LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SERVICES
Ms Elizabeth Lee MLA (Chair), Ms Bec Cody MLA (Deputy Chair)
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Submission Cover Sheet

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

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ACT BAR ASSOCIATION

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The Committee Secretary
The Standing Committee on Justice and
Community Safety
Legislative Assembly for the ACT
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Dear Committee Secretary,

Inquiry into *Motor Accident Injuries Bill 2018* - Exposure Drafts to the *Motor Accident Injuries Bill 2018* and to the Guide to the Bill - Submissions of ACT Bar Association

Thank you for the opportunity for the ACT Bar to provide a submission in response to the call for submissions by the Standing Committee on Justice and Community Safety of the Legislative Assembly.

The purpose of the legislation

The Bar Association submits that the purpose of a scheme of compulsory third party insurance is to provide proper compensation to those injured through the use of motor vehicles. The purpose of the scheme is not or should not be:

a) to produce or enhance the profit of insurance companies;
b) to give the ACT a new, unique or more modern 'model' scheme than other Australian jurisdictions at the expense of the rights of injured motorists.

The problem with a privately underwritten and administered scheme

The scheme proposed in the MAI Bill is best described as an 'at fault' scheme with a substantially limited common law entitlement.

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Unlike other at fault schemes such as the TAC scheme in Victoria, it is proposed that the scheme be privately underwritten. It is also proposed that claims will continue to be managed by private insurers.

This proposed method of administering claims gives insurers overwhelming power in relation to the provision of compensation to injured motorists.

The danger of active power imbalance is highlighted by the fact the MAI Bill proposes that claims be managed pursuant to undisclosed 'Guidelines', where all disputes arising in relation to claims must be subject to 'internal review', and where the nature of any external review remains unknown as to the identity of the reviewer, or the nature of the review process.

All that is known is that the decision upon external review will be binding upon the parties.

The failure of the Government to provide any detail as to the content of the 'Guidelines' makes it impossible for any stakeholder to make sensible submissions as to the likely real effect of the proposed scheme on injured motorists.

The Standing Committee should indicate that it is not able to make any recommendations to the Legislative Assembly until the content of the proposed Guidelines is known.

Submission 1

1.1 That private underwriting and administration of the MAI Act, an at fault compensation scheme with limited common law entitlement, is inappropriate.

1.2 That the role of insurers be reconsidered when the content of the 'Guidelines' is known.

The problem with the proposed rights of review

The Bar Association has serious concerns about the proposed rights of review and dispute resolution mechanisms in the MAI Bill.

The nature of disputes arising under the at fault part of the MAI Bill is likely to be broad. There is at least the prospect of wide-ranging disputes in relation to matters such as the quantum of income replacement payments; the entitlement to those payments; the entitlement to payment for medical and treatment expenses; the WPI assessment and the entitlement to payments for quality of life damages.

The MAI Bill provides the broadest discretion to the Attorney-General to appoint the external reviewer. At the moment the identity of the external reviewer remains unknown.

Similarly, the process to be adopted by the external reviewer remains unknown. Section 185(3) of the MAI Bill, however, provides that the decision of the external reviewer will be binding upon the parties. There does not appear to be any right of appeal.

It is therefore unknown if external review will be conducted by a Court, by an existing Tribunal such as ACAT, by a new Tribunal to be established or by some statutory person appointed from time to time by the Attorney-General.

It is not known how (if at all) the fundamental principles of procedural fairness will be applied, whether there will be the right to a hearing, the right to bring fresh evidence following the internal review or the right to cross examine witnesses.

It is not known if the rules of evidence will apply.

It is not known if the external reviewer will be required to act judicially, or whether it is to 'stand in the shoes' of the insurer in making its decision.

What is clear is that the right of representation will be affected, because it is proposed that legal practitioner's fees will be regulated, and that it will be unlawful for a legal practitioner to charge more than the regulated fee. Such regulation has the capacity to severely limit if not extinguish the capacity of injured people to obtain legal representation where there is a dispute with an insurer about entitlements.

Legal costs generally are already subject to strict and effective control pursuant to measures in the *Legal Profession Act* 2006 and the *Court Procedures Rules* 2006. Further regulation is unwarranted and can only limit the capacity of injured motorists to challenge decisions adverse to their interests or entitlement under the scheme. Bear in mind this is is already in circumstances where those motorists are at a significant power disadvantage in dealing with an insurer.

It is submitted that the ACT Magistrates Court is the most appropriate venue in this jurisdiction for the delivery of fair and just adjudication of disputes in a timely and efficient manner.

The Bar Association submits that the process to be adopted for the determination of disputes should be aligned with the rules of court otherwise applying in civil litigation. There should be the right of appeal to the Supreme Court pursuant to s274 of the *Magistrates Court* Act 1930.

The Bar Association is concerned that under the Bill as presently drafted, the Attorney-General is granted an unfettered power to appoint or dismiss an external reviewer at pleasure. Such an arrangement is obviously an inappropriate mechanism for adjudication upon fundamentally important aspects of the proposed scheme particularly if there is to be no avenue of appeal.

Submission 2

The Magistrates' Court should be nominated in the legislation as the external reviewer for disputes in relation to statutory benefits under the MAI Bill. Disputes should be determined pursuant to the rules of court otherwise applying for civil litigation. Legal costs should not be further regulated.

The problems with the use of 'WPI' assessments

It is generally accepted that the introduction of a whole person impairment ("WPI") threshold for common law claims will exclude about 90% of those injured in motor vehicle accidents because of the negligence of another from the recovery of compensation. In fact, it appears that is both a deliberate aim of the proposed scheme and indicative of its unfairness that common law rights are eliminated for those injured people.

Common law compensation attempts, so far as money can do, to put the injured person back into the position he or she would have been in but for the injury. When judges and magistrates decide how much compensation to award, they analyse the impact of the injury upon the person across all aspects of their life, for life.

Courts apply principles established over centuries. Injured people do not receive a windfall. The amounts awarded are determined by reference to the evidence relevant to the particular case before the Court.

The statutory compensation proposed in the MAI Bill is far more limited. It only provides limited protection (at the most, for 5 years) in defined sums and under strictly limited circumstances.

Where the proposed scheme has such a drastic impact on existing legal rights, the fairness and appropriateness of the mechanism should be carefully scrutinized.

The Bar Association submits that the use of WPI as a determinate of common law entitlement is inappropriate.

Where a person suffers a traumatic injury, the *impact* of the injury can be diverse. It may be that the injury has a significant physical impact (for example, the amputation of a limb), but little economic impact (because the injured person's economic capacity is not affected by the amputation).

The contrary may also be true. An injured person may suffer a significant and serious loss because of a relatively minor injury because of the nature of the work that they do or their personal circumstances.

Traditionally, WPI assessments were used in the workers' compensation field to determine levels of impairment, but not incapacity. The concepts of impairment and incapacity are different and should not be conflated. To use WPI as an overall threshold to determine the *impact* of an accident, and therefore drastically limit access to the right to common law compensation, is simply wrong and unfair.

WPI assessments do not pay true or proper regard to pain. They do not assess the ability to perform pre-injury occupations as an indicator of the impact of an injury.

Case study extracted from a claim commenced in the ACT Supreme Court in 2018 (nb. the injured person's name has been changed).

Linda was a 34 year old APS 6 officer in the Commonwealth Public Service. At 8.30am, she was driving her small hatchback vehicle along a busy Canberra road. The speed limit was 80km/h. There was a lot of traffic. Linda had just crossed an intersection with lights. The traffic then came to a stop, and she also slowed her vehicle to a stop. Her vehicle was the last to cross the intersection whilst the light was green. Within seconds, her vehicle was struck hard from behind by a white utility truck, much bigger than Linda's car. The force of the collision forced her car violently into the car in front of her, which in turn collided with a motorcycle in front of it, hurtling the rider into a forward somersault before he crashed to the ground.*

The driver of the white utility truck was at fault. He had failed to pay any appropriate attention to the road ahead of him or the traffic conditions.

Linda was badly injured. At the time of the collision she was resting her left hand on top of the gear stick. The force of the crash snapped her humerus in half. Her car seat broke. She suffered fractures to her ribs and in her back.

Linda had dropped her one-year old child at daycare. She had also recently discovered she was pregnant with her second child. At the time of the accident she was driving to the radiography centre to have an ultrasound to check upon her second baby. In addition to the physically pain she was suffering, she was consumed with fear that her unborn baby had been killed in the accident.

Linda was freed from her vehicle. She went to hospital by ambulance. She was taken to the operating theatre where an attempt was made to mend her left arm injury. Linda is left handed. An external fixing was attached to her arm. Linda was told that her unborn baby had survived the accident.

Over the following months, Linda suffered constant pain. Because she was pregnant, her body was prioritizing the growing baby over healing her injuries. Further, the changes to her body caused by her pregnancy were stretching her broken bones causing her enormous pain. She was also constantly concerned that there may have been some unknown effect upon her baby in the accident.

Her left arm injury failed to heal. She had to keep the external fixing on her arm throughout her pregnancy. She could not sleep properly and her husband had to move into a different bed so that he did not bump her in the night. She could not cuddle, hold or play with her toddler. She could not work. She could not drive.

Linda had given birth to her first child naturally without any complications. It had been her intention to attempt a natural birth with her second child, but she was unable to do so. As a result of her injuries, it was decided that the safest course was for an elective caesarian section rather than taking the risk that labour would be too difficult.

Fortunately, Linda's baby was healthy.

Even when she gave birth, her left arm had still not healed properly, so she had to have another operation to fix it after her baby was born.

Ultimately, her bones knitted. Linda was left with ongoing pain in her left arm. She tires easily. She has not been able to return to her pre-injury full time work and she now only works two days per-week. Her supervisors considered she was likely to obtain further promotions before the accident – at least to the EL1 level and probably EL2. That is very unlikely to occur now, because she simply can't work long enough hours.

Had Linda been injured under the proposed injury scheme, would she have been able to obtain proper compensation? The answer is "Probably not".

Linda was assessed during the litigation by Dr Garth Eaton, Occupational Physician. For the purposes of this submission, Dr Eaton was asked to consider whether Linda would have reached the 10% WPI threshold.

He said "Linda's condition is probably a good example where significant functional impairment and disability is likely to continue and not definitely reach 10%. The back condition would probably be less than 10%, any residual radial nerve injury probably a few % and possibly a few % for scarring. Her PI may total more than 10 % but she needs more treatment and rehab before her condition is stable. There is no guarantee she would reach the necessary percentage."

The **impact** of the injury is simply not reflected in the AMA Guides. If she had received a WPI assessment of, say 9%, then her entitlement to Quality of Life damages would be only $15,400. She would receive weekly compensation for a maximum of five years only. Thereafter, Linda would have to make up her lost income in some other way. It is likely she would never be able to do so. She would suffer a lifelong loss.

On the other hand, the driver of the white utility, who was clearly at fault, under the proposed scheme, depending upon his injuries, might be entitled to compensation and possibly more than Linda.

The Bar Association submits that the case study above demonstrates that the imposition of a WPI assessment of 10% will result in the exclusion of many more injured people from access to common law rights than was intended by the Citizens' Jury. It does not merely exclude those with 'minor' injuries, whether those be whiplash or an injury of some other description. It will not only exclude 'soft tissue' injuries.

Linda's case also demonstrates that will take longer for claims to be resolved under the proposed scheme than is the case under the current scheme. That is because the an entitlement to take action for a common law claim can only accrue upon the assessment that

an injured person has suffered a permanent impairment. In many cases it is likely that claims will not be able to be assessed for permanent impairment for more than 4 years after the accident. Court proceedings will not be able to be commenced until after that assessment. This outcome is fails completely to deal with the oft cited concerns about the time to taken to resolve current claims.

Submission 3

The Bar Association recommends that the proposed WPI of 10% or more as a threshold for access to common law rights be removed from the MAI Bill and replaced with a lower threshold or an alternative mechanism for the assessment and exclusion of truly 'small claims' from common law access.

Conclusions

The Bar Association submits that the purpose of any CTP scheme must be to provide proper compensation to injured people. It is submitted that in attempting to provide the opportunity to a greater number of people injured in motor vehicle accidents, the proposed scheme fails to achieve that purpose.

The balance of power has been shifted too heavily in favour of the insurers.

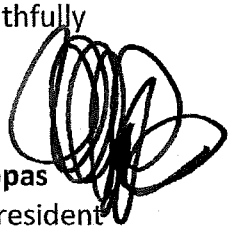
The nature of any appeal rights from injurer decisions remain largely unknown, but are clearly limited.

It is also likely that the further regulation of legal costs will have a significant impact upon the ability of injured people to obtain legal representation for those reviews.

The 10% WPI as a threshold for access to common law rights is too high. It will go well beyond the intention of the Citizen's Jury to limit small claims, and prevent motorists who suffer serious and permanent harm from seeking common law damages.

Finally, the Bar Association seeks the opportunity to give evidence to the Committee during its deliberations, including for Dr Garth Eaton to address the Committee. Dr Eaton is a highly qualified doctor with significant experience of motor accident injury assessment and will be able to offer valuable insight into the sorts of injury that will simply never be compensated under a 10% WPI threshold.

Yours faithfully



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