

Victims of Crime Assistance (Amendment) Bill

Circulation Print

EXPLANATORY MEMORANDUM

PART 1—PRELIMINARY

- Clause 1 sets out the purposes of the Act.
- Clause 2 provides that the Act is to commence on 1 January 2001, unless proclaimed sooner.
- Clause 3 states that the **Victims of Crime Assistance Act 1996** is called the Principal Act.

PART 2—AMENDMENT OF PRINCIPAL ACT

- Clause 4 substitutes a new purpose and objective section into the Principal Act, in replacement of the existing section 1 and section 6 (which is repealed by clause 19(1)).
- Clause 5 extends the definition of "injury" and inserts a definition for "significant adverse effect" in section 3(1) of the Principal Act. This latter term is relevant in determining the eligibility of victims for an award of special financial assistance under section 8A (inserted by clause 7).
- Clause 6 amends section 8(1) of the Principal Act to provide that awards of special financial assistance under section 8A are over and above any other entitlement that a primary victim has under the Principal Act. Accordingly, where a primary victim suffers an injury as a direct result of violence, their entitlements may exceed \$60 000. Primary victims who suffer a significant adverse effect without proving an injury will be limited to any award made under section 8A for special financial assistance, plus (by virtue of section 3(2)) any award made for counselling expenses.

Clause 7 inserts a new section 8A into the Principal Act.

Section 8A(1) provides that awards of special financial assistance are to be made available to victims who suffer a significant adverse effect as a direct result of an act of violence—whether or not they also suffer an injury. Assistance under section 8A does not extend to secondary or related victims.

Section 8A(2) states that a victim is eligible for an award under this section if the Victims of Crime Assistance Tribunal (VOCAT) is satisfied (on the balance of probabilities) that an act of violence has been committed against the applicant, who has experienced a significant adverse effect as a direct result of that act of violence, and that the act of violence falls within one of the four categories (A to D). Acts of violence will be categorised in the regulations, as noted in section 8A(6).

Sections 8A(3) and (4) provide that victims are eligible for a minimum award where VOCAT is satisfied that they experienced a significant adverse effect. "Significant adverse effect" includes grief, distress, trauma or injury (see clause 5). An additional amount is available, up to the maximum level, where VOCAT is satisfied that the victim has suffered an injury. An award under section 8A may be reduced or refused by VOCAT, in accordance with other provisions in the Principal Act (eg, having regard to the applicant's conduct or alternative entitlements to compensation).

Section 8A(5) sets out the minimum and maximum award levels for each of the four categories. The minimum and maximum award levels can be raised in circumstances that are prescribed in the regulations.

Section 8A(6) provides that the regulations may categorise acts of violence into the four categories (A to D), raise the minimum or maximum award levels, and set out circumstances in which a higher minimum or maximum award level is available. Circumstances in which a higher award level might be prescribed include, for example, situations where a lower-category act of violence has a particularly severe impact (such as permanent life-long serious physical injury) or involves sustained abuse against a particularly vulnerable individual

(such as a child or a person suffering from an intellectual disability or mental illness).

Section 8A(7) provides that, in order for VOCAT to be satisfied on a balance of probabilities that an act of violence of a particular category was committed, it is not necessary for a person to have been charged, convicted or found guilty. Moreover, VOCAT is free to determine that a different act of violence was committed than that which was the subject of a charge, conviction or finding of guilt.

Clause 8 inserts a new section 10A into the Principal Act to extend additional financial assistance, in exceptional circumstances, to certain secondary victims (eg children injured as a direct result of witnessing family violence, and parents or guardians injured as a direct result of becoming aware that an act of violence was committed against their child) to assist them in their recovery.

Clause 9 Section 12 of the Principal Act sets the "related victim pool" (ie, the amount that all related applicants affected by the same death must share) to \$100 000 less funeral expenses.

Clause 9(1) amends this section to allow VOCAT to exceed this limit in exceptional circumstances. Although it would not be necessary for a later applicant to show exceptional circumstances in order to access any residual amount left in the related victim pool following an earlier determination by VOCAT in respect of the same death, the applicant would have to show exceptional circumstances in order to obtain an award that exceeds the pool limit.

Clause 9(2) inserts a new section 13(4) into the Principal Act to extend additional financial assistance, in exceptional circumstances, to related victims to assist them in their recovery.

Clauses 9(3) and (4) remove the prohibition against related victims applying for, or receiving, an award where an earlier award has been made in respect the same death by repealing sections 14 and 52(d) of the Principal Act, respectively. However, related victim applicants must still notify VOCAT of other potential applicants (see clause 11), and VOCAT must endeavour to hear all such applications together (see section 32(2) inserted by clause 12).

Clause 10 amends section 16 of the Principal Act to ensure that crimes compensation is a payer of last resort (see the objective in section 1(2)(c), inserted by clause 4). VOCAT must offset any compensation or common law damages actually received by the applicant against any award made under the Principal Act. VOCAT may, but is not required to, reduce the award to take into account the amount that an applicant is eligible to receive under any scheme (such as those administered by WorkCover or the Transport Accident Commission) or under any insurance policy or superannuation scheme.

VOCAT must not, however, reduce any award of special financial assistance made under section 87A on account of the applicant's superannuation or insurance entitlements. Awards under section 87A may still be reduced, eg, by any amount received for pain and suffering from statutory schemes such as those administered by WorkCover and the Transport Accident Commission.

Clause 11 Section 30 of the Principal Act requires related victims to notify VOCAT within 21 days of making application of the details of other possible applicants. This notification procedure enables VOCAT to inform these other possible applicants that they risk being barred from making application if they did not do so within a given time period. Any failure to comply with the notification requirement by a related victim is an offence, punishable by a penalty of up to \$5000.

Clause 19(2) repeals section 30. However, clause 11 requires related victims to inform VOCAT at the time of application of the details of other possible applicants. A failure to comply will no longer attract a penalty.

Clause 12 As noted above (under clause 9), related victims are no longer barred from making an application by reason only that an earlier award has been made in respect of the same death. Clause 12 nevertheless requires VOCAT to endeavour to hear all such applications together.

Clause 12 also provides that VOCAT can make an award without waiting for the outcome of a related civil proceeding or a related proceeding under Division 2 of Part 4 of the **Sentencing Act 1991**. Although it would be expedient to await the outcome of any such proceeding to allow VOCAT to

determine the amount (if any) by which an award should be reduced, it is not expected that applications be unduly delayed by reason only that a victim has an action pending against an alleged offender, particularly when such delay causes financial hardship to the victim.

- Clause 13 amends section 38(2) of the Principal Act to provide that, when notifying applicants of its decision, VOCAT must inform them of the category of offence that was relied upon in making any award of special financial assistance under section 8A.
- Clause 14 amends section 41(2) of the Principal Act to indicate that consideration of an application can be adjourned pending the determination of a related civil or criminal proceeding which the victim has or is about to commence where it is reasonably likely that those proceedings will be determined within the next 6 months. However, having regard to VOCAT's duty to act fairly and expeditiously, it is intended that applications not be unduly delayed on account of lengthy criminal or civil proceedings.
- Clause 15 inserts a new section 42A into the Principal Act to regulate the manner in which documents filed with the Tribunal may be inspected. The section balances the interests of the community and the applicant in promoting open and publicly accountable proceedings and ensuring that victims' safety and integrity are not compromised by the unnecessary disclosure of sensitive information.
- Clause 16 amends section 43 of the Principal Act to restrict publication of material provided to VOCAT unless an order is made that it is in the public interest to allow publication.
- Clause 17 repeals section 48(3) of the Principal Act to remove the presumption that related victims bear their own costs.
- Clause 18 amends section 60(1) to enable applicants to seek a variation of their award of special financial assistance.

Section 60(2) is also amended to provide child victims with additional time in which to seek a variation of their original award. Child victims will now be able to apply for variation at any time up until 6 years after the date of the original award, or until they turn 24, whichever is later.

Clause 19 repeals sections 6 and 30 of the Principal Act (see clauses 4 and 11, respectively). Sections 73–75 are also repealed.

Clause 20 provides transitional provisions concerning the amendments made to the Principal Act. It inserts a new section 77 into the Principal Act.

Sections 77(1) and (2) provide that, subject to this section, the amendments made by clauses 15 (inspection of documents), 16 (publication of material), and 18(2) (additional time for child victims to make a variation application) apply from the date of commencement of the Act. The remaining amendments to the Principal Act (contained in clauses 4–19) apply only in respect of acts of violence occurring on or after 1 July 2000.

Sections 77(3) and (4) provide that the amendments to the Principal Act also apply in respect of sexual offences (being all those offences listed in paragraph (b) of the definition of "relevant offence" in section 3(1) of the Principal Act) committed against children before 1 July 2000 where—

- (i) the act of violence occurred on or after 1 July 1997; or
- (ii) the act of violence occurred any time before 1 July 2000, the victim had not made an application under the **Criminal Injuries Compensation Act 1983** (or its predecessor), and the alleged offender is committed or directly presented for trial at any time on or after 1 July 1997 (regardless of the outcome of that trial)—

provided that the application is made before 1 July 2002 or within 2 years of the date that the alleged offender is committed, or directly presented, for trial. VOCAT will continue to have power to grant extensions of time under section 29 of the Principal Act.

"Act of violence" is defined in section 3(1) of the Principal Act to include a criminal act or a series of related criminal acts. Section 75(5)(a) operates primarily in two situations. First, an act of violence may involve a series of related criminal acts that occur over a period of time (eg, where ongoing child sexual abuse occurs over many years and extends to a time that is on or after 1 July 1997). Second, an act of violence may occur between two dates but the precise date or dates on which the violence occurred are unknown (eg, where a child is unsure of

the exact date when an indecent assault was committed but knows that it occurred between 1 June and 30 August 1997). In these circumstances, a victim of pre-July 2000 childhood sexual abuse may therefore apply for financial assistance (including special financial assistance) under the amendments made to the Principal Act—regardless of whether the alleged perpetrator of the childhood sexual abuse was committed or directly presented for trial.

Section 77(5)(b) is also directed at two situations where the act of violence occurs between two dates. First, where there is ongoing abuse. Second, where the precise date or dates on which the violence occurred are unknown. In the first situation, this section enables applications to be made under sections 77(3) and (4) in relation to pre-July 2000 sexual offence(s) committed against a child, despite the victim having reached adulthood during the period of abuse. In the second situation, this section enables applications to be made under sections 77(3) and (4) in relation to pre-July 2000 sexual offence(s) committed against a victim in circumstances where it is not known for certain whether the victim was aged under 18 or not at the time the act of violence occurred. Where there is such doubt, the Act resolves this doubt in favour of the victim by providing that the victim is to be regarded as a child for these purposes.

Section 77(6) provides that, if an application in relation to a pre-July 2000 child sexual assault is made and determined under the Principal Act prior to its being amended by this Act, the applicant will be able to seek a variation of the original award in order to take the benefit of any amendments made to the Principal Act (eg special financial assistance). Section 77(7) allows these variation applications to be lodged by 1 July 2002 or within 2 years of the alleged offender being committed, or directly presented, for trial.

Similarly, sections 77(8) and (9) provide that, if commencement occurs after 1 July 2000, victims who have lodged an application (whether or not that application has been finally determined) in respect of an act of violence that occurred on or after 1 July 2000 will still be able to take the benefit of any amendments made to the Principal Act.

Where an act of violence occurred between a period that started before 1 July 2000 and ended after that date, section 77(10) deems the act of violence to have occurred on or after 1 July 2000.

PART 3—AMENDMENT OF SENTENCING ACT 1991

Clause 21 inserts a new Subdivision 1 into Division 2 of Part 4 of the **Sentencing Act 1991** concerning compensation for pain and suffering (and certain other specified expenses) payable by an offender to a victim of crime.

Section 85A provides definitions of a compensation order, injury, medical expenses and sexual offences. The definition of "injury" has been extended to expressly provide that grief, distress, trauma or other significant adverse effects constitute an injury. If a person is injured as a result of an offence, the offender may be ordered to pay compensation to that person.

Section 85B provides that a Court may order an offender (a person found guilty or convicted of an offence) to pay compensation to a victim of the offence committed by the offender. There is no limit on the amount of compensation that may be ordered to be paid.

Compensation may be for a range of matters including the pain and suffering of the victim, and medical expenses incurred by the victim. Compensation is not available under this Subdivision for property loss or damage. Applications for property loss or damage may be made under section 86 of the **Sentencing Act 1991**.

Section 85C provides that an application must be made within 12 months of the date on which the offender is found guilty or convicted of the offence (subject to section 85D). An application may be made by the victim or on the victim's behalf in certain circumstances (eg where the victim is a child).

Section 85C also provides that the prosecution may assist the victim in making an application.

Section 85D provides that the court may extend the time in which an application for compensation may be made, if it is satisfied that it is in the interests of justice to do so.

Section 85E provides that a party to a compensation order proceeding (which includes the victim and the offender) may appear personally or be represented at the proceeding.

Section 85F provides that the court must not refuse to hear and determine an application for a compensation order unless it considers that sufficient information is not available to determine the matter. In determining this, the court may have regard to matters such as the evidence in the hearing, the summary of evidence provided by the prosecution in a summary proceeding (where this has been accepted by the defendant and the court has acted on this information in finding the charge proved) and any other available documents (including a victim impact statement).

Section 85G indicates that when hearing a compensation order, the court may have regard to a range of evidence. That evidence includes evidence called by the victim or the offender and evidence given at the hearing at which the offender was found guilty.

Section 85H provides that when determining the amount of compensation payable, the court may take into account the financial circumstances of the offender.

Section 85I provides that the court must reduce the amount of any compensation order by the amount of any award made by the Victims of Crime Assistance Tribunal (VOCAT) to the victim. This section operates in conjunction with section 87A of the **Sentencing Act 1991**, which enables a court to order the offender to pay to the State the whole (or a part) of the amount awarded by VOCAT to the victim.

Section 85J requires the court to give written reasons for deciding to grant or refuse an application for a compensation order.

Section 85K provides that unless the court orders otherwise, the parties to these proceedings must bear their own costs.

Section 85L provides that the fact that a compensation order may be made does not take away from or affect in any way a person's rights to recover damages unless the expense or other matters claimed are fully satisfied by the recovery of money under the compensation order.

Section 85M provides that a compensation order will usually be taken to be a judgment debt due by the offender to the person in whose favour the order is made. Action to recover property or money to satisfy a compensation order may then be taken under the **Judgment Debt Recovery Act 1984**, if necessary.

- Clause 22 makes consequential amendments to section 86. These amendments are necessary because compensation for pain and suffering must now be made pursuant to Subdivision 1 of Division 2 of Part 4 of the **Sentencing Act 1991**, rather than pursuant to section 86.
- Clause 23 makes amendments to section 87A of the **Sentencing Act 1991** concerning the definition of "injury" and the time within which applications may be made. That section enables a court to order the offender to pay to the State the whole (or a part) of the amount awarded by VOCAT to the victim.
- Clause 24 provides transitional provisions concerning the amendments made to the **Sentencing Act 1991**. The new process for making application for compensation orders pursuant to Subdivision 1 of Division 2 of Part 4 of the **Sentencing Act 1991** applies to any application made after the commencement of the provisions, irrespective of when the offence was committed or the finding of guilt was made or the conviction was recorded.
- Clause 25 makes consequential amendments to the **Children and Young Persons Act 1989**, the **Confiscation Act 1997**, the **Accident Compensation Act 1985**, the **Accident Compensation (WorkCover Insurance) Act 1993** and the **Transport Accident Act 1986**.
- Clause 26 inserts a new section 252E into the **Accident Compensation Act 1985** in order to comply with the requirements of the **Constitution Act 1975**.
- Clause 27 inserts a new section 132C into the **Transport Accident Act 1986** in order to comply with the requirements of the **Constitution Act 1975**.