

Financial Policy Unit
Department of Health
189 Royal Street,
EAST PERTH WA 6004

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By Email: finance.policy@health.wa.gov.au

Dear Manager Policy and Legislative Services,

Health Services Act 2016
Proposed Regulations for Compensable Patients
Consultation Paper

I am writing to you as **President of the WA Branch of the Australian Lawyers Alliance (ALA)**.

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

I refer to the *Health Services Act 2016 ("the Act") Proposed Regulations for Compensable Patients Consultation Paper* and provide this submission in response to the proposals as follows:

1. General Comments and Concerns

The ALA generally supports the regulations to be enacted to support the recovery of debts from compensable patients and ensure that the cost of their treatment is not borne by the public health system where liability has been accepted for their claims and a compensation payor or insurer is liable to pay for such debts/costs.

However, ALA does not support such regulations where liability has not been accepted for compensable patients' claims and a compensation payor disputes that it is liable to pay for such debts/costs. This includes claims where a commercial settlement of a global nominal amount may be agreed between compensable patients and a compensation payor or insurer.

The compensation patient should not be required to incur the legal costs of pursuing a debt on behalf of the Department of Health for public hospital treatment in this situation.

The regulations should limit the definition of compensation only to cases where liability has been accepted or admitted for the payment of compensation or damages by a compensation payor or insurer or where a Court or other Tribunal has found a compensable payor to be liable for such compensation.

ALA also submits that the obligations with respect to reporting potential compensable patient treatment in a public hospital should be placed on the compensation payor or insurer, similar to the Medicare scheme.

Should a dispute arise with respect to the recovery and quantum of a compensable patient's treatment then this dispute should be between the Department of Health and a compensation payor or insurer – not the compensable patient and it should not be a debt payable by the compensable patient.

The unintended consequences of the proposed regulations to potential compensable patients is far reaching and will result in delay in resolving claims, and increased legal costs, which will be unrecoverable and more importantly, will likely result in patients not being able to pursue a claim where liability for the claim has been disputed or denied.

There is a significant risk of unfair financial burden on patients. Potential compensation patients may be unfairly liable for treatment costs if they are unable to recover those costs from a compensation payor. Further, if a compensation payment is not sufficient in quantum to cover past medical expenses it leaves no compensation to the patient for their other losses such as economic loss of earnings, general damages for pain and suffering etc. It also leaves them with a "debt" payable to the Hospital Service Provider.

A significant concern is that the proposed regulations in their current form risks creating a barrier to people seeking medical treatment that they need. A potential compensable patient may require public hospital treatment but if there is a risk that they will be liable to repay the costs of the same, they may decide not to go to hospital so as to avoid incurring a "debt". This denies access to medical treatment at a public hospital which everyone is entitled to receive.

This contradicts the principle that the public system should not be reimbursed at the expense of the injured party when liability is unresolved.

Finally, we understand that there is no reciprocal legislation or regulations in other States of Australia with respect to the recovery of public hospital treatment and whilst the intent of the proposed regulations are supposed to be administrative in nature, to facilitate more efficient and effective recovery of debts from compensable patients, the implications in reality with the current wording of the legislation will be punitive as outlined above.

2.1 Proposed Regulations

Section 53B allows regulations to be enacted specifying what 'payments of a kind' are to be included and excluded from the definition of 'compensation' in the HSA.

It is proposed that the regulations include 'reimbursement arrangements' as a kind of payment within the definition of 'compensation' in Section 53B. In this context, such arrangements refer to agreements, decisions of a compensation authority, or court orders that make a person liable to reimburse a compensable patient for medical expenses as they are incurred in respect of their treated injury. This is consistent with the inclusion of such arrangements in the definition of 'compensation' in the HOSCA.

It is also proposed that the regulations exclude the following kinds of payment from the definition of 'compensation' in Section 53B:

- *a payment made in the nature of a gift, or financial assistance, to a compensable patient, unless it has the effect of extinguishing (by agreement) a claim for compensation*
- *a payment made in the nature of criminal injuries compensation*
- *a payment made under the National Redress Scheme*

Submission: Support But Further Excluded Payments are Required

The ALA supports proposal 2.1 and the excluded kinds of payments from the definition of 'compensation' in Section 53B.

However as outlined above, in declined or disputed liability cases, settlements are often commercial and global, with no admission of liability and no breakdown of damages. There is no specific apportionment of allowance for medical expenses (past and future) nor is there is any specific apportionment of liability.

ALA submits that the following also needs to be included in the excluded kinds of payments from the definition of 'compensation' in Section 53B to take into account the above concerns as follows:

- *a payment made in the nature of a negligence claim against a public hospital for treatment provided.*
- *a payment made in the nature of a global settlement with no allocation or specific apportionment of allowance for past or future medical expenses*
- *a payment made in the nature of a global settlement where liability has been expressly denied by the compensation payor*
- *a payment made of \$5,000 or less (similar to Health and Other Services (Compensation) Act 1995 (Cth) Medicare provisions for an advanced payment)*
- *a payment made in the nature of superannuation disability benefits or income compensation benefits or disability benefit paid under a private insurance policy or superannuation policy*
- *a payment made in the nature of benefits paid pursuant to an industrial award or employment benefits such as extended sick leave or other employer funded benefits.*

2.2 Proposed Regulations on Requiring Information and Documents

Section 58(2)(a) allows regulations to be enacted requiring persons to give information or a document to a Health Service Provider about a treated injury.

This includes the following:

- *A Statutory Duty to Give Notice of Compensation Claims and Compensation Received*
- *A Statutory Duty to Give Notice of Finalised Compensation Claims*
- *A Power to Require Information and Documents Relating to Compensation Claims*

Submission: Do Not Support

- *A Statutory Duty to Give Notice of Compensation Claims and Compensation Received*

Of particular concern, is that the failure to report attracts strict liability and by extension will attract a fine. Unless the potential compensable patient is made aware of the need to report they are unlikely

to be aware that they need to do so and will therefore be subject to financial penalty which would be unfair and unjust.

ALA submits that the offence of strict liability and any fine is removed from the proposed regulations.

ALA submits that any statutory obligation remains only with the potential compensable patient and not their legal representative.

There are many examples where a potential compensable patient may not have the ability or will have difficulties with giving notice such as where they are:

- suffered catastrophic or serious injuries
- in a coma
- in a sedated state
- in a psychological state of distress
- on life support
- suffering loss of mental capacity to provide instructions or make decisions

ALA submits that there should be an ability with respect to circumstances where an extension of time can be granted (including on a retrospective basis) and “reasonable excuse” is defined in the proposed regulations.

The requirement for at least 28 days notice is unreasonable as there may be situations where a conference needs to be held or is listed by a Court or tribunal on short notice. If the regulations preclude this from happening, it unreasonably inhibits parties from holding urgent settlement discussions.

ALA submits that consideration be given to change to notice requirements to be within 28 days of any of the following events occurring the potentially compensable patient, or another person on their behalf, must notify any public hospital Health Service Provider of the occurrence and request “A Notice of Treatment Costs” incurred from the date of injury onwards:

- Listing of an informal settlement conference where negotiations to settle a claim will take place
- Submitting written “without prejudice” settlement submissions to a potential compensation payer/s.
- Listing of a Court or Tribunal conference including but not limited to pre-trial conference, mediation, conciliation or arbitration, where settlement negotiations may take place.

▪ *A Statutory Duty to Give Notice of Finalised Compensation Claims*

The statutory obligation with respect to giving notice of finalised compensation claims should mirror the *Health and Other Services (Compensation) Act 1995 (Cth)* where the statutory obligations falls to the compensation payer/insurer as the notifiable person and not the potential compensable patient.

ALA submits that consideration be given so that the statutory duty be imposed upon the compensation payer/insurer to provide a breakdown of settlement within 28 days of a settlement agreement being reached or final judgment being made:

- **The amount of compensation the patient is entitled to receive**
- **Whether an allocation has been made for past or future medical expenses, and the quantum of each**
- **Whether liability was apportioned in the settlement agreement or final judgement**
- **Who will pay the compensation to the patient, and in situations where there are two or more compensation payers, the amount that each is liable to pay to the patient.**

ALA submits that any statutory obligation remains only with the compensation payer/insurer and not the potential compensable patient.

▪ *A Power to Require Information and Documents Relating to Compensation Claims*

As already outlined above, in declined or disputed liability cases, settlements are often commercial and global, with no admission of liability and no breakdown of damages. There is no specific apportionment or allowance for medical expenses (past and future) nor is there any specific apportionment of liability. Also, the prescribed form of a settlement agreement in the WA workers' compensation scheme does not require medical and health expenses to be divided between past and future allowances.

The intention here is to provide sufficient information to a Health Service Provider to facilitate any negotiation required between the patient, compensation payer and Health Service Provider in respect of the amount recoverable for treatment of the patient's injury.

For many (if not all) potential compensable patients there will need to be certainty of recoverable amounts prior to engaging in settlement negotiations. .

ALA submits that the regulations should provide a clear mechanism for negotiations between the patient, compensation payer and Health Service Provider in respect of the amount recoverable for treatment of the patient's injury before settlement discussions take place not just after a settlement is reached.

ALA submits that the offence of strict liability and any fine is removed from the proposed regulations.

2.3 Proposed Regulations on Determining Treatment Costs

Section 58(2)(b) allows regulations to be enacted that permit the Chief Executive of a Health Service Provider to give notice of the charges intended to be recovered for treatment provided to a potential compensable patient for their treated injury.

This includes the following:

A Power to Notify Persons of Treatment Costs

A Power to Resolve Disputes Relating to a Notice of Treatment Costs

Submission: Do Not Support

▪ *A Power to Notify Persons of Treatment Costs*

A provision which deems the amount of the recoverable expenses to be correct if not disputed by a compensable patient within 28 days is unreasonable and too short of a timeframe.

ALA submits that the manner in which the above details may be disputed by the compensable patient, and a statement that they will be deemed correct if not disputed within 90 days (i.e. 12 weeks) of date of the notice.

It is unreasonable that the regulations will only permit the Chief Executive to issue an amended notice of treatment costs, no later than 14 days prior to a scheduled pre-trial conference as this time period is too short. This may result in insufficient time prior to a settlement or court conference to resolve a dispute leading to delayed resolution of claims, and potential cost consequences in the event of late requests to adjourn a settlement or court conferences (or other types of court events) due to the parties not having all necessary information available to settle the claim, and an overall frustration of the court processes.

Further, evidence may become available at later stages in proceedings, which affects the recoverability of treatment, and as court events, settlement conferences, conciliation conferences, mediations and the like are often organised at short notice, limiting the ability to issue amended notices of treatment costs to no later than 14 days prior to a scheduled pre-trial conference may hinder matters from resolving if accurate notices of treatment costs are unavailable at the necessary time.

ALA submits that regulations permit the Chief Executive of a Health Service provider to issue an amended notice of treatment costs, which may be given to the prescribed persons no later than 60 days (i.e. 8 weeks) prior to a scheduled pre-trial conference.

▪ *A Power to Resolve Disputes Relating to a Notice of Treatment Costs*

The proposed regulations set out that in the event of a dispute about the treatment costs, the Chief Executive of the relevant Health Service Provider must notify relevant persons of the decision as to whether the treatment in question was provided as a result of the compensable patient's treated injury also within 28 days. This is too long of a time period.

ALA submits that regulations specify that, in the event of a dispute, the Chief Executive of the relevant Health Service Provider must notify relevant persons of the decision made, in writing, within 14 days (i.e. 2 weeks) of being notified of the dispute.

It is also proposed that the regulations permit the Chief Executive of a Health Service Provider to grant an extension to the 28-day window for dispute of a notice of treatment costs. This is too long of a time period.

ALA submits that regulations permit the Chief Executive of a Health Service Provider to grant an extension to the 14 days (i.e. 2 weeks) window for dispute of a notice of treatment costs. This is too long of a time period.

The proposed process for a review of the Chief Executive's decision is unreasonable. This proposal will require the dissatisfied potential compensable patient to institute a process in the State Administrative Tribunal - a separate tribunal to where their matter is already being litigated – which will likely increase delay the resolution of their compensation claim.

Cost orders in the State Administrative Tribunal are rare, and generally parties in State Administrative Tribunal applications bear their own costs. Having to apply to the State Administrative Tribunal for a review of the Chief Executive's decision, will likely result in increased legal costs to the potential compensable patient – which are unlikely to be recovered by way of a cost order in favour of the a potential compensable patient if successful in the compensation proceedings by the compensation payor/insurer. Further, there is no clear guidelines on how long it will take for a Member of the State Administrative Tribunal for a review of the Chief Executive's decision.

ALA submits that a clear guideline of timeframes from the State Administrative Tribunal be obtained for a review of the Chief Executive's decision and the issue of legal costs involves in a successful review by a potential compensable patient payable by the Health Service Provider be addressed before any regulations are finalised.

2.4 Proposed Regulations on Recovering Treatment Costs

- *A Power to Recover Treatment Costs*
- *A Statutory Duty to Include Treatment Costs in Compensation Claims*
- *A Requirement to Accept a Lesser Amount for Treatment Costs*

Submission: Do Not Support

- *A Power to Recover Treatment Costs*

What mechanism of redress will there be if the Health Service Provider fails to produce the Notice in time and how long will Notice of Treatment Costs last for before they require renewal?

Further, there are issues which arise in the event that a Notice of Treatment Costs is not received in time and the potential compensable patient has not had the ability to seek a review or dispute the quantum or listed services in the Notice of Treatment Costs. A deeming provision is unfair and punitive in nature.

ALA submits that clear directions and guidelines be provided with respect to the above. ALA submits that there should be no deeming provision that fixes the amount of a debt payable to the Health Service Provider.

▪ *A Statutory Duty to Include Treatment Costs in Compensation Claims*

ALA submits that any statutory obligation remains only with the compensation payer/insurer and not the potential compensable patient.

ALA submits that the offence of strict liability and any fine is removed from the proposed regulations.

▪ *A Requirement to Accept a Lesser Amount for Treatment Costs*

The overall consideration should be for the Health Service Provider to facilitate any negotiation required between the patient, compensation payer and Health Service Provider in respect of the amount recoverable for treatment of the patient's injury and an agreement reached for the reasonable recovery of treatment costs.

ALA submits that a Health Service Provider is required to engage in negotiations with the potential compensation patient with respect to the amount recoverable for treatment of the patient's injury and consider the principle of "proportionately" and "risks of litigation" when considering a reduced amount for treatment costs.

For workers, compensation claims, ALA submit that the regulations ought to provide that the maximum amount a Health Service Provider can recover from any settlement cannot exceed the residual benefits provided for by the *Workers' Compensation & Injury Management Act 2023*.

For workers' compensation claims, ALA submits that the recoverable amounts for individual medical services should be limited to the maximum amounts fixed at WorkCover gazetted rates.

Thank you for the opportunity to provide a submission to this consultation. If you have any questions, please direct correspondence to the writer on 0449 881 691 or at escarff@scarfflawyers.com.au.

Yours sincerely,



Eleanor Scarff

President of the WA Branch

Australian Lawyers Alliance