LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

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

Submission Cover Sheet

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

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The Committee Secretary,
Standing Committee on Justice and Community Safety,
Legislative Assembly for the ACT,
GPO Box 1020,
CANBERRA ACT 2601

Email: LACommitteeJCS@parliament.act.gov.au

Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to the Inquiry into Motor Accident Injuries Bill 2018 - Exposure Drafts to the Motor Accident Injuries Bill 2018 and to the Guide to the Bill.

Please do not hesitate to contact me and my colleagues on (02) 6120 5000 or at WHawkins@mauriceblackburn.com.au if we can further assist with the Committee's important work.

Yours faithfully,

Walter Hawkins

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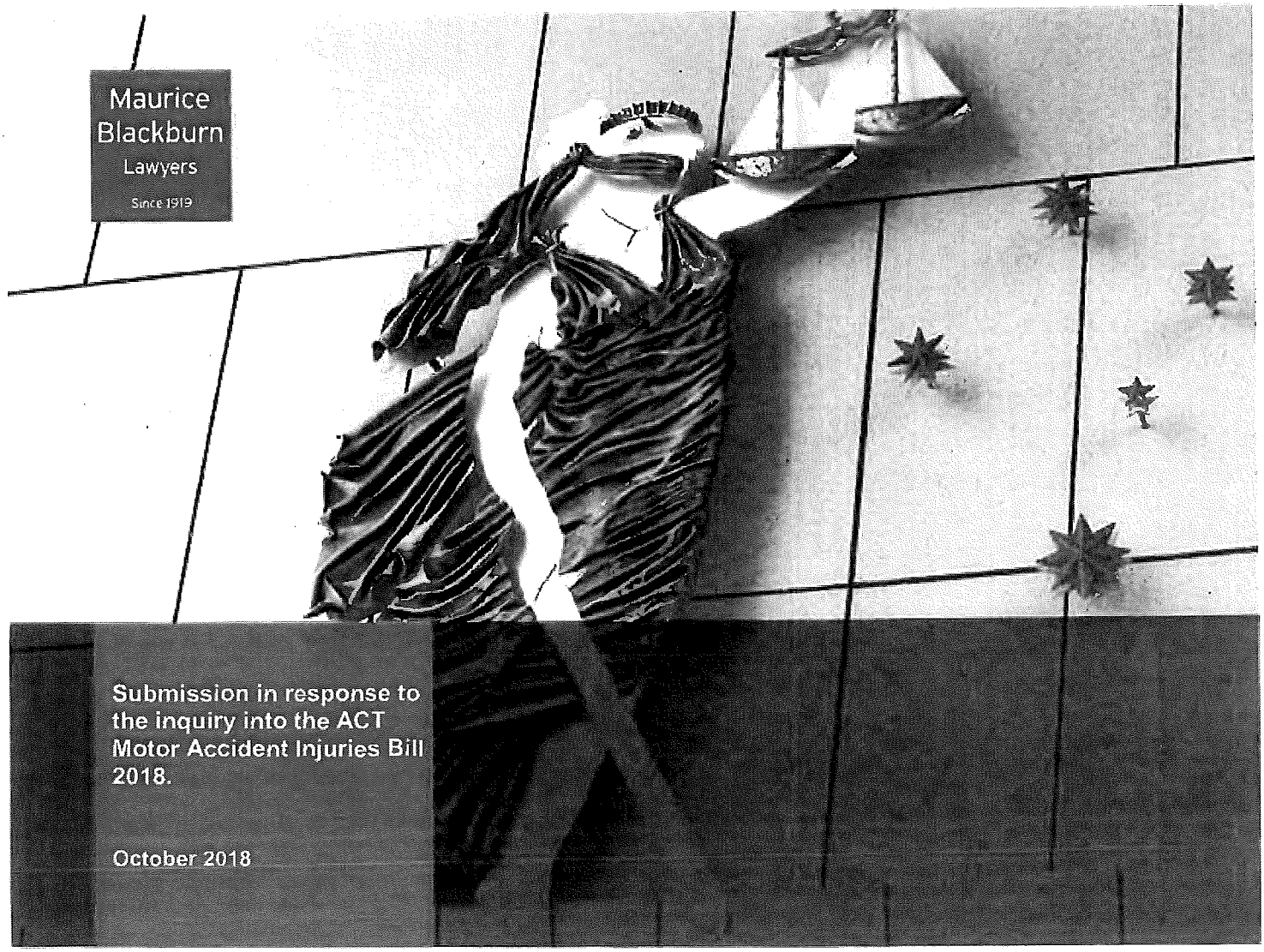

Submission in response to the inquiry into the ACT Motor Accident Injuries Bill 2018.

October 2018

TABLE OF CONTENTS

Page

Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 32 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

The Canberra office focuses upon personal injury and particularly road trauma, workplace injury and public and product liability. Lawyers from other specialised practice groups regularly visit to assist clients in those practice areas.

Our Submission

Maurice Blackburn welcomes the opportunity to provide input to the Committee's deliberations in relation to the draft Bill.

In this submission we set out our concerns not only with the Bill, but with the compensation scheme it represents and the process which was used to develop it.

Specifically, our submission sets out our view that it is the wrong option that creates the wrong outcomes for injured Canberrans.

Furthermore, the wrong stakeholders benefit, and the wrong implementation of deliberative democracy was used.

The ACT Government has made a poor decision in relation to its choice of compensation scheme for ACT residents who have been injured in a motor vehicle accident.

The chosen scheme will lead to worse outcomes for many injured motorists than maintaining the status quo. Surviving a road accident can be a traumatic experience. When there is significant injury involved – physical or psychological injury, or both – impacting the injured's capacity to work or function in activities of daily life, the trauma associated with the experience is heightened.

The scheme chosen by the Government will exacerbate that trauma.

The imposition of ridiculously high injury thresholds which an injured person must satisfy before being eligible to exercise their common law rights, is a poor decision for consumers.

To make matters worse, it appears that the process for choosing this outcome has been infiltrated by the insurance industry, who stand to gain significantly from the changes that this Bill introduces.

The Government then utilised a deliberative democracy process – in the form of a citizen's jury – and charged them with the responsibility for choosing the most appropriate option for a compensation scheme.

The Government purposefully recruited the citizen's jury, excluding anyone who had had experience with the current compensation system.

The jury had no lived experience of the system to draw on.

The Government then engaged hopelessly conflicted agencies to design the citizen's jury process, and determine the models that jury members were exposed to. The capacity for making an informed decision, based on independent information, was severely diminished by the process.

The critical Whole of Person Impairment (WPI) model was only introduced at the last step in the citizen's jury process.

Unsurprisingly, the citizen's jury chose the model that the Government, and the insurance industry, had decided was the best option.

We are particularly concerned about the role of big insurance and their partners, multi-billion dollar multi-national conglomerates, in this process.

Big Insurance described model D as "the most efficient", the "most robust" and that it represents the "largest dollar savings to ACT motorists while still providing 'generous cover'".[1]

Throughout this process, the Government has failed to make a substantive argument as to how the current compensation scheme is less fair, or less efficient, or less consumer-friendly than the alternatives.

Maurice Blackburn took the time to provide our specific concerns about the process to the Chief Minister's Office in August. We received a response three days before the Committee's submission deadline.

Along with their unsatisfactory responses, we are now left with an unsatisfactory Bill, detailing an unsatisfactory compensation scheme, derived through a compromised and unsatisfactory process.

Above all, as a result of this, injured people will be worse off.

At a time in history when the insurance and wider financial industries are being exposed for behaviours that Royal Commissioner Hayne simply puts down to 'greed', we are shocked that the ACT Government would actively side with the industry over consumers.

We hope that the Committee will provide more balanced scrutiny of the impacts of the proposed changes before making its recommendations to the Parliament.

[1] https://www.canberratimes.com.au/national/act/ctp-citizens-jury-stakeholders-endorse-big-change-for-new-compulsory-third-party-insurance-model-20180320-h0xp4y.html

Background

The move toward no-fault compensation schemes is not a new phenomenon.

Ernst Karner, Director of the Institute for European Tort Law, and an internationally renowned expert on traffic accident liability and automated vehicles, writes that:[2]

> "*The first suggestions for replacing tort liability with a no-fault compensation system were made as a reaction to increasing automobile traffic in the United States as early as the beginning of the twentieth century and followed the example of no-fault workers' compensation systems. The primary reasons for them were the entirely insufficient insurance protection being provided for automobile accidents and the lack of state social security*" (p.378)

He goes on to note that:

> "*... the great popularity enjoyed by no-fault compensation systems in the 1970s is above all attributable to the expectation that they would produce a notably more efficient and lower-cost compensation process. Exactly this hope..... has in fact often been bitterly disappointed. Insurance premiums in the U.S. no-fault jurisdictions are up to fifty percent higher than in those states which have retained pure tort law liability. This too may be thought to have contributed to the fact that the enthusiasm for no-fault solutions has, at least for now, considerably abated.*" (p.381)

Fortunately, Australia is not hampered by the same ills which Karner suggests led to the development and proliferation of no-fault schemes. We have well entrenched compulsory third party insurance requirements in place, and we have the safety net in place of a thorough social security and health system. The drivers for change simply do not exist.

In the ACT, a fault-based scheme with full common law access has been in place for many years. The current system, whilst not perfect, offers considerable control to claimants in the determination of how their claim plays out. The current scheme is fully funded, and premium costs have been trending downward[3] since 2013, with the introduction of competition amongst providers.

This is not the first time that the Government has attempted to cap the rights of injured motorists. Introduced by the then Treasurer Andrew Barr, the Government ended up walking away from the Road Transport (Third-Party Insurance) Amendment Bill 2011, after a multi-party committee rejected the laws.

The current legislative change is obviously represents unfinished business for the Chief Minister.

In 2017, the ACT Government once again introduced a process to investigate potential changes to the existing motor accident injuries regime. It opted to utilise a deliberative democracy model – in the form of a citizen's jury – to assist with the decision making. Information of Maurice Blackburn's concerns about this process can be found in part (b) of this submission.

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[2] Ernst Karner, A Comparative Analysis of Traffic Accident Systems, 53 Wake Forest L. Rev. 365 (2018)

[3] https://yoursay.act.gov.au/application/files/2215/0335/5538/Understanding_CTP_Insurance_in_the_ACT_2017.PDF: p.5

Putting to one side the process undertaken to achieve the Government's policy position, the draft Bill which is currently before the Committee raises several areas of concern for Maurice Blackburn. These include:

- The Bill represents a move from a fault based liability to a risk based liability. The effect of this is that the current level of compensation provided to innocent road accident victims will be redirected to pay benefits to the driver who caused the accident.

- The Bill in Part 2.6 describes defined Quality of Life benefits. This includes the imposition of thresholds which limit the access of injured people to common law processes. It is estimated that this shift will see 90% of ACT road users that have been injured through no fault of their own lose their right to access the common law rights they enjoy under the current regime;

- The Bill enshrines an expanded role for insurance companies in determining when and if compensation is to be paid. It is unclear how the legislation would require insurance companies to prioritise their duty to their customer against their duty to maximise profits.

- The Bill refers regularly to Regulations, however those Regulations are not as yet available. Similarly, Guidelines referred to frequently in the Bill have not been made available. We are concerned that both the Committee and the ACT Parliament are being asked to investigate, then accept a Bill which does not have all the information available.

- There is a lack of detail as to the derivation of various figures. For example, s.160 gives the sliding scale for WPI, but with no information as to how the $7,000 and $350,000 were arrived at. Such figures were the subject of much debate in the lead up to the release of the Bill, so an explanation or rationale for how the figures were derived would be useful.

- The external review process is unclear – including which court or tribunal would be nominated to hear review proceedings. This is discussed further in our response to Term of Reference (d).

Aside from the substantive shift from a fault based to no-fault based scheme, and the introduction of WPI thresholds, the Bill makes several other less obvious changes which will impact people working with the scheme:

- Sections 64 and 65 place a cap on expenses related to treatment and care, through the introduction of MAI Guidelines. This does not apply in the existing scheme.

- Section 108 provides that income replacement benefits are not commutable to lump sum. This is a significant change, as there will not be able to be a buy out or commutation of income benefits.

  Often, when injured people receive their rightful payout, they have a large number of expenses that need to be paid upfront – such as refitting their house, or paying down their mortgage. A lump sum payment is invaluable in enabling people to get themselves prepared for the changes in work and life habits which result from the accident.

The removal of the choice to commutate income replacement benefits to lump sum is a popular move with insurers – but not with those who are receiving the payout.

- The introduction of recovery plans (Division 2.5.4) introduces the new procedure that information about any treatment or care outside of the recovery plan must be supplied to the insurer for approval.

- Section 145 provides that where there is both physical and psychological injuries, the Bill restricts the injured person who has sustained a physical injury and a psychological injury resulting from a motor accident to quality of life benefits for Whole of Person Impairment (WPI) resulting from either the physical injury or the psychological injury, but not both. In these situations, should the injured person wish to have a second WPI assessment but does not notify the insurer or give the insurer second WPI report within 26 weeks, that person is taken to have accepted the report. The injured person is then presumed to have their quality of life finally dealt with.

  The arbitrary decision to separate physical from psychological injury in the calculation of WPI following a motor vehicle accident not only seems cruel, but counterproductive to what research is telling us. The two are inextricably linked.

  A recent study[4] by researchers from John Walsh Centre for Rehabilitation Research, Kolling Institute for Medical Research, Sydney Medical School-Northern and the University of Sydney has found that psychological distress associated with motor vehicle accidents is substantial and prevalent.

  They found that regardless of whether the psychological distress was instigated before or after the accident, physical injury resulted in significantly elevated levels of distress. They further found that that psychological distress can regularly remain elevated for at least three years after the accident.

  They go on to say:

  > "*Furthermore, preliminary research suggests that when a person has experienced a physical injury as well as psychological distress, the cost of their claim has been shown to double.*" (p.2)

  The decision to decide WPI based on one component OR the other, rather than take the compound effect of both on the life of the claimant, seems particularly callous for the individual, yet beneficial for the insurer.

- There are several changes to the entitlements related to legal support during the claims process. For example, s.186(2) provides that a lawyer is not entitled to be paid or to recover any legal costs or fees for services provided to an Applicant or an insurer in relation to an application for defined benefits other than the prescribed costs and fees. There would be no solicitor/client fees.

  This change will actively reduce the number of legal professionals who are willing or financially able to help claimants navigate the system.

  Injured people without the assistance of specialist advice will be expected to negotiate disputes about their medical treatment and their capacity to work directly

[4] Guest R, Tran Y, Gopinath B, Cameron ID, Craig A. Psychological distress following a motor vehicle crash: preliminary results of a randomised controlled trial investigating brief psychological interventions. *Trials*. 2018;19:343. doi:10.1186/s13063-018-2716-2.

with well-resourced insurers. The current power imbalance in the insurer/claimant relationship will be made all the more stark by this change.

- Section 204 provides that there is no damages for gratuitous care. This is going to be a significant in cost upon a number of Claimants. It will also reduce the special damages which become critical in determination of costs, to the advantage of insurers.

- Section 414 prohibits referral fees. Whilst we understand the desire to eradicate claims farming, this may have unintended consequences when it comes to the provision of appropriate support to claimants.

What each of the above changes has in common, is that they are all in the favour of insurers. None of these changes is designed to benefit consumers. This appears to be a theme underpinning this change process.

Responses to Terms of Reference

(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

Maurice Blackburn strongly supports initiatives which enable early access to treatment and support for injured people.

The benefits of early access to treatment are well documented. Early access to treatment following road trauma can assist in the physical recovery, can help people return to work more quickly, and can have positive impacts on psychological recovery.

Most State/Territory CTP schemes are predicated on the benefits of early intervention.[5] Each strives for efficiencies that would enable the prioritisation of access to treatment, economic support and rehabilitation.

Maurice Blackburn is concerned, however, that changes should not be made that undermine the long term health and dignity of those that have suffered injury and trauma.

Whether by design or accident, a false choice has been created between the two.

By stripping away rights and access to compensation, the scheme outlined in the draft legislation is fixing one problem by creating another.

The scheme designed in the draft Bill appears to be trying to strike a balance between timeliness/efficiency of compensation being paid, with the right of individuals to receive the compensation they need as a result of the trauma they have survived.

Maurice Blackburn believes that the draft Bill does not get that balance right.

[5] See for example https://www.sira.nsw.gov.au/fraud-and-regulation/reforms/ctp-green-slip-reforms/new-benefits-for-injured-people; http://www.ctp.sa.gov.au/for-injured-people/injury-recovery

The efficiencies in payouts, and the timeliness of payouts that the Bill is striving for are not based on sound evidence.

Proponents of no-fault compensation schemes argue that, by removing or limiting access to common law rights, the scheme gains the capacity to offer quicker access to compensation and lower administrative costs.

This has not always proven to be the case. Ronen Perry (2018)[6], for example, in his in-depth study of the shift by the government in Israel from a fault-based to a no-fault compensation scheme for motor vehicle accidents found that the median time between the accident and the decision actually rose once the shift to the no-fault scheme had taken place.

Perry also found that claims that the move to a no-fault scheme would unclog the judicial and courts systems also have proven unfounded.

Of late, Maurice Blackburn has observed a number of forums where insurers are advocating strongly for regime change, sold under the banner of "early access to medical treatment".

For example, the federal Parliamentary Joint Committee on Corporations and Financial Services is currently conducting an inquiry examining options for greater involvement by private sector life insurers in worker rehabilitation[7]. Submissions to this inquiry are evenly divided in terms of support for the proposition. Those groups who represent the interests of consumers (beyondblue, CHOICE, ACTU etc) argue that greater direct involvement in rehabilitation by insurers is merely an attempt by the industry to find new ways to cut costs, and that there are conflicts of interest at play when those holding the cheque book also provide the services. Insurers and their industry peaks are very much in favour of the change, on the basis of enhancing their capacity to finalise claims, thereby minimising payouts, and keeping payout monies 'in-house'.

Maurice Blackburn is also arguing strongly in federal inquiries[8] that the information collected by the My Health Record system needs to be tightly regulated to ensure that insurance companies cannot access the data, and use unrelated medical history to deny access to insurance or insurance claims.

It is also not unusual for insurance companies to offer political donations, as an additional means of strengthening their advocacy to achieve the outcomes that would benefit them the most.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry has cast a serious shadow over the reputation of the insurance industry, highlight numerous examples of misconduct and conduct which falls below community expectations. The use of poor definitions, intrusive surveillance techniques and bullying behaviours have been identified as tools of trade.

Of the options put to the citizen's jury, Option D was the preferred option of insurers. Suncorp, for example, believe that Option D offers the most equitable benefits. Their spokesperson is noted as having stated:

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[6] Ronen Perry, From Fault-Based to Strict Liability: A Case Study of an Overpraised Reform, 53 Wake Forest L. Rev. 383 (2018): p.407

[7] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Rehabilitation

[8] See for example: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/MyHealthRecordsystem

"Model D is the most efficient with 58 per cent of premium going to injured people. It has the lowest premium for motorists and will result in the greatest cuts to legal fees and insurer profit".[9]

Suncorp entered the ACT CTP Market in 2013, when Andrew Barr was Treasurer.

Suncorp is one of Australia's largest insurers, with a Gross written premium of $8.1b in FY18. Its ACT business was a portion of that business.

In light of recent experience, Maurice Blackburn is sceptical when an insurer endorses a policy position on the basis that that position will cut insurer profits.

The current Financial Services Royal Commission reminds us that any claims by an insurance and banking behemoth should be met with a healthy level of scepticism.

We also doubt that the management of Suncorp would have the same view on reform. In fact, following CTP reforms in South Australia, Suncorp's investor presentations for the FY16 and FY17 periods noted the State being a "market opportunity" and headlined growth in the State for FY17.[10]

(ii) equitable cover for all people injured in a motor vehicle accident

It is simply not credible to claim that Option D will provide equitable cover for ALL injured people.

The scheme selected by the Government's citizen's jury will provide worse outcomes for those suffering the worst injuries on the roads.

The implementation of a 10% minimum threshold for injury means that 90% of those who currently enjoy legal rights to pursue compensation will lose that right. They will be left in the hands of bureaucrats and insurance companies.

Their predicament will be much like that faced by NDIS clients at present, where those suffering injury and disability are waiting months for bureaucratic processes to resolve simple issues and requests.

Our experience has shown that a 10% threshold is extraordinarily difficult to cross.

The use of the draconian Whole of Person Impairment (WPI) measurement system means that an individual can have several discreet injuries, each of which can be life changing – but unless they add up to the minimum WPI threshold, the injured person is ineligible to access their common law rights.

For example, the Canberra Times recently highlighted the case of Tracey Dodimead[11].

Injuries to her arm and wrist sustained in a motor vehicle accident have left her unable to continue in her profession as a teacher of hairdressing.

[9] [9] https://www.canberratimes.com.au/national/act/ctp-citizens-jury-stakeholders-endorse-big-change-for-new-compulsory-third-party-insurance-model-20180320-h0xp4y.html
[10] https://www.asx.com.au/asxpdf/20170803/pdf/43l47zq2r6spks.pdf; https://www.asx.com.au/asxpdf/20160804/pdf/4392p12w7ckjyf.pdf
[11] https://www.canberratimes.com.au/national/act/canberras-new-ctp-model-wont-help-tracey-dodimead-20180320-h0xpws.html

Even though her career is now ruined, the insurer's medical experts assessed Ms Dodimead's injuries as 1% WPI. This means that she is unable to meet the minimum threshold to pursue her common law entitlements.

The Chief Minister's Office, in their response to questions from Maurice Blackburn, noted that:

> *"WPI as an assessment tool is already in use in the ACT, through the Comcare scheme that applies to tens of thousands of local workers."*

That scheme has been widely pilloried as a bureaucratic nightmare for those trying to navigate the scheme, imposing impossible hurdles just to access the right to claim. Maurice Blackburn has supported one applicant who, through the various cycles of claim, decision and appeal, has taken six years just to gain entry to the system.[12]

Mr Barr's own political party has been a long term critic of the Comcare scheme as being inadequate and delivering poor outcomes for citizens. His office's advocacy for the worst components of that scheme, when it suits a particular political stance, is disappointing and shocking to those who work to assist injured people navigate its appalling provisions.

Maurice Blackburn suspects that the level of public knowledge on this aspect of the draft legislation is negligible. In our experience, our clients believe they have certain rights in place, but when they most need it, they will find they don't qualify.

The reason the premium is cheaper under a regime which removes people's access to common law rights is that, when in a time of greatest need, you have almost no chance of accessing the supports you require.

Option D, and therefore the draft legislation, fails in its objective to provide equitable cover for all people injured in a motor vehicle accident.

It is important to note that a no-fault scheme can operate hand-in-hand with common law rights. Karner (2018) concludes that:

> *"Thus, risk based liabilities should compensate both personal injuries and property damage to an unlimited extent, as fault-based liabilities do."*[13]

(iii) a value for money and efficient system

It simply is not possible to state truthfully that Option D will offer better value for money or efficiency than the status quo.

The current system is providing a value for money and efficient system.

The current system is price competitive with other States and Territories in terms of affordability. As mentioned earlier, premium costs to consumers has been trending downward with the introduction of competition in to the provider market.

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[12] https://www.smh.com.au/politics/federal/abc-staffer-wins-bullying-case-in-six-year-compensation-battle-20180813-p4zx7x.html
[13] Ibid, p.382

Maurice Blackburn sees no reason to believe that the model selected by the Government's citizen's jury will deliver a more efficient outcome.

The question of efficiency can be viewed in terms of the *outcomes* of efficiency gains. Those gains will either:

- Produce a cheaper product for the consumer, with more streamlined access to benefits, and/or
- Produce enhanced profits for insurers.

Maurice Blackburn is in favour of providing more cost effective products for consumers.

In our experience, the outcome of similar regime changes in other jurisdictions, where access to common law rights have been removed, has been that the cost for households changes very little. For example, in South Australia, following wholesale changes to the CTP regime in 2013, their affordability index rating dipped to between 40% and 50% in 2014. It then returned to above 55% in 2015 and has remained steady, as the least affordable scheme in Australia ever since[14].

(iv) promoting broader knowledge of the scheme and safer driver practices

Maurice Blackburn strongly supports driver education and knowledge but there is nothing in Option D that could not be covered equally, in terms of promoting knowledge, in Option A.

(v) implementing a support system to better navigate the claims process

The report from a CTP Claimants' deliberative democracy workshop[15], conducted in February 2018 sourced and documented the views of those with lived experience of the current ACT CTP regime. Participants spoke of their uncertainty in navigating the claims process:

> "*A sense of initial ignorance and disorientation about what to do was a common experience. One participant sought advice at his local police station about what he should do following his accident. This reflects a general low awareness of the CTP scheme and its requirements in the wider community, until people need to turn to it when they have an accident.... CTP seems irrelevant until you need it; nobody thinks about it much until they are thrown into the turmoil of a vehicle accident*". (p.18)

Past CTP claimants spoke of the importance of gaining a holistic over view of the claims process – something that was lacking in the experience of many of the participants. They also spoke about the importance of access to information at the

[14] CTP Issues Paper, NSW Government CTP Roundtable 2013; d'finitive Accident Compensation August 2014 and August 2015; d'finitive Motor Injury Insights September 2016 and October 2017.

[15] Available for download from https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/6215/2142/8296/Attachment_2_to_ACT_Law_Society_and_ACT_Bar_Association_Comments.pdf. Note – Maurice Blackburn was a co-sponsor of this workshop, along with a number of ACT law firms

hospital, the usefulness of information sheets and blogs, and the support and advice provided by legal and health professionals.

A good understanding of the claims process is important in assisting claimants to feel a sense of control.

As we have seen in the implementation of the NDIS, a perfect claims and support scheme in theory is always tricky to implement. The national experience of the difficulties facing the NDIS demonstrate the importance, to the scheme participants of:

- Having participant choice and control as foundation stones,
- Having ongoing support provided to participants as they navigate the new system (eg Planners and LACs), and
- Having an accessible and user-friendly review process in place for when things don't go to plan.

Those with lived experience of the current ACT CTP scheme, and those who work to support claimants, find that the scheme works well from the perspective of the injured. Central to this is the capacity to keep control of their own outcomes, through having the choice to exercise their common law rights.

(vi) a system that strengthens integrity and reduces fraudulent behaviour

Maurice Blackburn strongly supports any measures that strengthen integrity and reduces fraudulent behaviour but there is nothing in Option D that could not be covered equally in Option A.

(b) the draft bill's alignment with the model chosen by the CTP citizens' jury and the detailed design documents underpinning this model;

Maurice Blackburn agrees that the draft bill aligns with closely with the model chosen by the Government's citizen's jury.

Maurice Blackburn remains concerned, however, that the Government's citizens jury process was flawed – both in terms of its make-up, and its opportunity to make informed and independent decisions.

Some of our concerns about the process are outlined below.

a) *Issues relating to the choice of members of the citizen's jury:*

Curiously, ACT residents who have had experience with the current scheme were specifically excluded from the process. In other words, none of the participants on the citizen's jury had any direct lived experience with the current scheme.

In excluding those with lived experience of the scheme, the Government has missed an opportunity to understand the impacts of changes under consideration.

It is difficult to identify another broad scale inquiry process which has not deliberately set out to source the lived experience of citizens.

For example, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry not only interrogated the actions of institutions, it dedicated a significant portion of its limited time to hear from those who suffered as a result of corporate misconduct. In fact, these accounts of personal experience provided some of the more memorable moments of the public hearings.

Without the benefit of lived experience, members of the citizen's jury were left to make their decisions trusting that the reports they were given of the human impact of poor policy were accurate and thorough.

b) *Issues relating to the quality and timeliness of information provided to the Citizen's Jury*

The arbitrary and brutal nature of minimum injury thresholds, before access to common law kicks in, were not explained until very late in the process and were not fully explained on how they would work in practice.

Process design would indicate that participants were exposed to a lack of proper consideration of the benefits of the current scheme, when compared to those in other States and Territories.

c) *Issues relating to the independence of those engaged to provide information to the Citizen's Jury.*

As described earlier, the current Chief Minister has a history of attempting to introduce specific changes to the motor accident compensation system in the ACT.

Given this existing policy position, it is vitally important that any community consultation process be beyond reproach in the provision of independent policy advice and comparative data to the process.

Maurice Blackburn is concerned about the degree to which expert advice was both narrow and aligned with the existing views of policy makers to pursue changes reflecting Option D.

The Government engaged Finity – a firm currently engaged by the ACT Government as CTP scheme actuaries and to review premium filings from insurers – to design the citizen's jury process, following a tender process.

Given the ongoing relationship with Finity, it would be reasonable to ask whether there was a conflict for the firm in providing models to the citizen's jury. Finity has an obvious commercial interest in maintaining a positive relationship with that major funder.

The principal external adviser in relation to mechanisms for measuring injury for the citizen's jury process was Dr Dwight Dowda. He was engaged by Finity Consulting to:

> *"provide advice relating to assessment of a person injured in a motor vehicle accident, with consideration of medical issues in regards to the development of a motor accident compensation scheme for the ACT."*

The advice Dr Dowda provided for the citizen's jury included a number of specific and harsh recommendations on how injuries are assessed. He also made a number of specific recommendations in relation to Medical Assessments.

The third last paragraph Dr Dowda's CV, provided as part of the information pack to the citizens jury, acknowledges that:

> *He is chairperson of the Medical Advisory Group (MAG) of Medhealth, which provides clinical guidance and advice on clinical governance for Medhealth's medical consultants.*

Medhealth has seven businesses, all of which relate to the work and road injury sectors in some way.

Three of them provide Independent Medical Examinations in Canberra:

- MLCOA[16]
- Assess Medical Group[17]
- Medilaw[18]

It is also worth noting also that Medhealth is part of a $2.2b global behemoth called Examworks[19] which is owned by the American private equity investment firm fund called Leonard Green and Partners.

Examworks is billed as:[20]

> *"..... a leading provider of independent medical examinations, peer reviews, bill reviews, Medicare compliance, case management, record retrieval, document management and other related services ("IME services")."*

Formal advice provided by Dr Dowda to the citizen's jury process specifically states:

> *"MEDICAL DECISION MAKERS*
> *In the situation where a case is in dispute, an appointed panel of experienced medical decision makers should be available from which to obtain a non-partisan, unbiased and sound medical opinion. Such independent medical examiners do exist throughout Australia and are already engaged by various compensation schemes as Authorised Medical Specialists (or similar) and are well versed in dealing with the types of questions arising in disputed compensation cases (as in points 1-10 immediately above)".*[21]

By recommending that a role for "an appointed panel of experienced medical decision makers" be embedded in the scheme, and that appropriately qualified organisations (such as his own) exist in Australia, it is clear that his interests are potentially conflicted.

We raised this conflict specifically with the Chief Minister's office. They declined the opportunity to provide any reassurance on how such conflicts were considered or managed.

The above relationships raise serious questions about the degree to which the members of the citizen's jury were provided sufficiently independent information on which to make an informed decision in relation to the most appropriate model for the ACT into the future.

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[16] http://www.mlcoa.com.au/contact-us/
[17] http://www.assessmedicalgroup.com.au/
[18] http://www.medilaw.com.au/offices-act
[19] http://www.medhealthgroup.com.au/about/
[20] https://finance.yahoo.com/news/examworks-announces-completion-acquisition-leonard-135602180.html
[21] Memo dated 24 January 2018, from Dr Dwight K Dowda to Mr Geoff Atkins, re: ACT Motor Vehicle Accident Scheme

(c) the draft bill's consistency with other relevant insurance schemes operating in the Territory

Whilst the bill may describe a scheme which is consistent with other relevant schemes operating in the ACT, it does not represent a scheme which is comparable in any positive way with schemes operating in other States and Territories.

In fact, structurally it most closely aligns with the NSW and SA schemes – both of which are easily identifiable as the worst CTP schemes in Australia.

Instead of looking to align this scheme with other ACT Government schemes, ACT residents have a right to expect the gold medal standard from across the country.

(d) the most suitable avenues for external review of matters arising between parties under the proposed new Motor Accident Injuries scheme

As mentioned elsewhere, Maurice Blackburn is concerned that the external review process outlined in the Bill lacks clarity.

External review must be fair, timely and be of appropriate cost to claimants and insurers.

Disputes now regularly arise over treatment and losses claimed and this will continue under Option D.

Option D, however, is also likely to trigger highly technical disputes due to the impact of the thresholds and caps introduced in the Bill.

Maurice Blackburn is concerned that insurers have unlimited financial resources in handling disputes including experienced claims managers and internal and external legal advisors. The status asymmetry in the insurer/claimant relationship is at its most stark in review processes. It is vital that the Bill make explicit provision to anticipate then allow for this imbalance.

Maurice Blackburn also submits that reviews must be heard by external bodies with appropriate capacity and expertise. Only the Magistrates (including Industrial Court) and the Supreme Court are experienced in disputes arising from personal injury and those courts should continue to have exclusive jurisdiction.

Any external review must ensure that claimants are able to obtain professional including legal advice in all disputes to ensure fairness and the integrity of external review.

Recommendations to the Committee

Maurice Blackburn makes the following recommendation to the Committee:

1. That the draft legislation be abandoned.