

2010

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

VICTIMS OF CRIME AMENDMENT BILL 2010

EXPLANATORY STATEMENT

Circulated by authority of
Simon Corbell MLA
Attorney General

Victims of Crime Amendment Bill 2010

Outline

The *Victims of Crime Act 1993* was one of the first instances of law reform recognising victims in Australia, but has since been overtaken by reforms in other Australian and overseas jurisdictions. It is important the ACT strive for best practice in the support of victims of crime in our community, particularly given the ACT was Australia's first jurisdiction to adopt a statutory human rights framework.

The Bill inserts an objectives clause into the Act.

The Bill renames the Victims of Crime Coordinator as the Victims of Crime Commissioner and clarifies the Commissioner's statutory role and functions. These functions include managing the Victim Services Scheme and any other program for the benefit of victims.

The Bill removes the complaints and investigation role from the Victims of Crime Coordinator and lets it fall naturally to the ACT Ombudsman and Health Services Commissioner, both of whom currently have the power to investigate complaints by victims in respect of ACT Government agencies (Ombudsman) and health service providers (Health Services Commissioner). The Commissioner retains a role in trying to resolve victims' concerns less formally.

The Bill establishes the Victims Advisory Board. The Board will provide a platform to formulate protocols and procedures for the treatment of victims of crime and advise the Attorney General on the development of policies and plans to promote the interests of victims of crime.

The Bill meets the Government's commitment to victims of crime and builds on the Government's amalgamation of victim advocacy and support services in the entity known as Victim Support ACT to ensure a 'one-stop-shop' for victims of crime, and on a range of initiatives as part of the Sexual Assault Reform Program (SARP) to enhance the criminal justice response to vulnerable victims of crime.

The reforms have been overseen by a reference group comprising representatives from ACT criminal justice agencies.

Victims of Crime Amendment Bill 2010

Detail

Part 1 — Preliminary

Clause 1 — Name of Act

This clause names the short title of the Act. The name of the Act will be the *Victims of Crime Amendment Act 2010*.

Clause 2— Commencement

This clause enables the Act to commence on the day or days fixed by the Minister by written notice.

Clause 3— Legislation amended

This is a technical clause stating that this part of the Bill amends the *Victims of Crime Act 1994* and the *Victims of Crime Regulation 2000*. This clause also identifies other Acts that are being incidentally amended. A full list appears in Schedule 1.

Part 2 — Victims of Crime Act 1994

Clause 4— New section 3A

This is a standard provision which appears in all new Acts (which contain offence provisions) and which is, when the opportunity presents, included in existing legislation that has offence provisions. In this case there is an offence under the secrecy provision, section 29.

Clause 5— Part 2 heading

This clause inserts a new heading and section 3B into the Victims of Crime Act. This new section contains the objects of the Act.

Clause 6—Compliance with principles

This clause omits the words ‘mentioned in section 4’ as the words are not required.

Clause 7—New section 5(2)

This clause introduces a new section 5(2). The new section is intended to ensure that, where a primary victim is a child, their views, wishes and circumstances are considered before treating their guardian as a victim when applying the governing principles. This provision is particularly important where it may not be reasonably practicable in the circumstances to treat a parent or a legal carer as the guardian, for example, where the victim is an older teenager, or where a parent is alleged to have committed an offence against the victim.

Clause 8—Giving information to coordinator – legal immunity

This technical clause omits the current section 6. The section is reinserted later in the Act.

Clause 9—New part 2A

This clause inserts a new part 2A. The new part 2A introduces important concepts into the Act. Essentially the part defines a victim for the purposes of the Act. The definition is inclusive and victim is defined broadly, focusing on the harm suffered because of the offence rather than the relationship of other people to the victim who has suffered the initial, direct harm.

Clause 10—Part 3

Part 3 provides for the creation of the statutory office of the Victims of Crime Commissioner.

Division 3.1 Appointment of Commissioner

Section 7

This section provides for the appointment of the Victims of Crime Commissioner. The office holder will be appointed by the Minister for a period of not longer than 5 years. The provision is subject to the *Legislation Act 2001*. Conditions of appointment are agreed between the Minister and the Commissioner but are subject to any determination by the Remuneration Tribunal.

Section 8

This section lists certain circumstances in which the Minister may end the appointment of the Commissioner, including:

- if the Commissioner contravenes an ACT law; or
- for misbehaviour; or
- on bankruptcy; or
- on conviction of an offence attracting a penalty of imprisonment for at least one year or that would, if committed in the ACT, have attracted that penalty.

The Minister must end the Commissioner's appointment if the Commissioner is absent, other than on approved leave, for 14 days in a row or for 28 days in a 12-month period. The appointment must also end if the Commissioner suffers from mental or physical incapacity of a kind that substantially affects the exercise of the person's functions.

Section 9

This section provides for all staff assisting the Commissioner to be employed under the *Public Sector Management Act 1994*, which regulates the employment of ACT Government employees.

Section 10

This section moves the current section 18A which permits the Victims of Crime Commissioner to delegate his or her functions under the Act to a public servant to a more logical place in the Act.

Division 3.2 Functions of the Commissioner

Section 11

This section provides that the Victims of Crime Commissioner will have certain functions in the connection with the administration of justice. Essentially, these functions are aimed at enabling the Commissioner to advocate for the interest of

victims; ensuring that all victims are made aware of services available and that those services are provided efficiently and effectively; promoting and resolving concerns raised by victims in regard to the governing principles and interests of victims; ensuring the needs of victims, especially in respect of information, are met by the criminal justice system; and ensuring that awareness of the interests of victims of crime are promoted both within the general community and within Government.

This section also brings the function of managing the program known as the Victims Services Scheme (VSS) and any other program for the benefit of victims into the Commissioner's statutory functions. Currently, the Coordinator manages the VSS under a delegation from the Chief Executive of the Department of Justice and Community Safety. The section now makes this role a statutory function.

The section is consistent with current drafting practice in including a note indicating that a provision of law that gives an entity (including a person) a function also gives the entity powers necessary and convenient to exercise the function

Section 12

Section 12(1) and (2) provides a facilitative function for the Victims of Crime Commissioner to try to resolve a concern raised by a victim about an agency involved in the administration of justice, in circumstances where the Commissioner considers that the agency has not complied with the governing principles. This section is intended to facilitate the timely resolution by any involved agency of concerns that are raised by a victim with the Commissioner.

Section 12 (2) also provides that the Commissioner will be able to request that an agency provide any document or information reasonably required by the Commissioner to resolve such a concern. The agency is required to provide any information to the commissioner that it could provide to the victim on request. It will be open to the agency to provide such further information as may be permissible and appropriate to assist the Commissioner to resolve the concern. (In this regard it is also relevant to note that s.136 of the *Crimes (Sentencing) Act 2005* (also amended by this Bill – see below) provides that a 'criminal justice entity' may give information the entity holds about an offender or a victim to another criminal justice entity. The Commissioner, DPP and ACT Policing are all criminal justice entities for that Act.)

Examples of the Commissioner's role in resolving a victim's concern

An example demonstrating how section 12 (1) and (2) will operate in practice is in circumstances where a victim has not been provided with information from police about the status of a matter as it progresses through the criminal justice system (as is required by section 4 (b) of the Governing Principles).

If a victim is concerned that he or she is not receiving information about the status of a matter in which they are a victim, the Commissioner will be able to resolve this concern quickly and effectively by contacting the police, ascertaining the status of the matter and providing this information and feedback to the victim. Police will be required to provide case status information as it is information that is reasonably

required by the Commissioner to resolve the victim's concern that could be provided to the victim.

The section also provides for a formal complaint process for victims to refer their matter directly to a relevant complaints authority. In addition it provides that the Commissioner can facilitate the referral of a complaint on a victim's behalf to the relevant complaints authority.

Section 12(4) provides that the Victims of Crime Commissioner must refer any complaint relating to non-compliance with the governing principles to a relevant complaints entity, namely the Human Rights Commission, the ACT Ombudsman or any other entity authorised to investigate a complaint relating to the administration of justice.

The Commissioner does not have a formal investigation function.

Section 12(5) provides that the Commissioner may use his or her discretion to not refer a complaint until the complainant has attempted to resolve the complaint with the appropriate agency or, if the complaint is minor in nature, the Commissioner has tried to resolve the complaint between the complainant and the relevant agency. Hence if the thing complained of is the fact that the agency has repeatedly failed to respond to the victim's approaches, the Commissioner may conclude it is not necessary for the victim to make a further attempt to give the agency an opportunity to respond before referring the complaint.

Section 12(6) provides that if a complaint is referred to a relevant complaints entity, the Commissioner must give the entity all documents and information held by the Commissioner about the complaint. This only relates to information and documentation that is relevant to the complaint and does not include information or documents that the Commissioner may hold that relate to the health of the person making the complaint unless they are to the complaint.

This provision does not prevent a victim of crime from lodging a complaint directly with the complaints entity.

The formal complaints process will be that of the relevant complaints entity.

Section 13

This section has been renumbered from the current section 8. It provides for the Commissioner to be present in court, even if the court is closed to members of the public. It enables the Commissioner to ensure that victims are receiving the information and assistance they require.

Clause 11 – Victims services scheme – establishment

This clause removes the ability for regulations to be made in respect of nominating a service agency to be responsible for managing the VSS and the establishment of the Victims Assistance Board. Management of the VSS is now a function of the

Commissioner. The Victims Assistance Board has been superseded by the Victims Advisory Board.

Clause 12 —Section 19 (2)(e)

This is a technical amendment which changes the word ‘coordinator’ to ‘Commissioner’.

Clause 13 – New Part 4A

Part 4A establishes the Victims Advisory Board.

Section 22A

This section establishes the Victims Advisory Board (the Board).

Section 22B

This section outlines the functions of the Board which include: developing and advising the Minister on policy, protocols and procedures for the treatment of victims; and any other function given to the Board under the Act or another territory law.

Section 22C

This section outlines the membership of the Board, which consists of:

- The chief executive of the Department of Justice and Community Safety;
- The Commissioner; and
- Members appointed under section 22D.

Subsection (2) enables the chief executive to delegate their function in respect of the Board to a public servant. The Board is intended to be a high-level advisory board with members who have decision-making powers for the agency or organisation they represent. The expectation is that this delegation would not ordinarily go beyond a deputy chief executive level.

Section 22D

This section outlines who the Minister must appoint as members of the Board. This includes representatives from:

- The DPP
- AFP
- ACT Courts
- Corrective Services
- Youth Justice, and
- Restorative Justice Unit.

Again the expectation is that representatives would ordinarily be at a high level of seniority.

The Minister must also appoint as board members:

- 3 people who represent the interests of victims services groups
- 1 person from the Indigenous community, and
- 1 person who is a lawyer.

Members must be employed, practise, or live in the ACT. Members appointed by the Minister representing the interests of victims' services groups, and the Indigenous community, and a lawyer, must not be public servants.

This section is governed by the *Legislation Act 2001*.

Section 22E

This section makes the chief executive the chair of the Board.

Section 22F

This section outlines the conditions of appointment to the Board. These include that an appointed member holds the position on a part-time basis and the member holds the position on terms decided by the Minister.

Section 22G

This section outlines the terms of appointment to the Board. These include that a member is appointed for no longer than 3 years.

The Minister must end an appointment if the member is no longer a representative of the entity or if the member no longer represents the interests of the group or community the member was appointed to represent.

The Minister may end the appointment of a member for:

- Misbehaviour or physical or mental incapacity
- Bankruptcy
- Being absent for 3 consecutive meetings
- Conviction of an indictable offence, or
- Failure to comply with the disclosure of interest requirements.

Division 4A.2 Proceedings of Board

Section 22H

This section outlines the time and place of meetings. The Board decides when and where it will meet but must meet twice a year. The chair may call a meeting or the Board must meet when asked to do so by the Minister or at least 7 members.

Section 22I

This section outlines the procedures for meetings. The chair presides at all meetings, except if they are absent. If the chair is absent, the members present choose a member to preside. Seven members of the board constitute a quorum and each member has a vote on each question to be decided. Questions are to be decided on a majority of members present, however if there is a tied vote the member presiding has the deciding vote. The Board must keep minutes of its meetings.

Section 22J

This section provides for members of the Board to disclose any direct or indirect financial interests in an issue being considered by the Board where that interest could conflict with the proper exercise of the member's function.

Clause 14 – part 6

This clause inserts a new part 6.

Part 6 MiscellaneousSection 28

This section provides protection for an official from civil proceedings when the official has acted honestly and without recklessness in the exercise of a function or in the reasonable belief that the conduct was in the exercise of a function. This section does not affect any liability of the Territory.

Section 29

This section is a secrecy provision that protects information provided to the Commissioner in relation to the Act. It ensures that the Commissioner and staff assisting the Commissioner are not compelled to reveal information obtained through their work.

This section also creates an offence for the improper disclosure of protected information. This does not apply if the defendant divulged the protected information with the consent of the person to whom the information related or if the defendant divulged a record of protected information about someone else under this Act or another territory law, or in relation to the exercise of a function, as a person to whom the secrecy provision applies, under this Act or another territory law.

The evidential burden in this section lies with the defendant. While the imposition of a burden on a defendant may engage the presumption of innocence in section 22 (1) of the *Human Rights Act 2004*, the burden here is evidential and it can be argued that it does not lie with the vulnerable party, the victim of crime, rather it lies with the Commissioner or a member of staff assisting the Commissioner.

While section 29 of the Bill contains reverse-onus offences and thus limits the right to be presumed innocent until proved guilty according to law (expressed at section 22 of the Human Rights Act), this section also protects the right to privacy (section 12 of the Human Rights Act) afforded to an inherently vulnerable group – victims of crime. It is therefore considered that the reverse onus is a reasonable limitation that can be demonstrably justified in a free and democratic society

It is therefore considered that the placing of an evidential burden on the defence in section 29 of the Bill imposes a proportionate limit on the presumption of innocence.

Section 30

This section provides for the making of regulations under this Act.

Clauses 15- 24 Dictionary

These are technical clauses which either omit surplus definitions from the Act or insert new definitions for the Act.

Part 3 — Victims of Crime Regulation

Given the Victims of Crime Commissioner will now have the statutory function of managing the Victims Services Scheme (VSS), many of the amending clauses outlined below are substituting responsibilities from the ‘relevant service agency’ to the Commissioner. Similarly, many of the clauses are substituting responsibilities from the Victims Assistance Board to the Commissioner, given the roles and responsibilities of the Victims Assistance Board have already been subsumed by the Commissioner in practice.

Clause 25 – Part 2

This clause omits part 2 of the regulations which relate to the Victims Assistance Board. The Victims Assistance Board has been superseded by the Victims Advisory Board and the provisions with respect to the Board now appear in the Act.

Clause 26 – Responsible service agency

This clause removes section 21 of the regulations. This section currently nominates the Chief Executive as the service agency responsible for the management of the victims services scheme. As the management of the VSS has become a function of the Victims of Crime Commissioner, this section is redundant.

Clause 27 – Section 22

This clause substitutes the heading and opening words of section 22 to clarify that the Commissioner is now responsible for managing the VSS.

Clause 28 – Section 22(b)

This clause omits the words ‘and the guidelines made under section 17 (Guidelines)’. Section 17 has been removed due to the removal of Part 2 of the regulation which relates to the Victims Assistance Board.

Clause 29 – Section 22(f)

This clause establishes the reporting requirements for the Commissioner in respect to the VSS. The clause establishes that the Commissioner will report to the chief executive every 6 months on the services the Commissioner provides or arranges.

Clause 30 – section 22 (k) and (l)

This clause rewords current functions in respect to the VSS. Section 22(k) provides for the VSS to provide victims with information and assistance about the criminal justice system, the operation of the VSS and the complaint procedures. Section 22(l) obligates the Commissioner to keep financial records on the operations under the VSS.

Clause 31 – Employment etc of people - contact with eligible victims

This clause relates to the employment etc of people who come into contact with eligible victims. The Commissioner must be satisfied that the person has qualifications or experience with victims and people from a diversity of ethnic and cultural backgrounds and experience and knowledge of working in a multidisciplinary

team. The Commissioner must also encourage the person to undertake continuing education and ensure the person is familiar with the *Human Rights Act 2005*.

The Commissioner must also take reasonable steps to ensure any person employed or engaged who has been convicted of a serious offence does not have contact with an eligible victim.

Clauses 32, 33, and 35 – Sections 24, 25, 25A, 26 and 26A

These are technical clauses omitting the words ‘responsible service agency’ and substituting them with ‘Commissioner’.

Clause 34 – Section 25

This is a technical amendment which substitutes the word ‘committee’ with the words ‘Health Services Commissioner’.

Clause 36 – Section 27(1) and (2)

This is a technical amendment which redrafts a current provision.

Clause 37 – Section 28

The Division in which this section sits relates to applications for internal review. As the process currently stands in the regulation, if the Commissioner decides that a person is not eligible for the victims services scheme, written notice must be given to the person. The notice must be in accordance with the code of practice in force under the *Administrative Appeals Tribunal Act 1989*, section 25B(1). In particular, the notice must tell the person that they have the right to apply for an internal review, apply to the eligibility review committee for a review of the internal reviewer’s decision and to apply to the Administrative Appeals Tribunal for a review of the decision of the committee.

This clause removes the eligibility review committee from the process. The review of the internal decision will now lie with the Health Services Commissioner.

Clause 38 – Section 29

This is a technical amendment which removes the word ‘committee’ and replaces it with the words ‘Health Services Commissioner’ to bring into effect the new review provisions.

Clause 39 - Section 30

This clause outlines the process for the Health Services Commissioner to review the internal reviewer’s decision. The Health Services Commissioner has 28 days to review the internal reviewer’s decision. The Health Services Commissioner must either: confirm the decision; vary the decision; or set aside the decision and substitute the Health Services Commissioner’s own decision.

Clause 40 – Section 31

This is a technical amendment which replaces the word ‘committee’ with the words ‘Health Services Commissioner’ to bring into effect the new review provisions.

Clauses 41 and 42 – Sections 33(3) and 34(3)

These are technical amendments which substitute the words ‘responsible service agency’ with the word ‘Commissioner’.

Clause 43 – Section 34 (8)

This is a technical amendment which removes the responsibility of providing a closure report to the case coordinator from the responsible service agency and gives it to the Commissioner.

Clause 44 – Section 35 (5)

This is a technical amendment which removes the responsibility of giving a closure report to the case coordinator from the responsible service agency and gives it to the Commissioner.

Clause 45 – Section 36

This clause provides for how contact hours are provided to an eligible victim who lives in the ACT.

Clause 46 and 47 – Sections 37(1), (2) and (3)

These are technical amendments which remove the responsibility of providing contact hours from the responsible service agency and places it them with the Commissioner. The amendment to 37 (1) redrafts the current provision to make it clearer and easier to understand.

Clause 48 – Section 38

This is a technical amendment which removes the responsibility of referring a disagreement about the content of a care plan to an independent arbitrator nominated by the responsible service agency and places it with the Commissioner.

Clause 49 – Section 40(1) and (2)

This is a technical amendment which removes the responsibility of approving service providers from the Victims Assistance Board and places it with the Commissioner.

Clause 50 – Section 40(3)

This clause removes the requirement for the Victim Assistance Board to issue guidelines for using service providers that are not approved. The Victim Assistance Board will no longer exist.

Clause 51 – Section 41

This is a technical amendment which removes the responsibility for approving a person as a service provider if certain criteria are met, and places it with the Commissioner.

Clause 52 – Section 41 (a)(1)(i)

This clause replaces one of the current criteria for approval of a service provider, namely that the person is trained in the provision of services to victims, and replaces it with a broader criterion that the person needs to have qualifications or experience in working with victims and people from a diversity of ethnic and cultural backgrounds.

This broader criterion better reflects the intended criteria for service providers and aligns with the criteria of employing or engaging people who will have contact with eligible victims (section 23).

Clause 53 – Section 41 (d)

This clause removes the criteria that the person meets the guidelines made under section 17 for approval of service providers. Section 17 has been removed through the removal of Part 2 of the Regulations.

Clause 54 – Section 41 (2)

This clause links back to section 37 (1) and (2) which enables the Commissioner to approve contact hours to be delivered by a non-approved service provider if a person lives outside the ACT, or if a person lives in the ACT but is seeking contact hours from a service provider who is not approved. This may occur if a person is a victim of crime while visiting the ACT and returns to their home jurisdiction or if a person who lives in the ACT is already accessing services from a provider who may not necessarily be approved.

This is a new clause which provides that the Commissioner may only approve the use of a non-approved service provider if the Commissioner is satisfied the service provider meeting the criteria in subsection 41 (1).

Clause 55 – Section 42

This is a technical amendment which removes the responsibility for suspending the approval of service providers from the Victims Assistance Board and places it with the Commissioner.

Clause 56 – Section 43

This is a technical amendment which removes the responsibility for cancelling the approval of service providers from the Victims Assistance Board and places it with the Commissioner.

Clause 57 – Section 45

This is a technical amendment which removes the responsibility for providing a statement and certificate under the *Victims of Crime (Financial Assistance) Act 1983* from the responsible service agency and places it with the Commissioner.

Clause 58 – Section 46A

This is a technical amendment which removes the responsibility for providing written notice of decisions to refuse, suspend or cancel the approval of service providers from the Victims Assistance Board and places it with the Commissioner.

Clause 59 – New section 47A

This clause provides, in Part 4 of the Regulation, that the Commissioner may make guidelines about:

- the way a victim is assessed for eligibility to use the VSS;
- the employment or engagement of people who will have contact with eligible victims;

- the preparation, content and implementation of care plans;
- the eligibility of entities to be approved or used as service providers;
- the referral of victims to service providers or other entities dealing with victims;
- the establishment and operation of volunteer programs;
- the internal review of decisions made by the Commissioner;
- the holding of indemnity insurance by service providers; and
- other matters necessary and convenient to be decided with respect of the VSS.

The guidelines made under this section are notifiable instruments.

Clause 60 – Section 48

This is a technical amendment which removes the responsibility for making guidelines in respect of volunteers from the Victims Assistance Board and places it with the Commissioner.

Clause 61 – New section 48A

This clause inserts a new provision which provides that the Commissioner may approve independent arbitrators for this regulation. A person is approved as an independent arbitrator only if they are an approved service provider. The Commissioner must keep a list of approved independent arbitrators and the Commissioner must keep the list open for inspection by an eligible victim, without charge. If asked, the Commissioner must provide a copy of the list to an eligible victim without charge.

Clauses 62 and 63 – Sections 50 heading and 50(1)

These clauses are updates, and use the words ‘service provider’ rather than ‘approved service provider’.

Clauses 64-72 - Dictionary

These clauses amend the dictionary provisions to align the definitions with other amendments to the legislation.

Schedule 1 makes minor consequential amendments, including to the *Crimes (Sentencing) Act 2005*, mainly reflecting the change in title from Victims of Crime ‘Coordinator’ to ‘Commissioner’.