

**LEGISLATIVE ASSEMBLY**

**CIVIL LIABILITY BILL, 2002**

**EXPLANATORY MEMORANDUM**

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The objective of this Bill is to reduce public liability insurance premiums and / or improve insurance availability, through regulating the recovery of damages for death or injury. The aim is to achieve:

- Cost reduction;
- Claims cost containment for the future;
- Improving certainty and predictability in the insurance system; and,
- Changing social and legal attitudes towards the assumption of and liability for risk.

The Bill also places restrictions on advertising for personal injury legal services.

The Bill seeks to strike a balance between availability and affordability of public liability insurance, and ensuring adequate compensation for those sustaining a modest or serious injury due to the fault of another, rather than those sustaining relatively minor injuries.

The Bill has two operational parts. The first deals with claims for damages for personal injuries (including death). Under this Bill, damages for personal injuries will be limited. The second operational part of the Bill regulates advertising and touting for legal services relating to personal injury.

Currently, damages for personal injuries are generally governed by common law rules. However there are some specific types of personal injury that are the subject of State legislative controls. These are in relation to third party claims for personal injuries sustained in relation to motor vehicle accidents; workers compensation; and criminal injuries compensation. Those legislative schemes are not affected by the Bill.

The provisions with respect to a threshold for general damages, fixing of damages for pecuniary loss, and for provision of home care services, follow the framework contained in the Motor Vehicle (Third Party Insurance) Act 1943 (WA).

**Part 1 - Preliminary**  
**Clause 1: Short title**

This clause provides that the Act may be cited as the *Civil Liability Bill 2002*.

Clause 2:     **Commencement**

Subclause (1) provides that the Act is to come into operation on the day it is proclaimed.

Subclause (2) allows for different dates to be set for certain provisions to commence.

Clause 3:     **Meaning of “personal injury damages”**

Clause 3 defines the meaning of ‘personal injury damages’ for the purposes of the Bill. The term includes damages that relate to the death of a person. The Bill is only to apply to personal injuries sustained due to the fault of another.

Sums payable with respect to personal injury or death under a superannuation scheme or under an insurance policy, including a life insurance policy, are excluded from the definition.

Clause 4:     **Varying amounts to reflect award rate changes**

Clause 4 provides for a formula for the indexation of amounts of money set as thresholds and caps for awards of personal injury damages under the Bill.

Clause 5:     **Act binds Crown**

This clause provides that the Bill is binding on the State.

**Part 2 – Personal injury damages**

**Division 1 - Preliminary**

Clause 6:     **Application of this Part**

This clause sets out the application of Part 2 of the Bill. It provides that this Part applies in respect of an award of personal injury damages, subject to certain exceptions.

Subclause (1) provides that Part 2 applies to the awarding of personal injury damages. It does not apply to tortious claims generally; for example it would not apply to torts causing solely economic loss such as claims for negligent misrepresentation.

Subclause (2) ensures that the provisions of Part 2 will apply to awards for personal injuries damages whether the action is founded in tort, breach of contract or on another legal basis.

Subclause (3) lists certain exclusions. Excluded from application of the Part are injuries to which the *Motor Vehicle (Third Party Insurance) Act 1943* applies, and injuries to which the *Workers' Compensation and Rehabilitation Act 1981* applies. A number of other situations in which a person may be entitled to recover damages for personal injury are also excluded.

Subclause (4) provides for Part 2 to take effect only in relation to incidents occurring after the date of proclamation. The Bill is not to have retrospective operation.

Subclause (5) addresses circumstances where the date of the incident leading to the injury cannot be ascertained. For example a latent injury. In such cases, the relevant date to determine whether Part 2 applies will be the date on which the symptoms first become apparent.

Clause 7:     **Court awards constrained**

Clause 7 provides that a court may not award damages contrary to Part 2.

Clause 8:     **Act does not give rise to any cause of action**

Clause 8 clarifies that the Bill does not give rise to any cause of action to recover damages.

**Division 2 - Threshold on damages for non-pecuniary loss (general damages)**

Clause 9:     **Threshold on damages for non-pecuniary loss (general damages)**

Clause 9 imposes a threshold for the determination of damages for non-pecuniary loss (ie pain and suffering, loss of amenities of life, loss of enjoyment of life; curtailment of expectation of life, and disfigurement or mental harm).

Clause 10:    **Amount A**

Clause 10 sets the threshold figure for general damages of \$12,000, and provides for the indexation of that amount. The indexation formula applied is that contained in clause 4 of the Bill. No such damages are to be awarded unless the threshold is passed.

The threshold figure and the indexation formula are adopted from the *Motor Vehicle (Third Party Insurance) Act, 1943 and Regulations*.

**Division 3 – Fixing damages for pecuniary loss**  
**Damages for loss of earnings**

Clause 11:

Clause 11 requires the assessment of damages for loss of earnings or loss of earning capacity to be limited so as not to accrue at a rate exceeding 3 times average weekly earnings (defined to represent average gross (before tax) earnings of full-time adult wage and salary earners, by reference to Australian Bureau of Statistics publications). Average weekly earnings for full-time adults in Western Australia as reported by the Australian Bureau of Statistics on 16 May 2002 were \$895.80.

Clause 12: **Damages for provision of home care services**

Clause 12 restricts the damages that may be awarded for home care services (such as domestic help or nursing) that are provided on a gratuitous basis.

This clause imposes a formula that sets a threshold (proposed at \$5,000) and a restriction on the calculation of damages that can be awarded for these services to the average weekly wage, both in total and pro rata. In addition, such services that would have been provided in any event will not be eligible for compensation.

Clause 13: **Amount B**

The amount and formula applied for calculating and indexing the threshold and cap in respect to damages for provision of home care services is set out in clause 13. This amount and formula is adopted from the *Motor Vehicle (Third Party Insurance) Act, 1943 and Regulations*.

**Division 4 – Structured settlements**  
**Meaning of “structured settlement”**

Clause 14:

Clause 14 defines the term ‘structured settlement’. The key elements of the definition are that the settlement take the form of an agreement between the parties to the claim; and that the compensation or damages take the form of periodic payments.

**Clause 15: Consent order for structured settlement**

Clause 15 enables a court to make consent orders for structured settlements.

**Part 3 – Advertising legal services relating to personal injury and touting**

**Clause 16: Meaning of terms used in this Part**

Clause 16 sets out definitions for this Part.

**Clause 17: Restriction on advertising legal services relating to personal injury**

Clause 17 prohibits a lawyer from advertising personal injury services except by means of a statement in the manner allowed by Clause 18.

**Clause 18: Allowed publication**

Clause 18 limits the method by which personal injury legal services may be published and the contents of such a publication. It permits a lawyer or a person acting on the lawyer's behalf to advertise personal injury services by means of a statement that may include only the lawyer's name and contact details, and information as to any area of practice, speciality or accreditation of the lawyer. Such a statement is restricted in the way it can be published to one or more of the allowable publication methods set out in paragraphs (a) to (f) of subclause 18(1).

An example of advertising that is restricted is advertising personal injury services on a 'no win, no fee' or other speculative basis.

Subclause 18(3) prohibits a lawyer or someone on their behalf from advertising in or around a hospital.

**Clause 19: Prohibition on touting at scene of incidents or at any time**

Clause 19 provides that a person attending the scene of an accident, and a person whose job involves collecting information about accident victims or puts them in contact with accident victims, must not solicit or induce a victim to make a claim at the scene of an incident or at a hospital.

The clause also prohibits a person having contact with accident victims from providing to potential claimants 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 to the category of persons specified in subclause (6), or in the circumstances set out in (7) and (8).

**Clause 20: Prohibition on paying, or seeking payment, for touting**

Clause 20 provides that a person must not pay or receive payment of a fee for soliciting or inducing a potential claimant to make a claim.

**Clause 21: Consequences if person approved under an Act is convicted under section 19 and 20**

Clause 21 addresses the circumstances 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 against clauses 19 and 20 the conviction may be treated as misconduct that warrants suspension or cancellation of that person's approval under the Act under which the person is approved.

**Part 4 – Other matters**

**Clause 22: Regulations**

Clause 22 contains a regulation making power.