

# **Maintenance and Champerty in Western Australia – Project No 110: Discussion Paper**

Submission to Law Reform Commission of Western  
Australia

**8 November 2019**



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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.<sup>1</sup>

The ALA office is located on the land of the Gadigal of the Eora Nation.

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au).

## Submission

1. The ALA welcomes the opportunity to provide a submission to the Law Reform Commission of Western Australia in response to the Commission's 'Project No 110 - Maintenance and Champerty in Western Australia' Discussion Paper. The ALA has chosen to focus its response on the effect of the tort in the context of Western Australia's proposed representative proceedings regime.
2. The Commission has sought responses for consideration in relation to whether the tort of maintenance and champerty should be abolished in Western Australia or whether the tort should be otherwise modified. In the circumstances where either event results, the Commission also seeks comment upon any consequential amendments.
3. It is acknowledged that the Commission has previously considered whether the tort should be abolished in the 2015 *Representative Proceedings* Report (Project 103) ('**2015 Report**')<sup>2</sup>. The issue was raised but left undecided. The 2015 Report had considered the issue in the context of whether Western Australia should introduce a representative proceedings regime. The Commission ultimately recommended that Western Australia legislate in similar terms to the representative proceedings regime set out in Part IVA of the *Federal Court of Australia Act* (Cth). The recommendation has led to the introduction of the Civil Procedure (Representative Proceedings) Bill 2019 into Western Australian Parliament in June 2019. The Bill, if passed, will provide Western Australia with access to a representative proceedings procedure.
4. The Commission has aptly stated the obvious relevance that the tort of maintenance and champerty has to the operation of litigation funding in its current Discussion Paper.<sup>3</sup> Litigation funders have an increasing role in representative proceeding litigation in Australia, and the operation of the torts in Western Australia could be seen to act as a barrier or deterrent to litigation funders seeking to become involved in such litigation. Funding a legal matter through a third-party is becoming more accessible and serves the purpose of providing a means to persons who may not otherwise be able to access the justice system. As such, the ALA is concerned that the continuation of the torts in their current form may hinder the utility of a representative proceedings regime in Western Australia.

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<sup>2</sup> Law Reform Commission of Western Australia, *Representative Proceedings*, Final Report, Project No 103 (2015)

<sup>3</sup> Law Reform Commission of Western Australia, *Maintenance and Champerty in Western Australia*, Discussion Paper, Project No 110 (2015), page 9 at [1.3].

5. The ALA appreciates the concern that, without the operation of the tort or a modified version of it, litigation funders will have free reign to initiate litigation on whatever funding terms they consider appropriate which could place potential claimants in vulnerable situations. However, the operation of litigation funders in Australia is becoming highly regulated. The role of litigation funders has been and remains the topic of various Law Reform Commission Discussion Papers and Reports around Australia.<sup>4</sup> It is also evident by recent court decisions<sup>5</sup> that there has been extensive judicial oversight into the involvement of litigation funders in legal proceedings — the courts have not been afraid to intervene in this regard.
6. Further, it is noted that the torts only remain operative in Western Australia, Queensland and the Northern Territory. Notably the Northern Territory and Western Australia do not yet have a representative proceedings regime nor did Queensland up until 2017. Given the torts are not operative in other states, there is a real risk that if a representative proceedings regime is introduced, the operation of the torts may incite litigation funders to commence proceedings elsewhere which would give rise to the possibility of ‘forum shopping’. This is a concern that has been raised by the Law Society of Western Australia by way of submission to the Commission in 2015 in response to the *Representative Proceedings* Discussion Paper<sup>6</sup> — the ALA agrees with the view expressed by the Law Society of Western Australia.
7. The ALA expresses the view that the continued operation of the tort may hinder the accessibility and purpose of a representative proceedings regime in Western Australia. In appreciation of the ongoing regulation of litigation funders in Australia and where there is interest and the power for the Court to intervene in litigation funded matters, the ALA supports a recommendation that the torts of maintenance and champerty be abolished.

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<sup>4</sup> Victoria Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings*, Final Report (March 2018); Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report (November 2018)

<sup>5</sup> See *Murphy Operator Pty Ltd & Ors v Gladstone Ports Corporation Limited & Anor (No 4)* [2019] QSC 228 where the Court upheld the legality of a litigation funding agreement; *Endeavour River Pty Ltd v MG Responsible Entity Limited & Anor* [2019] FCA 1719 where Justice Murphy has refused to approve a settlement on the basis that the 32 per cent commission sought by the litigation funder was “too high”.

<sup>6</sup> Law Reform Commission of Western Australia, *Maintenance and Champerty in Western Australia*, Discussion Paper, Project No 110 (2015), page 11 at [2.1].

A handwritten signature in black ink, consisting of several overlapping loops and a final flourish.

**Michelle Antunovich**

Western Australia President  
Australian Lawyers Alliance