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

Submission Number: 65

Date Authorised for Publication: 26 October 2018

CFMEU
CONSTRUCTION

CFMEU ACT
Unit 7-10, 8 Cape Street
Dickson 2602
PO Box 498
Dickson 2602
Ph 02 6267 1599
Fax 02 6249 1247
ABN: 38 491 952 173

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

By Email: LACommitteeJCS@parliament.act.gov.au

Inquiry into Motor Accident Injuries Bill 2018 - Submission of the CFMEU

A. Introduction

The CFMEU represents over 2000 ACT construction workers and their families. We take an active role in representing members in relation to workplace health and safety and assisting members when they are injured in workplace accidents. This exposure to the effects of workplace injury and the ACT workers' compensation insurance scheme gives us an insight into the probable effects of the proposed CTP insurance scheme set out in the *Motor Accident Injuries Bill 2018* (the Bill).

We oppose changes to the law that have the capacity to negatively affect our members, their families and their communities. We welcome the opportunity to make this submission to the Inquiry into the Bill and thank the Committee for allowing us time to do so.

B. Submissions

The CFMEU submits that if enacted the effect of the Bill will be unfair to working people who are injured in motor vehicle accidents. It is our view that the Bill largely satisfies the interests of insurance companies rather than those of injured people.

The proposed CTP scheme, set out in the Bill, will significantly shift power and control to insurers and away from injured people. It will allow insurers 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 amount of lost income to which injured people are entitled.

The new CTP system will dramatically reduce the entitlements which are available to not-at-fault injured people. This includes providing only 80% of lost wages for the first year (after the first 13 weeks), and leaving many people with ongoing injury and incapacity dependent on the social security system after 5 years. Approximately 90% of injured people will be prevented from obtaining common law damages. Even those who exceed the threshold for access to common law damages will have their pain and suffering damages dramatically reduced (more than halved in many cases when compared to the current scheme) and other damages restricted and removed.

While we do not oppose a scheme that provides benefits for at-fault drivers, this should not be done by reducing the benefits for injured people who were not at fault. In the CFMEU's view people injured through the fault of others will be much worse off under the new scheme.

C. Responses to the Terms of Reference

(a) The draft bill's alignment with the following objectives for the ACT's Compulsory Third Party (CTP) insurance scheme:

(i) early access to medical treatment, economic support and rehabilitation services;

The CFMEU supports early access to treatment and support for persons injured in motor vehicle accidents. This is a fundamentally important aspect of any functioning CTP insurance scheme and one which we consider is available in the current scheme. Potentially, improvements may be made to the current scheme which would be minor and cost effective and improve early access to medical treatment, economic support and rehabilitation. However, this capacity for improvement does not justify the introduction of proposed new scheme.

The proposed scheme will undermine the long term health and dignity of injured claimants by requiring them to rely on the good grace of the insurer to provide early medical treatment, economic support and rehabilitation services. Many injured persons will become involved in a series of protracted micro-disputes with the insurer effectively preventing their access to medical treatment and support. While the proposed scheme contains minor changes with regard to early access they do not justify the introduction of the proposed scheme as a whole. We say that the elements of the scheme which deal with early access could be easily replicated by amendment to the current scheme.

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

We say that the proposed scheme does not in fact provide equitable cover for all people injured in a motor vehicle accident. Reducing the cover available to not-at-fault injured people, in order to provide cover for at-fault injured people, is not equitable. Similarly, it is not equitable to subject injured people to a requirement to be beholden to an insurer to obtain medical treatment, economic support and rehabilitation over a period of many years.

The 10% WPI threshold for access to common law will mean that approximately 90% of injured people will be excluded from obtaining proper compensation. In many cases injured people with less than 10% WPI have chronic pain and long term incapacity for work.

For people in this category the proposed scheme will:

- Cap lost wages at 80% for the first year.
- Prevent any payment of lost wages after 5 years.
- Prevent any payment of medical expenses after 5 years.
- Prevent any payment of damages for care provided by family members (thereby perpetuating gender based undervaluing of care work).
- Leave them trapped in a system where they are required to constantly negotiate with an insurer.

The Union is concerned that as a result of lower benefits and caps inherent in the scheme more injured people without capacity to work will end up dependent on the social welfare system. In addition, it appears to us that it is highly likely that as the deficiencies in the scheme become apparent many Canberrans will feel that it is necessary to take out expensive private injury and income protection insurance to address those deficiencies. In comparison under the current scheme all Canberrans have access to a level of compensation that allows them to have flexibility as to how their injuries are treated and to pursue the recovery of the actual loss they have suffered, without the need for unnecessary additional insurance.

We say that a scheme that leaves long term injured persons' dependent on social welfare and/or private insurance cannot reasonably be said to be delivering equitable outcomes. Obviously, an injured person who becomes dependent on welfare benefits under the proposed scheme will be worse off than under the current scheme, where they would have access to common law compensation. Similarly, while private insurance may adequately fill the gaps in the proposed scheme, this is at cost to the individual, and the capacity to take out private personal accident or income protection insurance is clearly a matter which is dependent on the socio-economic status of the individual.

We do not oppose a scheme that provides benefits for at-fault drivers. However, it is not equitable to do this by reducing the benefits for injured people who were not at fault.

(iii) a value for money and efficient system;

We are not aware of the evidence that the current system is not providing value for money. We understand that the current scheme is price competitive with other States and Territories.

We submit that when the hidden costs of the infrastructure necessary to run the new scheme, including bureaucracy and the extra burden on courts, are considered there is no reason to believe that the proposed scheme will deliver a more cost effective or efficient outcome. It may in fact be less efficient and more expensive.

In relation to the suggestion that the proposed scheme will result in lower insurance premiums we submit that outcome of reductions in common law rights in other States has been that the cost of insurance for households changes very little once prices normalise after the first few years. However, insurers enjoy increased profits. In addition, we note that to the extent that there may be

limited savings associated with lower CTP premiums these may be offset by the additional cost of private income protection and other insurances, which individuals may feel compelled to obtain to insure against the risks associated with gaps in the proposed system.

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

We strongly support driver education and safer driver practices and knowledge. This does not require the introduction of the proposed scheme.

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

We submit that the current scheme works well for injured people. They can obtain expert representation and can keep control of their own outcomes through their common law rights. A very troubling feature of the new scheme is the amount of control insurers will have of the claims process which will extend of a period of up to 5 years, extending the period in which an injured person may require support and advice.

We are aware of a suggestion that bodies such as community legal centres (CLCs) may be tasked with advising on the claims process, in our view this is very problematic. As we understand, CLCs do not have the expertise or experience in injury matters to carry out this role, and could not do so on their current funding models. Funding CLCs to do this work would also be yet another hidden cost in the new scheme.

We understand that the citizens jury may have recommended the defined benefit scheme on the basis that it was desirable to reduce the need for an injured person to go to court to get the help they need. This of course pre-supposes that insurers will act properly in their case handling and not deny treatment or engage in disputation with the injured person about treatments. The Union is concerned that rather than reducing the need to go to court in order to obtain needed treatment, the scheme has the capacity to lead to the proliferation of treatment related disputes during the benefit period, where injured persons will be forced to engage in litigation to get the help they need, a perverse and undesirable side effect of the proposed scheme.

We are concerned that throughout the process insurers will have access to professional claims officers and internal and external lawyers, whereas injured people will not. The likelihood of a large number of micro disputes over, for example, the cost of an MRI or physiotherapy treatment, will make this lack of representation very problematic. In any event, is likely that there will also be a consequential blow-out in the use of court/tribunal resources which will be borne by the public purse, as micro disputes of this kind become intractable. These kind of problems are significantly reduced in the current common law scheme which provides both for appropriate representation and finality for the injured person with the payment of common law damages.

The apparent desire to reduce legal costs in the proposed scheme by limiting opportunities for legal representation, assumes that costs of legal representation are in some way wasted or unwarranted costs. Ensuring that vulnerable injured people have access to appropriate legal representation that assists them to navigate a complex and usually unfamiliar area of law is an essential component of an equitable scheme. The costs of legal representation in the current scheme may also be described as costs associated with providing appropriate support. The cost of ensuring that an injured person

is properly advised and is able to make informed choices about their claim, which may affect the remainder of their working life, is a legitimate cost that should be borne by any properly designed CTP scheme. The CFMEU does not support those aspects of the scheme which would limit an injured person's access to legal representation when such representation is obviously justifiable on equitable grounds.

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

We strongly support any measures that strengthen integrity and reduce fraudulent behaviour. However, we are not aware of evidence that these are issues of major significance in the current scheme.

In addition, we doubt whether the proposed scheme can appropriately regulate the behaviour of insurers where they are shown to lack integrity, for example: when insurers unnecessarily deny a recommended medical treatment and subject the injured claimant to a lengthy period of dispute and uncertainty, this is arguably unethical behaviour. We draw the attention of the Committee to the behaviour of insurers which has been exposed in the Banking Royal Commission, where the insurance industry has shown itself incapable of providing proper information and advice to vulnerable injured claimants. We do not accept that guidelines or protocols will effectively prevent insurers from acting in their own interest and consider that the proposed scheme is weak in this regard.

In any event, if there is a perception that there is a need to otherwise reduce fraudulent behaviour in CTP claims, it is not necessary to introduce an entirely new scheme which reduces injured persons' entitlements in order to do so.

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

We do not support the concept of citizen's juries in the development of policy of this kind, in a manner which is outside normal democratic processes. We say that the proper process for the development of important policy affecting all ACT citizens is through the normal electoral process, in which each citizen has equal say, and not through an exclusive process in which a self-selecting group of only 50 citizens purports to determine outcomes for the remainder of all Canberrans.

In addition, we are concerned that this citizens jury, in particular, cannot be said to be demographically representative of the citizens of the ACT. We strongly doubt that there can have been adequate representation for working people, in particular construction workers on the jury. Participation on the jury would have required a participant to give up significant periods of time. Having regard to ordinary shift patterns in the construction industry which frequently require workers to perform weekend work, blue collar workers in industries like construction are significantly less likely to volunteer participate in processes of this kind. CFMEU members, like the vast majority of Canberrans who are also citizens, are effectively disenfranchised by the use of the citizens' jury, if the jury report is given greater weight than the views expressed by each individual citizen in the ordinary democratic process.

We also reject the proposition that the jury was independent, insofar as the information available leads us to believe that the jury was susceptible to direction by the convenors.

Notwithstanding our concerns with the use of the citizens' juries overall, we say that the suggestion that the citizens' jury designed the proposed the scheme is improbable. At most it can be said that the jury report identified broad brush objectives for **a** scheme. However, the actual impact of the proposed scheme is in its detail, about which we say the jury cannot reasonably have had input or understanding.

In the time available, the jury could not reasonably have been expected develop the expertise necessary to understand or deal with the detail in the scheme. For example, the 10% WPI threshold for common law claims is a fundament part of the proposed scheme. Having regard to the specialised medico legal knowledge usually applied to the 10% WPI threshold it is profoundly unlikely that jury understood what degree of injury and permanent incapacity is required to meet the 10% threshold.

Further, we are concerned that, on the information available to us the jury process was undermined by the following factors:

- People who have experience with the current scheme were specifically excluded from participating in the citizens' jury so that no jury members had direct lived experience of the current scheme.
- The arbitrary nature of WPI thresholds were not raised until very late in the process. It was not explained to the jury how these thresholds work in practice.
- Such expert advice as was available to the jury was both narrow and managed by the convenors to achieve what appears to us to be a pre-determined outcome.
- There was inadequate consideration of the benefits of the current scheme, when compared to those in other jurisdictions.

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

The proposed changes will introduce very different compensation systems for CTP and workplace injuries. In this regard the proposed scheme is obviously inconsistent with the most relevant other scheme operating in the Territory, that is the Workers Compensation scheme. To the extent that consistency with other schemes is one of the desired features of any CTP scheme we say that the proposed scheme fails to meet this standard.

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 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.

The proposed scheme requires that the injured person make an election between the schemes at an early time, when it may not be clear which is the best path. Simply receiving workers' compensation could prevent the injured person from receiving CTP damages. This will discourage injured workers from properly making workers compensation claims, even though a workers' compensation claim may ultimately be more beneficial to the injured person and their overall rehabilitation.

Moreover, the proposed scheme further fragments the common law system in ACT. In addition to the divergence from the workplace injury scheme, the proposed scheme very significantly reduces the damages available to a person injured in a motor vehicle accident compared to if they sustained the same injury through the negligence of, for example, the occupier of a premises or through medical negligence. This is divergence of outcomes for similar injuries is obviously undesirable, and highlights the inequitable nature of the proposed scheme.

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

This question raises with one of the very troubling aspects of the proposed scheme. The proposed scheme does not identify a source of external review but leaves it to the attorney general to designate the external reviewer. This lack of attention to the question of external review indicates to us that the designers of the scheme have failed to understand the significance of the role of external review in schemes of this kind.

An injured person will be required to deal directly with the insurer to obtain medical treatment, rehabilitation and lost wages for up to 5 years. It is highly likely during this time that the injured person will be in dispute with the insurer multiple times. The application and payment process has many triggers for dispute with the insurer. The insurer will decide how much lost income an injured person is entitled to and what medical treatment it will pay for. It is not realistic to expect that a vulnerable injured person, who is not able to access legal representation, will be able to adequately and repeatedly represent their own interests against the insurers' professional claims managers and in-house legal teams. Disputes over these issues can take an enormous psychological toll on an injured person. The internal reviews in the proposed scheme are not adequate to deal with the types of disputes likely to arise and, as they are based on self-regulation, are likely fail vulnerable injured people, in a similar manner to the recently exposed scandals of bank and insurance industry self-regulation.

The Union submits that elements of the proposed internal review scheme are contrary to the principles of natural justice and procedural fairness. Internal reviews of insurers' decisions are to be performed by an employee of the same insurer who is 'not closely involved with the original decision'. External review is excluded for some decisions. The insurers will have a legislated right to speak directly with an injured person, even where the injured person has a legal representative. The potential for manipulation or bullying of injured people is obvious and disturbing.

To protect injured people, external review is necessary. We are concerned that external review has been resisted by the designers of the scheme who apparently are guided by the insurers' interests. Proper external reviews must be available in which injured people are able to be legally represented. While we do not agree that the proposed scheme should be enacted, to the extent that it may be we say that the appropriate location for external review is the Industrial Division of the ACT Magistrates

Court. We note that the Court has significant expertise in dealing with similar personal injury matters arising out of the Workers' Compensation jurisdiction.

D. Recommendation to the Committee

Taking into account the deficiencies in both the legislation and the undemocratic citizens jury process which led to its development, and also noting that there has been no substantive case advanced by Government as to how the present CTP scheme is not fair or efficient, the CFMEU recommends that the draft legislation be abandoned.

CFMEU
ACT Branch
17 October 2018