SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No:	AB 767	**Hearing Date:**	August 7, 2020
Author:	Grayson		
Version:	August 3, 2020		
Urgency:	Yes	**Fiscal:**	Yes
Consultant:	SC		

Subject: ***Victim Compensation: Use of Excessive Force by a Peace Officer***

HISTORY

Source: Betty T. Yee, California State Controller
Californians for Safety and Justice

Prior Legislation: AB 375 (Durazo), Ch. 592, 2019
SB 1232 (Bradford), Ch. 983, Stats. 2018
SB 381 (de León), 2017, held in Assembly Appropriations Comm.
AB 1061 (Gloria), 2017, held in Assembly Appropriations Comm.
SB 556 (Grayson), 2016, held in Assembly Appropriations Comm.
AB 2160 (Bonta), 2016, held in Assembly Appropriations Comm.
SB 1324 (Hancock), Ch. 730, Stats. 2016
AB 1563 (Rodriguez), Ch. 121, Stats. 2016
AB 1140 (Bonta), Ch. 569, Stats. 2015
AB 2685 (Cooley), Ch. 508, Stats. 2014
SB 1299 (Wright), Ch. 870, Stats. 2012

Support: San Francisco District Attorney's Office; Youth Alive!

Opposition: None known

Assembly Floor Vote: Not Relevant

PURPOSE

The purpose of this bill is to expand eligibility for compensation under the Victims Compensation Program for injuries or death caused by use of force by a police officer.

Existing law states that the Legislature finds and declares that it is in the public interest to assist residents of the State of California in obtaining compensation for the pecuniary losses they suffer as a direct result of criminal acts. (Gov. Code, § 13950, subd. (a).)

Existing law establishes the California Victims Compensation Claims Board (board) to operate the California Victim Compensation Program (CalVCP). (Gov. Code, §§ 13950 *et. seq*.)

Existing law authorizes the board to reimburse for pecuniary loss for the following types of losses:

- Medical or medical-related expenses incurred by the victim for services provided by a licensed medical provider;

- Out-patient psychiatric, psychological or other mental health counseling-related expenses incurred by the victim or derivative victim, including peer counseling services provided by a rape crisis center;

- Compensation equal to the loss of income or loss of support, or both, that a victim or derivative victim incurs as a direct result of the victim's injury or the victim's death;

- Cash payment to, or on behalf of, the victim for job retraining or similar employment-oriented services;

- The expense of installing or increasing residential security, not to exceed $1,000;

- The expense of renovating or retrofitting a victim's residence or a vehicle to make them accessible or operational, if it is medically necessary;

- Relocation expenses up to $2,000 if the expenses are determined by law enforcement to be necessary for the victim's personal safety, or by a mental health treatment provider to be necessary for the emotional well-being of the victim; and,

- Funeral or burial expenses. (Gov. Code, § 13957, subd. (a).)

Existing law limits the total award to or on behalf of each victim to $35,000, except that this amount may be increased up to $70,000 if federal funds for that increase are available. (Gov. Code, § 13957, subd. (b).)

Existing law provides than an application for compensation shall be filed with the board in the manner determined by the board. (Gov. Code, § 13952, subd. (a).)

Existing law authorizes the board to require submission of additional information supporting the application that is reasonably necessary to verify the application and determine eligibility for compensation. (Gov. Code, § 13952, subd. (c)(1).)

Existing law requires the board to verify with hospitals, physicians, law enforcement officials, or other interested parties involved, the treatment of the victim or derivative victim, circumstances of the crime, amounts paid or received by or for the victim or derivative victim, and any other pertinent information deemed necessary by the board. (Gov. Code, § 13954, subd. (a).)

Existing law requires an application to be filed in accordance with the following timelines:

- Within seven years of the date of the crime;

- Seven years after the victim attains 21 years of age; or,

- Seven years of the time the victim or derivative victim knew or in the exercise of ordinary diligence could have discovered than an injury or death had been sustained as a direct result of crime, whichever is later. (Gov. Code, § 13953, subd. (a).)

Existing law defines "victim" to mean an individual who sustains injury or death as a direct result of a crime as specified. (Gov. Code, 13951, subd. (e).)

Existing law defines "derivative victim" to mean an individual who sustains pecuniary loss as a result of injury or death to a victim. (Gov. Code, 13951, subd. (e).)

Existing law defines "crime" for purposes of victim compensation to mean "a crime or public offense, wherever it may take place, that would constitute a misdemeanor or a felony if the crime had been committed in California by a competent adult. (Gov. Code, § 13951, subd. (b)(1).)

This bill amends the definition of "crime" to specify that a suspect need not be arrested or charged for the commission of the crime.

This bill additionally defines "crime" to include the use of force by a peace officer that is beyond what is reasonable under the totality of circumstances and causes injury or death to the victim, regardless of whether the peace officer is arrested for, charged with, or convicted of committing a crime or public offense.

This bill provides that "peace officer" has the same meaning as in Section 830 of the Penal Code.

This bill defines "victim services provider" to mean an individual, whether paid or serving as a volunteer, who provides services to victims under the auspices or supervision of either an agency or organization that has a documented record of providing services to victims, or a law enforcement or prosecution agency.

Existing law provides that a person shall not be eligible for compensation under the following conditions:

- If the board finds that denial is appropriate because of the nature of the victim's or other applicant's involvement in the events leading to the crime, or the involvement of the person whose injury or death gives rise to the application. Factors that may be considered when making this determination include, but are not limited to:
    - The victim or derivative victim initiated the qualifying crime, or provoked or aggravated the suspect into initiating the qualifying crime;
    - The qualifying crime was a reasonably foreseeable consequence of the conduct of the victim or derivative victim;
    - The victim or derivative victim was committing a crime that could be charged as a felony and reasonably lead to them being victimized, unless the injury or death occurred as a direct result of specified crimes including rape, domestic violence, or statutory rape where the minor is under 16 and the perpetrator is over 20.
- If the board finds that the victim or, if compensation is sought by, or on behalf of, a derivative victim, either the victim or derivative victim failed to cooperate reasonably with a law enforcement agency in the apprehension and conviction of a criminal committing the crime. In determining whether cooperation has been reasonable, the board shall consider:

- The victim's or derivative victim's age, physical condition, and psychological state, cultural or linguistic barriers, any compelling health and safety concerns, including but not limited to, a reasonable fear of retaliation or harm that would jeopardize the well-being of the victim or victim's family or the derivative victim or derivative victim's family, and giving due consideration to the degree of cooperation of which the victim or derivative victim is capable in light of the presence of any of these factors.

- A victim of domestic violence shall not be determined to have failed to cooperate based on their conduct with law enforcement at the scene of the crime.

- Lack of cooperation shall not be found solely because a victim of sexual assault, domestic violence, or human trafficking delayed reporting the qualifying crime. (Gov. Code, § 13956, subds. (a) & (b).)

Existing law states that if the victim is determined to have been involved in the events leading to the qualifying crime, factors that may be considered to mitigate or overcome involvement include, but are not limited to:

- The victim's injuries were significantly more serious than reasonably could have been expected based on the victim's level of involvement;

- A third party interfered in a manner not foreseeable by the victim or derivative victim; and,

- The board shall consider the victim's age, physical condition, and psychological state, as well as any compelling health and safety concerns, in determining whether the application should be denied for this reason. (Gov. Code, § 13956, subd. (a)(2).)

This bill states that victim or derivative victim's involvement in the events leading to the crime requires that they initiated the qualifying crime, or directly provoked or aggravated the suspect into committing the qualifying crime.

This bill further provides for involvement in the events leading to the crime, the victim or derivative victim must have knowingly and willingly committed a crime that could be charged as a felony, absent consideration of any enhancement or prior conviction which reasonably lead to them being victimized.

This bill states that an application for compensation based on peace officer use of force shall not be denied based upon the victim's involvement in the crime or the victim's failure to cooperate.

Existing law states that a victim of domestic violence shall not be determined to have failed to cooperate based on his or her conduct with law enforcement at the scene of the crime. Lack of cooperation shall also not be found solely because a victim of sexual assault, domestic violence, or human trafficking delayed reporting the qualifying crime. (Gov. Code, § 13956, subd. (b)(1).)

This bill applies the above provision to all victims applying for compensation and also states that a victim shall not be determined to have failed to cooperate based on their conduct with law enforcement in a hospital following the crime.

Existing law provides that an application for a claim based on domestic violence, human trafficking, or sexual assault shall not be denied solely because a police report was not made by the victim and requires the board to adopt guidelines that allow it to consider and approve applications for assistance other than a police report to establish that a sexual assault crime has occurred. (Gov. Code, § 13956, subd. (b)(2)-(4).

This bill provides that if an application for a claim based on injury or death that happened as a result of police use of force, the board shall not deny the application based solely on a police report, or the lack thereof, or based upon whether the law enforcement officer was arrested or charged with a crime. If there is no police report, the application may be supported by other evidence to establish that a crime occurred.

Existing law provides factors for the board to consider outside of a police report for applications for claims based on sexual assault, human trafficking or domestic violence to determine that a crime has occurred including, but not limited to medical records or mental health records. (Gov. Code, § 13956, subd. (b)(2)-(5).)

This bill states that notwithstanding other provisions, the board shall not deny an application, in whole or in part, based solely on the contents of the police report, or because a police report was not made by the victim, or based upon whether any suspect was arrested or charged with the qualifying crime. The board shall consider other evidence to establish that a qualifying crime occurred. The additional factors evidencing that a qualifying crime has occurred may include, but are not limited to, the following:

- A written statement provided by a victim services provider who has provided services to the victim or derivative victim in response to the impact of the qualifying crime;
- A statement provided by a credible witness to the qualifying crime;
- A permanent restraining order or protective order issued by a court to protect or separate the victim or derivative victim from the person responsible for the qualifying crime;
- A statement from a licensed medical provider, physician's assistant, nurse practitioner, or other person licensed to provide medical or mental healthcare documenting that the victim experienced physical, mental, or emotional injury as a result of the qualifying crime;
- Video, audio, or photographic recordings of the commission of the qualifying crime; or,
- Any other reliable corroborating evidence that the board finds sufficient to reasonably establish that a qualifying crime occurred.

This bill contains an urgency clause.

COMMENTS

1. Need for This Bill

According to the author of this bill:

> Current eligibility restrictions can lock survivors out of compensation, and victims of police violence and their families typically cannot access compensation.
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> CalVCB has discretion to deny applications if it determines the victim's involvement in the events gives rise to the application. In cases of police violence, a police report documenting the victimization is often elusive. And, CalVCB must rely on a police report when assessing the victim's role. They are not given the same flexibility, as given to victims of other crimes, to use forms of documentation other than a police report.
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> Many crime survivors are denied access to needed resources because they have failed to report to law enforcement. Yet data collected by the Bureau of Justice Statistics found that only 45% of violent victimizations are ever reported to police. People do not report crimes to law enforcement for various reasons, including fear of reprisal or negative past interactions with police.

2. Purpose and History of CalVCP

The victim compensation program was created in 1965, the first such program in the country. The board provides compensation for victims of violent crime. It reimburses eligible victims for many crime-related expenses, such as counseling and medical fees. Funding for the board comes from restitution fines and penalty assessments paid by criminal offenders, as well as federal matching funds. (See the California Victim Compensation Board's (CalVCB) website <http://www.vcgcb.ca.gov/board/> [as of July 16, 2020].)

The CalVCB is considered the payer of last resort and can only pay treatment expenses after other available sources of payment have been applied to a bill. Those sources include, but are not limited to, health insurance, workers compensation insurance, automobile insurance, Medi-cal, and Medicare. (CalVCB's website, Billing and Payments page <https://victims.ca.gov/providers/billing.aspx#:~:text=The%20Victim%20Compensation%20Board%20is,been%20applied%20to%20a%20bill> [as of July 16, 2020].)

3. Eligibility Requirements for Compensation

The CalVCP reimburses eligible victims for specified expenses such as counseling and medical fees. Eligible persons are victims and derivative victims and the crime either occurred in California or the victim is a resident of California or a member or a family member living with a member of the military stationed in California. The victim or derivative victim must have sustained either physical injury or emotional injury for specified crimes.

Once an application is filed, the board is required to verify with hospitals, physicians, law enforcement officials, or other interested parties involved, the treatment of the victim or

derivative victim, circumstances of the crime, amounts paid or received by or for the victim or derivative victim, and any other pertinent information deemed necessary by the board. Any verification information requested by the board must be returned within 10 days of the request. The applicant is also required to cooperate with the staff of the board or the victim center in the verification of the information contained in the application. Failure to cooperate may constitute grounds to reject the application. The board is required to approve or deny applications within an average of 90 days and no later than 180 calendar days of acceptance by the board or victim center.

Under existing law, the board may deny an application based on a finding that the victim was involved in the events leading to the crime or the victim's failure to reasonably cooperate with law enforcement. The proponents of this bill state that these disqualifying factors unjustly exclude victims of excessive police force from compensation. Specifically, the board may find that the victim was involved in the events leading up to their own injury or death because of an infraction or some other minor act that caused the police to initiate contact or because the victim resisted the officer's orders during the encounter. The board may also find that the victim failed to reasonably cooperate with law enforcement by not filing a police report regarding the use of force or not answering officers' questions when arrested or detained.

This bill provides statutory authority for victims of police use of force to apply for victim compensation. This bill accomplishes this by expanding the definition of a qualifying crime to include "the use of force by a peace officer that is beyond what is reasonable under the totality of circumstances, and causes the victim injury or death. . . ." Because this is a new standard for a qualifying crime, it is unclear what evidence may be needed to help the board make this highly factual finding. This bill further provides that the board shall not deny the application based solely on a police report, or the lack thereof, or based upon whether the law enforcement officer was arrested or charged with a crime. If there is no police report, the application may be supported by other evidence to establish that a crime occurred.

This bill also makes changes to existing laws that that impact victims in general, not just those who are injured or killed by police use of force. Specifically, the bill makes changes to the provisions describing victim involvement in events leading to the crime by requiring that the victim or derivative victim directly provoked or aggravated the suspect into committing the crime. Also, if involvement means the victim or derivative victim was committing a felony, the victim or must have knowingly and willingly committed the offense and the offense must be one that can be charged as a felony absent consideration of any enhancement or prior conviction. This bill also provides that a victim shall not have failed to cooperated based on their conduct with law enforcement in a hospital following the crime.

4. Fund Condition of CalVCP

The CalVCB Restitution Fund has been operating under a structural deficient for a number of years. In 2015, the Legislative Analyst's Office reported the CalVCB Restitution Fund was depleting and would eventually face insolvency. Although revenue has remained consistent, expenditures have outpaced revenues since FY 2015-16. The Governor's 2020-21 revised budget allocated $23.5 million dollars in one-time General Fund monies to backfill declining fine and fee revenues in the Restitution Fund. This amount will allow the CalVCB to continue operating at its current resource level. Expanding compensation eligibility to victims currently not eligible will put cost pressures on an already deficient fund. Additionally, whether the bill applies

retroactively (currently VCP has a statute of limitations of 7 years) or prospectively can greatly impact costs as well.

5. San Francisco District Attorney's Office Victim Compensation for Police Violence

In June of this year, San Francisco District Attorney Chesa Boudin announced a new policy to provide compensation for victims of police violence that occurred in San Francisco or to a San Francisco resident. The new program will make victims and their families eligible for up to $7,500 in funeral costs, $5,000 for medical bills, $2,500 for relocation costs, $1,000 for mental health treatment and $1,000 for crime scene cleanup if property is damaged during an incident. The district attorney's office will determine eligibility and may require documentation of harm such as medical bills. The program will not apply retroactively. (Iovino*, San Francisco DA Makes Victims of Police Violence Eligible for Compensation*, Courthouse News Service (June 9, 2020) < https://www.courthousenews.com/san-francisco-da-makes-victims-of-police-violence-eligible-for-compensation/> [as of July 30, 2020].)

6. Argument in Support

According to Californians for Safety and Justice, a cosponsor of this bill:

> Current eligibility restrictions can lock survivors out of compensation, and victims of police violence and their families typically cannot access compensation. The California Victim Compensation Board (CalVCB) has discretion to deny applications if it determines the victim's involvement in the events leading to the crime... gives rise to the application, or if it finds the survivor "failed to cooperate reasonably" with law enforcement. These restrictions apply even to homicide victims, compounding trauma for family members who are left without needed support for funeral expenses and other critical supports. These determinations also leave room for implicit bias to enter the process, and open survivors up to judgment based on their past interactions with law enforcement and perceptions of criminality.
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> In cases of police brutality, a police report documenting the victimization is often elusive. Survivors and witnesses may also not want to speak with officers, resulting in exclusion from compensation for noncooperation. And, CalVCB must rely on a police report when assessing the victim's role, which can be biased in cases where the very people responsible for the injury or death are those tasked with documenting it and assigning blame.
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> AB 767 takes a comprehensive approach to tackling these issues and is driven by the calls from survivors to remove unjust barriers to compensation. Overall, this bill will further improve survivor experiences with the compensation program as a payer of last resort.

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