LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

REPORT ON THE

INQUIRY INTO THE

CRIMINAL INJURIES COMPENSATION (AMENDMENT) BILL 1993

REPORT NO. 7

OF

THE STANDING COMMITTEE ON LEGAL AFFAIRS

October 1994

RESOLUTION OF APPOINTMENT

The following general purpose standing committees be established to inquire into and report on matters referred to it by the Assembly or matters that are considered by the committee to be of concern to the community ...

... a Standing Committee on Legal Affairs to examine matters related to administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, law reform and consumer affairs

ACT Legislative Assembly Minutes of Proceedings, (1992), No. 1, 27 March 1992, p 6

COMMITTEE MEMBERSHIP

Mr Gary Humphries MLA	Chairman
Mrs Ellnor Grassby MLA	*(from 9 August 1993)*
Mr David Lamont MLA	*(to 9 August 1993)*
Ms Helen Szuty MLA	

Secretary:	Mr Ron Owens *(to February 1993; and from June 1993 to April 1994)*
	Ms Judy Starcevich *(from March to June 1993)*
	Mr Bill Symington *(from April to June 1994)*
	Mr Rod Power *(from June 1994)*
Inquiry Secretary:	Mr Russell Keith

SUMMARY OF RECOMMENDATIONS

Recommendation 1

3.15. As the Committee is not able to support any of the provisions of the Bill except for a minor drafting detail which could easily be dealt with at another time, the Committee recommends that these unsupported provisions of the Criminal Injuries Compensation Bill 1993 not be proceeded with.

Recommendation 2

4.7. The Committee recommends that section 8 of the Act be amended to provide that where the identity of the person whose criminal conduct is alleged to have caused the injury is not disclosed in the application, the applicant be required to prove the commission of the offence to which the application relates beyond reasonable doubt.

Recommendation 3

4.10. The Committee recommends that section 9 of the Act be amended to provide that compensation is not payable if the injury occurred at a time when the applicant was—

- **committing a criminal offence;**
- **under the influence of intoxicating liquor; or**
- **unlawfully under the influence of a drug of dependence or a prohibited substance as defined by the *Drugs of Dependence Act 1988*;**

unless the claimant can prove, on the balance of probabilities, that the injury was not significantly contributed to by the person being either involved in the criminal offence or under the influence of alcohol or drugs.

Recommendation 4

4.12. The Committee recommends that section 34 of the Act be amended to provide that the Territory is a party to any proceedings before a court or the Registrar of the Supreme Court in an application for compensation.

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Recommendation 5

4.16. The Committee recommends that a new section be inserted into the Act to provide that:

- **an applicant must, if required by the Territory, submit to a medical or psychological examination;**
- **that the cost of such an examination would be borne by the Territory;**
- **that the proceedings would be stayed until the examination is complete; and**
- **that the report of the examining practitioner should be made available to the applicant.**

Recommendation 6

4.19. The Committee recommends that the Act provide for the settlement of matters between the Territory and the applicant and for the recognition of such settlements by the court.

1. BACKGROUND

Effect of the Bill

1.1. If passed by the Assembly as presented, the Criminal Injuries Compensation (Amendment) Bill 1993 would have the effect of:

- removing the definition of "criminal conduct", being "an act or omission that constitutes, or is an element of, an offence" and replacing that term with "offence" (clauses 4, 5, 6, 10, 11, 12, 13, 14, 15, 16);
- giving the court an explicit discretion to only grant compensation when it is satisfied that is just and equitable to do so (clause 7);
- causing the court to have regard, *inter alia,* to whether criminal proceedings have been instituted in relation to the offence causing the injury when considering whether to grant compensation (clause 8);
- excluding classes of injuries which are prescribed by regulation from compensation unless criminal proceedings have been instituted in relation to the offence resulting in the injury (clause 9(d));
- making the amendments in the Bill apply to any application lodged but not determined at the time of commencement (clause 17); and
- making a minor editing amendment (clause 9(a)).

Conduct of the Inquiry

1.2. The Attorney General introduced the Criminal Injuries Compensation (Amendment) Bill 1993 (the Bill) on 26 August 1993.[1]

1.3. On 9 September 1993, the Committee resolved to inquire into and report on the Bill.[2] On 8 January 1994 the Committee advertised the inquiry in the *Canberra Times* and called for submissions by 11 February 1994. The Committee received four submissions.

1.4. On 10 March 1994, the Committee held public hearings into the Criminal Injuries Compensation (Amendment) Bill 1993, the Evidence (Amendment) Bill 1993 and the Coroners (Amendment) Bill 1993.

1.5. The Attorney General wrote to the Chairman on 11 March 1994 indicating he would be willing to amend parts of the Bill in response to concerns raised with him by the Victims of Crime Assistance League. He wrote again on 18 April in response to questions raised at the public hearing.

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[1] ACT Legislative Assembly, *Minutes of Proceedings* No. 73, 26 August 1993

[2] Standing Committee on Legal Affairs, Minutes of Proceedings No. 16, 9 September 1993

1.6. On 17 August 1994 the Committee met privately with Mr Brian Slarke of the Victims of Crime Assistance League to discuss the Bill.

1.7. On 14 September 1994 the Chairman met with the Attorney General to discuss the concerns and suggestions of the Committee. In response to issues raised at the meeting, the Attorney wrote to the Chairman on 28 September 1994. A copy of that letter is at Appendix 3.

2. MAJOR ISSUES RAISED IN EVIDENCE

Requiring proof of an "offence" rather than of "criminal conduct" increases the burden of proof

2.1. The Bill removes the definition of "criminal conduct", being "an act or omission that constitutes or is an element of an offence" and replaces the term with "offence", meaning "an offence against a law in force in the Territory". It was argued that this will mean that to receive compensation an applicant will be required to prove that all the elements, rather than just some, of an offence have been committed.[3]

2.2. It was argued that this amendment will "unfairly prejudice the position of a person injured as a result of conduct where unfortunately all elements of a criminal offence cannot be proved"[4], such as occasions where it is not possible to establish criminal intent.

> *One example would be in a situation where a person who is either a police officer or civilian is chasing a person who had been involved in committing an offence. In the course of chasing that person the applicant may injure themselves. In those circumstances there is clearly no intention on the part of the assailant to cause injury to the applicant but ... it is in the public interest for those persons to be compensated.*[5]

2.3. It was also argued that the need to prove all elements of an offence would result in longer hearings and add to the cost of proceedings.[6]

2.4. The Government submitted that the amendment was proposed to close off an argument that had been put forward in an application by a Mr Ritherdon where he was accidentally struck by a child on a bicycle.[7] In that case it was argued that since it was the case that if the child had intended to strike the person she would have committed the offence of battery, the striking of the person was an element of that offence, even though the element of intent was in fact absent.

2.5. Subsequent to the presentation of the Bill, Mr Justice Higgins ruled in the Supreme Court against that argument, saying that it seemed "incongruous to describe an act which is an 'element' of an accident as being, simultaneously, an 'element' of battery." Higgins J concluded that:

> *The term "element", in other words, refers to a situation where only part of the offence or acts comprising it result in the injury complained of. It does not require the actus*

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3 Mr Richard Faulks, Sneddon Hall and Gallop, Submission No 1, pp 1–2
4 *ibid*
5 *ibid*
6 *ibid*
7 *Hansard*, 26 August p 2728 & Transcript pp 11–2

reus to be separated from any necessary intent or state of mind required to accompany the act.[8]

2.6. It is arguable that this ruling obviates the need for any amendment as the court has indicated that an " 'element' of offence must appear to be accompanied by relevant mens rea unless mens rea is absent by reason of lack of criminal capacity (s. 4)"[9].

Requiring that the Court be satisfied that compensation is just and equitable confers an inappropriate discretion on the court

2.7. It was argued in evidence before the Committee that the proposed section 7A, which requires that "[c]ompensation shall not be awarded unless the court is satisfied that it would be just and equitable to do so", "inserts a discretion which is uncertain and inappropriate"[10]. It was stated that the community needs to know in what circumstances they are entitled to receive compensation, whereas this section imposes a condition on compensation that it be paid only when the judicial officer perceives it to be just and equitable. "[Y]ou are effectively providing an opportunity for the court to refuse compensation where it feels it is appropriate to do so."[11]

2.8. Government officials informed the Committee that the courts already exercise a discretion as to what injuries are compensatable, citing an example where the court refused to compensate a mugger who had been run down by his intended victim.[12] It was also brought to the Committee's attention that the operation of the Act, even with the existing discretion, may not meet community expectations, citing a case of a man receiving a significant amount of compensation after being injured in a fight over payments for drugs where the assailant was acquitted on the grounds of self-defence.

Whether criminal proceedings have been instituted in relation to an incident is extraneous to the seriousness of the incident

2.9. The intention of the Bill was expressed in the Minister's presentation speech as being to "limit claims for compensation to deserving victims of serious crime."[13] In order to achieve this, the Government "decided that the awarding of compensation should be linked to the prosecution of offenders..."[14] It proposed to do this through the new section 8A which would require the court to have regard to whether criminal proceedings have been instituted and, if not, whether the alleged offender had been identified, whether there was an apparent intent to cause injury, and whether and when the offence was reported to the police.

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[8] Mr Justice Higgins, re Ritherdon, No. SCA 68 of 1993 pp 5 & 6
[9] Higgins, *op cit* p 1
[10] Faulks, *op cit*, p 2
[11] Mr Richard Faulks, Transcript, p 46
[12] Mr John McGuinness, Transcript, p 6
[13] Mr Terry Connolly MLA, *Hansard*, 26 August 1993, p 2728
[14] *ibid*

2.10. However, submissions and witnesses before the Committee strongly argued that the seriousness of an offence is not necessarily related to whether it is prosecuted. It was argued that if the Government wants to set some minimum standards for the seriousness of offences covered by the Act, it should use a standard directly related to the offence or injury. One suggestion was to increase the minimum payable compensation amounts. The Act currently sets a minimum of $100.

2.11. Decisions on whether to prosecute may be dependent on factors which may have no bearing on the seriousness of the offence, such as whether the offender is a juvenile, the record of the offender, and the likelihood of a conviction. The proposed amendment, in effect, could give some discretion to the police as to whether a person may be compensated for a crime and may influence the police's decision whether to prosecute a matter:

> *...such a provision discriminates against those victims of crime where, due to no fault of the victim, the assailant is unidentified and no criminal proceedings are brought. Effectively the legislature is delegating to the police a role in determining whether compensation should be payable. If the police for reasons known to them decide not to institute criminal proceedings, a victim of any criminal conduct is placed at a disadvantage under the proposed amendments.*[15]

There is no demonstrated rationale for treating certain types of injuries prejudicially other than to reduce pay-outs

2.12. Proposed paragraph 9(1)(c) of the Act removes injuries prescribed under that paragraph from the ambit of the Act unless criminal proceedings have been instituted in relation to the offence causing that injury. However, as outlined above, the seriousness of an offence is not necessarily related to whether proceedings are instituted. A serious offence may cause a prescribed injury but no proceedings might then be instituted due, for example, to lack of evidence of the identity of the offender. Under paragraph (c), such an injury could not be compensated.

2.13. The Committee received a copy of draft regulations to be made under proposed 9(1)(c) which prescribes:

> *(a) an injury sustained by a person while participating in sport as a result of an act or omission of another participant (whether or not the act or omission was within any applicable sport rules);*
>
> *(b) an inquiry arising out of the use of a bicycle, skate board, roller blades or similar recreational device; or*
>
> *(c) an injury caused by an animal.*

2.14. It was argued by ACT Sports House[16] that, in relation to injuries sustained during sport, the courts have established robust and well accepted tests for

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[15] Faulks, *op cit*, p 2

[16] Mr Greg Walker, Transcript, pp 39

determining when violence within sport is criminal, taking into account a presumed consent to a level of infringement of the rules. There is no essential difference between criminal acts on or off the sporting field and no reason to treat deliberate assault at a football game as a lesser offence than assault outside a nightclub.

2.15. In relation to dog bites, it was argued that the injuries suffered could be substantial and should be treated the same as other injuries that result from criminal conduct.[17]. The Attorney General suggested that dog bites should be compensated for under the *Dog Control Act.*[18]

Prescribing classes of injuries as not compensatable should be dealt with by act rather than by regulation

2.16. It was argued that to prescribe classes of injuries as not compensatable is to take away otherwise existing rights of people under the Act and that if the Assembly wishes to take away such rights, it should do so in the Act itself as "it is inappropriate for the Legislature to provide an open ended proscription for payment of compensation with the categories where compensation will not be payable to be at some later stage set out in regulations".[19]

> *It is essential ... that citizens know what their rights are and in what circumstances they can bring an application. That should be set out in the Act. Effectively, this Bill is leaving an open-ended capacity, through regulation making, to proscribe any type of conduct which the regulation maker may feel is inappropriate for compensation in the future.*[20]

The Act is unjustly made to apply retrospectively

2.17. Section 17 would make the amendments apply to applications lodged but not determined prior to the commencement of the Bill. It was argued that this in effect would make the Bill adversely retrospective. It could adversely affect cases where an injury was sustained years ago but because the victim is still receiving treatment, or the court has not been able to list the matter, or a witness is unavailable, the case has not been determined.

The premise that the original intention of the Act was only to compensate victims of serious violent crime is unsupported by evidence

2.18. The Government has claimed that the original intention of the Act was only to compensate victims of serious violent crime. In the presentation speech for the Bill, the Attorney General said that:

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[17] Faulks, *op cit*, p 3
[18] Connolly MLA, *Hansard*, 26 August 1993, p 2729
[19] Faulks, *op cit*, p 3
[20] Faulks, Transcript, p 47

> *The criminal injuries compensation scheme was introduced to compensate victims of violent crime. The concept underlying the legislation is that the community should accept some responsibility for assisting victims to recover from the devastating effects that assaults and other serious crimes may have on them. Unfortunately, it has become apparent that the courts have departed from the original purpose underlying the criminal injuries compensation scheme.*
>
> *...the scheme was never intended to compensate everyone who may be injured as a result of wrongdoing by another person. ... The Act recognises this already by excluding injuries arising from the use of motor vehicles.*[21]

2.19. To support that claim, the Government pointed to a minute dated 1974 to the then Commonwealth Attorney-General[22] and the recommendations of a 1980 Australian Law Reform Commission report on sentencing of federal offenders.[23] However, the Government did not provide any direct evidence other than the Act itself of the intention of the 1983 ordinance.

2.20. It is notable that no other Australian jurisdiction makes a distinction in its criminal injuries compensation legislation between serious/violent and other crimes. The strongest requirements for compensation in terms of the severity of the offence are for an imprisonable offence in Victoria and a minimum compensatable amount of $1,000 in South Australia. Western Australian legislation explicitly includes misdemeanours and simple offences.

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[21] Connolly MLA, *Hansard*, p2727 & 2728

[22] Mr Terry Connolly MLA, letter to Mr Humphries MLA dated 18 April 1994

[23] McGuinness, Transcript, p 1–2

3. CONSIDERATION OF THE BILL

"Criminal Conduct" (clauses 4, 5, 6, 10, 11, 12, 13, 14, 15, 16);

3.1. As outlined at 2.4., the Government proposed a series of the amendments to replace "criminal conduct" with "offence" in reaction to an argument by an applicant that, since intentionally inflicting an injury on another person is assault, the infliction of an injury on another, whether intentional or accidental, is an element of the offence of assault and therefore criminal conduct under the Act. However, subsequent to the introduction of the Bill, it has been ruled in the Supreme Court that such an argument does not hold.

3.2. Concerns were raised in evidence that replacing "criminal conduct" with "offence" may increase the burden of proof for the applicant as he or she will need to prove all the elements of an offence (cf 2.1. to 2.3.). As Justice Higgins' ruling required that there must be an offence for there to be an element of an offence,[24] it is arguable that the change would not alter the burden of proof. However, the ruling at the same time obviates the need for the amendment because it indicates that the feared loophole does not exist. The Committee therefore considers that, since the amendment is at best needless and at worst unnecessarily increases the burden of proof, it should not be supported.

Court's Discretion (clause 7)

3.3. The Committee agreed with the argument put forward in evidence that, as far as possible, the Act should set out the conditions under which compensation is and is not payable so that there would be more consistency in rulings and potential applicants may reasonably determine whether or not an application would be likely to be successful. It is also evident that the Court already feels at liberty to use a level of discretion. The Committee believes that the most appropriate way of dealing with dubious applications is through enacting effective legislation that clearly sets out what is and is not compensatable.

Regarding the Institution of Criminal Proceedings (clause 8)

3.4. The Committee considered that having regard to whether criminal proceedings had been instituted to determine whether an injury was compensatable was inappropriate. A number of factors may bear upon whether proceedings are commenced that have no relationship to the worthiness of a claim for compensation.

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[24] Higgins J ruled that "The term 'element', in other words, refers to a situation where only part of the offence or acts comprising it result in the injury complained of. It does not require the actus reus to be separated from any necessary intent or sate of mind required to accompany the act." *op cit*, p 6 This implies that there must be an offence for there to be an element of that offence.

Conversely, to make compensation in some way dependent on prosecution may influence how an offender is dealt with.

3.5. The Committee was also not satisfied with the premise underlying this amendment that only victims of serious crime should be compensated. The Attorney General was not able to provide any hard evidence for his claim that the original intention of the Act was to compensate only victims of serious violent crime. Further, the Committee was not, in any case, of the view that innocent victims of a less serious crime who have suffered serious injuries were less worthy of compensation than victims of more serious crimes, if in fact crimes are not measured by the seriousness of the injuries they cause.

Conditional Exclusion of Prescribed Injuries (clause 9(d) & Draft Regulations)

3.6. The comments made above in relation to clause 8 equally apply to clause 9(d).

3.7. The Committee also agreed with the view that measures which in effect take away otherwise existing rights of people should lie in the principal act rather than in regulations.

3.8. Nevertheless, the Committee considered that injuries resulting from criminal conduct sustained while participating in sport; from the use of a bicycle or small wheeled transport; or from an animal, should be compensatable under the Act.

3.9. The Committee considers that to treat criminal behaviour on the sporting field differently under the Act could convey the message that such behaviour was less criminal than assaults off the sporting field. The Committee notes that the courts have appropriate tests for what constitutes criminal behaviour on the sporting field and the application of those tests should ensure that criminal injuries compensation does not become a *de facto*, no cost, sports insurance scheme.

3.10. Similarly, the Court has indicated by its treatment of the Ritherdon case that it will not treat criminal injuries compensation as a compensation scheme for bicycle accidents.

3.11. The Committee also was not convinced that there were sufficient reasons for treating injuries sustained from the criminal conduct by the keeper of an animal less favourably than other injuries from criminal behaviour, particularly when the cost of such compensation to the community is relatively small, while the costs to the victims can be very significant.

3.12. The Committee was not satisfied that criminal injuries compensation was being abused in relation to sporting, bicycle or animal injuries and, under the circumstances, was not convinced of the need for amending the Act in relation to those specific kinds of injuries. However, the Committee notes that it is possible that some individuals may seek to be compensated for injuries that would not fall within the spirit of the Act. The Committee believes that the operation of the Act should continue to be

monitored and notes that evidence of abuse of the scheme could cause the Assembly to introduce stricter tests for compensation.

Application of the Bill (clause 17)

3.13. The Committee considers that making the amendments apply to applications lodged but not determined is to make the Bill act retrospectively in a way that disadvantages applicants. Therefore, the Committee finds such a provision unacceptable.

Minor Amendment (clause 9(a))

3.14. Clause 9(a) removes a reference to death arising out of the use of a motor vehicle. The reference is unnecessary because compensation is not payable in respect of any injury arising from the use of a motor vehicle. The Committee does not have any difficulty with that amendment.

Conclusion

3.15. As the Committee is not able to support any of the provisions of the Bill except for a minor drafting detail which could easily be dealt with at another time, the Committee recommends that these unsupported provisions of the Criminal Injuries Compensation Bill 1993 not be proceeded with.

4. SUGGESTIONS FOR REFORM

4.1. Notwithstanding the objections raised to the Bill in Chapter 3, the Committee shares the Attorney General's concern that compensation should be paid only to *bona fide* victims of crime. The Committee also notes that the Bill was introduced quickly in response to what appeared at the time to be potential loopholes in the scheme.

4.2. The Committee is concerned about the Territory paying compensation for injuries that are directly contributed to by the injured person's behaviour, particularly when that behaviour is criminal. The Committee is particularly mindful of people injured in drunken brawls and people too drunk to remember how they were injured but who believe they were assaulted.

4.3. Following discussions between the Chairman and the Attorney General about the Committee's concern and suggestions in this regard, the Attorney wrote to the Committee suggesting additional amendments to the Act. A copy of that letter is at Appendix 3.

Unknown Assailant

4.4. The Committee agrees with the suggestion that section 8 of the Act be amended to provide that where the identity of the alleged assailant or person whose criminal conduct is alleged to have caused the injury is not disclosed in the application, the applicant be required to prove the commission of the offence to which the application relates beyond reasonable doubt.

4.5. As the Attorney General notes, this provision would allow the Territory to seek another version of the applicant's claim from the alleged offender or, if such a version is unavailable, require the applicant to reach a higher standard of proof that his or her injury is properly compensatable. Such a provision would be relevant in cases where the applicant was too drunk to remember what happened or where the applicant wishes not to reveal the full circumstances of the case.

4.6. The Committee notes that under the South Australian *Criminal Injuries Compensation Act 1978*, every applicant must prove the commission of the offence beyond reasonable doubt.[25]

4.7. The Committee recommends that section 8 of the Act be amended to provide that where the identity of the person whose criminal conduct is alleged to have caused the injury is not disclosed in the application, the applicant be required to prove the commission of the offence to which the application relates beyond reasonable doubt.

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[25] Section 8, *Criminal Injuries Compensation Act 1978*, South Australia

Intoxicated Claimant or Claimant Committing a Criminal Offence

4.8. The Committee agrees with the suggestion that section 9 of the Act be amended to provide that compensation is not payable if the injury occurred at a time when the applicant was—

- committing a criminal offence;
- under the influence of intoxicating liquor; or
- unlawfully under the influence of a drug of dependence or a prohibited substance as defined by the *Drugs of Dependence Act 1988*;

unless the claimant can prove, on the balance of probabilities, that the injury was not the result of the person being either involved in the criminal offence or under the influence of alcohol or drugs. However, the Committee suggests that the words "the result of" be replaced with "significantly contributed to by".

4.9. This provision, while not removing the right of a person committing an offence or intoxicated to seek compensation for a prescribed injury, would make any such injury not compensatable if the injured person significantly contributed to their own injury through either committing an offence or being intoxicated. Once it was established that the injured person was committing an offence or "under the influence", the burden of proving, on the balance of probabilities, that his or her own offence or intoxication were not contributory would fall on the applicant.

4.10. The Committee recommends that section 9 of the Act be amended to provide that compensation is not payable if the injury occurred at a time when the applicant was—

- **committing a criminal offence;**
- **under the influence of intoxicating liquor; or**
- **unlawfully under the influence of a drug of dependence or a prohibited substance as defined by the *Drugs of Dependence Act 1988*;**

unless the claimant can prove, on the balance of probabilities, that the injury was not significantly contributed to by the person being either involved in the criminal offence or under the influence of alcohol or drugs.

Territory's Right of Appeal from Magistrates Court Decision

4.11. The Committee agrees with the suggestion that section 34 of the Act be amended to provide that the Territory is a party to any proceedings before a court or the Registrar of the Supreme Court in an application for compensation in order to give the Territory the same rights of appeal as an applicant from an unsatisfactory decision.

4.12. The Committee recommends that section 34 of the Act be amended to provide that the Territory is a party to any proceedings before a court or the Registrar of the Supreme Court in an application for compensation.

Territory's Right to a Medical Examination of a Claimant

4.13. The Committee agrees with the suggestion that a new section be inserted to provide that:

- an applicant must, if required by the Territory, submit to a medical (or psychological) examination;
- that the cost of such an examination would be borne by the Territory;
- that the proceedings would be stayed until the examination is complete; and
- that the report of the examining practitioner should be made available to the applicant.

4.14. The Committee considers that the present situation whereby the Territory does not have a right to obtain a medical examination of a person claiming compensation militates against the proper consideration of applications by the court and leaves the scheme open to abuse.

4.15. The Committee notes that similar provisions exist in South Australia[26], New South Wales[27], and Queensland.[28]

4.16. The Committee recommends that a new section be inserted into the Act to provide that:

- **an applicant must, if required by the Territory, submit to a medical or psychological examination;**
- **that the cost of such an examination would be borne by the Territory;**
- **that the proceedings would be stayed until the examination is complete; and**
- **that the report of the examining practitioner should be made available to the applicant.**

Sports Injuries

4.17. As outlined at 3.9., the Committee does not support special treatment of sporting injuries under the Act as injuries that are found to be caused by conduct that is criminal should be compensated.

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[26] Section 7a, *Criminal Injuries Compensation Act 1978*, South Australia

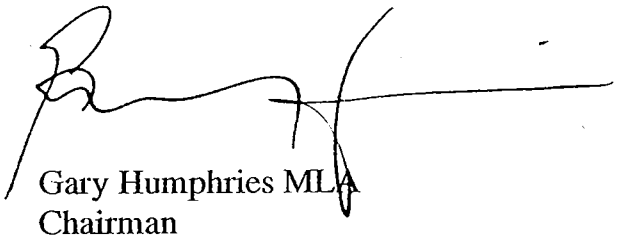
[27] Section 18A, *Victims Compensation Act 1987*, New South Wales

[28] Queensland does not have a criminal injuries compensation scheme but sections 663C, D & E of its *Criminal Code Act 1899* provide for *ex gratia* payments to victims of crime. The Code provides for the Minister requesting a medical examination.

Other Matters

4.18. The Committee supports the suggestion that the Act provide for the settlement of matters between the Territory and the applicant and for the recognition of such settlements by the Court.

4.19. The Committee recommends that the Act provide for the settlement of matters between the Territory and the applicant and for the recognition of such settlements by the court.



Gary Humphries MLA
Chairman
12 October 1994

Standing Committee on Legal Affairs
Inquiry into the Criminal Injuries Compensation Scheme
Additional Comments from Ellnor Grassby MLA

The Attorney General, Mr Terry Connolly MLA, indicated in his presentation speech that the prime rationale for the *Criminal Injuries Compensation Act* and thus the Criminal Injuries Compensation Scheme (CICS) was to compensate victims of violent crime. It was never intended under the legislation for the Scheme to act as a general government slush fund for victims of accidents or negligence or any other injury which may be sustained in a manner where another party's conduct was bordering on criminal behaviour.

It appears that other members of the Committee are not as committed as the Government to amending the principal act in order to place some legislative ceiling on the volume of payouts under the CICS. I share completely the view of the Minister that payments under the Scheme must be limited to, and targeted at, victims of violent crime. If this is not done, the cost of the scheme will become so burdensome that it will be a major drain on recurrent expenditure (Legal Services Sub-Program 12.2). The table below clearly shows the burgeoning cost of the Scheme and projections for the next four financial years.

Year	Payments	Cost/house	% Increase
Actual Costs			
91/92	$1,205,444	$12.26	
92/93	$1,917,899	$18.75	52.96%
93/94	$3,054,571	$28.88	54.03%
Projected Costs			
94/95	$4,704,039	$43.01	54.00%
95/96	$7,244,221	$64.12	54.00%
96/97	$11,156,100	$95.69	54.00%
97/98	$17,180,394	$142.96	54.00%

It is quite concerning to me as a member of this Assembly and of the Government at the fact that a component of government expenditure is growing at over 50 percent per annum. If the growth in expenditure continues unchecked at its current pace, by the financial year 1997-98, three years out, expenditure under the scheme will be over $17 million. This equates to an increase from $12 per ACT household in 1991-92, to over $140 per ACT household during the 1997-98 financial year.

There are three areas in particular that have been brought to my attention during this inquiry where I believe public funds should not have been expended. It is already a fact that the ratepayer has become the insurer of the last resort and unless costs can be contained, they will continue to do so. Payments to persons involved in incidences where they are at, or leaving taverns, hotels and clubs generally should not be picked up by the taxpayer. Evidence presented to the Select Committee on Drugs indicated that more onus should be placed on the proprietors of these establishments to minimise drunkenness and public disorder.

In the United States, there are many documented cases where patrons have sued bars that allowed them to become drunk where they have subsequently gone on to injure themselves. This has caused (/resulted in) a number of US states to pass laws on these matters. I believe that businesses which sell liquor should be made more accountable for the actions of their patrons and congratulate the Attorney General for his initiative of a Safer Civic Code of Practice in this regard. Unless proprietors take more pro-active measures in this area, then the Government should consider moves to either make proprietors legally accountable or to take out a form of public liability insurance to meet the cost of any claims.

Where injuries occur at work or are sustained during sport, the costs yet again should not be borne by the taxpayer. The employer, or in the case of sport, a more comprehensive insurance scheme, should be funding any costs. Employers and sporting organisations are in the best position to minimise costs in these areas through their own actions. If they need legislative backing for their initiatives or other support from the Government, they could then negotiate this with the Government.

During the inquiry process, two of the primary witnesses were the Law Society and ACT Sport. They capably put forward a coherent case for maintaining the status quo and protecting the rights of their members to utilise the current system. However, governments and parliaments must ultimately make choices about the extent of expenditure of public money and what limits are to be placed on it so that ratepayers ultimately do not face spiralling tax bills. In this sense, responsibility in the expenditure of public money takes a higher priority over legislative purity.

The Attorney General's proposed bill will ensure that compensation will only be paid in situations where criminal conduct does occur and where it is just and equitable to do so.

Ellnor Grassby MLA
12 October 1994

APPENDIX 1: SUBMISSIONS

Mr Richard Faulks	Sneddon Hall & Gallop
Mr Tony Naar	ACT Sports House Inc. (ACTSPORT)
Mr John McGuinness	ACT Attorney General's Department
Mr Greg Walker	Crossin Barker Gosling (on behalf of ACT Sports House Inc.)

APPENDIX 2: PUBLIC HEARINGS

ACT Attorney General's Department	Mr John McGinness Mr Tiru Vallal Mr Chris Dalton Ms Caroline Donovan Mr Phil Thompson
ACT Sports House Inc.	Mr Jim Roberts Mr Greg Walker
Sneddon Hall & Gallop	Mr Richard Faulks

APPENDIX 3: LETTER FROM THE ATTORNEY GENERAL

Letter Office from Gov at mtg on 29/9/94

Government of the Australian Capital Territory

Terry Connolly MLA

ATTORNEY GENERAL

GPO Box 1020
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☎ (06) 2050011
Fax (06) 2050495

Mr Gary Humphries MLA
Chairman
Legislative Assembly Standing
Committee on Legal Affairs
Legislative Assembly for the ACT
London Circuit
CANBERRA ACT 2601

Dear Mr ~~Humphries~~ Gary

I refer to our meeting of 14 September regarding proposed amendments to the *Criminal Injuries Compensation Act 1983.*

I have had my officers examine your proposals for further amendments to the Act, beyond those which I introduced last year and also your comments regarding those amendments and offer the following suggestions for the consideration of the Legal Affairs Committee.

UNKNOWN ASSAILANT

I suggest that section 8 be amended to provide that where the identity of the alleged assailant or person whose criminal conduct (to be "who committed the offence" under the amendments already introduced) is alleged to have caused the injury is not disclosed in the application then the applicant be required to prove the commission of the offence to which the application relates beyond reasonable doubt (note this is not that the applicant has to prove the identity of the assailant to this standard, rather that the injury in the case of an unknown assailant is a "prescribed injury" - that is caused by the commission of an offence by another person). The advantage of this amendment would be to allow the Territory to seek another version of the applicant's claim from the alleged offender and if such a version is unavailable require the applicant to reach a higher standard of proof that his or her injury is properly compensable.

INTOXICATED CLAIMANT OR CLAIMANT COMMITTING A CRIMINAL OFFENCE

I suggest that section 9 be further amended to provide that compensation is not payable if the injury occurred at a time when the applicant was

- committing a criminal offence
- under the influence of intoxicating liquor
- unlawfully under the influence of a drug of dependence or a prohibited substance (see *Drugs of Dependence Act 1988*)

unless the claimant can prove, on the balance of probabilities, that the injury was not the result of the person being either involved in the criminal offence or under the influence of alcohol or drugs.

This is a familiar requirement in relation to statutory defences in that it is on the defendant to establish exculpatory circumstances on the balance of probabilities - it is a common formulation in respect of defences to offences of strict liability and is justifiable in this context if we start from the point that people in this category should not prima facie recover unless they can show why they should.

TERRITORY'S RIGHT OF APPEAL FROM MAGISTRATES COURT DECISION

If section 34 is amended to provide that the Territory is a party (as opposed to only having a right of appearance) to any proceedings before a court or the Registrar of the Supreme Court in an application for compensation, then as a party the Territory will have the same rights of appeal as an applicant from an unsatisfactory decision.

TERRITORY'S RIGHT TO A MEDICAL EXAMINATION OF CLAIMANT

We agreed that the Territory should be able to require an applicant to undergo a medical examination. This will require that a new section be inserted to provide that an applicant must, if required by the Territory:

- submit to a medical (or psychological) examination;
- that the cost will be borne by the Territory;
- that the proceedings will be stayed until the examination is complete;
- the report of the examining practitioner should be made available to the applicant.

(see section 7 South Australian CIC Act).

SPORTS INJURIES

We discussed various methods for ensuring that deliberate injuries should still be compensable if suffered in a sporting event. In my view the most appropriate way to do this would be to amend draft regulation 4 by providing that there is an exception to the sports injuries exclusion where the assailant meant to cause the injury (ie. not meant to do the act but meant to cause the person the injury suffered - this would be proved, as per the usual standard, on the balance of probabilities). The suggested formulation for the sports injuries exclusion is:

> " an injury sustained while participating in sport or a game as a result of an act or omission of another participant (whether or not the act or omission was within the rules applicable to the sport or game), ***not being an act or omission intended to cause the injury***"

It needs to be remembered that if charges are laid by the DPP then the sports injuries exclusion is not operative and the injury is compensable provided causation is established.

DOG BITES

We agreed that "injury caused by an animal" be removed from draft regulation 4.

OTHER SUGGESTIONS

The Government Solicitors Office has asked for an amendment to authorise the Territory to settle matters with the applicant and have that settlement recognised by the Court (this is already occurring informally). Such a provision will promote certainty for both the applicant and the Territory and help reduce legal costs for the applicant by avoiding the need for a hearing where agreement between the parties can be reached.

You will note that I have ommitted your suggestion that compensation not be payable where the applicant "deliberately or recklessly, placed him/herself in the position where the .... injury was likely to occur". On reflection I would be concerned that this might be construed as "blaming the victim" for the injury (for example critics could suggest that a woman who accepts a ride home from a stranger and was sexually assaulted placed herself in the relevant situation, similarly a victim of domestic violence remaining in a residence with an offender after having been assaulted, thereby risking further assaults or a protester who joins a demonstration where it could be anticipated that feelings would run high and might result in some violence). I believe that the amendments relating to intoxicated or criminal offender applicants will deal adequately with the majority of situations where persons have precipitated their own injuries to such an extent as to be undeserving of compensation. Also, I believe that stating the specific cases where the conduct of the applicant would exclude compensation better meets your concern that potential applicants and practitioners should be able to ascertain their right to compensation from the face of the legislation.

I look forward to receiving the Committee's report and hope that we might be able to finalise and deal with the necessary and agreed amendments before the Assembly rises.

Yours sincerely

Terry Connolly

28 SEP 1994