

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

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

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 2012.¹
- 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.²
- 1.8 The Committee recommended that the Bill, in its current form, should not be supported by the ACT Legislative Assembly.³
- 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.⁴
- 1.10 The Committee made 13 recommendations in relation to its inquiry into the Road Transport (Third-Party Insurance) Amendment Bill 2011.

¹ 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>

² 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

³ 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

⁴ 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

- 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.⁵
- 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’.⁶

CITIZENS’ JURY 2017⁷

- 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.⁸
- 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.⁹
- 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:¹⁰
- 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.

⁵ 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

⁶ 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

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

⁸ ACT Government. *Submission 61*, p. 3.

⁹ ACT Government. *Submission 61*, pp. 3-4.

¹⁰ 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.¹¹
- 1.18 The jury also considered evidence given by 16 witnesses during the second week including 6 people injured in a motor vehicle accident.¹²
- 1.19 At the end of the Stage 1, the jury delivered its report¹³ on the objectives for an improved CTP scheme to the Stakeholder Reference Group. The jury's six objectives were¹⁴:
- 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'.¹⁵ The paper were prepared by external firms – Finity and Ernst & Young¹⁶.

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.¹⁷

¹¹ ACT Government. *Submission 61*, pp. 4-5.

¹² ACT Government. *Submission 61*, p. 5.

¹³ *Citizens Jury on Compulsory Third Party Insurance: Final Report*. 29th 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

¹⁴ ACT Government. *Submission 61*, p. 7.

¹⁵ ACT Government. *Submission 61*, pp. 4-5

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

¹⁷ ACT Government. *Submission 61*, pp. 7-8.

- 1.22 The jury decided that the model D best met its objectives set up within the report¹⁸ delivered in October 2017.
- 1.23 The model chosen by jurors should delivered the following improvements:¹⁹
- 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 report²⁰ 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 Report²¹ 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.'²²

¹⁸ *Citizens Jury on Compulsory Third Party Insurance: Final Report: 29th 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

¹⁹ ACT Government. *Submission 61*, p 8.

²⁰ *Citizens' Jury Report: Compulsory Third Party Insurance: 25th 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

²¹ *Ibid*, p. 5.

²² 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 2018.²³

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

²³ 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

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 submissions²⁴ 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

²⁴ 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.²⁵

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.²⁶

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%.²⁷

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.²⁸

²⁵ Slater & Gordon, *Submission 71*, pp. 2-3.

²⁶ Australian Education Union ACT Branch, *Submission 63*, p. 1.

²⁷ Mr Browne, *Submission 58*, p. 3.

²⁸ 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.²⁹

This sentiment was repeated by other submitters too.³⁰

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.³¹

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.³²

This sentiment was echoed by other submitters too.³³

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

²⁹ Mr Herbert, *Submission 19*, p. 1.

³⁰ 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*.

³¹ Australian Lawyers Alliance, *Submission 64*, p. 5.

³² Slater & Gordon, *Submission 71*, p. 5.

³³ 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.³⁴

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

³⁴ 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.³⁵

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.³⁶

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.³⁷

... 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.³⁸

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

³⁶ Suncorp Group, *Transcript of Evidence*, 19 November 2018, p. 95.

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

³⁸ 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’.³⁹ 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.⁴⁰

- 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.⁴¹

- 1.45 Many witnesses⁴² 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.⁴³

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’.⁴⁴

- 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’.⁴⁵

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

⁴⁰ CFMEU ACT Branch, *Transcript of Evidence*, 20 November 2018, p. 117.

⁴¹ Insurance Australia Group, *Transcript of Evidence*, 2 November 2018, p. 13.

⁴² 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.

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

⁴⁴ Maurice Blackburn, *Submission 68*, p. 12.

⁴⁵ Maurice Blackburn, *Submission 68*, p. 12.

1.48 Most submitters⁴⁶ and witnesses⁴⁷ 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.⁴⁸

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.⁴⁹

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.⁵⁰

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.⁵¹

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

⁴⁶ 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*

⁴⁷ 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; ⁴⁷ 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.

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

⁴⁹ Mr Webster, *Submission 52*, p. 1.

⁵⁰ Snedden, Hall & Gallop (Supplementary), *Submission 70*.

⁵¹ 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.⁵²

- 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.'⁵³

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

⁵² ACT Government, *Submission 61*, p. 9.

⁵³ 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 – one⁵⁴ 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

⁵⁴ 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