



New South Wales

# Civil Liability Amendment (Offender Damages Trust Fund) Bill 2005

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The object of this Bill is to amend the *Civil Liability Act 2002* to require that damages awarded against the Department of Corrective Services (and other public sector defendants) for injuries suffered by an offender in custody (*offender damages*) are to be held in trust and used to satisfy a claim for damages (a *victim claim*) for death or personal injury suffered by a victim of an offence committed by the offender. Any surplus remaining after victim claims are satisfied will be paid to the offender.

The Bill also allows a victim claim to be made within 6 months after offender damages are awarded despite the claim being barred because of the expiry of the limitation period for the making of the claim, but only for the purpose of the claim being satisfied from those offender damages.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on the date of assent.

**Clause 3** is a formal provision that gives effect to the amendments to the *Civil Liability Act 2002* set out in Schedule 1.

## Schedule 1 Amendments

**Schedule 1 [1]** inserts a new Division 6 into Part 2A of the *Civil Liability Act 2002*. Part 2A currently restricts the damages that can be awarded for death or personal injury suffered by an offender in custody when the award is against the Department of Corrective Services or other public sector defendants (referred to as ***protected defendants***).

The proposed new Division contains the following provisions:

- (a) Proposed section 26K contains definitions.
- (b) Proposed section 26L requires offender damages (damages awarded against a protected defendant for death or injury suffered by an offender in custody) to be held in trust as a ***victim trust fund*** for victims of the offender. There is an exception to cover amounts that a protected defendant is required under an Act of the State or the Commonwealth to pay to some other person.
- (c) Proposed section 26M provides that a victim trust fund is available to satisfy claims for damages (***victim claims***) 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 6 months (the ***eligibility period***) after the award date of the offender's damages and must be notified to the protected defendant. The claimant must also certify to the court in which the victim claim is made that the claim is made as a claim eligible to be satisfied from the victim trust fund.
- (d) 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.
- (e) 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 the offender.
- (f) Proposed section 26P allows proceedings to be taken on a victim claim after the limitation period for the taking of those proceedings has expired but only during the 6-month period after offender damages are awarded. An award of damages that results from such a claim can only be satisfied from the offender damages held in a victim trust fund.
- (g) 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.
- (h) 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.

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Explanatory note

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- (i) 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 for the Public Trustee to exercise functions on behalf of the protected defendant.
- (j) 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.
- (k) Proposed section 26U fixes a scale of maximum legal costs for legal services provided to the plaintiff on a victim claim that is eligible to be satisfied from a victim trust fund.
- (l) Proposed section 26V confers protection from personal liability for acts and omissions in good faith for the purpose of executing the proposed Division.
- (m) 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 an offence because of mental illness).

**Schedule 1 [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).



First print



New South Wales

# Civil Liability Amendment (Offender Damages Trust Fund) Bill 2005

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New South Wales

# Civil Liability Amendment (Offender Damages Trust Fund) Bill 2005

No. , 2005

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## A Bill for

An Act to amend the *Civil Liability Act 2002* to provide for the satisfaction of personal injury damages claims by victims of crime from certain damages awarded to offenders; and for other purposes.

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<b>The Legislature of New South Wales enacts:</b>	1
<b>1 Name of Act</b>	2
This Act is the <i>Civil Liability Amendment (Offender Damages Trust Fund) Act 2005</i> .	3 4
<b>2 Commencement</b>	5
This Act commences on the date of assent.	6
<b>3 Amendment of Civil Liability Act 2002 No 22</b>	7
The <i>Civil Liability Act 2002</i> is amended as set out in Schedule 1.	8

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## Schedule 1 Amendments

		1
	(Section 3)	2
[1]	<b>Part 2A, Division 6</b>	3
	Insert after Division 5 of Part 2A:	4
	<b>Division 6 Offender damages trust funds</b>	5
26K	<b>Interpretation</b>	6
(1)	In this Division:	7
	<i>award</i> of damages means an award of damages by a court (including such an award pursuant to judgment entered in accordance with an agreement between the parties to a claim for damages).	8 9 10 11
	<i>offender</i> means a person to whom an award of offender damages is made.	12 13
	<i>offender damages</i> means personal injury damages awarded pursuant to an award to which this Part applies.	14 15
	<b>Note.</b> For the purposes of this Division, this Part has an extended application. See Part 7 of Schedule 1.	16 17
	<i>victim claim</i> means a claim for personal injury damages in respect of:	18 19
	(a) an injury to a person caused by conduct of an offender that, on the balance of probabilities, constitutes an offence, or	20 21
	(b) the death of a person caused by or resulting from an injury to the person caused by conduct of an offender that, on the balance of probabilities, constitutes an offence.	22 23 24
	<i>victim trust fund</i> means offender damages awarded to an offender that are held on trust under this Division.	25 26
(2)	The definition of <i>victim claim</i> in this section:	27
	(a) operates whether or not a person whose conduct is alleged to constitute an offence has been, will be or is capable of being proceeded against or convicted of any offence concerned, and	28 29 30 31
	(b) extends to conduct of a person that would have constituted an offence if the person had not been suffering from a mental illness at the time of the conduct (whether or not the person was acquitted of an offence concerning that conduct by reason of mental illness or was found by a court not to be fit to be tried for an offence concerning that conduct by reason of such an illness).	32 33 34 35 36 37 38

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<b>26L</b>	<b>Offender damages to be held in trust as victim trust fund</b>	1
(1)	The amount of any offender damages awarded to an offender is to be held in trust for the offender by the protected defendant liable to pay those damages and may be paid out only as authorised by this Division.	2 3 4 5
(2)	Offender damages held by a protected defendant in trust for an offender under this Division comprise a <i>victim trust fund</i> for victims of the offender. The protected defendant is <i>responsible</i> for the fund.	6 7 8 9
(3)	This section does not affect (and is subject to) any obligation imposed on the protected defendant by or under an enactment of the State or the Commonwealth to pay to some other person money owed or due to or held on account of the offender. <b>Note.</b> Section 26T also provides an exception to this section for legal costs.	10 11 12 13 14 15
(4)	An amount deducted or withheld from offender damages under Division 5 (Victims support payments owed by offender) is not required to be held in trust under this section.	16 17 18
(5)	An amount held in a victim trust fund for victims of an offender is:	19 20
(a)	not available for the payment of a creditor of the offender, and	21 22
(b)	not liable to be attached or taken in execution at the instance of a creditor of the offender.	23 24
<b>26M</b>	<b>Victim trust fund available to satisfy eligible victim claims</b>	25
(1)	A victim trust fund is available to satisfy victim claims against the offender concerned as provided by this Division but only if the claim is <i>eligible</i> to be satisfied from the victim trust fund as provided by this section.	26 27 28 29
(2)	A victim claim is <i>eligible</i> to be satisfied from a victim trust fund only if within the <i>eligibility period</i> for the victim trust fund:	30 31
(a)	the person commences proceedings on the claim in a court (or proceedings by the person on the claim are pending in a court at the beginning of the eligibility period), and	32 33 34
(b)	the person gives the protected defendant responsible for the victim trust fund notice in writing of those proceedings together with such details of those proceedings as the protected defendant may request, and	35 36 37 38

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(c)	the person certifies to the court before which those proceedings are taken that the person is making the claim as a claim that is eligible to be satisfied from the victim trust fund.	1 2 3 4
(3)	The <i>eligibility period</i> for a victim trust fund comprising offender damages awarded to an offender is the period of 6 months following the date (the <i>award date</i> for those damages) on which the claim for those damages is finally determined by a court award of those damages.	5 6 7 8 9
(4)	A claim is not finally determined by a court until the time for appealing against the award of damages expires with no appeal having been made or when all appeals against the award have been withdrawn or finally determined.	10 11 12 13
(5)	The protected defendant responsible for a victim trust fund must give the registrar of each court in which a victim claim may be brought notice of each victim claim of which the protected defendant is given notice under this section.	14 15 16 17
<b>26N</b>	<b>Notice to persons entitled to make victim claim</b>	18
(1)	The protected defendant responsible for a victim trust fund must, within 28 days after the award date for the damages concerned, send to each person who appears (from any official records reasonably available to the protected defendant) to have a victim claim against the offender a notice in writing:	19 20 21 22 23
(a)	naming the offender and stating that there is a victim trust fund for victims of the offender, and	24 25
(b)	specifying the eligibility period for that victim trust fund, and	26 27
(c)	stating that a victim claim made within the eligibility period for the victim trust fund may be eligible to be satisfied from the victim trust fund.	28 29 30
(2)	The notice is to be sent to a person at the address of the person last known to the protected defendant or as shown in official records reasonably available to the protected defendant.	31 32 33
(3)	The protected defendant may also publish such a notice in the Gazette.	34 35
(4)	To remove doubt, <i>victim claim</i> in this section includes a victim claim that can be made as a result of section 26P (Commencement of victim claims proceedings despite expiry of limitation period).	36 37 38 39

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<b>26O</b>	<b>Provision of information to persons entitled to claim</b>	1
(1)	A protected defendant must, in response to a request made during or within 1 month after the eligibility period for a victim trust fund by or on behalf of a person who appears to the protected defendant to be entitled to make a victim claim against the offender, provide such information as the protected defendant is reasonably able to provide concerning:	2 3 4 5 6 7
(a)	the award of damages to the offender and the amount of the victim trust fund, and	8 9
(b)	any other victim claim against the offender that may be eligible to be satisfied from the victim trust fund and of which the protected defendant has been given notice under this Division.	10 11 12 13
(2)	The provision of information by a protected defendant under this section:	14 15
(a)	is authorised despite any agreement to which the protected defendant is a party that would otherwise prohibit or restrict the disclosure of information concerning an award of offender damages, and	16 17 18 19
(b)	does not constitute a contravention of any such agreement.	20
(3)	A person to whom information is provided under this section must not disclose that information to any other person except for the purposes of or in connection with the taking and determination of proceedings on a victim claim against the offender concerned.	21 22 23 24 25
	Maximum penalty: 50 penalty units.	26
(4)	Proceedings for an offence under this section may be dealt with summarily before a Local Court.	27 28
<b>26P</b>	<b>Commencement of victim claims proceedings despite expiry of limitation period</b>	29 30
(1)	If there is a victim trust fund for victims of an offender, an action on a cause of action to recover damages pursuant to a victim claim against the offender is (despite any provision of the <i>Limitation Act 1969</i> ) maintainable by proceedings on the cause of action commenced during the eligibility period for the victim trust fund.	31 32 33 34 35 36
(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 by or under the <i>Limitation Act 1969</i> is	37 38 39

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reinstated for the purposes of proceedings on the cause of action that are commenced during the eligibility period for the victim trust fund.	1 2 3
(3) However, an award of damages in proceedings commenced under this section (that could not otherwise be commenced):	4 5
(a) has effect only for the purpose of enabling an order to be made under this Division for the payment of the whole or a specified part of those damages out of money held in the victim trust fund concerned, and	6 7 8 9
(b) cannot otherwise be enforced against the offender concerned or any property of the offender.	10 11
<b>26Q Orders for payment of damages out of money held in trust for victims of offender</b>	12 13
(1) A court that awards damages to a person on a victim claim against an offender may, if satisfied that the claim is eligible to be satisfied from a victim trust fund for victims of the offender, order that the whole or a specified part of those damages is to be paid out of money held in the victim trust fund.	14 15 16 17 18
(2) Before the court orders the payment of damages out of money held in the victim trust fund, the court must consider:	19 20
(a) whether there are or are likely to be other victim claims eligible to be satisfied from the victim trust fund that may be ordered to be wholly or partly satisfied by payment from the victim trust fund, and	21 22 23 24
(b) the amount of the damages likely to be awarded in respect of those claims.	25 26
(3) In determining the amount of any damages to be ordered to be paid out of a victim trust fund, a court must ensure that the amount ordered to be paid:	27 28 29
(a) is fair and reasonable having regard to the existence of other claims that are eligible to be satisfied from the fund and that may be ordered to be wholly or partly satisfied by payment from the fund, and the amounts likely to be awarded in respect of those claims, and	30 31 32 33 34
(b) does not, as a proportion of the amount of the victim trust fund, exceed the proportion that the damages awarded represents as a proportion of the total damages likely to be awarded in respect of all claims eligible to be satisfied from the fund.	35 36 37 38 39

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(4)	A court may defer making an order for the payment of damages out of a victim trust fund until the court is satisfied that it is able to make a reasonable assessment of the extent of claims eligible to be satisfied from the fund.	1 2 3 4
(5)	The payment by a protected defendant of an amount out of a victim trust fund in accordance with an order of a court under this section is 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 protected defendant to pay the amount to the offender concerned as offender damages.	5 6 7 8 9 10
(6)	An order of a court under this section is not subject to appeal except on a question of law.	11 12
<b>26R</b>	<b>Payment to offender of trust fund surplus</b>	<b>13</b>
(1)	When the protected defendant responsible for a victim trust fund is satisfied that all claims eligible to be satisfied from the fund have been finally determined, the protected defendant is to make a determination of the surplus (if any) in the fund.	14 15 16 17
(2)	A court that awards damages to a person on a victim claim against an offender may give directions to the protected defendant concerned in respect of the determination by the protected defendant of the surplus (if any) in the victim trust fund concerned.	18 19 20 21 22
(3)	If a protected defendant responsible for a victim trust fund determines that there is a surplus in the fund, the protected defendant must pay that surplus to or at the direction of the offender concerned.	23 24 25 26
(4)	The <i>surplus</i> in a victim trust fund is the amount that will remain in the fund after payment out of the fund of the following amounts:	27 28 29
(a)	the amount of all claims eligible to be satisfied from the fund that are ordered by a court under this Division to be paid out of the fund,	30 31 32
(b)	all amounts payable to the Public Trustee out of the fund.	33
<b>26S</b>	<b>Trust funds to be held by Public Trustee</b>	<b>34</b>
(1)	Money held by a protected defendant in trust under this Division is to be held by the Public Trustee on behalf of the protected defendant.	35 36 37

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| (2)        | Interest received by the Public Trustee in respect of the investment of an amount held by the Public Trustee under this section is payable to and forms part of the victim trust fund of which the amount forms part.   | 1<br>2<br>3<br>4                       |
| (3)        | A protected defendant may enter into arrangements with the Public Trustee for the exercise by the Public Trustee on behalf of the protected defendant of any functions of the protected defendant under this Division.  | 5<br>6<br>7<br>8                       |
| (4)        | The Public Trustee is authorised to enter into any such arrangements and is authorised to exercise any functions on behalf of a protected defendant in accordance with those arrangements.  | 9<br>10<br>11<br>12                    |
| (5)        | There is payable to the Public Trustee out of a victim trust fund the reasonable costs of the Public Trustee incurred in the exercise in respect of the fund of any functions under this section or any functions on behalf of a protected defendant pursuant to an arrangement with the protected defendant under this section.  | 13<br>14<br>15<br>16<br>17             |
| (6)        | The Public Trustee is to certify as to the reasonable costs payable to the Public Trustee under this section and such a certificate is sufficient authority for the payment of the relevant amounts out of the victim trust fund concerned.   | 18<br>19<br>20<br>21                   |
| <b>26T</b> | <b>Exception for legal costs</b>  | 22                                     |
| (1)        | This Division does not require any amount to be held in trust that is payable by the protected defendant as legal costs under an order for costs made against the protected defendant or (in the case of an award of damages that is inclusive of costs) that is reasonably attributable to the offender's legal costs.   | 23<br>24<br>25<br>26<br>27             |
| (2)        | The amount reasonably attributable to the offender's legal costs in the case of an award of damages that is inclusive of costs is the amount determined by the protected defendant on the basis of a bill for those costs provided to the protected defendant by the legal practitioner concerned.  | 28<br>29<br>30<br>31<br>32             |
| (3)        | If the amount determined by the protected defendant as the amount reasonably attributable to the offender's legal costs is disputed, the protected defendant is to apply for the assessment of those costs under the <i>Legal Profession Act 1987</i> or the <i>Legal Profession Act 2004</i> (as if the protected defendant were liable to pay those costs as a result of an order for the payment of an unspecified amount of costs made by a court). | 33<br>34<br>35<br>36<br>37<br>38<br>39 |

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(4)	The costs of a costs assessment for the purposes of this section are payable:	1
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(a)	by the offender (by deduction from the offender damages concerned), unless paragraph (b) applies, or	3
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(b)	by the protected defendant if the amount of the costs as determined by the costs assessor is at least 10% more than the amount determined by the protected defendant.	5
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<b>26U</b>	<b>Maximum legal costs of eligible claims</b>	8
(1)	The maximum costs for legal services provided to the plaintiff in connection with a victim claim that is eligible to be satisfied from a victim trust fund are fixed as follows:	9
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(a)	if the amount recovered on the claim does not exceed \$100,000—maximum costs are fixed at 20% of the amount recovered or \$10,000, whichever is greater,	12
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(b)	if the amount recovered on the claim exceeds \$100,000 but does not exceed \$250,000—maximum costs are fixed at 18% of the amount recovered or \$20,000, whichever is greater,	15
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(c)	if the amount recovered on the claim exceeds \$250,000 but does not exceed \$500,000—maximum costs are fixed at 16% of the amount recovered or \$45,000, whichever is greater,	19
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(d)	if the amount recovered on the claim exceeds \$500,000—maximum costs are fixed at 15% of the amount recovered or \$80,000, whichever is greater.	23
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(2)	The regulations may prescribe an amount or percentage to replace any amount or percentage in subsection (1). When such a replacement amount or percentage is prescribed, it applies for the purposes of subsection (1) in place of the amount or percentage that it replaces.	26
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(3)	Before the commencement of the <i>Legal Profession Act 2004</i> , Division 5B (Maximum costs in personal injury damages matters) of Part 11 of the <i>Legal Profession Act 1987</i> applies in respect of the maximum costs for legal services provided to a plaintiff in connection with a victim claim that is eligible to be satisfied from a victim trust fund as if subsections (1) and (2) of this section were substituted for subsections (1) and (2) of section 198D of that Act.	31
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<p>(4) After the commencement of the <i>Legal Profession Act 2004</i>, Division 9 (Maximum costs in personal injury damages matters) of Part 3.2 of the <i>Legal Profession Act 2004</i> applies in respect of the maximum costs for legal services provided to a plaintiff in connection with a victim claim that is eligible to be satisfied from a victim trust fund as if subsections (1) and (2) of this section were substituted for subsections (1) and (2) of section 338 of that Act.</p> <p>(5) The <b><i>amount recovered</i></b> on a claim is the full amount of the damages awarded (not just the amount ordered to be paid from a victim trust fund).</p> <p><b>26V Protection from liability</b></p> <p>(1) An act or omission by a person as a public official does not subject the person personally to any action, liability, claim or demand if the act or omission was done or omitted to be done in good faith in the administration or execution of this Division.</p> <p>(2) In this section:  <i>public official</i> means:                      (a) a member of staff of or agent of a protected defendant, or                      (b) the Public Trustee, or a member of staff or agent of the Public Trustee, when the Public Trustee is acting on behalf of a protected defendant under this Division.</p> <p><b>26W Division overrides Part 7 Division 2</b></p> <p>Division 2 (Supervision of damages arising out of criminal conduct by persons suffering from mental illness) of Part 7 does not apply to damages required to be held in trust under this Division.</p> <p><b>[2] Schedule 1 Savings and transitional provisions</b></p> <p>Insert at the end of clause 1 (1):  <i>Civil Liability Amendment (Offender Damages Trust Fund) Act 2005</i></p>	<p>1 2 3 4 5 6 7 8</p> <p>9 10 11</p> <p>12</p> <p>13 14 15 16</p> <p>17 18 19 20 21 22</p> <p>23</p> <p>24 25 26 27</p> <p>28</p> <p>29</p> <p>30 31</p>
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<b>[3] Schedule 1</b>	1
Insert after Part 6:	2
<b>Part 7 Provisions consequent on enactment of Civil Liability Amendment (Offender Damages Trust Fund) Act 2005</b>	3 4 5
<b>20 Extended operation of Part 2A Division 6</b>	6
For the purposes of the operation of Division 6 (Offender damages trust funds) of Part 2A:	7 8
(a) that Part extends to an award of personal injury damages in proceedings commenced before the commencement of that Part, and	9 10 11
(b) Parts 5 and 6 of this Schedule do not limit the operation of that Part.	12 13
<b>Note.</b> This clause has the effect of extending the operation of Division 6 of Part 2A beyond the operation of the other provisions of that Part.	14 15
<b>21 Amendments extend to existing claims and damages awards</b>	16
A provision of Division 6 (Offender damages trust funds) of Part 2A extends to:	17 18
(a) an award of offender damages made before the commencement of the provision that has not been satisfied by the protected defendant concerned as at that commencement, and	19 20 21 22
(b) an award of offender damages made after the commencement of the provision in respect of a claim for damages that arose before that commencement, and	23 24 25
(c) a victim claim made in respect of a cause of action that arose before the commencement of the provision.	26 27