

House of Assembly—No 12

As laid on the table and read a first time, 25 September 2008

South Australia

**Civil Liability (Offender Damages) Amendment
Bill 2008**

A BILL FOR

An Act to amend the *Civil Liability Act 1936*.

Contents

Part 1—Preliminary

- 1 Short title
- 2 Commencement
- 3 Amendment provisions

Part 2—Amendment of *Civil Liability Act 1936*

- 4 Insertion of Part 8A

Part 8A—Special provisions relating to offender damages

- 58A Interpretation
 - 58B Application of Part
 - 58C Authority to withhold or deduct certain amounts from offender damages
 - 58D Offender damages to be held in trust as eligible victim claims trust fund
 - 58E Exception for legal costs
 - 58F Eligible victim claims trust funds to be held by Public Trustee
 - 58G Eligible victim claims trust fund available to satisfy eligible victim claims
 - 58H Notice to persons entitled to make eligible victim claim
 - 58I Provision of information to persons entitled to make eligible victim claim
 - 58J Commencement of eligible victim claim proceedings despite expiry of limitation period
 - 58K Orders for payment of damages out of eligible victim claims trust fund
 - 58L Payment to offender of eligible victim claims trust fund surplus
 - 58M Costs
 - 58N Immunity
 - 58O Regulations
-

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Civil Liability (Offender Damages) Amendment Act 2008*.

5 2—Commencement

This Act will come into operation 3 months after assent.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Civil Liability Act 1936*

4—Insertion of Part 8A

After Part 8 insert:

Part 8A—Special provisions relating to offender damages

58A—Interpretation

(1) In this Part—

Crown includes—

- (a) a Minister, instrumentality or agency of the Crown; and
- (b) a body or person declared by the regulations to be an instrumentality or agency of the Crown for the purposes of this Part;

damages includes money paid or payable in relation to the death or injury of a person under insurance cover provided under section 17D of the *Correctional Services Act 1982*;

eligibility period, in relation to a particular eligible victim claims trust fund, means the period ending 6 months after the offender damages award date;

eligible victim claim—see subsection (2)(b);

eligible victim claims trust fund means a fund established under section 58D;

offence includes conduct on the part of a person that would constitute an offence if it were not for that person's age or mental impairment;

offender means a person who is in custody for an offence, and includes a former offender;

offender damages—see section 58B;

offender damages award date, in relation to offender damages held in an eligible victim claims trust fund, means—

- (a) if an appeal in relation to offender damages has not been lodged within the period provided for lodging such an appeal—the end date of the period; or
- (b) if an appeal in relation to offender damages has been lodged—the date on which the appeal lapses or is finally determined,

whichever is the later;

VOC Act means the *Victims of Crime Act 2001*.

- (2) For the purposes of this Part—
- (a) a person is *in custody* if the person—
- (i) is detained in a correctional institution under the *Correctional Services Act 1982*; or
 - (ii) is detained in a training centre under the *Young Offenders Act 1993*; or
 - (iii) is subject to a supervision order under section 269O of the *Criminal Law Consolidation Act 1935*; or
 - (iv) is serving a period of home detention; or
 - (v) is the subject of an order under which the offender is required to perform community service (whether under the *Criminal Law (Sentencing) Act 1988* or *Young Offenders Act 1993*); or
 - (vi) is on probation or parole;
- (b) an *eligible victim claim* is a claim for damages for injury to, or the death of, a person caused by an offence of which the person was a victim (regardless of whether any limitation period in which proceedings for such a claim may be commenced has expired).

58B—Application of Part

- (1) This Part applies where damages are awarded against the Crown—
- (a) to an offender for personal injury arising from an accident caused wholly or in part by the negligence of the Crown while the offender was in custody (*offender damages*); or
 - (b) for personal injury arising in the manner described in paragraph (a) that results in the death of an offender and damages are claimed under Part 5 for harm resulting from the death (*offender damages*).
- (2) This Part does not apply to a cause of action for damages against the Crown maintained or maintainable under the *Survival of Causes of Action Act 1940*.

58C—Authority to withhold or deduct certain amounts from offender damages

- (1) If the Crown is liable to pay offender damages to an offender, the Crown may—
- (a) withhold from the damages an amount equal to any interim payment for statutory compensation made to a claimant under section 27 of the VOC Act in respect of an offence committed by the offender; or
 - (b) deduct from those damages an amount required to be paid by the offender to satisfy any judgment made against the offender under section 28 of the VOC Act.

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- (2) The Crown may (and must if the offender so requests in writing) require the Public Trustee to hold an amount referred to in subsection (1) on behalf of the Crown.
- (3) Subject to this section, interest is payable on an amount withheld under subsection (1)(a) as follows:
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- (a) if the Crown holds the withheld amount—the amount of interest determined by the Minister in accordance with the requirements set out in the regulations for the purposes of this paragraph;
- (b) if the Public Trustee holds the withheld amount on behalf of the Crown—an amount of interest equal to the amount of income received by the Public Trustee in respect of the investment of the amount under the *Public Trustee Act 1995*;
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- (c) if, in relation to interim payment for compensation made to a claimant under section 27 of the VOC Act, an order for statutory compensation is subsequently made in favour of the claimant under that Act—an amount of interest equal to the amount determined in accordance with paragraph (a) or (b) (as the case requires) must be paid to the claimant;
- 20
- (d) if, in relation to an interim payment for compensation made to a claimant under section 27 of the VOC Act, an order for statutory compensation for a lesser amount is subsequently made in favour of the claimant under that Act—the amount of interest equal to the amount determined in accordance with paragraph (a) or (b) (as the case requires) must be divided between the claimant and the offender in the appropriate proportion;
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- (e) if, in relation to an interim payment for compensation made under section 27 of the VOC Act, the Attorney-General subsequently recovers an amount equal to the interim payment from the claimant under section 29 of the VOC Act—an amount of interest equal to the amount determined in accordance with paragraph (a) or (b) (as the case requires) must be paid to the offender.
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- (4) The Crown or the Public Trustee (as the case requires) is to pay an amount deducted under subsection (1)(b) to the person to whom the judgment made against the offender under section 28 of the VOC Act requires payment be made.
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- (5) Payment made by the Crown or the Public Trustee under this section will, to the extent of the amount paid, be taken to be a payment to the offender in satisfaction of the obligation to pay the damages concerned.

58D—Offender damages to be held in trust as eligible victim claims trust fund

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- (1) Subject to this Part, the amount of any offender damages awarded to an offender must be held in trust (an *eligible victim claims trust fund*) for the offender by the Crown.
- (2) This section does not apply to an amount deducted or withheld under section 58C from damages payable to an offender by the Crown.
- (3) A payment from an eligible victim claims trust fund may only be made in accordance with this Part.
- 10
- (4) Nothing in this section affects an obligation imposed on the Crown by or under any other Act or law to pay to some other person money owed to, or held on account of, the offender.
- (5) Despite any other Act or law, an amount held in trust for an offender under this section—
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- (a) is not available for the payment of a creditor of the offender; and
- (b) is not liable to be attached or taken in execution at the instance of a creditor of the offender.

58E—Exception for legal costs

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- (1) Nothing in section 58D requires an amount payable by the Crown as legal costs under an order for costs made against the Crown or, in the case of an award of offender damages that is inclusive of costs, that is reasonably attributable to the offender's legal costs, to be held in trust.
- 25
- (2) For the purposes of subsection (1), the amount of an award of offender damages inclusive of costs that is reasonably attributable to the offender's legal costs is the amount determined by the Crown as being reasonably attributable to the offender's legal costs, having regard to any bill for those costs provided to the Crown by the offender or the legal practitioner concerned.
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58F—Eligible victim claims trust funds to be held by Public Trustee

- (1) Offender damages to be held by the Crown in trust under this Part are to be held by the Public Trustee on behalf of the Crown.
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- (2) An amount of interest equal to the amount of income received by the Public Trustee in respect of the investment under the *Public Trustee Act 1995* of the amount held by the Public Trustee in relation to a particular eligible victim claims trust fund is payable to, and forms part of, the trust fund.

58G—Eligible victim claims trust fund available to satisfy eligible victim claims

An eligible victim claims trust fund is available to satisfy eligible victim claims against the relevant offender under this Part if—

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- (a) proceedings in relation to the eligible victim claim—
- (i) have been commenced prior to the commencement of the eligibility period; or
- (ii) are commenced within the eligibility period; and
- 10 (b) the complainant in the proceedings gives the Crown notice in writing of those proceedings in the prescribed form; and
- (c) the court awarding damages in relation to the proceedings is satisfied that the claim is an eligible victim claim.

58H—Notice to persons entitled to make eligible victim claim

- 15 (1) The Crown must, within 28 days after the offender damages award date in relation to offender damages held in an eligible victim claims trust fund, send to each person who may, after reasonable enquiries by the Crown, have an eligible victim claim against the relevant offender a written notice—
- 20 (a) naming the offender and stating that there is an eligible victim claims trust fund available to satisfy eligible victim claims in relation to the offender; and
- (b) specifying the eligibility period for that trust fund; and
- 25 (c) explaining that a successful eligible victim claim made within the eligibility period for the trust fund may be satisfied wholly or in part from the trust fund.
- (2) The notice is to be sent to a person at the address of the person last known to the Crown or as shown in official records reasonably available to the Crown.
- 30 (3) The Crown must also publish a notice in the Gazette containing the information set out in subsection (1).

58I—Provision of information to persons entitled to make eligible victim claim

- 35 (1) A person who may make an eligible victim claim or a person acting on his or her behalf may, by written notice made not later than 28 days after the expiry of the eligibility period in relation to the relevant eligible victim claims trust fund, apply to the Crown for the release of information of the kind specified in subsection (2).
- (2) The Crown must, if an application is made in accordance with subsection (1), provide such information as the Crown is reasonably able to provide concerning—
- 40 (a) the award of damages to the offender and the amount in the eligible victim claims trust fund; and

(b) any other eligible victim claim against the offender that may be satisfied from the trust fund and of which the Crown has been given notice under this section.

(3) The provision of information under this section—

(a) is authorised despite any agreement to which the Crown is a party that would otherwise prohibit or restrict the disclosure of information concerning the offender damages; and

(b) does not constitute a contravention of any such agreement.

(4) A person to whom information is provided under this section must not disclose or communicate the information provided (whether to that person or otherwise) except—

(a) as required or authorised by or under this Act or any other Act; or

(b) to a court or in connection with any legal proceedings.

Maximum penalty: \$10 000.

58J—Commencement of eligible victim claim proceedings despite expiry of limitation period

(1) Despite any other Act or law, if there is an eligible victim claims trust fund for victims of an offender, an action or a cause of action to recover damages under an eligible victim claim against the offender is maintainable by proceedings on the cause of action commenced during the eligibility period for the trust fund.

(2) The right and title to damages of a person formerly having such a cause of action that has been extinguished by the expiration of a limitation period fixed under the *Limitation of Actions Act 1936* is reinstated for the purposes of proceedings on a cause of action commenced during the eligibility period for the trust fund.

(3) However, an award of damages in proceedings commenced under this section (being proceedings that could not otherwise be commenced)—

(a) only has effect for the purpose of enabling an order to be made under this Part for the payment of the whole or part of those damages out of money held in the eligible victim claims trust fund concerned; and

(b) cannot otherwise be enforced against the offender concerned or any property of the offender.

58K—Orders for payment of damages out of eligible victim claims trust fund

(1) A court that awards damages to a person on a claim against an offender may, if satisfied that—

(a) the claim is an eligible victim claim; and

- (b) an eligible victim claims trust fund is available to satisfy eligible victim claims against the relevant offender,

order that the whole or a specified part of those damages is to be paid out of money held in the eligible victim claims trust fund.

- 5 (2) In determining the amount of any damages to be ordered to be paid out of an eligible victim claims trust fund, a court must ensure the amount is fair and reasonable having regard to—
- 10 (a) whether there are, or are likely to be, other eligible victim claims in relation to the offender that may be ordered to be wholly or partly satisfied by payment from the trust fund; and
- (b) the amount of damages likely to be awarded in respect of those claims.
- 15 (3) A court may defer making an order for the payment of damages out of an eligible victim claims trust fund until the court is satisfied that it is able to make a reasonable assessment of the extent of eligible victim claims that may be ordered to be satisfied by payment from the trust fund.
- 20 (4) The payment by the Crown of an amount out of an eligible victim claims trust fund in accordance with an order of a court under this section will be taken to be a payment made at the direction of the offender and operates as a discharge, to the extent of the payment, of any liability of the Crown to pay the amount to the offender concerned as offender damages.
- 25 (5) An order of a court under this section is not subject to appeal except on a question of law.

58L—Payment to offender of eligible victim claims trust fund surplus

- 30 (1) The Crown must, if satisfied that all eligible victim claims that may be ordered to be satisfied by payment from a particular trust fund have been finally determined—
- (a) make a determination of the surplus (if any) in the trust fund; and
- 35 (b) subject to subsection (2), pay any surplus to, or at the direction of, the relevant offender.
- (2) Nothing in subsection (1) affects the operation of a provision of the *Correctional Services Act 1982* or the *Young Offenders Act 1993* relating to the payment of money to a person detained under those Acts.
- 40 (3) For the purposes of subsection (1), an eligible victim claim is not finally determined until—
- (a) if an appeal in relation to the claim has not been lodged within the period provided for lodging such an appeal—the end date of the period; or

- (b) if an appeal in relation to the claim has been lodged—the date on which the appeal lapses or is finally determined,

whichever is the later.

- (4) A court that awards damages to a person on an eligible victim claim may give directions to the Crown in relation to a determination required under subsection (1).

- (5) In this section—

surplus, in relation to an eligible victim claims trust fund, means the amount remaining in the trust fund after payment out of the trust fund of—

- (a) the amount of all eligible victim claims ordered under this Part to be wholly or partly satisfied by payment from the trust fund; and

- (b) all amounts payable out of the fund to the Public Trustee or the Crown under this Part.

58M—Costs

- (1) The reasonable costs incurred by, or on behalf of, the Public Trustee in holding or otherwise administering an amount held by the Public Trustee under this Part are payable to the Public Trustee out of the amount, or any interest or income received by the Public Trustee in respect of the amount.

- (2) The reasonable costs incurred by, or on behalf of, the Public Trustee or the Crown in the performance of any function under this Part in relation to a particular eligible victim claims trust fund are payable to the Public Trustee or the Crown (as the case requires) out of the trust fund.

- (3) The Public Trustee or the Crown (as the case requires) must certify as to the reasonable costs payable under this section (and such certificate is sufficient authority for the payment of the certified amounts out of the relevant amount or eligible victim claims trust fund).

- (4) A party who is dissatisfied with an amount of costs certified by the Public Trustee or the Crown may request a Master of the District Court to tax the costs and, after taxing the costs, the Master may confirm or vary the amount of the costs payable under this section.

58N—Immunity

- (1) Subject to this section, no civil liability attaches to a person for an act or omission in the exercise or purported exercise of official powers or functions under this Part.

- (2) An action that would, but for subsection (1), lie against a person lies instead against the Crown.

- (3) This section does not prejudice rights of action of the Crown in respect of an act or omission of a person not in good faith.

- (4) This section does not apply to a person if section 74 of the *Public Sector Management Act 1995*, or section 22 of the *Public Corporations Act 1993* or clause 11 of the Schedule of that Act, applies to the person.

5 **580—Regulations**

- (1) The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Part.
- (2) The regulations may—
- 10 (a) be of general application or vary in their application according to prescribed factors;
- (b) provide that a matter or thing in respect of which regulations may be made is to be determined according to the discretion of the Minister.
- 15 (3) A regulation under this Part may make provisions of a saving or transitional nature consequent on the enactment of this Part or on the commencement of specified provisions of this Part.