

PERSONAL INJURIES PROCEEDINGS BILL 2002

EXPLANATORY NOTES

General Outline

Purpose of legislation

The main purpose of this Act is to facilitate the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury.

Reasons for the objectives and how they will be achieved

Prior to the collapse of HIH Insurance and the terrorist attacks in the United States on 11 September 2001, there was evidence that public liability insurance premiums were increasing.

Subsequent to those events the effect on the insurance industry was exacerbated and public liability insurance premiums began to increase significantly, in some cases up to 1000%. These increases created particular hardship for not-for-profit organisations and also impacted on the viability of a number of small businesses, especially tourism operators. Other events associated with medical negligence insurers focused attention on liability for personal injuries/generally.

Although there are many factors contributing to the cause of the increases in insurance premiums, Governments across Australian have acted with a range of targeted legislative responses to endeavour to contain the problem.

This Bill will reduce the costs of legal proceedings by introducing a process with which claimants are required to comply before legal proceedings can be commenced in a court. The Bill is based on the pre-court processes in the *Motor Insurance Act 1994* which has been successful in reducing claims costs and legal costs associated with personal injuries arising out of motor vehicle accidents.

The Bill also seeks to address pressure on insurance premiums from increasing volumes of claims by imposing restrictions on lawyer advertising, and facilitating expressions of regret by defendants.

Administrative cost to Government of implementation

There are no financial implications for the Government in the Bill.

Fundamental legislative principles

The Bill raises a number of issues relating to fundamental legislative principles arising from:

- the proposed abolition of the costs indemnity rule for smaller claims with total damages of less than \$30,000 and the capping of legal cost recovery for claims between \$30,000 and \$50,000;
- the introduction of the cap on economic loss claims;
- the thresholds on loss of consortium/servitium claims; and
- the code for gratuitous services claims.

The Bill may be perceived as limiting individual rights in relation to common law claims for damages. However, the amendments are aimed at ensuring an appropriate balance between benefits and the cost of premiums, and ensuring adequate compensation for the moderately and seriously injured, rather than those with relatively minor injuries.

The Bill does not limit access to the courts by individuals. Rather, it imposes a range of restrictions upon the amounts of damages (and costs) which persons may recover once they are in court. The Scrutiny of Legislation Committee has acknowledged Parliament's right to alter the common law with respect to the nature and extent of an individual's right to take legal action. This is a significant function of Parliament. The range and extent of the changes are, in the circumstances of this Bill, reasonable.

The amendments are aimed at ensuring an appropriate balance between benefits and the cost of premiums and preserving adequate compensation to the moderately and seriously injured, rather than those with relatively minor injuries.

In order to ensure that limitations imposed by the Bill apply equally, irrespective of the jurisdiction in which the action is brought for an accident in Queensland, the Bill requires a court to regard any limits on liability as substantive law. The provision also gives the respondent the

right of recovery from the claimant if the claimant obtained an amount greater than his/her entitlement. This aspect is designed to address any possible award given in an overseas jurisdiction.

The Bill also restricts the right of a party to elect to have a claim determined by a jury. However, only in a very few personal injury trials have parties elected for trial by jury.

Consultation

There has been consultation on the Bill with the following:

- Australian Medical Association Queensland;
- Insurance Council of Australia;
- Members of the judiciary;
- Queensland Law Society;
- Bar Association of Queensland;
- Australian Plaintiff Lawyers' Association;
- Individual lawyers;
- Government Departments and agencies;
- Disability Council of Queensland;
- Volunteering Queensland;
- Local Government Association of Queensland; and
- Queensland Council of Social Services.

NOTES ON PROVISIONS

CHAPTER 1—PRELIMINARY

PART 1—INTRODUCTION

Clause 1 states the short title of the Act.

Clause 2 provides that the Act is taken to have commenced on 18 June 2002.

Clause 3 provides that a note in the text of the Act is part of the Act.

PART 2—MAIN PURPOSE AND APPLICATION OF ACT

Clause 4 states the main purpose of the Act. This is to facilitate the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury. Based on the success of the *Motor Accident Insurance Act 1994* in reducing claims costs and legal costs associated with personal injuries arising out of motor vehicle accidents, the Act should contribute to reduced insurance costs by providing for the early resolution of claims for damages for personal injury that fall within the scope of the Act. The Act also imposes limits on the amounts that can be awarded for economic loss and gratuitous care, and places restrictions on advertising for personal injury services.

Clause 5 provides that the Act is binding on the State, the Commonwealth and other States to the extent that they can be bound.

Clause 6 sets out the application of the Act. It applies to all personal injury arising out of an incident that happens on or after 18 June 2002. The Act is retrospective to the extent that section 58 (Exclusion of jury trial) applies to all personal injury arising before, on or after 18 June 2002.

Excluded from the application of the Act are injuries to which the *Motor Accident Insurance Act 1994* applies or injuries to which the *WorkCover Queensland Act 1996* applies.

Clause 6(4) also provides that the Act does not apply in a number of other contexts in which a person may be entitled to recover damages for personal injury.

Clause 7 provides that if an action for an injury that occurred in Queensland is brought in another jurisdiction, the court deciding the claim is required to regard any limits on liability as substantive law. The provision also gives the person liable to pay damages the right of recovery from the claimant if the claimant actually obtained an amount greater than his/her entitlement.

PART 3—INTERPRETATION

Clause 8 provides that the definition of words used in the Act is set out in the dictionary in the schedule to the Act.

CHAPTER 2—CLAIMS

PART 1—PRE-COURT PROCEDURES

Division 1—Claims Procedures

Clause 9 specifies the requirement for written notice of the claim to be given to the person against whom the proceeding is proposed to be started, and the timeframe for such notices. A reasonable excuse for the delay in giving a notice must be given where it is not given within the prescribed times. If the claimant has made a complaint to the Health Rights Commissioner under the *Health Rights Commission Act 1991* the making of the complaint under that Act is taken to be a reasonable excuse for not giving the notice within the period prescribed in this section.

Clause 10 requires the alleged respondent to inform the claimant within one month of receiving the claim whether they are the proper respondent to the claim, or inform the claimant of the further information needed to decide whether they are the proper respondent.

If the claimant disputes the alleged respondent's advice that the alleged respondent is not a proper respondent to the claim, the claimant must give written notice to the alleged respondent that the claimant regards the alleged respondent as a proper respondent to the claim.

Clause 11 provides that an acknowledgment that a person is a proper respondent to a claim does not constitute an admission of liability for the claim.

Clause 12 specifies the respondent's obligations in responding to the notice of claim.

Clause 13 provides that if the respondent does not respond within the prescribed time they are conclusively presumed to be satisfied the notice is a complying notice of claim.

Clause 14 provides that a claimant may add other respondents by giving them a notice of the claim and copies of other documents given to or received from any other respondent. If the time for adding further respondents has ended, further respondents can only be added with the agreement of the parties or with the court's leave.

Clause 15 provides the conditions under which one respondent may act for another respondent as claim manager where a claim involves two or more respondents. However, if the respondents' claim manager acts beyond the scope of their authority, the respondents' claim manager is liable to the other respondent or respondents for any loss suffered by the other respondent or respondents.

Clause 16 sets out a procedure by which a respondent can add another party in order to have that party contribute towards the respondent's liability. If the time for a respondent to add further contributors has ended, further contributors can only be added with the agreement of the parties or with the court's leave.

Clause 17 provides that a person served with a contribution notice must respond to the notice within the prescribed period by admitting, denying or partially denying or admitting the contribution or indemnity.

Clause 18 provides that a claimant who fails to give notice of a claim as required by this division is not able to proceed further with the claim unless the respondent is satisfied the relevant material has been provided or the

claimant's non-compliance has been remedied or the respondent waives compliance. The court can also give authority to proceed or declare that the claimant has remedied non-compliance or impose any conditions it considers necessary or appropriate to minimise prejudice to a respondent from the claimant's failure.

Clause 19 protects the position of the claimant during minority or a period of legal incapacity.

Clause 20 sets out the requirements of a respondent to attempt to resolve a claim. Steps the respondent must take include the taking reasonable steps for informing themselves about the incident, advising the claimant whether liability is admitted or denied, if contributory negligence is claimed and the making of offers of settlement. Offers and counteroffers must be accompanied by relevant material to enable a proper assessment of the offer and counteroffer.

Division 2—Obligations of the parties

Clause 21 establishes the purpose of this division which is to put the parties in a position where they have enough information to assess liability and quantum in relation to a claim.

Clause 22 establishes the duty of a claimant to provide documents that are in the claimant's possession to the respondent and information reasonably requested by the respondent about any of the matters listed in section 22(1)(b). If the claim is a health care claim, the claimant must, if reasonably requested by the respondent, give the respondent a report from a doctor that includes an opinion regarding the nature and extent of the injury and the causal relationship between the incident and the alleged injury.

Clause 23 provides for the claimant and respondent to jointly arrange an expert report.

Clause 24 provides that where a claimant is liable for the costs of an expert report obtained by agreement, the respondent must reimburse the claimant for the reasonable cost of obtaining the report, subject to any agreement between the claimant and the respondent.

Clause 25 enables the respondent, where the respondent fails to obtain the claimant's agreement, to require a claimant to undergo a medical examination at the respondent's expense. However, a claimant is not

obliged to undergo an examination or assessment if it is unreasonable or unnecessarily repetitious.

Clause 26 specifies the requirements on a respondent who seeks to establish that a claimant has not attempted to mitigate damages. If the matter ultimately proceeds to court, in assessing damages, the court may take the failure to take reasonable steps to mitigate into account.

Clause 27 requires the respondent to cooperate with a claimant by providing information related to the claim.

Clause 28 imposes an obligation on a respondent who is seeking contribution from another person, to cooperate with a contributor.

Clause 29 imposes an obligation on a contributor to cooperate with the respondent.

Clause 30 relates to the rights of nondisclosure of information or documentary material protected by legal professional privilege. However, investigative reports, medical reports and other reports connected with rehabilitation, though they would otherwise be protected by legal professional privilege, must be disclosed. Investigative reports do not have to be disclosed where they include any document prepared in relation to an application for, or an opinion on or a decision about, indemnity from the State. It permits an insurer to withhold information where fraud is suspected.

Clause 31 provides that it is an offence not to disclose material required by this division.

Clause 32 sets out the consequences of a party's failure to comply with provisions requiring the giving of information. A document that should have been disclosed cannot be used by a party in a subsequent court proceeding based on the claim unless the court otherwise orders. If the document comes to the other party's knowledge, the other party may use the document.

Clause 33 provides for information disclosure under this division to have the same privileges as if disclosed in course of proceedings before the Supreme Court.

Clause 34 clarifies that a party is not obliged to provide the same document on more than one occasion.

Division 3—Enforcement of Divs 1 and 2

Clause 35 authorises the court to order any party to comply with the duties imposed by this division.

Division 4—Compulsory conference

Clause 36 provides that before proceedings in a court can be started about a claim there must be a compulsory conference. However by agreement of the parties, or an application to the court, the conference may be dispensed with or postponed.

Clause 37 sets out the requirements for information to be exchanged prior to the compulsory conference, including requirements for a certificate of readiness. A legally represented party must be given a costs statement which provides the claimant with details of incurred legal costs and an estimate of possible future legal costs if the claim proceeds to trial and is decided by the court, and the costs implications relative to the amounts contained in the mandatory offers and counteroffers of the claimant and the respondent .

Clause 38 sets out the procedure to apply at the compulsory conference. If all parties agree, the compulsory conference may be held with a mediator.

Clause 39 provides that if the conference cannot settle the claim parties must exchange mandatory final offers.

Clause 40 sets out provisions about mandatory final offers. If a claim proceeds to court, the mandatory final offers of the claimant and respondent must be filed at the court in sealed envelopes. The court must not read the mandatory final offers until it has decided the claim. The court must take these offers into account in making a decision about costs.

Clause 41 facilitates the making of offers to contribute by parties to a contribution claim.

Clause 42 sets out the times after the compulsory conference has been held (or dispensed with) within which a proceeding based on the claim should be started.

Division 5—Urgent proceedings

Clause 43 enables urgent proceedings to be commenced before the court. Even though there has been non-compliance with this part, the court may give leave to a claimant to start the proceeding. The court may give leave on conditions that the court considers appropriate or necessary having regard to the particular circumstances of the case. However, a proceeding started by leave is stayed until the claimant complies with the part or the proceeding is dismissed.

PART 2—EXPRESSIONS OF REGRET

Clause 44 sets out the purpose of part 2. It is to allow individuals involved in an incident to express regret about the incident without being concerned that their expression of regret may be used as an admission of liability.

Clause 45 sets out the meaning of “expression of regret”. However, if the expression of regret contains an acknowledgment of fault on the part of the individual it would not be inadmissible.

Clause 46 provides that an expression of regret made before the commencement of a court proceeding in relation to the incident is not admissible in the court proceeding.

PART 3—PROCEEDINGS IN COURT

Clause 47 provides that a summary judgment is not to be given on the basis of the defendant’s admissions. However, judgment by consent can be given.

Clause 48 enables a court dealing with a proceeding based on a claim to order costs against a party who does not comply with the requirements of chapter 2, part 1, division 1.

Clause 49 sets out the consequences of a claimant's failure to mitigate damages. The court must consider whether the claimant has taken reasonable steps to mitigate damages. It provides that, if it appears that the claimant has not taken reasonable steps, the court must reduce the claimant's damages to an appropriate extent reflecting the claimant's failure.

Clause 50 provides that a court can not award exemplary, punitive or aggravated damages in relation to a claim.

Clause 51 requires the assessment of damages for loss of earnings or loss of earning capacity to be limited to a weekly amount not exceeding 3 times average weekly earnings (as defined).

Clause 52 requires damages for future loss to be discounted at a rate of 5%.

Clause 53 establishes a threshold for eligibility for damages in respect of loss of consortium (between husband and wife, the entitlement to companionship, love, affection comfort, and support of the other) and loss of servitium (loss or impairment of the services, duty, or labour to be rendered by one person to another). This clause also limits compensation to a weekly amount not exceeding 3 times average weekly earnings (as defined).

Clause 54 establishes a code for eligibility for damages for the payment of gratuitous services. A threshold factor is introduced that determines eligibility for these damages.

Clause 55 aligns the calculation of interest payment for past losses to the Treasury Bond rate for 10 year investments. This will ensure the interest is appropriate for the economic conditions at the time of settlement.

Clause 56 provides limits on costs that can be awarded for smaller claims. Where damages are \$30,000 or less, no legal costs are recoverable. If damages are more than \$30,000 but not more than \$50,000, the claimant has a maximum entitlement under the claim for legal fees of \$2,500. However, if the matter proceeds to trial, costs subsequent to the issue of proceedings are recoverable in situations where judgments are more favourable than the mandatory final offers made at the compulsory conference or before the proceedings are commenced.

Clause 57 provides that a court can not award damages, or interest on damages, contrary to this chapter.

Clause 58 provides that a proceeding in a court based on a claim must be heard and determined by a court sitting without a jury.

Clause 59 modifies the period of limitation applicable to a claim where a complying notice of a claim is given or an application for leave to start a proceeding based on a claim is made before the end of the limitation period applying to the claim. The clause extends the limitation period prescribed by the *Limitation of Actions Act 1974*.

Clause 60 provides that a respondent may recover from the claimant or other person who defrauds or attempts to defraud the respondent costs incurred because of the fraud.

PART 4—STRUCTURED SETTLEMENTS

Clause 61 facilitates the making of consent orders for structured settlements

CHAPTER 3—GENERAL

PART 1—RESTRICTION ON ADVERTISING OF PERSONAL INJURY SERVICES

Clause 62 provides that this part is of general application. The advertising restrictions apply to personal injury, not only under this Act, but also, for example, for personal injury to which the *Motor Accident Insurance Act 1994* applies and damages and compensation to which the *WorkCover Queensland Act 1996* applies.

Clause 63 sets out definitions for this part.

Clause 64 sets out the meaning of the term “advertises personal injury services” in this part.

Clause 65 explains the meaning of “allowable publication methods” for this part.

Clause 66 prohibits a lawyer from advertising personal injury services except by means of a statement that includes only the lawyer’s name and

contact details, together with information as to any area of practice or speciality of the lawyer that is published by an “allowable publication method”. An example of advertising that is restricted is advertising personal injury services on a ‘no win, no fee’ or other speculative basis.

Clause 67 provides that a prohibited person must not solicit or induce a person to make a claim at the scene of an incident or at a hospital.

A person cannot provide to a potential claimant the name, address or telephone number of a particular lawyer or firm of lawyers.

Further, the person is not permitted to disclose information to anyone other than the category of persons specified in sub clause (5).

Clause 68 provides that a person must not pay or seek payment of a fee for soliciting or inducing a potential claimant to make a claim.

Clause 69 addresses the circumstance of a person who is approved under an Act in a professional capacity. The clause stipulates that if the professional person is convicted of an offence under sections 67 or 68 the conviction may be treated as misconduct under the Act under which the person is approved.

PART 2—PROTECTION OF PERSONS PERFORMING DUTIES TO ENHANCE PUBLIC SAFETY

Clause 70 provides that this part is of general application.

Clause 71 provides protection from liability at law to persons performing duties to enhance public safety in the course of rendering first aid or other aid or assistance in circumstances of emergency to an injured person. For the protection to apply, the act done or omitted must be in good faith and without reckless disregard for the injured person’s safety. This clause does not limit or affect the *Law Reform Act 1995*, part 5 (Voluntary Aid in Emergency).

PART 3—MISCELLANEOUS

Clause 72 imposes a penalty including possible imprisonment for a person who defrauds or attempts to defraud a respondent or an insurer. It also outlines the provision for dealing with recurrent offences in a complaint.

Clause 73 states that it is an offence to provide false or misleading information or statements and imposes a severe penalty for a contravention.

Clause 74 provides that the chief executive may approve forms for use under this Act.

Clause 75 enables the Governor in Council to make regulations under this Act.

CHAPTER 4—TRANSITIONAL PROVISIONS

Clause 76 sets out transitional provisions for the Act. The provision will allow time for persons and agencies to establish systems to manage the receipt of claims and for approved forms to be developed and made publicly available

Clause 77 provides for transitional provisions for jury trials.

CHAPTER 5—ACTS AMENDED

AMENDMENT OF MOTOR ACCIDENT INSURANCE ACT 1994

Clause 78 states that this part amends the *Motor Accident Insurance Act 1994*.

Clause 79 inserts a new division into the *Motor Accident Insurance Act 1994* that enables a court to make a consent order for structured settlement

for the payment of or all or part of an award of damages in the form of periodic payments funded by an annuity or other agreed means.

Clause 80 omits sections 97A and 97B from the Motor Accident Insurance Act 1994.

SCHEDULE

DICTIONARY

The schedule contains a dictionary defining the terms used in the Act.