

Review of Criminal Injuries Scheme in Western Australia

Submission to Western Australia Department of Justice

23 August 2018

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

¹ www.lawyersalliance.com.au.

Introduction

1. The Australian Lawyers Alliance WA (ALA WA) is pleased to provide a submission to the Review of Criminal Injuries Scheme and in particular the Discussion Paper June 2018.
2. The ALA WA has consulted its members who practise in this area of the law and considered its charter to protect and promote justice, freedom and the rights of the individual in responding to the Discussion Paper.

Discussion Question 1

Is the current Criminal Injuries Compensation scheme appropriate for victims in Western Australia?

3. Generally the Scheme does provide a level of compensation for victims of some, but not all offences. There are occasions when claims take too long to process. The jurisdictional maximum amount available is inadequate for some claims.

Discussion Question 2

Is the current scheme achieving outcomes for victims that:

(a) are fair, equitable and timely?

4. Not always. The ALA notes that there is no recognition in the Scheme that children and elderly people are often more affected by offences, particularly ones involving violence or aggravating circumstances such as the occurrence of the offence in a person's own home. The element of power, influence or trust recognised in some other jurisdictions is a matter that warrants favourable consideration in this Review. Whilst individual awards sometimes include the outcome if psychological harm can be identified, the underlying issue is not addressed in the framework of the Scheme itself. ALA WA recommends consideration of adoption of principles available in, for example, Victoria on these issues.

5. The second difficulty is in the increasing times taken for determinations to be made. The reasons for that and the pressures on the Assessors have been documented for several years in the Annual Reports of the Chief Assessor.²
6. In 2016-17 only one third of applications were completed in 39 weeks or less. About 40 per cent took more than 52 weeks — some considerably longer. ALA WA considers that an urgent increase in the number of assessors is required to meet the delays.
7. The absence of specific recognition of pregnancy resulting from sexual assaults as a compensable item without further evidence of consequences to health is a deficiency that can also result in inequitable outcomes. ALA WA recommends that the definition of injury be broadened to include pregnancy.
8. The time limit in respect of access to future medical treatment expenses should be removed, particularly in cases where future dental treatment is required, given ongoing treatment and maintenance cost associated with dental treatment.
9. There is also an inadequacy in amounts awarded given the statutory cap of \$75,000. That cap has been in place for many years and it is appropriate to increase it. ALA WA recommends an increase to \$150,000. This would reflect community expectations and the fact that treatment expenses which often form a component of the awards are now much higher than in 2004. It is the sum adopted in the national response to the Royal Commission into Institutional Responses to Child Sexual Abuse and it would be unjust that comparable violence in one setting would be considered only worthy of 50 per cent of the community standard in a different circumstance but potentially involving similar damage.

(b) are consistent and predictable?

10. Given the limitations noted above, the actual decisions generally are considered consistent and predictable.

² For example, see p5 and p11 of Chief Assessor's Report 2016/2017 for increased number of claims and increased delays

(c) minimise trauma for victims and maximise the therapeutic effect for victims?

11. The delay in a large proportion of the awards does operate against maximising therapeutic benefit and can act to increase trauma in some cases.

Discussion Question 4

Where does the responsibility for the Criminal Injuries Compensation scheme belong in the jurisdictional hierarchy of Western Australian Courts and/or tribunals?

12. ALA WA supports the maintenance of a primarily administrative system with judicial review in appropriate cases. It notes that the Discussion Paper raises the possibility of magistrates also exercising the jurisdiction. It would be difficult to have a hybrid administrative/judicial model.

Discussion Question 5

Western Australia has the second highest maximum amount awardable for primary victims. Should consideration be given to amending the Criminal Injuries Compensation Regulations 2003 to include scheduled amounts for injuries?

13. ALA WA opposes a statutory table based on impairment or disability ratings. Whilst it has a superficial attraction of creating certainty and consistency, the individual circumstances of claimants risks being missed in such an approach. It will also inevitably increase the costs of obtaining medical assessments to include those ratings. Many applicants are not represented and may not be able to obtain reports of that kind. In any event in a 'no costs' jurisdiction, those costs will reduce the effective amount paid to the recipient of the award of compensation.

Discussion Question 6

Is the current scheme efficient and sustainable for the State?

15. ALA WA notes that in 2016–17 a total of almost \$40 million was paid with an average award of \$17,500. Clearly the State can not only afford that amount but if the maximum was increased to \$150,000 — given that only 10% of awards are for sums greater than \$50,000 — it is unlikely that the overall cost would double, although those most severely affected would

have greater recognition of their injuries and losses. ALA WA considers that a more realistic maximum would not undermine the sustainability of the Scheme.

Discussion Question 7

Schemes operating in other Australian States run under a financial assistance scheme, which for victims of crime is timelier and gives quicker access to funding to assist with their rehabilitation. Given the benefits that a financial assistance scheme could provide to victims of crime, should consideration be given to the scheme for Western Australia being changed to a financial assistance scheme?

16. ALA WA considers that an increase in early interim awards would ameliorate the hardship on claimants without the need to discard the current system in favour of a financial assistance model.
17. There is also the potential issue if there is any disentiing conduct by the victim or no conviction after a lengthy criminal court proceeding, then victims may be required to repay monies received.

Discussion Question 8

Could compensation/financial assistance be determined in the pre-sentencing process rather than post-sentencing?

18. ALA WA does not support a model where finalisation of compensation must occur in the pre-sentencing process.
19. Medical stabilisation is not usually reached by the time of sentencing and the extent of injuries/losses is usually not known at time of sentencing.
20. Often victims would not be able to provide sufficient medical evidence to a Magistrate/Judge in order for them to make an appropriate determination. If it was to be introduced clear guidelines would be needed to ensure that it was at the election of the claimant.

Discussion Question 9

If there were no changes recommended to the current Western Australian scheme, could applications for compensation be completed in a timelier manner if consideration was given to all magistrates in the State being appointed as additional Assessors?

21. ALA WA recognises that, in principle, magistrates ought to be able to make fair and equitable awards and hence more decision-makers could speed up the assessment process. The risk is in the wide variability in awards that may result from, for example, a magistrate making only a small number of awards per year without any general ‘tariff’ being established. ALA WA also recognises that there has been the development of a specialist jurisdiction which generally produces consistent awards.

Discussion Question 10

Is there a need for Assessors to, when requested, provide written reasons for a decision to make an award?

22. ALA WA recognises that, in principle, some level of decision making ought to be available if requested. In some cases it might be confined to a statement of reasons on specific issues such as economic loss. It might also operate to discourage appeals, although the number of appeals is relatively small and is not the major concern on this issue.

Discussion Question 11

In respect of the recovery of awards or recovery of financial assistance, should this scheme be adopted in Western Australia, should:

- (a) awards or financial assistance be recovered; and if so, should**
- (b) recovery of the total amount of an award or financial assistance from the offender be mandatory?**

23. ALA WA does not agree that recovery ought to be mandatory. Sometimes notifying the offender of the victim’s application for Criminal Injuries Compensation is not appropriate. The current system of a discretionary recovery model allows for those relatively few cases where a recovery is a possibility to be pursued.

Discussion Question 12

The Australian Capital Territory, New South Wales, Northern Territory and South Australia have levies in places, some of which is funding or partially funding victim compensation schemes. Should consideration be given to implementing a victims' levy for Western Australia?

24. In principle ALA WA does support the introduction of a victims' levy system to be introduced but notes the primary obligation of the State to fund fair and equitable Criminal Injuries Compensation. It would be willing to make further submissions on the model and implementation of a levy if it is adopted by the Review.

Discussion Question 13

Is there anything further that you would like to provide comment on that you believe would improve the Criminal Injuries Compensation scheme for Western Australian victims of crime?

25. There is one remaining anomaly in the compensation area. In jurisdictions dealing with other types of compensation, costs (sometimes modest) are awarded. The nature of Criminal Injuries Compensation is undoubtedly different in the sense that the State is not the wrongdoer, but we understand that the Assessors consider legal representation in complex cases which does assist in determination of the claims. A modest allowance for complex cases — as determined by the Assessor — of up to 10 per cent of the award would not distort the nature of the Scheme and would not involve significant additional costs. ALA WA recommends that the introduction of limited legal fees in addition to the award made be considered as part of the Review. We otherwise refer to the body of the submissions.

Graham Droppert



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Australian Lawyers Alliance