

# REPORT ON INQUIRY INTO THE EXPOSURE DRAFT OF THE MOTOR ACCIDENT INJURIES BILL 2018

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

DECEMBER 2018

REPORT 4



## THE COMMITTEE

### COMMITTEE MEMBERSHIP

Mrs Giulia Jones MLA	Chair from 14 December 2016 to 22 March 2018 and from 2 November 2018. Member from 13 December 2016 to 22 March 2018. Re-appointed as member, 1 November 2018. [On 21 March 2018 the Assembly discharged Mrs Giulia Jones MLA from the Committee and appointed Ms Nicole Lawder MLA in her place (for the period 22 March 2018 to 17 September 2018)] <sup>1</sup>
Ms Elizabeth Lee MLA	Chair from 22 March 2018 to 1 November 2018 Member from 13 December 2016 to 1 November 2018.
Ms Bec Cody MLA	Deputy Chair from 14 December 2016 Member from 13 December 2016
Ms Nicole Lawder MLA	Member from 22 March 2018 (for the period 22 March 2018 to 17 September 2018)
Mr Chris Steel MLA	Member from 13 December 2016 to 23 August 2018
Mr Michael Pettersson MLA	Member from 23 August 2018

### SECRETARIAT

Mr Andrew Snedden	Acting Secretary [from 10 April 2018]
Ms Jindriska Coufalova	Research Assistant
Ms Lydia Chung	Administrative Assistance

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<sup>1</sup> ACT Legislative Assembly, *Minutes of Proceedings*, No. 51, 21 March 2018, pp. 738; *Hansard*, 21 March 2018, p. 839.



## RESOLUTION OF APPOINTMENT

The Legislative Assembly for the ACT appointed the Standing Committee on Justice and Community Safety on 13 December 2016.

Specifically the resolution of 13 December 2016 establishing the Standing Committees of the 9<sup>th</sup> Assembly, as it relates to the Justice and Community Safety Committee states:

That:

(1) The following general purpose standing committees be established and each committee 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:

(d) a Standing Committee on Justice and Community Safety to perform a legislative scrutiny role and examine matters related to community and individual rights, consumer rights, courts, police and emergency services, corrections including a prison, administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, consumer affairs and regulatory services;

(4) Each general purpose committee shall consist of the following number of members, composed as follows:

(d) the Standing Committee on Justice and Community Safety:

- (i) two members to be nominated by the Opposition;
- (ii) two members to be nominated by the Government; and
- (iii) the Chair shall be an Opposition member;

(5) Each committee shall have power to consider and make use of the evidence and records of the relevant standing committee during the previous Assembly.

(6) Each committee be provided with necessary staff, facilities and resources.

(7) The foregoing provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.<sup>2</sup>

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<sup>2</sup> ACT Legislative Assembly, *Minutes of Proceedings*, No. 2, 13 December 2016, pp. 13–16.

On 20 September 2018, paragraph (4) of this resolution was omitted and the following paragraph substituted:

(4) Each general purpose committee shall consist of the following number of members, composed as follows:

(d) the Standing Committee on Justice and Community Safety:

- (i) one member to be nominated by the Opposition;
- (ii) two members to be nominated by the Government; and
- (iii) the Chair shall be the Opposition member.<sup>3</sup>

## REFERENCE OF THE EXPOSURE DRAFT OF THE MOTOR ACCIDENT INJURIES BILL 2018

On 20 September 2018 the Legislative Assembly referred the Exposure Draft of the Motor Accident Injuries Bill 2018 and the accompanying explanatory guide to the Standing Committee on Justice and Community Safety for inquiry and report by 1 November 2018.

On 30 October 2018, the Legislative Assembly amended the resolution of 20 September 2018 to provide for the Committee to conduct its inquiry and report by 14 December 2018.

The Exposure Draft of the Motor Accident Injuries Bill 2018 is at:

[https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/6015/3733/0484/Exposure\\_Draft\\_Motor\\_Accident\\_Injuries\\_Bill\\_2018.pdf](https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/6015/3733/0484/Exposure_Draft_Motor_Accident_Injuries_Bill_2018.pdf)

The explanatory guide is at:

[https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/4315/3733/0261/Motor\\_Accident\\_Injuries\\_Bill\\_Explanatory\\_Guide\\_-\\_Exposure\\_Draft.pdf](https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/4315/3733/0261/Motor_Accident_Injuries_Bill_Explanatory_Guide_-_Exposure_Draft.pdf)

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<sup>3</sup> ACT Legislative Assembly, *Minutes of Proceedings*, No. 73, 20 September 2018, p. 1028.

## TERM OF REFERENCE (TOR)

1.1 The Committee's terms of reference (ToR) on the inquiry are:

- (1) That the Exposure Draft of the Motor Accident Injuries Bill 2018 and the accompanying explanatory guide be referred to the Standing Committee on Justice and Community Safety Committee (the Committee) to inquire into and report on:
  - (a) the draft Bill's alignment with the following objectives for the ACT's Compulsory Third Party (CTP) insurance scheme:
    - (i) early access to medical treatment, economic support and rehabilitation services;
    - (ii) equitable cover for all people injured in a motor vehicle accident;
    - (iii) a value for money and efficient system;
    - (iv) promoting broader knowledge of the scheme and safer driver practices;
    - (v) implementing a support system to better navigate the claims process; and
    - (vi) a system that strengthens integrity and reduces fraudulent behaviour;
  - (b) the draft Bill's alignment with the model chosen by the CTP citizens' jury and the detailed design documents underpinning this model;
  - (c) the draft Bill's consistency with other relevant insurance schemes operating in the Territory; and
  - (d) the most suitable avenues for external review of matters arising between parties under the proposed new Motor Accident Injuries scheme;
- (2) the Committee is to report by 1 November 2018; and

if the Assembly is not sitting when the Committee has completed its inquiry, the Committee may send its report to the Speaker or, in the absence of the Speaker, to the Deputy Speaker or any other Member, who is authorised to give directions for its printing, publishing and circulation."





## ACRONYMS

CTP	Compulsory Third Party (insurance)
MAI Bill	Exposure Draft of the Motor Accident Injuries Bill 2018
WPI	Whole Person Impairment



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# 1 CONCLUSION

- 1.1 The Committee has agreed to a Committee report on this reference as appears in the preceding pages.
- 1.2 Additional comments on the reference by Mr Pettersson MLA and Ms Cody MLA are attached.
- 1.3 A dissenting report on the reference by Mrs Jones MLA is attached.

Giulia Jones MLA  
Chair  
14 December 2018



## APPENDIX A – SUBMISSIONS

Submission Number	Submitter
1 - 56	Individual Submissions
57	Arundell
58	Browne
59	Francis
60	ACT Bar Association
61	ACT Government
62	ACT Law Society
63	Australian Education Union ACT Branch
64	Australian Lawyers Alliance
65	CFMEU ACT
66	IAG
67	Maliganis Edwards Johnson Partners
68	Maurice Blackburn
69	Pedal Power ACT
70	Snedden, Hall & Gallop (Supplementary)
71	Slater & Gordon
72	Suncorp
73	Unions ACT
74	United Firefighters Union of Australia ACT Branch
75	Wheatland





## APPENDIX B - WITNESSES

### FRIDAY, 2 NOVEMBER 2018

- Arundell, Mr Leon
- Browne, Mr Bill, Member, CTP Citizens Jury
- Isley, Ms Meghan, Senior Manager, Scheme Design, Policy and Injury Prevention, Insurance Australia Group
- King, Ms Nadine, Manager, Regulatory Policy, CTP Portfolios, Insurance Australia Group
- Ronald, Mr Jamie, Barrister, ACT Bar Association
- Whybrow, Mr Steven, President, ACT Bar Association

### MONDAY, 19 NOVEMBER 2018

- Blumer, Mr Felix, Law Society of the ACT
- Blumer, Ms Noor, National President, Australian Lawyers Alliance
- Burr, Ms Amy, Australian Lawyers Alliance
- Donohue, Mr Chris, President, Law Society of the ACT
- Francis, Mr Gary
- Gill, Mr Andrew, Scheme Integrity Consultatnt, Forensic Data Analysis, Suncorp Group
- Hawkins, Mr Walter, Maurice Blackburn Lawyers
- Ibbotson, Mr Jeff, Vice-President, Pedal Power ACT
- Kayrooz, Mr Matthew, Head of Accident and Trauma, Personal Injury Portfolio and Products, Suncorp Group
- O'Hara, Ms Dianne, Chief Executive Officer, Law Society of the ACT
- Rahman, Mr Surayez, Executive Manager, ACT CTP, Suncorp Group

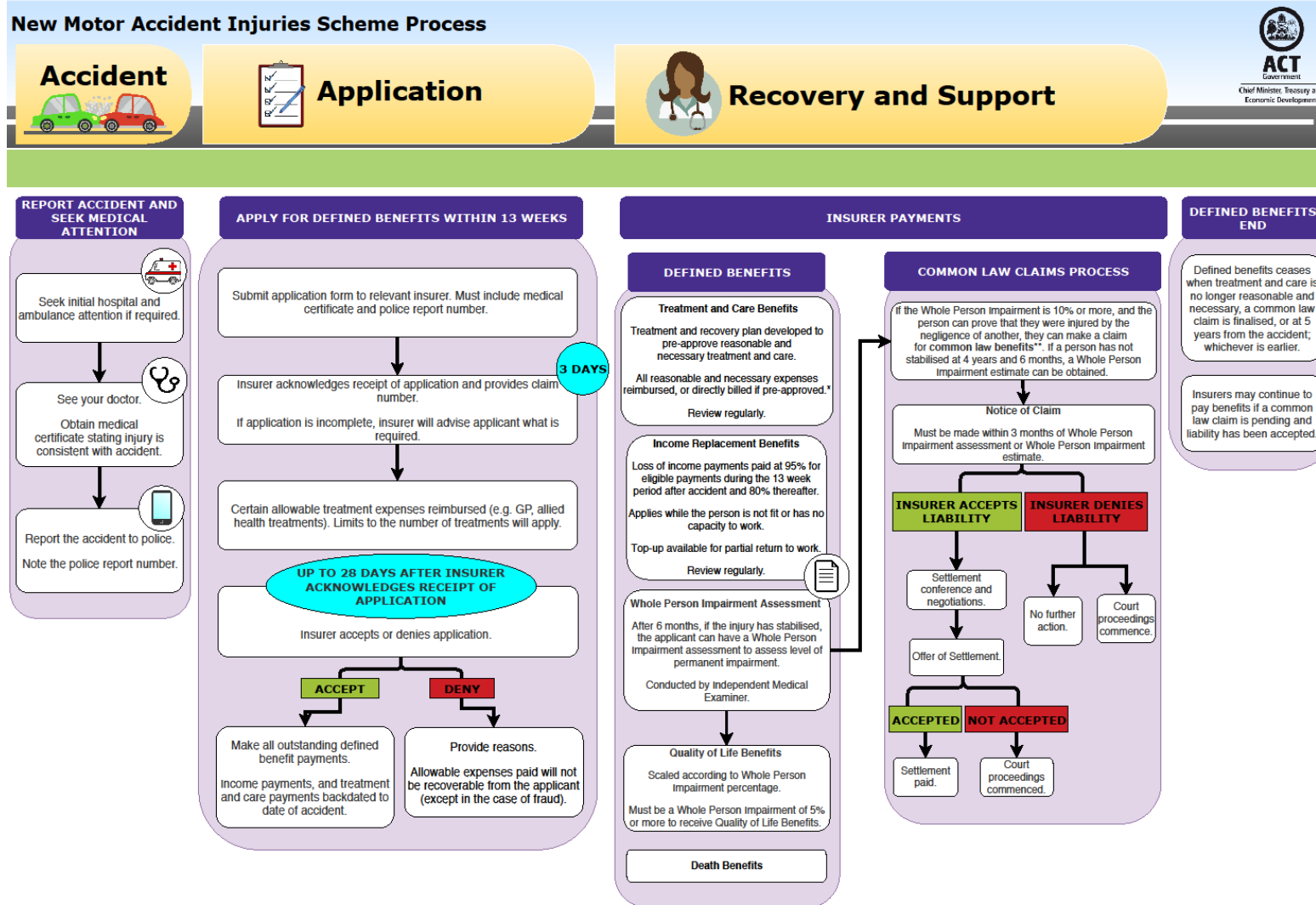
### TUESDAY, 20 NOVEMBER 2018

- Carrick, Mr Martin, Practice Group Leader, Slater and Gordon
- Edwards, Mr Craig, Partner, Maliganis Edwards Johnson
- Ehsan, Mr Hassan, Senior Associate, Maliganis Edwards Johnson
- Hiscox, Mr Michael, Executive Officer, CFMEU ACT Branch
- Read, Ms Rosalind, Senior Legal Officer, CFMEU ACT Branch
- Treloar, Mr James, Partner, Maliganis Edwards Johnson



## APPENDIX C – DIAGRAMMATIC REPRESENTATIONS OF CURRENT AND PROPOSED ACT CTP SCHEME





\* A late application made more than 13 weeks after the accident may be accepted if made within two years and a full & satisfactory explanation given. Injuries that manifest themselves after the date of accident is a justifiable reason for a late application. No access to immediate benefits before acceptance of application.

On acceptance of a late application: reasonable and necessary treatment and care expense reimbursements backdated for only 13 weeks unless exceptional circumstances apply; income payments backdated for only 4 weeks unless exceptional circumstances apply.

\*\* Defined benefits continue to be paid up to 5 years until the common law claim is resolved.

Blameless/No-Fault Motor Accident: under a common law claim, the driver in this type of accident is deemed to be at-fault for the purpose of others being able to make a common law claim. This covers situations where a person is injured through no fault of their own, but cannot demonstrate that another party was at fault. For example, an accident occurring due to a driver suffering a heart attack.



# HOW DOES MOTOR VEHICLE ACCIDENT INSURANCE WORK IN THE ACT?



## COVERAGE FOR PERSONAL INJURY

### COMPULSORY THIRD-PARTY INSURANCE (CTP)

**Compulsory:** When you register or re-register your vehicle, you are required to pay a CTP premium. You cannot opt out.

#### WHO DOES IT COVER?

- ✔ **Covers other people** (including pedestrians, cyclists and passengers) **injured in a car accident that is found to be your fault** or the fault of someone else driving your car.
- ✔ **If you are injured and it's someone else's fault, their CTP insurance will cover you** for medical costs, and claims can be made for things like lost income and pain and suffering. If a person is found to be partially at fault for the accident or their injuries (e.g. they weren't wearing a seatbelt), their benefits will be reduced to account for their contribution.

#### CTP DOES NOT COVER:

- ❌ Injury to yourself, if the accident was found to be your fault.
- ❌ Injuries if no one was at fault such as a collision with wildlife (e.g. if you hit a kangaroo).
- ❌ Property damage.

If you are in an accident and the driver at fault does not have CTP insurance, the injured person will be covered by the nominal defendant. This is a scheme run by the ACT government to enable injured persons to be compensated. The uninsured person is liable to pay back any amount paid out by the nominal defendant.

#### OTHER BENEFITS INCLUDE:

Injured persons may be covered for the first \$5,000 of their medical expenses, if they notify their insurer within 30 days. Some CTP insurers offer other benefits, like limited cover for eligible at fault drivers.

### LIFETIME CARE AND SUPPORT SCHEME

**Compulsory:** You are required to pay a levy for this cover as part of your vehicle registration. You cannot opt out.

#### WHAT DOES IT COVER?

- ✔ **Covers catastrophic injury to you and others:** Provides treatment and care of anyone who is in a motor vehicle accident in the ACT and is catastrophically injured e.g. spinal cord injury, traumatic brain injury, multiple amputations or serious burns.
- ✔ It doesn't matter who was at fault in the accident—everyone is covered if catastrophically injured.
- ✔ Injured people get the care and treatment they need for their whole life.

#### THE SCHEME DOES NOT COVER:

- ❌ Injuries that do not meet the definition of catastrophic.
- ❌ Property damage.
- ❌ Lost income or pain and suffering. But if someone else was found to be at fault, you may be able to claim this under CTP.

### PERSONAL INJURY/ACCIDENT INSURANCE

**Optional:** You can choose to buy this cover from an insurer. This is an optional policy.

#### WHAT DOES IT COVER?

- ✔ **Covers you for injury** in an accident even if you were found to be at fault or no one was at fault (subject to individual policy limitations).
- ✔ It can cover gaps in your private health insurance.

#### THE INSURANCE DOES NOT COVER:

- ❌ Property damage unless this is specifically offered under your policy.

**Where are the gaps?** Unless you choose to buy separate personal injury or accident insurance, or your CTP policy offers additional benefits, you are not covered for non-catastrophic injuries from a motor vehicle accident if you were at fault or no one was at fault. CTP insurance covers people you injure, not you. If someone else causes an accident and you are injured, you will not be covered by the at-fault person's CTP insurance for all of your loss if you are found to be partly at fault for the accident. Treatment and care for a serious injury over an extended period of time can cost hundreds of thousands of dollars. If you were not eligible for CTP compensation or the Lifetime Care and Support Scheme, you would have to access public or private health, social security or aged care services, if you needed support as a result of your injuries. Limits and eligibility criteria apply to these services.



## OPTIONAL COVERAGE FOR PROPERTY DAMAGE

### THIRD PARTY PROPERTY INSURANCE

**Optional:** You can choose to buy this cover from an insurer. This is an optional policy.

#### WHAT DOES IT COVER?

- ✔ **Covers damage to other cars** and property where you are found to be at fault in an accident.
  - ✔ Some insurers offer other benefits, such as cover for fire and theft.
- It is usually a less expensive option than comprehensive insurance if you are not worried about covering damage to your car or property.

#### THE INSURANCE DOES NOT COVER:

- ❌ If your car is damaged in an accident.
- ❌ You or anyone else for any injuries caused by the accident.
- ❌ Your car for fire and theft unless you choose this as an optional extra.

### COMPREHENSIVE INSURANCE

**Optional:** You can choose to buy this cover from an insurer. This is an optional policy.

#### WHAT DOES IT COVER?

- ✔ **Covers your car against fire, theft and accident damage**, even if you are found to be at fault in an accident.
- ✔ **Covers damage to other cars** and property where you are found to be at fault in an accident.
- ✔ Covers everything that is covered by a third party property insurance policy.

#### THE INSURANCE DOES NOT COVER:

- ❌ You or anyone else for any injuries caused by the accident.

**Where are the gaps?** Unless you choose to buy this type of insurance, you are not covered for damage to your car or someone else's car if the accident is your fault. You may have to pay the other person a significant amount of money, depending on how much damage is done and the type of car they drive.





## ADDITIONAL COMMENTS – MR PETERSSON MLA AND MS CODY MLA



**Inquiry into Motor Accident Injuries Bill 2018**  
**Additional Comments from Michael Pettersson MLA and Bec Cody MLA**

## **Introduction**

Compulsory Third Party (CTP) insurance is a critical protection for Canberrans who are injured in a motor vehicle accident. A sudden accident while on the road can have very serious consequences – ranging from short term injury and incapacitation to permanent impairment, the loss of an ability to work and a severe reduction in someone’s quality of life.

Road accidents can happen for a wide range of reasons including momentary inattention and distraction, environmental conditions, driver incapacitation and misjudgements. Only a relatively small subset of accidents are caused by road users actively and intentionally breaking the law.

The ACT’s current CTP scheme is clearly deficient in that it only covers people injured in an accident *who can prove someone else was at fault*. People who are injured in single-vehicle accidents or who cannot demonstrate before a court that another driver caused the accident are excluded from any coverage whatsoever. This is not fair since every driver must pay for a CTP policy when they register their vehicle. There are hundreds of Canberrans every year who pay for a CTP policy, but then discover they are not eligible to claim for any of their treatment needs or lost income when they are involved in an accident.

Furthermore, the fact that our current system relies on demonstrating that someone else was at fault in order to access any support for treatment or lost income means the entire process of accessing benefits through the CTP scheme is extremely adversarial. The most consistent theme of the evidence presented to the Committee by Canberrans who had been involved in accidents was that the process of getting help takes an unreasonably long time (during which injuries can go untreated and lost income can create significant financial stress); involves a distressing and damaging amount of interrogation by lawyers, doctors and the courts; and is very difficult to navigate without expensive legal representation as a result.

The Committee therefore believes there is strong justification for reforming the ACT scheme to ensure *all* drivers are covered regardless of who is at fault, and that people can have their medical bills and lost income covered without needing to undertake an extended legal battle to do so.

However, the Committee also heard clear evidence about the life-changing impact vehicle accidents can have on people who are permanently impaired, unable to work in their chosen professions again or enjoy their former hobbies and passions. According to ACT Government data, these more serious accidents represent a relatively small share of the total accidents in the ACT each year, but their impact is devastating and often permanent for the people affected. It is absolutely critical that any reforms to the current CTP scheme protect the ability of seriously injured people to seek a level of compensation for their injuries that reflects the ongoing nature of their support needs and loss of quality of life.

More generally, it is important that all Canberrans injured in an accident have avenues to pursue appeals of decisions affecting their treatment and benefits where they do not agree with them. The legal system plays a crucial role in providing oversight and review of decisions where these are not favourable to injured people, and this must be retained in any new scheme going forward. While it is not ideal to have a system that requires almost everyone to get a lawyer in order to get what they need – as is currently the case – fair and

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just administration of any new system will require that people *can* still seek legal review of decisions if they choose to, and be legally represented when they do.

The new scheme outlined in the *Motor Accident Injuries Bill* achieves the significant benefits of expanding coverage to all Canberrans and putting in place a system for people to access the treatment and lost wages they need without having to prove someone else was at fault through a legal process. However, the bill is currently lacking a series of important details and safeguards which will be critical to ensure the proposed new scheme operates in line with the Government's stated intentions and the best interests of Canberrans who are injured on our roads.

**Recommendation 1: The Government proceed with the proposed bill but with key amendments and additions as outlined in this report.**

### **Objectives**

The citizens' jury on CTP recommended a series of objectives that a CTP scheme operating in Canberrans' best interests should achieve. Examining how the draft bill aligns with these objectives was a key part of this Committee's Terms of Reference. The following section considers each of these objectives and provides recommendations and observations against these in line with the committee's deliberations.

#### *Early access to medical treatment, economic support and rehabilitation services*

The draft MAI Bill puts in place a series of requirements to ensure that injured Canberrans can get early access to medical treatment, income replacement and rehabilitation services to start recovering from their accident as soon as possible.

First and foremost, the proposed new scheme promotes much earlier access to treatment, care and lost wages than the current scheme by removing the need to demonstrate that someone else was at fault in order to access benefits. At the moment, if the driver who is considered to have caused an accident denies liability, the injured person who believes they were not at fault must take a case to court in order to get a determination on this question of liability. Removing the need to prove fault will significantly expedite the process of accessing benefits because *all* drivers will be entitled to these – except in a limited set of circumstances outlined in Part 3.3 of the bill where an individual is actively breaking the law.

More specifically, the provisions of Part 2.3 of the bill and additional elements identified in the Guide to be covered by the associated guidelines provide detail on how the early access objective will be met. This includes requirements that:

- Insurers must acknowledge receipt of application for benefits within three working days, and provide a response to the injured person about the status of their application within 28 days. If the insurer fails to respond within 28 days, they will be assumed under the Act to have taken liability and must commence payment of defined benefits;
- Injured people can have their expenses covered for reasonable treatment and care benefits that will be identified in the guidelines – such as GP visits or imaging – that they use during the period an insurer is assessing their application;
- Once an application is formally accepted or deemed to have been accepted by the lapsing of the 28-day period, the insurer is required under the Act to commence

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paying eligible defined benefits including making both treatment and income payments.

The Committee heard significant concerns from a range of stakeholders including unions and the legal community about the willingness of insurers to deliver early access. There was a strong concern that insurers would seek to delay or minimise necessary treatment, support and income replacement in order to maximise their own profits. This is obviously a concern for the equity and good operation of the scheme if it reduces the capacity for people to get early access. The evidence from the Financial Services Royal Commission gives credence to the suggestion that insurers cannot always be relied upon to act ethically or in a manner that maximises outcomes for injured people.

The draft MAI bill does include some safeguards in this context. Part 5.3, Section 316 puts new and additional conditions on insurers seeking to provide MAI Insurance in the ACT, including:

*“(c) a condition for requiring the licensed insurer to manage applications under chapter 2 for defined benefits promptly;*

*(d) a condition for requiring the licensed insurer to achieve early resolution of motor accident claims; (e) a condition for requiring the licensed insurer to achieve early payment of reasonable and necessary treatment and care for injured people”*

This section would appear to operate in tandem with the provisions of Part 2.3 and the proposed guidelines to specify the specific actions insurers must take to comply with these conditions.

Part 5.4, Section 322 of the draft bill then states that the regulator (the new Motor Accident Injuries Commissioner) has the power to suspend an insurer’s licence to provide MAI policies if they contravene these or other licence conditions.

A further important safeguard on insurer behaviour is the capacity for efficient and effective external review of decisions. Ensuring there are clear, accessible and affordable options for people to pursue external review where they are not getting early or necessary access to treatment and care will be crucial in ensuring this objective is met. Recommendations to strengthen the external review mechanism are dealt with in a separate section later in this report.

*Equitable cover for all people injured in a motor vehicle accident*

The citizens’ jury’s objectives report stated:

*“We propose to cover, in an equitable manner, any persons injured as a result as of a motor vehicle accident in the ACT. Everyone, regardless of whether at-fault or not-at-fault, should be covered in terms of health care and treatment. Compensation for loss of earnings should be limited to a defined amount. Non-at-fault drivers with serious injuries would have access to litigation under the common-law system. Equitable means fair, just, unbiased, reasonable, timely and impartial.”*

Division 2.2.1 of the draft MAI Bill makes clear that coverage will be provided to anyone who sustains a personal injury as a result of a motor vehicle accident in the ACT.

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According to modelling prepared for the ACT Government and published as part of the consultation process, this will see approximately 600 more injured people per year become eligible for treatment, care and income replacement benefits compared with the current scheme – with 1,500 expected claims per year through the scheme compared with 900 currently.<sup>1</sup>

The Committee considers that this significant expansion of coverage and the move to a no-fault basis for accessing support through the scheme is clearly aligned with the objective of providing equitable cover for all people injured in a motor vehicle accident.

*A value for money and efficient system*

The Committee heard that there are differing views about what represents value for money and efficiency in terms of a motor accident injury scheme.

Some witnesses and submissions emphasised the importance of covering all injured people and providing them with upfront benefits that prioritise recovery, rather than maximising lump-sum payments which may not be available for a long time after an accident. Others highlighted the importance of injured people who are not at fault being able to pursue unlimited compensation through common law. This difference of views appears to mirror the detailed discussions had by the CTP citizens' jury over the trade-offs involved in designing an effective accident scheme.

If coverage is to be expanded to everyone who is injured in a motor vehicle accident, then this can be dealt with in two ways: by significantly increasing premium costs for all drivers, or by using the existing premium pool more efficiently. The ACT Government has defined efficiency in this context as channelling more of the total premium costs into treatment and care benefits for the more seriously injured.

The Committee does not believe the Canberra community would accept a large increase in CTP premiums at a time when many households are facing cost of living pressures. To achieve the expansion of coverage to all injured drivers that the community, the citizens' jury and stakeholders have indicated a preference for, efficiencies must therefore be identified elsewhere.

The proposed scheme narrows the number of injured people each year who can make common law claims for compensation, with the majority of injured people intended to have their costs for treatment, lost wages and other needs met through defined benefits. ACT Government data indicates that at present, approximately one quarter of scheme costs go to legal and investigation costs, which is generally about the same share as goes towards treatment and care benefits for people who are injured. If more people are automatically able to access benefits through the scheme without needing to go to court and pursue common law damages, then it seems feasible that some of this share of overall scheme costs can then be redirected towards direct benefits for people who are injured. In this way, the proposed scheme would achieve a greater level of efficiency in terms of how premiums are used.

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<sup>1</sup> 'Estimated costs of alternative benefit designs for the ACT's Compulsory Third Party (CTP) Insurance Scheme', [EY paper provided to CTP citizens' jury](#), available on the ACT Government's CTP YourSay page.

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However, this will depend on there being an actual reduction in the number of legal cases that must be pursued – which in turn depends on insurers paying out people’s legitimate defined benefit entitlements in full and not engaging in vexatious or unethical behaviour to deny benefits where they are due. The Committee has heard concerns from many stakeholders that insurers cannot be relied upon to do this. Ensuring insurers and all other scheme participants behave appropriately within any new arrangements will require there to be appropriate safeguards in place; recommendations addressing these issues are contained in the following sections.

But on the basis of the available information about how the new scheme will increase the number of people accessing defined benefits for their treatment and care needs and therefore reduce the number of legal cases which should need to be pursued for people to access these benefits for less serious injuries, the Committee is of the view that this has the potential to be more efficient and provide better value for Canberrans’ premium funds than the current arrangements. The Committee notes that the ferocity of protest against the proposed scheme from personal injury lawyers, in particular, strongly suggests that it does have the potential to achieve efficiencies in the area of legal and investigative costs.

By creating a scheme which ensures all injured people are able to receive benefits for treatment, care and lost wages following an accident; creates a system under which these benefits can be provided to people without needing to prove fault to access them; and directs a greater share of the benefits available through the scheme to injured people, the proposed Motor Accident Injuries Scheme is in good alignment with these three objectives identified by the CTP Citizens’ Jury.

However, given the significant change to the existing scheme and the way injured people access benefits, the bill should include a mandatory review of the full scheme with an emphasis on outcomes for injured people within three years from the date of implementation.

**Recommendation 2: The bill be amended to require a mandatory review of the full scheme, including share of premiums directed to treatment and support for injured people, the number of legal disputes occurring, time taken to resolve claims and average claims outcomes for people with different injury severities, not more than three years from the date of its implementation. The findings of this review should be tabled in the ACT Legislative Assembly for public scrutiny.**

*Promoting broader knowledge of the scheme and safer driver practices*

Submissions to the inquiry did not generally focus on this element of the scheme or the draft bill. Similarly, the draft MAI Bill does not detail specific steps that will be taken under the proposed arrangements to promote better understanding of the scheme or encourage Canberrans to drive more safely.

This is reasonable given these matters are generally separate to the design of the scheme itself and the legislative provisions needed to give effect to it, which are the focus of the bill. However, this was an important objective for the wider insurance scheme as identified by the citizens’ jury and the Government should provide more clarity on how this objective will be achieved if the proposed reforms are implemented.

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**Recommendation 3: The Government should detail, at the time of introducing a final bill, how it plans to promote broader knowledge of the scheme and safer driver practices if the MAI legislation is passed.**

*Implementing a support system to better navigate the claims process*

The Committee heard evidence from past and current claimants that the existing CTP scheme can be complicated and confusing to navigate, with a lack of clarity over what injured people need to do and where they go to access support. Submissions from the legal community emphasised their information support role as one of the core contributions lawyers make for people seeking to navigate the scheme.

The objectives report of the CTP citizens' jury also clearly identified the importance of injured people being better supported to navigate the scheme to ensure they receive their full entitlements in the quickest way possible.

Part 2.11, Section 187 of the draft bill supports this objective by providing new powers for the MAI Commissioner to designate providers for information services. These support service providers would be appointed to support injured people in the process of identifying what their entitlements are within the MAI scheme and applying to access these.

Division 2.3.1 of the draft bill also identifies a range of information that will be required to be provided to an injured person at the time of making a claim. This includes information on:

- Accessing, completing and submitting an application;
- The information that must be provided as part of an application;
- The time limits applying to making an application;
- Where and with whom an application must be lodged;
- Procedures for obtaining approval for treatment and care as well as reimbursement for these expenses;
- The use of WPI thresholds, processes for seeking an assessment and eligibility for different kinds of benefits or common law access based on WPI.

Both these sections of the bill specify that requirements for all of these items will be further specified in the associated guidelines. However, these guidelines had not been finalised at the time of the Committee's deliberations. It is therefore difficult for the Committee to form a view on whether these information and support requirements are sufficient, or sufficiently rigorous, to improve support for people navigating the claims system. Ideally, the information that insurers must provide would be clearly specified by the Government in terms of its wording, format and how it must be actively made available to claimants. It would not be acceptable if information was only passively made available to claimants via an insurer's website or similar.

The importance of the key guidelines associated with this bill being available for scrutiny by members of the Legislative Assembly and the broader public before the bill is debated is addressed further in Recommendation 5 below.

The Committee notes that the proposed scheme's ability to meet both the objectives of promoting broader knowledge of injured people's rights and supporting people to better navigate the claims process will depend significantly on the resourcing provided to support



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the powers provided by the legislation. Achieving these objectives will depend on the new Motor Accident Injuries Commissioner being appropriately resourced to provide a strong oversight function which effectively uses the powers granted in the bill, and the proper resourcing of information support providers in whatever form they ultimately take.

**Recommendation 4: The Government must provide appropriate resourcing to the new Motor Accident Injuries Commission and associated support services to ensure the objectives of the scheme which cannot be strictly defined in legislation can be achieved.**

**Recommendation 5: Given the range of powers and scheme requirements intended to be included in subordinate guidelines and regulations to the Motor Accident Injuries Bill, the Government should ensure the key regulations are provided to the Assembly for full public scrutiny and consideration by members before bringing the final bill forward for debate.**

*A system that strengthens integrity and reduces fraudulent behaviour.*

The Committee did not hear evidence that there is significant concern about system integrity or fraudulent behaviour in the current CTP arrangements. In fact, witnesses such as Slater & Gordon Lawyers and Suncorp emphasised that there is no particular evidence of significant or systemic fraud within the ACT system. The Government has also not provided any evidence to indicate that fraud is having a particular impact on either scheme outcomes or premium costs at present.

Based on this evidence – or lack thereof – the Committee believes reform of the current CTP scheme would not be justified solely on the basis of this criteria. However, reform is still justified on the basis of expanding access to coverage, providing earlier treatment and care and other objectives identified by the citizens’ jury as discussed above.

### **External review**

The Terms of Reference for this inquiry asked the Committee to consider ‘the most suitable avenues for external review of matters arising between parties under the proposed new Motor Accident Injuries scheme.’

External review is crucial for protecting the rights of injured Canberrans and establishing the right incentives to drive good behaviour by insurers. The ACT Government will establish – through legislation and regulation – the obligations of insurers in terms of providing appropriate treatment, care and income support. However, the Financial Services Royal Commission has demonstrated the importance of there also being strong oversight of insurer activity, coupled with swift and significant sanctions if they do not meet their obligations.

Canberrans *must* be able to seek external review of insurer decisions where they believe these are incorrect or unfair. This access to review must be low cost, fast and accessible – meaning that ideally the system would be simple enough that people do not have to be legally represented unless they choose to be.

The draft bill currently only provides the Attorney-General with a power to declare an entity responsible for carrying out external review of an externally reviewable decision. This is clearly insufficient given how important external review will be to the successful operation of

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the propose scheme, and has created significant concern from stakeholders that these powers will not be sufficiently broad or robust. The final bill must provide a higher level of detail about the jurisdiction and arrangements for external review to make clear that this is an integral component of the scheme.

**Recommendation 6: Recognising the importance of external review to ensure that injured people have recourse to pursue disputes and ensure the accountability of insurers, the Government should explicitly identify the body that will hear external disputes on defined benefits and associated arrangements in the final Motor Accident Injuries Bill.**

The Government specifically sought feedback on which level of the legal system should be given jurisdiction to hear external disputes arising from the proposed new MAI scheme. Unfortunately however, legal stakeholders provided minimal feedback on this issue despite their significant and valued expertise – presumably because of their wholesale objections to the proposed new scheme.

The Committee’s following observations apply particularly to the defined benefits component of the new MAI scheme. This is because injured people who reach the injury severity threshold required to make a common law claim will continue to have their matters dealt with in the Magistrates Court under the provisions of the *Wrongs Act* as is currently the case.

An issue that has been raised with the Committee is the obstacle that legal costs may create to injured people pursuing legal action against insurers for defined benefit claims matters which have relatively low dollar costs. This is clearly a concern, as the filing and hearing fees associated with appealing a decision through the ACT Magistrates Court can reach thousands of dollars; this is before accounting for the costs associated with legal representation. Canberrans should not be prevented from pursuing external review of decisions which may have lower dollar impacts but significant benefits in terms of their overall recovery or quality of life, simply because of the costs involved in doing so.

The ACT Civil and Administrative Tribunal has been identified as a potential alternative to the Magistrates Court for hearing external review cases, both because it is a significantly lower cost jurisdiction and because individuals do not have to be legally represented in order to pursue a case there (although they can still choose to do so). The ACAT is generally also able to consider cases faster because of the dispute resolution and administrative processes in place as well as caseload.

While the evidence and submissions presented to the Committee did not explore these issues in great depth, the cost, time and representation obstacles of pursuing action through the ACT Magistrates Court would seem to work against the critical objective of ensuring injured people have a genuine avenue to pursue external review of decisions when they need to.

**Recommendation 7: In light of the importance of injured people being able to seek external legal review of insurer decisions at low cost, the external review power for defined benefits should be allocated to the ACT Civil and Administrative Tribunal. This will ensure that there is no cost impediment to injured people pursuing external review of decisions with lower dollar value impacts, while also promoting quick and less confrontational access to review.**

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The Committee has also heard suggestions of poor practice which involves insurers denying seemingly legitimate claims and then using legal proceedings to wear down injured people until they withdraw their claims either because of the costs or time involved in continuing to contest the matter. Where possible, the MAI scheme should provide safeguards against this – ensuring cost orders can be made against the losing party in an external review process would create a valuable incentive against insurers denying legitimate claims.

**Recommendation 8: To ensure insurers are appropriately incentivised against denying reasonable benefits, the final bill should include a power for ACAT to make legal cost orders against the losing party in external review cases.**

### **Other issues**

The Committee's inquiry has identified a series of further issues which are within the scope of the Terms of Reference while not being explicitly stepped out in them. The following section explores these additional issues and makes a series of recommendations to strengthen the proposed bill to address them.

#### *Interaction with workers' compensation*

There are clear interactions between the proposed MAI scheme and the existing workers' compensation arrangements in place in the ACT. The Guide to the draft MAI bill acknowledges this in stating:

*“The final bill will contain provisions so injured people covered under a workers compensation scheme have the choice of receiving defined benefits under either their workers compensation scheme or the new Motor Accident Injuries scheme.”*

These interactions are new and arise because under the existing arrangements, only the workers' compensation scheme offers defined benefits to all workers. People seeking to access any support through the CTP scheme must make a claim through common law.

Under the proposed arrangements, defined benefits will be available *both* within workers' compensation and the MAI scheme. Workers whose injury is caused by their employer's negligence can then also pursue a claim through common law, as can drivers whose injury meets the severity threshold and can prove someone else was at fault.

Injured people will need to make a determination about which scheme to access defined benefits through. Importantly though, this does not prevent them later pursuing a common law claim through the other.

Given these new interactions between workers' compensation and the proposed MAI scheme, the Committee was disappointed to hear evidence that there was no prior consultation with unions about the proposed changes. Where other stakeholders with a significant interest in the scheme were directly engaged – including the legal community, insurers and health care consumer representatives – unions do not appear to have been included in these earlier engagements. The Committee believes that future work on the MAI scheme would benefit from the input and insights of unions – both because of the interactions with workers' compensation and their broader role as advocates for fair outcomes for Canberrans.

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Information provided to unions and the committee indicates workers who are injured in a motor vehicle accident while at work are proposed to have one month to elect whether to receive defined benefits under their workers' compensation arrangements or the new MAI scheme. The Committee heard clear feedback from UnionsACT and individual unions that this simply does not provide enough time for workers to properly understand their rights and entitlements under both schemes, seek appropriate medical and other advice about their recovery needs, and make an informed decision that is in their best interest. The Committee is of the strong view that injured workers require more time to make a decision of such significance and the final bill must reflect this.

**Recommendation 8: Noting the importance of ensuring workers who are injured on the road while at work have the time to properly understand their entitlements under both workers' compensation and the Motor Accident Injuries scheme, the Government provide a longer period for workers to elect which scheme to access defined benefits through.**

**Recommendation 9: Given the interaction between workers' compensation and the Motor Accident Injuries Scheme, the Government consider including unions within the scope of bodies authorised to provide information support services.**

*WPI and common law access*

One of the most significant changes that would be implemented by the new MAI scheme is the use of a Whole Person Impairment (WPI) threshold to determine access to common law.

Currently, anyone who is injured in a motor vehicle accident and can prove someone else was at fault is able to make a common law claim. Legal representatives gave evidence that unrestricted access to common law is important to ensure people can seek just compensation for injuries caused by someone else. But the Committee also heard evidence from insurers that this can create a significant degree of inequity and variability in what people with the same kinds of injury can be awarded in benefits, and this contributes to higher scheme costs overall. As detailed above in the section on scheme efficiency, the Government has indicated that the use of a WPI threshold is an important feature of the overall scheme design because it focuses a greater share of the overall scheme resources on those who are more seriously injured.

There appeared to be a significant level of confusion about where the WPI threshold has been set in the draft bill and what this would mean for injured people. This has led to some less than informed contributions to the Committee's work. For example, one legal submission identified a range of cases where people had been assessed at WPI levels that would have qualified them for making a common law claim under the proposed new scheme – but the submission claimed this was not the case. The Committee suggests that those involved in discussions about the scheme – particularly representatives of professional bodies and service providers – may wish to familiarise themselves more closely with the details of the proposed MAI scheme as part of commenting on it.

The Committee notes that WPI thresholds are already used both in workers' compensation and compulsory third party insurance schemes around Australia; they are also already used in

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the ACT within the Comcare scheme that applies to Australian Public Servants and the private workers' compensation scheme.

On that basis, the Committee accepts that it may be reasonable to also apply a WPI threshold in the context of the new MAI scheme. The fact that all injured people can access up to five years of treatment, care and lost wages through the defined benefits part of the scheme should mean that a majority of people will be able to have their needs met without pursuing a common law claim.

However, when using thresholds there will always be cases where a person may come extremely close but not quite qualify, or where two people with the same level of injury may experience very different outcomes because of their age, occupation or other factors. It is critically important that the MAI scheme has enough flexibility to ensure that people who do not reach the injury severity threshold but have a legitimate case to pursue common law compensation are not excluded from doing so.

A number of witnesses and submissions raised the idea of adding a 'narrative test' to the MAI scheme, as is used in other CTP schemes such as Victoria's. This allows for consideration of individual circumstances when deciding whether an injured person should be able to make a common law claim, in cases where they do not reach a particular injury severity threshold.

This is a useful concept, but needs to be aligned with the rest of the scheme design. In a case such as the proposed MAI scheme where the WPI threshold is relatively low (10 per cent or above) compared with other CTP schemes (e.g. 30 per cent in the Victorian scheme), a very broad narrative test may not be necessary because a greater share of people will already be eligible to pursue common law compensation in addition to defined benefits. Instead, it may be sufficient to have a more targeted set of exemptions to the WPI threshold which deal with particular situations of concern. For example, the Committee believes that where someone who works in a physical job is no longer able to do that specific work they are trained for, this may create grounds for a common law claim even if they are not permanently impaired to the level of 10 per cent WPI.

The Committee also heard evidence that *how* WPI is assessed matters in determining how many people will be able to pursue common law compensation in addition to defined benefits. In particular, several submissions raised concerns that assessing physical and psychological injuries separately may lead to people being assessed as 'less injured' than they actually are. The Committee believes it is important that the MAI scheme appropriately recognise and assist people with the psychological impacts of being involved in an accident or having a serious injury requiring rehabilitation over an extended period of time. There is some uncertainty in the current draft of the bill as to whether this is the case – the final bill should not leave room for doubt on this front.

**Recommendation 10: On the basis that similar injuries can have different impacts for people depending on factors such as their age and occupation, the Government should include in the final bill exemptions for circumstances where it may be appropriate for an injured person to be able to make a common law claim despite not having an assessed WPI of 10 per cent or more.**

**Recommendation 11: To ensure that WPI assessments appropriately capture the full scope of injuries caused by motor vehicle accidents, the final bill or associated**

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**regulations should clarify that physical and psychological injuries can be considered together in making an assessment of WPI.**

*Exclusions*

Division 2.2.2 of the bill outlines a detailed list of circumstances in which the benefits payable under the new MIA scheme may be reduced or fully excluded. These particularly cover circumstances where road users are acting in contravention of the road rules and other legal statutes.

While the majority of these exemptions appear reasonable and justified, Pedal Power's submission to the Committee identified a concern about blanket limitations on coverage where a cyclist is not wearing a helmet, even if this is not relevant to the injuries they sustain. For example, if a cyclist is hit by a car and sustains a leg injury, it is not clear why they should then have their access to benefits reduced given the lack of a helmet had no bearing on the nature or severity of their injury.

The Committee suggests that the implications of the current list of exclusions warrants further consideration in the context of finalising the bill.

**Recommendation 12: While noting that exclusions for people who are engaged in dangerous or illegal behaviour are important for incentivising safe behaviour on the road, the Government should consider the feasibility of further limiting exclusions for cyclists who are not wearing a helmet to circumstances where the use of a helmet would have been relevant to the nature of the injuries sustained.**

*Insurer profits*

A significant number of witnesses and submissions raised concerns that changes to the current CTP arrangements would put too much decision-making power in the hands of insurers, who would then seek to maximise their profits rather than outcomes for injured Canberrans. This is a strong concern and one that the Government should not take lightly in the context of seeking to implement the proposed MAI scheme.

However, it is also the case that the submissions and evidence provided to the committee on insurer behaviour were largely based on anecdotal cases and/or evidence from New South Wales where quite different scheme arrangements have only very recently been put in place. The Committee has not been presented with concrete evidence demonstrating that insurer profits are higher in no-fault schemes, or that in established no-fault schemes elsewhere the outcomes for injured people are worse than they would have been under alternative arrangements.

This is clearly a matter that warrants close attention going forward, given the level of concern within the community and scheme stakeholders.

The draft bill contains stronger information gathering powers for the new Motor Accident Injuries Commission compared with those available to the existing CTP Regulator. This will allow the MAI Commission to seek more, and more frequent, data from insurers about their profits, settlements, benefit payments and other matters that are crucial to protecting Canberrans' best interests. As outlined above, if the MAI Commission identifies that insurers

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are not acting in line with their regulatory obligations, the draft bill empowers them to suspend an insurer's licence to provide MAI insurance in the ACT.

The Committee heard evidence that other jurisdictions, such as New South Wales, have taken active steps to cap insurer profits as part of implementing CTP reforms. Such measures may also be warranted in the ACT, but clear data indicating that companies are making unreasonable returns from either the current or new scheme would be required to determine this. The Committee believes there should be close scrutiny of insurer profits as the proposed scheme is implemented, with a view to taking further steps in this area if it proves to be warranted.

**Recommendation 13: Noting that there is not currently sufficient information made available to the CTP Regulator or publicly to assess actual insurer profits within the scheme, the new Motor Accident Injuries Commissioner proactively exercise the extended data gathering powers provided in the MAI Bill and be properly resourced to do so.**

**Recommendation 14: The Government should commit to review insurer profits as part of the full scheme review within three years of implementation and take steps to cap profits as other jurisdictions have done if they are shown to be above fair and reasonable levels.**





## DISSENTING REPORT – MRS JONES MLA



INQUIRY INTO THE EXPOSURE DRAFT OF THE MOTOR  
ACCIDENT INJURIES BILL 2018

DISSENTING REPORT BY MRS JONES MLA

## REFERENCE OF THE EXPOSURE DRAFT OF THE MOTOR ACCIDENT INJURIES BILL 2018

On 20 September 2018 the Legislative Assembly referred the Exposure Draft of the Motor Accident Injuries Bill 2018 and the accompanying explanatory guide to the Standing Committee on Justice and Community Safety for inquiry and report by 1 November 2018.

On 30 October 2018, the Legislative Assembly amended the resolution of 20 September 2018 to provide for the Committee to conduct its inquiry and report by 14 December 2018.

The Exposure Draft of the Motor Accident Injuries Bill 2018 is at:

[https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/6015/3733/0484/Exposure\\_Draft\\_Motor\\_Accident\\_Injuries\\_Bill\\_2018.pdf](https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/6015/3733/0484/Exposure_Draft_Motor_Accident_Injuries_Bill_2018.pdf)

The explanatory guide is at:

[https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/4315/3733/0261/Motor\\_Accident\\_Injuries\\_Bill\\_Explanatory\\_Guide\\_-\\_Exposure\\_Draft.pdf](https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/4315/3733/0261/Motor_Accident_Injuries_Bill_Explanatory_Guide_-_Exposure_Draft.pdf)

## TERM OF REFERENCE (TOR)

1.1 The Committee's terms of reference (ToR) on the inquiry are:

- (1) That the Exposure Draft of the Motor Accident Injuries Bill 2018 and the accompanying explanatory guide be referred to the Standing Committee on Justice and Community Safety Committee (the Committee) to inquire into and report on:
  - (a) the draft Bill's alignment with the following objectives for the ACT's Compulsory Third Party (CTP) insurance scheme:
    - (i) early access to medical treatment, economic support and rehabilitation services;
    - (ii) equitable cover for all people injured in a motor vehicle accident;
    - (iii) a value for money and efficient system;
    - (iv) promoting broader knowledge of the scheme and safer driver practices;
    - (v) implementing a support system to better navigate the claims process; and
    - (vi) a system that strengthens integrity and reduces fraudulent behaviour;
  - (b) the draft Bill's alignment with the model chosen by the CTP citizens' jury and the detailed design documents underpinning this model;
  - (c) the draft Bill's consistency with other relevant insurance schemes operating in the Territory; and
  - (d) the most suitable avenues for external review of matters arising between parties under the proposed new Motor Accident Injuries scheme;
- (2) the Committee is to report by 1 November 2018; and

if the Assembly is not sitting when the Committee has completed its inquiry, the Committee may send its report to the Speaker or, in the absence of the Speaker, to the Deputy Speaker or any other Member, who is authorised to give directions for its printing, publishing and circulation."

# INTRODUCTION

## BACKGROUND TO THE INQUIRY

- 1.2 The Committee's terms of reference (ToR) ask the committee to examine the Exposure Draft of the MAI Bill and report on four matters:
  - I. how the Exposure Draft aligns with a number of objectives for the ACT's CTP insurance scheme, and,
  - II. how the Exposure Draft aligns with the model chosen by the CTP citizens' jury and the detailed design documents underpinning the model.
  - III. the Draft Bill's consistency with other relevant insurance schemes operating in the Territory; and
  - IV. the most suitable avenues for external review of matters arising between parties under the proposed new Motor Accident Injuries scheme;
- 1.3 The Committee advertised its inquiry on 21 September 2018 and invited submissions from the community and from a number of relevant groups and individuals by direct invitation.
- 1.4 The Committee nominated 12 September 2018 as the date for submissions.
- 1.5 The Committee received a total of 75 submissions, all of which are lodged on the Committee website at:

<https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety/motor-accident-injuries-Bill-2018exposure-draft-and-guide-to-the-motor-accident-injuries-Bill-2018-exposure-draft>

# EXPOSURE DRAFT – MOTOR ACCIDENT INJURIES (MAI) BILL 2018

## BACKGROUND TO THE PREPARATION AND PUBLICATION OF THE EXPOSURE DRAFT MAI BILL

### OTHER INQUIRIES – PUBLIC ACCOUNTS COMMITTEE 2012

- 1.6 The Standing Committee on Public Accounts (PAC) inquiry into the Road Transport (Third Party Insurance) Amendment Bill 2011 published the report of its Inquiry into the Bill in May 2012.<sup>1</sup>
- 1.7 The purpose of the Inquiry was to review the possible effects of the Bill on the provision of third party insurance in the ACT together with the review of the operation of the Road Transport (Third-Party Insurance Act 2008 (the Act). Based on the Terms of Reference, the Inquiry further examined the effect of the Act on the recovery and rehabilitation of people who have been injured as a result of a road crash. Furthermore, the Inquiry evaluated different aspects of the effectiveness of the Act together with the operation of the third-party insurance schemes in other Australian jurisdictions.<sup>2</sup>
- 1.8 The Committee recommended that the Bill, in its current form, should not be supported by the ACT Legislative Assembly.<sup>3</sup>
- 1.9 Notwithstanding its recommendation not to support the Bill, the PAC further recommended that after consideration the findings of (i) Standing Committee on Public Accounts inquiry into the Road Transport (Third-Party Insurance) Amendment Bill 2011; (ii) statutory review pursuant to section 275 of the Road Transport (Third-Party Insurance) Act 2008; and (iii) NSW Government’s internal review of the NSW CTP insurance scheme, the Government may bring forward or propose reform to the ACT CTP Insurance Scheme.<sup>4</sup>
- 1.10 The Committee made 13 recommendations in relation to its inquiry into the Road Transport (Third-Party Insurance) Amendment Bill 2011.

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<sup>1</sup> Standing Committee on Public Accounts, *Road Transport (Third-Party Insurance) Amendment Bill 2011*, viewed 3 December 2018, accessible at <https://www.parliament.act.gov.au/in-committees/previous-assemblies/Standing-Committees-Seventh-Assembly/Standing-Committee-on-Public-Accounts/22-Road-Transport-Third-Party-Insurance-Amendment-Bill-2011>

<sup>2</sup> Inquiry into the Road Transport (Third-Party Insurance) Amendment Bill 2011, *Terms of Reference*, viewed 03 December 2018, accessible at [https://www.parliament.act.gov.au/data/assets/pdf\\_file/0007/374362/ToR\\_PAC\\_Road\\_safe.pdf](https://www.parliament.act.gov.au/data/assets/pdf_file/0007/374362/ToR_PAC_Road_safe.pdf)

<sup>3</sup> Standing Committee on Public Accounts. *Inquiry into the Road Transport (Third-Party Insurance) Amendment Bill 2011, Recommendations: Recommendation 10*, p vi, viewed 03 December 2018, accessible at [https://www.parliament.act.gov.au/data/assets/pdf\\_file/0020/371513/PAC22\\_Road\\_Transp\\_Bill.pdf](https://www.parliament.act.gov.au/data/assets/pdf_file/0020/371513/PAC22_Road_Transp_Bill.pdf)

<sup>4</sup> Standing Committee on Public Accounts. *Inquiry into the Road Transport (Third-Party Insurance) Amendment Bill 2011, Recommendations: Recommendation 9*, p vi, viewed 03 December 2018, accessible at [https://www.parliament.act.gov.au/data/assets/pdf\\_file/0020/371513/PAC22\\_Road\\_Transp\\_Bill.pdf](https://www.parliament.act.gov.au/data/assets/pdf_file/0020/371513/PAC22_Road_Transp_Bill.pdf)

- 1.11 The Committee noted that many submitters not supporting the Bill ... highlighted significant issues with regard to limiting access to common law compensation for non-economic loss (NEL) together with the infrastructure required to implement the impairment threshold, the increase in the discount rate, and concerns that the Executive Government might be encroaching too far in relation to decisions about entitlements for injured people that was previously covered by common law.<sup>5</sup>
- 1.12 The Committee further noted that ‘evidence supporting the 2008 reforms to CTP insurance, as provided for in the current Act, was starting to emerge and any amendments prior to permitting these reforms to take effect could be counterproductive’.<sup>6</sup>

## CITIZENS’ JURY 2017<sup>7</sup>

- 1.13 The Citizens’ Jury process was held between October 2017 and March 2018 consisting from two stages: Stage 1 – Understanding CTP and Setting Objectives, and Stage 2 – Choosing a Model.
- 1.14 Prior the citizens’ jury process the ACT Government undertook a consultation process encompassing public surveys, submissions and comments considered lately by jurors who received the results of the survey and copies of all the feedback.<sup>8</sup>
- 1.15 The ACT Government appointed expert consultants (democracyCo) to run the citizens’ jury process including recruiting the jury to ‘ensure it happened at arm’s length from government.’ A group of around 50 jurors were chosen ensuring ‘the jury was made up of a mix of people according to criteria such as age, gender and location that broadly corresponded with the demographics of the ACT population’ and excluding a range of groups including those who were experienced claims currently.<sup>9</sup>
- 1.16 To form the discussion, the jury was given the remit: *What should the objectives of an improved CTP scheme be to best balance the interests of all road users?* together with six parameters set up by the ACT Government:<sup>10</sup>
- The CTP scheme must remain compulsory for all motorists.
  - The scheme must continue to be privately underwritten and the overall scheme design cannot raise the cost of premiums.

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<sup>5</sup> Standing Committee on Public Accounts. *Inquiry into the Road Transport (Third-Party Insurance) Amendment Bill 2011: Report*, p 4, viewed 03 December 2018, accessible at [https://www.parliament.act.gov.au/data/assets/pdf\\_file/0020/371513/PAC22\\_Road\\_Transp\\_Bill.pdf](https://www.parliament.act.gov.au/data/assets/pdf_file/0020/371513/PAC22_Road_Transp_Bill.pdf)

<sup>6</sup> Standing Committee on Public Accounts. *Inquiry into the Road Transport (Third-Party Insurance) Amendment Bill 2011: Report*, p 5, viewed 03 December 2018, accessible at [https://www.parliament.act.gov.au/data/assets/pdf\\_file/0020/371513/PAC22\\_Road\\_Transp\\_Bill.pdf](https://www.parliament.act.gov.au/data/assets/pdf_file/0020/371513/PAC22_Road_Transp_Bill.pdf)

<sup>7</sup> Detail on the Citizens’ Jury process can be found in the submission 61 provided by the ACT Government.

<sup>8</sup> ACT Government. *Submission 61*, p. 3.

<sup>9</sup> ACT Government. *Submission 61*, pp. 3-4.

<sup>10</sup> ACT Government. *Submission 61*, p. 4.



- The CTP scheme in the ACT must remain community-rated.
  - The types of vehicles for which CTP must be purchased and the way premiums are calculated between vehicle types cannot change as part of this process.
  - The scheme must be workable and fit within other legal and regulatory frameworks.
  - The deliberations could not examine the established Lifetime Care and Support Scheme.
- 1.17 To support the process, the Stakeholders Reference Group were appointed containing a wide range of stakeholders involved in a claim process such as a lawyer representatives, medical experts, insurers, consumer representatives, and public servants.<sup>11</sup>
- 1.18 The jury also considered evidence given by 16 witnesses during the second week including 6 people injured in a motor vehicle accident.<sup>12</sup>
- 1.19 At the end of the Stage 1, the jury delivered its report<sup>13</sup> on the objectives for an improved CTP scheme to the Stakeholder Reference Group. The jury's six objectives were<sup>14</sup>:
- Early access to medical treatment, economic support and rehabilitation services;
  - Equitable cover for all people injured in a motor vehicle accident;
  - A value for money and efficient system;
  - Promote broader knowledge of the scheme and safer driver practices;
  - Implement a support system to better navigate the claims process; and
  - A system that strengthens integrity and reduces fraudulent behaviour.
- 1.20 In March 2018, jury members were provided 'the scheme designer's paper outlining the four models and the contracted actuary's paper costing these models'.<sup>15</sup> The paper were prepared by external firms – Finity and Ernst & Young<sup>16</sup>.

## DECISION ON THE MODEL FOR THE MAI BILL

- 1.21 On Sunday 25 March 2018 after exploring and discussing all four models developed based on Stage 1, the Citizens' jury voted on model D to be a new model for CTP coverage. The jurors chose model D, with the final vote of 82 per cent.<sup>17</sup>

<sup>11</sup> ACT Government. *Submission 61*, pp. 4-5.

<sup>12</sup> ACT Government. *Submission 61*, p. 5.

<sup>13</sup> *Citizens Jury on Compulsory Third Party Insurance: Final Report*. 29<sup>th</sup> October 2017, viewed 5 December 2018, available at [https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/6715/0925/8006/Citizens\\_Jury\\_on\\_CTP\\_Final\\_Report\\_29th\\_October.pdf](https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/6715/0925/8006/Citizens_Jury_on_CTP_Final_Report_29th_October.pdf)

<sup>14</sup> ACT Government. *Submission 61*, p. 7.

<sup>15</sup> ACT Government. *Submission 61*, pp. 4-5

<sup>16</sup> All documents related to the jury process can be access at <https://yoursay.act.gov.au/ctp>

<sup>17</sup> ACT Government. *Submission 61*, pp. 7-8.

- 1.22 The jury decided that the model D best met its objectives set up within the report<sup>18</sup> delivered in October 2017.
- 1.23 The model chosen by jurors should delivered the following improvements:<sup>19</sup>
- everyone injured in a motor vehicle accident will receive up to five years treatment, care and income benefits, regardless of who was at fault. This means approximately 40 per cent of injured people who currently cannot make a CTP claim (apart from reimbursement of up to \$5,000 for medical expenses) will be covered, about 600 more Canberrans per year;
  - everyone will have earlier access to benefits after an accident. There will continue to be exclusions for serious criminal offences, in line with other Australian jurisdictions;
  - quality of life benefits, which provide compensation for non-financial loss, will be available for all people who meet injury thresholds; and
  - anyone whose injury was caused by someone else's negligence and who is more seriously injured and meets the required injury threshold will still be able to access additional common law benefits.
- 1.24 The final report<sup>20</sup> covering jury's decision together with a summary of other three models was delivered to the ACT Government on Tuesday, 27th March 2018.
- 1.25 The final report further incorporates a summary of the Minority Report<sup>21</sup> authored by four jury members stating issues regarding the model D:
- Compensation for not-at-fault victims;
  - Access to common law compensation;
  - Gratuitous care;
  - Concerns about WPI; and
  - Cost of premiums.
- 1.26 Based on model D, the ACT Government has developed the Motor Accident Injuries Bill 2018 and the accompanying explanatory guide noting '[t]he exposure draft of the Bill provides the framework, key principles and requirements for the operation of the new Motor Accident Injuries scheme.'<sup>22</sup>

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<sup>18</sup> *Citizens Jury on Compulsory Third Party Insurance: Final Report: 29<sup>th</sup> October 2017*, viewed 5 December 2018, available at [https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/6715/0925/8006/Citizens\\_Jury\\_on\\_CTP\\_Final\\_Report\\_29th\\_October.pdf](https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/6715/0925/8006/Citizens_Jury_on_CTP_Final_Report_29th_October.pdf)

<sup>19</sup> ACT Government. *Submission 61*, p 8.

<sup>20</sup> *Citizens' Jury Report: Compulsory Third Party Insurance: 25<sup>th</sup> March 2018*, viewed 5 December 2018, available at [https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/5215/2201/1327/Citizens\\_Jury\\_Report\\_on\\_CTP\\_25th\\_March\\_2018\\_with\\_links.pdf](https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/5215/2201/1327/Citizens_Jury_Report_on_CTP_25th_March_2018_with_links.pdf)

<sup>21</sup> *Ibid*, p. 5.

<sup>22</sup> ACT Government. *Submission 61*, p. 9.

# OUTLINE OF EXPOSURE DRAFT BILL

1.27 I note the advice from the ACT Government on the form of the Exposure Draft Bill:

The exposure draft of the Bill provides the framework, key principles and requirements for the operation of the new Motor Accident Injuries scheme.

and

As is identified in the guide to the exposure draft, the final Bill will include transitional provisions and provisions on the interaction with workers compensation schemes. The committee inquiry provides a further opportunity for consultation with the community on the detail of the new scheme. Input from the committee will inform the final Bill that is set to be introduced to the Legislative Assembly by the end of 2018.<sup>23</sup>

1.28 An outline of the Exposure Draft Bill is:

**Chapter 1** provides for preliminary matters, including:

- Important concepts, including injury concepts, insurance concepts indexation concepts and duties in relation to motor accidents
- A Motor Accident Injuries Commission

**Chapter 2** provides for the coverage provided in the Bill for:

- Entitlement to defined benefits, limitations and exceptions to entitlement
- When entitlement to certain benefits ends
- Application for defined benefits
- Accepting or rejecting liability for defined benefits
- Transfer of application from insurer
- Defined benefits and income replacement benefits
- Defined benefits – treatment and care
- Quality of life benefits (application)
- Quality of life benefits (WPI Assessment)
- Defined Benefit(death benefits), (funeral benefits), (Australians living overseas)
- Dispute resolution
- External review of decisions by insurer

**Chapter 3** –Motor Accident Injuries – common law damages

- Damages threshold
- Exclusions and limitations from damages
- No-fault motor accidents
- Court proceedings on motor accident claims

**Chapter 4** – motor accident injuries insurance

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<sup>23</sup> ACT Government. *Submission 61*, p. 11.

- Compulsory motor accident injuries insurance
- Motor Accident insurance policies
- Selection of an MAI insurer
- Length of MAI policy
- Policy cancellation
- MAI premiums
- Nominal Defendant liabilities
- Nominal Defendant Fund
- Mai insurer and nominal defendant may recover costs incurred

**Chapter 5 – MAI Insurer licences**

- Matters pertaining to all aspects of MAI insurer licences

**Chapter 6 – Enforcement**

1.29 The Committee has provided a link to the full Exposure Draft Bill at:

[https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/6015/3733/0484/Exposure\\_Draft\\_Motor\\_Accident\\_Injuries\\_Bill\\_2018.pdf](https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/6015/3733/0484/Exposure_Draft_Motor_Accident_Injuries_Bill_2018.pdf)

# CONDUCT OF THE INQUIRY

1.30 This chapter considers views on the inquiry terms of reference—as expressed in written submissions provided to the Committee, and as represented in appearances and evidence to the Committee as witnesses.

## SUBMISSIONS

1.31 The Committee received 75 submissions from a wide range of stakeholders.

1.32 As to the submission analytics—submissions were received from a range of key stakeholder groups—public sector, legal firms, professional legal associations, key interest groups and organisations, insurance companies, union groups, jury members, and interested individuals. A summary of submissions<sup>24</sup> received across these stakeholder groups is detailed in Table 1.1 together with their views on the proposed Bill.

Table 1.1—Summary of submissions received across stakeholder groups and their views on the Bill

Stakeholder group(s)	Number of submissions received	View expressed
ACT Government	1	Supportive
Legal firms	4	Not supportive
Professional legal associations	3	Not supportive
Union groups	4	Not supportive
Insurance companies	2	Supportive
Key interest groups and organisations	1	Not supportive
Interested individuals	58	Not supportive / One neutral
Jury stakeholders	1	Supportive

<sup>24</sup> Submissions authorised for publication.

Jury members	1	Not supportive
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## SUMMARY OF VIEWS IN SUBMISSIONS

1.33 The received submissions contain a wide range of non-supportive or supportive comments relating to the Bill. As shown in the table above, most of submitters opposite the Bill expressing concerns relating particular issues based on their experience with the current scheme or involvement in the process.

1.34 All submitters who oppose the Bill commented on proposed changes and highlighted the Bill as unfair to not-at-fault victims of a motor accidents:

The scheme which is proposed in the Motor Accidents Injuries Bill is not in the interests of not-at-fault injured people and is unfair. The changes appear to be largely in the interests of insurance companies rather than injured people. .... The proposed CTP scheme will significantly shift power and control to insurers. It will allow them to dictate such things as the information about entitlements which is provided to injured people, the medical treatment available to injured people and the determination of the lost income to which injured people are entitled.<sup>25</sup>

While we do not oppose a scheme that provides benefits for at-fault drivers, this should not be done by simply reducing the benefits for injured people who were not at fault.<sup>26</sup>

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%.<sup>27</sup>

1.35 In contrary, one submitter supported the Bill provided a summary of benefits for model D chosen by the Citizen Jury members

The model chosen by the Jurors in the Stage 2 process gave up to 5 years of no-fault benefits to all who were injured – medical and other care costs, home care, and loss of income, as well as aids, appliances and rehabilitation. In addition, it gave no-fault lump sum benefits where someone had a permanent impairment of 5%, based on their level of disability, up to \$350,000. Where someone could show fault, and their permanent impairment was 10% or more, they could seek damages for the non-economic losses up to \$500,000. Benefits for families where someone has died were also included.<sup>28</sup>

<sup>25</sup> Slater & Gordon, *Submission 71*, pp. 2-3.

<sup>26</sup> Australian Education Union ACT Branch, *Submission 63*, p. 1.

<sup>27</sup> Mr Browne, *Submission 58*, p. 3.

<sup>28</sup> Dr Wheatland, *Submission 75*, p. 2.

1.36 Mr Herbert also expressed his concern that the changes will shift power to insurers

Control of the scheme will pass to the insurance companies who will determine when and if compensation to injured people is paid and what amount. Anyone who believes the insurance companies will operate with sympathy and compassion for claimants is laughable. They are profit driven and will seek to minimise payments to compensate injured drivers and passengers at every opportunity.<sup>29</sup>

This sentiment was repeated by other submitters too.<sup>30</sup>

1.37 A number of submitters were concerned about limits set up by the Bill to access an independent review in case of disputes

The ALA is concerned that the review provisions in the MAI Bill will serve to limit access by claimants to appropriate review of decisions affecting their rights. The ALA is also concerned that under the MAI Bill, an internal review can be performed by a person involved in the initial decision and that external review is excluded for some decisions. The ALA submits that this is contrary to the principles of natural justice and procedural fairness.<sup>31</sup>

The internal reviews in the proposed scheme are inappropriate and akin to banks regulating themselves. External review is necessary, although it is expected that this will be resisted by the designers of the scheme. Proper external reviews must be available, in which injured people are legally represented. Note that insurers will access to professional claims officers and internal and external lawyers. The likelihood of a very large number of micro disputes over, for example, the refusal by the insurer to cover the cost of an MRI or physiotherapy treatment, will make this very problematic. In any event, there will also be a consequential blow-out in the use of court/tribunal resources which will be borne by the public purse.<sup>32</sup>

This sentiment was echoed by other submitters too.<sup>33</sup>

1.38 Unions' submissions also highlighted that the proposed changes will impact on compensation systems for work injuries

Under the proposed scheme compensation for an injury arising from a motor accident will be dramatically less than for a workplace injury. A whole new infrastructure will be set up to manage the new CTP scheme, including to deal with the assessment of thresholds for damages. As the difference will be so stark, and with the infrastructure in place, we are concerned that there will be irresistible pressure to amend the workers' compensation scheme to harmonise it with the new CTP scheme. We believe

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<sup>29</sup> Mr Herbert, *Submission 19*, p. 1.

<sup>30</sup> Submissions: *Submission 10; Submission 23; Submission 27; Submission 39; Submission 40; Submission 43; Submission 59; Submission 62; Submission 64; Submission 65; Submission 69; Submission 70; Submission 71; Submission 73; Submission 74*.

<sup>31</sup> Australian Lawyers Alliance, *Submission 64*, p. 5.

<sup>32</sup> Slater & Gordon, *Submission 71*, p. 5.

<sup>33</sup> Submissions: *Submission 60; Submission 62; Submission 68; Submission 70*.

that this is already being discussed by workers' compensation insurers and employer bodies.

The Union is concerned that the implementation of the proposed scheme will be also detrimental to the operation current ACT workers' compensation scheme in its current state. Currently a person who is injured in a work related motor accident can obtain the larger benefit of the two schemes.<sup>34</sup>

## COMMITTEE HEARINGS

- 1.39 The Committee held public hearings and invited 12 witnesses from a range of key stakeholder groups— legal firms, professional legal associations, key interest groups and organisations, insurance companies, union groups, jury members, and interested individuals.

Table 1.2—Summary of witnesses presenting to the committee’s inquiry received across stakeholder groups and their views on the Bill

Stakeholder group(s)	Witnesses Appearing	View expressed
Legal firms	3	Not supportive
Professional legal associations	3	Not supportive
Union groups	1	Not supportive
Insurance companies	2	Supportive
Key interest groups and organisations	1	Not supportive
Interested individuals	1	Not supportive
Jury members	1	Not supportive

## SUMMARY OF VIEWS FROM HEARINGS

- 1.40 Law Society of the ACT opposite the Bill as unfair and regressive one

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<sup>34</sup> CFMEU ACT, *Submission 65*, p. 6.



The proposed MAI scheme is a regressive change to a crucial compulsory scheme of insurance that presently protects people. The scheme would take away that protection to a significant degree. It will be a gross unfairness on the community, causing unnecessary anxiety, loss and misery. The only winners are likely to be the insurers and their supporters.<sup>35</sup>

1.41 As a contrary view, Suncorp Group stated

If this legislation is passed, we believe, the ACT will have the best CTP scheme in Australia. Crucially around 600 injured motorists a year will receive support for what the current scheme considers at-fault accidents, such as hitting a kangaroo or a momentary lapse in judgment. This has been an important social reform that will change the lives of hundreds of families for the better.<sup>36</sup>

1.42 Witnesses who oppose the Bill expressed their concern regarding to Whole of Person Impairment (WPI) set up at 10 per cent to receive full compensation

... but 10 per cent is a misleading notion because 100 per cent is effectively a tetraplegic person who cannot do anything. If you are above 30 or 40 per cent permanently impaired, you are incapable of working or having much quality of life as it is. So it is not 10 out of 100; it is 10 out of an artificial scale where it is not necessarily the case that the jury understood what they were agreeing to. ... I am not speaking with anything like having gone back to colleagues et cetera, but 10 per cent is a very high threshold which cuts out a lot of people. I cannot tell you what the figures of what five per cent would be. I know there is a genuine interest to deal with small claims—minor accidents where there are transient injuries that resolve and recover quickly and do not become administrative and cost burdens to the scheme.<sup>37</sup>

... a 10 per cent whole person impairment threshold is almost impossible to reach. For example, one of my clients worked as a plumber. He will never be able to work again as a plumber. He has back injuries which necessitated him taking very strong pain medication, and depression, which led to an attempted suicide and ongoing severe pain and depression. That person is unlikely to meet even five per cent whole person impairment.<sup>38</sup>

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<sup>35</sup> Law Society of the ACT, *Transcript of Evidence*, 19 November 2018, p. 81.

<sup>36</sup> Suncorp Group, *Transcript of Evidence*, 19 November 2018, p. 95.

<sup>37</sup> ACT Bar Association, *Transcript of Evidence*, 2 November 2018, pp. 41, 44.

<sup>38</sup> Australian Lawyers Alliance, *Transcript of Evidence*, 19 November 2018, p. 83.

- 1.43 Law Society of the ACT also highlighted that WPI ‘does not take into account your pre-injury occupation, it does not take into account pain and it does not take into account your future medical requirements’.<sup>39</sup> The same sentiment was also expressed by CFMEU ACT Branch

I think our view is that it is an inappropriate measure, partly because there are a lot of factors that are not considered in WPI. One of the examples that has been suggested is that it does not necessarily consider the type of work that you undertake and, as a result of that, what your lost income might be as a result of your injury.<sup>40</sup>

- 1.44 In contrast to statements on WPI above, witnesses in favour of the Bill supported

... having an objective approach and measure like the whole person impairment as part of the scheme, because it is a reliable and consistent way to assess and measure injury severity, and then use that to determine who should get access to what benefits.<sup>41</sup>

- 1.45 Many witnesses<sup>42</sup> noted that the current scheme needs to be reformed but still preferred it to the proposed one

... I think that the current scheme can be smoothed out, but retained, although we do still favour some elements of the no-fault aspect... I would stay with the current scheme until a better scheme can be formulated.<sup>43</sup>

## SUBMISSIONS AND HEARINGS - VIEWS ON THE CITIZENS’ JURY

- 1.46 The evidence from the inquiry process highlighted issues regarding to citizens’ jury process noting that the third-party insurance scheme is a complex issue to be fully examined by jury members without the benefit of lived experience as ‘ACT residents who have had experience with the current scheme were specifically excluded from the process’.<sup>44</sup>

- 1.47 One submitter expressed concern that ‘the Government’s citizens jury process was flawed - both in terms of its makeup, and its opportunity to make informed and independent decisions’.<sup>45</sup>

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<sup>39</sup> Law Society of the ACT, *Transcript of Evidence*, 19 November 2018, p. 84.

<sup>40</sup> CFMEU ACT Branch, *Transcript of Evidence*, 20 November 2018, p. 117.

<sup>41</sup> Insurance Australia Group, *Transcript of Evidence*, 2 November 2018, p. 13.

<sup>42</sup> Witnesses: Mr Francis, *Transcript of Evidence*, 19 November; Australian Lawyers Alliance, *Transcript of Evidence*, 19 November 2018; Law Society of the ACT, *Transcript of Evidence*, 19 November 2018; Maurice Blackburn Lawyers, *Transcript of Evidence*, 19 November 2018; Slater and Gordon, *Transcript of Evidence*, 20 November 2018.

<sup>43</sup> Pedal Power ACT, *Transcript of Evidence*, 19 November 2018, pp. 62, 63.

<sup>44</sup> Maurice Blackburn, *Submission 68*, p. 12.

<sup>45</sup> Maurice Blackburn, *Submission 68*, p. 12.

#### 1.48 Most submitters<sup>46</sup> and witnesses<sup>47</sup> commented on citizen jury process in dubious way

The jury's ability to reach a radical compromise was limited by its narrow terms of reference. We could not look at raising premiums, even though polling done by Piazza Research for the citizens jury showed that 49 per cent of Canberrans would prefer to pay higher premiums to get more generous coverage. We could not move to a government-run scheme, even though Dr Ian Cameron, a member of the stakeholder reference group, said, "Model D is not the model that could provide greatest equity and value for money. A more completely no-fault system, as in Victoria, would do that better." We also could not propose a scheme where some people would pay more than others and where some people would pay less, or look at other ways of encouraging drivers to take out insurance that would protect them, so ways of increasing first-party insurance rates.<sup>48</sup>

The "jury process" paid for by the ACT public, was a farce. It was secretive, restricted and biased. Not surprisingly, the outcome sought by the ACT CTP insurers was reached.<sup>49</sup>

The CTI Citizen's Jury was Canberra's first attempt at deliberative democracy, and ultimately it was only 39 jurors (0.00009% of the population) who made the decision to select model D (the most extreme model) which has led to the introduction of the Bill, Unfortunately a decision was made by the ACT Government to exclude any Canberran from the Citizen's Jury who had any experience with bringing a CTP claim, furthermore, certain postcodes were also excluded from the second round of the thousands of invitations that were sent out.<sup>50</sup>

#### 1.49 As a contrary view, one submitter noted

I consider that the views put by some that the jurors were not experts and so had no knowledge upon which to base their views both ill-informed and derogatory of the efforts of so many people - both "experts" and jurors - who worked together to help jurors consider the best balance of benefits for people who were harmed in motor accidents.<sup>51</sup>

#### 1.50 Transparency of citizen jury process was underlined by the ACT Government

Sessions from the first weekend were live streamed. In addition, the jury's deliberations were open to the general public with individuals able to register their interest to be an observer at the jury sessions. Members of the Stakeholder Reference

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<sup>46</sup> Submitters: Submitters: *Submission 11; Submission 52, Submission 58; Submission 59, Submission 62; Submission 63; Submission 65; Submission 67; Submission 68; Submission 70; Submission 71; Submission 73; Submission 74*

<sup>47</sup> Witnesses: Mr Browne, *Transcript of Evidence*, 2 November; ACT Bar Association, *Transcript of Evidence*, 2 November 2018; Law Society of the ACT, *Transcript of Evidence*, 19 November 2018; Maurice Blackburn Lawyers, *Transcript of Evidence*, 19 November 2018; <sup>47</sup> CFMEU ACT Branch, *Transcript of Evidence*, 20 November 2018; Slater and Gordon, *Transcript of Evidence*, 20 November 2018; Maliganis Edwards Johnson, *Transcript of Evidence*, 20 November 2018.

<sup>48</sup> Mr Browne, *Transcript of Evidence*, 2 November 2018, pp. 28-29.

<sup>49</sup> Mr Webster, *Submission 52*, p. 1.

<sup>50</sup> Snedden, Hall & Gallop (Supplementary), *Submission 70*.

<sup>51</sup> Dr Wheatland, *Submission 75*, p. 1.

Group were present throughout the jury weekends. Observers were able to view the process, both the plenary sessions and the small group discussions. The Government considers that the presence of observers was a key part of the transparency of the process.<sup>52</sup>

- 1.51 ACT Bar Association also commented on differences between chosen model D and the proposed Bill noting '[a]nd things that might have appeared to the jury to have been certain are now uncertain.'<sup>53</sup>

## PROBLEMS IDENTIFIED WITH THE EXPOSURE DRAFT BILL

- 1.52 Given the Committee was nominated as the sole point of contact on the Exposure Draft of the Bill, it is appropriate that a list of matters referred to the Committee as problems with the Bill is provided with this report.
- 1.53 The following problems with the proposed Bill were identified during the process of the inquiry:
- The Bill unnecessarily discriminates against those over 65 who may be or may have still been employed were they not to have been injured. This is not an issue under the current scheme.
  - The Bill creates an inequity by lower income earners being compensated in a formulaic manner which gives them less financial compensation than those of a greater means. This is not an issue under the current scheme
  - The Bill leaves the injured at a disadvantage if police infringements are not issued at an accident, this being potentially an arbitrary choice made by law enforcement officials with very long reaching consequences for the injured person. Entitlements will be severely affected by the issuing or non-issuing of infringement notices by police at the time of the accident. This is not an issue with the current scheme.
  - The Bill also relies on the issuing of infringements for the accident as being the determining factor in the reason for the accident, however it is quite possible that a matter for which an infringement was issued may not have been the causal factor in the accident taking place and this is a significant flaw in the justice or injustice which may be done to the victim or injured persons according to the proposed scheme. Whether the incident for which an infringement was issued has caused the accident must be considered when compensation is awarded, not simply whether an infringement has been issued which may or may not related to the accident having occurred. This is not an issue under the current scheme.
  - The Bill and proposed scheme does not take into consideration the wage or income which a person would have earned had they not been injured. This is an injustice as compared to the

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<sup>52</sup> ACT Government, *Submission 61*, p. 9.

<sup>53</sup> ACT Bar Association, *Transcript of Evidence, 2 November 2018*, p. 40.

current scheme in particular where such matters can be taken into account. This is not an issue under the current scheme.

- The Bill imposes a significant burden on injured parties very soon after the accident has occurred which can be at a time when they are under the influence of significant medications this is not the case under the current scheme.
- This Bill imposes a choice on the injured person if they will be assessed for impairment based upon either mental or physical health. The injured person can only have the assessment of one of these spheres tested and paid for by the proposed scheme. This is a ridiculous proposal. There is no medical reason why this should be the case, it seems yet again to be designed to make the cases easier to conclude rather than fairer for the injured person who may indeed have sustained detrimental outcome in both physical and mental health spheres. As a result it is possible that injustice will be done to either those who choose the lesser area of injury either out of ignorance or misunderstanding or indeed whose either mental or physical symptom have not yet stabilised. This is not an issue in the current scheme.
- The Bill proposed that children's assessment of injury be also performed in a shorter timeframe than under the current system. It has been suggested to the committee that even if a shorter timeframe was imposed through a scheme such as this, it is much harder to put the same timeframes on injuries sustained by children, as it is not always possible to know the effects of accidents on them for a longer period of time. This could create an injustice to children as opposed to the current scheme. This is not an issue under the current system.
- The Bill proposes a significant administrative and negotiating burden on injured persons. It excludes the regular representation by third parties of the injured person by legal assistance and so on. As a result the injured person will have to negotiate directly in most cases with the insurer themselves. This puts them at a significant disadvantage as compared to the current system.
- The Bill does not specifically allow for independent review of initial decisions made by insurance companies. The parties may need the arbitration or at least the oversight of a reviewer in order to avoid this.
- The Bill does not outline the process for dispute resolution and yet it is something about which the committee has heard considerable concerns. Similar legislation in NSW includes a clear dispute resolution process as part of the Bill, the proposed scheme does not. It is of grave concern to many that the Bill is planned to be passed through the assembly and yet there is no explanation of what dispute resolution process will be available. Thus the assembly will be asked to vote on a system missing this element which is clearly less satisfactory than the current scheme.
- The Bill is also missing any guidelines which will need to be very clear on what claimants would be entitled to; particularly for those seeking to start treatment immediately. There is significant concern that this information has not been provided to the community.

- The Bill is unclear on how early access to treatment may affect overall entitlements and makes some submitters concerned that claimants who wish to commence treatment immediately will not know at the outset how that will affect their overall claim.
- The Bill creates some significant concern that, regarding choice between quality of life versus payments allowing for a top-up, may disadvantage low income earners who are less able to exist without the cash available and yet may be disadvantaged in the longer term because of accessing this early cash payments. This would need to be resolved.
- The Bill as proposed reduces compensation to victims. This is a very significant reason for the Bill not to be supported. The scheme was originally established to assist those who no fault of their own are injured and whose lives are altered, the proposed scheme significantly reducing the amount accessible to the vast majority of claimants who would fit this categorically is a far less favourable scheme for the purpose for which it was set up.
- The Bill does not include payments to carers who provide gratuitous care and when this may be the best care available for the injured person it is would be far better to have such care able to be compensated for.
- The Bill does not provide for the majority of cases to involve independent medical review, this is a flaw in the Bill.
- The Bill does not allow for independent briefing options for those seeking compensation, however this would be necessary to allow for a balance between the desires of insurers to maximise their profits and the needs of the injured persons to be aware of all options available to them.
- The Bill does not go to the detail of a regulator of this legislation and the current regulator is an employee of ACT government. Therefore there is a need for a fully funded and independent regulator.
- It was put to the committee that profits of insurers be limited to 8% however it is not the committee's view to do so, it is the committee's view that there is presently no significant issue with profitability for this scheme.
- The proposed scheme does not allow explicitly for legal representation and indeed it may well remove the ability in the general scheme of things for ordinary people to be able to afford to have a lawyer represent their interests in negotiating with the professional insurance companies delivering the scheme. The current scheme allows for this representation and fees for the representation are deducted from final payments. This is missing from the proposed Bill and is a significant disadvantage over the current scheme.
- The proposed scheme does not have significant regard to natural justice and procedural fairness and as such there needs to be a rebalancing of the vulnerability of those who have suffered injury as compared to the insurers they will be dealing with.
- The proposed scheme will leave the innocent victims of motor vehicle accidents significantly less well compensated therefore the scheme is a much lesser one for victims in the ACT, this is an injustice to future victims which is not justified in the Bill.

- The Bill puts insurance companies as the major decision maker in access to early treatment and care, this could better be decided by an independent umpire, and unfortunately there is no such body in the proposed scheme.
- The Bill puts access to court judgements of compensation only for those who qualify as having 10% “Whole Person Impairment” or WPI, this measure was not designed for use in cases of insurance and even the American Medical Association, who designed this test of physical impairment have stated it is an inappropriate use of this system to use it in adjudicating insurance claims. 10% WPI will only be realistically achieved by a very small fraction of those injured on the roads in the ACT. This limits access to just outcomes for those with a lesser WPI whose entire lives may have been seriously impacted by their injuries but do not meet this very high benchmark. A much lower WPI would need to be adopted or indeed an entirely different method of assessment used for those with serious injuries.
- The lived experience of those who have previously been injured was not considered in the design of the scheme. This has left the scheme without such a valuable perspective.
- Non-economic loss and suffering of the injured person is not as significantly considered as it could be, this means that the flat rate compensation the scheme offers does not offer as proper a just response as the current scheme.
- There seems no justification why the injured people should have to choose between CTP and Workers compensation in the rare cases in which both would apply.
- The Bill’s income replacement scheme unfairly does not take into consideration the real pre earnings of the injured person, instead offers a flattened worth for income.

## COMMENTS

- 1.54 It is important to note that the Committee inquiry process received strong support from the groups invited to make a submission, and a strong representation of views and discussions gained from witnesses presented during the hearings.
- 1.55 During the hearings, the Committee asked witnesses the same question *‘if you had to choose between the current scheme and the proposed scheme what would you choose?’* All responses correspond with the column View expressed in the tables above.
- 1.56 Submissions to the inquiry, and evidence from witnesses at public hearings, expressed a range of views concerning the Bill. Most evidence was fully opposed to the Bill in its current form, while three submitters were supportive of the Bill – one<sup>54</sup> of them suggested parts should be changed or amended to improve outcome for injured persons. In contrast, many were not supportive of the Bill and were highly sceptical that the Bill would achieve the Bill’s some of main objectives—that of equitable cover, value for money and an efficient

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<sup>54</sup> Submission 66

system, and facilitating and reducing time to finalize settlements and payments. In the main, both submitters and witnesses opposing the Bill pointed out significant issues with regard to injustice for not-at-fault injured victims relating to their reduced benefits together with limiting access to common law compensation, compared with the current scheme.



## 2 COMMENTS AND RECOMMENDATIONS

### COMMENTS

- 2.1 I consider the citizens' jury process has been a flawed means of examining, assessing, comparing and concluding a proposed improved CTP scheme. In particular the collection of the Jury's views at the start of the process, then the introduction of a scheme designer who seemed not to pay much attention to the jury's views and then the presentation to both the experts panel and then the citizens' jury of only 4 options, none of which seem to have been an acceptable model limited the Juries' ability to genuinely shape the outcome of the process and in being forced to choose from the options available gives the impression of community support to a scheme which is clearly not an improvement of the scheme we have at present.

### CONCLUSIONS REGARDING THE MODEL CHOSEN

- 2.2 It is unreasonable and not in line with a representative democracy, to propose that a citizens' jury process binds a committee of the assembly to the manner in which it should look at the Bill's suitability for the citizens of the ACT. The reasons for this conclusion are as follows:
- The JACS Committee was formed as such: at its meeting of 13 December 2016 the Legislative Assembly resolved to create a Justice and Community Safety (JACS) Committee:
    - A Standing Committee on Justice and Community Safety to perform a legislative scrutiny role and examine matters related to **community and individual rights**, consumer rights, courts, police and emergency services, corrections including a prison, administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, consumer affairs and regulatory services.
  - The JACS Committee is charged with performing the role of a detailed examination of how matters may impact community and individual rights, among other things. Not to look at whether a given law meets some outcomes which a government claims is the will of the community or indeed a dubiously selected group of citizens involved in a highly manipulated process which may or may not in fact have even been able to represent the community as a whole.
  - The Committee cannot be bound by a limited terms of reference when the rights of the community and individuals will be so significantly impacted to the extent they are under the proposed Bill, this is a matter both of the committees very reason for existence as well as a matter of justice for the community.

- Furthermore, under Chapter 18 of the *House of Representative Practice*, it is noted that parliamentary committees such as the JACS Committee exist to oversee and scrutinise the Executive so as to enable them to contribute to better government. The Committee must not be unduly bound therefore by narrow terms of references to render the committee unable to perform its function in scrutinising the Executive and contributing to better government.
- Merely because the government has set up a test designed to prescribe and limit the JACS Committee's criticisms of the proposed Bill disregards the proper process of committees in the Legislative Assembly and in our Westminster system of representative government more generally.
- The Committee is not able to assess and answer the points requested in the Terms of Reference until it has first assessed the community's broad reaction to the proposed scheme. Otherwise as elected representatives, the Committee members are not fulfilling their first duties to their electors.
- The role of elected representatives is not to approve a politically manipulated "citizen's jury" process, but to represent their electors and the ACT as a whole.

- 2.3 This Bill is an abject failure at its most basic intent to provide Canberra road users with an insurance product that will compensate them for injury incurred.
- 2.4 The Bill promotes the interests of large insurance corporations at the expense of injured innocent people.
- 2.5 It fails in its purpose of improving compensation for the road users of the ACT in all criteria but one, and that is that it may allow those responsible for motor vehicle accidents to access a greater sum of money than is available at present to assist with any injuries they have inflicted upon themselves. However, given that the current scheme already includes some provisions, albeit to a lesser extent in some cases, it cannot be said that they will be objectively better off in all circumstances than under the current scheme.
- 2.6 A substantial majority of the victims injured will receive significantly less, and indeed they will be at the mercy of the large insurance corporations to a much greater extent under the proposed Bill than at present.
- 2.7 The inquiry was informed that the projected profits of the insurance companies offering CTP insurance in Canberra at present is a very healthy 8-13%.
- 2.8 It is no wonder that the only submitters or witnesses that expressed support for the proposed scheme were representing these very insurance corporations who are the only significant beneficiaries of the proposed scheme, given that it will, as described by them, smooth out their profits.

- 2.9 Given that our inquiry received only neutral, negative or non-supportive and clearly strongly opposed submissions - the substantial majority of which being very negative, it is hard to see how this Bill could be in any way favourably responded to by the Committee, despite an attempt to force the Committee to table a response to the government's objectives as provided in the terms of reference.
- 2.10 That is not the role of the Assembly's Committees and it would not do justice to the voters of the ACT who expect Assembly committees not to protect governments but to advocate better government; in this case, by protecting victims of motor vehicle accidents from a scheme which would unfavourably expose them to large insurance corporations interests and leave our constituents in a worse position.
- 2.11 It is not the Committee's place to support the smoothing out of profits for large insurance corporations at the expense of a just outcome for victims.
- 2.12 Therefore, it is only proper that we not conclude on terms of reference 1(a), 1(b), and 1(c). On 1(d) it is the consistent view of submitters who do not represent the insurers that the magistrates' court remain the body of external review.

# RECOMMENDATIONS

## Recommendation 1

**2.13 I recommend that, having regard to the Committee's terms or reference and evidence received by the Committee, that the scheme for a new CTP scheme provided by the Exposure Draft of the Motor Accident Injuries Bill 2018 not be supported by the Assembly and not proceed.**

## Recommendation 2

**2.14 I recommend that, having regard to the findings and comments in this report, the ACT Government begin again to genuinely seek improvements to the current scheme. The government should propose an improved scheme which benefits the community as a whole and not simply insurance companies.**

Giulia Jones MLA

14 December 2018

