 1 Name of Act

This Act may be cited as the *Law Reform (Vicarious Liability) Act 1983*.

### 2 Commencement

- (1) Sections 1 and 2 shall commence on the date of assent of this Act.
- (2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

### 3 Application of Act

This Act does not apply to or in respect of a tort committed by a person or arising out of a wrongful act or omission occurring before the day appointed and notified under section 2 (2).

### 4 Act to bind Crown

This Act binds the Crown.

### 5 Definitions

- (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

**court** includes a tribunal, and in relation to a claim for damages means any court or tribunal by or before which the claim falls to be determined.

**Crown** means the Crown in right of New South Wales.

**independent function**, in relation to a servant or a person in the service of the Crown, means a function conferred or imposed upon the servant or person, whether or

not as the holder of an office, by the common law or statute independently of the will of the servant's master or the Crown, as the case may require.

**legal proceedings** means proceedings in a court.

**originating process** means any statement of claim, summons, application or other process by means of which legal proceedings are commenced.

**person in the service of the Crown** does not include a servant of the Crown.

**police tort claim**—see section 9B (1).

(2) In this Act, a reference to:

- (a) a function includes a reference to a power, authority and duty, and
- (b) the performance of a function includes a reference to the exercise of the function and the failure to perform or exercise the function.

## **6 Police officer**

For the purposes of this Act, a police officer shall be deemed to be a person in the service of the Crown and not a servant of the Crown.

## **Part 2 Vicarious liability of masters for independent functions**

### **7 Vicarious liability of masters**

Notwithstanding any law to the contrary, a master is vicariously liable in respect of a tort committed by the master's servant in the performance or purported performance by the servant of an independent function where the performance or purported performance of the function:

- (a) is in the course of the servant's service for his or her master or is an incident of the servant's service (whether or not it was a term of his or her contract of service that the servant perform the function), or
- (b) is directed to or is incidental to the carrying on of any business, enterprise, undertaking or activity of the servant's master.

## **Part 3 Vicarious liability of Crown for persons in its service**

### **8 Further vicarious liability of the Crown**

(1) Notwithstanding any law to the contrary, the Crown is vicariously liable in respect of the tort committed by a person in the service of the Crown in the performance or purported performance by the person of a function (including an independent function) where the performance or purported performance of the function:

- (a) is in the course of the person's service with the Crown or is an incident of the

person's service (whether or not it was a term of the person's appointment to the service of the Crown that the person perform the function), or

(b) is directed to or is incidental to the carrying on of any business, enterprise, undertaking or activity of the Crown.

(2) Subsection (1) does not apply to or in respect of a tort committed by a person in the conduct of any business, enterprise, undertaking or activity which is:

(a) carried on by the person on the person's own account, or

(b) carried on by any partnership, of which the person is a member, on account of the partnership.

## **Part 4 Legal proceedings for damages for torts by police officers**

### **9 When torts committed by police officers**

In this Part, a tort is committed, or allegedly committed, by a police officer if the tort is committed, or allegedly committed, by a person who was a police officer at the time of the tort or alleged tort (whether or not acting in a personal or official capacity).

#### **9A Part extends to former police officers**

A reference in this Part to a claim against a police officer in respect of a tort or alleged tort includes a reference to a claim against a person who was a police officer at the time of the tort or alleged tort, but who has ceased to be a police officer since that time.

#### **9B How can police tort claims be made?**

(1) A **police tort claim** is a claim for damages for a tort allegedly committed by a police officer (the **police officer concerned**) in the performance or purported performance of the officer's functions (including an independent function) as a police officer, whether or not committed jointly or severally with any other person.

(2) Except as provided by this Part, a person may not in any legal proceedings make a police tort claim against the police officer concerned, but may instead make the claim against the Crown.

(3) A person who makes a police tort claim against the Crown in any legal proceedings may join the police officer concerned as a party to the proceedings only if the Crown denies that it would be vicariously liable for the alleged tort if it were established that the police officer concerned had committed the tort.

(4) If a person seeks to join a police officer under subsection (3) as a party to legal proceedings:

(a) the person is not required to file a new originating process, but may instead amend the existing originating process, and

- (b) the court is to make such orders as it considers appropriate to enable the existing originating process to be duly amended, and
- (c) nothing in the *Limitation Act 1969* precludes the making of a claim in the amended originating process for damages against the police officer for the alleged tort if the amendment to the originating process is made within 2 months after the Crown denies that it would be vicariously liable for the alleged tort if it were established that the police officer had committed the tort.

**9C Court required to make initial determination as to vicarious liability in any legal proceedings where in issue**

If the vicarious liability of the Crown is in issue in any legal proceedings in which a claim is made for damages for a tort allegedly committed by a police officer (whether or not it is a police tort claim) and the Crown and the police officer are both parties to the proceedings:

- (a) subject to paragraph (b)—the court must make an initial determination as to whether or not the Crown would be vicariously liable for the tort if it were established that the tort was committed by the police officer, and
- (b) that determination is to be made as soon as is reasonably practicable during the proceedings unless the court considers it impracticable in the circumstances to make such a determination before it determines whether or not the tort was committed.

**9D When court to strike out or dismiss claims against police officer or Crown**

- (1) Subject to section 9E, a court must make such orders as it considers appropriate to ensure that a claim before it for damages against a police officer for a tort allegedly committed by the officer is struck out or dismissed if:
  - (a) the court makes an initial determination under section 9C that the Crown would be vicariously liable for the tort if it were established that the tort was committed by the police officer, or
  - (b) the Crown concedes that it would be vicariously liable for the tort if it were established that the tort was committed by the police officer.
- (2) A court must make such orders as it considers appropriate to ensure that a claim before it for damages against the Crown for a tort allegedly committed by a police officer is struck out or dismissed if it makes an initial determination under section 9C that the Crown would not be vicariously liable for the tort if it were established that the tort was committed by the police officer.

**9E Part does not affect certain claims and legal proceedings**

Nothing in this Part:

- (a) makes the Crown vicariously liable for a tort committed by a police officer if it would

not otherwise be vicariously liable for that tort, or

- (b) prevents the Crown from bringing legal proceedings against, or claiming damages or a contribution or indemnity in any legal proceedings from, a police officer for a tort committed by the officer, or
- (c) prevents the Crown from joining a police officer to proceedings claiming damages for a tort committed by the police officer, or
- (d) prevents a person from bringing legal proceedings, or claiming damages in any legal proceedings, against another person who is not a police officer but who is jointly or severally liable for a tort committed by a police officer, or
- (e) prevents a person from making a police tort claim against a police officer in any legal proceedings brought against the person by the police officer, or
- (f) prevents a person from bringing legal proceedings, or claiming damages in any legal proceedings, against a police officer for a tort committed by the police officer otherwise than in the circumstances referred to in section 8 (1).

#### **9F Effect of Part on other laws**

The provisions of this Part have effect despite any other Act or law (whether written or unwritten). However, nothing in this Part affects the operation of the [Limitation Act 1969](#), except as provided by section 9B (4).

#### **9G Application of Part to pre-commencement torts**

- (1) This Part extends to torts allegedly committed by police officers before the commencement of this Part (a **pre-commencement tort**).
- (2) This Part (other than sections 9B (2), 9C and 9D (2)) also extends to any legal proceedings to which the Crown is a party concerning a pre-commencement tort, but only if:
  - (a) the proceedings are pending on the commencement of this Part, and
  - (b) the court has not yet begun a hearing on the merits in the proceedings.

### **Part 5 Miscellaneous**

#### **10 Effect of statutory exemptions**

- (1) In this section:

**person** includes the Crown.

**statutory exemption** means a provision made by or under an Act which excludes or limits the liability of a person.



- (2) For the purposes of determining whether or not a person is vicariously liable in respect of a tort committed by another person, any statutory exemption conferred on that other person is to be disregarded.
- (3) Except as provided by this section, nothing in this Act affects a statutory exemption conferred on a person.