

### State Government Legislative Reforms and the liability crisis



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*The 'liability crisis' continues to make headline news as individuals and companies experience difficulty finding or paying for their liability insurance as their renewals fall due.*

In an attempt to control the litigation and court awards related to claims against liability policies Australian States and Territories are introducing legislative reforms.

Catholic Church Insurances welcomes these reforms which will go some way to minimising future liability claims. These reforms are a long term solution and may not provide an immediate turnaround to the liability crisis.

The reforms offer solutions on a state by state basis, variously capping damages payouts relating to:

- pain and suffering,
- earning capacity; and
- gratuitous care.

Further, the legislation introduces exclusions for exemplary, punitive and aggravated damages, and claims for future economic loss.

Protection may be offered for volunteers and waivers from liability can apply were an injury is due to an inherent or obvious risk. Apologies may no longer constitute an admission of liability.

The following details the reforms and proposed reforms as far as information is currently available, as legislation is passed and the facts confirmed we will provide an updated bulletin to you.

#### Tort Reform – An Overview

In response to the “public liability crisis” every state and territory has put tort reform on the agenda with some states already introducing legislation while other states have draft bills or proposals. The legislation applies to all personal injury claims (with the exception of compulsory third party (“CTP”) and workers compensation claims).

The reforms are aimed at reducing the cost of a personal injury claim with the corollary that insurance premiums will fall. On announcing the draft legislation, NSW Premier, Bob Carr, stated that premiums would fall as a result of the reforms. Mr Carr’s enthusiasm was perhaps premature – the reforms are still in their infancy and it remains to be seen what impact they will have.

#### Glossary of terms

##### Costs – legal costs

*Exemplary, Aggravated and Punitive Damages* – damages awarded to a claimant to make an example of the defendant, to punish the defendant or because of the circumstances in which the behaviour was committed.

*Future economic loss* – loss of earning capacity

*General damages* – compensation payable for pain and suffering

*Gratuitous care damages* – damages payable to a claimant to compensate for unpaid care provided by a family member.

*Indemnity basis* – recovery of actual legal costs incurred rather than a percentage.

*Tort* – A civil wrong. Most commonly a tort is loss caused to a person as a result of the negligence of another.

### New South Wales

#### Civil Liability Act 2002

The NSW Parliament announced its first round of reforms on 20 March 2002 and the legislation was passed on 6 June 2002. The major reforms include:

- General damages capped at \$350,000. A claimant is not entitled to any general damages if the injury does not reach the threshold of 15% of the most extreme case.
- Exemplary, punitive and aggravated damages excluded. These damages are usually excluded under insurance policies and will not contribute to reducing premiums.
- Claims for future economic loss are limited to three times the average weekly earnings (\$2,712 net per week).
- Costs capped on claims up to \$100,000 (limited to \$10,000 or 20% of the amount claimed – whichever is greater)

The above reforms are limited to capping costs and payments but do not alter the law of liability.

#### Proposed Reforms

The *Civil Liability Amendment (Personal Responsibility) Bill 2002* has been introduced to parliament with a second round of reforms. The Bill makes substantive reforms limiting liability. The major proposed reforms include:

- Limiting claims where the injury is due to an inherent or obvious risk.
- No liability for injury, death or property damage arising from a recreational activity where a warning has been given. Waivers are recognised.
- Intoxicated person are not entitled to damages unless the incident would have occurred even if the person was not intoxicated. Where damages are awarded they are automatically reduced by 25% for contributory negligence.
- Volunteers not liable when doing work for community organisations when acting in good faith.
- An apology does not constitute an admission of liability.

### Queensland

#### Personal Injuries Proceedings Act 2002

- No legal costs for claims under \$30,000 and a cap of \$2,500 for claims between \$30,000 and \$50,000.
- Pre litigation procedures requiring early notification of claims following the appearance of symptoms.
- Mandatory exchange of information to facilitate settlement discussions.
- Mandatory offers of settlement and settlement conferences.
- Exemplary, punitive and aggravated damages excluded.

### Proposed Reforms

- Contributory negligence to be considered where the risk is increased by alcohol or recreational drugs.
- Waivers recognised.
- Volunteers to be provided with an indemnity from the organisation for which they work (except in the case of gross negligence).
- Exemplary, punitive and aggravated damages excluded.

### Victoria

Victoria is yet to enact any legislation aimed at tort reform.

The *Wrongs and Other Acts (Public Liability Insurance Reform) Bill 2002* has been introduced to the Parliament although it has not been passed. Some of the proposed reforms include:

- General damages capped at \$360,000.
- Loss of earnings claims limited to three times the average weekly earnings.
- No legal costs for claims under \$30,000 and a cap of \$2,500 for claims between \$30,000 and \$50,000.
- Waivers recognised when participating in risky activities.
- Volunteers and “Good Samaritans” cannot be sued.
- An apology does not constitute an admission of liability.
- Introduction of pre litigation procedures to encourage early settlement.

### South Australia

#### Volunteers Protection Act 2001

This Act is already in place and limits personal liability of a volunteer. Other proposed reforms include:

- Waivers recognised. Participants in recreational activities can agree on the extent of liability.
- Capping of general damages at \$241,500.
- Loss of earnings damages (past and future) capped at \$2.2 million.
- Gratuitous care damages capped at four times the average weekly earnings (regardless of the carer’s income).
- Contributory negligence presumed if intoxicated and damages reduced by not less than 25%.
- No liability for Good Samaritans.
- An apology does not constitute an admission of liability.

### Tasmania

*Civil Liability Bill* (introduced to Parliament on 23 October 2002)

This bill has not been passed. The major points in the bill include:

- Presumption of contributory negligence where intoxicated (minimum 25%)

- An apology is not an admission of liability.
- Structured settlements available retrospectively.

This bill proposes minor changes only. It is likely the Tasmanian Parliament will introduce further amendments to keep pace with the other states.

The Duties Act 2001 has been amended to remove stamp duty from public liability policies.

## Western Australia

### Volunteer (Protection from Liability) Bill 2002

The purpose of this Bill is to protect volunteers who serve the community. It has not been passed by Parliament. Further reforms have been introduced in the *Civil Liability Act 2002* that was passed on 20 November 2002. The Act applies to personal injuries claims. The reforms include:

- Threshold for entitlement to general damages fixed at \$12,000.
- Claims for future economic loss are limited to three times the average weekly earnings.
- Threshold for entitlement to damages for home care assistance fixed at \$5,000.

## ACT

The ACT has proposed three stages of reform for personal injury claims

### Stage One – Civil Law (Wrongs) Bill

- Ensure the legislation reflects current practice.
- Provide costs to be awarded on an indemnity basis.
- Protection for Good Samaritans and volunteers
- Accept the Commonwealth's proposed reforms for the voluntary assumption of risk.

### Stage Two – Changes consequent on national reviews agreed by the ACT

- Adoption of recommendations made by the federal government

### Stage Three – longer term changes to civil procedure

- Reforms to the court case management system and simplification of civil procedure rules.

In addition to the three stages, it has introduced a bill to exempt public liability policies from stamp duty.

## Northern Territory

*Personal Injuries (Liabilities and Damages) Bill 2002.*

The reforms in this Bill include:

- Cap and threshold for general damages (\$250,000.00).
- Loss of income claims capped at 3 times the average weekly income.
- Limit damages for gratuitous care from a family member.

- Compulsory settlement conferences or mediation prior to the issue of court proceedings.
- Volunteers to be exempted from liability.
- An expression of regret does not constitute an admission of liability.
- Presumption of contributory negligence if the person is intoxicated (minimum 25%). Presumption maybe rebutted in some circumstances.
- Allows for structured settlements

## What does it mean for clients of Catholic Church Insurances?

We understand the negative impact that premium increases have on Church clients and the interest on whether the reforms will have any significant impact in reducing claims or the cost of a claim and resulting premiums. The New South Wales legislation has only been in operation since June and to date, no cases have been decided under the new Act. Since the commencement of the Act, it appears fewer claims are being made in New South Wales although it is likely this abatement will only be temporary while plaintiff lawyers become conversant with (and less questioning of) the legislation.

The real effect of the tort reform legislation will not be known to insurers until it has been in place for at least 18 months. A review of court decisions made prior to the tort reform legislation indicate that if the same cases were decided today under the new or proposed legislation, the net cost would not be substantially different.

The biggest impact on tort reform is likely to be a shift in attitude of the courts. Recent decisions of the courts indicate that tort reform is on the agenda of the judiciary. The courts have effectively “clawed back” the duty of care to place some onus on claimants to take responsibility for their actions.

It remains to be seen how these changes will impact on premiums. Any reduction in claim costs may take 18 months to show up in a way that would reflect in the calculation of the premiums. Trends and results will be carefully monitored and where appropriate pricing of covers will be adjusted accordingly.

Catholic Church Insurances is committed to supporting best practice risk management as the best way of minimising liability risks.

If you have any comments or questions regarding the tort reforms and their likely impacts or require any assistance in relation to risk management please do not hesitate to contact your Account Executive or Catholic Church Insurances on 1300 655 001.

As always, we are committed to serving Church

*Peter Latham*

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### Tort Reform – A Comparative Overview

Jurisdiction	Legislation	Status	Retrospective	Waivers	Volunteer Protection	Damages	Costs
New South Wales	<i>Civil Liability Act 2002</i> <i>Civil Liability Amendment (Personal Responsibility) Bill 2002</i>	Act passed on 18 June 2002	Yes. Applies to all proceedings commenced after 20 March 2002 except for claims against Government agencies	Proposed	Proposed	General damages capped at \$360,000  15% threshold for entitlement to general damages  Earning capacity and gratuitous care damages capped	\$10,000.00 or 20% of amount claimed on claims up to \$100,000 whichever is the greater
Queensland	<i>Personal Injury Proceedings Act 2002</i>	Passed on 20 June 2002	Yes. Applies to all proceedings issued after 18 June 2002	No	Yes	Earning capacity and gratuitous care damages capped	No costs on claims up to \$30,000  \$2,500 on claims between \$30,000 and \$50,000
Victoria	<i>Wrongs and Other Acts (Public Liability Insurance Reform) Bill 2002</i>	Not yet passed	No	Proposed	Proposed	General damages capped at \$360,000	No costs on claims up to \$30,000  \$2,500 on claims between \$30,000 and \$50,000
South Australia	<i>Wrongs (Liability and Damages for Personal Injury) Amendment Bill</i>  <i>Recreational Services (Limitation of Liability) Bill</i>	Passed on 12 September 2002 Awaiting proclamation	No	Proposed	Yes	General damages capped at \$241,500  Gratuitous care capped	No reforms proposed
Western Australia	<i>Civil Liability Act 2002</i>	Not yet passed	No	No	Yes	General damages threshold of \$12,000  Earning capacity and gratuitous care capped	No reforms proposed
Tasmania	<i>Civil Liability Bill 2002</i>	Not yet passed	Yes, only in respect of structured settlements	No	No	No	No
ACT	<i>Civil Law (Wrongs) Bill</i>	Not yet passed	No	Proposed	Proposed	No reforms proposed	\$10,000 or 20% of amount claimed on claims up to \$100,000, whichever is the greater
Northern Territory	<i>Personal Injuries (Liabilities and Damages) Bill 2002</i>	Not yet passed	No	No	Yes	General damages capped at \$250,000  Earning Capacity and gratuitous care damages capped	No