

Review of the Criminal Injuries Compensation Scheme in Western Australia

To

THE OFFICE OF THE EXECUTIVE DIRECTOR
COURT & TRIBUNAL SERVICES
DEPARTMENT OF JUSTICE

Law Society Contact

MARY WOODFORD, GENERAL MANAGER ADVOCACY

Date

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The Law Society of Western Australia

Level 4, 160 St Georges Terrace, Perth WA 6000 | **Postal:** PO Box Z5345, Perth WA 6831 or DX 173 Perth
Phone: (08) 9324 8600 | **Fax:** (08) 9324 8699 | **Email:** info@lawsocietywa.asn.au | **Website:** lawsocietywa.asn.au

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1. Introduction

- 1.1 The Law Society of Western Australia (the Law Society) is the peak professional association for lawyers in Western Australia. Established in 1927, the Law Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.
- 1.2 This submission is made in response to the discussion paper 'Review of Criminal Injuries Scheme in Western Australia' (June 2018).
- 1.3 Since 2012, the Law Society has been in correspondence with the Commissioner for Victims of Crime regarding suggested reform to section 39 of the *Criminal Injuries Compensation Act 2003* (WA). The Law Society was advised that its letter of 5 September 2012 containing the proposals has been provided to the Department of Justice for consideration as part of this Review. The letter is included at Annexure A to this submission.

2. Response to Discussion Questions

The Law Society provides the following comments with respect to the discussion questions posed in the discussion paper.

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

The Law Society considers the current scheme is appropriate for victims, subject to the comments below.

2. Is the current scheme achieving outcomes for victims that: a) Are fair, equitable and timely?

The Law Society understands that the system is not timely, as it can take up to 12 months for victims to receive compensation.

b) are consistent and predictable?

Yes, the scheme is generally consistent and lawyers are able to advise their clients what the like range of compensation will be based on other cases.

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

No, particularly because of the current time delays.

The offender's right to appeal the award can also be traumatic for the victim, particularly where the appeal is frivolous or vexatious, and exposes the victim to further legal costs for their defence which are not recoverable.

Further, the Law Society understands that the OCIC does not redact the victim's personal details in the OCIC's file prior to the offender receiving a copy for the purposes of an appeal.

3. If you have answered no, to any of the questions posed in question 2, please outline how you would suggest changing the current scheme for Western Australia.

The Law Society suggests the following changes to the system:

- i. There should be a system whereby the victim's personal details are redacted from the OCIC's file before the offender can exercise their right to inspect relevant documents.
- ii. Additional Assessors should be employed at the OCIC to help combat the delays that are currently being experienced.
- iii. The withholding of some of a compensation payment for future medical expenses should be abolished, or alternatively, the time limit of ten years to use the withheld amount should be removed. Some victims may have ongoing medical costs well past the ten year mark, and others may not be able to use the amount set aside within ten years.

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

The OCIC is equivalent to the Magistrates Court, in that appeals lie to the District Court.

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?

The Law Society is of the view that Western Australia should not consider scheduled amounts for injuries. It is important that compensation is specific to the individual, as people respond and recover differently to different injuries. The standard common law principles should be applied in each case.

6. Is the current scheme efficient and sustainable for the State?

The Law Society is not in a position to comment on this 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?

The Law Society suggests an improved form of the current provision for interim awards is implemented rather than changing to a financial assistance scheme.

The current interim payment allowance of \$2,500 is too low and the Law Society is advised that the application process takes almost as long as the full application. Often the payment is received too late to be of real assistance.

It is also noted that almost half of the applications received by the OCIC are related to family and domestic violence. An improved interim payment scheme would also allow

victims of family or domestic violence to implement security measures where appropriate.

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

The Law Society is of the view that for a select few cases, the compensation/financial assistance could be determined in the pre-sentencing process rather than post sentencing, however, this would only be appropriate in circumstances where the victim's entitlements are able to be assessed at that time, and the victim agrees to that timeframe.

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?

The Law Society is not in a position to be able to provide a response to this question. However, it is noted that the feasibility of this suggestion would depend on the Magistrates' workloads and their areas of expertise.

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

Yes. This is how the system currently operates, and it should not be altered. The Law Society notes that many victims and offenders are unrepresented and may require written reasons to fully understand the decision. Written reasons are also required for an appeal. However, full reasons are not always required and a system could be implemented to allow requests for written reasons on a discrete point.

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?

The current recovery of awards system that is in place should remain. This recognises the public perception that offenders should pay for their actions. However, recovery should not be mandatory. It should only occur where practicable and where there are reasonable prospects of success. There may also be cases in which the offender should not be notified of the claim.

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

No, a victim's levy should not be implemented, particularly because in principle, responsibility for payment should lie with the offender.

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?

Yes, the Law Society would like to raise two further issues:

A. COSTS

The Law Society notes that many applicants require assistance to make a claim for compensation, and that assistance is not currently provided by the OCIC. Therefore, lawyers are often involved. Consideration should be given to either providing a dedicated help service for victims or allowing an amount for legal costs to be claimed on top of the award of compensation.

B. REFORM TO SECTION 43 OF THE ACT

Overview

Until recently, s. 42 of the Act was applied to compensation awards before the relevant cap under s. 31 was applied. However, the Law Society understands that a number of recent assessments have reinterpreted ss. 31 and 42 of the Act such that s. 42 is now applied after s. 31. As will be explained shortly, this can produce very different outcomes for two victims with similar injuries. This has the potential to create unfairness for some victims who have received compensation from other sources, which is undesirable.

Compensation awards

Part IV of the Act contains the rules to determine the quantum of a “compensation award”. The Assessor is given power to award compensation in s. 30 for an “injury” and “loss”. These terms are defined in ss. 3 & 6 of the Act and equate to non-pecuniary loss in the case of “injury” and pecuniary loss (including economic loss) in the case of “loss”. The usual common law rules as to the assessment of damages apply to an assessment of an award of compensation.

Section 42 is concerned with “double dipping”, and it provides:

(1) *In this section –*

Registered organisation *has the meaning given by the National Health Act 1953 of the Commonwealth.*

- (2) *An assessor must deduct from a compensation award in relation to any loss suffered by a victim, or a close relative of a deceased victim, any amount that the victim or close relative would, but for this Act, also be entitled to receive under a contract of insurance with a registered organisation in respect of any of that loss.*
- (3) *An assessor must deduct from a compensation award in relation to any injury or loss suffered by a victim, or a close relative of a deceased victim, any amount that the victim or close relative has received by way of compensation or damages, or under a contract of insurance, for the injury or loss.*
- (4) *If an assessor is satisfied that a victim, or a close relative of a deceased victim, who has suffered injury or loss will receive an amount by way of compensation or damages, or under a contract of insurance, for the injury or loss, the assessor may deduct the amount from a compensation award in relation to that injury or loss.*

(5) *Despite subsections (3) and (4), in the case of an application by a personal representative of a deceased victim, the amounts described in the Fatal Accidents Act 1959 section 5(2)(b) and (c) must not be deducted.*

Section 42(2) only applies to a “loss” suffered by a victim, since registered health insurers do not provide benefits for an “injury”. By contrast, sections 42(3) and 42(4) require deduction of amounts received for “injury or loss” since an award of damages, or benefits under a contract of general insurance, could cover either or both of those items.

The objects of s. 42 are made plain in the explanatory memorandum to the relevant Bill:

This clause provides that an assessor must deduct from an award any amount that a victim would be entitled to receive from health insurance for loss but for this Bill or has received or will receive under a contract of insurance for the injury or loss. The clause seeks to ensure any health and insurance entitlements are not denied due to the potential for criminal injuries compensation and prevents “double dipping”. It combines sections 24A and 26 of the 1985 Act.

It is obviously desirable that injured persons not be compensated twice for the same type of loss. However, it is also desirable that the provisions operate to consistently produce fair and equal outcomes for victims.

Interaction between section 31(1) and section 42(3)

By s. 30(1) an assessor has power to award a victim of an offence such compensation as the assessor is satisfied is just for the injury and for any loss suffered. Section 31(1) operates to put a cap on the amount of compensation that may be awarded by an assessor. Since 2003, the relevant cap has been \$75,000.00.

So, for example, if a reasonable assessment for a severely injured victim was, say \$300,000.00, s. 31(1) would limit the award to the capped amount of \$75,000.00.

The problematic interaction between the two sections arises because the Act does not specify in which order s. 31(1) and s. 42(3) are to be applied to an assessment. So, the two orders of operations are as follows:

- Assessor assesses the victim’s loss and injury, then applies the statutory cap under s. 31(1), and then following imposition of the cap, deducts any insurance paid to the victim pursuant to s. 42(3); or alternatively
- Assessor makes an assessment of the victim’s loss and injury, deducts any insurance paid pursuant to s. 42(3), then, if need be, imposes the statutory cap under s. 31(1).

The two orders of operations above can make a significant difference to whether a victim recovers anything at all under the Act. For example, two people suffer similar injuries under similar circumstances:

Victim A: is privately insured and claims her treatment costs amounting to \$25,000.00 on her private health insurer. In addition, she received \$50,000.00 income protection payments for the year off work following the injury. Her general damages were assessed at \$50,000.00.

Victim B: is uninsured, and is treated as a public patient. She suffers no economic loss, and her general damages claim is also assessed at \$50,000.00.

In this example, if s. 31(1) is applied prior to s. 42, victim A would receive nothing, and victim B \$50,000.00. The reverse order of application of those sections would result in the same award being made to each victim. The Law Society suggests that this would be the more reasonable outcome, given that both victims suffered similar injuries.

The Law Society suggests that the Department give consideration to amending the Act to clarify the order of operation of sections 31(1) and 42(3), and submits that any deductions should be made prior to the application of the cap.