

## Statute Law Revision and Repeals Bill 2019

### ***Clause 57 – Personal Injuries (Civil Claims) Act 2003 repealed***

1. The Explanatory Statement notes that operation of the *Personal Injuries (Civil Claims) Act 2003* depended on rules of court being made. However, since no such rules have been made most of the provisions of the Act have not commenced.
  - a. *Why has the system enacted by the Legislative Assembly in 2003 not been implemented?*
2. The Explanatory Statement states that rather than establishing rules of court, the Supreme Court issued a practice direction that sought to achieve, in part, what the Act sought to achieve. However, the Law Society NT states that Practice Direction 6 is neither mandatory nor enforceable, it only applies to the Supreme Court with no equivalent process for claims in the Local Court, and it does not have the scope or ability to assist in true pre-action resolution as the scheme which was enacted.
  - a. *Is it the case at this time, despite the enactment of the 2003 Act:*
    - i. *There is no enforceable system to provide for the economical and early resolution of claims for damages for personal injuries before proceedings are commenced;*
    - ii. *There is no pre-action process for personal injury claims for the Local Court;*
    - iii. *There is no comparable system in place to assist in pre-action resolution?*
3. As reflected in the objectives of the *Personal Injuries (Civil Claims) Act 2003*, the Law Society NT noted that this Act was passed by the Legislative Assembly at a time when all jurisdictions were responding to public concern about increasing public liability and other insurance costs and the potential contribution of litigated claims to those increased costs. A key focus was on facilitating resolution of claims before legal proceedings were filed, and on striking a balance in relation to the costs of proceedings.
  - a. *In the absence of alternate legislation, what has changed to suggest that commencement and implementation of the *Personal Injuries (Civil Claims) Act 2003* would no longer be of benefit in the Northern Territory?*
4. The Law Society NT advised that it has recently written to the Chief Justice to suggest that consideration be given to a review of Practice Direction 6, and noted that consultations on its operation raised the issue of whether or not it should be elevated to the status of a Supreme Court Rule.
  - a. *Has the Department undertaken any reviews as to the effectiveness of Practice Direction 6 and the extent to which it achieves the objectives of the *Personal Injuries (Civil Claims) Act 2003*? If not, why not?*

**SOCIAL POLICY SCRUTINY COMMITTEE**  
**Written Questions for the Department of the Attorney-General and Justice**

5. In briefing the Committee on this Bill, the Department advised that following identification by the Office of Parliamentary Counsel of Acts or provisions within Acts that had not been commenced, the Department consulted the agency responsible for administration of the Act prior to making a decision as to whether it should be abandoned, repealed or commenced.
    - a. *What consultation has occurred with the legal profession regarding the Statute law Revision and Repeals Bill*
  
  6. The Law Society NT submission suggests that the problems the Personal Injuries (Civil Claims) Act 2003 was meant to address still prevail and solutions it provides are still a live option.
    - a. *Are the reasons for the passage of the Personal Injuries (Civil Claims) Act 2003 still relevant?*
    - b. *Could the scheme enacted by the Personal Injuries (Civil Claims) Act 2003 still be implemented?*
    - c. *If yes to the above, is there any reason why the Personal Injuries (Civil Claims) Act 2003 should be repealed?*
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**Answers:**

1.a.

- The rules of court necessary for the practical operation of the Act were not made by the judicial officers.
- The key provisions of the *Personal Injuries (Civil Claims) Act 2003* (the Act) (are sections 7 and 8).
- Section 7 provides that, as a general rule, proceedings for claims for a person about a personal injury cannot be commenced unless the person making the claim (the claimant) has complied with the obligations contained in Part 2 of the Act (namely sections 8-18).
- Section 8 of the Act provides that, as a general rule, written notice of the claim must be given within 12 months of when the injury occurred or from when symptoms first appeared. Such a notice must comply with the form prescribed in rules of court and must be accompanied by any documents required by the rules to be provided.
- Other sections of the Act go on to provide as follows:
  - the person against whom the complaint is made (the respondent) must respond in a form and within a time as specified in rules of court (section 9);
  - there is general obligation on both the respondent and the claimant to provide to one another all relevant documents (section 10); and
  - if a claim is not resolved, the parties are obliged to have a resolution conference. Such a resolution conference must be held in accordance with requirements laid out in the rules (section 11).
- Section 13(1) provides that the Judges of the Supreme Court can make the rules necessary for the operation of sections 8 to 11. Section 13(2) provides a similar power for the Local Court.
- No such rules have been made.
- Until such rules are made sections 7 to 11 have no practical operation.
- The policy backdrop to this legislation was that the original version of the Bill as it existed prior to introduction contained detailed processes of the kind eventually contemplated as being suitable for the rules. These processes were based on processes contained in the *Personal Injuries Proceedings Act 2002* (Queensland). The Supreme Court judges requested that the Government remove those provisions from the draft Bill on the basis that it was preferable that the Judges prepare appropriate rules. The Government removed the prescriptive provisions on the basis that the Judges would prepare appropriate rules in a timely matter.

**SOCIAL POLICY SCRUTINY COMMITTEE**  
**Written Questions for the Department of the Attorney-General and Justice**

- Subsequently the Judges established a group involving themselves and the legal profession which, under the chairmanship of Justice Southwood, had the role of developing the rules. The group met through to 2005 but no rules were ever made. Later on another group led by Justice Mildren developed (Practice Direction 6 (PD6)).

2.

- i.* Practice Direction 6 (PD6) is not, in a legal sense, mandatory. However, the substantive answer depends on what is meant by 'enforceable'. A threat of possible and likely adverse costs consequences by not complying with the PD6 is a type of enforcement. It is not as blunt as the provisions in the Act which allow absolute enforcements. In short, the answer is 'yes' as in practice it is effectively treated as mandatory and repercussions can be severe. It can lead to having costs orders ordered against the lawyer's client – which in turn could lead to complaints to the Law Society.
- ii.* Yes, that is correct. There is no formal pre-claim action in the Local Court. It is the practice of some practitioners to seek to apply similar principles to PD6 in Local Court proceedings (usually referred to as being in the spirit of PD6).
- iii.* PD6 produces similar outcomes and for practitioners not following it the repercussions can be very severe. The relevant judicial officer will often order compliance with PD6 at pre-trial mentions and if not complied with there are consequences for the guilty parties). Not only that but the Court considers all parties are under an obligation to attempt to settle claims prior to litigation and under a duty to assist the Court managing cases to that end (and the contents of that duty are set out in the PD6).

3.a.

The Government accepts that PD6, for the Supreme Court, achieves most of the outcomes of the Act. Attached at Attachment A is a table comparing the provisions of the Act with the provisions of PD6. This table shows that PD6 has much of the same general content as the Act. Any difference in the operation of the Act and the operation of PD6 is considered by the litigation lawyers of the Department of the Attorney-General and Justice to be of marginal practical impact.

For the Local Court it is understood that former Chief Judge Lowndes has taken the view that a practice direction or rule along the lines of PD6 would make it more difficult for non represented parties to properly handle a matter. Additionally, there are very few personal injuries matters dealt with by the Local Court.

**SOCIAL POLICY SCRUTINY COMMITTEE**  
**Written Questions for the Department of the Attorney-General and Justice**

4.a.

For the reasons set out above the Department of the Attorney-General and Justice is satisfied that PD6 is archiving the substantive aims of the legislation. The Department believes that the Supreme Court Judges accept the policy objectives of the Act and that they are in a position to achieve the objectives of the Act.

Nonetheless, in light of the Law Society Submission the Hon Gerry McCarthy MLA, Acting Attorney-General and Minister for Justice, will write to the Hon Chief Justice Michael Grant and Her Honour Chief Judge Elizabeth Morris seeking their comments on the issues raised.

5.a.

The Department of the Attorney-General and Justice consulted with the Chief Justice before developing any amendments. The Chief Justice, on behalf of himself and the other judges supported the repeal of the legislation.

After the legislation was introduced the Department wrote to the Law Society Northern Territory and the Northern Territory Bar Association advising them of the introduction of the Bill and drawing their attention to the repeal of the Act. The Department also advised them that the Bill was being considered by the Social Policy Scrutiny Committee.

6.

The Hon Gerry McCarthy MLA, Acting Attorney-General and Minister for Justice, has referred the Law Society Northern Territory's suggestions to the Chief Justice and the Chief Judge. If either of them suggests that there is a practical need to retain any of the provisions of the Act, the Government will re-consider its position.

However, at this time the legal fact is that the substantive provisions of the Act cannot be commenced until the judicial officers arrange for the making of rules of court. The responses to the three questions are as follows:

- a) The legislation was enacted as part of suite of tort law reforms. The main companion legislation, *Personal Injuries (Liability and Damages) Act 2002* vastly reduced the ambit for contest regarding claims of damages for personal injuries. The Department's assessment is the number of claims or personal injuries civil claims legislation is not such as to warrant any need to either implementation of the legislation or to reform it.
- b) Yes – if the relevant judicial officers were to produce the relevant rules of court
- c) The aim of the Statute Law Revision and Repeals Bill 2019 is to remove from the statute book legislation that serves no purpose. This Act has some provisions that have been commenced (for example, the provisions dealing with the making of rules). This can mean that its existence can cause confusion. Only a fairly close reading and or knowledge of Northern Territory legislative history will cause a person to have any awareness that it has little substantive purpose.

**SOCIAL POLICY SCRUTINY COMMITTEE**  
**Written Questions for the Department of the Attorney-General and Justice**

Additionally, the mere existence of the Bill means it must be maintained as part of the statute book. The Act has been amended five times since it was made in 2003. These amendments were consequential to the enactment of more substantive Acts.

The appropriate issue to address is whether the Act should be repealed (rather than whether it could be implemented). The proposal is that the Act be repealed because there is a current substitute for the Act which appears to be working well and there is likely no prospect in those circumstances of the scheme being implemented.

**SOCIAL POLICY SCRUTINY COMMITTEE**  
**Written Questions for the Department of the Attorney-General and Justice**

**ATTACHMENT A**

**Comparison between the Act and the practice direction**

Provision (scope)	The Act (section)	PD6 (paragraph)	Comment
Objective	3	3	Not much different. PD6 is broader in so far as it applies to all claims whereas the Act only applies to claims of personal injuries.
Pre-litigation processes- compulsion	7	No legal compulsion – operational compulsion if the judicial officer is active.	
Notice of claim before litigation	8	4.1, 6	No time limit.
Provision of information	10	6, 10	
Reponses before litigation	9	4.3, 8-10	
Negotiations	11	4.4, 11	
Costs and other penalties, making o orders rewarding compliance	16, 17	13	
Offence of providing facies or misleading material	21	No equivalent.	