



**LEGISLATIVE ASSEMBLY**  
FOR THE AUSTRALIAN CAPITAL TERRITORY

---

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SERVICES  
Ms Elizabeth Lee MLA (Chair), Ms Bec Cody MLA (Deputy Chair)  
Mr Michael Pettersson MLA

## Submission Cover Sheet

Inquiry into Motor Accident Injuries Bill 2018—Exposure Draft and Guide to the  
Motor Accident Injuries Bill 2018 Exposure Draft

**Submission Number:** 58

**Date Authorised for Publication:** 26 October 2018

Submission: Bill Browne

# Submission to the Inquiry into Motor Accident Injuries Bill 2018 (Bill Browne)

Dear Standing Committee on Justice and Community Safety,

Thank you for the opportunity to make a submission to the inquiry.

My submission follows. Please contact me if you have any questions or would like me to elaborate on any area.

Regards,

Bill Browne

[REDACTED]

Submission: Bill Browne

## Introduction

I am one of 39 jurors who participated in the Citizens' Jury on Compulsory Third Party insurance, and a co-author of the Minority Report that expressed the concern of several jurors that the model chosen by the Citizens' Jury, Model D, has significant flaws that could harm people living and working in Canberra.

Since the Citizens' Jury concluded, I've remained involved in the process, including by attending the September briefing on the policy that will be put to the Legislative Assembly.

It is this continued involvement that has convinced me that the Committee inquiry, and the Legislative Assembly as a whole, represent the last chance to address significant flaws in the proposed new motor accident injuries scheme.

Problems with how the Citizens' Jury was conducted, and its limitations for achieving public policy outcomes, have been identified by stakeholders,<sup>1</sup> academic Professor Ron Levy,<sup>2</sup> journalist Crispin Hull<sup>3</sup> and my fellow jurors.<sup>4</sup>

For my submission, I am not going to criticise the process. I think the decision to use a Citizens' Jury to determine a public policy issue was a brave and bold one, although it was not conducted perfectly. This submission identifies issues that I think the Committee should consider that I believe do not undermine the final decision of the Citizens' Jury.

---

<sup>1</sup> See for example Sarah Avery (2018) "Law Society urges all Canberrans to speak out against reduction in CTP benefits", <https://www.actlawsociety.asn.au/news/law-society-urges-all-canberrans-to-speak-out-against-reduction-in-ctp-benefits> and Ken Archer (2018) "ACT Bar Bulletin ~ May 2018 Edition"

<sup>2</sup> Ron Levy (2018) "Review supports ACT Citizens' Juries, but with changes", <https://law.anu.edu.au/news-and-events/news/review-supports-act-citizens%20%99-juries-changes>

<sup>3</sup> Crispin Hull (2018) "Citizens' jury? Small wonder people have little faith in the system", *Canberra Times*, <https://www.smh.com.au/money/insurance/citizens-jury-small-wonder-people-have-little-faith-in-the-system-20180517-p4zfu1.html>

<sup>4</sup> Elise Scott (2018) "Canberra third-party insurance jury 'corrupted and misleading', participant says", *ABC News*, <https://www.abc.net.au/news/2018-04-10/canberra-third-party-insurance-jury-corrupted-juror-claims/9635198>

Submission: Bill Browne

## Summary

I am deeply concerned that the new motor accident injuries scheme expands the pool of people eligible for compensation by two-thirds while cutting overall compensation by 20%, and cutting compensation for victims of negligent motorists by 49%.

That amounts to \$16 million less compensation paid in the ACT each year. The legislation does not address these concerns.

The models available to the Citizens' Jury were either high in compensation but with low defined benefits or low in compensation but with high defined benefits. The jury never had the chance to consider a model high in compensation and with high defined benefits, but it is my belief that such a model is best for Canberrans.

In addition, the lack of a cap on insurer profits in the legislation means that the (small) efficiency gains promised by the proposed scheme may not eventuate; the proposed scheme could even end up more wasteful than the status quo.

Some classes of road users – particularly passengers, cyclists and pedestrians – are liable to lose millions of dollars in compensation each year. Legislators should know exactly how much these groups will lose before voting for the proposed scheme.

Given this, I have five recommendations for the Committee:

1. The Committee should investigate ways of making more compensation available, with an aim of keeping the total compensation paid roughly the same under the proposed scheme as it is under the status quo.
2. The Committee should recommend a cap on insurer profits of 8%, or require insurers to table documents proving that such a cap is too low.
3. The Committee should require EY to include in its new modelling how many millions of dollars of compensation it expects each class of road user to receive under the proposed scheme, and how that compares to the status quo.
4. The Committee should request that the public service redo its public resources with an eye to fairly presenting the benefits and costs of the existing scheme and the benefits and costs of the proposed scheme.
5. The Committee should recommend that the legislation be amended to guarantee that gratuitous care is compensated.

Submission: Bill Browne

## Concerns raised in the Minority Report

I want first to reproduce the main concerns (as I see them) identified in the Minority Report that I contributed to. Having followed the policy process since the Citizens' Jury concluded over six months ago, I do not believe that these concerns have been satisfactorily addressed.

1. The chosen model reduces compensation in the ACT by \$16 million per year (20%) while expanding people covered by two-thirds. Compensation will be spread too thinly.
2. It will reduce compensation for not at-fault victims by
  - a. 80% for loss of quality of life,
  - b. 31% for loss of earnings,
  - c. 17% for private medical costs,
  - d. 6% for public hospital costs and
  - e. 26% for care,
  - f. for an overall loss of compensation of 49% (EY report, Appendix B)
3. Extremely limiting access to common law reduces one's ability to contest rulings that may be unfair, including for people with serious injuries just under the threshold.
4. Removing compensation for gratuitous care undervalues carers.
5. Three concerns about Whole Person Impairment were expressed:
  - a. The process could be unfair
  - b. WPI is intrinsically inappropriate for determining compensation
  - c. The Jury was not given enough information to make an informed decision.

Submission: Bill Browne

Reducing lost compensation while keeping defined benefits high  
All throughout the Citizens' Jury, the majority of jurors strongly emphasised that the current fault-based compensation system seems unfair, inefficient or even arbitrary.

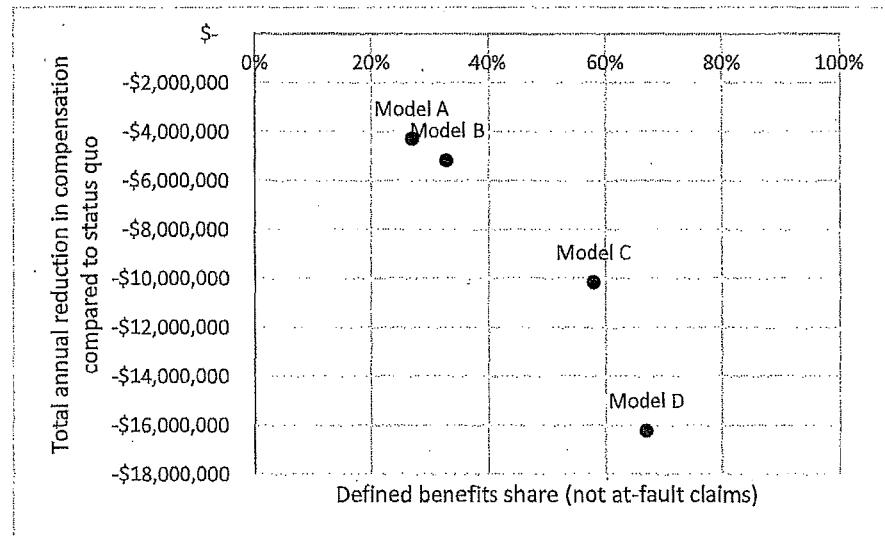
It is not surprising that the Citizens' Jury subsequently chose the model with the highest defined benefits for those injured in motor vehicle accidents, regardless of fault.

However, because only four models were presented to the jury, we could only ever choose between models with high compensation but low defined benefits and models with low compensation but high defined benefits.

The jury was not given the opportunity to consider a model that introduced a high level of defined benefits while also keeping overall compensation roughly in line with what it is now. If such a model had been presented to us, I know I would have enthusiastically supported it – and I suspect others would have as well.

This is illustrated in the chart below, which shows each model by how much it reduces compensation and what share of compensation would be in the form of defined benefits.

*Figure 1: The four models included no option for a high-compensation, high defined benefits scheme*



*A full explanation of my calculations is in the appendix.*

As you can see, if the Citizens' Jury wanted a high degree of defined benefits (above the 33% of Model B), its only options were schemes that sharply cut the amount of compensation paid.

Model D cuts compensation by 20% relative to the status quo (which works out to \$16 million per year less compensation in Canberra),<sup>5</sup> and cuts compensation for victims of negligent drivers by 49%.

The Jury saw no evidence to support the idea that victims of negligent drivers could afford to lose half of their compensation.

<sup>5</sup> The calculation – which was checked before publication – appears in the Minority Report. It can also be calculated manually from: EY (2018) “Estimated costs of alternative benefit designs for the ACT’s Compulsory Third Party (CTP) Insurance Scheme”, Appendix B – where the per-premium figures will have to be multiplied by the number of cars in the ACT (~250,00).

Submission: Bill Browne

I hope that seeing this will convince the Committee to keep the Citizens' Jury's preference of high defined benefits but to find some way of avoiding this steep loss in compensation.

- Lowering the Whole Person Impairment threshold for access to common law would increase access to justice for many victims of negligent motorists. 10% Whole Person Impairment is an extremely punitive measure.
- Alternatively, the Committee could recommend a switch to the Injury Scale Value threshold used in Model A or B
- Alternatively or additionally, the Committee could recommend a narrative test to add a qualitative element to the assessment. In a model that has been used elsewhere in Australia, people who fail the Whole Person Impairment threshold can still access common law by explaining the particularly circumstances of how they are affected by the injuries resulting from their motor vehicle accident.

**Recommendation:** The Committee should investigate ways of making more compensation available, with an aim of keeping the total compensation paid roughly the same under the proposed scheme as it is under the status quo.

Submission: Bill Browne

## Undervaluing care

At this point it is well documented that carer and domestic work – sometimes stereotyped as “women’s work” – is undervalued in the economy and, unfortunately, sometimes in our society as well.<sup>6</sup>

Fortunately, there have been recent changes worldwide and in Australia to better value carer and domestic work.

In this regard, the proposed scheme is a backwards step because it only compensates paid care. Under the status quo, claimants also receive compensation for “gratuitous care” – in other words, the care that a relative or friend provides for free.

Anyone who has been cared for by a loved one after an injury can attest to two things:

1. The care is often better quality or at least better targeted, since it is provided by someone who loves you and knows you well – often someone who already lives with you (so it can also be more convenient, flexible and urgent)
2. The care is “free” in the sense that it is not paid for, but it takes a toll on the person providing it – and often it costs the carer financially (for example if they take time off work, or if they have to hire someone to do other tasks that they used to have time to do)

The jury saw no evidence that gratuitous care was unnecessary or should not be compensated.

The new CTP scheme only provides compensation for paid care. This will leave the hard work of “free” care provided by loved ones uncompensated.

Recommendation: The Committee should recommend that the legislation be amended to guarantee that gratuitous care is compensated.

---

<sup>6</sup> See for example LJB Hayes (2017) *Stories of care: A labour of law*; Madeleine Bunting (2016) “Who cares: the emotional labour of an undervalued, underpaid workforce”, *The Guardian*; Anne-Marie Slaughter (2016) “The Work That Makes Work Possible”, *The Atlantic*

## Capping insurer profits

The Citizens' Jury's choice of Model D is the most efficient of the four models that we could choose between, with a difference of one percentage point between Models B and C, and two percentage points with the status quo.

However, that efficiency depends on insurer profits dropping from \$42 per premium under the status quo to \$30 per premium under the proposed scheme.<sup>7</sup>

This suggests that insurers – out of naivety or generosity – supported a model that will reduce their profits by 29% – or \$3 million per year. I think it is more likely that insurers do *not* expect their profits to go down, or they would not have supported this model in the first place.

If insurer profits remain the same at \$42 per premium, the proposed scheme will only have an efficiency of 55%, making it the equal-least efficient scheme, and less efficient than the status quo.

The only way to guarantee that the proposed scheme is more efficient than the old scheme is to place a cap on insurer profits, like the one that NSW recently introduced after long-term insurer profits averaged 19% per year (being much higher in some years).<sup>8</sup> ACT's insurers does not report what their final profits are, but an insurer promised me that they are not as high as 19%.

The jury saw no evidence that insurer profits needed to be higher in the ACT than they are in NSW, where they are capped at 8%.<sup>9</sup>

I have heard the arguments from regulators and insurers that such a cap should not be imposed at the same time that a proposed scheme is introduced, and I find them unconvincing.

Argument 1: The scheme should be allowed to settle for a few years before it is known what level profits should be capped at.

NSW imposed its cap at the same time as it passed its reforms, so it is clearly possible to do so.

If the Legislative Assembly is truly concerned, it can always legislate for a high initial cap that automatically lowers each year. If after a few years it is clear that insurer profits are too low, the insurers can make their case to the Assembly to have the Act amended.

Argument 2: Because motor vehicle claims often take years to arise and be resolved, it's not known for years what share of premiums in any given year will go to profits. Firstly, the insurers argued forcefully for Model D on the grounds that claims would be resolved quicker and more predictably, so the scheme should be more predictable than the status quo.

Secondly, NSW has imposed a cap without these problems emerging.

Thirdly, profit caps could be imposed in such a way to address this problem. Surplus funds for each year could be placed in a separate account which can be used for compensation but not for insurer

---

<sup>7</sup>. EY (2018) "Estimated costs of alternative benefit designs for the ACT's Compulsory Third Party (CTP) Insurance Scheme", p 23

<sup>8</sup> Esther Han (2016) "Baird government's plan to axe green slip insurers' 'super profits' amid reforms", *Sydney Morning Herald*, <https://www.smh.com.au/business/consumer-affairs/baird-governments-plan-to-axe-green-slip-insurers-super-profits-amid-reforms-20161103-gsgvyr.html>

<sup>9</sup> Lucy McNally (2017) "Green slip cost reduced by NSW with insurance profits on compulsory car insurance capped", *ABC News*, <https://www.abc.net.au/news/2017-03-07/green-slip-changes-with-consumers-to-pay-less/8331764>

Submission: Bill Browne

profits. The funds could remain there as long as they are needed to potentially pay for outstanding claims.

Argument 3: We can collect information for years and then decide what an appropriate profit level is

The insurers called for sweeping changes to the ACT's CTP scheme while refusing to disclose relevant data to the public (e.g. on the prevalence of fraud, their long-term profits, causes of delays, etc), including on the grounds that the information is "commercial in confidence" – even though the insurers in the ACT are a duopoly, meaning that each must already have excellent information about their sole competitor.

If insurers think that the NSW cap on profits of 8% is too high for the ACT, they should release past data to prove it.

Recommendation: The Committee should recommend a cap on insurer profits of 8%, or require insurers to table documents proving that such a cap is too low.

Submission: Bill Browne

### Effect on different classes of people

Pedestrians, passengers and cyclists are likely to be big losers from the proposed scheme because they are all more likely to be not at-fault than at-fault, and compensation to those not at-fault is being reduced by 49%.

I have done some *rough* calculations that suggest that Canberra cyclists will lose about \$5 million per year in compensation under the proposed scheme versus the status quo. I've gone through the maths in more detail in the appendix.

The Legislative Assembly should not depend on my rough calculations.

Figures on how much each group – motorcyclists, drivers, passengers, pedestrians and cyclists – stands to gain or lose from the proposed scheme *should* have been part of the calculations done by EY for the Citizens' Jury.

The absence of this information means that the jury never got a chance to see how their decision would affect the different groups of people who use Canberra's roads.

However, with EY returning to re-do their modelling before the Bill is debated in the Legislative Assembly, this is the opportunity to provide this information.

**Recommendation:** The Committee should require EY to include in its new modelling how many millions of dollars of compensation it expects each class of road user to receive under the proposed scheme, and how that compares to the status quo.

## Concerns with the presentation of information

During the jury process, concerns were raised by stakeholders and jurors about the quality and integrity of information provided to us by stakeholders and public servants.

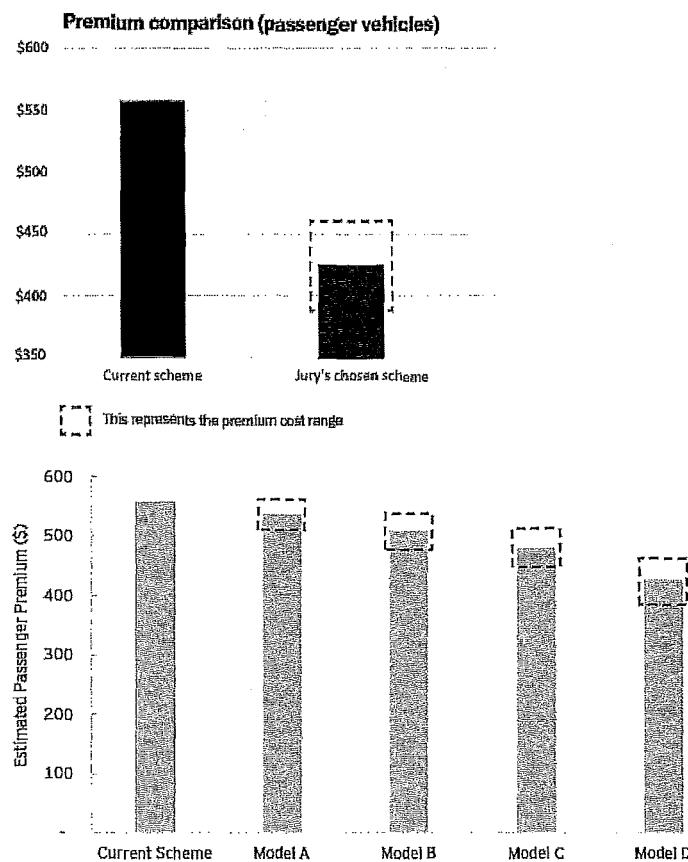
I am also concerned by some materials that have been produced after the Citizens' Jury process concluded, for example the "Summary of chosen scheme" provided on the ACT Your Say website. This website is meant to involve the public in decision making, so it is particularly important that the information on it is as clear and balanced as possible.

### Cut-off bar chart

In the Your Say documents, the bar chart showing how much lower premiums are under the chosen scheme versus the status quo begins at \$350, not \$0, making the current scheme look about 150% more expensive; it is in fact 29% more expensive.

In the original EY report that serves as the source for the Your Say chart, the chart does start from \$0,<sup>10</sup> so the information was originally presented in a way that made it less likely to be misinterpreted.

Figure 2: Chart as it appears on Your Say versus how the information was originally presented by EY



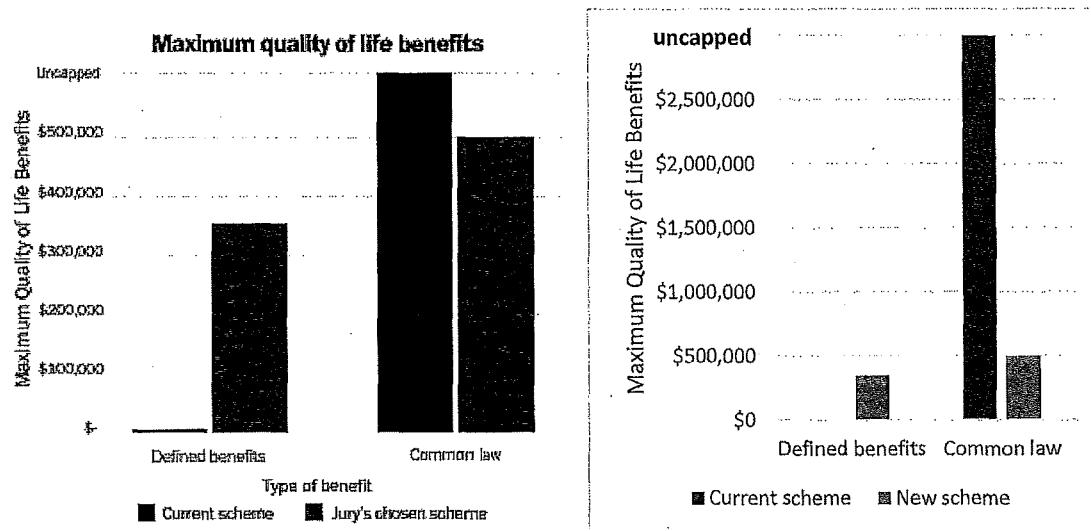
<sup>10</sup> See EY (2018) "Estimated costs of alternative benefit designs for the ACT's Compulsory Third Party (CTP) Insurance Scheme", p 15

Submission: Bill Browne

Depicting “uncapped” compensation as only 20% higher than capped compensation An egregious distortion is the “Maximum quality of life benefits” chart, which shows that the chosen scheme is capped at “\$500,000” while the status quo appears to be capped at \$600,000 when it is in fact uncapped. This gives the impression that there is only a small loss of benefits from the proposed scheme.

Since there have been some claims worth more than \$3 million in the ACT in recent years,<sup>11</sup> the “uncapped” value should have been much higher. Not all of that \$3 million would have been the quality of life benefit component, but a large portion of it would have been – and, because the compensation is uncapped, the payments could be potentially even higher.

*Figure 3: Chart as it appears in the official documentation versus how it might be presented to reflect the “uncapped” nature of the status quo*



The Your Say website is supposed to invite commentary and reflection from the public. To make informed decisions, the public need resources that do not favour or appear to favour the government’s preferred scheme.

**Recommendation:** The Committee should request that the public service redo its public resources with an eye to fairly presenting the benefits and costs of the existing scheme and the benefits and costs of the proposed scheme.

<sup>11</sup> Daniel Burdon (2017) “Multi-million dollar insurance claims send ACT’s CTP payments over \$100 million”, *The Canberra Times*, <https://www.canberratimes.com.au/national/act/multimillion-dollar-insurance-claims-send-acts-ctp-payments-over-100-million-20171031-gzbi64.html>

## Appendix: Explanation of my calculations

Lost compensation relative to status quo

To calculate the total annual reduction in compensation by model compared to the status quo, I used the document that EY prepared for the Citizens' Jury.<sup>12</sup>

I took the total premium cost for each of Models A–D and multiplied it by the estimated scheme efficiency for that model. I did the same thing for the status quo, which was also modelled by EY.

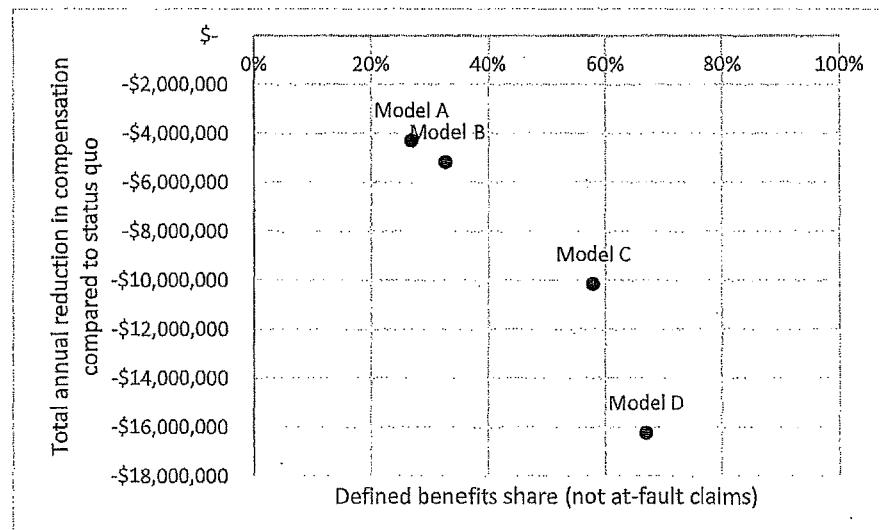
This told me how many dollars per premium would go to compensation under each model, so I subtracted the amount of compensation paid under the status quo to get the difference.

I multiplied the gap for each scheme by 250,000 (roughly the number of cars, and therefore premiums, in the ACT) to get the annual total difference in compensation per scheme.

*Figure 4: Calculations*

	Premium	Scheme efficiency	Compensation per premium	Difference from status quo	Compensation vs status quo (ACT, per year)
<b>Status quo</b>	\$556	56%	\$311	N/A	N/A
<b>Model A</b>	\$535	55%	\$294	-\$17	-\$4,277,500
<b>Model B</b>	\$510	57%	\$291	-\$21	-\$5,165,000
<b>Model C</b>	\$475	57%	\$271	-\$41	-\$10,152,500
<b>Model D</b>	\$425	58%	\$247	-\$65	-\$16,215,000

*Figure 5: The relevant chart*



<sup>12</sup> EY (2018) "Estimated costs of alternative benefit designs for the ACT's Compulsory Third Party (CTP) Insurance Scheme", p 17, 65, 66, <https://yoursay.act.gov.au/ctp>

Submission: Bill Browne

Effect on a class of people (cyclists)

The proposed scheme dramatically reduces compensation to those not at-fault in a motor vehicle accident, with the savings going to reduced premiums and to compensate those at-fault in a motor vehicle accident.

This means that every class of road user will receive less compensation under the proposed scheme than they do under the status quo unless they are significantly more likely to be at fault than the average road user. This may be the case for motorcyclists, as they are “up to 10 times more” likely to be at-fault than not at-fault,<sup>13</sup> but is unlikely to be the case for any other class of road user.

For my rough calculations that cyclists stand to lose \$5 million in compensation each year, I used the following statistics:

- According to the Victorian State Trauma Registry and the National Coronial Information System, in 2015 cyclists were 141 of 1,215 traffic-related deaths and major injuries in Victoria, or 11.6%.<sup>14</sup>
- According to research from the University of Adelaide’s Centre for Automotive Safety Research, drivers are at-fault in 79% of cases involving cyclists (cyclists were at-fault in the residual 21% of cases).<sup>15</sup>
- This compares to motor accident injuries overall, where around 60% of claimants are not at-fault<sup>16</sup>
- There are ~250,000 cars (and therefore premiums) in the ACT

All else being equal, it follows that cyclists are 15.3% of not at-fault claimants ( $79\% / 60\% * 11.6\%$ ) and 6.1% of at-fault claimants ( $21\% / 40\% * 11.6\%$ ).

We know from EY that, under the status quo, about \$308 per premium compensates those not at-fault and \$0 per premium compensates those at-fault.<sup>17</sup> Under Model D, about \$152 per premium compensates those not at-fault and \$65 compensates those at-fault.<sup>18</sup> Multiplying this by the number of premiums in the ACT gives the total annual figure.

We can multiply these figures by the rate of at-fault and not at-fault cyclists to find total compensation gained or lost.

---

<sup>13</sup> EY (2018) “Estimated costs of alternative benefit designs for the ACT’s Compulsory Third Party (CTP) Insurance Scheme”, p 5, <https://yoursay.act.gov.au/ctp>

<sup>14</sup> Timna Jacks (2017) “I realised how close I was to being killed”: Serious cyclist accidents rise by 8 per cent each year”, <https://www.theage.com.au/national/victoria/i-realised-how-close-i-was-to-being-killed--serious-cyclist-accidents-rise-by-8-per-cent-each-year-20170909-gye49r.html>

<sup>15</sup> VL Lindsay (2013) “Injured cyclist profile: an in-depth study of a sample of cyclists injured in road crashes in South Australia”, p 8, <http://casr.adelaide.edu.au/publications/list/?id=1346>

<sup>16</sup> EY (2018) “Estimated costs of alternative benefit designs for the ACT’s Compulsory Third Party (CTP) Insurance Scheme”, <https://yoursay.act.gov.au/ctp>

<sup>17</sup> This is conservative because there are some defined benefits under the status quo.

<sup>18</sup> Note that legal costs are part of the total claims cost but are not compensation: EY (2018) “Estimated costs of alternative benefit designs for the ACT’s Compulsory Third Party (CTP) Insurance Scheme”, Appendix B, <https://yoursay.act.gov.au/ctp>

*Figure 6: Calculations for not at-fault (NAF) cyclists and at-fault (AF) cyclists*

	Status quo	Proposed scheme	Difference per premium	Difference per year, total
<i>Cyclist % NAF claimants</i>	15.3%	15.3%		
<i>Cyclist % AF claimants</i>	6.1%	6.1%		
<i>Compensation for NAF</i>	\$308 per premium	\$152 per premium		
<i>Compensation for AF</i>	\$0 per premium	\$65 per premium		
<i>Compensation NAF cyclists</i>	\$47 per premium	\$23 per premium	-\$24 per premium	\$5,959,136
<i>Compensation AF cyclists</i>	\$0 per premium	\$4 per premium	\$4 per premium	\$990,046
<i>Total compensation cyclists</i>	\$47 per premium	\$27 per premium	-\$20 per premium	-\$4,969,090

Of course, in making these calculations I have used data from other jurisdictions in Australia. It is possible that the statistics are different in the ACT. However, they would have to be significantly different to affect the overall finding that cyclists as a class stand to lose significant compensation under the proposed scheme.