



Queensland

# Civil Liability Amendment Regulation (No. 1) 2008

## Explanatory Notes for SL 2008 No. 264

made under the

*Civil Liability Act 2003*

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## General outline

### Short title

*Civil Liability Amendment Regulation (No. 1) 2008.*

### Authorising law

Sections 61 and 74 of the *Civil Liability Act 2003* (the Act).

### Objectives of the Subordinate Legislation

The objective of the regulation is to amend the *Civil Liability Regulation 2003* to improve its practical operation and, in particular, the effectiveness of the injury scale by providing better guidance as to where injuries sit within the injury scale and ensuring there is parity between different injuries of comparable severity. This is primarily achieved by including:

- additional injury descriptions (expressed as new examples of injuries);
- examples of factors affecting assessment of an injury scale value (ISV) for an injury; and
- comments about appropriate levels of ISV for injuries.

Some other amendments are also made to:

- vary the ISV ranges for injuries where inconsistencies are identified;
- break down large ISV ranges into sub-categories; and
- clarify the placement of particular injuries within the injury scale.

## **Reasons for the Subordinate Legislation**

The Act, which commenced on 9 April 2003, was introduced as part of the Government's broader personal injury law reform agenda with the aim of further facilitating the ongoing affordability of insurance through clarification of some basic principles within the substantive law and sustainable awards of damages for personal injury. The Act adopted a majority of the recommendations in the Review of the Law of Negligence Final Report (the Ipp Report).

The Act includes limits on the recovery of both special and general damages in personal injury actions. Special damages are those damages which are readily quantifiable, such as damages representing loss of income or outlays for medical expenses. General damages are intended to compensate for pain, suffering, loss of amenities of life, loss of expectation of life or disfigurement.

Sections 61 and 62 of the Act provide a system for the assessment of any general damages component of an award of damages in a personal injury action. A court is to assess an injury scale value (ISV) on a scale running from 0 to 100 for any injury. The scale reflects 100 equal gradations from an injury not severe enough to justify any award of general damages to an injury of the gravest conceivable kind.

In assessing an ISV, the court is to have regard to any ISVs that have been assessed by courts in cases involving personal injury similar to that before it. Further, the court is to have regard to the range of ISVs for similar injuries prescribed by regulation. This requirement on the court relates to all personal injuries covered by the Act that occurred on or after 2 December 2002.

The *Civil Liability Regulation 2003*, which commenced on 26 September 2003, sets out the ranges of ISVs for various injuries. The objectives of the table of ISVs for the various injuries (the injury scale) which are prescribed in schedule 4 of the *Civil Liability Regulation 2003* include promoting:

- (a) consistency between assessments of general damages awarded by courts for similar injuries; and
- (b) similar assessments of general damages awarded by courts for different types of injury that have a similar level of adverse impact on an injured person.

On 19 May 2005, the Honourable Rod Welford MP, then Attorney-General and Minister for Justice, wrote to stakeholders seeking comments for the purposes of a review of the practical operation of the *Civil Liability Regulation 2003*. In particular, stakeholders were asked to comment on a Discussion Paper which raised a number of points and posed a series of questions on the practical implementation of the *Civil Liability Regulation 2003* and experiences with the application of the injury scale.

In late 2006, the Report: *Review of the Civil Liability Regulation 2003* (Review Report) was released to key stakeholders to provide feedback on the status of the review, recommendations to be implemented and future directions. The key recommendations in the Review Report to address stakeholders' concerns were for refinements to be made to:

- Ensure parity between different injuries of comparative severity;
- Ensure sufficient descriptions are provided for injuries with wider ranges to enable accurate assessment of where in the scale a particular injury falls and to lower anomalies in the application of multiple injury rules; and
- Determine the need for additional commonly occurring injuries to be included in the scale (for example seat belt injuries).

In March 2007, a panel of medical experts was established to assist the Department of Justice and Attorney-General with development of a draft amending regulation to address stakeholders' concerns. The panel (comprising an orthopaedic surgeon, neurologist, plastic surgeon, physician and infectious disease expert) was requested to consider stakeholder comments and recommendations from the review and provide advice on suitable amendments.

In December 2007, a draft Amendment Regulation was finalised and released to key stakeholders, with a consultation paper. The primary aim of the Amendment Regulation is to address stakeholders' concerns raised in the Review by providing better guidance as to where injuries sit within the scale and ensuring parity between different injuries of comparable severity.

## **Consistency with the authorising law**

Section 61 of the Act prescribes that the court must assess general damages by reference to an injury scale value (ISV). Further, the ISV must be assessed under any rules prescribed by regulation. The ranges of ISV for various injuries in the *Civil Liability Regulation 2003* are prescribed under section 61 of the Act.

Section 74 of the Act also confers a general regulation-making power on the Governor in Council. Rules to ensure appropriate application of the ranges of ISV are authorised under section 74 of the Act.

## **Administrative cost to Government of implementation**

There is no cost to Government in the implementation of the regulation.

## **Consistency with Fundamental Legislative Principles**

The regulation is consistent with fundamental legislative principles.

# **Consultation**

## **Community**

The review of the *Civil Liability Regulation 2003* was undertaken by way of seeking submissions from specific stakeholders. The stakeholders were those consulted by Government during the original development of the Act and *Civil Liability Regulation 2003*, namely:

- AAMI Insurance
- Allianz Australia Insurance Group
- Australian Lawyers Alliance
- Australian Medical Association (Queensland Branch)
- Bar Association of Queensland
- Insurance Council of Australia

- Local Government Association of Queensland
- NRMA Insurance
- QBE Insurance Group
- Queensland Doctors Mutual
- Queensland Law Society
- RACQ Insurance
- Suncorp Metway Insurance.

The following stakeholders were consulted on a draft of the regulation:

- Australian Lawyers Alliance
- Australian Medical Association
- Queensland Doctors' Mutual
- Local Government Association of Queensland
- The Chief Justice of Queensland
- The Chief Judge of the District Court of Queensland
- The Chief Magistrate
- Bar Association of Queensland
- Queensland Law Society.

A number of private insurers were also consulted, including:

- Suncorp Metway Insurance Limited
- Australian Associated Motor Insurers Limited
- Allianz Australia Insurance Limited
- Insurance Australia Limited
- QBE Insurance (Australia) Limited
- RACQ Insurance Limited
- Advant
- Australian Associated Motor Insurers Limited).

## Government

Consultation has been undertaken with the Department of the Premier and Cabinet, Queensland Health, Department of Employment and Industrial Relations, the Motor Accident Insurance Commission and the Queensland Office of Regulatory Efficiency.

The Office of the Queensland Parliamentary Counsel has drafted the regulation.

## Notes on provisions

Section 1 provides the short title of the regulation.

Section 2 provides that the regulation commences on 1 July 2009.

Section 3 provides that the regulation amends the *Civil Liability Regulation 2003*.

Section 4 inserts a new section 7. This new section deals with transitional matters for the regulation. It provides that the amendments in the regulation will apply to injuries arising on or after commencement of the new section.

Section 5 of the regulation amends section 11 of schedule 3 of the *Civil Liability Regulation 2003* to include a note to provide that it is not a function of a doctor to identify the item in schedule 4 to which an injury belongs or the appropriate ISV for an injury. The notes also include a cross reference to Chapter 11, part 5 of the *Uniform Civil Procedure Rules 1999* which deals with expert evidence. These amendments are consistent with the review recommendations.

Section 6 of the regulation amends the injury scale in schedule 4 of the *Civil Liability Regulation 2003* consistent with the recommendations made in the review. The following amendments are made to schedule 4:

- (a) Variation of the ISV ranges where inconsistencies are apparent.

For example, the regulation increases the ISV ranges for item 100.2 (An upper limb amputation through or above the elbow but below the

shoulder), item 100.3 (An upper limb amputation below the elbow) and item 111 (Total or effective loss of 1 hand). It is also proposed to lower the ISV range for item 112 (Amputation of the thumb or part of the thumb). The amendments provide better parity with injuries of similar severity and causing similar permanent impairment. The orthopaedic specialist on the medical panel advised that the current ISV ranges are inconsistent with other injuries of similar severity and causing permanent impairment within the injury scale.

The ISV ranges for amputations of lower limbs have also been reduced for some items, for example item 129 (Loss of both lower limbs above or through the knee). These amendments have been made to ensure parity with other injuries in the scale with similar level of resulting impairment and particularly for parity with upper limb amputations.

- (b) Clarification of the placement of particular injuries within the injury scale.

For example, part 5, division 6 (Injuries to the digestive system) is amended to clarify that tongue, throat and abdominal wall injuries are to be assessed in this division. This amendment is not intended to impact on the ISV points allocated to these injuries but clarify under which items in schedule 4 these injuries should be assessed.

Another example, is the amendments made to part 5, division 7 (Kidney injuries) and division 9 (Bowel injuries). These amendments clarify that ureter injuries are to be assessed under division 7 while urethra injuries are to be assessed under division 9.

- (c) Breaking down large ISV ranges into sub-categories.

For example, item 5.2 (Extreme brain injury – substantially reduced insight), which currently has an ISV range of 16 to 70 points, has been broken down into items 5.2.1 (36 to 70 points) for where the injured person will have partial or complete insight for not more than half of the person's waking hours) and 5.2.2 (16 to 35 points) for where the injured person will have infrequent period of partial insight and will show unreliable, rare or limited responses to physical or emotional stimuli.

- (d) Providing additional injury descriptions (expressed as new examples of injuries).

For example, item 9 (Minor head injury) is amended to add “uncomplicated skull fracture” as an example of an injury within this item. More severe skull injuries would result in a brain injury under other items.

- (e) Including examples of factors affecting assessment of an ISV for an injury.

For example, Part 7 (Scarring to parts of the body other than the face) is amended to include examples of factors affecting assessment of ISV of injuries within this part. The factors include location of a scar, age, adverse psychological reaction and likelihood of a scar fading or becoming less noticeable over a period of time.

- (f) Providing comments about appropriate levels of ISV for an injury.

For example, item 147 (Extreme foot injury that is not an amputation) is amended to include a comment about the appropriate level of ISV to provide guidance for assessment of injuries within this item.

- (g) Inserting a new sub-item (item 151.3) for amputations of individual lesser toes with an ISV range of 3 to 5. The existing items 151.1 and 151.2 only provide for amputation of all toes and of the great toe.

Some minor drafting changes are also made to schedule 4.

Section 7 amends the dictionary in schedule 7 of the *Civil Liability Regulation 2003* to insert a new definition of digestive system consistent with the changes to schedule 4 in part 5, division 6. A definition for ankylosis is also included which is a new term used in the amendments to schedule 4.

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#### ENDNOTES

- 1 Laid before the Legislative Assembly on . . .
- 2 The administering agency is the Department of Justice and Attorney-General.



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