CIVIL LIABILITY LEGISLATION AMENDMENT BILL 2008

Page: 10306

Bill introduced, and read a first time and ordered to be printed on motion by the Hon. John Hatzistergos.

Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, Minister for Justice, and Minister for Industrial Relations) [11.31 a.m.]: I move:

That this bill be now read a second time.

The Civil Liability Legislation Amendment Bill 2008 will make it easier for victims of crime to receive a share of damages awarded to prison inmates. While victims of an offence currently have a right to sue their offender for civil damages, in reality this is usually illusory. Most prison inmates do not have sufficient assets to pay any damages awarded. On occasions, however, prison inmates are awarded large compensation payments for claims made in respect of incidents arising while in custody.

In 2005 the Government introduced legislation to ensure that if a prison inmate is awarded compensation those damages are quarantined, enabling the damages to be used to satisfy claims made by the offender's victims. Under this scheme any damages awarded to an offender in respect of injuries incurred while that offender was in custody are now held in trust and used to satisfy claims made by victims of an offence committed by the offender. Any surplus remaining after victim claims are satisfied is then paid out to the offender. By freezing the damages in this way victims of the offender can be notified and given the opportunity to lodge claims in the knowledge that the offender will not be able to dissipate the award of damages to avoid a claim.

The New South Wales scheme was the first scheme of its kind in Australia. Other jurisdictions have now followed suit. While the number of prison inmates awarded damages is relatively small, the Government wants to make sure their victims have a priority claim over these damages for their own injuries. The Civil Liability Legislation Amendment Bill introduces a number of improvements to that scheme, making it easier for victims to make claims. For example, the bill increases the period within which a victim can make a claim from six months from the date the offender was awarded damages to 12 months. The bill authorises the Commissioner of Police to provide information to the State about victims who may have a claim against the offender to make it easier for the State to identify and notify those victims of their potential right to claim against the offender.

The bill reduces unnecessary costs incurred by the State in responding to personal injury claims by offenders. It introduces a new requirement that offenders who may have a claim for damages against the Department of Corrective Services or certain other public sector defendants—referred to in the Act as protected defendants—notify the protected defendant within six months of the incident giving rise to the claim. The bill prevents offenders from circumventing the provisions of the Civil Liability Act by specifying that part 2A—the special provisions for offenders in custody—extends to a claim for an intentional tort for which the protected defendant is vicariously liable. As the Civil Liability Act does not generally cover intentional torts, some inmates have sought to avoid the operation of the Civil Liability Act by pleading their claim in intentional tort and therefore seeking to have it dealt with at common law. These amendments close that loophole.

I now turn to the key provisions of the bill. The amendment to section 26M extends the time within which victims may make a claim out of the trust fund from six months from the date the offender was awarded damages to 12 months. This will give victims more time to bring their claim. It can often be difficult for a protected defendant to identify potential victims who may have a claim against the offender, particularly where the offences against those victims were committed some time ago. Currently the Crown Solicitor writes to persons who may have a victim claim within 28 days notifying them that they may have a claim. Those with a possible claim are identified from any official records reasonably available to the protected defendant.

The amendments to section 26N authorise the Commissioner of Police to provide a protected defendant with information that the protected defendant may reasonably require for identifying and contacting persons who may have a victim claim and for determining whether a person appears to have a victim claim. It will enable police to provide appropriate information from the Computerised Operational Policing System, known as COPS. This amendment will make it easier for potential claimants to be identified and notified. Section 26N(1) currently provides that the protected defendant must, within 28 days after the award of damages to the offender, notify each person who appears to have a victim claim against the offender that he or she may be able to make a victim claim. The new section 26N (1A) will provide that the notice must be sent as far as practicable within 28 days after the award of damages. This will enable victims who are identified outside the 28-day period to be

notified.

The bill inserts a new division 1A in part 2A of the Act, imposing duties on offenders who make a claim against a protected defendant to notify the protected defendant of the incident within six months of its occurring, and to provide information and documents reasonably requested by the protected defendant. Section 26BA requires that the notice must be in writing, must specify the date of the incident, must describe the incident, and must state that the incident may give rise to a claim against the protected defendant. Section 26BB requires that an offender making the claim must comply with any reasonable request by the protected defendant for certain information or documents that will enable the protected defendant to assess the merits of the claim and any liability and be able to make an informed settlement offer if appropriate.

Requiring offenders to provide a timely and accurate account of incidents such as a fall or an assault will enable the State's lawyers to assess the merits of the claim more quickly and easily and to speak to witnesses whilst the events are still fresh in their minds. This should help reduce unnecessary costs incurred by the State in responding to offender claims. These requirements are modelled on parts 4.2 and 4.3 of the Motor Accidents Compensation Act 1999.

Section 26BD deals with the consequences of an offender failing to comply with the notification requirements. A protected defendant may apply to the court hearing the offender's damages claim to dismiss the proceedings on the grounds of a failure to comply with the requirements of sections 26BA or 26BB. That application must be made within two months after the statement of claim has been served on the protected defendant. If the court is not satisfied that sections 26BA or 26BB have been complied with the court must, unless there is a satisfactory explanation or reasonable excuse, dismiss the proceedings.

The bill recognises that there may be certain circumstances in which an offender may be unable to comply with the requirements to provide notice of the incident or the further information requested. An offender is considered to be a vulnerable offender if the offender has a reasonable apprehension that his or her safety will be put at risk if he or she notifies the protected defendant or complies with the request for information and if the offender has, as a result of the apprehension, applied to be placed in protective custody or transferred to another correctional facility. This may occur, for example, where the incident involved an assault by another inmate. Whilst an inmate is a vulnerable offender he or she is not required to comply with sections 26BA or 26BB.

The bill amends section 26B to provide that part 2A of the Act applies where the damages awarded to the offender are based on the vicarious liability of the protected defendant for the tort—whether or not negligence—committed by another person. This amendment ensures that part 2A applies, for example, where a claim is brought by an offender that an intentional tort was committed by a correctional officer, and the claim against the State is brought solely on the grounds of the State's vicarious liability for the actions of its employees, and not on the grounds of any negligence by the State. This amendment confirms that only claims against the person who it is claimed actually committed an intentional tort are excluded from the Act. The bill provides that offender damages are to be held in trust by the Public Trustee rather than by the protected defendant.

I am pleased to announce that the Government will also make other important improvements to the scheme that do not require legislative amendment. Through the New South Wales Legal Representation Office in my department we will be offering free legal assistance and advice to victims of the offender to assess the merits of any claim they may have. This will avoid the very unfortunate scenario where victims, after receiving notification of the offender's compensation award, have to pay for legal advice only to be advised that they may not have a claim. Where the victim is assessed as having a claim with reasonable prospects of success, I am pleased to advise that the Legal Representation Office will now be available to provide free legal representation to the victim. In addition, I intend to write to the rules committee of the District Court to suggest that victim claims under part 2A of the Act be dealt with on the papers unless oral evidence is required in the interests of justice. This will reduce further trauma and expense for victims.

Finally, and unrelated to the offender damages provisions, this bill introduces some changes to the provisions of the Civil Liability Act, the Motor Accidents Act and the Motor Accidents Compensation Act regarding the availability of gratuitous care damages. Gratuitous care damages—sometimes referred to as *Griffiths v Kerkemeyer* damages—include, for example, unpaid care by an injured worker's relative. These amendments are needed simply to correct a drafting problem identified recently by the Court of Appeal and do not make it harder to claim compensation. However, if the changes are not made damages awards are likely to increase and, with it, insurance premiums.

The New South Wales Court of Appeal revealed the problem in its decision in the case of *Harrison v Melhem* in May this year. For many years, litigants and the courts have assumed that there was a two-pronged test for gratuitous care damages—that is, that care must be provided for at least six hours a week and for at least six consecutive months. Although that is what was intended, the Court of Appeal has ruled that is not what the section says. The court found that compensation could be claimed even if only one of the thresholds was met. Although the drafting problem seems small, the impact on insurance premiums could be significant. The changes will ensure the law does what everyone has always assumed it was supposed to do. It will ensure that claimants must demonstrate that the gratuitous care they have received has been provided for at six hours per week for at

least six consecutive months. I commend the bill to the House.