

HUMAN RIGHTS & DISCRIMINATION COMMISSIONER

ACT Human Rights Commission

Andréa Cullen
Committee Secretary
Standing Committee on Public Accounts
ACT Legislative Assembly

 A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE	
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Dear Ms Cullen

Road Transport (Third-Party Insurance) Amendment Bill 2011

Thank you for the invitation to provide comments on the Road Transport (Third-Party Insurance) Amendment Bill 2011 ('the Bill').

As you know, I provided comments on the earlier Exposure Draft of the Road Transport (Third-Party Insurance) Amendment Bill 2010 raising a number of concerns with the Exposure Draft from a human rights perspective. I attach a copy of that original advice for your reference. The Bill differs from the Exposure Draft, and the amendments have addressed some of the issues I had raised, but I continue to have some concerns about the consistency of other aspects of the Bill with rights protected under the *Human Rights Act 2004* (HR Act) as set out below.

Summary of Issues

In my advice on the Exposure Draft, I raised the following issues:

- General concerns about restricting access to certain common law damages based on level of impairment, as it could engage the rights to equality and fair trial;
- Specific concerns about the different thresholds for physical and psychological injury;
- Specific concerns about physical and psychological injuries not being combined for an assessment of whole body impairment;
- Specific concerns about the proposed cap on non-economic loss (NEL) damages and
- Specific concerns about the 5% discount on NEL damages; and
- General comments about a lack of justification in the Explanatory Statement on the limitation of rights across all these issues.

I also re-stated my previous concerns with access for low-income earners to costs arising from litigation. This is an issue not introduced in the Bill, but reflects concerns I had previously raised in relation to compulsory third party transport insurance.

Changes

I welcome the changes in the Bill, which do respond to some issues I had raised, most particularly:

- Harmonisation of the thresholds for both physical and psychological injury at 15%; and
- Removal of the cap on NEL damages.

Nonetheless, I continue to have concerns with the lack of discussion in the Explanatory Statement regarding human rights issues. It is difficult to assess the proportionality of these changes without such justification. I note the Explanatory Statement states that the motivations for the changes are:

- NEL damages are now a largely outdated measure, arising in the common law at a time in history when an injured party was unlikely to have the medical and rehabilitation facilities available to recover from an injury sustained in an accident.
- The key goal of the Act is to get injured people to access medical diagnosis, treatment and health services as soon as possible to facilitate quicker return to health and a reduced propensity to develop long term injuries
- What these proposed amendments do is facilitate the objectives of the CTP Act by improving the scheme; through facilitating the speedy resolution of relatively minor personal injury claims, encouraging the rehabilitation of all claimants, the affordability of premiums and competition in the ACT CTP market.

There is no consideration in the Explanatory Statement of the limitations which the Bill places on human rights, and whether these are proportionate. In particular it would be useful to consider whether the stated objectives could be achieved in a way which would have less impact on human rights. Whilst the levels of physical and psychological injury are now uniform, the Bill would still place those with certain disabilities (including permanent disabilities) at a detriment because the nature of their disability does not meet an arbitrary threshold. I therefore continue to have concerns that limiting access to NEL damages for one form of civil wrong, on the basis of a level of physical and psychological impairment, limits the rights to fair trial and equality.

No Combined Threshold

I noted in my original advice that clause 155I(2) of the Exposure Draft prevents psychiatric and physical impairments being combined to determine the relevant threshold. It is difficult to reconcile the description of this measure as 'whole body impairment' when the definition seeks to separate physical and psychological injury. This reinforces the impression that these thresholds are arbitrary.

Assessment of Impairment

As I discussed in my original advice, proposed s.155H would allow a person to apply to the assessor to have a second medical assessment only if the injury has deteriorated or if there is additional new information about the injury.

Under proposed s.155K the Magistrates Court may reject a medical assessment certificate, but only if admitted a matter in the certificate into proceedings would cause a party substantial injustice. Unlike the Government's proposed changes to the workers compensation scheme, this at least gives the court the power to undertake their own assessment of the injured person's degree of permanent impairment. I note that the assessment under s.155J(3) is peer reviewed.

Nonetheless, absent any 'substantial injustice', there appears no appeal or review right to the assessor or the courts in circumstances where a person feels their assessment has been incorrectly determined. An alternative would be to provide a person to apply to the assessor to have a second medical assessment in all cases. Even better, as noted by the Law Society Submission on the Explanatory Statement, would be a review right to a court of Tribunal.¹ This would be a relatively minor change but would lessen the limitation on the right to fair trial.

Lump Sum Discount

I note proposed new s.155A would continue to apply a discount to lump sum payments, set out at a default rate of 5 per cent. As I noted in my original advice, there doesn't appear to be a justification for this approach, other than a citation to a previous decision of the High Court. However, the High Court in *Todorovic v Waller* found the appropriate discount would be 3%.² The explanation given for this change is that this is the percentage which applies in other jurisdictions. I note submissions by others to the Exposure Draft noted this change would have disproportionate impact on children and the disabled, and so may constitute an unreasonable limitation on the right to equality.³

Costs

I note the Bill retains current s.155 in new section 156A. I have previously expressed concerns that s.155 of the *Road Transport (Third-Party Insurance) Act* indirectly discriminates against individuals less likely to incur economic loss as the result of a motor vehicle accident, for example, low income earners including part time workers (who are disproportionately women), children and young people and students. Low income earners, by virtue of their low income, are likely to be awarded lower damages figures for lost income. They are also more likely than higher income earners to have lower medical costs due to access bulk-billed services. The culmination of these two costs being lower than for higher income earners means that low income earners are more likely to fit the criteria in s.155(2)(a) and hence be prevented from claiming costs than higher income earners. This potentially amounts to indirect discrimination against these low income groups.

¹ Submission from ACT Law Society,
<http://www.treasury.act.gov.au/compulsorytpi/CTP%20submission%20FINAL%20-%20Joint%20ACT%20Law%20Society,%20ALA%20and%20Bar%20Assoc.pdf> (accessed 9 March 2011)

² (1981) 150 CLR 402

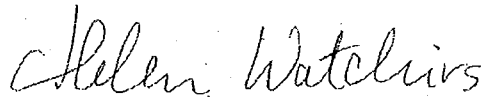
³ Submission from Maurice Blackburn Lawyers,
<http://www.treasury.act.gov.au/compulsorytpi/Maurice%20Blackburn%20FINAL%20301110.pdf> (accessed 9 March 2011)

I note that Bill does not seek to reverse these changes, and I restate that I have concerns with the impact of a cap on access to costs based on economic loss.

Conclusion

Thank you for the opportunity to provide this submission. Overall, I note that the Bill appears to limit rights under the HR Act, and absent any specific justification, it is difficult for me to assess if such limitations are reasonable.

Yours sincerely

A handwritten signature in cursive script that reads "Helen Watchirs".

Dr Helen Watchirs
Human Rights and Discrimination Commissioner
25 January 2012