

CIVIL LIABILITY BILL 2003

EXPLANATORY NOTES ON AMENDMENTS TO BE MOVED IN COMMITTEE

General Outline

Objectives of the amendments

To ensure the main purpose of the Act is achieved whilst ensuring maximum practical operability of the law relating to personal injury, property damage and economic loss claims.

Reasons for the objectives and how they will be achieved

Further consultation with various stakeholders and the Queensland Parliamentary Counsel's Office has identified a number of application and drafting issues. The proposed amendments deal with those concerns.

Administrative cost to Government of implementation

There are no financial implications for the Government as a result of the amendments.

Consistency with Fundamental Legislative Principles

The amendments do not breach fundamental legal principles.

CONSULTATION

Community

There has been further consultation with representatives of the Australian Plaintiff Lawyers Association and the Bar Association of Queensland. Also, further submissions were received from insurers and various professional bodies.

Government

The Insurance Policy Taskforce has been advised of the majority of proposed changes of substance.

NOTES ON PROVISIONS**PART 1—PRELIMINARY**

Clause 1 amends clause 2 of the Bill to clarify the commencement of certain provisions of the Bill.

Clause 2 amends clause 4 of the Bill by inserting application provisions for sections, divisions and parts of the Bill. Insertion of this information will ensure a smooth transition in operation of the law to incidents affected by the Bill.

Clause 3 amends the Bill by deleting the current heading for Chapter 2 and inserting a heading that is in line with the terminology of the remainder of the Bill.

Clause 4 amends clause 10 of the Bill to ensure application of the provision in line with the commencement provisions in clause 2 and the statements in clause 4 of the Bill.

Clause 5 amends clause 15 of the Bill by inserting a definition of “a professional”. The definition is technical in that it ensures consistency within the Bill.

Clause 6 amends clause 21 of the Bill by deleting sub-clause (2). The sub-clause was considered to be a restatement of the common law position describing the duty owed by a doctor, but in fact created an uncertainty through possible creation of a statutory duty upon doctors. This concern was raised despite the content of sub-clause 7(1) of the Bill. The content is superfluous as a result of the wording in sub-clause (1). Deletion of the clause does not affect the intent or application for the clause.

Clause 7 further amends clause 21 consequential to the amendment in clause 5.

Clause 8 amends clause 22 of the Bill to grammatically reflect the intention of the clause that the provision of the warning, advice or other

information is to be associated with the giving of a professional service by a professional.

Clause 9 further amends clause 22 to grammatically reflect the intention of the clause that the provision of the warning, advice or other information is to be associated with the giving of a professional service by a professional.

Clause 10 amends clause 26 of the Bill for grammatical consistency and is technical in nature only.

Clause 11 further amends clause 26 by deleting reference to the date upon which an act to which the section applies is done or omitted. Reference to the date is unnecessary as the provision is a copy of section 71 of the *Personal Injuries Proceedings Act 2002*. That provision will, by clause 105A, cease to operate on the date of assent of the Bill, and clause 26 will commence on the date of assent. In such circumstances, it is unnecessary to maintain the retrospectivity within the clause, as section 71 will apply to any act prior to the date of assent.

Clause 12 amends clause 27 of the Bill for grammatical consistency and is technical in nature only.

Clause 13 amends the example in clause 31 of the Bill to properly reflect the intention of the Bill. The example as previously provided may have improperly placed a higher standard of reliance by a plaintiff upon a professional's advice than that intended. The amendment will properly reflect the content of the advice provided and relied upon for operation of the provision.

Clause 14 amends clause 37 of the Bill by deleting sub-clause (3). The sub-clause was originally a restatement of sub-clause 7(1) specifically relating to the content of clause 37. The sub-clause is superfluous in those circumstances and may have caused confusion in proper application of the section. It also omits the sunset provision originally contained in the clause. Accordingly, the partial non-feasance defence is to be enacted into force.

Clause 15 amends the definition of "community organisation" in clause 38 by expanding the types of entities for which a volunteer may do community work and obtain the protection provided by the provisions of the Bill.

Clause 16 amends the definition of "community work" in clause 38 by inserting the words "recreational, political" after the word "sporting". It is appropriate to differentiate between sporting activity and recreational

activity, given many leisure activities may not necessarily be defined as sporting. Further, in order to ensure national consistency, it is appropriate to include political activity as part of this definition. Such amendments will ensure the protection of the wider section of the volunteer community.

Clause 17 amends clause 46 of the Bill by deleting sub-clause (3). The sub-clause was originally a restatement of sub-clause 7(1) specifically relating to the content of clause 46. The sub-clause is superfluous in those circumstances and may have caused confusion in proper application of the section.

Clause 18 amends the Bill by deleting clause 52 in its entirety.

Clause 19 amends clause 54 of the Bill by inserting a reference to the section under the *Personal Injuries Proceedings Act 2002* which the clause replicates. Such reference is necessary for transition of the law and to ensure that notices given under that section are considered by a Court when applying the clause.

Clause 20 further amends clause 54 to ensure the provisions as applied under the *Personal Injuries Proceedings Act 2002* are unchanged, maintaining consistency in application of the pre-procedure process under that Act to proceedings that have been commenced before assent is given to the Bill, as well as after that time.

Clause 21 amends clause 60 of the Bill by replacing the provision with a new clause that more closely replicates the provisions of the *Personal Injuries Proceedings Act 2002* and the *Motor Accidents Insurance Act 1944* which it replaces.

Clause 22 amends clause 62 of the Bill to clarify application of the clause. A Court must only assess an injury scale value for incidents that occur subsequent to 1 December 2002. Whilst such an assessment may be made for incidents that occur on or prior to this date (for use, if a Court considers it appropriate, in assessing an appropriate award of general damages), the common law as to damages will continue to apply to those incidents.

Clause 23 further amends clause 62 technically to ensure continuity of language within the provision.

Clause 24 also amends clause 62 by inserting a sub-clause requiring courts to provide reasons for a decision in circumstances where an injury scale value for a particular injury is assessed at an injury scale value that is outside the range of any value previously assessed for any injury of similar nature. The intention is that Courts, when assessing injury scale values, are

to be strictly guided by the limits set by regulation and to appropriately consider and be guided by assessments made for similar injuries previously within those limits.

Clause 25 amends clause 64 of the Bill to ensure the provisions relating to structured settlements continue to apply to personal injury actions only, following transfer of the concepts from the *Personal Injuries Proceedings Act 2002*.

Clause 26 amends clause 65 of the Bill by deleting the requirement for the Court to provide a written outline of the individual damages components that would make up a proposed order. The Court will still be required to notify parties of the terms proposed to be made for an order that involves a damages component for future loss exceeding \$100,000.

Clause 27 amends clause 73 by deleting reference to the date upon which an act to which the section applies is done or omitted. Reference to the date is unnecessary as the provision is a copy of section 46 of the *Personal Injuries Proceedings Act 2002*. That provision will, by clause 100, cease to operate on the date of assent of the Bill, and clause 73 will commence on the date of assent. In such circumstances, it is unnecessary to maintain the retrospectivity within the clause, as section 46 will apply to any act prior to the date of assent.

Clause 28 amends clause 81 by inserting a replacement subsection 6(2)(b), along with an example, in to the *Personal Injuries Proceedings Act 2002* to that originally proposed in the Bill. It is, and was at the time of passage of that Act, the intention that all claims for personal injury must go through a form of pre-proceedings process. Concern has been raised that the current section and proposed amendment do not achieve this. The provision as inserted by amendment will ensure the intent is achieved, whilst providing guidance on application of the provision. The section has no effect on application of the substance of the remainder of the Bill to any claim, such application outlined by clauses 4 and 5 of the Bill.

Clause 29 amends clause 82 of the Bill by inserting a sub-clause to further amend section 7 of the *Personal Injuries Proceedings Act 2002*. The further amendment to section 7 inserts two subsections that ensure any notice of claim given under the *Personal Injuries Proceedings Act 2002* is given in the approved form as at the date of giving the notice, as opposed to the date of the incident to which the notice relates. Further, the subsections inserted clarify the intention of the Act that the notice to be given at all times was that approved as at the date of giving notice.

Clause 30 amends clause 83 by making a technical amendment to section 9(5) of the *Personal Injuries Proceedings Act 2002* to allow proper application of the proposed clause 9A relating to giving initial notice under that Act of medical negligence claims.

Clause 31 further amends clause 83 by making a technical amendment to section 9(6) of the *Personal Injuries Proceedings Act 2002* to allow proper application of the proposed clause 9A relating to giving initial notice under that Act of medical negligence claims.

Clause 32 also amends clause 83 of the Bill by requiring a claimant under the *Personal Injuries Proceedings Act 2002* to advise the respondent in writing of the other parties who will be, or are, parties to the pre-procedure process.

Clause 33 additionally amends clause 83 by inserting a further two subsections into section 9 of the *Personal Injuries Proceedings Act 2002*. The first subsection will allow community legal services to continue to provide initial legal advice for free to the community without triggering the timeframes contained within subsection 9(3). The second subsection is a technical amendment to facilitate application of the new provisions inserted relating to giving initial notice under that Act of medical negligence claims.

Clause 34 amends the Bill by inserting clause 83A into the Bill. This new clause inserts a new section into the *Personal Injuries Proceedings Act 2002*. The new section applies to claims relating to allegations of medical negligence. The result of the new section will be that, prior to giving part 1 of a notice of a claim under that Act, a claimant will be required to provide an initial letter to the person they consider at fault, detailing certain defined information. This initial notice will be required to be provided within the time frame currently outlined for provision of part 1 of a notice. The person to whom the initial notice is given will have 1 month to respond in writing, advising whether they hold records relating to the treatment identified, and to provide copies of those documents.

The claimant will then have a period of twelve months to assess those documents, obtain a medical report from a medical specialist and provide this report along with the part 1 of the notice of claim to the respondent. If the claim involves a failure to work, the medical report is not required to address this allegation. The section provides that the claim will then enter into the current pre-court procedure under that Act. It is specifically provided that, during the period between the time at which the initial notice

is given and the provision of the medical report and part 1 of the notice of claim, the person is not required to otherwise investigate the claim.

Clause 35 amends clause 85 of the Bill by inserting an application provision that ensures application of the original intention of the *Personal Injuries Proceedings Act 2002* not to affect the rights of parties to insurance contracts.

Clause 36 amends clause 87 of the Bill by inserting reference to section 10 into section 13 of the *Personal Injuries Proceedings Act 2002*. This will result in a respondent being deemed to accept part 1 of a notice of claim as compliant if they fail to respond as required under section 10. This accords with the original intention of that Act.

Clause 37 amends clause 92 of the Bill by inserting a subsection into the proposed clause 20B of the *Personal Injuries Proceedings Act 2002*. The subsection ensures application of the provision in line with the intention of the provisions and as demonstrated by the provisions being inserted by clause 107 of the Bill.

Clause 38 further amends clause 92 by amending the time frame in proposed clause 20C(b) to allow for the initial notice procedures for medical negligence claims under proposed clause 9A, being inserted into that Act. The amended time frame allows the initial notice procedure to be completed within the time under which a claimant is required to provide part 1 of a notice of a claim.

Clause 39 also amends clause 92 by inserting a further subsection into proposed clause 20C to ensure consistent application of the time frames under the *Personal Injuries Proceedings Act 2002* by allowing consultation with a community legal service without triggering commencement of the time frames.

Clause 40 amends clause 95 of the Bill by making a consequential amendment to the proposed clause 29A being inserted into the *Personal Injuries Proceedings Act 2002*. It will result in consistent application of the intention of the proposed clause with respect to the costs of copying documents to the proposed clause 9A being inserted into that Act.

Clause 41 amends clause 105 of the Bill by replacing the definition of “community legal service”. The definition now requires all entities who provide free legal services to the community, or a section of the community, to which the exemption from prosecution applies, to be identified by way of regulation under that proposed provision.

Clause 42 amends the Bill by inserting clause 105A. This amendment is technical in that it repeals the provisions in the *Personal Injuries Proceedings Act 2002* relating to volunteers acting in emergency situations, those provisions now replicated in clauses 25 and 26 of the Bill.

Clause 43 amends the Bill by inserting clause 106A. This new clause will amend clause 77D of the *Personal Injuries Proceedings Act 2002* to read in accordance with the judgment of His Honour McGill DCJ in the matter of *Lamb v. State of Queensland*. In circumstances where a compliant notice of claim is given on or after 18 June 2003, it will be necessary for an applicant to obtain the leave of the Court to commence proceedings. The proceedings must be filed prior to closure of the court registry on 18 December 2003.

Clause 44 amends clause 107 of the Bill by consequentially amending the transitional provisions being inserted into the *Personal Injuries Proceedings Act 2002*. The amendments will allow for the initial notice procedure, under the proposed clause 9A being inserted into that Act, to operate within the time frames expressed. A claimant will be required to comply with the initial notice procedure within the time outlined under the proposed clause 80 being inserted into that Act, and prior to delivering part 1 of a notice of claim.

Clause 45 further amends clause 107 of the Bill by inserting a new proposed clause 81 for insertion into the *Personal Injuries Proceedings Act 2002*. The proposed clause 81 is a further transitional provision that ensures continued application of the provisions being transferred from that Act into the Bill to incidents that occur prior to commencement of the Bill.

Clause 46 amends clause 108 of the Bill by amending the definition of “complying part 1 notice of claim” to grammatically reflect the procedure under the *Personal Injuries Proceedings Act 2002*.

Clause 47 amends Schedule 2 by grammatically correcting the definition of “claim” in the dictionary to the Bill.