



## NSW Legislative Council Hansard (Proof)

### Civil Liability Amendment (Offender Damages Trust Fund) Bill

Extract from NSW Legislative Council Hansard and Papers Wednesday 19 October 2005 (Proof).

#### Second Reading

**The Hon. HENRY TSANG** (Parliamentary Secretary) [6.10 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

#### Leave granted.

This bill introduces a Government initiative that is the first of its kind in Australia—a scheme to quarantine awards of damages and compensation to offenders into a trust fund to enable victims to lodge claims against them. Under the scheme, when an offender is awarded damages or compensation from a government department, the offender's personal injury victims will get the first opportunity to access the damages. The issue of inmate litigation remains topical. Notwithstanding the limitations on offender damages imposed by part 2A of the Civil Liability Act 2002, introduced by the Civil Liability (Offender Damages) Act 2004, the community is rightly outraged when offenders receive large amounts of compensation for injuries received in custody, particularly when the amount awarded is compared with the victims compensation available to their victims.

The community perceives such offenders to be using the law for their own purposes when it suits them, but disrespecting the law and the community in the commission of their crimes. Under this bill, damages awarded to offenders will be held in a trust fund. The offender's victims will be notified, and will have six months in which to make a claim against the offender in a civil court if they wish. All victims have a right to sue an offender for civil damages; they have always had such a right. In most cases this right is illusory since an offender rarely has sufficient assets with which to pay any damages awarded. It is all the more galling for a victim to forego the right to sue an offender on this reasoning and then to see the offender paid a large amount of compensation, even more so when the offender can spend or hide that compensation before the victim can bring a civil case against the offender. If the limitation period for an intentional tort has expired, the victim has no recourse at all.

The scheme to be introduced by this bill will redress that balance from the offender's favour to the victim's favour. The scheme will facilitate a process whereby victims may, if they wish, take their own civil action against the offender, at their own expense, in the knowledge that quarantined funds exist to satisfy claims. The scheme will be facilitative, not administrative. The Government will not be involved in any such legal action, nor will any new bureaucracy be established to determine litigation or administer the scheme. The normal qualification criteria will apply to victim litigants seeking legal aid. This is not a scheme to redress all wrongs done by offenders to their victims. It is a scheme to redress, as far as possible, serious wrongs committed by particular offenders against victims in light of the changed financial standing of the offenders.

I now turn to the detail of the bill. Schedule 1 [1] inserts a new division 6 into part 2A of the Civil Liability Act 2002. Proposed section 26K contains definitions, including definitions of "offender", "offender damages", "victim claims" and "victim trust fund". The definitions, together with part 7 of schedule 1, apply the scheme to an offender, as defined in existing section 26A, who receives an award of personal injury damages from a protected defendant, also defined in section 26A, whether those proceedings were conducted under Part 2A or otherwise and whether a court entered a verdict and damages or the parties reached a settlement that was entered as a judgment. Proposed section 26L requires offender damages to be held in trust in a Victim Trust Fund for victims of the offender. There is an exception to cover amounts that a protected defendant is required to pay to some other person under an Act of the Commonwealth or the State, such as the Health Insurance Commission, the Australian Taxation Office, Centrelink, or other payments which, if unpaid, are enforceable against the protected defendant under statute.

Proposed section 26M provides that a Victim Trust Fund is available to satisfy claims for damages in respect of death or personal injury suffered by victims of offences committed by the offender. To be eligible to be satisfied from a Victim Trust Fund, a victim claim must be made within an eligibility period of six months after the award date of the offender's damages and must be notified to the protected defendant. The court in which the victim claim is made must also be notified that the claim is made as a claim that is eligible to be satisfied from the Victim Trust Fund. Proposed section 26N requires the protected defendant responsible for a Victim Trust Fund to give notice about the fund to persons who appear to be entitled to make a victim claim against the offender.

Proposed section 26O provides for the protected defendant to provide a victim with other information about the Victim Trust Fund and other victim claims against an offender. Proposed section 26P allows proceedings to be

taken on a victim claim after the limitation period for the taking of those proceedings, but only during the six-month period after offender damages are awarded. An award of damages that results from such a claim may be satisfied only from the offender damages held in a Victim Trust Fund. Proposed section 26Q allows a court that awards damages on a victim claim that is eligible to be satisfied from a Victim Trust Fund to order the whole or part of the damages to be satisfied from the fund. In making such an order, a court must inform itself about, and allow for the making of, similar orders in respect of other claims that are eligible to be satisfied from the Victim Trust Fund.

Proposed section 26R requires payment to the offender of any surplus remaining in a Victim Trust Fund after payment of all victim claims ordered to be paid from the fund and administrative expenses of the fund. Proposed section 26S provides for victim trust funds to be held and invested by the Public Trustee. The section also provides for a protected defendant to enter into arrangements with the Public Trustee to exercise functions on behalf of the protected defendant. Proposed section 26T provides for legal costs awarded against a protected defendant in connection with an award of offender damages to not form part of a Victim Trust Fund. Proposed section 26U fixes a scale of maximum legal costs for legal services provided to a plaintiff on a victim claim that is eligible to be satisfied from a Victim Trust Fund. This provision ensures that the money actually goes to victims and not lawyers. The cap is justified because in most cases there should be little argument over liability, only quantum.

Proposed section 26V confers protection from liability for acts and omissions in good faith for the purpose of executing the proposed division. Proposed section 26W provides that the proposed division overrides proposed division 2 of part 7, which deals with offender damages awarded to persons who are not guilty of what would otherwise be an offence because of mental illness. Schedule 1, items [2] and [3] enact savings and transitional provisions for the proposed amendments. The amendments will apply prospectively to all awards of offender damages, including awards in respect of proceedings commenced and causes of action that arose before the commencement of the amendments, even though other provisions of part 2A have a more limited application to damages awarded and proceedings commenced before the commencement of that part.

In practice, the scheme will operate as follows. First, an award of offender damages will be frozen in an Offender Trust Fund for six months to enable victims to commence civil actions against the offender. The relevant protected defendant is to notify victims reasonably known to it within 28 days of the award date. Secondly, if no civil actions by victims against the offender have been started and notified to the relevant protected defendant in the six months freeze period, the money in the Offender Trust Fund is to be paid to the offender, together with interest. Thirdly, if one or more civil actions are commenced against the offender, the Offender Trust Fund will continue until the resolution of all victim claims. Fourthly, where there is a single victim claim the court hearing the claim may award damages to the victim from the Victim Trust Fund. If the damages amount exceeds the amount of the trust fund the victim will be awarded total damages and the court will order payment of moneys to the extent of the trust fund amount. The victim will be entitled to enforce any shortfall as a judgment debt under normal civil enforcement procedures except if the claim would have been statute barred but for the scheme, in which case the victim will be entitled only to be awarded damages in the amount of the Victim Trust Fund.

Fifthly, where there are multiple victims suing the offender the scheme contains a mechanism to ensure that the first successful litigant does not exhaust the trust fund, leaving little or nothing for the other victims. Here each court hearing a victim claim is to award total damages against an offender and specify how much of that total damages is to be awarded against the Victim Trust Fund, having regard to the existence of other claims and the amounts likely to be awarded in respect of those claims. The remainder of the damages will be enforceable against the other assets of the offender under normal civil enforcement procedures except if a claim would have been statute barred but for the scheme, in which case the victim will be entitled to receive only damages from the Victim Trust Fund notwithstanding that a larger amount of total damages would have been payable if the claim had not been otherwise statute barred.

Sixthly, in order for victims to be able to consider whether or not it is worthwhile to pursue a victim claim against the offender, victims may seek information from the protected defendant of any victim claims notified to the protected defendant. Victims and their legal practitioners may then consult other claimants in considering whether or not to pursue their own claim. It may not be worthwhile to pursue their claim in light of their injury, another claimant's injury, the amount in the Victim Trust Fund and the potential legal costs of bringing a claim. The bill contains provisions to ensure that information may be provided by a protected defendant notwithstanding a non-disclosure clause in a settlement agreement. That information so provided is not to be provided to any person for any other purpose.

Victims who have received victims compensation will not be allowed to double dip. There is existing provision under the Victims Support and Rehabilitation Act 1996 for a victim to be subrogated to the Victims Compensation Fund for the amount of victim compensation paid from any award of damages received. Protected defendants will be required to notify the Director of the Victims Compensation Fund of any victim claims notified to it. The remaining amendments in the bill are procedural in nature. I commend the bill to the House.

