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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Mr Andrew Snedden
Committee Secretary
Standing Committee on Justice and Community Safety
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601

via email: *LACommitteeJCS@parliament.act.gov.au*

Dear Mr Snedden,

Please find attached a submission from the Law Society of the ACT in relation to the inquiry by the Standing Committee on Justice and Community Safety on the exposure draft of the Motor Accident Injuries Bill 2018 (ACT).

The Society would request that they be permitted to appear before the Committee in order to address the submission.

Please do not hesitate to contact me should you require any further information in relation to the Society's submission.

Yours sincerely,

Dianne O'Hara

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Chief Executive Officer

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Executive Summary

This submission responds to the Inquiry into the exposure draft of the Motor Accident Injuries Bill 2018 (ACT) by the Standing Committee of the ACT Legislative Assembly on Justice and Community Safety.

The primary purpose of Compulsory Third Party (CTP) insurance is to compensate people injured, or the relatives of people killed, as a result of the negligent act of another. The purpose of the scheme reflects the social norm that people injured through the negligence of an at-fault driver should be restored to their pre-accident position to the extent possible.

Although the ACT's CTP scheme is considered to be one of the most comprehensive in the country, the Law Society of the ACT (Society) is pleased to work with government to ensure the ongoing efficiency and effectiveness of the scheme.

The Society notes the Motor Accident Injuries Bill (ACT) seeks to implement the key principles identified by the pilot citizens' jury. While the Society supports the very broad principles determined by the pilot citizens' jury, the Society strongly opposes the manner in which the Government proposes the principles be implemented in the new scheme.

The Society strongly opposes the Motor Accident Injuries Bill 2018 (ACT) in its present form.

The proposed motor accidents injuries (MAI) scheme outlined in the exposure draft is inequitable and unfair. It will result in severe and adverse compensation outcomes for many Canberrans. Implementation of the proposed scheme would result in:

- a dramatic reduction in compensation available to about 90% of people injured through the fault of another;
- a ceding of many life-changing decisions in relation to the rights and entitlements of injured people to large insurers;
- a substantial shift in power from injured people to large insurers with the involvement of legal practitioners actively discouraged;
- the extensive use of arbitrary and inappropriate thresholds that are designed to exclude injured people from receiving compensation commensurate with the extent of the damage they have suffered;
- the imposition of caps on damages that will ensure injured people are not fully compensated for the extent of the damage they have suffered;
- the destruction of the autonomy and dignity vital to injured people as they manage their recovery process; and
- the removal of the right of many injured people to have their personal circumstances thoroughly considered and assessed through the judicial process and to ensure that the resultant compensation is appropriately tailored to their individual circumstances.

The motor accident injuries scheme outlined in the exposure draft is a regressive, rather than progressive, development of a crucial, compulsory scheme of insurance that protects many Canberrans each year.

The Society believes that it is possible to achieve the principles identified by the pilot citizens' jury, but in a manner that is fair and equitable. The Society urges the Committee to ensure that the unjust scheme outlined in the exposure draft does not proceed in its current form.

Introduction

The Society is pleased to provide the following submission in response to the Inquiry into the Motor Accident Injuries Bill 2018 by the Standing Committee of the ACT Legislative Assembly on Justice and Community Safety (Committee).

The Society is the peak professional association that supports and represents members of the legal profession in the ACT. The Society maintains professional standards and ethics as well as providing public comment and promoting discussion regarding law reform and issues affecting the legal profession. The Society currently represents over 2,400 legal practitioners within the ACT.

The Society is uniquely placed to comment on the operation of the ACT's existing CTP system and the proposed MAI scheme, having both members who work with injured persons as well as members who represent insurers. Legal practitioners who work with injured people on a daily basis see first-hand the devastating impact motor vehicle accidents can have on the lives of victims and their families.

CTP insurance is a compulsory form of insurance that all registered motor vehicle owners must purchase with their vehicle registration fee. Under longstanding tort law principles, the primary purpose of CTP insurance is to compensate people injured, or the relatives of people killed, as a result of the negligent act of another. The purpose of the scheme reflects the social norm that people injured through the negligence of an at-fault driver should be restored to their pre-accident position to the extent possible.

The Society notes the six priorities for the ACT CTP scheme identified by the pilot citizens' jury, as follows:

- 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;
- a system that strengthens integrity and reduces fraudulent behaviour.

While the Society supports the very broad principles determined by the pilot citizens' jury, it does so only on the basis that any scheme changes are made on a fair and equitable basis. The exposure draft is not fair and equitable. The proposed MAI scheme outlined in the exposure draft is inefficient, unworkable on a practical level and highly damaging to those injured through the negligence of another.

The Committee should consider the following practical effects of the MAI scheme:

- the lack of social justice in a scheme that is structured so as to deliberately under-compensate innocent injured road accident victims in order to offer a questionable and temporary reduction in CTP premiums;
- the dramatic reduction in compensation available to innocent injured people;
- the arbitrary and unfair outcomes for injured people that will result from the use of the whole person impairment (WPI) assessment process;
- the inappropriateness of forcing injured people to deal directly with large insurance companies without the benefit of professional, independent advice as to their rights and entitlements;
- the dramatic reduction in the right of injured victims to have the life-changing decisions of private insurers reviewed; and
- the absurdity of offering general damages on a scale that contemplates a WPI percentage of up to 100%.

Further, in its deliberations as to why it is necessary to dismantle the ACT's functioning scheme widely considered to be the fairest and most comprehensive in the country, the Society urges the Committee to consider the following:

- the scheme is stable and affordable. In its latest Annual Report, the CTP Regulator indicated:

  - since the introduction of competition into the CTP market in the ACT in 2013, the average private passenger vehicle premium has fallen by $40.23 or 6.8%;[1]
  - affordability (or premiums as a proportion of ACT average weekly earnings) has also improved since 2013, despite low wage growth over this period;[2]
- the scheme has not seen the surge in small (or minor severity) claims that have been experienced in other jurisdictions such as NSW. In its most recent report, the CTP Regulator confirmed that claims frequency has remained within 'a fairly tight band' over the six years to 2016-2017;[3] and
- there are a number of ACT-specific structural elements (in addition to common law access) that contribute to the overall cost of the ACT CTP scheme. They include for example, the fact that the ACT median income is the highest in Australia and the lack of risk rating (in terms of age and vehicle type) within the scheme.

Structure of this submission

The remainder of this submission is structured as follows:

- **Part 2: Preliminary Comments**, sets out the Society's general, preliminary comments in relation to the exposure draft;

- **Part 3: Terms of Reference**, specifically addresses each term of reference to be considered by the Committee;

- **Part 4: Specific Legislative Provisions**, reviews the terms of the exposure draft and provides a commentary on a number of the more problematic provisions; and

- **Part 5: Conclusions and Recommendations**, sets out the Society's recommendations for the fair and equitable development of the ACT's CTP scheme in a way that is consistent with the principles nominated by the citizens' jury.

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1 Chief Minister, Treasury and Economic Development Directorate, *Annual Report 2017-18 Volume 1* (October 2018) ACT Government, 267 < https://www.cmtedd.act.gov.au/__data/assets/pdf_file/0003/1262478/CMTEDD-Annual-Report-2017-18-Volume-1.pdf>.

2 Ibid 271.

3 Ibid 275.

PART 2: Preliminary Comments

The Society directs a number of preliminary comments to the Committee in regard to the following aspects of the exposure draft:

- the excessive reference to (undisclosed) MAI guidelines and WPI assessment guidelines (guidelines) throughout the exposure draft;
- the unprecedented limitations placed on the rights of review of injured people;
- the severe and adverse impact of the imposition of caps and thresholds on the entitlements of injured people;
- the curtailment of the role of legal practitioners; and
- the truncated timing of committee deliberations.

Guidelines

The Society notes that nearly 15% of the 423 sections in the exposure draft refer to guidelines, which have not been made publicly available. It is not possible to comprehensively comment on a scheme where over 60 separate powers and functions are referred to external documents that stakeholders have no visibility of.

In effect, this means that members of the Legislative Assembly will be required to consider and debate the merits of a complicated scheme in circumstances where there are significant gaps in the legislation. The guidelines will substantially impact the operation of the scheme. Given the extent of the powers and functions to be determined by the guidelines, the Society questions how the Assembly can be certain as to what they are approving in their absence.

A list of the wide-ranging powers and functions to be specified in the guidelines is provided below.

Section	Commentary
417	The MAI commission may make '*MAI guidelines*' about any matter required or permitted by the Act to be included in the guidelines.
141(1), (4)	The MAI commission must make '*WPI assessment guidelines*' for a WPI assessment of an injured person.
23(e), 23(h)	*Inter alia*, the MAI commission's functions are to make guidelines in relation to premiums under the Act and to issue, monitor and review the MAI guidelines (and other statutory instruments) under the Act.
37(2)(c)	The MAI commission must authorise IME providers under the Act. The MAI commission must be satisfied, *inter alia*, that an entity meets the criteria set out in the MAI guidelines.
37(3)	The MAI guidelines may stipulate: - the criteria for authorising an entity to be an IME provider; - the operational requirements to be imposed on an IME provider; and - the fees that may be charged by an IME provider for the provision of services for WPI assessments.
38(a)	A doctor is regarded as a '*private medical examiner*' for an injured person if *inter alia*, he or she meets the requirements under the WPI assessment guidelines to conduct WPI assessments.
54(1), (2)	A potential applicant for defined benefits must be given information and support from a relevant insurer. The MAI guidelines may stipulate the information and support that is required. The MAI guidelines may provide for the following: - the circumstances in which support and information must be provided; - the information that must be given to an injured person about the procedures relating to applying for defined benefits (including, *inter alia*, time limits for making an application and the information to be given with an application); - in relation to an application for treatment and care benefits and income replacement benefits, the information that must be given with a '*receipt notice*' (including information about allowable expenses for treatment and care);

	- in relation to an application for treatment and care benefits and income replacement benefits (for which the relevant insurer has accepted liability), the information that must be given (including the procedures for obtaining approval for treatment and care and for reimbursement of treatment and care expenses and the evidence that the applicant must give the insurer about the applicant's fitness for work) - the information to be given to an injured person to help him or her decide whether they are eligible for a quality of life payment (including relevant information such as the required WPI, the procedure for applying for a WPI assessment, the time limits and the conditions applying to the making of an application) - in circumstances where a person's WPI is at least 10%, the information to be given to a person (including the consequences of accepting a quality of life benefit, the time limits for making a claim and seeking legal advice about whether to make a claim).
54(3)	In relation to section 54(2), the MAI guidelines may make provision for when and how a relevant insurer must give the information to an injured person.
56(4)	In the event that an injured person revokes an '*authority to disclose personal health information*', (while the injured person is still entitled to defined benefits), the MAI guidelines may stipulate the circumstances in which an injured person must give the relevant insurer a consent.
58(2), (3)	The MAI guidelines may set out the requirements for making an application for defined benefits (including, *inter alia*, the information that must be included with an application and the reimbursable treatment expenses incurred by an applicant before making an application). The MAI guidelines may also require the applicant to, *inter alia*: - provide a police accident notification number or a police accident report for the motor accident with the application; - authorise the relevant insurer to obtain relevant information and documents from stated people; and - authorise the relevant insurer to provide the information and documents to stated people.
62(1)	The MAI guidelines may state the time limit for a relevant insurer to issue an applicant with a receipt notice. A relevant insurer must issue the receipt notice following receipt of an application for defined benefits (within the '*application period*').
62(1)(a)(ii)	The MAI guidelines may set out the information that must be included in the receipt notice.
62(2)(b)	*Inter alia*, if an application does not include all the information required under the MAI guidelines (or a regulation), it will be regarded as incomplete. The relevant insurer must return the application to the applicant accompanied by a '*required additional information notice*'.
62(3)	The MAI guidelines may set out the form and information required for a receipt notice or a '*late receipt notice*'.
65	In relation to the allowable expenses for treatment and care for an applicant for defined benefits, the MAI guidelines may stipulate the following: - the treatment and care for which the applicant may incur allowable expenses (including restrictions e.g. the number of GP appointments an applicant may have); - verifying the injured person's allowable expenses; - the period for which allowable expenses are payable; and - the amount of allowable expenses.
67(2)(b)	If a relevant insurer accepts liability for the defined benefits, the relevant insurer must issue the applicant with a '*defined benefits notice*'. The MAI guidelines may require a defined benefits notice to include certain information.
68(2)	On accepting liability for defined benefits, a relevant insurer must pay the applicant the defined benefits to which he or she is entitled in accordance with the requirements set out in the MAI guidelines.
79(2)	In relation to defined benefits (income replacement benefits), the MAI guidelines may state what is (or is not) taken to be '*paid work*'.
80(2)	In relation to defined benefits (income replacement benefits), the MAI guidelines may set out the matters to be considered in assessing whether an injured person is capable (or is not capable) of being in paid work.
85(3)	In relation to defined benefits (income replacement benefits), the MAI guidelines may set out the matters to be considered in determining the weekly income that the injured person is likely to have been entitled to had the motor accident not happened (and had the person continued in the employment).

90	In relation to defined benefits (income replacement benefits), the MAI guidelines may set out the matters to be considered in determining an injured person's pre-injury weekly income or pre-injury earning capacity.
91(2)	In addition to the entitlement provisions in Division 2.4.2 of the Act, the MAI guidelines may make provision in relation to entitlement to income replacement benefits.
100(3)	In relation to defined benefits (income replacement benefits), the MAI guidelines may set out the matters to be considered by a relevant insurer in assessing an injured person's post-injury earning capacity (and the associated procedures).
101(3)	The MAI guidelines may state the kinds of circumstances that may be exceptional circumstances justifying earlier payment of income replacement benefits by a relevant insurer (who accepts liability).
103(6)	The circumstances in which a relevant insurer may pay the injured person an '*interim weekly payment*' are set out in section 103(1)-(5). The MAI guidelines may set out additional requirements in relation to interim weekly payments.
104(3)	In addition to section 104(1)-(2), the MAI guidelines may set out additional requirements in relation to a '*fitness for work certificate*' and a '*work declaration*' (including, *inter alia*, the form and contents of fitness for work certificates and work declarations).
120(e)	A relevant insurer must consider the matters listed in section 120(a)-(d) of the Act (i.e. cost effectiveness of the treatment and care) in deciding whether treatment and care for an injured person is 'reasonable and necessary'. The MAI guidelines may stipulate further matters for a relevant insurer to consider.
121(4)	Section 121(1) states that a relevant insurer may require an injured person to attend a health practitioner for an assessment of the injured person's needs for treatment and care. The MAI guidelines may provide for: - the conduct of assessments and the suspension of treatment and care benefits; and - income replacement benefits.
123(4)	Section 123(4) stipulates the time period (28 days) for a relevant insurer to provide a '*recovery plan*' to an injured person and their doctor. The MAI guidelines may stipulate a longer time period.
125	The MAI guidelines may provide for recovery plans, including in relation to the following: - the time within which a recovery plan must be given to an injured person and their doctor (as stated in section 123(4)); - approval of treatment and care and treatment and care expenses under a recovery plan; - information to be considered by the relevant insurer when developing a recovery plan; - the minimum requirements for a recovery plan; and - the obligations that an injured person and a relevant insurer have under a recovery plan.
128(3)	The MAI guidelines may state the kinds of circumstances that may be exceptional circumstances justifying the earlier payment of treatment and care benefits payable by a relevant insurer (who accepts liability for a late application for defined benefits).
129(2)	If an injured person is entitled to treatment and care benefits, a relevant insurer must pay for their treatment and care expenses. The MAI guidelines may require an injured person to verify their treatment and care expenses. This may include verifying that: - the expenses were incurred; - the treatment and care for which the expenses were incurred was given; and - the injury for which the treatment and care was given resulted from the motor accident.
129(3)	The MAI guidelines may stipulate the circumstances in which a relevant insurer may pay the treatment and care expense of an injured person before the expense is incurred.
130	In relation to defined benefits (treatment and care benefits), the MAI guidelines may stipulate: - what is reasonable and necessary treatment and care for an injured person; - the maximum amount of defined benefits payable for stated treatment and care; - that the treatment and care that an injured person receives is verified as reasonable and necessary; - that the costs of treatment and care that an injured person receives is verified as reasonable and necessary; - the information that an injured person may ask a health practitioner for in relation to an assessment of their injuries; - the information that a relevant insurer may ask a health practitioner for in relation to an assessment of an injured person's injuries; - the circumstances in which a relevant insurer may ask for additional medical assessments of an injured

	person; - the payment of expenses in relation to reasonable and necessary treatment and care provided by a public hospital, an ambulance service and a bulk billing provider of a service relating to treatment and care; and - the principles to be followed by health practitioners in relation to the provision of treatment and care for injured people.
134(3)(b), (c)	In addition to section 134(1)-(2), the MAI guidelines may stipulate both the details and accompanying documents required for a Quality of Life benefits application.
140(b)	The WPI assessment guidelines may stipulate the requirements for a '*WPI report*'.
141(2)(a)	The WPI assessment guidelines must explain how: - a person's WPI is identified; and - the percentage of the person's WPI is worked out.
141(2)(b)	The WPI assessment guidelines may state procedures and principles to be followed in making a WPI assessment, including whether: - a person's injuries have stabilised; and - the person is likely to have a permanent impairment as a result of the injuries.
141(2)(c)	The WPI assessment guidelines may apply, adopt or incorporate a law of another jurisdiction or instrument.
142(3)	The MAI guidelines may stipulate the procedure for arranging a WPI assessment of an injured person, including: - selecting an IME provider; - the time within which the assessment must be arranged; and - arrangements for payment of the assessment.
144(a)	A WPI assessment of an injured person must be carried out in accordance with the WPI assessment guidelines.
144(b)(i)(A)	The WPI assessment guidelines may state the training that is required for an independent medical examiner to carry out a WPI assessment of an injured person.
146(1)(c)	The WPI assessment guidelines may stipulate how the WPI assessments may be combined to decide an injured person's WPI if an injured person has injuries to more than 1 body system.
147(3)	The WPI report is prepared by an independent medical examiner who carries out a WPI assessment. The WPI assessment guidelines may state the requirements for a WPI report (including the time within which a WPI report must be given).
152(3)	The WPI assessment guidelines may stipulate how the private medical examiner must carry out the second WPI assessment.
152(6)	The MAI guidelines may stipulate: - the relevant insurer's responsibilities in relation to the second WPI report; and - the time limits that apply to an offer of quality of life benefits made in response to the second WPI report.
153(3)	The MAI guidelines may state the time limit within which the second WPI report may be given to the first medical examiner.
168(5)	In relation to the periodic payment of defined benefits to Australians living overseas, the MAI guidelines may stipulate: - the period for which an Australian living overseas must live outside Australia to be eligible for periodic payments; and - the amount and frequency of periodic payments payable to an Australian living overseas.
169(5)	In relation to the lump sum payment of defined benefits to foreign nationals, the MAI guidelines may stipulate: - the extent to which a foreign national's injury is covered by an insurance policy held by the foreign national in relation to their stay in Australia; - the eligibility of a foreign national to enter into a lump sum agreement; - the amount of a lump sum payable to a foreign national under a lump sum agreement (and how the amount is to be calculated) - the defined benefits that are to be taken into account when calculating the amount of a lump sum payable to a foreign national under a lump sum agreement; and

	- procedures for the payment of defined benefits to a foreign national until the foreign national enters a lump sum agreement.
171(3)(b)	The MAI guidelines may stipulate that a late application may be made (i.e. if more than 28 days has passed since the date of the internally reviewable decision) to an insurer for internal review of an internally reviewable decision about an application for defined benefits. Accordingly, the MAI guidelines do not state that a late application may be made, an application for internal review cannot be made after 28 days.
171(6), (7)	The MAI guidelines may provide for internal review applications. An application for internal review must be made in accordance with the MAI guidelines.
172(1), (2)	An insurer carrying out an internal review must carry out the internal review in accordance with the MAI guidelines. In relation to carrying out an internal review, the MAI guidelines may make provision for: - who may or may not carry out an internal review; and - how an internal review is to be carried out (including the requirement for an insurer to give: reasons for the insurer's decision on an internal review and supporting documentation for the insurer's decision on an internal review).
176(2)	After receiving an application for internal review, an insurer must decide the application and notify the applicant of the decision within 10 business days. The MAI guidelines may stipulate the circumstances in which the 10 business days may be extended.
179(3)	The MAI guidelines may limit the time within which an application for external review may be made.
179(4)	An application for external review must be made in accordance with the MAI guidelines.
184(1)	The MAI guidelines may provide for the period in which an application for external review must be decided by an external reviewer. An external reviewer's decision is not invalid on the basis that it is made after the end of the decision period.
187(3)	In relation to defined benefits information services, the MAI guidelines may stipulate the following: - the form and content of applications for approval to provide a defined benefits information service; - the application process; - the qualifications required of providers; - the duration and conditions of approvals; and - the information services to be provided.
267, 269(2)(b)	The MAI guidelines may stipulate the following in relation to premiums for MAI policies: - how MAI premiums are to be calculated and the factors to be taken into account in working out MAI premiums; - requiring licensed insurers to state how they have worked out MAI premiums; and - any additional information the MAI commission may require licensed insurers to give to the MAI commission (with an application for approval of a premium or to justify MAI premiums they have already given to the MAI commission for approval). The MAI commission may reject a premium for a MAI policy only if the MAI commission considers that, *inter alia*, the premium does not comply with the MAI guidelines.
283(2)	The MAI guidelines may make provision in relation to UVP liability contributions, including provision for the following: - how UVP liability contributions are to be worked out; - the factors to be considered in working out UVP liability contributions.
315(1)(i)	*Inter alia,* a condition of a MAI insurer licence is that the licensed insurer must comply with the MAI guidelines.
324(e), 341(2)(b), 344, 350(1)(c), 356(2)(b)(v), 357(1)(a)(ii)	After consulting with each licensed insurer, the MAI commission may make MAI guidelines that set out the following: - business plans for licensed insurers; and - the issue of MAI policies. A licensed insurer's '*business plan*' must comply with the MAI guidelines. One of the grounds in which the MAI commission may suspend a licensed insurer's MAI insurer licence is if the MAI commission receives a report (under section 350) and believes on reasonable grounds that the insurer is (or is likely to become) unable to meets its liabilities under the Act (or under MIA policies issued

	by the insurer). *Inter alia,* a section 350 report reports on the licensed insurer's compliance with the MIA guidelines. The MAI commission may prepare a '*net profit report*' in relation to a licensed insurer which may be based on, *inter alia,* a licensed insurer's compliance with the MAI guidelines (as reported in a section 350 report). The MAI commission may give the Minister reports about the level of compliance by insurers with, *inter alia,* any conditions of MAI insurer licenses (including the MAI guidelines).
353(4)	The MAI guidelines may specify the 'other information' that the MAI commission may ask a licensed insurer to provide to the MAI commission.
377	The MAI guidelines may specify the circumstances in which a relevant insurer may contact the following people directly (whether or not the person has legal representation): - a person injured in the motor accident; - an applicant for defined benefits; - a claimant for damages. The MAI guidelines may specify the following: - the circumstances in which an insurer may communicate with an applicant for defined benefits or a claimant for a motor accident claim; and - the matters about which an insurer may communicate with an applicant for defined benefits or a claimant for a motor accident claim.
418	In relation to forms for the Act, the MAI guidelines may specify the following: - the information that must be included in a form; - where forms for this Act may be accessed.

Limited rights of review

The Society believes that implementation of the MAI scheme as outlined in the exposure draft would generate a multitude of disputes between claimants and insurers.

The removal of 'fault' (through the extension of coverage to at-fault drivers) will not decrease the likely number of disputes. Disputes as to fault are not common within the existing CTP scheme – a fact consistent with schemes throughout various national and international jurisdictions.[4] The effect of removing this small source of disputation will be negligible. In its place, the proposed MAI scheme is replete with triggers for dispute between injured people and the relevant insurer.

For example, the experience of other schemes has demonstrated disputes are likely to arise in relation to:

- the entitlement of a claimant to income replacement payments – quantum of payments;
- the entitlement of a claimant to income replacement payments – duration of payments;
- the entitlement of a claimant to income replacement payments – qualification of applicant;
- the entitlement of a claimant to income replacement payments – quantum of payments;
- the entitlement of a claimant to income replacement payments – duration of payments;
- the entitlement of a claimant to treatment expenses – is the treatment 'cost effective';
- the entitlement of a claimant to treatment expenses – is the treatment appropriate for the injury;
- the entitlement of a claimant to treatment expenses – is the provider appropriate for the treatment provided;
- a decision by the insurer to cease or suspend income replacement payments;
- a decision by the insurer to suspend or cease payment for treatment and care benefits;
- the decision by an insurer that a claimant's injuries have stabilised and the person is not likely to have a permanent impairment;
- the results of a WPI assessment;
- the entitlement of a claimant to a quality of life payment – quantum of payment; and

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4 Ronen Perry, 'From Fault-Based to Strict Liability: A Case Study of an Overpraised Reform' (2018) 53, *Wake Forest Law Review* 383, 391-392.

- whether the claimant has provided a 'full and satisfactory explanation' for a delay in applying for defined benefits.

It is of serious concern to the Society that not only is the prevalence of disputes likely to increase under the MAI scheme, the mechanisms in place to manage disputes have been seriously compromised. Matters that may be subject to internal review (internally reviewable matters) will be prescribed by regulation[5] and so are as yet not publicly available. Internal reviews must be carried out 'by a knowledgeable person not closely involved in the original decision'.[6]

If not resolved through internal review, some disputes may be referred to external review. Matters that may be subject to external review (externally reviewable matters) will be prescribed by regulation[7] and so are as yet not publicly available. The entity responsible for conducting the external review is yet to be determined, but will be declared at some later date by the Attorney-General.[8] The decision of the as yet unknown external reviewer is expressed in the exposure draft to be binding on the parties to the review.[9] The substantial legislative detail that would normally specify the management of internal and external reviews is sadly lacking in the exposure draft.

The intent of the internal and external review provisions of the exposure draft appears to be to severely limit access by claimants to appropriate review of decisions affecting their rights. It is of particular concern that many elements of the review mechanisms operate contrary to well established principles of natural justice and procedural fairness - it is not acceptable that an internal review can be performed by a person involved in the initial decision; external review is excluded for some decisions; and insurers will have a legislated right to speak directly with an injured person even where the injured person has chosen to be legally represented.

The Society notes that the provisions of the exposure draft allow the Attorney-General to declare a particular entity responsible for carrying out an external review of an externally reviewable decision. While the Society understands that the selected entity is likely to be either the ACT Magistrates Court or the ACT Civil and Administrative Tribunal (ACAT), equally the Attorney could declare a new statutory body as the entity. The practicalities and resourcing implications of directing a range of new injury related disputes and self-represented litigants to either of the Magistrates Court or the ACAT has obviously not been addressed by the Government or the scheme designer. The Society finds the uncertainty and lack of detail relating to such a critical aspect of the exposure draft unacceptable.

Imposition of caps and thresholds

The Society rejects the proposed introduction of whole person impairment (WPI) as a mechanism to prevent injured people accessing their full compensation entitlements.

Use of WPI (as modified by AMA 5) as proposed in the exposure draft is inappropriate. AMA 5 is not designed to determine entitlement to compensation for wage loss or medical expenses. WPI assessments do not account for pain. The ability of the injured person to perform pre-injury occupations is not considered as part of the assessment, nor will WPI assessments take account of either future surgeries or injury deterioration. On any level, the result for many seriously injured people will be unfair.

Under the proposed MAI scheme, people injured through the fault of others who are assessed as having a WPI of less than 10% will no longer be able to pursue a common law claim. The imposition of a 10% WPI threshold is a significant barrier and its selection is entirely random. About 90% of innocent injured people will not reach this

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5 Motor Accident Injuries Bill 2018 (ACT) s 170.

6 Andrew Barr MLA, Treasurer, ACT Government, *Guide to the Motor Accident Injuries Bill 2018 Exposure Draft* (September 2018) ACT Government Your Say, 20 <https://www.cmtedd.act.gov.au/__data/assets/pdf_file/0003/1262478/CMTEDD-Annual-Report-2017-18-Volume-1.pdf>.

7 Motor Accident Injuries Bill 2018 (ACT) s 177.

8 Ibid s 178.

9 Ibid s 185.

threshold, and so will not receive compensation commensurate with the extent of the harm they have suffered. At 10% WPI, an injured person is considered sufficiently injured to be eligible to be fully compensated for general damages. However, at 9% WPI, an injured person would be substantially under compensated. In many cases, people with less than 10% WPI suffer from chronic pain and incapacity to work.

For an estimated 90% of injured people, the proposed MAI scheme will:

- cap lost wages for the first year at 95% for the first three months and 80% thereafter;
- prevent the long-term recovery of lost wages;
- prevent any payment of medical expenses after five years;
- exclude any payment of damages for care provided by family members; and
- cap payments for damages for pain and suffering.

A 'scaled formula' will apply to the payment of damages for pain and suffering. Maximum damages for a not at-fault injured person (of $500,000) will apply in instances where the injured person is assessed at 100% WPI. At 10% WPI, the injured person would be eligible for $25,000. The practical application of the 'scale' is a nonsense, and will operate to ensure that damages paid for pain and suffering are severely and unfairly curtailed.

Role of legal profession

The Society remains concerned at the anti-lawyer sentiment encouraged throughout the citizens' jury consultation process and evident in aspects of the exposure draft. The Society rejects any suggestion that the involvement of legal practitioners throughout the CTP claims process is responsible for the undue costs or delay in the system.

As noted previously, legal practitioners work with injured people on a daily basis and have a comprehensive understanding of their rights and entitlements. It is offensive to infer that the removal of legal practitioners from the process would result in injured people receiving better quality outcomes. It is not realistic to expect that injured people will be able to adequately and repeatedly represent their own interests against the insurers' professional claims managers and in-house legal teams.

The proposed MAI scheme is designed to give the insurers power to determine many of an injured person's entitlements. It is specifically designed to restrict injured peoples' access to legal representation. For example, the exposure draft seeks to limit the costs and fees payable in relation to applications for defined benefits as well as ensuring that legal practitioners are not able to charge more than the prescribed fee.[10] It is disingenuous to suggest that limiting legal fees, 'will not limit an applicant being able to obtaining (sic) legal assistance from a lawyer'.[11] Constraining the fees payable to legal practitioners will operate to limit the ability of injured people to obtain professional, independent advice if they are in dispute with the insurer as to their entitlements. This appears to be the case in NSW, where the fees payable to legal practitioners have been dramatically curtailed when compared to fees payable to practitioners in other jurisdictions.[12] The Society is most concerned that claimants will be deprived of their legal rights and entitlements due to a lack of legal representation – an unacceptable outcome in a jurisdiction that professes to be human rights compliant.

The Society notes that legal practitioners are currently subject to substantial regulatory and consumer protection oversight through mechanisms including the *Legal Profession Act 2006* (ACT) and the *Court Procedures Rules 2006* (ACT). At the commencement of a matter, practitioners are required to ensure clients are made aware of legal costs (via the costs disclosure notice) and agree to the proposed costs (via the mandatory costs

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10 Ibid s 186.

11 Barr MLA, above n 6, 21.

12 NSW Bar Association, Submission to the Standing Committee on Law and Justice, Parliament of New South Wales, *2018 review of the Compulsory Third Party insurance scheme*, 22 June 2018, 2.

agreement). Remedies are available for non-compliance with these legislative provisions.[13] Consumer satisfaction with the role of legal practitioners in this area of the law is high.[14]

It is the view of the Society that the MAI scheme shifts the balance of power too far in favour of insurers. The proposed scheme relies on insurers to provide a range of information to injured people, including to those with serious enough injuries to still have a common law claim. Underlying the many responsibilities placed on insurers throughout the draft is the assumption that the insurers will act reasonably in their conduct towards claimants. The current review of the CTP insurance scheme in NSW has before it evidence that this is not the case, with examples of:

- insurers refusing to engage in any communications with legal representatives;
- providing claimants with mis-statements as to the nature of the applicable costs regulations; and
- providing claimants with correspondence containing clear legal errors.[15]

The Society further notes that recent evidence before The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission) indicates that the handling and settling of insurance claims is specifically excluded from the definition of a financial service and therefore not subject to a range of obligations, 'including the obligation for an insurance company to do all things necessary to ensure that it provides financial services efficiently, honestly and fairly'.[16]

Timing of committee deliberations

The Society is extremely disappointed at the unduly rushed timeframe allowed for the review of the exposure draft.

Only six weeks has been allocated for the Committee to report back to the Assembly on a complex scheme that has a significant impact on all Canberrans. This inquiry appears to be the most restricted timeline of all of the standing committee inquiries currently listed on the Legislative Assembly website.

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13 *Legal Profession Act 2006* (ACT) ch 4.

14 CNS Projects, Double Arrow Consulting, *Your Experiences are Important, CTP Claimants Deliberative Democracy Workshop, Report from a workshop held in Canberra, 28 February, 2018,* (12 March 2018) 5, 17, 19.

15 Australian Lawyers Alliance, Submission to the Standing Committee on Law and Justice, Parliament of New South Wales, *2018 review of the Compulsory Third Party insurance scheme*, 18 June 2018, 19-24.

16 Transcript of Proceedings, The Financial Services Royal Commission (10 September 2018) 5275.

PART 3: Terms of Reference

Objectives of CTP insurance scheme

The Committee has been asked to inquire into and report on the alignment of the exposure draft with the following objectives for the ACT's CTP insurance scheme:

- 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;
- promoting broader knowledge of the scheme and safer driver practices;
- implementing a support system to better navigate the claims process; and
- a system that strengthens integrity and reduces fraudulent behavior.

Early access to medical treatment, economic support and rehabilitation services

The Society supports the principle of providing people injured in road accidents with early access to medical treatment, economic support and rehabilitation services. The Society does not believe that the provisions of the exposure draft will achieve this objective.

In practice, access by injured persons to early treatment and care is often hampered by a range of issues, including:

- cumbersome and repetitious bureaucratic processes imposed by insurers;
- the admission of fault by insurers, but denial of injury (and therefore the denial of responsibility for the payment of medical and rehabilitation expenses, even in circumstances where the treating doctor has certified the injuries were suffered as a result of the accident);[17] and
- the need for the injured person to repeatedly obtain separate approvals from the insurer for treatment.

The Society does not believe that the exposure draft addresses these issues. In practical terms, the proposed MAI scheme will continue to rely on the good will and cooperation of the insurers to achieve the goals of early treatment and care. As has been noted earlier in this submission, recent experience in NSW has clearly demonstrated that implementing a more expansive role for insurers does not necessarily equate with the more efficient and timely processing of insurance claims.

The following outlines some of the impediments to the achievement of early treatment and care for injured people contained within the exposure draft:

- only treatment and care assessed as reasonable and necessary by the insurer will be reimbursed;
- the insurer will only be liable for treatment and care nominated in a recovery plan drafted by the insurer. The injured person must separately apply for approval by the insurer of treatment and care expenses outside of the recovery plan;
- an insurer may require that an injured person be assessed by a health practitioner (other than the person's treating doctor); and
- an insurer can suspend the injured person's treatment and care benefits if the person does not comply with the insurer's reasonable requests.

The Society reiterates its view that it is important to appropriately balance the power of insurers to investigate and manage claims with the basic rights of injured people. The MAI scheme does not achieve this equilibrium. The MAI scheme extends to the insurers significant power to direct, assess, re-assess, distribute and suspend

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17 On 30 July 2018, three legal firms wrote to the CTP Regulator to complain about the apparent trend in insurers admitting liability but not injury. The matter is currently being considered.

payments, to injured people. The Society is most concerned that the disproportionate power extended to insurers could be used to impose punitive measures under the guise of treatment and significantly erode the sense of dignity and autonomy injured people deserve.

The Society further notes the repeated assertions that all claimants will be eligible for treatment, care and income replacement payments for up to five years. In practice, it will be the insurer who will determine the period for which a claimant will be considered sufficiently injured to receive such payments. The average length of time included in the modelling for payment of the defined benefits for each of treatment, care and income replacement was 0.89 years, 2.62 years and 1.75 years respectively. Injured people assessed by the insurers as sufficiently recovered will have their benefits terminated.

Equitable cover for all people injured in a motor vehicle accident

The Society supports the notion of equitable cover for all people injured in a motor vehicle accident.

The Society absolutely rejects the notion that 'equitable cover' can or should be achieved by arbitrarily reducing the compensation payable to innocently injured people in order to pay a level of benefits to at-fault drivers.

Currently any person injured in a motor vehicle accident in the ACT may receive up to $5,000 for early medical expenses. This is a valuable element of the ACT CTP scheme that legal practitioners believe could operate more effectively.

The claim by the ACT Government that the extension of at-fault coverage is more equitable is demonstrably false. In tabling the exposure draft, Mick Gentlemen MLA stated:

> *For example, if you are the driver and get injured in a single-car accident you cannot claim under Canberra's current CTP scheme. That means that if you hit a kangaroo or lose control on an icy patch of road you cannot make a claim to cover your medical bills, care needs and lost income.*[18]

The most recent ACT Government report, the *2016 ACT Road Crash Report,* outlines the number and severity of motor vehicle accidents in the ACT. The Government data clearly demonstrates that overwhelmingly accidents are caused by the fault of a driver. Only four injury related accidents were caused by wildlife. Importantly, the report notes that in 2016:

- there were over 7,900 on-road vehicle accidents recorded, involving 15,476 vehicles and resulting in 11 fatalities and 110 hospital admissions;
- 88% of vehicle crashes in the ACT involve two or more vehicles;
- the most frequent cause of vehicle accidents were rear end collisions with approximately 45% of all motor vehicle accidents the result of rear end collisions;
- there is an upward trend in the number of vulnerable road users (cyclists, pedestrians and motor-cyclists) injured on our roads; and
- collisions with animals (including wildlife) accounted for only four injury crashes.[19]

It is further noted that three of the four CTP insurers currently licensed to operate in the ACT provide at-fault driver coverage to their customers at no additional cost. The three insurers in question (namely, the NRMA, GIO and APIA) hold over 92% market share in the ACT.[20]

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18 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 20 September 2018, 389 (Mick Gentleman).

19 ACT Government, *2016 ACT Road Crash Report* (August 2017) Justice and Community Safety Directorate, 12 <http://cdn.justice.act.gov.au/resources/uploads/JACS/Road_Safety/PDFs/ACT_Road_Crash_Report_2017web_accessable.pdf>.

20 Chief Minister, above n 1, 272.

The Society rejects the notion that it is in any way reasonable to extend the coverage of CTP insurance through reducing the entitlements of innocently injured victims via the introduction of a WPI threshold. The Society is disappointed that to date, no consideration has been given to achieving universal coverage through other, less extreme measures.[21]

The Society urges the Committee (through consideration of the lived experience of injured people) to ensure that they fully understand the impact on innocently injured victims of the arbitrary reduction in compensation that will be imposed under the proposed MAI scheme. Damages are intended to compensate people for the extent of the damage they have suffered – they do not represent a windfall gain. To impose a randomly-selected limit on the extent to which not at-fault people can be compensated for their injuries is grossly inequitable.

As noted previously, use of WPI and the AMA Guides in the manner outlined in the exposure draft is entirely inappropriate. The practical effect will be that insurers will no longer have to pay full compensation to about 90% of innocent injured people on the assumption that these 'less seriously injured' people have been over-compensated in the past. The proposition is untenable.

Injured people can suffer serious, lifelong injuries that are assessed as less than 10% WPI. Under the proposed MAI scheme such people injured through the fault of another would lose their right to full compensation for pain and suffering, care provided by family members and long-term medical care. They would not be fully compensated for their loss of income and all of their medical expenses. Examples of injuries assessed at less than 10% WPI include:

- a person suffered a rupture of the left tibialis anterior tendon. The injured person had surgery to reconstruct the tendon that required a graft, reattachment and tendon lengthening. The injured person returned to work some months later on light duties. Although now back on normal duties, the injured person has problems with steps and ladders (and these are regularly used in his work), he has acknowledged pain and significant stiffness, and the leg is visibly thinner than the other. He has a recognised limp and a shortened stance phase and scarring over the dorsal aspect of the foot and proximal medial tibia for the hamstring graft. He is unable to perform a single leg heel raise. He was assessed at 0% WPI;
- a not-at fault driver was involved in a head on collision. He suffered dislocated and fractured toes, a fracture to the L2 vertebra, fractures to the 4th, 5th and 6th ribs, marked deformity and scarring to the left breast and right thigh meralgia paraesthetica (a condition that causes pain, numbness and tingling). He experiences ongoing pain in his chest, back and foot. He was assessed at 8% WPI;
- a 17 year old girl who had lost 17 teeth was held to have 0% WPI on the basis she could chew from the other side of her mouth, notwithstanding that she would undergo many painful dental treatments over a prolonged period for periodic replacements of bridges and crowns;[22] and
- an ankle fusion (welding of the ankle joint to stop the movement that causes pain) is assessed at 4% WPI. The injured person (in this instance a police officer) was no longer be able to flex the joint, run, jog, or work all day on their feet. Some pain persisted.[23]

The Committee is urged to consider:

- the severity of the reduction in benefits to innocently injured car accident victims can be seen in the significantly reduced number of anticipated common law claims. About 90% of not at-fault claimants will be excluded from pursuing a common law claim. This means that the ability of about 90% of injured people to receive general damages to compensate them for the full extent of the harm they have suffered will be removed. The cost per policy of common law benefits for not at-fault claimants will reduce from $354 in the current scheme to under $100 in the new scheme;[24]

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21 Refer recommendations, Part 5 of this submission.

22 NSW Bar Association, *CTP Reform and the 10% WPI Fallacy*, 1-2

23 Ibid.

24 Ernst & Young, *Estimated costs of alternative benefit designs for the ACT's Compulsory Third Party (CTP) Insurance Scheme, ACT CTP Citizen's Jury* (13 March 2018) 57.

- the complete lack of understanding by the citizens' jury in regard to the WPI threshold. Jurors were only introduced to the WPI scale on the weekend of 24-25 March 2018 - the weekend they commenced voting for the model. It is not acceptable that a measure that will so adversely affect the rights of many injured Canberrans can be adopted without a detailed understanding of the impact of the decision;
- legal practitioners have consistently strongly objected to the use of AMA Guides and WPI to determine levels of financial compensation. It is reiterated that the authors of the AMA Guides themselves clearly state that the Guides should not be used for the direct assessment of compensation.

  The Guides is not to be used for direct financial awards nor as the sole measure of disability. The Guides provides a standard medical assessment for impairment determination and may be used as a component in disability assessment.[25]

The Society notes the proposed imposition of a 'scaled formula' designed to limit the payment of damages for pain and suffering. Maximum damages will apply in instances where the injured person is assessed at 100% WPI – and where effectively the injured person would be supported by the Life Time Care and Support scheme. At more realistic WPI levels, the payments under the scale are much less. The practical application of the 'scale' as currently included in the exposure draft is a nonsense.

The introduction of caps and thresholds effectively removes from seriously injured people the right to have their personal circumstances thoroughly considered and assessed through the judicial process and to ensure that the resultant compensation is appropriately tailored to their individual circumstances.

Value for money and efficient system

The Society contends that the ACT's existing CTP scheme is the fairest and most comprehensive CTP insurance scheme in Australia. The scheme operates as a CTP scheme is specifically designed to - that is, to compensate people injured in motor vehicle accident through no fault of their own for their losses and damages to the extent possible. Despite its comprehensive coverage, the scheme is not the most expensive in the country. It is the view of the Society that the scheme is cost effective and represents value for money.

Unfortunately, the proposed MAI scheme does not represent value for money nor is it an efficient system.

The compensation entitlement of about 90% of innocent injured people will be severely downgraded. Injured people will be actively discouraged from pursuing their full compensation entitlements and instead encouraged to accept a (supposedly) faster, lesser amount. The longer-term implications of under-compensating injured people for their injuries and losses is that inevitably they will be forced to rely on family, friends, medicare and the broader social welfare system.

One of the reported benefits of the proposed MAI scheme is expressed to be the premium savings of between $91 and $171 per annum.[26] The Society does not believe consumers will in fact benefit from any savings. The Society's view is based on statements by Ernst & Young (EY) who costed the proposed model, and who indicated that:

- the costing relied on information supplied to them. They did not undertake a 'ground up estimate of the cost of the current ACT scheme';
- 'there is significant additional uncertainty and limitation associated with our four model design costing estimates';
- Model D was the most uncertain of the models.[27]

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25 AMA, *American Medical Association Guides to the Evaluation of Permanent Impairment* (5th ed).

26 Elise Scott, 'Canberra car insurance premiums expected to be cut as Government unveils CTP plan', ABC (online), 20 September 2018 < https://www.abc.net.au/news/2018-09-20/canberra-ctpi-insurance-car-laws-citizens-jury/10284606>.

27 Ernst & Young, above n 24, 77.

In addition, the Society notes that there are a number of costs of the proposed MAI scheme that have not been accounted for within the EY modelling. These include, the set-up and recurrent costs for the proposed MAI bureaucracy, and the cost of the conduct of the disputes inherent in the proposed scheme, including the additional resourcing that will be required for the external review entity.

The Society believes that the proposed MAI scheme will simply operate as a windfall to insurance companies. It is of concern that all of the modelling in regard to the costs of the proposed models exclusively refer to the filed profits of insurers, and not their actual profits. The filed profit of the ACT CTP insurers is consistently reported as within the range of 8%-11%.[28]

Experience in other jurisdictions throughout Australia has shown that there can be a significant difference between the filed profit of insurers and their actual profit. The Society understands that a similar situation may exist in the ACT.

In NSW, the insurers' filed profit margins over an extended period fell within a band of between 6%-9%. In actual fact, the actual profit margins achieved were considerably higher, reaching 30% in some cases.[29] Similarly, a review of Queensland's CTP scheme stated:

> *Analysis by MAIC's consulting actuary reveals that actual insurer profitability has remained well in excess of the eight per cent allowance, being in the range of 25 per cent to 31 per cent over the past five years.*[30]

The Society understands that the ACT does not currently undertake an evaluation of insurers' actual profit margins.[31] The Society does not believe that a proper assessment of premiums levels can be completed in the absence of such information.

It is the Society's view that if the actual insurer profits are outside of the filed band, there is potential to ensure the surplus (excess) profit is returned to the scheme rather than retained by the insurers. This mechanism could apply the additional funds to the extended coverage, for example.

The Society does not believe that the compensation payable under the proposed MAI scheme is sufficient to cover the needs of the majority of injured people. In such circumstances, in order to ensure they do have adequate insurance cover, it would be prudent for people to take out supplementary cover, such as income protection insurance. This would quickly consume any estimated premium savings and disadvantage those who are either ineligible for, or who cannot afford, such insurance.

Promoting broader knowledge of the scheme and safer driver practices

The Society would support initiatives designed to promote safe driver practices and a broader knowledge within the community of their rights and entitlements if they have been involved in a motor vehicle accident.

Implementing a support system to better navigate the claims process

The Society draws the attention of the Committee to the information support mechanism provisions within the exposure draft.

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28 Chief Minister, above n 1, 277.

29 State Insurance Regulatory Authority, *Report of the Independent Review of Insurer Profit within the NSW Compulsory Third Party Scheme* (2015) SIRA, 21 < https://www.sira.nsw.gov.au/resources-library/law-and-policy-or-corporate/publications/Report-of-the-Independent-Review-of-Insurer-Profit-151015.pdf>.

30 Henry Smerdon AM, Jo Blades and Rowan Ward, *Review of Queensland's Compulsory Third Party Insurance Scheme* (December 2016) 17 < https://maic.qld.gov.au/wp-content/uploads/2017/04/2016-CTP-Scheme-Review-Report-Final.pdf>.

31 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 13 April 2018, 1949 (Andrew Barr).

As has been noted earlier, the Society has serious concerns with the extent to which the MAI scheme proposes to rely on insurers to inform claimants of their rights and entitlements. As discussed earlier in this submission, this has proven to be problematic in NSW.

The exposure draft contemplates that the MAI commission may approve a person to provide a defined benefits information service.[32] Such a person must not be a lawyer (presumably meaning the person cannot be an Australian legal practitioner).[33] The guide to the exposure draft states that the MAI commission could approve a community legal service (CLC) to provide this service.[34]

The Society questions the rationale underlying the legislation prohibiting a 'lawyer' from providing this service. The Society also draws the attention of the Committee to section 16 of the *Legal Profession Act 2006* (ACT), which prohibits a person who is not an Australia legal practitioner from engaging in legal practice.

Of equal concern is the indication that the provision of the service could be provided by a CLC – but presumably not the legal practitioners employed by, or volunteering at, the relevant CLC. Given the caseload and current resourcing issues of CLCs generally, the notion seems ill-conceived and a mis-use of the strained capacity of the centres.

It is the Society's view that the poorly considered provisions relating to the management of the information service is indicative of the rushed and piecemeal nature of many of the provisions in the exposure draft.

A system that strengthens integrity and reduces fraudulent behavior

The issue of claims harvesting is not specific to the ACT and a number of jurisdictions (including NSW where the practice is thought to have originated) have legislated to make claims harvesting illegal. The Society wrote to the Government in August 2017 urging the Government to act and indicating its support for the introduction of a similar provision to that enacted in NSW to be included in the *Road Transport (Third Party Insurance) Act 2008* (ACT) or its associated Regulation. It is disappointing to the Society that this recommendation was not acted upon in a timely manner.

Legal practitioners are pleased to note the ongoing recent acknowledgements by the CTP Regulator that there is no evidence of fraudulent practices in the ACT (as has been the case in jurisdictions such as NSW). Specifically, the blowout in claims for soft tissue injuries experienced in some other jurisdictions is not apparent in the ACT. In its 2015-2016 annual report, the CTP regulator noted:

> *The CTP regulator has been analysing the ACT's scheme data, and is working co-operatively with other Heads of Motor Accident Insurance Schemes in regard to fraud issues and monitoring. The typical characteristics of fraud that have tainted the NSW CTP schemes are not currently evident on a systemic basis within the ACT CTP scheme. For example, ... claims frequency since 2011 has remained within a tight band (unlike the NSW CTP scheme with an average annual growth estimated of over 5 per cent for the same period). Further, the ACT Scheme has not experienced a spike in minor severity claims in recent years.*[35]

Draft bill's alignment with the model chosen by the CTP citizens' jury and the detailed design documents underpinning this model

The Society notes with concern that a number of matters previously inserted into and subsequently withdrawn from the Model D documentation prior to its presentation to the citizens' jury have re-appeared in the exposure draft and/or the guide to the exposure draft. These matters include, for example, the use of the CLCs to provide information support.

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32 Motor Accident Injuries Bill 2018 (ACT) s 187(1).

33 Ibid s 187(2).

34 Barr MLA, above n 6, 21.

35 Chief Minister, Treasury and Economic Development Directorate, *Annual Report 2015-16 Volume 1* (October 2016) ACT Government, 230 <http://www.cmd.act.gov.au/__data/assets/pdf_file/0008/1015955/CMTEDD-Vol-1_FA.pdf>.

Draft bill's consistency with other relevant insurance schemes operating in the Territory

The Society makes no comment on this term of reference.

The most suitable avenues for external review of matters arising between parties under the proposed new Motor Accident Injuries scheme;

The Society refers the Committee to its earlier comments in this submission regarding internal and external review.

PART 4: Specific legislative provisions

The Society believes that the exposure draft has a number of serious omissions, is incomplete, and if enacted, will seriously degrade the ACT's CTP's scheme, leaving innocently injured road accident victims and their families in financial hardship and emotional distress.

The following table provides a commentary in regard to some of the more problematic aspects of the exposure draft. The specific concerns of the Society in relation to the undisclosed guidelines and the review processes have been addressed earlier in this submission and so are largely omitted from the table below.

Section/ Part/ Division	Provision	Commentary
19(2)	The responsible person for, or driver of, a motor vehicle involved in the motor accident must comply fully with any reasonable request made by the MAI insurer for the motor vehicle for information in relation to an application for defined benefits or a motor accident claim resulting from the motor accident.	The section does not define what a reasonable request or a reasonable excuse is – that will be determined by the insurer. The penalty for non-compliance is a maximum of 20 penalty units.
19(3)	This section does not apply to a person if the person has a reasonable excuse for failing to comply with the request	
Part 1.3	Motor accident injuries commission	This part establishes a new bureaucracy, the Motor Accident Injuries Commission. The resourcing for the bureaucracy does not appear to have been accounted for in the relevant financial modelling.
34(1)	For this chapter, a *full and satisfactory explanation* by an applicant for a delay in applying for defined benefits is a full account of the conduct, including the actions, knowledge and belief of the applicant, from the date of the motor accident until the date of providing the explanation.	This imposes an extremely onerous requirement on the injured person.
Division 2.2.2	Limitations and exceptions to entitlement	It is not clear how many of the reported 600 additional at-fault claims these exclusions will exclude.
58(3)(a)	The MAI guidelines may require the applicant to do 1 or more of the following: (a) provide a police accident notification number or police accident report for the motor accident with the application;	Evidence before the NSW Legislative Council 2018 review of the CTP insurance scheme indicates that insurers are insisting that injured people provide a police incident number. Claimants report that in many instances, police would not as a matter of course take a report of many accidents, meaning that it is extremely difficult to meet this requirement.[36]
70(1)	A decision by a relevant insurer to accept liability for defined benefits does not prevent the insurer from making a later decision to reject the liability.	This means the insurer can later change their mind in regard to accepting liability.
77(b)(i)	For this part, gross income of an injured person who is an employee— (b) does not include the following: (i) any contribution paid or payable on behalf of the person by the person's employer to a	Superannuation is excluded from gross income. This will disadvantage not at-fault claimants.

36 Australian Lawyers Alliance, above n 15, 28.

	superannuation scheme for the benefit of the person;	
93	A person injured in a motor accident is not entitled to income replacement benefits if, when the accident happens, the person is the following age: (RA + 26 weeks)	An injured person is not entitled to income replacement payments 26 weeks after retirement age. A person that is still working at age 65 and intending to work until 70 will be disadvantaged by this provision.
105(1)	This section applies if the relevant insurer for a motor accident makes a reasonable request that the injured person undergo a medical or other examination to assess the person's fitness for work.	The insurer can suspend payments if (in the insurer's view) the injured person has failed to comply with a reasonable request to undergo a medical or other assessment. It is not clear how many assessments the insurer can require the injured person to undertake.
105(2)	If the injured person fails without reasonable excuse to comply with the request, the relevant insurer may suspend the person's benefit payments for the period that the failure to comply continues.	
108	The relevant insurer for a motor accident must not commute income replacement benefits to which an injured person is, or may be, entitled to a lump sum payment.	Income replacement benefits are not commutable to a lump sum. It is not clear why.
110(2)	*excluded treatment and care* means treatment, care, support or services of a kind prescribed by regulation.	This mechanism could be used to exclude anything.
120	In deciding whether treatment and care for an injured person is reasonable and necessary, the relevant insurer for the motor accident must consider the following: (a) whether the treatment and care is reasonable and necessary in the circumstances; (b) whether the treatment and care— (i) is directly related to the person's injury; and (ii) is appropriate for the injury; and (iii) will benefit the person; (c) the appropriateness of a provider of the treatment and care; (d) whether the treatment and care is cost effective; (e) the MAI guidelines.	This section provides for the insurer to be able to determine if the treatment or care is reasonable and necessary. On what basis would an insurer determine whether the treatment and care is cost effective, was appropriate and/or would benefit the person?
121(1)	The relevant insurer for a motor accident may require a person injured in the motor accident to attend a health practitioner for an assessment of the injured person's needs for treatment and care, including a medical or other examination.	The insurer can suspend payments if (in the insurer's view) the injured person has failed to comply with a reasonable request to undergo a medical or other assessment. It is not clear how many assessments the insurer can require the injured person to undertake.
121(2)	The injured person must comply with any reasonable request made by the relevant insurer in relation to the assessment.	
123(3)	The relevant insurer must give the injured person and the injured person's doctor a recovery plan for the injured person.	The insurer will draft a recovery plan for the injured person.
126(1)	If the relevant insurer for a motor accident gives a person injured in the motor accident a recovery plan— (a) the injured person must apply to the relevant insurer for approval to undergo treatment and care that is not mentioned in the recovery plan; and (b) the relevant insurer is not liable for treatment and care expenses incurred in relation to treatment and care the injured person undergoes without the relevant insurer's approval.	The insurer is not liable for treatment and care expenses outside of the recovery plan.
136(2)	The relevant insurer must give the injured person a written notice telling the person— (a) that the	If the insurer believes the injury stabilised, but there is no permanent impairment, the injured person

	insurer believes— (i) the person's injuries have stabilised; but (ii) the person is not likely to have a permanent impairment as a result of the injuries; and (b) the reasons for the belief; and (c) that the insurer will not refer the person for a WPI assessment unless the person— (i) confirms the request for the assessment; and (ii) pays an excess payment to the insurer for the assessment.	must pay an excess payment to the insurer for a WPI assessment in order to prove otherwise.
145(1)	If an injured person sustains both a physical injury and a psychological injury resulting from a motor accident, the person is entitled to quality of life benefits for whole person impairment resulting from either the physical injury or the psychological injury, but not both injuries.	If an injured person has a physical and a psychological injury, the person is entitled to quality of life benefits for either the physical or the psychological injury, but not both. The injured person must tell the insurer which injury they want assessed. It is not clear how the injured person would be in a position to make that decision.
145(2)	Before the relevant insurer for the motor accident refers the injured person for a WPI assessment, the person must tell the insurer, in writing, which kind of injury is to be assessed.	
160(1)	The amount of quality of life benefits payable to a person injured in a motor accident is the following, as at the date of the WPI report: (a) for a WPI percentage of less than 5%—nil; (b) for a WPI percentage of 5%—$7 000 AWE indexed; (c) for a WPI percentage of 6% to 10%— $7 000 AWE indexed + [(WPI–5) x $2 100 AWE indexed]; (d) for a WPI percentage of 11% to 20%— $17 500 AWE indexed + [(WPI–10) x $2 450 AWE indexed]; (e) for a WPI percentage of 21% to 50%— $42 000 AWE indexed + [(WPI–20) x $2 800 AWE indexed]; (f) for a WPI percentage of 51% to 99%— $126 000 AWE indexed + [(WPI–50) x $4 480 AWE indexed]; (g) for a WPI percentage of 100%—$350 000 AWE indexed.	This section sets out the sliding scale of benefits payable for injured people based on a WPI assessment of between 0% and 100%. It is not clear how these amounts have been determined – reference to a 100% WPI is nonsensical.
Part 2.10	Dispute resolution	Refer comments in Part 2 of this submission
170	*internally reviewable matter* means a matter prescribed by regulation to be an internally reviewable matter.	This could be anything. Substantive law should not be referred to regulations.
177	*externally reviewable matter* means a matter prescribed by regulation to be an externally reviewable matter.	As above.
178(1)	The Attorney-General may declare the entity responsible for carrying out external review of an externally reviewable decision.	This is unacceptable - refer earlier comments in Part 2 of this submission.
185(3)	An external reviewer's decision on an application for external review is binding on the parties to the review.	This is an unacceptable condition on the rights of injured people.
186(1)	A regulation may prescribe the legal costs and fees payable by applicants and insurers in relation to applications for defined benefits (including in relation to dispute resolution).	Refer comments in Part 2 of this submission.
186(2)	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	

187(1)	The MAI commission may approve a person to provide a defined benefits information service for this Act.	Refer comments in Part 3 of this submission.
187(2)	However, the MAI commission must not approve a lawyer to provide defined benefits information service.	
198(1)	An award of damages in a motor accident claim may be made only if the injured person to whom the motor accident claim relates has— (a) made an application for quality of life benefits under Chapter 2 (Motor accident injuries—defined benefits) and been assessed as having a WPI of at least 10% as a result of the motor accident; or (b) died as a result of the motor accident.	This provision will exclude about 90% of people injured in a motor vehicle accident through no fault of their own.
201(1)	The amount of quality of life damages that may be awarded to a claimant is the following, as at the date of the WPI report: (a) for a WPI percentage of 10%—$25 000 AWE indexed; (b) for a WPI percentage of 11% to 20%— $25 000 AWE indexed + [(WPI–10) x $3 500 AWE indexed]; (c) for a WPI percentage of 21% to 50%— $60 000 AWE indexed + [(WPI–20) x $4 000 AWE indexed]; (d) for a WPI percentage of 51% to 99%— $180 000 AWE indexed + [(WPI–50) x $6 400 AWE indexed]; (e) for a WPI percentage of 100%—$500 000 AWE indexed.	This section sets out the sliding scale of benefits payable for injured people based on a WPI assessment of between 10% and 100%. It is not clear how these amounts have been determined – reference to a 100% WPI is nonsensical.
203	Damages may not be awarded in a motor accident claim for any loss of earnings of the claimant in the first year after the motor accident.	This means that people injured in a motor vehicle accident through no fault of their own will not be fully compensated for their loss.
204	Damages may not be awarded in a motor accident claim for treatment, care, support or services provided to a claimant for which the claimant has not paid and is not liable to pay.	This effectively cuts out *Griffiths v Kirkemeyer* claims and means that people injured in a motor vehicle accident through no fault of their own will not be fully compensated for their loss.
Part 6.3	Enforcement – powers of authorised officers	It is not clear what the duties of authorised officers are.
414	Referral fees prohibited	The Society wrote to the ACT Government on 7 August 2017 to recommend action be taken against claims harvesting practices, based on the NSW legislation. The Society notes that the MAI provisions do not appear to be based on the NSW equivalent. The MAI provisions create an offence for which a payment is made, rather than have the conduct dealt with through the conduct provisions of the *Legal Profession Act 2006* (ACT).

PART 5: Conclusions and Recommendations

The Society does not support the exposure draft in its current form. The Society believes that it is possible to achieve the principles identified by the pilot citizens' jury, but in a manner that is fair and equitable.

It is not necessary to remove the rights of the majority of not at-fault injured people to full compensation. It is unrealistic to assume that insurers will act in the best interest of injured people. It is not in the interests of injured people to remove their autonomy and control to manage their own injuries and recovery. It is not necessary to dismantle a scheme that is recognised as one of the most comprehensive in the country.

ACT legal practitioners have consistently indicated their commitment and willingness to work co-operatively with Government to ensure the CTP scheme operates as efficiently and fairly as possible.

The Society urges the Committee to consider the following recommendations as a means of preserving the fair and supportive scheme that currently operates in the ACT, while also achieving the objectives agreed by the citizens' jury.

Recommendations

The achievement of extended coverage to some at-fault drivers could be provided through the accommodation of blameless accidents within the scheme.

The achievement of extended coverage can be achieved without the need to cut the compensation of innocently injured victims and avoid the severe, adverse impact such cuts would have. In the first instance, the Society believes that the actual (as opposed to filed) profits of insurers should be further reviewed.

Legal practitioners note the co-operative and productive dialogue that exists between practitioners and regulators (including CTP regulators) in other jurisdictions and at a federal level. While the CTP regulator in the ACT meets with insurers, there is limited dialogue with the profession. The Society believes that more informed interactions between the parties would greatly assist in ensuring the scheme is easier to navigate, streamlined and more efficient.