

STANDING COMMITTEE ON PUBLIC ACCOUNTS

**Inquiry into the Road Transport (Third-Party  
Insurance) Amendment Bill 2011**

APRIL 2012

**Report 22**



## Committee membership

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Mr Brendan Smyth MLA	Member from 5 August 2011 Deputy Chair to 5 August 2011
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## Resolution of appointment<sup>1</sup>

The ACT Legislative Assembly appointed the Standing Committee on Public Accounts on 9 December 2008 to:

- (1) examine:
  - (a) the accounts of the receipts and expenditure of the Australian Capital Territory and its authorities; and
  - (b) all reports of the Auditor-General which have been presented to the Assembly;
- (2) report to the Assembly any items or matters in those accounts, statements and reports, or any circumstances connected with them, to which the Committee is of the opinion that the attention of the Assembly should be directed;
- (3) inquire into any question in connection with the public accounts which is referred to it by the Assembly and to report to the Assembly on that question; and
- (4) examine matters relating to economic and business development, small business, tourism, market and regulatory reform, public sector management, taxation and revenue.

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<sup>1</sup> ACT Legislative Assembly, *Minutes of Proceedings No. 2*, Tuesday 9 December 2008, pp. 12–13.

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## RECOMMENDATIONS

### RECOMMENDATION 1

3.15 The Committee recommends that the 28 day timeframe for notice to be given to the injured person's insurer, as required under section 72 of the *Road Transport (Third-Party Insurance) Act 2008*, be amended to provide some discretionary extension where there may be a good reason why a crash victim has not been able to give the notification within that time.

### RECOMMENDATION 2

3.16 The Committee recommends that the ACT Government (and the CTP Insurer) should more widely promote the availability of early payment for treatment of motor crash injuries as provided for under section 72 of the *Road Transport (Third-Party Insurance) Act 2008*.

### RECOMMENDATION 3

3.26 The Committee recommends that the ACT Government review the provisions concerning compulsory conferencing in the *Road Transport (Third-Party Insurance) Act 2008* to determine a more practical approach.

### RECOMMENDATION 4

4.47 The Committee recommends that the ACT Government in response to this report should either: (a) detail an alternative mechanism to using the AMA Guides as a definitive threshold for determining non-economic loss impairment ; or (b) detail how the use of AMA Guides will be modified to address the issues raised concerning their sole use as a measure of impairment for non-economic loss.

### RECOMMENDATION 5

4.82 The Committee recommends that the statutory discount rate, as per section 155A of the *Road Transport (Third-Party Insurance) Act 2008*, remain at three per cent.

### RECOMMENDATION 6

4.133 The Committee recommends that the ACT Government, to the extent that this work does not already take place, should keep a watching brief on all jurisdictional reviews of compulsory third-party insurance schemes.

**RECOMMENDATION 7**

4.157 The Committee recommends that the ACT Government advise the ACT Legislative Assembly of: (a) how it intends to address the issue of lifetime care for people catastrophically injured, in the context of the development by the Commonwealth of proposals regarding the introduction of an National Disability Insurance Scheme (NDIS); or (b) in the absence of a NDIS, how it will examine the feasibility of lifetime care for people catastrophically injured in motor vehicle crashes.

**RECOMMENDATION 8**

4.158 The Committee recommends that, if the National Disability Insurance Scheme (NDIS) does not proceed in a timely fashion, the ACT Government should examine the feasibility of introducing a no-fault lifetime care scheme for people who suffer catastrophic injury.

**RECOMMENDATION 9**

4.189 The Committee recommends that after considering the findings of the: (i) Standing Committee on Public Accounts inquiry into the Road Transport (Third-Party Insurance) Amendment Bill 2011; (ii) statutory review pursuant to section 275 of the Road Transport (Third-Party Insurance) Act 2008; and (iii) NSW Government's internal review of the NSW CTP insurance scheme, the ACT Government may choose to bring forward or propose reform to the ACT CTP Insurance Scheme—but that the Road Transport (Third-Party insurance) Amendment Bill 2011, as presented, should not be supported.

**RECOMMENDATION 10**

4.190 The Committee recommends that the Road Transport (Third-Party Insurance) Amendment Bill 2011, in its current form, should not be supported by the ACT Legislative Assembly.

**RECOMMENDATION 11**

4.191 The Committee recommends that any significant changes to NSW CTP insurance legislation should automatically trigger an internal government review of the ACT CTP insurance legislation. The conclusions of these reviews should be tabled in the ACT Legislative Assembly.

**RECOMMENDATION 12**

5.7 The Committee recommends that the ACT Government should place greater emphasis on achieving 'Vision Zero' within the transport system.

**RECOMMENDATION 13**

5.20 The Committee recommends that the ACT Government establish a consultative working group comprised of appropriate experts in CTP insurance scheme design from all sectors to propose an alternative scheme or model that supports a culture in the scheme of all stakeholders working to the best advantage of the scheme itself. The working group, amongst other things, should consider:

- (a) alternative compensatory mechanisms to damages for non-economic loss (NEL) that have the effect of restoration for injured people, and
- (b) alternative mechanisms for controlling premium costs other than limiting access to common law.

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# 1 INTRODUCTION AND CONDUCT OF INQUIRY

## Referral of the inquiry

- 1.1 The Road Transport (Third-Party Insurance) Amendment Bill 2011 (the Bill) was tabled in the Legislative Assembly on 17 February 2011. On 31 March 2011, the Assembly referred the Bill to the Standing Committee on Public Accounts (the Committee) for inquiry.<sup>2</sup>
- 1.2 A copy of the Bill along with the explanatory statement is available at **Appendix A**.

## Terms of reference

- 1.3 The Committee's terms of reference (T of R) were to inquire into, and report on, the Bill by the first sitting week in March 2012.
- 1.4 On 20 March 2012, the Committee made a 246A Statement informing the Assembly that the statutory review pursuant to section 275 of the *Road Transport (Third-Party Insurance) Act 2008* had not been tabled, as advised by the Treasurer, in the February 2012 sitting.<sup>3</sup>
- 1.5 Statutory review periods are designed to ensure a timely evaluation of the implementation and performance against specific legislation. The Committee's examination of the statutory review, prior to reporting, was a critical aspect of its consideration of the referred Bill. On this basis, the Committee asked the Assembly for an extension of time to report. This

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<sup>2</sup> ACT Legislative Assembly, Minutes of Proceedings No. 98, Thursday 31 March 2011, pp. 1233–1234.

<sup>3</sup> ACT Legislative Assembly, Minutes of Proceedings No. 139, Tuesday 20 March 2012, pp. 1792–1793.

## 2 STANDING COMMITTEE ON PUBLIC ACCOUNTS

extension was to be until such time as the statutory review<sup>4</sup> had been provided and the Committee has had sufficient time to consider it in detail. The Assembly agreed to amend the reporting date to 'by the second sitting week in May 2012'.<sup>5</sup>

1.6 Pursuant to standing order 216, whilst the Inquiry's T of R were the Bill, along with the explanatory statement, the Committee resolved to also:

- 1) review the operation of the *Road Transport (Third-Party Insurance) Act 2008*. In conducting this review, the Committee shall:
  - a) evaluate the effect of the Act on the recovery and rehabilitation of people who have been injured as a result of a road crash
  - b) evaluate the effectiveness of the Act in meeting the Objects as set out in section 5A
  - c) evaluate the effectiveness of the Act on premiums for third-party insurance (TPI)
  - d) evaluate the effectiveness of the Act in encouraging increased competition in the provision of TPI in the ACT, and
  - e) evaluate any other aspects of the effectiveness of the Act
- 2) review the possible effects of the Bill on the provision of TPI in the ACT
- 3) review the operation of TPI schemes in other Australian jurisdictions
- 4) examine any other factors that may influence the cost of registering a motor vehicle in the ACT
- 5) consider innovative or alternative compulsory TPI scheme designs in other jurisdictions
- 6) examine the impact of TPI premiums on the sustainability of transport
- 7) consider the long-term viability of the TPI scheme in the ACT, and
- 8) any other relevant matter.

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<sup>4</sup> The Statutory Review—Review of the ACT's Compulsory Third-Party (CTP) insurance scheme as prescribed under section 275 of the *Road Transport (Third-Party Insurance) Act 2008*—was tabled by the Treasurer on 20 March 2012.

<sup>5</sup> ACT Legislative Assembly, Minutes of Proceedings No. 139, Tuesday 20 March 2012, pp. 1792–1793.

- 1.7 The inquiry T of R have been organised into three broad themes, that is: (i) the operation of the current Act; (ii) the Bill; and (iii) wider policy implications of compulsory third-party (CTP) insurance or TPI schemes and design. The Committee's report is structured around these three themes.

## Conduct of the inquiry

### Advertisement

- 1.8 The Committee called for submissions by placing a notice on the ACT Legislative Assembly's website, and by writing to the responsible Minister. A wide range of stakeholders were also invited by email and correspondence to participate in the Inquiry.

### Submissions

- 1.9 The Committee received eight submissions and six supplementary submissions. The individuals and organisations who lodged submissions are listed at **Appendix B**. Copies of the submissions can be downloaded from the Committee's website.<sup>6</sup>

## How the Committee determined and agreed to progress the inquiry

- 1.10 From the outset of the inquiry, as part of its call for submissions, the Committee emphasised that it had a broad public interest mandate and was not in a position to determine the rights and wrongs of individual cases that may be attracted by the Inquiry.
- 1.11 The Committee advised that it would be confining its inquiry to the T of R. Individual cases would only be considered to the extent that they may assist the Committee with the general matters of principle, policy or public administration relevant to the T of R. The Committee also emphasised that

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<sup>6</sup> <<http://www.parliament.act.gov.au/committees/index1.asp?committee=116&inquiry=1001>>

submitters needed to be mindful of providing information as part of their submissions where it related to a matter currently before the courts.

## Public hearings

- 1.12 Public hearings were held on: 6 October 2011; 12 October 2011; 31 October 2011; and 10 November 2011. Witnesses who appeared before the Committee are listed at **Appendix C**. The Committee's website contains transcripts of these hearings.<sup>7</sup>
- 1.13 The Committee met on: (i) 2 February 2012 to discuss the Chair's draft; and (ii) 7 February 2012, 14 March 2012; and 24 April 2012 to discuss the Committee's draft report, which was adopted on 24 April 2012.

## Structure of the report

- 1.14 The Committee has not attempted to produce a definitive work on CTP insurance schemes and design. Instead, the Committee has produced a report that examined several key themes arising in the context of the Bill, and the Committee's widened T of R, that became apparent during the course of its inquiry based on the evidence received.
- 1.15 Submissions to the inquiry, and evidence from witnesses at public hearings, expressed a range of views concerning the Bill. Some evidence was fully supportive of the Bill in its current form, while other submitters were not opposed to the Bill. In contrast, some were not supportive of the Bill and were highly sceptical that the amendments would achieve the Bill's two main objectives—that of reducing premium costs and facilitating access to early treatment and rehabilitation. In the main, these submitters highlighted significant issues with regard to limiting access to common law compensation for non-economic loss (NEL) together with the infrastructure required to implement the impairment threshold, the increase in the discount rate, and concerns that the Executive Government might be encroaching too far in relation to decisions about entitlements for injured people that was previously covered by common law.

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<sup>7</sup> <<http://www.parliament.act.gov.au/committees/index1.asp?committee=116>>

- 1.16 A common theme from some submitters was that evidence supporting the 2008 reforms to CTP insurance, as provided for in the current Act, was starting to emerge and any amendments prior to permitting these reforms to take effect could be counterproductive. Concern was also expressed by a number of submitters that amendments to the current Act were being proposed before a statutory review of its operation had been completed. Such an approach was considered to be premature and contrary to evidence based public policy. Another common theme from some submitters was that the Bill appears to limit rights under the *Human Rights Act 2004*.
- 1.17 Others did not express a particular view on the Bill, but provided suggestions for an alternative scheme design that would ensure appropriate compensation for injured people whilst also reigning in premium costs. One submission using a deeply personal experience they had had as parents with the ACT CTP insurance scheme highlighted limitations with respect to its coverage for extended family members and legal costs incurred to execute the estate of an adult child tragically killed in the ACT. Another submitter expressed reservations generally about limiting access to compensation to achieve a couple of dollars reduction in premiums.
- 1.18 The Committee's report is divided into three parts and covers the following main topics:

***Part 1—Context to the inquiry***

- Chapter 1—Introduction and conduct of the inquiry
- Chapter 2—Background on the concept of compulsory third-party motor vehicle insurance

***Part 2—Third-party insurance schemes and design***

- Chapter 3—Operation of the current Act
- Chapter 4—The Bill
- Chapter 5—The wider system in which CTP insurance operates
- Chapter 6—Wider policy considerations for CTP insurance schemes and design

***Part 3—Summary and conclusions***

- Chapter 7—Committee conclusions

## Acknowledgements

- 1.19 The Committee thanks the current Treasurer, Mr Andrew Barr MLA, the former Treasurer, Ms Katy Gallagher MLA, and Treasury Directorate officials, who assisted the Committee during the course of its inquiry. The Committee also acknowledges and thanks all those who contributed to its inquiry by making submissions, providing additional information and appearing before it to give evidence.
- 1.20 The Committee recognises the significant commitment of time and resources required to participate in an inquiry of this nature and is grateful that it was able to draw on a broad range of expertise and experience in its deliberations.

## 2 THE CONCEPT OF COMPULSORY THIRD-PARTY MOTOR VEHICLE INSURANCE

The citizens of Canberra who are going to be most affected by the proposed legislation do not yet know who they are, and nor do we. We do know that they include our colleagues, our neighbours, families and friends. They will be passengers, cyclists, pedestrians and drivers who find themselves injured as a result of the negligent action of another driver or of a driver.<sup>8</sup>

- 2.1 The insidious nature of third-party injury as a direct result of a motor vehicle crash is that no one is immune, who it will affect is unknown, and nor can its occurrence be predicted. As a form of injury, it can happen to anyone, anytime, anyplace through no fault of their own. If it does happen to you, or someone you know, as an injured party, or someone who knows an injured party, you would expect to be fully compensated for the injuries sustained.

### Public policy context

- 2.2 The invention and widespread use of the motor vehicle in the early twentieth century revolutionised the speed, mobility and convenience of travel. Its development marked the next stage in the transport revolution that began with railways, and as happened with railways, it also brought about widespread economic, cultural, social, planning and infrastructure changes.<sup>9</sup>
- 2.3 Whilst the motor vehicle has impacted positively on everyday life for many people, its arrival has also been accompanied by a range of consequences that include: (i) safety issues, such as increases in injury rates and rate of accidental death; (ii) environmental considerations, such as the generation of air and noise pollution; (iii) growth in urban sprawl; (iv) increasing prevalence of obesity; and (v) a disconnection of community.<sup>10</sup>

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<sup>8</sup> Ms Noor Blumer, *Transcript of evidence*, 31 October 2011, p. 55.

<sup>9</sup> Urrey. J. (2004) The 'system' of automobility, *Theory, Culture & Society*, **21**, 4-5, pp. 25-39.

<sup>10</sup> Urrey. J. (2004) The 'system' of automobility, *Theory, Culture & Society*, **21**, 4-5, pp. 25-39.

- 2.4 A significant consequence of the arrival of the motor vehicle concerns injury and its associated insurance arrangements. Importantly, the cost of motor vehicle crashes and the ensuing injuries to first and third parties make motor vehicle insurance a critical public policy issue, in particular, CTP insurance.<sup>11</sup>
- 2.5 In an economic context, CTP insurance attempts to respond to a negative externality or transaction spillover. That is, where a motor vehicle is involved in a crash, its use has the potential to impose a negative side effect on a third-party impacted on by the crash.<sup>12</sup>
- 2.6 The purpose of motor vehicle CTP insurance schemes is to provide adequate compensation for an innocent third-party injured as a consequence of a motor vehicle crash. CTP insurance schemes establish through statute the compulsory payment of premiums by owners of motor vehicles. These premiums are pooled to provide funds for third parties who may be injured in motor vehicle crashes to pursue compensation.
- 2.7 There are different views in the literature with regard to the goals of compensation schemes for third-party victims of motor vehicle crashes. For example, Calabresi (1970) prioritises four goals—detering crashes, distributing risk, minimising administrative expense and providing justice.<sup>13</sup> Alternatively, Rolph, Hammitt, Houchens and Palin (1985) specify three categories:
- **Detering crashes**—it is noted that whilst liability rules can potentially affect how people drive, the fear of injury, traffic citations, or uncompensated property damage are considered to be probably more important in detering crashes.

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<sup>11</sup> James, K.A. (2006) An Analysis of the Determinants and Implications of the Selection of the Full versus Limited Tort Automobile Insurance Coverage in New Jersey and Pennsylvania, Paper presented at the American Risk and Insurance Association Annual Conference; MacKenzie, J.J., Dower, R.C. and Chen, D.D.T (1992) *The Going Rate: What It Really Costs to Drive*, World Resources Institute, Washington, DC.

<sup>12</sup> Arrow, K.J. (1969). The Organization of Economic Activity: Issues Pertinent to the Choice of Market versus Non-market Allocations, in *Analysis and Evaluation of Public Expenditures: The PPP System*.

<sup>13</sup> Calabresi, G. (1970) *The Costs of Accidents*, Yale University Press, New Haven.

- **Administering the system efficiently and justly**—efficient administration includes: cost effective administration of the courts, provision of lawyers and claims adjusters, marketing insurance and managing premium costs.

‘Just’ administration of the system is considered difficult to define. However, two principles are important: (i) those responsible for crashes should pay for the injury and damage<sup>14</sup> they cause; and (ii) similarly situated individuals should be treated the same.

- **Ensuring that victims are suitably compensated**—whilst this may appear to be the easiest goal to designate and possibly measure statistically, determining the standard of what level of compensation is suitable in each situation is a normative decision and much more difficult to determine. As to whether the Scheme as amended, by the Bill, provides the most suitable compensation is a matter for the Assembly.

2.8 The Law Council of Australia submitted there were three simple elements to very good, successful insurance scheme design—(i) a high level of flexibility; (ii) low disputation inside the scheme; and (iii) a short tail.<sup>15</sup> The Council emphasised that the design elements of a scheme are critical to the success of a scheme for all involved.<sup>16</sup>

2.9 The Productivity Commission, whilst noting that there are many possible criteria against which to assess insurance arrangements, highlights the following criteria to assess injury insurance frameworks:

- a) the certainty, timeliness and quality of care and support throughout a person’s life
- b) coverage of people acquiring a disability through a catastrophic injury
- c) recovery and health outcomes
- d) the freedom of people to choose whether they want to litigate and, if successful, how to spend the proceeds
- e) people’s desire to achieve justice when someone caused them a loss
- f) the impact on people’s incentives to take care to avoid injuring others

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<sup>14</sup> Noting that CTP insurance covers third-party injury as a direct result of a motor vehicle crash. It does not cover any property damage that may arise as a direct result of a motor vehicle crash.

<sup>15</sup> *Transcript of evidence*, 12 October 2011, p. 37.

<sup>16</sup> *Transcript of evidence*, 12 October 2011, p. 41.

- g) costs and the efficiency of achieving objectives, and
- h) the desire by people to get compensation for loss of earnings and pain and suffering.<sup>17</sup>

2.10 The Commission also noted that these criteria are not mutually exclusive and that the pursuit of some criteria will be counterproductive to other criteria.

The Commission emphasised:

There are inevitably tradeoffs between these criteria. Consequently, no insurance arrangement is perfect, and choosing the 'best' requires some judgment as to the appropriate balance. In addition, as a practical reality, litigation arrangements for compensation are often subject to statutory limits and other rules (with such constraints growing after 2002 to secure the affordability of insurance systems...)<sup>18</sup>

2.11 With regard to scheme design—NRMA Insurance commented that:

From our experience a good compulsory third-party insurance scheme has the following characteristics: firstly, it creates incentives for good behaviour by allowing insurers to risk grade for safer driving; currently in the ACT safer drivers are subsidising drivers who take more risk. Secondly, it is focused on early treatment and return to health; injured persons who are focused on getting better, rather than on the amount of compensation they may receive, generally have better health outcomes. Finally, it is a mechanism, other than premium adjustment, for reviewing the performance of the scheme against its design. Currently the only lever that can be adjusted as scheme costs increase is premium. For example, there is no ability to regulate increasing award payments.<sup>19</sup>

2.12 Whilst there are different views with regard to the goals of compensation schemes for third-party victims of motor vehicle crashes, there are also common themes.

## **Background on CTP insurance arrangements—an Australian context**

2.13 Third-party motor vehicle insurance is compulsory and thus a mandatory requirement for registering a vehicle in Australia. As a form of third-party personal injury insurance, it does not cover injuries sustained by the driver of

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<sup>17</sup> Australian Productivity Commission. (2011) *Disability Care and Support Inquiry Report*, 10 August, Canberra, p. 796.

the vehicle at fault (though some schemes provide a form of bounded coverage for drivers at fault) and it does not cover any property damage that may arise as a direct result of a motor vehicle crash.

- 2.14 Its principal objective is to counteract the millions of dollars it costs each year to remediate injuries, damage or prevent fatalities caused by Australian motorists. It is referred to as 'third-party' because CTP insurance arrangements involve three parties—(i) the driver/owner of a vehicle considered 'at fault' for a crash, (ii) the insurance provider for the 'at fault' vehicle, and (iii) the third-party individual(s) who have been injured.
- 2.15 As a form of insurance arrangement, CTP insurance schemes, by pooling compulsory premium payments, ensure that compensation is available, irrespective of the financial means of the owner or driver of a motor vehicle causing a crash. It insures the driver of a motor vehicle against liability for death or injuries they may cause other road users as a result of a motor vehicle crash. Coverage extends to passengers of all vehicles involved in the crash, and to pedestrians and cyclists.<sup>20</sup>
- 2.16 Compensation can be for economic loss as well as NEL. Economic loss includes hospital, medical and rehabilitation costs and loss of earnings. NEL is for pain and suffering and loss of quality of life. Compensation for NEL acknowledges that not all injuries sustained are easily 'translated to loss of income or the incurring of medical expenses'.<sup>21</sup> In this context:

NEL damages are compensation for the actual injury itself, pain and associated trauma, loss of amenities, loss of life expectancy and loss of enjoyment and quality of life. Compensation will never fully restore the accident victim's enjoyment of life, but it is recognised that some form of restitution can go a little way toward achieving that objective.<sup>22</sup>

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<sup>18</sup> Australian Productivity Commission. (2011) *Disability Care and Support Inquiry Report*, 10 August, Canberra, p. 796.

<sup>19</sup> Ms Mary Maini, *Transcript of evidence*, 10 November 2011, p. 89.

<sup>20</sup> <http://www.allianz.com.au/car-insurance/third-party-vs-comprehensive-car-insurance>

<sup>21</sup> Submission No. 2, Annexure A, pp. 8–9; King, S.P. (2010) Does Tort Law Reform Help or Hurt Consumers?, *The Economic Record*, **86**, 275, pp. 563–577.

<sup>22</sup> Submission No. 2, Annexure A, pp. 8–9.

## Operation of CTP insurance schemes in other Australian jurisdictions

2.17 Evidence to the Committee highlighted that every CTP insurance scheme across Australia is different and, on this basis, it is difficult to draw direct comparisons between them.<sup>23</sup> The schemes are representative of fault-based or common law schemes, no-fault schemes, and hybrid schemes. Furthermore, the schemes are either publicly or privately underwritten. A comparative summary of CTP insurance schemes across Australia is detailed at **Appendix D**.

2.18 A representative from NRMA Insurance commented:

The schemes across Australia are so diverse. You have got publicly underwritten schemes and privately underwritten schemes.<sup>24</sup>

2.19 An important distinction between CTP insurance schemes is whether they are fault-based (common law) or no-fault schemes. There are strengths and weaknesses associated with each type, however, the primary difference concerns access to common law compensation. A summary of differences between fault-based and no-fault insurance arrangements is set out in the table below:

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<sup>23</sup> Submission No. 2, August 2011; Submission No. 5, September 2011.

<sup>24</sup> Ms Mary Maini, *Transcript of evidence*, 10 November 2011, pp. 89–90.

Table 2.1—Summary of fault-based and no-fault insurance arrangements<sup>25</sup>

Fault-based insurance arrangements	No-fault insurance arrangements
<ul style="list-style-type: none"> <li>▪ Use common law rights to determine compensation.</li> <li>▪ In the case of catastrophic injury, considered not to meet people's care costs efficiently. This is on the basis that legal costs can be sizeable, and for those claims compensable through insurance, monies recovered often fall short of meeting injured people's lifetime care requirements.</li> <li>▪ Other attributes of fault-based systems considered to be problematic include:               <ul style="list-style-type: none"> <li>○ uncertainty with regard court outcomes, as injured people's future needs are not easily predicted and lump sum payments often inadequately capture these needs, compensation can be delayed, and lump sum payments can be mismanaged</li> <li>○ adversarial processes and delay can hinder recovery and health outcomes, and</li> <li>○ where arrangements have limited focus on or no risk-rating of premiums, the common law does not provide an incentive for safer driving behaviour.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ May remove common law rights completely or limit common law rights.</li> <li>▪ Considered to reduce people's freedom on the basis of removal of, or in part, common law rights.</li> <li>▪ Generally considered to give rise to superior outcomes compared with fault-based common law systems. Attributes of no-fault systems considered to contribute to this claim include:               <ul style="list-style-type: none"> <li>○ provide consistent coverage across injured people according to injury related needs</li> <li>○ provide more predictable and coordinated care and support over an injured person's lifetime</li> <li>○ do not adversely affect injured people's incentives to improve their functioning following an injury, and</li> <li>○ considered to be more efficient.</li> </ul> </li> <li>▪ Currently perform no worse at deterring excessively risky behaviour, as despite the appearance of the common law, it is the insurer that pays. And although no-fault arrangements would probably not meet all people's desire for 'punishment' of an at-fault party, there is no clear evidence that the common law achieves this either.</li> </ul>

2.20 In responding to a question about ways to equitably ensure the long-term viability of the ACT CTP insurance scheme, the Treasurer commented that:

There are a number of different options for scheme design, premiums and procedures evident from the varying CTP schemes across Australia.

As to scheme design, the ACT could move to an entirely no-fault scheme which would enable compensation for care and treatment for everyone over their life time. Alternatively the ACT could move to a hybrid scheme, for example, Victoria, Tasmania and New South Wales. Finally, more restrictions could be applied to common law damages such as caps on different heads of damages.

A no-fault scheme will necessarily either repeal common law compensation altogether (for example the Northern Territory) or allow common law access on a limited and structured basis (for example, Victoria uses thresholds, Tasmania applies strict timeframes and NSW offers no fault coverage only to those catastrophically injured).

There is no current model of sustainable CTP insurance that allows full access to common law damages.<sup>26</sup>

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<sup>25</sup> Sourced from Australian Productivity Commission. (2011) *Disability Care and Support Inquiry Report*, 10 August, Canberra, pp. 789–850.

<sup>26</sup> Mr Andrew Barr MLA, Response to supplementary question No. 13 (following on from public hearing of 6 October 2011), January 2012.

2.21 Notwithstanding the limitations on direct comparisons between schemes, salient aspects of CTP insurance schemes pertinent to this inquiry are worthy of mention. These include:

- There appears to be no correlation between multiple insurers and more generous compensation benefits or cost of CTP insurance premiums.<sup>27</sup>
- With the exception of two jurisdictions, the schemes are either publicly underwritten or privately underwritten by a monopoly insurer.<sup>28</sup>
- With the exception of the ACT, single insurer schemes, with fault-based or hybrid (no-fault with common law access) arrangements, operate in South Australia, Tasmania and Western Australia. The Tasmanian and Western Australian schemes are publicly underwritten and the South Australian scheme is privately underwritten and administered.<sup>29</sup>
- The ACT, as the smallest jurisdiction, with the second lowest number of registered vehicles, has a smaller premium pool compared with most other jurisdictions.<sup>30</sup>
- Only two jurisdictions apply a Whole Person Impairment (WPI) threshold to compensation claims—NSW and Victoria. If the Bill was to be introduced, the ACT would become the third jurisdiction to introduce a WPI. The Bill proposes the introduction of a 15 per cent WPI threshold for NEL.<sup>31</sup>
- Victoria is a publicly underwritten, hybrid no-fault scheme and, on this basis, it would not be appropriate to compare this scheme with the amendments proposed under the Bill. The NSW CTP insurance scheme is a privately underwritten scheme that applies a 10 per cent WPI threshold for NEL and, on this basis, can be reasonably compared with the Bill.<sup>32</sup>

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<sup>27</sup> Submission No. 2, August 2011.

<sup>28</sup> Submission No. 2, August 2011.

<sup>29</sup> Law Council of Australia, Response to QToN at the public hearing of 12 October 2011, October 2011.

<sup>30</sup> Submission No. 2, August 2011.

<sup>31</sup> Submission No. 5b, October 2011.

<sup>32</sup> Submission No. 5b, October 2011.

2.22 Aside from the NSW and Victorian CTP insurance schemes, the Law Council of Australia commented:

Of the remaining schemes in Australia, there is unrestricted access to common law under the CTPI schemes in Queensland, Tasmania, Western Australia and South Australia. A statutory no-fault scheme exists in the Northern Territory. Whilst there are a number of differences between Australian schemes which allow access to common law, the ACT is not at odds with the majority of CTPI schemes in Australia in terms of common law access.<sup>33</sup>

2.23 As to whether there is a perfect CTP insurance scheme across Australia, the Committee was told:

...the answer would probably be no. The reason for that is that, as with any scheme design, there is also a trade-off. If the trade-off is that you really want to ensure that you have a lump sum compensation scheme then how do you actually design it so that the most seriously injured are not disadvantaged?<sup>34</sup>

2.24 The Committee notes that the impending developments regarding a National Disability Insurance Scheme (NDIS), as announced by the Federal Government in August 2011, are likely to add another layer of complexity to injury insurance frameworks across all jurisdictions.<sup>35</sup>

## The ACT CTP insurance scheme

2.25 The ACT has a fault-based CTP insurance scheme where the ability of injured people to claim compensation under common law is reliant on the establishment of negligence against an owner or driver of a motor vehicle.<sup>36</sup> The scheme is privately underwritten by a single insurer—NRMA Insurance—and ‘provides full and comprehensive coverage to those injured by other drivers’ negligence’.<sup>37</sup>

2.26 The current ACT CTP insurance scheme is subject to provisions detailed in the *Road Transport (Third-Party Insurance) Act 2008* and the *Road Transport (Third-Party Insurance) Regulations 2008*.<sup>38</sup> This statutory framework marked significant reform to CTP insurance in the ACT and, at the time of its introduction, was lauded by the then Treasurer on the basis that it was

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<sup>33</sup> Submission No. 5b, October 2011.

<sup>34</sup> Ms Mary Maini, *Transcript of evidence*, 10 November 2011, pp. 89–90.

anticipated to bring about cost savings that would flow through to premiums, 'without diminishing the compensation available for negligently injured persons'.<sup>39</sup>

- 2.27 A summary of the ACT CTP insurance scheme under the current Act, in particular as it relates to compensation coverage, is detailed at **Appendix D**.

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<sup>35</sup> Australian Government, Joint Ministerial Media release: 'Productivity Commission's final report into disability care and support', 10 August 2011; *Transcript of evidence*, 10 November 2011, pp. 89–90.

<sup>36</sup> ACT Treasury Directorate website, Compulsory Third-Party Insurance homepage, accessed 11 January 2012, available at: <http://www.treasury.act.gov.au/compulsorytpi/index.shtml>

<sup>37</sup> Submission No. 2, August 2011, Annexure A, p. 8.

<sup>38</sup> Ms Katy Gallagher MLA, Media release: 'Creating a modern compulsory third-party scheme for the ACT', 17 February 2011.

<sup>39</sup> Mr Jon Stanhope MLA, Explanatory Statement—The Road Transport (Third-Party Insurance) Bill 2007, 22 November 2007, p. 1.

### 3 THE CURRENT ACT

I am pleased to inform the Assembly that we are starting to see evidence that the new scheme is meeting the expectations of government in providing better health and wellbeing outcomes for those injured in a motor crash....<sup>40</sup>

The former Treasurer commenting on the success of the 2008 ACT CTP insurance scheme (the current Act) in contributing to the recovery and rehabilitation of crash victims.

- 3.1 The ACT Law Society submitted that it was its intuitive experience that the 2008 Act had already significantly reduced costs, time to settlement and the amount of litigation, and sample figures provided by its President appeared to support this position. The figures illustrated that:

Of the claims for accidents occurring in the first year of the 2008 scheme, 79 per cent of ours [*Blumers*] have already resolved by way of agreed settlement with the insurer. Of the claims for accidents occurring in the second year of the 2008 scheme, 40 per cent have already resolved by way of agreed settlement with the insurer. At this stage no statements of claim in our figures have been issued by our firm for accidents on or after 1 October 2008.<sup>41</sup>

- 3.2 In the Government's own information on the 2008 reforms already released it states that:

'[C]laim sizes to date under the revised legislation are lower than under the previous legislative regime. Much of the reduction is attributable to a reduction in legal costs'.<sup>42</sup>

- 3.3 Furthermore, the Committee notes that the Government by its own evidence has reported a 27 per cent reduction in claims frequency since the 2008 reforms.<sup>43</sup>

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<sup>40</sup> Ms Katy Gallagher MLA, ACT Legislative Assembly, *Hansard*, 19 August 2010, p. 3603.

<sup>41</sup> Ms Noor Blumer, *Transcript of evidence*, 31 October 2011, p. 56; Submission No. 2a, October 2011.

<sup>42</sup> Letter of 30 June 2010 from David Health of Cumpston Sarjeant Consulting Actuaries to Mr Tom McDonald, Director, Legal and Insurance Policy, ACT Treasury. Folio 91 of Actuarial Report (Cumpston Sarjeant Consultant Actuaries): ACT CTP Scheme—Impact of proposed legislative changes with respect to whole person impairment cited in Submission No. 2, August 2011.

<sup>43</sup> *Transcript of evidence*, 6 October 2011; Mr Andrew Barr MLA, Response to QToN #9 at public hearing of 6 October 2011; Law Council of Australia, Response to QToN at the public hearing of 12 October 2011, p. 7.

## 2008 reform package to CTP insurance

3.4 As noted in chapter two, the current Act reflects what has been referred to as the 2008 reforms to CTP insurance. The 2008 reforms introduced new CTP insurance legislation—the *Road Transport (Third-Party Insurance) Act 2008* (the Act) and the *Road Transport (Third-Party Insurance) Regulations 2008*.<sup>44</sup> The principal aspect of the reforms was the removal of Part 10 of the *Road Transport (General) Act 1999* relating to CTP insurance and placing these provisions in a separate Act—the *Road Transport (Third-Party Insurance) Act 2008*.

3.5 At the time the *Road Transport (Third-party Insurance) Bill 2007* was introduced, the then Treasurer told the Assembly:

The current CTP scheme in place in the ACT has not changed significantly since 1948. The new legislation is expected to bring about cost savings flowing through to CTP premiums, without diminishing the compensation available for negligently injured persons. The legislation will also remove barriers to competition and give insurance companies clear guidelines for providing CTP insurance in the ACT, which should now give consumers a choice of provider.<sup>45</sup>

3.6 With respect to the 2008 reforms, NRMA Insurance told the Committee:

...we have seen a downwards trend in the time taken for injured people to make a claim, from an average of 113 days before the reforms to 73 days post reforms. The changes to encourage people to access medical treatment earlier have allowed us to more than halve the time it takes to pay for this treatment. This means the changes made in 2008 have encouraged more people to access treatment earlier. What we have not seen, however, is people utilising the earlier treatment process in large enough numbers to have a significant impact on the operation of the scheme.

Since 2008 we have also seen an increase in the proportion of claims that have legal representation. It is too early to speculate on what this means. The scheme is, however, still in the early stages and, given the long tail nature of the scheme, there may be further trends that emerge in the future.<sup>46</sup>

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<sup>44</sup> Ms Katy Gallagher MLA, Media release: 'Creating a modern compulsory third-party scheme for the ACT', 17 February 2011.

<sup>45</sup> Mr Jon Stanhope MLA, Explanatory Statement—The *Road Transport (Third-Party Insurance) Bill 2007*, 22 November 2007, p. 1.

<sup>46</sup> Ms Mary Maini, *Transcript of evidence*, 10 November 2011, p. 90.

## Operation of the current Act

3.7 To assess the operation of the current Act, the Committee's T of R required it to consider: (i) the effect of the Act on the recovery and rehabilitation of people who have been injured as a result of a road crash; (ii) the effectiveness of the Act in meeting the Objects as set out in section 5A of the Act; (iii) the effect of the Act on premiums for CTP insurance; and (iv) the statutory review of the Act.

### Effect of the Act on recovery and rehabilitation of people who have been injured as a result of a road crash

3.8 The ACT Law Society, ACT Bar Association and the ACT Branch of the Australian Lawyers Alliance were of the view, based on their respective experience, that the 2008 Act had improved the availability of treatment and rehabilitation for people who had been injured as a result of a motor vehicle crash.<sup>47</sup>

3.9 Furthermore, they applauded the introduction of Part 3 of the 2008 Act—*Early payment for treatment of motor accident injuries*. This part of the Act provides for a crash victim to receive an initial payment to fund important treatment and rehabilitation, subject to notice to an insurer within 28 days of the motor crash and without involving any admission of liability or requiring police or other evidence. This provision appears to assist in early return to health and positive rehabilitation for many crash victims.

3.10 As noted earlier in this chapter, the former Treasurer has also commented on the success of the 2008 Scheme in contributing to the recovery and rehabilitation of crash victims.<sup>48</sup>

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<sup>47</sup> Submission No. 2, August 2011, p. 5.

<sup>48</sup> Ms Katy Gallagher MLA, ACT Legislative Assembly, *Hansard*, 19 August 2010, p. 3603.

3.11 In evidence, the Government stated several times that only seven per cent of ACT crash victims were accessing the \$5,000 early access to medical assistance.<sup>49</sup> This outcome was a concern to the Government as this provision had been introduced as part of the 2008 reforms:

...to get people thinking about rehabilitation, the 2008 act allows for people to go to the insurer and receive up to \$5,000 worth of medical expenses paid even before there is any liability established.<sup>50</sup>

3.12 In contrast to the Government's figure of seven per cent, figures provided by a supplementary joint submission from the ACT Law Society, ACT Bar Association and the ACT Branch of the Australian Lawyers Alliance tell a different story. The Committee acknowledges that this data is drawn from one legal firm in the ACT market—Blumers Lawyers. However, in the absence of other information, it provides a useful reference point concerning the performance of the 2008 scheme.<sup>51</sup> This data is summarised in the table below:

Table 3.1—Figures for claims for injuries from ACT motor vehicle crashes—Blumers Lawyers (the Solicitors)—after 1 October 2008<sup>52</sup>

Date of crash to date of first known treatment	<ul style="list-style-type: none"> <li>▪ Average—2 days</li> <li>▪ 54% received treatment the same day as the crash</li> <li>▪ 95% received treatment with one week of the crash</li> <li>▪ The longest period before receiving treatment was 2 months, and the next 2 longest periods were 1 month</li> </ul>
Date of crash to date of contacting the solicitors	<ul style="list-style-type: none"> <li>▪ Average—41 days</li> <li>▪ 75% made first contact within 28 day period</li> </ul>
Early notification for early treatment claims made	<p>In 64% of matters in which the Solicitors were contacted within the 28 day period, the Solicitors made the early notification on behalf of the injured person. The reason for not making early notification was usually one of the following:</p> <ol style="list-style-type: none"> <li>i. The injured person was already receiving treatment coverage from their workers compensation insurer and therefore was not necessary.</li> <li>ii. The injured person was unable to identify the vehicle at fault and provide the registration details. Many people were too traumatised or injured to be in a position to take details of the vehicles involved and sometimes the injured person is taken from the scene by ambulance.</li> <li>iii. The injured person wasn't able to obtain and provide the prescribed medical certificate within the time period.</li> <li>iv. The Solicitors were unable to obtain information from ACT Policing, with respect to the identity of the vehicle, within the required time [It is noted there has been amendment—as part of the 2008 reforms—to allow entitlement to early treatment while the police report is still waiting to be received (section 72(2) of the <i>Road Transport (TPI) Act 2008</i>].</li> <li>v. The injured person was in a financial position to pay for their own treatment (some with private health insurance cover) and to seek reimbursement later.</li> </ol>
Early resolution of matters	<p>Of the claims for crashes occurring in the first year of the 2008 Scheme, 79% have already been resolved by way of agreed settlement with the insurer.</p> <p>Of the claims for crashes occurring in the second year of the 2008 scheme, 40% have already been resolved by way of agreed settlement with the insurer.</p>
Court proceedings issued	<p>As at 31 October 2011—no statements of claim have been issued by the Solicitors for crashes on or after 1 October 2008. Some interlocutory applications have been made in the Supreme Court to deal with compliance issues and seeking waiver of some of those requirements. Unfortunately, some of the 2008 legislation lacks clarity and has required the interpretation of the Court.</p>

<sup>49</sup> *Transcript of evidence*, 6 October 2011, p. 10; 14; 15; 29; and 32.

<sup>50</sup> Mr Roger Broughton, *Transcript of evidence*, 6 October 2011, p. 15.

<sup>51</sup> Submission No. 2a, October 2011; *Transcript of evidence*, 31 October 2011, p. 55; 70; 78.

<sup>52</sup> Based on a review of Blumers Lawyers' figures after 1 October 2008 and provided in summary percentage form (Submission No. 2a, October 2011).

- 3.13 The ACT Law Society's joint submission encouraged a review of section 72—*Entitlement to early payment—injured person to give forms to insurer within 28 days* to consider whether the 28 day timeframe for notice to be given to the injured person's insurer should be subject to some discretionary extension where there may be a good reason why a crash victim has not been able to give the notification within the statutory time; for example, because of their injuries, or their ignorance of the notice provision. It would also be helpful for further public promotion of the availability of such assistance.
- 3.14 A witness elaborated that the initial period of 28 days for early treatment:  
...be extended sufficiently to allow people a bit more time to make that initial not-too-many-questions-asked treatment available.<sup>53</sup>

#### RECOMMENDATION 1

- 3.15 **The Committee recommends that the 28 day timeframe for notice to be given to the injured person's insurer, as required under section 72 of the *Road Transport (Third-Party Insurance) Act 2008*, be amended to provide some discretionary extension where there may be a good reason why a crash victim has not been able to give the notification within that time.**

#### RECOMMENDATION 2

- 3.16 **The Committee recommends that the ACT Government (and the CTP Insurer) should more widely promote the availability of early payment for treatment of motor crash injuries as provided for under section 72 of the *Road Transport (Third-Party Insurance) Act 2008*.**

### **Effectiveness of the Act in meeting the Objects as set out in section 5A of the Act**

- 3.17 The Objects of the Act, as detailed in section 5A, are:
- a) to continue and improve the system of compulsory TPI, and the scheme of statutory insurance for uninsured and unidentified vehicles operating in the ACT

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<sup>53</sup> Ms Noor Blumer, *Transcript of evidence*, 31 October 2011, p. 61.

- b) to promote competition in setting premiums for compulsory third-party insurance policies
- c) to keep the costs of insurance at an affordable level
- d) to provide for the licensing and supervision of insurers providing insurance under policies of compulsory third-party insurance
- e) to encourage the speedy resolution of personal injury claims resulting from motor accidents
- f) to promote and encourage, as far as practicable, the rehabilitation of people who sustain personal injury because of motor accidents
- g) to establish and keep a register of motor accident claims to help the administration of the statutory insurance scheme and the detection of fraud, and
- h) to promote measures directed at eliminating or reducing causes of motor accidents and mitigating their result.

3.18 The ACT Law Society, ACT Bar Association and the ACT Branch of the Australian Lawyers Alliance were of the view that, in general, based on their respective experience, the current Act had assisted in achieving Objects (a), (d), (e), (f) and (h).<sup>54</sup> In the absence of available data, some submitters argued that it was difficult to determine whether the Act had fulfilled objects (b), (c) and (g).<sup>55</sup>

*Collective consideration of objects (a), (c) and (e)*

3.19 The consideration of **objects (a), (c) and (e)** collectively relates to supporting continuous improvement of the CTP insurance scheme, early identification of issues, the provision of funding for treatment, and early resolution of claims:

3.20 The Committee notes that the claims procedures set out in Part 4.2 (Motor accident claims procedures) and Part 4.3 (Obligations to give documents and information) respectively require that claimants provide early written notice of claims and defence. Parties to a motor crash claim are also required to disclose relevant documents to one another. ACT Law Society, ACT Bar Association and the ACT Branch of the Australian Lawyers Alliance submitted that these procedures were sensible and assisted with the early identification of issues, the provision of funding for treatment, and early resolution of claims. On this

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<sup>54</sup> Submission No. 2, August 2011.

<sup>55</sup> Submission No. 2, August 2011.

basis, these procedures improve and reduce the costs of the CTP insurance scheme and encourage the speedy resolution of claims.

- 3.21 However, the ACT Law Society and its joint submitters suggested that ‘substantial compliance’ with notice provisions or forms should be sufficient. They argued that this would:

...mirror section 4(1) of the *Civil Law (Wrongs) Regulation 2003* and avoid arid and costly debates about such compliance. Our experience is that many notices are rejected for technical or arbitrary reasons concerning the possible omission of one or two minor details. This leads to further delay and costs.<sup>56</sup>

- 3.22 The 2008 Act also introduced requirements for compulsory conferences (Part 4.7) and mandatory final offers (Part 4.8) prior to court proceedings. The ACT Law Society, ACT Bar Association and the ACT Branch of the Australian Lawyers Alliance, whilst supporting these procedures, noted:

...that the profession has regularly made representations about amendments to these provisions to remove impractical and costly complications associated with the current provisions...The scheme could be significantly improved with further reduction of cost by adopting the amendments proposed...<sup>57</sup>

- 3.23 In evidence, a witness elaborated about the provisions concerning compulsory conferencing:

The compulsory conferences are a bit of a problem because they require both sides to certify that they are ready for trial at a time when we have not yet been allowed to issue court proceedings, which is a technical and ethical difficulty for lawyers. Once again, another problem with that is the requirement to advise our clients as to the costs repercussions. The letter is virtually impossible to write because there are currently 17 or 27 different permutations about what might happen, depending on what the amount is. So it is very unworkable. Consequently, my firm recently had its first compulsory conference. That is how hard it is. And that is a similar experience in other firms. I know they have had the odd ones, but not very many.<sup>58</sup>

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<sup>56</sup> Submission No. 2, August 2011, p. 6.

<sup>57</sup> Submission No. 2, August 2011, pp. 6–7.

<sup>58</sup> Ms Noor Blumer, *Transcript of evidence*, 31 October 2011, p. 61.

3.24 Improvements to the mandatory final offer provisions contained within the present legislation were also suggested. Concern was raised with regard to the uncertainty surrounding these provisions and also the compulsory conference provisions. A witness explained:

At present the compulsory conference provisions require the parties to a proceeding to indicate that at the time of the conference they are ready for trial, when clearly they are not. That situation has now been removed in Queensland. It could very easily be removed in the ACT.<sup>59</sup>

3.25 Whilst the Committee supports the intent behind the introduction of requirements relating to compulsory conferencing and mandatory final offers prior to court proceedings, it notes that there are practical limitations concerning implementation.

### RECOMMENDATION 3

3.26 **The Committee recommends that the ACT Government review the provisions concerning compulsory conferencing in the *Road Transport (Third-Party Insurance) Act 2008* to determine a more practical approach.**

*Collective consideration of objects (a) and (c)*

3.27 The consideration of **objects (a) and (c)** collectively relates to supporting continuous improvement of the CTP insurance scheme and keeping the costs of insurance at an affordable level via limitation of risks:

3.28 The Committee notes that the 2008 reforms introduced changes to harmonise ACT arrangements with those in NSW. This included a change of meaning of 'motor accident' to mirror the applicable NSW legislation. For example, section 7 of the Act excludes from coverage under the CTP insurance scheme, injuries arising from loading or unloading vehicles. Some evidence suggested that this would:

...limit claims and avoid costly dual insurance arguments in some cases. Further, there is a limitation of some risks such as those involving repeat use injuries (see

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<sup>59</sup> Mr Angus Bucknell, *Transcript of evidence*, 31 October 2011, p. 62.

sections 21 and 22 of the 2008 Act). These changes are likely to allow a downward shift in TPI premiums and fulfil Object (c).<sup>60</sup>

*Collective consideration of objects (a) and (d)*

- 3.29 The consideration of **objects (a) and (d)** collectively relates to supporting continuous improvement of the CTP insurance scheme and the licensing and supervision of insurers via handling of claims concerning uninsured or unidentified vehicles:
- 3.30 The Committee notes that to assist with the handling of claims regarding unregistered, uninsured or unidentified motor vehicles, Part 4.10A established the ACT Insurance Authority (as the Nominal Defendant) to deal with claims involving uninsured or unidentified drivers. The ACT Law Society, ACT Bar Association and the ACT Branch of the Australian Lawyers Alliance considered that these provisions ‘appear to be operating satisfactorily’.<sup>61</sup>

*Collective consideration of objects (a), (c), (e) and (f)*

- 3.31 The consideration of objects (a), (c), (e) & (f) collectively relates to supporting speedy resolution of claims, early treatment, competition and encouraging the rehabilitation of injured people:
- 3.32 As noted previously, under the comment made regarding the effect of the Act on the recovery and rehabilitation of people injured as a result of a road crash, Part 3 of the 2008 Act—*Early payment for treatment of motor accident injuries* introduced without prejudice payments for treatment and rehabilitation where notice is given. Evidence to the Committee advanced that this had contributed to fulfilling objects (a), (e) and (f) and was also likely to permit a downward shift in CTP insurance premiums and realise object (c).<sup>62</sup>

*Collective consideration of objects (c) and (e)*

- 3.33 The consideration of **objects (c) and (e)** collectively relates to the reduction of legal costs and insurance costs:

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<sup>60</sup> Submission No. 2, August 2011, p. 7.

<sup>61</sup> Submission No. 2, August 2011, p. 7.

<sup>62</sup> Submission No. 2, August 2011, p. 7.

- 3.34 The ACT Law Society, ACT Bar Association and the ACT Branch of the Australian Lawyers Alliance suggested that in situations where small matters proceeded to litigation the recovery of legal costs be limited.<sup>63</sup>
- 3.35 The Committee was told that the cost provisions as detailed at section 155 and section 156 of the Act and the Regulations were convoluted, difficult to understand, arbitrary and unfairly discriminated against disadvantaged crash victims who were young, aged or otherwise not employed. As a consequence, the ACT Law Society and its joint submitters were of the view that these provisions did not appear to be fully achieving their stated aims.
- 3.36 The ACT Law Society submitted that the cost provisions were unclear:  
 ...and probably unhelpful for that reason and are still awaiting judicial determination. Unfortunately, lawyers cannot work out what they mean.<sup>64</sup>

*Collective consideration of objects (c) and (e)*

- 3.37 The consideration of **objects (c) and (e)** collectively relates to promoting competition and supervision of insurance providers:
- 3.38 The Committee notes that the 2008 reforms, Part 5 of the Act—*Licensing of insurers*, included enhanced provisions for the licensing of insurers. However, at this stage, there continues to be only one licensed insurer. As to the likelihood of this changing, a Treasury Directorate representative advised:  
 We have two insurers who are very well progressed towards setting up to enter our market, but they are waiting for this particular bill to pass through the Assembly.<sup>65</sup>
- 3.39 According to the Treasury Directorate, the Bill ‘gets the framework right to allow for competition’. However, the Under Treasurer added:  
 We cannot guarantee competition. Obviously each of the insurers will have their own appetite and will have their own reasons for entering the ACT market. But I do believe it gets the framework right to allow for competition.<sup>66</sup>

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<sup>63</sup> Submission No. 2, August 2011, p. 7.

<sup>64</sup> Ms Noor Blumer, *Transcript of evidence*, 31 October 2011, p. 61.

<sup>65</sup> Mr Roger Broughton, *Transcript of evidence*, 6 October 2011, p. 7.

<sup>66</sup> Ms Megan Smithies, *Transcript of evidence*, 6 October 2011, p. 7.

3.40 Conversely, the ACT Law Society, ACT Bar Association and the ACT Branch of the Australian Lawyers Alliance commented that:

...anecdotal evidence from insurers suggests that this [*sic*] it is unlikely that other insurers will seek to become registered providers of TPI in the ACT because of the very small market size in the ACT. An insurer who obtained, say, 20% of the market could have their premium pool wiped out by one or two catastrophic injuries.<sup>67</sup>

3.41 The Committee sought an explanation for why insurers, not currently in the market, would be interested in entering the market after the passage of the Bill. The Committee was told that they consider the current scheme to:

...be too volatile for them to be able to enter the market with a degree of comfort, given that they will have a share of a mere 260,000 vehicles. At the moment most of these insurers operate in both New South Wales and Queensland and they have a share of nine million vehicles. So this is a very small addition and they want the transition, if they come in here, to be as seamless as possible for them. So they do not want to spend a lot of money on new systems dealing with a new scheme and a scheme that is 100 per cent common law access; with that goes quite a degree of volatility in the size of the awards relating to the various claims.<sup>68</sup>

3.42 In summary, some evidence to the Committee supported that the current Act had achieved several of its objectives. In the absence of available data, it was difficult to determine whether the Act had fulfilled objects (b), (c) and (g).

### **Effect of the Act on premiums for CTP insurance**

3.43 The absence of actuarial data or other information on the effect of the current Act makes it difficult to assess whether the 2008 reforms have had an impact on premiums.<sup>69</sup> The availability of information to this effect has been an issue raised in evidence throughout the inquiry. The Committee notes the Government made available copies of the two most recent actuarial reports obtained by the Treasury Directorate during the Inquiry<sup>70</sup> and towards the end of the Inquiry, the report on the statutory review of the current Act (pursuant to section 275) was tabled in the Legislative Assembly.<sup>71</sup> Notwithstanding this, the Committee notes that due to the long-tailed nature of the Scheme, these

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<sup>67</sup> Submission No. 2, August 2011, p. 7.

<sup>68</sup> Mr Roger Broughton, *Transcript of evidence*, 6 October 2011, p. 7.

reports did not have sufficient information about the impact of the 2008 reforms.

- 3.44 The ACT Law Society, ACT Bar Association and the ACT Branch of the Australian Lawyers Alliance submitted that:

The Government has systematically refused to release any actuarial or other data on the effect of the 2008 Act on premiums, despite many requests from us. Indeed the Government is currently vigorously defending the secrecy of such data in proceedings before the ACT Civil and Administrative Tribunal. The 2008 Act requires Government approval for TPI premiums. Accordingly, detailed actuarial data should be available, including in relation to the amount of profit being taken from the scheme by insurers.<sup>72</sup>

- 3.45 Furthermore, in a supplementary submission, the ACT Law Society and its joint submitters noted that:

The decision of the ACT Government and the NRMA to withhold any substantial figures regarding the performance of the 2008 scheme has made it difficult to understand the need for changes to the scheme.<sup>73</sup>

- 3.46 The Committee notes that the former Treasurer advised the Legislative Assembly that she had been seeking to provide Members with an appropriate level of information on this matter:

I have been seeking to provide members with an appropriate level of information. I accept that for members in this place that has been a deficit that we need to fix. At this point in time we have not reached agreement with the NRMA about the form of that information. There are some concerns from the insurer that, depending on the granularity of the information provided, competitors would be able to pull together enough of that data, if it is released publicly, for them to be commercially challenging for the insurer. But we are working with that insurer. I understand they are discussing it again today.

I have also sought advice from GSO around whether, if we are not able to release all of the information publicly, based on those commercial reasons, that information could be provided in an in-confidence way to members of this place who are going to debate this legislation. I am awaiting that formal advice.<sup>74</sup>

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<sup>69</sup> Submission No. 2, August 2011 and Submission No. 5, September 2011.

<sup>70</sup> Mr Andrew Barr MLA, Response to QToN #6 at public hearing of 6 October 2011, February 2012.

<sup>71</sup> Tabled 20 March 2012

<sup>72</sup> Submission No. 2, August 2011, p. 8.

<sup>73</sup> Submission No. 2a, October 2011, p. 1.

<sup>74</sup> ACT Legislative Assembly, *Hansard*, 31 March 2011, pp. 1173–1174.

3.47 In evidence, the Committee asked the Treasurer to provide an update on the provision of this information to Members. As noted earlier, the Government made available copies of the two most recent actuarial reports obtained by the Treasury Directorate during the Inquiry<sup>75</sup> and towards the end of the Inquiry, the report on the statutory review of the current Act (pursuant to section 275) was tabled in the Legislative Assembly.<sup>76</sup>

3.48 The Committee notes that the Government's media release announcing the creation of a modern CTP Scheme for the ACT stated that:

The research done in preparation for this Bill indicates that these amendments will reduce TPI premiums. These lower premiums will assist families by reducing costs through their annual renewal of their car registration.<sup>77</sup>

3.49 However, as noted early in this chapter, the Government was subsequently more cautious about whether the proposed amendments would guarantee competition.<sup>78</sup>

3.50 NRMA Insurance was more guarded about the impact the proposed amendments would have on premiums and in encouraging competition:

In respect of the likely impact of the Bill on CTP in the ACT, it is probable that there would be some downward pressure on premiums if overall claims are lowered. These reforms may enhance the predictability of future liability in the scheme which could serve to make this market more attractive to other insurers.<sup>79</sup>

3.51 Evidence to the Committee was of the view the 2008 Act should allow a reduction in premiums. This was on the basis that the 2008 reforms have improved the speed of claim settlement and limited litigation in smaller matters.<sup>80</sup>

3.52 During questioning, the Committee was advised that, if there were changes to premiums, it was likely to take years for these to be passed onto consumers. Ensuing discussion explored this matter:

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<sup>75</sup> Mr Andrew Barr MLA, Response to QToN #6 at public hearing of 6 October 2011, February 2012.

<sup>76</sup> Tabled 20 March 2012

<sup>77</sup> Ms Katy Gallagher MLA, Media release: 'Creating a modern compulsory third-party scheme for the ACT', 17 February 2011.

<sup>78</sup> *Transcript of evidence*, 6 October 2011, p. 7.

<sup>79</sup> Submission No. 4, August 2011, p. 3.

<sup>80</sup> Submission No. 2, August 2011.

**THE CHAIR:** What do you think the time frame would be in terms of passing on any changes to consumers, if there were changes—premium changes, I mean? If there are any, how long is it likely to take for them to be passed through?

**Ms Maini:** It would—

**THE CHAIR:** I guess, given your previous evidence that we are still not sure about the 2008 changes—

**Ms Maini:** That is right.

**THE CHAIR:** I think where we are coming to is that it is going to be quite a while—don't hold your breath.

**Ms Maini:** That is right.

**THE CHAIR:** It will be years.

**Ms Maini:** That is right. It is difficult to speculate and say that with this you will see an immediate reduction. The reason for that is, again, as I said, that there are other factors that go into premium determinations and premium setting that may offset that.<sup>81</sup>

## Statutory review of the *Road Transport (Third-Party Insurance) Act 2008*

3.53 A statute is generally reviewed to update and consolidate it by assessing the performance of the Act in meeting its objectives. Specifically, in the case of the *Road Transport (Third-Party Insurance) Act 2008*, it is important to review the operation and application of the Act to: (i) ensure best practice in statutory review; and (ii) provide a rationale for the proposed amendments.

### Best practice in statutory review

3.54 Generally, statutory review periods are designed to ensure a timely evaluation of the implementation and performance against the legislation. Some statutes prescribe review periods that can range from between three to five years. The purpose of a statutory review process is to:

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<sup>81</sup> *Transcript of evidence*, 10 November 2011, p. 93.

- update and consolidate legislation—factoring in the performance of the Act in achieving its objective(s) and building upon guidance and best practice in other jurisdictions, and
- ensure that the legislation is meeting the needs of the operating environment and its stakeholders.

3.55 Section 275 of the Act provides that a review of its operation commence as soon as practicable after the end of its third year of operation. The responsible Minister is also required to present a report on the review to the Legislative Assembly within three months after the day the review is started.<sup>82</sup> At the time the Bill was released as an exposure draft for public consultation and when the Bill was introduced into the Legislative Assembly, the Act had been in operation for less than three years and the statutory review of its operation had not commenced let alone been completed.

3.56 The Committee emphasises that it is contrary to best practice statutory review and evidence based public policy making to propose amendments to an Act prior to completion of a statutory review process. Furthermore, it is premature to be making amendments before the completion of such an important process. The Committee notes that such action could be construed as a disregard for evidence based public policy making and the review process itself.

3.57 The Committee is concerned that this approach may set a precedent that legislation can be reviewed or amended prior to a statutory review being completed.

### **Commencement of statutory review pursuant to section 275 of the Act**

3.58 As noted earlier, pursuant to section 275 of the *Road Transport (Third-Party Insurance) Act 2008*—the responsible Minister has a statutory requirement to review the Act and present a report on the review to the Legislative Assembly. Specifically, the Act states:

The Minister must review the operation of the Act as soon as practicable after the end of its 3<sup>rd</sup> year of operation.

The Minister must present a report on the review to the Legislative Assembly within 3 months after the day the review is started.

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<sup>82</sup> Section 275—*Road Transport (Third-Party Insurance) Act 2008*

3.59 When the Bill was referred for inquiry on 31 March 2011, the Treasurer at the time stated:

I have asked that Treasury commence the review on 1 October and that they complete it in November and be able to provide that information to the committee to assist with the speedy reporting from the public accounts committee.<sup>83</sup>

3.60 The Committee notes that the former Treasurer was quoted in the *Canberra Times* of 25 March 2011 as saying that the review (as required by section 275 of the Act) of the 2008 reforms to CTP insurance arrangements ‘is not going to tell us anything that we don’t already know’. At its public hearing on 6 October 2011, the Committee asked the Treasurer if he held the same view. The Treasurer commented:

That I would rely on a quote out of the *Canberra Times*—I will go back and speak to the former Treasurer to ensure that that is an accurate reflection of what she said. But perhaps it is best if I leave it at that at this point in time.<sup>84</sup>

3.61 At the time of tabling its report, the Committee had not received a response from the Treasurer.

3.62 In evidence, the Committee sought further information on the review status, in particular, whether it had commenced, when it would be provided to the Assembly in accordance with the Act, and how its findings and recommendations would be addressed in the context of the Bill. The Treasurer told the Committee:

The three year legislative review commenced on 6 October 2011.

The Act stipulates that within 3 months of the review having commenced the report is to be presented to the Assembly. As the three month period ends on 6 January 2011 [2012], the report is expected to be presented to the Legislative Assembly in the first sitting week for 2012.

The Government will consider the review before deciding on future actions regarding the ACT’s CTP scheme.<sup>85</sup>

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<sup>83</sup> ACT Legislative Assembly, *Hansard*, 31 March 2011, p. 1175.

<sup>84</sup> Mr Andrew Barr MLA, *Transcript of evidence*, 6 October 2011, pp. 31–32.

<sup>85</sup> Mr Andrew Barr MLA, Response to supplementary question No. 6 (following on from public hearing of 6 October 2011), January 2012.

- 3.63 Statutory review periods are designed to ensure a timely evaluation of the implementation and performance against specific legislation. Consequently, the Committee's examination of the statutory review was a critical aspect of its consideration of the referred Bill. As the statutory review was not tabled during the February 2012 sitting, as noted earlier, the Committee asked for, and the Assembly agreed to, an extension of time<sup>86</sup> for it to report on the referred Bill.
- 3.64 The Statutory Review of the ACT's CTP insurance scheme as prescribed under section 275 of the Road Transport (Third-Party Insurance) Act 2008 was tabled by the Treasurer on 20 March 2012.
- 3.65 The Committee notes that the tabling of the Review did not comply with the three month timeframe—three months after the Review had started—as required by the Act. The Treasurer told the Assembly:

I thank members for raising this matter today and I apologise to the Assembly for the delay in providing the report. As members may be aware, the scheme actuary took some personal leave during the period and, I understand, was unavailable for a three-week period. That, combined with a further filing by the NRMA of their premium on 9 January, is the reason for the delay. I note section 275(4) of the act provides that the minister may have regard to anything else that the minister considers relevant, and in the context of this review I believe that the latest filing from the NRMA is relevant.

...

...I wish to publicly acknowledge that I should have advised the Assembly in the February sittings of the delay and the reasons for it. I apologise to the Assembly. I have the report today...

There has been a delay. The reasons for the delay are twofold—the personal leave of the scheme actuary, the unavailability of IAG insurance officials over the summer holiday period, and that the NRMA filed a new premium claim on 9 January. For those reasons the report is delayed. I have it to table today and I apologise to the Assembly for the delay.<sup>87</sup>

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<sup>86</sup> By the last sitting week in May 2012.

<sup>87</sup> Mr Andrew Barr MLA, *Hansard*, ACT Legislative Assembly, 20 March 2012, p. 851.

### **Adequate time to assess the performance of the current Act in meeting its objectives**

3.66 A recurring issue raised in evidence to the inquiry, and which concerns the Committee, is whether there has been adequate time to assess the performance of the current Act in meeting its objectives. This is particularly important for three reasons: (i) the long tailed nature of CTP insurance claims; (ii) the reforms under the current Act have only been in place for three years, and that patterns of behaviour in response to these reforms would only now be emerging; and (iii) the Bill is intended to build on the 2008 reforms. At the time the 2008 reforms were introduced, the CTP insurance scheme had not changed significantly since 1948.<sup>88</sup> As the 2008 reforms marked an important milestone for the CTP insurance scheme, the Committee considers that it is even more prudent to ensure that there has been adequate time to fully review and evaluate the operation of the Act prior to any further amendment.

3.67 In evidence, the Committee was interested in the perspective of NRMA Insurance as to whether, at this stage, the effects of the 2008 reforms were unknown. Ensuing discussion explored this matter:

**Ms Maini:** All aspects are unknown; that is right. Are we seeing a decrease in claims costs? Not yet. Are we seeing a decrease in other factors that you would say are success factors of the scheme? No; we are seeing the same.

**MR SMYTH:** When would it be reasonable to see those effects?

**Ms Maini:** Whenever you introduce reforms you have a period where everyone is trying to work around—not work around the scheme, because that is not correct, but trying to understand the intent of the scheme and how we work within it. That is why it takes so long sometimes to set the right premium. Once you establish schemes, it takes about a good two to three years to see anything coming through, depending on how many files finalise during that period.

**MR SMYTH:** But we have not had a good two to three years yet, really, have we?

**Ms Maini:** No, not yet.<sup>89</sup>

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<sup>88</sup> Mr Jon Stanhope MLA, Explanatory Statement—The Road Transport (Third-Party Insurance) Bill 2007, 22 November 2007, p. 1.

<sup>89</sup> *Transcript of evidence*, 10 November 2011, p. 87.

3.68 The Committee also sought NRMA Insurance's views on whether changing the Act only three years after the 2008 reforms would have the effect of giving stability and predictability to the Scheme. Ensuing discussion between the Committee and NRMA Insurance's General Manager, Long Tail Claims explored this matter:

**Ms Maini:** On the one hand you might say that that is premature but, on the other hand, you might answer that by saying it really depends on what legislative changes were introduced in 2008. If the 2008 reforms introduced mechanisms for earlier reporting on pre-litigation procedures and did nothing other than that then you would say that the environment is such that things might not change and it may not be premature. On the other hand, you could say that there are not enough claims that are finalised to be able to draw any conclusions, so in that case it is premature.

**MR SMYTH:** So which hand are we coming down on?

**Ms Maini:** What I am seeing is that even though the legislative frameworks have been introduced and we do have earlier reporting and we do have earlier payments being made, in some cases we have not seen a shift in the culture.

**MR SMYTH:** Is it too early to tell, though?

**Ms Maini:** It may well be if you are just looking at one year because the majority of files that have closed for us are in the 2008 year, and that is only 80 per cent of those files. If you can see from those that the environment has not changed at all and it is still quite adversarial—all we are doing is really delaying the advent of litigation because, ultimately, that is where we are going—then the reforms may not be too early.<sup>90</sup>

3.69 Evidence to the inquiry suggested that the effects of the 2008 reforms will 'deepen without any need for further restrictions on common law rights'.<sup>91</sup>

3.70 Some submitters suggested that after careful analysis of the 2008 reforms—as required by the statutory review—the evidence may indicate that the 2008 reforms are starting to take effect and thus make much of the current Bill unnecessary.<sup>92</sup>

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<sup>90</sup> *Transcript of evidence*, 10 November 2011, p. 87.

<sup>91</sup> Law Council of Australia, Response to QToN at the public hearing of 12 October 2011, p. 7.

<sup>92</sup> Submission No. 2, August 2011; Submission No. 5, September 2011; *Transcript of evidence*, 31 October 2011.

### **Review of the ACT Compulsory Third-party (CTP) insurance scheme as prescribed under section 275 of the Road Transport (Third-Party Insurance) Act 2008**

- 3.71 As noted earlier, the Statutory Review was tabled in the Assembly by the Treasurer on 20 March 2012.
- 3.72 Section 275 of the Act details the criteria the Review must have regard to—:
- (a) how effectively the scheme under the Act provides reduced premiums for compulsory third-party insurance policies for motor vehicles; and
  - (b) any reform to any scheme providing for compulsory third-party insurance for motor vehicles implemented in other jurisdictions in Australia; and
  - (c) the impact of the changes on the recovery to health, well-being and work of the claimant.<sup>93</sup>
- 3.73 The Review criteria were examined, in the main, using an actuarial analysis of the impacts of the 2008 legislation and supplemented by research investigating health outcomes under compensation schemes.<sup>94</sup> The actuary analysis was conducted by the ACT CTP Scheme’s consulting actuaries—Cumpston Sarjeant—examining some 11 400 finalised claims spanning the period from 2001 to 2011.<sup>95</sup>
- 3.74 The Committee notes that the Review reports on matters outside the scope and terms required. The ACT Law Society, ACT Bar Association and the ACT Branch of the Australian Lawyers Alliance noted:
- ...with some concern that the Review has, in certain instances, reported into areas beyond the scope and terms of the Review.
- The Review purports to comment upon the effect of the proposed 2011 Bill which falls outside the terms of the Review pursuant to Section 275.<sup>96</sup>
- 3.75 Evidence to the Committee submitted that the Review found:
- claims frequency has fallen;

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<sup>93</sup> Section 275, *Road Transport (Third-Party Insurance) Act 2008*.

<sup>94</sup> Review of the ACT Compulsory Third-Party (CTP) insurance scheme as prescribed under section 275 of the *Road Transport (Third-Party Insurance) Act 2008*, 20 March 2012, p. 3.

<sup>95</sup> Review of the ACT Compulsory Third-Party (CTP) insurance scheme as prescribed under section 275 of the *Road Transport (Third-Party Insurance) Act 2008*, 20 March 2012, p. 3.

<sup>96</sup> Submission 2c, April 2012, p. 3.

- the Act has been beneficial in improving the regulatory environment and prompt reporting;
- that claims are finalising at a faster rate than claims brought prior to October 2008;
- the Act has placed downward pressure on CTP premiums;
- the Act has brought about early intervention and payment of medical, hospital and treatment expenses;
- that the average claim size has decreased;
- that legal costs are lower.<sup>97</sup>

3.76 Furthermore, the Committee was told that aspects of the Review:

...identify a positive impact of the 2008 scheme, namely that claims frequency has fallen, claims are being reported more promptly, claims are being resolved more quickly and legal costs are lower. We remain of the view that the 2008 legislation has been the driver of all of these positive aspects.<sup>98</sup>

3.77 The Committee has a number of concerns with the findings and conclusions of the Review that have the potential to impact on its credibility and robustness. These are detailed below.

3.78 On at least two occasions, the Review contradicts its position. The first relates to commentary in relation to 'the effectiveness of the reforms implemented through the Act in achieving improved health outcomes can in principle be assessed through quantity of methods'. However, the Review report then states that 'there is limited ACT specific information available at this stage. Some inferences may be drawn from an analysis of the reporting and claim finalisation times, and possibly through the analysis of the expenditure on medical treatment.'<sup>99</sup>

3.79 Evidence to the Committee suggested that this situation was concerning as it:

...appears to be an admission that there is insufficient data available at this time for the reviewer to make findings, rather than relying upon inferences based upon the lack of information. It has been the position of the Law Society, Bar Association and ALA throughout the period since the proposed 2011 Road Transport (Third-Party Insurance) Bill that there has been both a lack of information and data made available to the public with respect to the operation of the 2008 Act and that the 2008 Act has not been in operation for a sufficient period of time for an accurate assessment of its effects to be quantitatively made. The first paragraph on page 8 of the Review appears to bear out this concern.

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<sup>97</sup> Submission 2c, April 2012, p. 1.

<sup>98</sup> Submission 2c, April 2012, p. 4.

Furthermore, we are concerned that the actuarial analysis, which has not been provided to the Law Society, Bar Association, ALA or the public, may not be quantitatively accurate for the reasons identified in the Review.<sup>100</sup>

- 3.80 The second contradiction concerns commentary about the effectiveness of the Act in improving the regulatory environment. At page three, the Review comments that ‘overall, the review indicates the legislative changes have been beneficial in improving the regulatory environment with better information collection, relatively prompt reporting and faster finalisation’.<sup>101</sup> However, later on, the Review states ‘the extent to which the Act has been successful in improving the regulatory environment and provides better information is beyond the scope of an actuarial assessment’.<sup>102</sup> The Committee notes that the actuarial assessment was the primary vehicle through which the Review criteria were assessed.
- 3.81 Concerns were expressed to the Committee about the accuracy of the Review on the basis that there were some limitations concerning the information sources used for the actuarial analysis— approximately 11 400 finalised claims spanning the period from 2001 to 2011. The Review notes that approximately 85 per cent of these claims relate to claims before October 2008. However, at an earlier stage, in relation to the information drawn from the operation of the CTP Scheme prior 2008, the Report emphasises that ‘there was a lack of information around CTP claims and in particular, medical intervention, treatment, rehabilitation and return to health’.<sup>103</sup>
- 3.82 Evidence to the Committee advanced that notwithstanding this data limitation, the actuaries were able to identify 11 400 claim records, amongst other elements, with respect to payments by head of damage for each claim.

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<sup>99</sup> Review of the ACT Compulsory Third-Party (CTP) insurance scheme as prescribed under section 275 of the *Road Transport (Third-Party Insurance) Act 2008*, 20 March 2012.

<sup>100</sup> Submission 2c, April 2012, p. 2.

<sup>101</sup> Review of the ACT Compulsory Third Party (CTP) insurance scheme as prescribed under section 275 of the *Road Transport (Third-Party Insurance) Act 2008*, 20 March 2012, p. 3.

<sup>102</sup> Review of the ACT Compulsory Third Party (CTP) insurance scheme as prescribed under section 275 of the *Road Transport (Third-Party Insurance) Act 2008*, 20 March 2012, p. 7.

<sup>103</sup> Review of the ACT Compulsory Third-Party (CTP) insurance scheme as prescribed under section 275 of the *Road Transport (Third-Party Insurance) Act 2008*, 20 March 2012, p. 3 and 8.

The ACT Law Society, ACT Bar Association and the ACT Branch of the Australian Lawyers Alliance submitted that:

...it is improbable, if not impossible, for 11,400 claims to be broken down into their various heads of damage given that the vast majority of those claims, somewhere in the order of 85-90%, would have been resolved between the parties, in the absence of a verdict of a Court, as a compromised settlement. In those instances where a matter has been settled between the parties arising from negotiation, there is in most cases an absence of agreement as to the heads of damage. For the actuaries to assert that they are able to identify heads of damage in 11,400 matters is strange and we can only assume that some arbitrary mechanism or formula has been imposed by the NRMA with respect to matters settled after the event. We would question the veracity and utility, as well as the arbitrary nature of any such formula.<sup>104</sup>

3.83 The Review makes certain findings with regard to increases in premiums since the introduction of the Act in 2008. Amongst other things, the Review singles out that the 'poor financial market performance following the Global Financial Crisis ("GFC")' has made it necessary for insurers to make greater provision for future claim liabilities. As a consequence, 'earnings have suffered an additional recent down turn'.<sup>105</sup>

3.84 The Review further notes that since the introduction of the legislation in 2008, premiums have increased by \$141.00 (net). The Review attributes the net increase, in the main to claims costs linked to claims under the pre-2008 legislative environment; and a drop in investment earnings.<sup>106</sup> Evidence to the Committee was of the view that:

The 2008 Act was brought into place to regulate claims costs, which it has largely achieved. Pre-2008 claims remain outside the scope of the operation of the 2008 legislation and, presumably, this would have been anticipated by the authors and legislators of the 2008 Act, as well as any stakeholders such as the NRMA who may have been involved in the drafting of the 2008 legislation.

The fact that there has been "a drop in investment earnings" is instructive in relation to the removal of the rights of injured motorists anticipated in the 2011 Bill. The stated aims of the 2011 legislation were to "increase medical and

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<sup>104</sup> Submission 2c, April 2012, pp. 2–3.

<sup>105</sup> Review of the ACT Compulsory Third-Party (CTP) insurance scheme as prescribed under section 275 of the *Road Transport (Third-Party Insurance) Act 2008*, 20 March 2012, p. 12.

<sup>106</sup> Review of the ACT Compulsory Third-Party (CTP) insurance scheme as prescribed under section 275 of the *Road Transport (Third-Party Insurance) Act 2008*, 20 March 2012, p. 12.

hospital treatment and rehabilitation intervention and payments" although, of course, there is nothing within the 2011 Bill which effects any increase in those benefits.<sup>107</sup>

3.85 As noted earlier, the principal vehicle (actuarial analysis of the impacts of the 2008 legislation) by which the Review criteria were examined was supplemented by research investigating health outcomes under compensation schemes.<sup>108</sup>

3.86 With regard to the impact of the 2008 legislation on health outcomes, evidence to the Committee submitted that:

...the 2008 legislation has been beneficial with respect to health outcomes insofar as the payment of medical, hospital and treatment expenses and the provision for early payment introduced by the 2008 legislation has a positive effect on health.<sup>109</sup>

3.87 The position articulated by the Review—that claimants for damages arising from motor vehicle crash injuries are likely to suffer worse health outcomes than people who do not seek compensation—has been a position put forward in evidence to the Inquiry as the basis for supporting legislative reform, such as the introduction of an impairment threshold, to improve health outcomes. This proposed relationship is discussed in more detail later in this report under ‘Medical treatment and rehabilitation’.

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<sup>107</sup> Submission 2c, April 2012, p. 3.

<sup>108</sup> Review of the ACT Compulsory Third-Party (CTP) insurance scheme as prescribed under section 275 of the *Road Transport (Third-Party Insurance) Act 2008*, 20 March 2012, p. 3.

<sup>109</sup> Submission 2c, April 2012, p. 4.

## 4 THE BILL

I do strongly feel that anyone injured in an accident has the right to fair and equitable compensation [sic].<sup>110</sup>

...

Anyone receiving [sic] an injury should have the right to fair and equitable compensation regardless of how serious or minor the injury is, no person should have to suffer emotional physical or monetary loss as the result of an accident.

...

I am sure if someone in government had themselves or family members quality of life taken away, by no cause of their [sic] own, that member would like to have their family member or themselves fully compensated.<sup>111</sup>

A private citizen expressing his concern and objection to any change in the current ACT CTP Insurance scheme.

4.1 The Bill proposes to amend the *Road Transport (Third-Party Insurance) Act 2008* in a range of ways. This includes: (i) insertion of new frameworks for the assessment of both economic and NEL. In the case of NEL, in particular, damages will only be payable after a required degree of permanent impairment threshold is met; (ii) creation of procedures for undertaking medical assessments to determine the degree of permanent impairment of an injured motor crash claimant; and (iii) specifying rules for the award of interest payable on awards of damages.<sup>112</sup>

4.2 In practical terms, the proposed amendments are expected:

...to establish a modern, evidence based statutory entitlement process in substitution for non-economic loss damages (NEL damages commonly known as general damages) in the case of relatively minor injuries. It will also assist in the shift towards transparency under the CTP Act, in particular, the awarding of damages for motor crash claims.<sup>113</sup>

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<sup>110</sup> Submission No. 1, August 2011.

<sup>111</sup> Submission No. 1, August 2011.

<sup>112</sup> Ms Katy Gallagher MLA, Explanatory Statement—Road Transport (Third-Party Insurance) Amendment Bill 2011, 17 February 2011; Road Transport (Third-Party Insurance) Amendment Bill 2011, February 2011; Ms Katy Gallagher MLA, Media release: 'Creating a modern compulsory third-party scheme for the ACT', 17 February 2011; Scrutiny of Bills and Subordinate Legislation Committee. (2011) Scrutiny Report No. 34, 24 March.

<sup>113</sup> Ms Katy Gallagher MLA, Explanatory Statement—Road Transport (Third-Party Insurance) Amendment Bill 2011, 17 February 2011, p. 1.

- 4.3 At the time the Bill was introduced, the then Treasurer told the Legislative Assembly that the proposed amendments were ‘intended to further facilitate the objectives’ of the *Road Transport (Third-Party Insurance) Act 2008* (the Act).<sup>114</sup>
- 4.4 According to the Treasurer, a key goal of the Act is:
- ...to get injured people to access medical diagnosis, treatment and health services as soon as possible to facilitate quicker return to health and a reduced propensity to develop long term injuries. In other words, injuries treated now are better than injuries treated tomorrow.<sup>115</sup>
- 4.5 The Government advised that the Bill had two main objectives—(i) to achieve better health outcomes for those injured in road crashes; and (ii) to reduce the costs to the community of CTP insurance premiums.<sup>116</sup>
- 4.6 In the context of re-establishing a focus on the health and rehabilitation of claimants, according to the Government, the quintessential or intrinsic elements of the Bill in support of this objective are:
- the establishment of a statutory minimum impairment threshold process for NEL
  - to provide a mechanism for independent, expert medical assessments to be undertaken shortly after the injury occurred, to assess the impairment of a person injured in a motor crash
  - to allow for medical assessments to be peer reviewed, and if necessary reviewed by a court. These medical assessments are binding on the parties to a motor crash claim and conclusive proof in any court
  - that physical and psychological injuries must be assessed separately, and
  - if a person is injured in a motor crash then they will be entitled to non-economic loss if their injuries are serious such that their whole person permanent impairment is 15 per cent or more for either physical or psychological injuries.<sup>117</sup>
- 4.7 The changes proposed to awards for non-economic losses are designed to meet the objectives by encouraging those suffering relatively minor injuries to seek

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<sup>114</sup> Ms Katy Gallagher MLA, Explanatory Statement—Road Transport (Third-Party Insurance) Amendment Bill 2011, 17 February 2011.

<sup>115</sup> Ms Katy Gallagher MLA, Explanatory Statement—Road Transport (Third-Party Insurance) Amendment Bill 2011, 17 February 2011, p. 1.

<sup>116</sup> Mr Andrew Barr MLA, *Transcript of evidence*, 6 October 2011, p. 2.

<sup>117</sup> ACT Treasury Directorate website, Compulsory Third-Party Insurance homepage, accessed 11 January 2012, available at: <http://www.treasury.act.gov.au/compulsorytpi/index.shtml>

early treatment and rehabilitation. The Bill builds on previous reforms established under the current Act to encourage early treatment and provide more rigour around award payments.

4.8 Furthermore, the Bill proposes a number of amendments designed to increase transparency regarding the awarding of damages and the prescribing of rules for the determination of interest payable on awards of damage. Specifically, the Bill contains the following elements:

- provisions to ensure transparency in awarding damages for a claimant's future loss of earning capacity
- an increase in the statutory discount rate from 3 per cent to 5 per cent, and
- interest on compensation will be paid only in circumstances where an insurer has not met their obligations under the Act (as prescribed in the Bill).<sup>118</sup>

4.9 According to the Government, the key provisions of the Bill:

- do not take away any claimant's ability to make a claim for compensation
- do not take away any claimant's ability to choose to litigate their claim
- only apply to NEL (otherwise known as general damages or pain and suffering), and
- all claimants will still be able to access all other heads of damage as compensation, such as medical and rehabilitation costs (past and future), economic loss (past and future earnings) and attendant/domestic care if required.<sup>119</sup>

4.10 With regard to the performance of the current scheme, the Government was of the view that it:

...unfortunately, provides incentives towards maximising lump sum payments and away from rehabilitation. At its most basic, the current scheme trades money for quality of life and it is this that the government seeks to change. Injured Canberrans deserve better than a system that prolongs their waiting. They deserve a system that emphasises rehabilitation and restored quality of life and appropriate compensation. I think ACT households and businesses deserve

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<sup>118</sup> ACT Treasury Directorate website, Compulsory Third-Party Insurance homepage, accessed 11 January 2012, available at: <http://www.treasury.act.gov.au/compulsorytpi/index.shtml>

<sup>119</sup> ACT Treasury Directorate website, Compulsory Third-Party Insurance homepage, accessed 11 January 2012, available at: <http://www.treasury.act.gov.au/compulsorytpi/index.shtml>

better than a system that practically guarantees the highest insurance premiums in the country. And they deserve relief from these significant cost pressures.<sup>120</sup>

4.11 The Law Council of Australia emphasised that:

The people worst affected by this Bill will be retirees, stay at home parents, children, disabled or incapacitated people and the unemployed.<sup>121</sup>

4.12 The basis for this view was explained in evidence:

Obviously, when you are restricting access to damages but not economic loss, using a threshold, the people who are going to be worst affected are those that do not have any income, and those that do not have any income that they can declare or claim through any other process. Those people will obviously be worst affected by a scheme which restricts their right to claim damages for the pain and suffering that they have endured as a result of an accident.<sup>122</sup>

...for example, a stay-at-home parent who employs themselves in a variety of different ways but they do not do so for recompense or money. They might be unable to perform any of the things that they used to be able to do around the house or whatever, or they might suffer significant restriction in terms of doing so. That, to your average person, would be considered a form of employment but it is not compensable through the system, unless you have some form of recognition that there are things that you lose that are not economic in value.<sup>123</sup>

## Exposure draft consultation process

4.13 The release of an exposure draft of a bill or regulations for public consultation is an important stage in the statutory lawmaking process. The consultation stage provides an opportunity for all stakeholders and interested members of the community to consider and contribute to the final content of a bill or regulation.

4.14 The Road Transport (Third-Party Insurance) Amendment Bill 2010 was released on 5 October 2010 for an eight week consultation period that closed on 30 November 2010.<sup>124</sup> Five submissions were received from interested

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<sup>120</sup> Mr Andrew Barr MLA, *Transcript of evidence*, 6 October 2011, p. 2.

<sup>121</sup> Submission No. 5, September 2011, p. 3.

<sup>122</sup> Mr Nick Parmeter, *Transcript of evidence*, 12 October 2011, p. 46.

<sup>123</sup> Mr Nick Parmeter, *Transcript of evidence*, 12 October 2011, p. 46.

<sup>124</sup> Ms Katy Gallagher MLA, Media release: 'Government consults on CTP and Workers' Compensation scheme changes', 5 October 2010; ACT Treasury Directorate website, CTP Insurance

stakeholders—the legal fraternity, the Community Public Sector Union and the ACT Human Rights and Discrimination Commissioner.

4.15 Following the consultation period, the Committee understands that the proposed Bill was amended as follows:

- the proposed 20 per cent threshold that was to apply to NEL psychological injuries was reduced to 15 per cent, the same as for NEL physical injuries
- a proposed cap on NEL was removed, and
- noting that section 257 of the *Road Transport (Third-Party Insurance) Act 2008* which prescribes a review of the operation of the Act to commence ‘as soon as practicable after the end of its third year of operation’ — expires five years after the day the Act commenced, a review of the operation of the amended Act, five years from commencement, will be required to ensure that the amendments and the CTP insurance scheme is working.<sup>125</sup>

4.16 The Committee is of the view that an eight week consultation period for proposed amendments that, if enacted, will limit common law compensation rights is insufficient. Furthermore, given the significance of the proposed amendments, the Government should have been more proactive in communicating to the Canberra community, as part of the exposure draft consultation process, the likely impact of the Bill on compensation, aside from claims that premium costs may fall.

4.17 The Committee notes that the ACT Government’s publication—*Engaging Canberrans—A guide to community engagement* proposes that:

When engaging peak bodies it is important to allow sufficient time for adequate consideration of your proposal, policy or community engagement strategy. A minimum of six weeks is recommended to allow enough time for organisations to provide feedback.<sup>126</sup>

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homepage—Public consultation—Road Transport (Third-Party Insurance) Amendment Bill 2010—accessed 7 April 2011, available at:

<http://www.treasury.act.gov.au/compulsorytpi/Public%20consultation%>

<sup>125</sup> ACT Treasury Directorate website, CTP Insurance homepage—Public consultation—Road Transport (Third-Party Insurance) Amendment Bill 2010—accessed 7 April 2011, available at: <http://www.treasury.act.gov.au/compulsorytpi/Public%20consultation%>

<sup>126</sup> ACT Government. (2011) *Engaging Canberrans—A guide to community engagement*, p. 4, accessed 5 February 2012, available at: [http://www.communityengagement.act.gov.au/\\_\\_data/assets/pdf\\_file/0005/240890/Community\\_engagement\\_July2011\\_FA\\_screen.pdf](http://www.communityengagement.act.gov.au/__data/assets/pdf_file/0005/240890/Community_engagement_July2011_FA_screen.pdf)

- 4.18 Furthermore, for high to very complex matters, the Guide recommends a consultation timeframe of between 10 to 16 plus weeks to ensure that a diverse range of community views can be considered in the development of policy and programs.<sup>127</sup>
- 4.19 The Committee considers the proposed amendments as detailed in the Bill to be significant and would fall into the category of high to complex matters. The Committee concludes that the Government should adhere to its published community engagement guidelines.
- 4.20 The Committees notes that the Treasury Directorate identified the strengthening of the Territory's Regulatory Impact Statement (RIS) processes as a priority for 2011–12.<sup>128</sup> The Committee understands that this priority is one of the actions the ACT has to take under the Council of Australian Governments (COAG) national economy commitments.
- 4.21 Appropriate consultation is a key element of best practice regulation. It is vital to ensure that any proposed regulatory change responds to the dual goals of effectiveness—in that it addresses an identified problem—and *efficiency*—in that it should maximise the benefits to the community, whilst taking taking account of the costs.<sup>129</sup>
- 4.22 As part of the regulatory governance framework, the Committee expects that a regulatory impact statement would be prepared along these lines for any amendment to the Act and its accompanying subordinate legislation.

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<sup>127</sup> ACT Government. (2011) *Engaging Canberrans—A guide to community engagement*, p. 4, accessed 5 February 2012, available at: [http://www.communityengagement.act.gov.au/\\_\\_data/assets/pdf\\_file/0005/240890/Community\\_engagement\\_July2011\\_FA\\_screen.pdf](http://www.communityengagement.act.gov.au/__data/assets/pdf_file/0005/240890/Community_engagement_July2011_FA_screen.pdf)

<sup>128</sup> 2011–12 Budget Paper No. 4, p. 143; Select Committee on Estimates 2011–12, *Transcript of evidence*, 16 May 2011, pp. 152–155.

<sup>129</sup> Australian Government. (2012) *Best Practice Regulation Handbook*, accessed 5 February 2012, available at: <http://www.finance.gov.au/obpr/proposal/handbook/1-productivity-and-regulation.html>

## Main effects of the Bill on the provision of CTP insurance in the ACT

4.23 The Committee received considerable evidence concerning the major aspects of the Bill that would impact on the provision of CTP insurance in the ACT. These aspects were also discussed at length with witnesses.

### Section 155F(a)—Whole person impairment thresholds for non-economic loss

4.24 The Bill will introduce a 15 per cent WPI threshold for NEL—physical injuries and NEL—psychological injuries. The American Medical Association (AMA) Guide to Evaluation of Permanent Impairment, Fifth Edition (AMA 5) will be used to determine the 15 per cent impairment threshold.

4.25 This threshold will limit the ability of a third-party injured in a motor vehicle crash to access compensation for NEL (pain and suffering) and the loss of enjoyment of life. Furthermore, the Bill precludes the combining of NEL—physical injuries and NEL—psychological injuries to determine the impairment threshold.

4.26 According to the ACT Law Society and its joint submitters, this will rule out over 80 per cent of victims negligently injured in a motor vehicle crash from proper compensation.<sup>130</sup>

4.27 A Treasury Directorate official explained:

The bill is designed to focus people's priorities differently from what they currently are. If you are injured in a vehicle accident now you have got a couple of choices, assuming that somebody is at fault and you can identify that. Your choices are that you can go directly to the insurer—and we have only got one, the NRMA—and say, "I've been injured in an accident; I need help," et cetera, or you can go to a lawyer.

...

So the way the bill works is to say that if you have a relatively minor injury—that is, less than the 15 per cent threshold—you will not be entitled to claim non-economic losses, so your chances of getting a fairly large lump sum payout for your injury are drastically reduced, more or less removed, and so you no longer

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<sup>130</sup> Submission No. 2, August 2011; Submission No. 5, September 2011.

have an incentive to hold off on medical treatment to try and maximise a payout. Your incentive is to utilise the scheme and get all the medical treatment you can possibly get.<sup>131</sup>

4.28 The rationale for the impairment threshold is to remove the incentive to maximise compensation and to place a focus on rehabilitation and restoration of injured people. Principally, the Bill will establish a test for an injured party to access compensation for NEL.<sup>132</sup>

4.29 The Insurance Council of Australia submitted that:

...the assessment of impairment based on objective medical criteria for the purpose of accessing general damages ensures the fair and impartial access to general damages for those who have suffered more serious injuries.

...The WPI assessment allows for consistency in the awarding for damages based on the level of objective impairment suffered by the injured person irrespective of their age or particular circumstance.

These measures are consistent with provisions in other schemes and jurisdictions...Those people whose degree of WPI is less than the threshold will remain entitled to receive medical treatment, rehabilitation assistance, and economic loss should their injury and circumstance require it.<sup>133</sup>

4.30 A principal issue surrounding the imposition of thresholds is that some people will always fall below the threshold. As to the various ways thresholds can be applied to insurance compensation, a witness elaborated:

If you go back to the principal design of why thresholds were ever introduced, you will see it was to try and ensure that there was almost like a gateway so that people who were most seriously injured had access to the greater compensation dollar. Whether you have a whole person impairment threshold, whether you have a points system, at the end of the day, that is what it is designed to do. For the head of damage, that is described as pain and suffering or non-economic loss, the outcome is the same—that is, try and redirect funds so that those who are more seriously injured have access to pain and suffering.<sup>134</sup>

4.31 The Law Council of Australia highlighted that impairment thresholds do three things in insurance schemes—they reduce cost, but they have also been shown

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<sup>131</sup> Mr Roger Broughton, *Transcript of evidence*, 6 October 2011, p. 10.

<sup>132</sup> *Transcript of evidence*, 6 October 2011, p. 6.

<sup>133</sup> Submission No. 3, September 2011, pp. 1–2.

<sup>134</sup> Ms Mary Maini, *Transcript of evidence*, 10 November 2011, p. 86.

to bring about two unintended consequences—they drive up disputation, and they can distract injured people from the treatment process, as their focus becomes all consuming on whether they qualify for a form of compensation.<sup>135</sup>

4.32 The Law Council also emphasised that there is:

...a problem with using impairment rating as a methodology for thresholds, in that impairment is not the true measure of loss for someone who is seeking to recover inside an insurance scheme. Disability is actually the measure. The nomination of a 15 per cent impairment level, of itself, has particular implications. Someone could well suffer a very high impairment rating—for example, a loss of a digit in a hand—but it is not that disabling; whereas someone could have a lower impairment rating—for example, a disc injury to a back—but it could be career ending. We have a fundamental difficulty around using impairment for that purpose.<sup>136</sup>

4.33 The Committee heard evidence that the following injuries would not get over the threshold for 10 per cent WPI on AMA 4 in NSW:

Loss of both breasts does not get you over the threshold.

...a disc prolapsed in the lumbar spine...If the discs in your spine bulge to the point where they protrude into the spinal cord, that will affect the nerves running through the spinal cord. In your lumbar spine the nerves run down into your feet and your legs, and when you have a disc that bulges out and impinges upon that nerve, you get shooting pains down into the limbs that is called radiculopathy. That does not get over the threshold.

I had a client in New South Wales who lost seven teeth in a motor vehicle accident—one upper side of her mouth—when she hit the steering wheel. That received zero per cent whole person impairment because the AMA guides measure your loss of teeth by loss of your ability to chew or masticate. That came in at zero, and this is a girl who has had to have implants built in and will have them replaced every eight to 10 years for many decades to come. Zero per cent.

An ankle fusion, where you barely can move your ankle in order to get rid of pain and try and provide some stability, does not get over the threshold. I had one horrific case where a girl's car was T-boned. She was in the driver's seat. She had the window down. The car gets flipped over onto its side, and it slides along the ground. As it slides along the ground, the side of her face is pressed where the window would normally be and slides along the ground, too. An entire ear

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<sup>135</sup> *Transcript of evidence*, 12 October 2011, p. 38.

<sup>136</sup> Mr Simon Morrison, *Transcript of evidence*, 12 October 2011, p. 38.

was ripped off and the side of her face had to be rebuilt with some titanium mesh. She did not get over the threshold.

The one that really tears at me is, on a regular basis, I have mothers sitting opposite me at my desk where I explain that they do not get over the threshold for pain and suffering. They have lost a child in an accident, and I have got to sit and explain that: “Your psychiatric condition, I know you’re upset. I know you’re traumatised. I know this will tear at you for the rest of your life, but you don’t get over the threshold.”<sup>137</sup>

- 4.34 The Committee acknowledges that payment for pain and suffering (general damages) recognises that an injured party will experience some loss of enjoyment of life as a result of sustaining a permanent or long-term injury.<sup>138</sup>
- 4.35 In any compensatory system there will always be individuals who will try and take advantage of the system to maximise or exploit its weaknesses or opportunities for their own personal gain; in practical effect it means that people will enter into the system for wrong reasons.
- 4.36 To improve issues around premiums and cost containment—the Law Council of Australia emphasised that it was imperative to go:
- ...back to the elements of what makes a scheme really work well for the benefit of everybody<sup>139</sup>
- ...
- It is the design elements of a scheme which are critical to the success of a scheme for all involved.<sup>140</sup>
- 4.37 A number of concerns were also raised regarding the creation of procedures and associated infrastructure that will be needed to implement the 15 per cent threshold. These related to the use of AMA Guides for determining thresholds and the use of medical panels to determine the issue of thresholds.

### **Section 155P—Use of AMA Guides for determining thresholds**

- 4.38 Concern regarding the use of the AMA 5 Guide to determine the 15 per cent impairment thresholds was raised with the Committee.

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<sup>137</sup> Mr Andrew Stone, *Transcript of evidence*, 31 October 2011, pp. 59–60.

<sup>138</sup> Submission No. 2, August 2011.

<sup>139</sup> Mr Simon Morrison, *Transcript of evidence*, 12 October 2011, p. 41.

<sup>140</sup> *Transcript of evidence*, 12 October 2011, p. 41.

4.39 The Committee understands that the Guides were developed by American doctors to communicate with each other, not as a mechanism to determine legal entitlement or otherwise. Furthermore, the Guides expressly state that they are not to be used for direct financial awards or as the sole measure of disability.<sup>141</sup> The President of the ACT Branch of the Australian Lawyers Alliance elaborated:

The AMA guidelines were devised as a communication guide between doctors so that doctors could indicate to each other what the level of disability is. The guidelines themselves have a disclaimer indicating that the guidelines should not be used for the purposes of determining entitlements to compensation. I can read from them if you care for that.

...

This is from page 13:

Impairment percentages derived from the Guide's criteria should not be used as direct estimates of disability. Impairment percentages estimate the extent of the impairment on whole person functioning and account for basic activities of daily living, not including work. The complexity of work activities requires individual analyses. Impairment assessment is a necessary first step for determining disability

The guide also indicates at 1.8 on page 13 that it is not to be used for a person's entitlement to non-economic loss.<sup>142</sup>

4.40 The Committee sought the Government's view on the conditions attached to the use of the AMA Guides and was told:

**Ms Smithies:** No, I do not think that is correct. The proposal is to use it as a threshold, not for direct compensation. It is a threshold issue: use AMA 5 as a guide to a threshold, but in terms of direct compensation for those who fall over the threshold, that will have nothing to do with the AMA guide and everything to do with the process that is currently underway, and that has been underway for many years, around negotiation and settlement.<sup>143</sup>

4.41 The Law Council of Australia submitted, with respect, that the Government's response was misleading, as under the Bill:

...the AMA Guides would be used to determine whether an injured person can claim compensation for noneconomic loss. Compensation for non-economic loss

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<sup>141</sup> Submission No. 2, August 2011; pp. 18–19; *Transcript of evidence*, 31 October 2011, p. 65.

<sup>142</sup> Mr Angus Bucknell, *Transcript of evidence*, 31 October 2011, p. 65.

<sup>143</sup> *Transcript of evidence*, 6 October 2011, p. 19.

is a "direct financial award", therefore the threshold determines whether a claimant will receive that direct financial reward. Whilst Treasury appears to have interpreted this to only preclude the benchmarking of awards against particular levels of impairment (i.e. 15% = \$X, 20% = \$Y, 25% = \$Z), this appears to be nothing more than an argument drawn from a particularly narrow construction of the cautionary note contained in the preambular paragraphs of the AMA Guides.

Moreover, the Guides also state that they are not to be used " ... as the sole measure of disability." That is precisely what is proposed under the present Bill. There will be no opportunity for assessment of the impact of an injury on the claimant's quality of life if an assessor determines they have not sustained greater than 15% WPI under the AMA Guides.<sup>144</sup>

- 4.42 Evidence highlighted the fickleness of falling below or over the impairment threshold. The Committee was told:

When you draw a line, you then have people who fall just under and just over, and the operation of these guidelines means that two millimetres of wasting in the leg or one or two degrees of angulation of movement out of a range of 120 can see you under or over. It is that capriciously narrow between being over and not being over.<sup>145</sup>

- 4.43 Evidence also emphasised that, in addition to issues raised in relation to the appropriateness of using the AMA Guide as a sole measure of disability, more importantly are the guidelines that accompany them. The Committee heard that in NSW, the guidelines take the form of:

...a thick booklet that, in effect, qualifies the various operations of AMA 4 and, in part, makes up a whole series of new scales that do not come out of AMA 4.<sup>146</sup>

- 4.44 The Committee notes that the AMA Guides cannot:

...in any circumstances, replace a determination of a court because injuries affect different people in different ways. For example, an injury to the hand may have a markedly different effect on a singer than a pianist. That is the importance of access to the common law — access to the common law is a citizen's protection if a dispute arises with his or her insurer.<sup>147</sup>

- 4.45 The Committee emphasises the inherent weaknesses in using the AMA Guides as the definitive threshold for determining NEL impairment. The Committee is strongly of the view that the Guides are imprecise and inappropriate tools

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<sup>144</sup> Submission No. 5b, October 2011, p. 2.

<sup>145</sup> Mr Andrew Stone, *Transcript of evidence*, 31 October 2011, p. 60.

for this purpose and that the Government should do further work on developing a more robust vehicle for assessing impairment.

- 4.46 However, the Committee is firmly of the view that the AMA Guides should only be used as a starting point not as a sole measure for determining impairment.

#### RECOMMENDATION 4

- 4.47 **The Committee recommends that the ACT Government in response to this report should either: (a) detail an alternative mechanism to using the AMA Guides as a definitive threshold for determining non-economic loss impairment; or (b) detail how the use of AMA Guides will be modified to address the issues raised concerning their sole use as a measure of impairment for non-economic loss.**

#### **Division 4.9, B.4—Use of medical panels to determine the issue of thresholds**

- 4.48 The Insurance Council of Australia supported the introduction of a robust framework for the assessment of permanent impairment with the main benefits being independent and objective medical assessments. The Council explained:

Introducing a Medical Assessor who is qualified and experienced together with a peer review should, we anticipate, ensure consistent whole person impairment (WPI) assessments. We submit however, that consideration be given to limiting the peer review process to those circumstances where either the injured person or insurer wishes to review the initial assessment.

We believe that this will minimise delays in the overall assessment process, particularly if there is a finite number of appropriately trained medical assessors in the particular medical field.<sup>148</sup>

- 4.49 Notwithstanding the view of the Insurance Council, other evidence raised concerns regarding the use of medical panels to determine thresholds and associated matters. These matters can be organised into two categories—(i)

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<sup>146</sup> Mr Andrew Stone, *Transcript of evidence*, 31 October 2011, p. 59.

<sup>147</sup> Submission No. 2, August 2011, p. 4.

<sup>148</sup> Submission No. 3, September 2011, p. 2.

encroachment of the Executive in determining compensation for injured people; and (ii) the efficiency of the medical assessment process.

### **Encroachment of the Executive in determining compensation for injured people**

4.50 The Committee heard evidence raising concerns about various provisions in the Bill which move decisions about the entitlements of an injured party, previously covered by common law into the control of the Executive Government. A case in point was arrangements for medical panels. The Committee was told:

There is a very substantial move towards the executive government determining what you get and how you get it if you are injured and you are making a claim for pain and suffering or loss of enjoyment of life, whereas once you went before a court who would determine your case on its individual facts and circumstances.<sup>149</sup>

4.51 The President of the ACT Bar Association cautioned that:

...this takes us into an area where there is a substantial inroad into what courts do.

...

...you are taking the determination of individual rights into areas largely within the control of the executive government, and one should think very carefully before doing so.<sup>150</sup>

4.52 The Law Council of Australia commented that:

...without expounding the Kable Doctrine in detail, the Law Council considers it unlikely to impact on the Constitutional validity of medical panels proposed under the Bill, unless it could be demonstrated that medical panels are exercising a judicial power<sup>151</sup> or that the measures contained in the Bill impose an unreasonable fetter on the judicial functions of the Court.<sup>152</sup>

4.53 The Government also commented that it was:

...confident that the structure of the proposed new division 4.9B of the Act, to be inserted by the Road Transport (TPI) Amendment Bill 2011, retains an appropriate level of discretion in the Court to undertake its judicial functions without impairment. The Court determines liability and quantum on the basis of the evidence presented to it, performing its proper judicial functions within a statutory framework establishing the basis for determining the outcome after

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<sup>149</sup> Mr Philip Walker, *Transcript of evidence*, 31 October 2011, p. 58.

<sup>150</sup> Mr Philip Walker, *Transcript of evidence*, 31 October 2011, p. 59.

assessing that evidence and applying proper judicial process. The process of medical assessment, which the court may reject in certain circumstances, streamlines the evidentiary process but does not exclude the court considering the terms of that assessment.<sup>153</sup>

4.54 Furthermore, evidence suggested that the following provisions of the Bill permit the Executive Government's involvement in relation to decisions about entitlements for injured people:

- The CTP regulator is a senior public servant, the Director-General of the Treasury Directorate.
- The guidelines by which an injured claimant's permanent impairment will be assessed will be determined by the Executive Government. Furthermore, these guidelines are not disallowable by the Assembly.
- The CTP regulator appoints people to the medical panels to assess injury. Furthermore, the CTP regulator can also appoint a particular medical assessor either generally or for a stated impairment dispute.
- Appointment as a medical assessor is for no more than three years—there is no security of tenure and also a consequential effect for independence.
- The CTP Regulator may set guidelines for the courts to determine the level of NEL—that is, how much they award in relation to NEL in its various iterations.<sup>154</sup>

### **Efficiency of the medical assessment process**

4.55 Based on the experience of the NSW CTP insurance scheme, issues were also raised concerning the efficiency of the medical assessment process. These concerns relate to an increasing number of disputes and delays as part of the medical assessment process.

4.56 A case study from the NSW Medical Assessment Service (MAS) Bulletin illustrates this issue:

On the first MAS assessment...the condition was not stabilised. Comes back nine months later for another MAS assessment. There it is over 10 per cent, but the insurer challenges it. It goes to a review panel. That takes a few more months to organise, and that is confirmed as being over 10 per cent. To get that over 10 per

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<sup>151</sup> Ex parte Boilermakers' Society of Australia—(Boilermakers' Case) (1956) 94 CLR 254.

<sup>152</sup> Law Council of Australia, Response to QToN at public hearing of 12 October 2011, p. 6, October 2011.

<sup>153</sup> Mr Andrew Barr MLA, Response to QToN #5 at public hearing of 6 October 2011, January 2012.

<sup>154</sup> *Transcript of evidence*, 31 October 2011, pp. 58–59; Submission No. 2b, October 2011.

cent result was two years from start to finish. A court would have heard that case, allocated the money and moved onto the next case long before that. So you are looking at delays in the process.<sup>155</sup>

- 4.57 In practical terms, delays in the medical assessment process, for whatever reason, slow down the resolution of claims and add to costs within the scheme.
- 4.58 Evidence also questioned where the ACT was going to source doctors to appoint to the medical panels. It was proposed that to secure the number of necessary doctors and required specialities of expertise, injured claimants would in all likelihood be transported to Sydney for assessment. The Committee was told:

The other question that you might like to ask down there is: where are you going to get the doctors from to do this? Up here we struggle to put together a panel. It takes a panel of about 160 or 170 doctors to make the Medical Assessment Service operate, and we still hit problems. There are only two dermatologists on the panel. If both sides have used one of those for a medico-legal, there is nobody left at the Medical Assessment Service who can do the assessment, let alone another three who can be the review panel. I suspect you are going to struggle to find the doctors in the ACT to make this work.

I think what you are going to end up doing is shipping people up to Sydney to have them medically examined for the sake of these assessments. Either that or you will bring doctors down there. And if you are bringing doctors down there, you are not going to get the good quality doctors, because they do not want to give up a day to do medico-legal work. What you are going to get is the usual suspects writing the usual suspects sort of reports.<sup>156</sup>

- 4.59 Based on experience in NSW, an important outcome of the Bill will be a requirement to factor in additional costs that will be incurred in relation to administrative appeals. The Committee heard that in NSW:

We have now got a burgeoning industry up here of administrative appeals from MAS assessors who do not know how to properly apply the guidelines.<sup>157</sup>

- 4.60 A pertinent point made in evidence is the additional expense that will be associated with the creation of procedures to implement the impairment threshold—for example, medical assessors on panels and possible transportation to Sydney for injured claimants. Furthermore, delays arising

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<sup>155</sup> Mr Andrew Stone, *Transcript of evidence*, 31 October 2011, p. 60.

<sup>156</sup> Mr Andrew Stone, *Transcript of evidence*, 31 October 2011, p. 61.

from disputes in the medical assessment process or completing a medical assessment process also adds to the cost of claims. These additional expenses will have to met by the Scheme costs.<sup>158</sup>

## **Section 155A—Increasing the discount rate from 3 per cent to 5 per cent**

- 4.61 The Bill proposes an increase in the statutory discount rate from 3 per cent to 5 per cent. Evidence to the Committee suggested that there was no scientific basis to support the selection of 5 per cent as the discount rate aside from the argument that it aligns with that in other jurisdictions.
- 4.62 To assess the impact a 2 per cent increase will have on people injured in a motor vehicle crash, the concept behind discount rates needs to be considered. Discount rates are a common economic tool that refers to the rate used to convert dollars which occur in future year(s) to a present value in the base year.<sup>159</sup>
- 4.63 As applied to CTP insurance, a discount rate is used:
- ...to account for the assumed benefit that recipients of common law compensation obtain from early receipt of future benefits. It is intended to offset the ability of the plaintiff to invest lump sums in reasonably safe investments.<sup>160</sup>
- ...but should also take account of taxation on returns on that investment and likelihood of future inflation...<sup>161</sup>
- 4.64 Discount rates are applied only to lump sum compensation for future care and treatment expenses and future loss of income. Consequently, where a discount rate is set that inadequately accounts for the future benefit of common law compensation, those with the largest compensation payment for

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<sup>157</sup> Mr Andrew Stone, *Transcript of evidence*, 31 October 2011, p. 61.

<sup>158</sup> *Transcript of evidence*, 31 October 2011, pp. 61–62.

<sup>159</sup> Chrystal, K.A. & Lipsey, R.G. (1997) *Economics for Business Management*, Oxford University Press, New York.

<sup>160</sup> Submission No. 5, September 2011, p. 5.

<sup>161</sup> Mr Nick Parmeter, *Transcript of evidence*, 12 October 2011, p. 46.

future care and treatment and loss of income (that is, the youngest and the most severely injured) will be impacted the most.<sup>162</sup>

- 4.65 Evidence to the Committee cited a number of credible and authoritative sources providing guidance as to an appropriate discount rate. A summary is set out below.
- 4.66 A prominent High Court decision established a discount rate of three per cent in *Todorovic v Waller [1981]*. This decision has been influential in the rate applied and the basis for its application. This decision argued that such a rate allows for inflation, wages, prices and taxes on the invested sum awarded.<sup>163</sup>
- 4.67 The actuarial firm—Cumpston Sarjeant Pty Ltd—after an assessment of a diverse range of different figures, including the level of inflation, the rate of taxation on investment etc. concluded that the discount rate should reflect the net, after tax investment rate, which stands at 2.65% after adjusting for inflation.<sup>164</sup> The Committee notes that the rate at the time of the Todorovic and Waller decision in 1981 was about the same, having regard to the prevailing economic circumstances.<sup>165</sup>
- 4.68 In 2002, a Negligence Review Panel which was established by the Heads of Treasury to inquire into ways to restrict common law compensation, expressly rejected using discount rates for this purpose, noting that:

Assume that a 25 year old is totally and permanently incapacitated for work. This means that damages for future loss of earning capacity will be calculated to cover a 40-year period. The effect of increasing the discount rate from 3 per cent to 5 per cent would be to reduce the lump sum to 75 per cent of its 3 per cent level. Thus, an increase of 2 percentage points in the discount rate would lead to a reduction of 25 per cent in the award.<sup>166</sup>

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<sup>162</sup> Submission No. 5, September 2011.

<sup>163</sup> Productivity Commission. (2011) *Disability Care and Support Inquiry Report*, 10 August, Canberra.

<sup>164</sup> Plover, C. and Sarjeant, H. (2010) Financial compensation—inconsistencies, absurdities, and bad judgments, Paper presented at the 2010 National Conference of the Australian Lawyers Alliance, 21–23 October; Submission No. 5, September 2011; p. 6; *Transcript of evidence*, 12 October 2011, pp. 47–48.

<sup>165</sup> *Transcript of evidence*, 12 October 2011, pp. 47–48.

<sup>166</sup> Justice D. Ipp, Prof. D. Sheldon, Prof. P. Cane, I. Macintosh. (2002) *Review of the Law of Negligence*, September, Commonwealth of Australia, p. 209.

- 4.69 The Panel recommended that the discount rate be set nationally at 3 per cent, after concluding that:
- ....using a discount rate higher than can reasonably be justified by reference to the appropriate criteria would be an unfair and entirely arbitrary way of reducing the total damages bill. Furthermore, we have seen that the group that would be most disadvantaged by doing so would be those who are most in need — namely the most seriously injured.<sup>167</sup>
- 4.70 The Law Council submitted that the ‘best guide to a fair and appropriate discount rate’ was the 10-year Commonwealth Treasury indexed bond rate, which presently stands at 2.69 per cent.<sup>168</sup>
- 4.71 Notwithstanding the above authoritative guidance, there is considerable variability in the discount rate applied to lump sum damages, both across jurisdictions and across individual schemes.<sup>169</sup>
- 4.72 The practical consequences of a discount rate based on incorrect assumptions or one that is set too high, is that it impacts on the ability of a beneficiary to fund their lifetime care costs.<sup>170</sup>
- 4.73 The Committee notes that Annexure A, p. 22 to the joint submission from the ACT Law Society, ACT Bar Association and the ACT Branch of the Australian Lawyers Alliance details the impact on lump sum compensation arising from an increase in the discount rate from 3 per cent to 5 per cent.<sup>171</sup>
- 4.74 The NSW report by the NSW Law Reform Commission highlighted that:
- ...studies also found inaccuracy in the lump sum award where inadequate allowance was made for the effects of inflation on the cost of items and services including wheelchairs, pharmaceuticals and home nursing. Other inaccuracies were found in the failure to assess accurately the physical capabilities of the victim and his or her likely lifestyle and employment prospects.<sup>172</sup>

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<sup>167</sup> Justice D. Ipp, Prof. D. Sheldon, Prof. P. Cane, I. Macintosh. (2002) *Review of the Law of Negligence*, September, Commonwealth of Australia, p. 209.

<sup>168</sup> Submission No. 5, September 2011, p. 6.

<sup>169</sup> Productivity Commission. (2011) *Disability Care and Support Inquiry Report*, 10 August, Canberra.

<sup>170</sup> Productivity Commission. (2011) *Disability Care and Support Inquiry Report*, 10 August, Canberra.

<sup>171</sup> Submission No. 2, August 2011, Annexure A, p. 22.

<sup>172</sup> NSW Law Reform Commission. (1992) *Provisional Damages*, Discussion Paper 25—Community Law Reform Program, chapter 2.6.

4.75 The Committee emphasises that when incorrect assumptions are made with regard to a discount rate, it is the injured party who bears the risk of future uncertainty and where funds are insufficient, ultimately the taxpayer. In practical terms, the injured party:

...bears the risk that a once and-for-all (discounted) lump sum will meet injury-related needs for their lifetime. If funds are insufficient or mismanaged, social welfare and health and disability services are relied on.<sup>173</sup>

4.76 With regard to human rights considerations as they might relate to the proposed increase in the discount rate, the Human Rights Commissioner commented:

As I noted in my original advice, there doesn't appear to be a justification for this approach, other than a citation to a previous decision of the High Court. However, the High Court in *Todorovic v Waller* found the appropriate discount would be 3%.<sup>174</sup> The explanation given for this change is that this is the percentage which applies in other jurisdictions. I note submissions by others<sup>175</sup> to the Exposure Draft noted this change would have a disproportionate impact on children and the disabled, and so may constitute an unreasonable limitation on the right to equality.<sup>176</sup>

4.77 The joint submission from the ACT Law Society, ACT Bar Association and the ACT Branch of the Australian Lawyers' Alliance in response to the exposure draft concluded that:

Adopting a 5% discount rate would ... impact most severely on the youngest and most severely injured people, in particular those who will require a lifetime of care and support...<sup>177</sup>

4.78 The Scrutiny of Bills and Subordinate Legislation Committee also commented that there may be an argument that proposed section 155A 'would lead to a

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<sup>173</sup> Productivity Commission. (2011) *Disability Care and Support Inquiry Report*, 10 August, Canberra.

<sup>174</sup> (1981) 150 CLR 402

<sup>175</sup> Submission from Maurice Blackburn Lawyers,  
<http://www.treasury.act.gov.au/compulsorytpi/Maurice%20Blackburn%20FINAL%20301110.pdf>  
 (accessed 9 March 2011)

<sup>176</sup> Submission No. 8, January 2012, p. 3.

<sup>177</sup> Joint submission from the ACT Law Society, ACT Bar Association and the ACT Branch of the Australian Lawyers' Alliance, Exposure draft consultation, p. 23.

form of indirect discrimination against the youngest and most severely injured people'.<sup>178</sup>

- 4.79 The Committee raised human rights considerations as they might relate to the increase in the discount rate with Treasury Directorate officials. Ensuing discussion explored this matter:

**THE CHAIR:** Again, can I talk about the discount rate. You are increasing the discount rate from three per cent to five per cent. This, of course, will have a greater impact on young people and more seriously injured people. Can you, again, in the context of section 28 of the Human Rights Act, explain how this is proportionate? If you wish you can take that on notice but either way can you explain it?

**Mr Broughton:** Yes, I think we will take that on notice.

**Mr McDonald:** It is an issue also of parity with other jurisdictions and around providing greater stability of risk. We are the only jurisdiction that goes on the Todorovic doctrine. Ms Le Couteur, as you know, the average discount rate is about five per cent. In some states, it is six. In Western Australia I believe it is even higher. But it was to do with risk and stability.

**THE CHAIR:** Being the same as other states is a different argument from the human rights side. Being the same as other states is an argument but it is a different argument.<sup>179</sup>

- 4.80 In the absence of evidence to support the rationale behind increasing the discount rate coupled with the impact it will have on the youngest and the most severely injured, the Committee can only conclude that the proposed increase is not on a principled basis but rather is intended to arbitrarily lower awards of compensation and to bring the ACT into line with other jurisdictions.
- 4.81 The Committee also notes that increasing the discount rate to five per cent is contrary to the recommendations made by authoritative reports, in particular, that of the Commonwealth Negligence Review Panel.

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<sup>178</sup> ACT Legislative Assembly Scrutiny of Bills and Subordinate Legislation Committee, Report No. 34, 24 March 2011.

<sup>179</sup> *Transcript of evidence*, 6 October 2011, p. 26.

- 4.82 **The Committee recommends that the statutory discount rate, as per section 155A of the *Road Transport (Third-Party Insurance) Act 2008*, remain at three per cent.**

### **Impact of increase in discount rate on ability to buy into lifetime care schemes**

- 4.83 The Committee discussed the impact an increase in the discount rate would have on the ability to buy into a no-fault scheme such as the New South Wales (NSW) lifetime care scheme. The Committee understands that this option would not be possible under the increased discount rate as the actual cost of future care and treatment would not be covered if the overall award was reduced by 25 per cent or more.<sup>180</sup> A witness elaborated:

...one of the concerns about the lifetime care and support scheme is that once it was established it did not allow people who were already catastrophically injured to buy into the scheme.

Subsequently they made the option available but so far no-one has been able to. The simple reason for that is because if someone does get a payout, a compensation payment for future care and treatment expenses, that is discounted by five per cent, which, as you know, brings the payment down by 27 per cent or thereabouts and they cannot afford to buy into the scheme. If, at some point in the future, the ACT government were to reach an agreement with the New South Wales government or decided to set up its own scheme to provide lifetime care and support for the most catastrophically injured, a discount rate of five per cent would make that difficult to achieve through the existing insurance system.<sup>181</sup>

### **Section 156—Limiting payment of interest on damages to injured people**

- 4.84 The ACT Law Society and its joint submitters were of the view that section 156 in the Bill was unjust as it denies negligently injured road users proper compensation. The basis for this argument was that section 156 proposes to limit payment of interest on amounts paid out by injured people where compensation is delayed by the insurance and court processes.<sup>182</sup>

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<sup>180</sup> Submission No. 5, September 2011, p. 6.

<sup>181</sup> Mr Nick Parmeter, *Transcript of evidence*, 12 October 2011, p. 47.

<sup>182</sup> Submission No. 2, August 2011.

## Cost-shifting

4.85 Evidence advanced that the Bill would shift many treatment costs from the insurer onto the injured party and ultimately onto taxpayers.<sup>183</sup> The Committee notes that research analysing the effect of tort law reform on consumers, supports this view, in that:

...reforms to limit non-economic losses make consumers unambiguously worse off ex ante. Although insurance premiums fall and these reductions are passed on to consumers in full, this gain is more than offset by the increased risk that consumers are forced to bear.<sup>184</sup>

4.86 In contrast, the Committee heard that the current Act has the potential to incur additional costs on the public health system because injured people can receive a lump sum payment for general damages but can choose whether they use it to pay for medical treatment or access the public health system. This would then be passed on as a cost to the taxpayer. The Government suggested that the introduction of an impairment threshold would remediate this situation. A Treasury Directorate official explained:

...in fact the reforms we have got in place are probably going to reduce the cost on the public health system because under the compensation focus the payments are made to the individuals, then they make a choice about whether they pay for their own health care or fall back onto the public health system. Often these lump sum payments are used for purposes other than rehabilitation.<sup>185</sup>

4.87 The Committee queried whether any safeguard existed in the current system to avoid double compensation and was told:

...you can front up to the GP and be referred to a specialist and all those sorts of things without even mentioning the fact that this may have been from a vehicle accident or a compensable vehicle accident. Generally you are picked up through the system if you are subject to a current claim at the time. But once the claim has been settled and compensation has been paid you are just the same as everybody else on the street.<sup>186</sup>

4.88 The Committee understands that the Productivity Commission's report inquiring into disability care and support acknowledged that processes to

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<sup>183</sup> Submission No. 2, August 2011.

<sup>184</sup> King, S.P. (2010) Does Tort Law Reform Help or Hurt Consumers?, *The Economic Record*, 86, 275, pp. 563–577.

<sup>185</sup> Mr Roger Broughton, *Transcript of evidence*, 6 October 2011, pp. 8–9.

<sup>186</sup> Mr Roger Broughton, *Transcript of evidence*, 6 October 2011, p. 9.

avoid double compensation—where an injured party has access to a lump sum payment which may cover some or all of their care and support expenses may also access taxpayer funded services—was needed. Furthermore, the Commission noted that various measures to avoid double compensation such as lump sum preclusion periods and compensation recovery arrangements were difficult and costly to administer.<sup>187</sup>

## Human rights considerations

4.89 A matter raised as part of evidence to the Committee related to the Scrutiny of Bills and Subordinate Legislation Committee's report on the Bill (Scrutiny Report No. 34—24 March 2011), in particular its compliance with the *Human Rights Act 2004 (the HR Act)*. The Scrutiny of Bills and Subordinate Legislation Committee commented:

Given that the Bill would restrict in some ways the amount of damages otherwise obtainable at common law, the issue becomes whether these restrictions are justifiable under HRA section 28.<sup>188</sup>

4.90 At public hearings on the 6 October 2011 and 12 October 2011, the Committee sought comment on the report under section 38 of the HR Act as made by the Scrutiny of Bills committee with the Treasurer and the Law Council of Australia respectively, which both parties took on notice to respond. These responses are considered below.

4.91 The Committee notes that the ACT Human Rights and Discrimination Commissioner (the Commissioner) had made a submission to the Treasury Directorate as part of the consultation process on the exposure draft of the Bill. The Committee invited the Commissioner to provide any further comment on human rights considerations as they might relate to the proposed Bill. The Commissioner provided a submission.<sup>189</sup>

4.92 The Commissioner stated that:

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<sup>187</sup> Productivity Commission. (2011) *Disability Care and Support Inquiry Report*, 10 August, Canberra.

<sup>188</sup> Scrutiny of Bills and Subordinate Legislation Committee. (2011) Report on the Bill (Scrutiny Report No. 34—24 March 2011), p. 6.

<sup>189</sup> Submission No. 8, January 2012.

The Bill differs from the Exposure Draft, and the amendments have addressed some of the issues I had raised, but I continue to have some concerns about the consistency of other aspects of the Bill with rights protected under the *Human Rights Act 2004*...<sup>190</sup>

4.93 The Commissioner welcomed amendments to the Bill which address some of the issues she had raised, in particular:

- the harmonisation of the WPI thresholds for NEL psychological and physical injury at 15 per cent, and
- the removal of a cap on NEL damages.<sup>191</sup>

4.94 Notwithstanding these changes, the Commissioner continues to have concerns that the Bill appears to limit rights under the HR Act. The Commissioner emphasised that there was no discussion in the explanatory statement of the limitations the Bill would place on human rights and whether these were proportionate. The Commissioner suggested that it would be useful to examine ‘whether the stated objectives could be achieved in a way which would have less impact on human rights’.<sup>192</sup>

4.95 In evidence, the Committee discussed with Treasury Directorate officials issues raised by the Scrutiny committee and the Human Rights Commission with regard to human rights considerations. Ensuing discussion explored this matter:

**THE CHAIR:**...One of the issues is the right to a fair trial and equality before the law. The human rights commissioner has raised a concern that limiting legal rights to compensation on the basis of impairment effectively discriminates against people. Section 8 of the Human Rights Act protects the right to equality before the law and particularly provides protection against laws which discriminate on the basis of disability. The bill appears to be creating a legal discrimination against those of a particular class or amount of disability. Could you explain why this is a proportionate limitation in the context of section 28 of the Human Rights Act?

**Mr Broughton:** I think the intention of the act was that people with disabilities not be discriminated against. The bill that you have in front of you is actually discriminating in favour of people with disabilities because it provides a greater entitlement for people who are more permanently disabled than others.

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<sup>190</sup> Submission No. 8, January 2012, p. 1.

<sup>191</sup> Submission No. 2, January 2012, p. 2.

<sup>192</sup> Submission No. 2, January 2012, p. 2.

**MR HARGREAVES:** Would you perhaps entertain the comment by the scrutiny of bills committee, on which I sit—so I declare my interest here. It talks about anti-discriminatory practices with respect to people with disabilities but it does not actually talk about whether it is positive discrimination or negative discrimination. So would you entertain the idea that this legislation in fact, if it is going to be labelled as discrimination, is in the positive and therefore that people with disabilities in this city are going to be treated better as a result of this?

**Mr Broughton:** I think you have just said what I said but far more eloquently, thank you.

**THE CHAIR:** Could we focus not on the people who are the over 15 per cent but the under 15 per cent? With what we no longer have, you could regard it as discrimination against those people. You have only answered half of my question. You have not addressed the situation of the under 15 per cent. Could you address that section?

**Mr Broughton:** You are back to saying that we essentially do not allow people with less than 15 per cent impairment to access non-economic loss.

**THE CHAIR:** My understanding is that there are significant limitations. They cannot go to court et cetera.

**Mr Broughton:** No. The only thing the act does differently from what we are doing now is to say that if they go to court or if they are settling with the insurer outside court, they are not entitled to non-economic losses. It does not prevent those people from having their day in court. They are entitled to put in claims for health costs, for loss of income and for all the other things that they might do. But they are not able to be awarded an amount for non-economic loss.<sup>193</sup>

4.96 Human rights considerations as they relate to the Bill include:

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<sup>193</sup> *Transcript of evidence*, 6 October 2011, p. 23–24.

## Discrimination—section 8 of the *Human Rights Act 2004*

- 4.97 Section 8(3) of the HR Act 2004 specifies that ‘everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground’.<sup>194</sup>
- 4.98 With regard to human rights considerations as they might relate to section 8 of the HR Act 2004, the Government was of the view that the Bill does not indirectly discriminate because it applies to all persons. The Bill will impact on different people in different ways on the basis of the extent of their injuries. As such this outcome is ‘unrelated to a personal attribute as envisaged’ by the HR Act 2004.<sup>195</sup>
- 4.99 The Treasurer advised the Committee that:

The Bill introduces amendments to the *Road Transport (Third-Party Insurance) Act 2008* aiming to, among other things: encourage rehabilitation, encourage speedy resolution of CTP claims, keep the costs of insurance at an affordable level, and promote competition for CTP premiums.

While the proposed amendments may engage section 8, in so far as they may have different impacts on different claimants, in my view the limitation of the right is proportionate as it seeks to achieve the Bill’s objectives set out above, including encouraging rehabilitation and creating a sustainable scheme of third party insurance.<sup>196</sup>

## Introduction of the NEL WPI threshold

- 4.100 Notwithstanding the harmonisation of the thresholds for NEL physical and psychological injury, the Commissioner was of the view that the Bill would:
- ...still place those with certain disabilities (including permanent disabilities) at a detriment because the nature of their disability does not meet an arbitrary threshold. I therefore continue to have concerns that limiting access to NEL damages for one form of civil wrong, on the basis of a level of physical and psychological impairment, limits the rights to fair trial and equality.<sup>197</sup>

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<sup>194</sup> Section 8(3) of the *Human Rights Act 2004*.

<sup>195</sup> Mr Andrew Barr MLA, Response to QToN #3, public hearing of 6 October 2011, February 2012.

<sup>196</sup> Mr Andrew Barr MLA, Response to QToN #3, public hearing of 6 October 2011, February 2012.

<sup>197</sup> Submission No. 2, January 2012, p. 2.

4.101 The Law Council of Australia commented that:

...whole person Impairment ‘thresholds’ and higher discount rates will impact on certain vulnerable groups disproportionately. Whilst the Law Council accepts the provisions are not designed to directly discriminate on the basis of age or disability, potentially the provisions discriminate indirectly.

...

...if it is accepted that the Bill has the effect of indirectly discriminating against injured claimants on the basis of their age, employment status or level of disability, the Law Council agrees with the ACT Human Rights Commissioner that the discrimination may not be reasonable or proportionate to the objective being sought. This is because:

- (a) the identified objectives are vague and unsubstantiated by any evidence that the measures proposed in the Bill will be successful; and
- (b) the deleterious impact on injured people, particularly the young and the most catastrophically injured, will be profound if these measures are introduced.<sup>198</sup>

### No combined threshold

4.102 Section 155(2) of the Bill does not permit the combining of psychiatric and physical impairments to determine whether a person is over or under the 15 per cent threshold. The limitation on combining impairments, in the Commissioner’s view makes it:

...difficult to reconcile the description of this measure as ‘whole body impairment’ when the definition seeks to separate physical and psychological injury. This reinforces the impression that these thresholds are arbitrary.<sup>199</sup>

4.103 The President of the ACT Bar Association also commented:

Just on that human rights matter...*[there are]* things that may warrant consideration. The fact that psychological injury and physical injury cannot be aggregated does tend to suggest—and I suspect it is more the psychological injury that is being viewed as a somehow lesser or somehow more suspicious injury than a physical injury, but, again, I could not see any obvious justification as to why the two cannot be aggregated, and that is relative under the Human Rights Act.<sup>200</sup>

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<sup>198</sup> Law Council of Australia, Response to QToN at the public hearing of 12 October 2012, 26 October, pp. 2–3.

<sup>199</sup> Submission No. 2, January 2012, p. 2.

<sup>200</sup> Mr Phillip Walker, *Transcript of evidence*, 31 October 2011, p. 79.

## Lump sum discount

- 4.104 As noted previously, under section 155A of the Bill, the statutory discount rate will be increased from 3 per cent to five per cent. As discussed previously, it appears that this change is without justification aside from the argument that it aligns with other jurisdictions. Its proposed increase is contrary to a range of authoritative advice as cited earlier in this chapter and will impact on the youngest and most severely injured.
- 4.105 The Commissioner, along with a number of other submitters, raised concerns about the impact an increase in the discount rate from three per cent to five per cent would have on children and the disabled. This has previously been discussed in this chapter under—*Section 155A—Increasing the discount rate from 3 per cent to five per cent.*

## Costs

- 4.106 The Commissioner restated previous concerns raised in relation to CTP insurance with regard to the impact of a cap on access to costs based on economic loss. The Bill retains the current section 155 in a new section—156A. The Commissioner is of the view that section 155 of the Act:

...indirectly discriminates against individuals less likely to incur economic loss as the result of a motor vehicle accident, for example, low income earners including part time workers (who are disproportionately women), children and young people and students. Low income earners, by virtue of their low income, are likely to be awarded lower damages figures for lost income. They are also more likely than higher income earners to have lower medical costs due to access bulk-billed services. The culmination of these two costs being lower than for higher income earners means that law [*low*] income earners are more likely to fit the criteria in s.155(2)(a) and hence be prevented from claiming costs than higher income earners. This potentially amounts to indirect discrimination against these low income groups.<sup>201</sup>

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<sup>201</sup> Submission No. 8, January 2012, p. 3.

## The right to fair trial—subsection 21(1) of the *Human Rights Act 2004*

4.107 Section 21(1) of the HR Act 2004 specifies that ‘everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing’.<sup>202</sup>

4.108 With regard to human rights considerations as they might relate to section 21(1) of the HR Act 2004, the Government acknowledged that the proposed amendment whereby medical assessment certificates will have the status of ‘conclusive proof’ in a proceeding under the CTP, may engage section 21 of the HR Act 2004 to the extent that:

...it could affect the amount and type of evidence considered by an ‘independent and impartial court or tribunal after a fair public hearing’.<sup>203</sup>

4.109 However, notwithstanding the above, the Treasurer was of the view that:

...the impact on s21 is proportionate. It is justified to achieve the Bill’s objective to encourage speedy resolution of CTP claims by streamlining the process of medical assessment, with possible positive medical rehabilitation outcomes.

Importantly, the medical certificate is not determinative of a persons’ ability to make a CTP claim. The Bill contains provisions which allow the Court to reject the certificate if admitting it would cause substantial injustice. While the operation of the proposed amendment is yet to be seen in the ACT, the ability of the court to reject a certificate in these circumstances would then allow the parties to tender any evidence they seek to lead, thereby satisfying the requirements in section 21 of the HRA.<sup>204</sup>

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<sup>202</sup> Section 21(1) of the *Human Rights Act 2004*.

<sup>203</sup> Mr Andrew Barr MLA, Response to Supplementary Question #1 following on from the public hearing of 6 October 2011, February 2012.

<sup>204</sup> Mr Andrew Barr MLA, Response to Supplementary Question #1 following on from the public hearing of 6 October 201, February 2012.

## Assessment of impairment

4.110 The proposed section 155H will provide for a person to apply to a medical assessor for a second medical assessment on the ground that either (i) the injury has deteriorated or (ii) there is new information about the injury.

4.111 The Commissioner commented that:

Nonetheless, absent any 'substantial injustice', there appears no appeal or review right to the assessor or the courts in circumstances where a person feels their assessment has been incorrectly determined.<sup>205</sup>

4.112 The Commissioner proposed that an alternative would be to permit injured persons to be able to apply to the medical assessor for a second medical assessment in all cases. A further alternative, as suggested by the Law Council of Australia, would be to provide a review right to a court of Tribunal.<sup>206</sup> In the Commissioner's view, this option 'would be a relatively minor change but would lessen the limitation on the right to fair trial'.<sup>207</sup>

4.113 The President of the ACT Bar Association also commented with regard to section 155:

Just on that human rights matter...[*there are*] things that may warrant consideration...The point on which I concluded my opening in relation to the medical tribunals is that section 21 [*HR Act*] provides that you are entitled to have your rights determined by a competent, independent and impartial court or a tribunal after a fair and public hearing.<sup>208</sup>

## Summary

4.114 In summary, evidence to the Committee raised concerns about the consistency of aspects of the Bill with rights protected under the HR Act, in particular, under section 8 (Discrimination) and section 21 (The right to a fair trial).

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<sup>205</sup> Submission No. 8, January 2012, p. 3.

<sup>206</sup> Submission from ACT Law Society,  
<http://www.treasury.act.gov.au/compulsorytpi/CTP%20submission%20FINAL%20-%20Joint%20ACT%20Law%20Society,%20ALA%20and%20Bar%20Assoc.pdf> (accessed 9 March 2011)

<sup>207</sup> Submission No. 8, January 2012, p. 3.

<sup>208</sup> Mr Philip Walker, *Transcript of evidence*, 31 October 2011, p. 79.

4.115 Notwithstanding the Government's view with regard to human rights considerations as they might relate to sections 8 and 21 of the HR Act, the Committee is of the view that there are significant human rights considerations with the introduction of the 15 per cent WPI threshold and an increase in the statutory discount rate from three per cent to five per cent.

## Consideration of the NSW CTP insurance scheme

4.116 Consideration of the NSW CTP insurance scheme is pertinent to this inquiry as it provides a reasonable indication of what could be expected if similar changes to the CTP insurance scheme were introduced in the ACT.<sup>209</sup>

4.117 At the time the *Motor Accidents Compensation Act 1999* (NSW) (the MACA) was introduced, a 10 per cent WPI threshold was applied to general damages for pain and suffering. The impact of the impairment threshold was an 81 per cent reduction in the number of negligently injured road users who could claim compensation for pain and suffering.<sup>210</sup>

4.118 The Committee heard evidence, drawn from documents obtained in 2006 under freedom of information from the NSW Motor Accidents Authority (MAA)<sup>211</sup> that the performance of the NSW Scheme with regard to claims and premium costs included:

- The projected proportion of claims which resulted in a payment for NEL dropped from 58 per cent in 1996–1999 to 11 per cent for 2000–2005.<sup>212</sup> This translates into an 81 per cent decrease in the number of people who receive payment for NEL in NSW following a road crash.
- After the introduction of the MACA Act, for the period—1999 to 2005, the average CTP insurance premiums in NSW fell by around \$100, from \$433

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<sup>209</sup> Submission No. 5, September 2011, p. 5.

<sup>210</sup> Letter from Taylor Fry Consulting Actuaries to the Deputy General Manager of the Motor Accidents Authority of New South Wales of New South Wales (11 April 2006). Table 3 (p 9) as cited in Submission No. 5, September 2011, p. 3.

<sup>211</sup> Submission No. 5, September 2011, pp. 3–4.

<sup>212</sup> Letter from Taylor Fry Consulting Actuaries to the Deputy General Manager of the Motor Accidents Authority of New South Wales of New South Wales (11 April 2006). Table 3 (p 9) as cited in Submission No. 5, September 2011, p. 3.

to \$332.<sup>213</sup> However, notwithstanding the introduction of the impairment threshold, the average CTP insurance premium across NSW is now \$453.97.<sup>214</sup>

4.119 In considering the experience of the NSW Scheme, based on the evidence, it appears that insurer profitability for CTP insurance has been significant and, in the context of the cost to NSW road users, unjustifiably high.<sup>215</sup> The Committee was told:

- For the eight year period—1 July 1991 to 30 June 1999, NSW CTP insurers made an estimated profit of \$1034m (discounted value)—equivalent to 12 per cent of CTP insurance premiums collected.<sup>216</sup>
- For the six year period—1999 to 2005, NSW CTP insurers made profits of \$2.239m—equivalent to 27 per cent of CTP insurance premiums collected over that period.<sup>217</sup> The Committee understands that according to actuarial advice commissioned by the NSW Government, profit margins in the range of 4.5 to 6 per cent of gross premium for a CTP insurer are considered reasonable.<sup>218</sup>

4.120 In considering the performance of the NSW Scheme, it is important to note that it has a 10 per cent WPI threshold based on AMA 4, whereas the Bill under consideration will introduce a 15 per cent WPI threshold based on AMA 5.

4.121 As to the difference between AMA 5 and AMA 4, the Government explained:

In using AMA 5 guidelines, it has been necessary for the ACT to set the threshold at a level that achieves the same or similar outcomes to that in NSW, without unreasonably affecting those with severe injuries.

As AMA 5 is recognised to be more subjective in relation to the medical determination of physical impairments, the threshold is set at 15% or more in

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<sup>213</sup> MAA Annual Report 2005–2006, p. 83.

<sup>214</sup> Finity Consulting, CTP News—Spring 2010, October 2010.

<sup>215</sup> Submission No. 5, September 2011; and Submission No. 5a, October 2011.

<sup>216</sup> Gould, Adrian. (2005) Report to Motor Accidents Authority: Estimates as at 30 June 2005 of profitability of past NSW compulsory third-party premiums written by insurers, 12 October, Table 2.1, p. 3 as cited in Submission No. 5, September 2011, p. 3.

<sup>217</sup> MAA Annual Report 2009/10, p. 9.

<sup>218</sup> Letter from Greg Taylor, Taylor Fry Consulting Actuaries to David Bowen, General Manager, Motor Accidents Authority of New South Wales (4 October 2001), paragraph 6.3–6.5, p. 12 as cited in Submission No. 5, September 2011, p. 4.

order to capture claims in relation to relatively minor injuries where early treatment results in higher rates of recovery. The scheme actuary has advised that AMA 5/15% is a similar proxy to AMA 4/greater than 10 %<sup>219</sup>

4.122 The Committee understands that the Government estimates that the 15 per cent threshold will reduce the number of people eligible for NEL compensation arising from injury on ACT roads by approximately 85 per cent. Some evidence was of the view that this estimate was conservative and that the actual reduction in eligibility was likely to be higher.<sup>220</sup>

4.123 The Committee notes that a 2006 review of the performance of the NSW MAA by the NSW Parliament's Upper House Standing Committee on Law and Justice found that:

...profit estimates prepared by the MAA indicate that insurers will realise profits substantially higher than those estimated in premiums filings. Some Inquiry participants suggested that insurers had unduly profited whilst claimants had received inadequate damages. The Committee inquired into this issue and found that the primary cause of increased profits was an unexpected fall in the claim frequency in NSW.<sup>221</sup>

4.124 Furthermore, a submission from the NSW Bar Association to the Standing Committee on Law and Justice's Eleventh Review of the MAA and *Motor Accidents Compensation Act 1999*, in commenting on the operation of the NSW CTP insurance scheme noted:

The Association's representative on the Motor Accident Council had the opportunity earlier this year to engage in discussions with the MAA scheme actuaries. The actuaries conceded that looking back on payments for non-economic loss for accidents occurring between 1995 and 1999 (compensated under section 79A), it was clear (admittedly in hindsight) that the 1995 amendments had worked in terms of stabilising payouts for non-economic loss. The tragedy for the 90% of motor accident victims who have missed out on compensation for pain and suffering since 1999 is that the 1999 amendments were not financially necessary.<sup>222</sup>

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<sup>219</sup> Mr Andrew Barr MLA, Response to supplementary question No. 3, January 2012.

<sup>220</sup> Submission No. 5, September 2011, p. 4; Submission No. 2, August 2011.

<sup>221</sup> NSW Standing Committee on Law and Justice. (2006), Review of Exercise of the Functions of the Motor Accidents Authority and Motor Accidents Council, Report 31, September, NSW Legislative Council.

<sup>222</sup> NSW Bar Association. (2011) Submission to the NSW Upper House Standing Committee on Law and Justice's Eleventh Review of the Motor Accidents Authority and *Motor Accidents Compensation Act 1999*, 11 August, p. 6.

4.125 The Committee understands that a key criticism of the NSW scheme is that the major beneficiary of the scheme has been the insurers.<sup>223</sup>

4.126 As noted previously, whilst there was a reduction in CTP insurance premiums following the introduction of impairment thresholds together with other reforms, it appears from the evidence that a significant proportion of the reduced claims liability has been retained by insurers—as illustrated by a 27 per cent per year profit average since 1999. This outcome is all the more concerning as there is a competitive market for CTP insurance in NSW, made up of seven major insurers, of which none has a dominant market share.<sup>224</sup>

4.127 A recent article in the *Sydney Morning Herald* commenting on the NSW Scheme emphasised that:

Motorists have been overcharged \$500 each over the past decade under a green slip system that allows insurance companies to consistently over-estimate future claims and pocket billions in resulting 'super profits'.

Since 2000, insurers have taken an estimated \$2.5 billion above an 8 per cent profit margin deemed reasonable by the NSW government. Their actual margin has averaged 24 per cent and in 2002 reached 31 per cent.

The profit gouge equates to an extra \$50 on every one of the 1.3 million compulsory third-party policies, or greenslips, issued each year by companies such as NRMA Insurance, Suncorp, GIO, Allianz and QBE.<sup>225</sup>

4.128 In response, an article in the *Canberra Times* reported that :

Green slip insurers have defended the hefty profits made over the past decade, saying no one could have forecast a halving of claims in NSW.

The Insurance Council of Australia supported the profits, saying claims were half what had been forecast when premiums were set during negotiations with the MAA.<sup>226</sup>

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<sup>223</sup> *Transcript of evidence*, 12 October 2011, p. 41.

<sup>224</sup> MAA Annual Report 2009/10, p. 57; Submission No. 5, September 2011; Submission No. 5a, October 2011.

<sup>225</sup> Aston, H. (2011) The \$2.5 billion green slip slap, *Sydney Morning Herald*, 7 October.

<sup>226</sup> AAP. (2011) 'Insurers defend massive surge in green slip profits', *Canberra Times*, 11 October.

- 4.129 The Committee understands that the NSW Government has commenced an internal review of the excessive profits and the pricing of CTP insurance premiums.<sup>227</sup>
- 4.130 The situation with the NSW scheme highlights that NSW drivers are paying premium costs for a level of coverage that excludes approximately 80 per cent of crash victims from accessing compensation attributable to the introduction of an impairment threshold for NEL in 1999. Coupled with the long-tailed nature of the scheme, whereby actual profits claimed in any given underwriting year, do not emerge until 5–6 years after a premium has been written, has given rise to the practice of NSW insurers over-estimating claims and underestimating profits to be realized in more recent underwriting years. The result has been significant profits for insurers and an overcharging of motorists relative to the level of compensation they can access under the Scheme.<sup>228</sup>
- 4.131 The Committee notes that insurers are profit seeking entities acting in the best interests of their shareholders and as such are entitled to make reasonable profits. Furthermore, they are a key stakeholder in any CTP insurance scheme. What concerns the Committee is a legislative framework that permits insurers to make profits that are out of proportion with the level of risk carried by the insurer coupled with a scheme that excludes approximately 80 per cent of crash victims from accessing compensation attributable to the introduction of an impairment threshold for NEL. It appears that the NSW scheme is skewed unfairly towards insurers at the expense of a reduction in access to compensation.
- 4.132 The experience of the NSW CTP insurance scheme should be heeded in any future amendment to the ACT CTP insurance scheme. Furthermore, the outcomes of the recently announced review of the NSW CTP insurance scheme should be examined in detail prior to any amendment to the current Act.

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<sup>227</sup> Aston, H. (2011) The \$2.5 billion green slip slap, *Sydney Morning Herald*, 7 October.

<sup>228</sup> Submission No. 5, September 2011.

## RECOMMENDATION 6

- 4.133 **The Committee recommends that the ACT Government, to the extent that this work does not already take place, should keep a watching brief on all jurisdictional reviews of compulsory third-party insurance schemes.**

## Effectiveness of the proposed amendments in meeting the objectives of the Bill

- 4.134 A useful exercise to determine the appropriateness of proposed amendments is to assess a Bill and its likely impact against each of its generally regarded objectives. Based on the evidence received, this section assesses the Bill and the likelihood of its objectives being achieved.
- 4.135 As a general comment, the Law Council of Australia was:
- ...concerned that the provision[s] of the Bill are largely inimical or unrelated to most of its stated objectives.<sup>229</sup>
- 4.136 This evidence highlights that provisions in the Bill are ‘essentially hostile to its objectives’ and if this is the case, the Committee has concerns about the effect of the Bill if it is passed in its current form.

## Medical treatment and rehabilitation

- 4.137 The Law Council of Australia submitted that it could not see anything in the Bill that would directly address medical treatment and rehabilitation. Essentially, the argument that has been put to support an objective of addressing medical treatment and rehabilitation, is that if the incentive to not seek treatment is removed, it will follow that people will be encouraged to focus more on that area of the scheme.<sup>230</sup> However, the Law Council of Australia strongly rejected:
- ...any suggestion that the Bill might affect recovery outcomes for road accident victims. There is nothing in the Bill directed at improving access to treatment and rehabilitation services and it is disingenuous to suggest otherwise. Nor is there

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<sup>229</sup> Submission No. 5, September 2011, p. 1.

any provision creating a stronger presumption that insurers will agree to meet the cost of medical or other treatment.<sup>231</sup>

4.138 Evidence to the Committee argued that the basis for this claim was a spurious and unsupported notion—that is, that allowing injured people to pursue their common law rights impedes their recovery.<sup>232</sup>

4.139 The President of the ACT Law Society commented:

We understand that the committee has been informed that monetary compensation for injuries received retards return to health and work. There is no empirical evidence that such is the case.<sup>233</sup>

4.140 The Committee understands that a number of studies have been conducted examining the effect of litigation on recovery following a crash and that the majority of these studies have been either discredited or found to be inconclusive.<sup>234</sup>

4.141 The Committee also notes a recent authoritative meta-study (Spearing and Connelly) conducted in 2009, which evaluated the quality of the empirical evidence regarding the link between injury compensation and poor health outcomes. This study concluded that:

Until consistent, high quality evidence is available, calls to change scheme design or to otherwise alter the balance between the cost and availability of injury compensation on the basis that compensation is ‘bad for health’, should be viewed with caution.<sup>235</sup>

4.142 Ensuing discussion with Ms Spearing explored what sort of consistent, high-quality evidence was required:

**Ms Spearing:** A lot of the studies and systematic reviews, unlike the primary studies that these reviews have looked at, have not dealt with the problems of two sorts of bias which hamper the quality of observational studies, and neither of those sorts of bias have been dealt with convincingly. In fact, one has not been dealt with at all. It is that conclusion that I am directing my statement at—the fact

<sup>230</sup> Submission No. 5, September 2011; *Transcript of evidence* 12 October 2011.

<sup>231</sup> Submission No. 5, September 2011, p. 2.

<sup>232</sup> Submission No. 5, September 2011, p. 2.

<sup>233</sup> Ms Noor Blumer, *Transcript of evidence*, 31 October 2011, p. 55.

<sup>234</sup> Submission No. 5, September 2011, Submission No. 5b, October 2011.

<sup>235</sup> Spearing, N. and Connelly, L. (2009) Is compensation—‘bad for health’? a systematic meta-review, *International Journal of the Care for the Injured*, **41**, 7, pp. 683-692.

that we need to have primary studies that convincingly deal with both sources of bias so that we can disentangle this question a little bit better than we have.

**MR SMYTH:** So we as a committee, or those seeking to change the laws, if somebody is running that sort of excuse, should treat it with a great deal of scepticism?

...

**THE CHAIR:** We should be sceptical about people pushing the idea that changes will improve the medical outcomes? Would that be a fair summary?

**Ms Spearing:** You are asking me whether it is premature to change the legislation on the basis of the health outcomes question?

**THE CHAIR:** Yes.

**Ms Spearing:** Yes, I strongly believe that it is. I have spent 3½ years looking at all of the research in this field and I strongly believe this argument about compensation or aspects of seeking compensation and the effect on health outcomes does not have any merit based on what we have before us at the moment. I do not believe this argument that compensation makes for worse health outcomes stands up.

...

**Ms Spearing:** I think the argument is too soon. You cannot conclude that health is adversely affected by compensation or by the process to seek compensation based on the current research. That is my conclusion. That is all I can say really. What happens is up to other people, but based on the science there is no conclusion yet. It may be that, when the bias is taken into consideration, we find out that perhaps aspects of the process lead to worse health. I do not know that and I do not think anybody else does yet. Or it may be that we find there is no effect. Until these sorts of studies are done and these considerations are taken it is not possible to use that argument that health can be adversely affected by compensation or a compensation-seeking process.<sup>236</sup>

4.143 Throughout its inquiry, the Committee was provided with a number of research papers to support the proposition that there is a relationship between compensation, aspects of seeking compensation, and effect on health outcomes.

4.144 The Committee emphasises that the methodological rigour and findings of the authoritative study conducted by Spearing and Connelly should be carefully

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<sup>236</sup> *Transcript of evidence*, 31 October 2011, pp. 73–74.

considered when decisions are being made to alter compensation entitlements or legal processes in CTP insurance schemes. Specifically, with regard to the proposed association between compensation (and related processes) and poor health outcomes, Spearing and Connelly argued in their meta-review:

..that the best quality of evidence on this topic would (1)focus on a single compensation concept or process(e.g., compensation per se, or related legal processes such as litigation, legal representation, or particular types of compensation systems) and would not treat these as homogeneous, (2)would include primary studies using health outcome measures as opposed to those that use proxy measures of health (such as claim duration), and (3) would take a high level of care (e.g., by conducting broad searches and appraising the quality of primary studies) to minimise potential sources of bias, as judged by our application of the AMSTAR instrument<sup>237</sup>. We found that just one systematic review met all of these three criteria and, perhaps ironically, it was the only one to conclude that there is strong evidence of no association between litigation(as a compensation- related construct) and health outcomes (measured in terms of pain and disability).<sup>238</sup>

4.145 The Committee is strongly of the view that a cautious approach should be taken with regard to altering compensation entitlements or legal processes in CTP insurance schemes on the basis they may improve health outcomes and reiterates the conclusion of Spearing and Connelly’s authoritative study:

...that until consistent, high quality, evidence is available from studies that have addressed the methodological problems in this field of inquiry, calls to change injury compensation on the basis that it is “bad for health” should be viewed with caution. There is a danger that decisions to alter compensation entitlements or legal processes based on inconclusive and conflicting results— whether these are obtained from primary or secondary research— may themselves have negative consequences for the wellbeing of injured people.<sup>239</sup>

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<sup>237</sup> Shea, B., Bouter, L., Peterson J., Boers, M., Andersson, N. and Ortiz, Z., et al. (2007) External validation of a measurement tool to assess systematic reviews (AMSTAR). *PLoS ONE*, 2, 12, e:1350.

<sup>238</sup> Spearing NM. Response to Cassidy JD, et al.. *Injury* (2011), doi:10.1016/j.injury.2010.12.021, p. 1.

<sup>239</sup> Spearing NM. Response to Cassidy JD, et al.. *Injury* (2011), doi:10.1016/j.injury.2010.12.021, p. 2.

4.146 Reference to the statistics relating to the NSW scheme, concerning improvement in access to medical care and treatment was cited by the Government as evidence in support of the proposed Bill achieving this stated objective. The Law Council of Australia cautioned about the limitations associated in assessing this data to support an improvement in access to medical and treatment:

It is very difficult to assess that data, particularly in light of the fact that there has been a significant restructure of the way that payments are issued. For instance, the former insurance minister in New South Wales used to regularly state that there had been a real increase in the level of non-economic loss payments to people who had received compensation under the scheme, following the 1999 changes. In fact, that was largely due to the fact that there had been a removal of all of the claims below a certain level, due to the threshold, and as a result the average size of the non-economic loss payment looked larger. A similar story could be told in relation to the proportion for medical care and treatment. So we regard that as a fairly spurious justification for a threshold in this instance. Certainly, the discount rate does not help either.<sup>240</sup>

4.147 The President of the ACT Bar Association stressed:

When I read the 50 pages of transcript of what has already occurred before you, the dominant theme seemed to be that the purpose of this bill was to direct more money towards the rehabilitation of injured motor vehicle accident victims. I expected, when you had a series of Treasury officials before you and that was the key aspect, so it was said, of this legislation, that you would have been taken to a clause in the bill which showed you exactly how that was going to occur. At no time in that 50 pages did anybody favour you with that reference. The simple reason is that no such clause exists.<sup>241</sup>

4.148 The President of the ACT Bar Association emphasised that clauses in the Bill reduce compensation for medical treatment as opposed to diverting more funds to rehabilitation. In particular, the provisions that reduce compensation for medical treatment are:

...those which increase the discount rate. They also reduce the amount of compensation payable for lost earnings...[and]

...there is a reduction in the amount of compensation available to the vast majority of people for what has been called non-economic loss. That is what this

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<sup>240</sup> Mr Nick Parmeter, *Transcript of evidence*, 12 October 2011, p. 44.

<sup>241</sup> Mr Philip Walker, *Transcript of evidence*, 31 October 2011, p. 57.

bill does. It reduces. It does not give and there is no clause in it which anybody can point to which shows that it does.<sup>242</sup>

### Catastrophic injury

4.149 The Committee notes that there is no definition of catastrophic injury<sup>243</sup> in the Act. In the context of considering insurance arrangements for catastrophic injury, the Productivity Commission emphasises that:

A key focus of insurance for personal injury is on people who face particularly high and enduring costs from an accident. There are over 20 000 people with a 'catastrophic-level' injury in Australia, with up to 1 000 being injured each year. These injuries are mostly experienced by young men aged less than 30 years old, and usually entails a period of initial acute care and intensive medical and social rehabilitation to return to some level of independence. In most cases, the consequences of the injury will have a broader and permanent impact on a person's life and functioning, and typically affect their family.<sup>244</sup>

4.150 In general terms, the classification of an injury as catastrophic needs to take into account (in combination) the type of injury acquired and its emergency treatment, the initial post injury treatment and rehabilitation phase together with the post treatment lifelong care and support required. The Productivity Commission suggests that catastrophic injuries:

...mainly comprise major acquired brain injuries, spinal cord injuries, burns and multiple amputations. In most instances, people need lifelong supports and, particularly in the initial post-injury phase, have intensive clinical needs and require post treatment supports, early interventions and rehabilitation services.<sup>245</sup>

4.151 In the case of people who suffer a catastrophic injury, in the early stages of the injury, insurance arrangements will be focused on costs and hospital and rehabilitation services during the initial recovery period. However, the

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<sup>242</sup> Mr Philip Walker, *Transcript of evidence*, 31 October 2011, p. 57.

<sup>243</sup> The Productivity Commission's report—*Disability Care and Support Inquiry Report*, 10 August 2011 refers to **catastrophic injury** as—'a level of personal injury broadly consistent with existing definitions and assessments used by the Victorian Transport Accident Commission (TAC) major injury unit, the NSW Lifetime Care and Support Authority (LTCSA) and the New Zealand Accident Compensation Corporation's (ACC) National Serious Injury Service' (p. 794).

<sup>244</sup> Australian Productivity Commission. (2011) *Disability Care and Support Inquiry Report*, 10 August, Canberra, p. 793.

<sup>245</sup> Australian Productivity Commission. (2011) *Disability Care and Support Inquiry Report*, 10 August, Canberra, p. 43.

significant ongoing cost and need is for lifetime care and support, in the main for personal care services.<sup>246</sup>

- 4.152 According to the literature, approximately half of all catastrophic injuries in Australia are the result of motor vehicle crashes.<sup>247</sup>
- 4.153 The Committee discussed with witnesses the concept of lifetime care and support for people with catastrophic injuries. The Committee understands that NSW has a no-fault lifetime care scheme—the Lifetime Care and Support Scheme which is administered by the Lifetime Care and Support Authority of NSW—a statutory corporation established under the *Motor Accidents (Lifetime Care and Support) Act 2006*. The Scheme provides:
- ... lifelong treatment, rehabilitation and attendant care for people who have a spinal cord injury, a moderate to severe brain injury, multiple amputations, serious burns or blindness from a motor accident in NSW.<sup>248</sup>
- 4.154 The availability of lifetime care schemes whilst ensuring that more predictable and coordinated care and support are provided over an injured person's lifetime, also can mitigate the issue of funding large compensation payments and the subsequent impact on scheme viability.
- 4.155 The Committee does not believe that the Bill, as proposed, addresses the most seriously disadvantaged, i.e., those catastrophically injured, noting that other jurisdictions have lifetime care systems. The Committee put this proposition to NRMA Insurance's General Manager, Long Tail Claims, who replied:

**Ms Maini:** That is right.

**MR SMYTH:** Should we be looking to introduce that into the ACT?

**Ms Maini:** I cannot answer this. I am assuming that there is an inevitability that the ACT will look at an extension of the lifetime care and support scheme, given what is going on with the Productivity Commission and the establishment of

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<sup>246</sup> Australian Productivity Commission. (2011) *Disability Care and Support Inquiry Report*, 10 August, Canberra, p. 793.

<sup>247</sup> Walsh, J., Feyers, A.M., Johnson, S., Higglett, M., Cameron, I. and Rebbeck, I. (2007) *Whiplash Claimants Health Outcomes and Cost Pre and Post the 1999 NSW CTP legislative Reforms*, PriceWaterhouseCoopers.

<sup>248</sup> NSW Lifetime Care and Support Scheme—<http://www.maa.nsw.gov.au/default.aspx?MenuID=24>

NIIS [NDIS]. There may be an inevitability there. Whether the ACT Assembly wants to accelerate that is really a matter for the government.<sup>249</sup>

- 4.156 As noted previously, the impending development regarding an NDIS, whilst adding another layer of complexity to injury insurance frameworks, create an impetus for the ACT Government to examine the feasibility of introducing a lifetime care scheme.

#### RECOMMENDATION 7

- 4.157 **The Committee recommends that the ACT Government advise the ACT Legislative Assembly of: (a) how it intends to address the issue of lifetime care for people catastrophically injured, in the context of the development by the Commonwealth of proposals regarding the introduction of an National Disability Insurance Scheme (NDIS); or (b) in the absence of a NDIS, how it will examine the feasibility of lifetime care for people catastrophically injured in motor vehicle crashes.**

#### RECOMMENDATION 8

- 4.158 **The Committee recommends that, if the National Disability Insurance Scheme (NDIS) does not proceed in a timely fashion, the ACT Government should examine the feasibility of introducing a no-fault lifetime care scheme for people who suffer catastrophic injury.**

### Encouragement of speedy resolution of claims

- 4.159 The Law Council of Australia was of the view that there did not appear to be any provisions in the Bill that would foster the speedy resolution of claims. The Committee understands that reforms introduced in 2008 were designed to address this issue and, based on preliminary evidence, appear to be working.
- 4.160 However, evidence to the Committee emphasised that these reforms need to be given more time to be assessed for their effectiveness.<sup>250</sup>

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<sup>249</sup> *Transcript of evidence*, 10 November 2011, p. 90.

<sup>250</sup> *Transcript of evidence*, 12 October 2011, p. 44; Submission No. 2, August 2011.

## Introducing competition

4.161 The Committee accepts that the Government is trying to introduce competition as an outcome of the Bill. It appears that the mechanism by which the Bill is attempting to do this is by limiting compensation.<sup>251</sup>

4.162 The Government seems to be working on the premise that the only way to lower premiums is to introduce competition by encouraging insurers to enter the ACT insurance market. The introduction of competition in the main will be achieved by reducing benefits to those insured under the Scheme's insurance policies, thereby reducing risk and increasing the profitability of CTP insurance in the ACT.<sup>252</sup> The Law Council of Australia further elaborated:

The Government's case is based on an assumption that, all other things being equal, interstate insurers will be motivated by potential profit to attempt to break the NRMA's long held monopoly on CTP insurance in the ACT (which was, until introduction of the 2008 Act, supported by statute). The Law Council considers this to be a dangerous assumption, the cost of which will be borne by those injured on ACT roads without any corresponding certainty as to the degree of reduction in premium that may result.

If this Bill is enacted and premiums fall as a result (which is a highly contestable assumption given there is a monopoly insurer), it will be because CTP insurance policies in the ACT are worth substantially less.<sup>253</sup>

4.163 The Law Council of Australia commented that:

We are not sure if it will be successful; neither is the government, according to its own evidence. But it is something that we perceive as a genuine attempt to encourage other insurers to enter the market. Our argument is that we do not think you necessarily need to go to these lengths to make the ACT an attractive place for other insurers. It is also not necessarily apparent that you need competition in order to bring down premiums. There might be other ways of doing that.<sup>254</sup>

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<sup>251</sup> Submission No. 5, September 2011, p. 2.

<sup>252</sup> Submission No. 5, September 2011.

<sup>253</sup> Submission No. 5, September 2011, p. 3.

<sup>254</sup> Mr Nick Parmeter, *Transcript of evidence*, 12 October 2011, p. 45.

4.164 With regard to the introduction of competition, the Government has made claims that the proposed changes, in particular the impairment threshold, will help introduce competition. The NSW scheme experience tells a different story. A witness elaborated:

Let me also say that the insurers entering the market thing is possibly a bit of a furphy. We started in 1988 with 13 insurers in New South Wales. We are now effectively down to five. Allianz holds multiple licences using the old CIC label, but effectively we have only got the five insurers. There has been no sign of any new entrant into the market for the better part of a decade, despite that being one of the things promised with the introduction of the 1999 act—that it would encourage new entrants into the market. It has not done it and I would be very surprised if it did it down there for you either.<sup>255</sup>

4.165 The Committee heard evidence querying whether the entry of other insurers to the market was a necessary requisite to drive premiums down. This was on the basis that there are also other schemes in Australia that have a single insurer.<sup>256</sup>

4.166 The Committee was interested to know which jurisdictions also have a single insurer and was told:

Tasmania is one example. Queensland—not in CPT, but in workers compensation. Both of the schemes just nominated have rising solvency levels. I can tell you from the Queensland scheme that, with a monopoly insurer, what underpins the great success of that scheme financially is both the design framework of the scheme and the culture. I spoke half an hour ago to a lawyer in Hobart who is active in the CTP scheme in Tasmania and sought his advice in relation to why the Tasmanian scheme seems to work well, has low premium and one insurer. His advice was that it was largely cultural—that there is a culture within the scheme of early intervention, early resolution and claims get through the process quite well.<sup>257</sup>

4.167 The Committee was also interested to know how insurance premiums were going to fall if the proposed changes in the Bill were introduced. The Under Treasurer advised:

It is actually difficult to predict how much future CTP insurance premiums will reduce by. There are a number of drivers of those CTP premiums. Obviously

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<sup>255</sup> Mr Andrew Stone, *Transcript of evidence*, 31 October 2011, p. 63.

<sup>256</sup> *Transcript of evidence*, 12 October 2011; Submission No. 5, September 2011; Submission No. 5a, October 2011; Submission No. 5b, October 2011.

<sup>257</sup> Mr Simon Morrison, *Transcript of evidence*, 12 October 2011, p. 45.

there are issues around wage inflation and superimposed inflation—increases above wage inflation. There are issues around the frequency of accidents and then there are issues around award payments. So there are a complex set of issues that go to determining the premium set.

There is no doubt, though, in our mind that this will put downward pressure on the increase in premiums. So the rate of growth in the premiums will no doubt slow and, hopefully, they will reduce but we would not have a figure that we would be putting on that actual—in comparison, all else being equal—reduction in premiums.<sup>258</sup>

4.168 In the absence of a figure, the Committee sought detail as to how the Government would determine if the proposed changes had delivered on the Bill's objectives, in particular a reduction in premiums, and was told:

...you can only look at this in terms of the historical increase in premiums. Certainly anything that would maintain the premium or reduce the premium would demonstrate exactly that. Anything that reduced the current rate and growth in premiums that we have seen is another way that we will measure it. What is our current rate of growth or the rate of growth in the last three years? Is it less than that? Is it actually negative in terms of the premiums now being levied?

I guess it is probably also fair to say that we do get a fair amount of disaggregated data in relation to the scheme. So we do understand the issues of the number of claims and superimposed inflation and wage growth et cetera. Certainly from a regulator's perspective, we can take a look at what is actually happening in those premiums.

Having said that, though, these are insurance premiums which have long-tail claims as well. We are still dealing with significant and catastrophic injuries from the past as well and they will need to be worked their way through. So any improvement in premiums will have to be judged in the relative long run as well.<sup>259</sup>

## **Promoting measures directed at eliminating or reducing causes of motor crashes and mitigating their results**

4.169 The Law Council of Australia noted that whilst the promotion of measures directed at eliminating or reducing causes of motor crashes and mitigating

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<sup>258</sup> Ms Megan Smithies, *Transcript of evidence*, 6 October 2011, p. 2.

<sup>259</sup> Ms Megan Smithies, *Transcript of evidence*, 6 October 2011, p. 3.

their results was listed in the Explanatory Statement as one of the objectives of the Bill, in its view there did:

...not appear to be anything in the Bill that would encourage safer driving or eliminate/reduce causes of motor accidents, much less mitigating their results.<sup>260</sup>

4.170 Again, the Law Council of Australia submitted that it could not really see anything in the Bill that would make ACT roads safer or encourage safer driving.<sup>261</sup>

4.171 The Committee notes that NRMA Insurance is a strong advocate of road safety initiatives to reduce the severity and number of motor crashes in the ACT and across Australia.<sup>262</sup> The Committee understands that NRMA Insurance is the only insurer in Australia that also has a dedicated research arm to its insurance operations. NRMA Insurance explained that they:

...are the only insurer in Australia to own and operate a physical vehicle research centre in which we undertake research into the effects of automotive design and engineering on the safety, security and repair costs of motor vehicles. We have a long history of working with community groups such as KidSafe and the broader industry to change behaviour and reduce incidents on the road.<sup>263</sup>

4.172 In evidence, a witness elaborated:

Since 2004 we have contributed nearly \$4 million back to the community through the NRMA ACT Road Safety Trust, matching motorists' contributions dollar for dollar. We have given a further \$1 million through our community partnerships such as Kidsafe, the ACT home safety program, the State Emergency Service and our community grants program.<sup>264</sup>

4.173 At the time the Bill was referred to the Committee for inquiry, the then Treasurer commented:

I know that one of the biggest changes that we could make is that we could all slow down and stop tailgating people. That would be a good start. That would have a big impact on the scheme.<sup>265</sup>

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<sup>260</sup> Submission No. 5, September 2011, p. 3.

<sup>261</sup> *Transcript of evidence*, 12 October 2011, p. 45.

<sup>262</sup> Submission No. 4, September 2011, p. 3.

<sup>263</sup> Submission No. 4, September 2011, p. 3.

<sup>264</sup> Ms Mary Maini, *Transcript of evidence*, 10 November 2011, p. 80.

<sup>265</sup> Ms Katy Gallagher MLA, ACT Legislative Assembly Debates, 31 March 2011, p. 1174.

- 4.174 The Committee notes that successive governments have implemented a range of transport and road policy initiatives that may impact positively on road safety, by eliminating or reducing causes of motor crashes. This includes: (i) the lowering of speed limits in residential areas; (ii) red light and speed cameras; (iii) point to point speed cameras; (iv) random drug and alcohol testing; (v) road improvements to address black spots; (vi) random vehicle checks for unregistered and uninsured vehicles; (vii) public awareness campaigns, for example the road safety signage throughout Canberra promoting positive driving behaviour; (viii) the application of public holiday demerit points; (ix) power to seize false or otherwise unlawful driver licences and registration-related documents; (x) the introduction of the RAPID (recognition and analysis of plates identified) automatic number plate recognition technology used by police to detect possible unlicensed drivers or unregistered vehicles in roadside operations; (xi) as well as several initiatives to improve safety of pedestrians and cyclists, such as lowered speed limits in shopping areas and bicycle lanes and paths.
- 4.175 The Committee acknowledges that the Chief Minister received an Australian Bicycling Achievement Award in March 2012 for ‘her active support to transform key areas of the city into bicycle and walking friendly precincts’.<sup>266</sup>
- 4.176 Notwithstanding this, the Committee notes that Australia remains significantly less advanced in terms of the prioritisation of pedestrians and cyclists, and pedestrian and cyclist infrastructure, than international best practice.<sup>267</sup> For example, in some western European countries, 10 to 20 per cent of transport journeys are made by bicycle as compared with less than 2 per cent in Australia.<sup>268</sup>
- 4.177 The Committee acknowledges the contribution NRMA Insurance has made in partnership with the ACT community to the enhancement of road safety for the benefit of all road users as part of the NRMA–ACT Road Safety Trust.

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<sup>266</sup> CPF. (2012) National Award for ACT Chief Minister—accessed 8 May 2012, available at: <http://www.cyclingpromotion.com.au/content/view/558/9>

<sup>267</sup> Infrastructure Australia. (2009) *Cycling Infrastructure for Australian Cities: Background Paper*, March, p. 2; 5.

<sup>268</sup> Infrastructure Australia. (2009) *Cycling Infrastructure for Australian Cities: Background Paper*, March, p. 2.

- 4.178 The NRMA–ACT Road Safety Trust was established in 1992 and was originally funded by a \$10 million contribution from NRMA Insurance. This contribution represented surplus third-party insurance premiums that resulted from lower than expected insurance claims during the 1980s. This amount was increased to \$12 million as a result of investment income earned in advance of project expenditure. The \$12 million was committed to road safety related projects by 30 June 1998.<sup>269</sup>
- 4.179 The Trust is currently funded by the \$2.00 Road Safety Contribution, which is raised as part of ACT motor vehicle registration fees and is matched by NRMA Insurance. Funds raised are distributed via an annual grant program. Over the period 1992 to 2009, the Trust has allocated more than \$20 million to approximately 340 road safety projects.<sup>270</sup>

## Summary—Committee position on the Bill

- 4.180 The Bill, if fully or partly passed by the Assembly, will bring a range of changes to the CTP insurance scheme in the ACT. At the time the Bill was referred, the then Treasurer emphasised:
- ...this is very significant law reform...<sup>271</sup>
- 4.181 The Parliamentary Convenor of the ACT Greens also commented:
- The proposed CTP changes have certainly proved to be controversial ...<sup>272</sup>
- 4.182 The Committee is fully aware that the significant amendments detailed in the Bill encompass tort law reforms. The proposed reforms—introduction of an impairment threshold for NEL and an increase in the discount rate for lump sum payments under economic loss are of concern to the Committee.

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<sup>269</sup> NRMA–ACT Road Safety Trust website—

<http://www.roadsafetytrust.org.au/c/rtt?a=da&did=1000950>—accessed 25 February 2012.

<sup>270</sup> NRMA–ACT Road Safety Trust website—

<http://www.roadsafetytrust.org.au/c/rtt?a=da&did=1000950>—accessed 25 February 2012; ACT Government RegoACT website—<http://www.rego.act.gov.au/registrations/regorenawal.htm>—accessed 25 February 2012.

<sup>271</sup> ACT Legislative Assembly, *Hansard*, 31 March 2011, p. 1173.

<sup>272</sup> ACT Legislative Assembly, *Hansard*, 31 March 2011, p. 1171.

- 4.183 The Committee notes that analysing the effect of tort law reform on consumers found that reforms to limit compensation for NEL make consumers unambiguously worse off before the injury event. Whilst this research found that insurance premiums fell and these reductions were passed on to consumers, any gain is more than offset by the increased risk that consumers have to carry.<sup>273</sup>
- 4.184 The Committee acknowledges that no insurance scheme is perfect and that scheme design will inevitably involve tradeoffs among a range of criteria. Furthermore, a critical consideration of insurance schemes is that they need to be affordable and cost effective and that these goals are increasingly being applied to common law regimes.<sup>274</sup>
- 4.185 After careful consideration of the evidence, the Committee concludes that the Bill not be supported in its current form on the basis that:
- a) there is insufficient evidence that the proposed amendments will achieve the two overarching objectives of the Bill—(i) to achieve better health outcomes for those injured in road crashes, and (ii) to reduce the costs to the community of CTP insurance premiums
  - b) there are significant human rights considerations with the introduction of the 15 per cent WPI threshold and an increase in the discount rate
  - c) limiting access to common law compensation should not be done lightly. The effect the Bill will have on premium costs is uncertain, however, the impact of the reduced access to common law recompense is clear. Furthermore, if there were changes to premiums, it is likely to take years for these to be passed onto consumers
  - d) the case has not been made to warrant the introduction of the amendments. Evidence to the Inquiry indicated that the 2008 reforms were starting to take effect and further time was needed to understand the impact of these reforms
  - e) the lessons from the history of the NSW CTP insurance scheme, as detailed in this report, should be heeded, and are a reasonable indicator

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<sup>273</sup> King, S.P. (2010) Does Tort Law Reform Help or Hurt Consumers?, *The Economic Record*, **86**, 275, pp. 563–577.

<sup>274</sup> Australian Government. (2004) *Reform of Liability Insurance Law in Australia*, February, Commonwealth of Australia, Canberra; Field, A. (2008) There Must be a Better Way: Personal injuries compensation since the crisis in insurance, *Deakin Law Review*, **13**, 1.

of how the proposed amendments are likely to play out in the ACT. Noting of course that NSW has a 10 per cent WPI threshold based on AMA 4 and the ACT will introduce a 15 per cent WPI threshold based on AMA 5

- f) any future amendment to the Act should not take place until after the NSW Government's internal review<sup>275</sup> of the excessive profits and the pricing of CTP insurance premiums has reported and its findings considered in detail, and
- g) any future amendment to the Act should take into consideration the findings of this inquiry.

4.186 In view of these most serious and fundamental concerns about the nature of this Bill, the Committee does not support the Bill. Notwithstanding this position, the Committee appreciates the work of the Government with regard to the ACT CTP Insurance Scheme. The Committee acknowledges that the Government may choose to bring forward or propose further reform with regard to the Scheme. However, the Committee is of the view that any further reform should not take place until the Government has had sufficient time to consider this report, take into account the findings of its statutory review pursuant to section 275 of the Act, and the findings of the internal review of the NSW CTP insurance scheme. On this basis, the Committee is of the view that the Bill, as presented, should not be supported.

4.187 As noted earlier, the Committee has had concerns throughout this inquiry that the reforms proposed in the Bill were premature. These concerns have been confirmed by evidence from a number of witnesses which show that it is still far too early to undertake a full assessment of the reforms which were implemented in 2008. The very nature of a business, where there are long lead times between an event occurring and of one or more outcomes arising from that event, means that a reasonable period—being some years—has to elapse before a useful evaluation can be made.

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<sup>275</sup> NSW Government's internal review of the NSW CTP insurance scheme—announced October 2011.

RECOMMENDATION 9

- 4.188 **The Committee recommends that after considering the findings of the: (i) Standing Committee on Public Accounts inquiry into the Road Transport (Third-Party Insurance) Amendment Bill 2011; (ii) statutory review pursuant to section 275 of the *Road Transport (Third-Party Insurance) Act 2008*; and (iii) NSW Government's internal review of the NSW CTP insurance scheme, the ACT Government may choose to bring forward or propose reform to the ACT CTP Insurance Scheme—but that the Road Transport (Third-Party insurance) Amendment Bill 2011, as presented, should not be supported.**

RECOMMENDATION 10

- 4.189 **The Committee recommends that the Road Transport (Third-Party Insurance) Amendment Bill 2011, in its current form, should not be supported by the ACT Legislative Assembly.**

RECOMMENDATION 11

- 4.190 **The Committee recommends that any significant changes to NSW CTP insurance legislation should automatically trigger an internal government review of the ACT CTP insurance legislation. The conclusions of these reviews should be tabled in the ACT Legislative Assembly.**



## 5 THE WIDER SYSTEM IN WHICH CTP INSURANCE OPERATES

5.1 The Committee acknowledges that the concept of CTP insurance is itself complex, and how it works is also determined by the wider system in which it operates. Any strategies to improve its performance must take into account the effectiveness of road safety measures. A road safety measure is defined as:

...any technical device or programme that has improving road safety as the only objective or at least one of its stated objectives.<sup>276</sup>

5.2 Implementation of road safety measures may be directed at any element of the road system, such as:

...patterns of land use, the road itself, road furniture, traffic control devices, motor vehicles, police enforcement and road users and their behaviour.<sup>277</sup>

5.3 The Committee believes that the proposed reforms as detailed in the Bill are treating the symptoms instead of targeting the overarching problem—that is, to reduce the number and severity of motor vehicle crashes in the ACT. The Committee believes that the priority focus should be on measures to improve road safety. Whilst improving road safety is not a concept that has a standard scientific definition, an authoritative source in the discipline refers to it as ‘a reduction in the expected number of accidents, a reduction in accident or injury severity or a reduction in the rate of accidents or injuries per kilometre of travel’.<sup>278</sup>

5.4 The Committee notes that successive governments have implemented a range of transport and road policy initiatives that may impact positively on road safety, by eliminating or reducing causes of motor crashes. The Committee also acknowledges the contribution NRMA Insurance has made in partnership

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<sup>276</sup> Elvik, R., Høy, A., Vaa, T. and Sørensen, M. (2009) *The Handbook of Road Safety Measures* (2<sup>nd</sup> edn.), Emerald publishing.

<sup>277</sup> Elvik, R., Høy, A., Vaa, T. and Sørensen, M. (2009) *The Handbook of Road Safety Measures* (2<sup>nd</sup> edn.), Emerald publishing, p. 3.

<sup>278</sup> Elvik, R., Høy, A., Vaa, T. and Sørensen, M. (2009) *The Handbook of Road Safety Measures* (2<sup>nd</sup> edn.), Emerald publishing, pp. 3–4.

with the ACT community to the enhancement of road safety for the benefit of all road users as part of the NRMA–ACT Road Safety Trust. Further discussion on promoting measures directed at eliminating or reducing causes of motor crashes and mitigating their results is set out in chapter four.

- 5.5 The Committee is aware that the ACT Government has released a Discussion paper—‘Vision Zero’ Road Safety Strategy 2011–2020 Discussion Paper (August 2010) on potential measures for the next ACT Road Safety Strategy 2011–2020.<sup>279</sup> The Discussion paper proposes a number of strategies to support the uptake of the ‘Vision Zero’ philosophy<sup>280</sup> together with a more robust application of ‘safe system’ principles.
- 5.6 The only way to reduce demand on CTP insurance and the wider system in which it operates is to: (i) reduce the cause—the severity and incidence of motor vehicle crashes or (ii) reduce the amount paid in compensation to those injured in motor vehicle crashes. The Committee is in favour of the former and not necessarily the latter.

## RECOMMENDATION 12

- 5.7 **The Committee recommends that the ACT Government should place greater emphasis on achieving ‘Vision Zero’ within the transport system.**

## Restoration—‘making whole’

- 5.8 In the context of public interest disclosure, the United States’ False Claims Act provides whistleblowers further protection from the financial impact that their disclosure may have on their lives as a result of reprisals. This protection uses

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<sup>279</sup> ACT Government—Territory and Municipal Services Directorate—ACT Road Safety Strategy [http://www.tams.act.gov.au/live/about\\_our\\_department/community\\_engagement/community\\_engagement\\_activities\\_and\\_events/act\\_road\\_safety\\_strategy](http://www.tams.act.gov.au/live/about_our_department/community_engagement/community_engagement_activities_and_events/act_road_safety_strategy)

<sup>280</sup> Vision Zero is a philosophy of road safety that eventually no one will be killed or seriously injured within the road transport system. The Vision is an expression of the ethical imperative that ‘it can never be ethically acceptable that people are killed or seriously injured when moving within the road transport system’ [Swedish Ministry of Transport and Communications. (1997) *En route to a society with safe road traffic*. Selected extract from Memorandum prepared by the Swedish Ministry of Transport and Communications].

a concept that a whistleblower ‘may be awarded “all relief necessary to make the employee whole,” including reinstatement, back pay, two times the amount of back pay, litigation costs, and attorney fees’.<sup>281</sup> It is the concept of ‘making whole’ that interests the Committee, in particular how it might apply to an individual injured as a third-party in a motor vehicle crash.

5.9 A submission to the Committee emphasised that:

People who get injured through no fault of their own should get adequate funds to rebuild their lives.<sup>282</sup>

5.10 It appears to the Committee that principally the drivers for CTP insurance scheme changes are often focused on the need to cut costs, rather than focusing on trying to rehabilitate or recover injured people. It seems to the Committee that the accent should be on the way in which people get their lives back together again. Notwithstanding that cost is an issue it should take second place to that of providing all relief necessary to make an injured person whole again. The Committee posits that if attention was actually focused on the treatment issues, as opposed to cost concerns inside a scheme, cost concerns may be taken care of.

5.11 A feature of compensation for NEL or pain and suffering is to compensate injured people for past and future loss arising from an injury. In the insurance literature ‘non-economic’ loss refers, for example, to pain and suffering or the loss of physical attributes, such as the loss of a limb.<sup>283</sup> As noted previously, access to this form of compensation will be limited under the Bill.

5.12 The concept of restoration or ‘making whole’, in the main is probably more closely related with compensation for NEL. As noted previously, compensation for NEL is recognition that there is a loss of enjoyment and quality of life that comes out of the fact that a person has sustained a permanent or long-term injury. The Committee discussed this concept at

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<sup>281</sup> Whistleblower Rewards Network cited in Parliament of Australia. (2005) Whistleblowing in Australia—transparency, accountability but above all, the truth, Department of Parliamentary Services Parliamentary Library Research Note No. 31, 2004–05, 14 February 2005.

<sup>282</sup> Submission No. 6, October 2011.

<sup>283</sup> King, S.P. (2010) Does Tort Law Reform Help or Hurt Consumers?, *The Economic Record*, 86, 275, pp. 563–577.

length with witnesses and acknowledges that it is a difficult one to grapple with in terms of a solution.

- 5.13 For example, the Committee heard that a professional violinist who lost a finger would be compensated, on the basis of economic loss, however, an individual who was a very good violinist, and play purely as a recreational pursuit and gets much satisfaction and enjoyment from being able to do this would not be compensated for the loss of a finger. They may also play in small social settings which also contributes to their general well being and they make a worthwhile contribution to society through this pursuit. A person in this situation will get nothing for the loss of a finger. The Committee finds this situation completely unsatisfactory. Whilst money will never give an individual their finger back, it may permit them to pursue their affinity with the violin, as means of deriving enjoyment, in other ways, for example, by attending performances or a study tour overseas. These alternative pursuits in the field of music appreciation would hopefully give rise to the enjoyment benefits previously derived from playing the violin together with the added socialisation and community contribution benefits.<sup>284</sup>
- 5.14 The Committee was interested as to why there should be nothing for permanent impairment, such as the loss of the use of a finger under the Bill. A Treasury Directorate official explained:

The loss of one finger would not put you above the 15 per cent threshold. What you would be entitled to is all the medical treatment that you can get that would help with that process. Obviously, unless you are extremely fortunate, the finger would not be fully replaced.

...

It does not matter whether you are a violinist or what; you have either got a 15 per cent impairment or you have not. In the case of the world-famous violinist who has lost a finger —

...

They are entitled to any loss of income that is associated with this. Their finger will not get replaced and they will not get non-economic losses, but they will get a loss of income. If they are a very highly paid violinist, they will be compensated if they cannot play in the future.<sup>285</sup>

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<sup>284</sup> *Transcript of evidence*, 6 October 2011, pp. 16–17.

<sup>285</sup> Mr Roger Broughton, *Transcript of evidence*, 6 October 2011, pp. 16–17.

5.15 The Committee was also interested to know the impact that reduced compensation for NEL would have on injured people. As compensation for matters such as loss of enjoyment of life and pain and suffering is not only compensation for that which you have suffered in the past but also compensation for that which you will suffer in the future.<sup>286</sup> The President of the ACT Bar Association elaborated:

If you are a person who spends some months in hospital, perhaps in traction, and requires perhaps the rebreaking of a bone in order to get it to set properly, but you recover, you get nothing for that time in hospital because you are not permanently impaired. If you are a person who is likely to spend the rest of your life taking Panadeine Forte every day because you suffer from a prolonged pain condition but you can still walk, talk and so forth, you get nothing, because you are not 15 per cent whole person permanently impaired.

If you are a person, for example, keen on sports—cyclists get a regular mention because they are one of the groups of people who are most likely to be affected by compensation arising from motor vehicle accidents—and you are reduced from somebody who was a highly proficient, competitive cyclist to somebody who can still walk, ambulate, move, but you are no longer a competitive cyclist, you get nothing for the loss of that, perhaps one of the most enjoyable parts of your life.<sup>287</sup>

5.16 The President of the ACT Law Society also cited as an example—a retired lady:

...who gets her enjoyment from life from the following: playing the organ at church, doing tapestries and making clothes for her grandchildren. I am sorry if that is a bit of a cliché, but that is a good example.

Under the current system, if that woman—that Canberra person—loses the ability to do those things, then she will be entitled to an award of general damages for her pain and suffering and loss of enjoyment of life. That will be assessed in the manner we have just discussed, but mostly it will not be assessed by a court. It will be assessed by advice given by her lawyers and the other side will negotiate and we will think about what is a fair sum for that if we then go to court.

That lady is not entitled to anything for loss of income because she is not a concert pianist. So she does not get anything for that. All she would be entitled to is her treatment expenses for the surgeries and for some hand physiotherapy no doubt. But in a case of that nature, the physiotherapy would probably not be

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<sup>286</sup> Mr Philip Walker, *Transcript of evidence*, 31 October 2011, p. 58.

<sup>287</sup> Mr Philip Walker, *Transcript of evidence*, 31 October 2011, p. 58.

ongoing or would only be required from time to time, and there would probably be no need for future surgery.

What she would actually get is the expenses paid that she has already incurred. That money is not going into her pockets. That is going, quite rightly, to the doctors, physiotherapists and so on. She may get some award for future treatment but it would be very small because it would be very unlikely, if at all.

She would get nothing for loss of income because it has not at all affected her ability to earn an income. Therefore, she would get nothing. That lady, for what she has been through and what she has lost, will get nothing. That is not fair. That is simply not fair.<sup>288</sup>

- 5.17 As an alternative to payments for NEL, a submitter was of the view that there should be no payments for ‘pain and suffering’ but instead that standard payments should be made for different types of injuries and a CTP insurance scheme should give people the funds to rebuild their lives. Where standard amounts are deemed inadequate to enable injured people to rebuild their lives, claims for extra payments should be permissible under the Scheme.<sup>289</sup>
- 5.18 Genuine attempts to restore people or make them whole again benefits everyone—the CTP insurance scheme, the community and ultimately the injured people themselves. Furthermore, the Committee believes that a legislative framework should not unfairly discriminate against injured people, as the evidence indicates in relation to a number of the proposed amendments, in particular, the introduction of the NEL WPI threshold and the increase in the discount rate.
- 5.19 The Committee is strongly of the view that a legislative framework that supports this intent should be thoroughly investigated. Furthermore, the ACT community in partnership with the Legislative Assembly should be active participants in determining the benefits and the boundaries they want in their CTP insurance scheme.

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<sup>288</sup> Ms Noor Blumer, *Transcript of evidence*, 31 October 2011, pp. 66–67.

<sup>289</sup> Submission No. 6, October 2011.

RECOMMENDATION 13

- 5.20 **The Committee recommends that the ACT Government establish a consultative working group comprised of appropriate experts in CTP insurance scheme design from all sectors to propose an alternative scheme or model that supports a culture in the scheme of all stakeholders working to the best advantage of the scheme itself. The working group, amongst other things, should consider:**
- a) alternative compensatory mechanisms to damages for non-economic loss (NEL) that have the effect of restoration for injured people, and**
  - b) alternative mechanisms for controlling premium costs other than limiting access to common law.**



## 6 WIDER POLICY IMPLICATIONS

6.1 CTP insurance falls within a wider public policy context, in particular transport and road safety policy more generally. Some of the Committee's Terms of Reference required it to consider some of these wider policy implications.

### Other factors that may influence the cost of registering a motor vehicle in the ACT

6.2 As one of the desired outcomes of the proposed amendments is to reduce CTP insurance premium costs, it is useful to consider other factors that may influence the cost of registering a motor vehicle in the ACT.

6.3 Drawn from information available on ACT Government websites, registration fees in the ACT are comprised of the following elements:

- a Road Rescue Fee of approximately \$16.00
- a Road Safety Contribution of approximately \$2.00
- CTP insurance of approximately \$487.50 (though depends on vehicle type), and
- a registration fee set by the Government (whilst dependent on the weight of the vehicle will be approximately half the total cost of registering a vehicle).<sup>290</sup>

6.4 On this information alone, if a desired outcome is to reduce the cost of registering a motor vehicle in the ACT, then a reduction in the total cost of registering a vehicle could be achieved by reducing the registration fee component. The Committee notes that the Government increased registration fees significantly from 1 July 2011.

6.5 Importantly, evidence highlighted that an assessment of the cost of insurance as a proportion of the total costs of running a vehicle should be examined. Whilst these costs should be actuarially calculated, an indicative assessment based on information from various ACT Government and insurer websites

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<sup>290</sup> Submission No. 2, August 2011.

indicates that CTP insurance premiums are only about 3.4% to 6.1% of the costs of running a vehicle in the ACT for average car drivers. Noting that these costs are indicative only, nonetheless they suggest that small changes to CTP insurance will have a limited effect on average car drivers.<sup>291</sup>

## The impact of CTP insurance premiums on the sustainability of transport

6.6 The Committee's T of R required it to consider the impact of CTP insurance premiums on the sustainability of transport. The Committee acknowledges that in some ways, CTP insurance already contributes to the sustainability of transport by providing a reduction in CTP insurance premiums for smaller vehicles. For example, as cited in evidence, in 2010 the CTP insurance premium was approximately \$70 less for a Mini (1195Kg) than a utility (1530Kg). Furthermore, a Mini also attracts a registration fee of around \$125 less.<sup>292</sup>

6.7 The ACT Law Society, ACT Bar Association and the ACT Branch of the Australian Lawyers Alliance commented:

The issue of whether the Government wishes to further use the price of TPI as a mechanism to induce behavioural change in transport users and providers should, we believe, be regarded by the Committee as subsidiary to this Inquiry. Indeed the impact of road transport on the natural and built environment is a subject worthy of the separate and continuing study which it receives at all levels of government.<sup>293</sup>

6.8 The Committee considers that the risk rating of premiums has the potential to impact on the sustainability of transport and explored the feasibility of its introduction. Furthermore, it can reduce premiums for consumers with good driving records.

6.9 The ACT Law Society and its joint submitters were of the view that the risk rating of premiums, in addition to impacting on sustainability of transport,

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<sup>291</sup> Submission No. 2, August 2011.

<sup>292</sup> Submission No. 2, August 2011.

<sup>293</sup> Submission No. 2, August 2011, p. 15.

was also an instrument which could serve as an incentive to improve driving behaviour.<sup>294</sup>

- 6.10 At the present time the ACT CTP insurance scheme has community risk rated premiums. According to NRMA Insurance this means that 'good risks' provide a cross subsidy for so called 'bad risks'. Whilst some level of cross-subsidisation is necessary to ensure that CTP insurance premiums are affordable, the concept of a price signal for lower risk profiles may act as an incentive to encourage lower risk driving behaviour.<sup>295</sup> The President of the ACT Branch of the Australian Lawyers Alliance elaborated:

In the ACT we have a flat rate, regardless of how well or how poorly you drive, regardless of how old your motor vehicle is, regardless of whether or not you have any demerits or regardless of whether or not you have been at fault. In New South Wales there is a risk rating scheme.

...

If the government chose to accept a risk rating scheme you would have different classes. You would reward people with good driving histories.<sup>296</sup>

- 6.11 NRMA Insurance submitted that the risk rating of premiums could be achieved by allowing each insurer to select rating factors and determine the premium for each factor and class of vehicle. This would allow an insurer to charge a lower premium for good risks and a slightly higher premium for others. In this scenario, the premiums paid by vehicle owners would better reflect their risk. In its submission, NRMA Insurance advocated for an upper limit on premiums to ensure that CTP insurance was affordable for all. It also recognised that system changes would be required. However, the cost incurred would be outweighed by the benefits to motorists and the encouragement of better driving behaviour in general.<sup>297</sup>

- 6.12 In evidence, a representative of NRMA Insurance elaborated with regard to the practicalities of implementation:

I will talk to two issues. One is how you would actually introduce it. The way you could introduce it is to change the premium determination guidelines. So every insurer in the ACT has to ensure that whatever premiums they establish are guided by the premium determination guidelines. So the mechanism is there.

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<sup>294</sup> Submission No. 2, August 2011.

<sup>295</sup> Submission No. 4, September 2011, pp. 2–3.

<sup>296</sup> Mr Angus Bucknell, *Transcript of evidence*, 31 October 2011, p. 62.

You could introduce risk rating factors. Drawing an analogy to New South Wales, you could look at age of driver, whether there are any at-fault accidents, over what period of time and vehicle design. It is not in New South Wales, but you could end cap rating. There are different ways in which you could introduce risk rating.<sup>298</sup>

- 6.13 As to the impact on premiums, if risk rating was introduced, a representative of NRMA Insurance explained:

That would actually be a direct flow-through to the community and the motorist. Rather than having one set price, depending on your risk rating factors, you would either have a discounted premium or you would probably pay a higher premium. What that percentage would be is really a matter for design in the future.<sup>299</sup>

- 6.14 The Committee sought the Government's view on whether risk rating for the ACT CTP insurance scheme had been considered and was told:

Risk rated premiums, as exist under the NSW scheme, were considered during the development of the 2008 reforms. The Government concluded that it would be premature to introduce risk rating of premiums in the absence of competition, since such a system could be gamed by an incumbent insurer to entrench itself against any competitors that might be attempting to enter the market. This is because the incumbent insurer necessarily has a much more detailed understanding of the risk profile of its existing portfolio than a potential market entrant.<sup>300</sup>

- 6.15 The Government further advised that:

Evidence and experience indicates competition will not enter the ACT until the volatility of the scheme is reduced, in other words the focus is on health outcomes rather than maximising compensation.

In terms of premiums, risk rated premiums may create a disincentive to those more at risk of accidents and lower premiums for some. However, to change the premium structure in this manner before stabilising the market and may result in unreasonable premium increases for those who can least afford it.<sup>301</sup>

- 6.16 The Committee is interested in the relationship between kilometres travelled and crash rates. Insurance actuaries have acknowledged for some time that

<sup>297</sup> Submission No. 4, September 2011.

<sup>298</sup> Ms Mary Maini, *Transcript of evidence*, 10 November 2011, pp. 90–91.

<sup>299</sup> Ms Mary Maini, *Transcript of evidence*, 10 November 2011, pp. 90–91.

<sup>300</sup> Mr Andrew Barr MLA, Response to supplementary question No. 15, January 2012.

<sup>301</sup> Mr Andrew Barr MLA, Response to supplementary question No. 13, January 2012.

annual vehicle kilometres is a significant factor in annual crash and claim rates<sup>302</sup>. Conversely, until recently, the insurance industry has argued that kilometres driven were a relatively minor risk factor on the basis that reliable data was unavailable apart from self reports by motorists which were considered to be unreliable.<sup>303</sup> Recent research based on more reliable vehicle-travel data shows a positive relationship between annual kilometres and annual crash risk for a particular driver or vehicle (that is, on the provision that all other risk factors remain equal, such as driver history, vehicle type and location).<sup>304</sup>

6.17 Litman and Fitzroy (2012) elaborate further:

There is some debate over the relative importance of mileage as a risk factor. Some experts argue that annual vehicle mileage is less important than other factors such as driver age, vehicle type and location (Cardoso and Woll 1993)<sup>305</sup>. However, when other factors are held constant (that is, for a particular motorist), annual mileage appears to have a major effect on annual crash rates, and mileage reductions can be expected to reduce per capita crashes (Ferreira and Minike 2010<sup>306</sup>).<sup>307</sup>

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<sup>302</sup> CAS. (1996) *Foundations of Casualty Actuarial Science*, 3rd Edition, Casualty Actuarial Society, Arlington; Butler, P. (1996) *Automobile Insurance Pricing*, National Organization for Women ([www.now.org](http://www.now.org)), presented at *National Conference on Women's Travel Issues*, Baltimore, National Organization for Women CentsPerMileNow ([www.centspermilenow.org/publicat.htm](http://www.centspermilenow.org/publicat.htm)).

<sup>303</sup> Cardoso, R. and Woll, R. (1993) Discussion of Patrick Butler's 'Cost-Based Pricing of Individual Automobile Risk Transfer: Car-Mile Exposure Unit Analysis', *Journal of Actuarial Practice*, **1**, 1, pp. 69-71; Litman, T. And Fitzroy, S. (2012) *Safe Travels – Evaluating Mobility Management Traffic Safety Impacts*, Victoria Transport Policy Institute. 16 January, p. 23.

<sup>304</sup> Litman, T. And Fitzroy, S. (2012) *Safe Travels – Evaluating Mobility Management Traffic Safety Impacts*, Victoria Transport Policy Institute. 16 January

<sup>305</sup> Cardoso, R. and Woll, R. (1993) Discussion of Patrick Butler's 'Cost-Based Pricing of Individual Automobile Risk Transfer: Car-Mile Exposure Unit Analysis', *Journal of Actuarial Practice*, **1**, 1.

<sup>306</sup> Ferreira, J. and Minike, E. (2010) *A Risk Assessment of Pay-As-You-Drive Auto Insurance*, Department of Urban Studies and Planning, *Massachusetts Institute of Technology*.

<sup>307</sup> Litman, T. And Fitzroy, S. (2012) *Safe Travels – Evaluating Mobility Management Traffic Safety Impacts*, Victoria Transport Policy Institute. 16 January, p. 23.

6.18 On the basis that there would appear to be a direct relationship between the number of kilometres driven and the number of crashes, the Committee queried whether kilometres driven might be a parameter for risk rating, to which NRMA Insurance commented:

Kilometres driven? I would say, why not?<sup>308</sup>

## **The long-term viability of the CTP insurance scheme in the ACT**

6.19 Consideration of the long term viability of a CTP insurance scheme is pertinent when amendments are being proposed.

6.20 The ACT Law Society and its joint submitters were of the view that there was:

...no evidence to suggest that the current scheme is not financially viable in the short or long term.<sup>309</sup>

6.21 In considering the viability of a CTP insurance scheme—the perspective of the premium payer and the crash victim should be considered. As noted previously, in the absence of any detailed data on the operation and performance of the current Act, it is difficult to determine if any amendments are needed to respond to concerns about the financial viability of the Scheme.

6.22 Furthermore, the experience of the NSW CTP insurance scheme with regard to insurer profits should be heeded in the context of any claims made about the viability of the ACT CTP insurance scheme.

6.23 Furthermore, the ACT Law Society and its joint submitters emphasised that in their collective view:

...the current scheme broadly reflects the democratic instinct and sense of fairness held by most ACT citizens. A scheme such as the one outlined in the Bill would fail in terms of long-term human rights viability.<sup>310</sup>

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<sup>308</sup> Ms Mary Maini, *Transcript of evidence*, 10 November 2011, pp. 90–91.

<sup>309</sup> Submission No. 2, August 2011, p. 17.

<sup>310</sup> Submission No. 2, August 2011, p. 17.

## Other matters

### Limitations with CTP insurance coverage

6.24 Inadequacies about the coverage of the current CTP insurance scheme not extending to family members, beyond parents, for counselling and the costs incurred by parents living interstate having to engage a solicitor to act on their behalf to execute the estate of an adult child tragically killed in the ACT were raised with the Committee.<sup>311</sup>

6.25 Whilst citing a very personal example of their direct experience with the ACT CTP insurance scheme, a submission from two private citizens told the Committee:

...counselling services are only for parents not for siblings and/or extended family and are not included under current CTP INSURANCE

...within the current legislation the CTP INSURANCE insurer agreed to pay for counselling for the parents of the deceased, there was no such counselling (covered by CTP INSURANCE) available to siblings and extended family members of the deceased. At this time, we found this to be unfathomable, and not only did this place enormous additional emotional strain on the families, it created extra financial burden.

...

In the case of the Rial family [*their son*], Steven died intestate and with no dependants. We were forced to engage a solicitor to act in our behalf to deal with the estate. Due to the nature of this issue many hours of work were spent privately and with solicitors providing instruction to get final closure of the estate. The fact that we had to engage a solicitor, cost the family personally, as solicitors fees were not (and still are not) included as part the current legislation's compensation Act as the general public would assume. The solicitors fees which the family incurred due to the incident, whether for working on the estate, or other matters that ultimately arose from the initial incident should be included as part of the third party insurers responsibility.<sup>312</sup>

6.26 The Committee notes that in many jurisdictions, including the Commonwealth, the notion of what constitutes an extended family – for

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<sup>311</sup> Submission No. 7, December 2011.

<sup>312</sup> Submission No. 7, December 2011.

example, grandparents, step parents, half siblings, defacto relationships—are recognised in various statutes.<sup>313</sup>

## Alternative scheme design

6.27 An individual noted in his submission that CTP insurance in the ACT was ‘unnecessarily expensive’ and the reasons for this had little to do with competition but were tied to the way the system was structured.<sup>314</sup> This submission proposed a variation to the design of the current scheme as a means of reducing costs which could be used to either increase compensation benefits or reduce premiums. Key features of the alternative scheme included:

- People who are at fault should pay extra—in the submitter’s view, people who cause crashes are not punished if they have insurance.
- There should be no payments for “pain and suffering” but instead, standard payments should be made for different types of injuries and the Scheme should give people the funds to rebuild their lives. The Scheme should provide that injured people can make claims for extra payments if the standard amounts are deemed inadequate.
- Payments to cover the costs of the Scheme are made after the cost to community is known on an annual basis and collected equally from all drivers over the next year. As such payments are not collected in advance and this avoids insurance companies having to collect more than is necessary to cover them in the event of an increase in payments. Insurance companies have to take on risks over which they have little control and they require extra payments to cover this risk. Funding through savings of this type is always more expensive than payment after the fact.<sup>315</sup>

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<sup>313</sup> Submission No. 7, December 2011.

<sup>314</sup> Submission No. 6, October 2011.

<sup>315</sup> Submission No. 6, October 2011.

## 7 CONCLUSION

- 7.1 The Committee wishes to thank all of the organisations that, and individuals who, have contributed to its inquiry, by making submissions, providing additional information, and/or appearing before it to give evidence.
- 7.2 The Committee recognises the significant commitment of time and resources required to participate in an inquiry of this nature and is grateful that it was able to draw on a broad range of expertise and experience in its deliberations. The Committee notes that it has adopted many of the recommendations, or variations thereof, suggested by participants as recommendations for this report.
- 7.3 The Committee has made **thirteen** recommendations in relation to its inquiry into the Road Transport (Third-Party Insurance) Amendment Bill 2011.

Caroline Le Couteur MLA

Chair

24 April 2012



## **APPENDIX A: Road Transport (Third-Party Insurance) Amendment Bill 2011**

A copy of the Road Transport (Third-Party Insurance) Amendment Bill 2011, together with the explanatory statement, is attached.



2011

THE LEGISLATIVE ASSEMBLY  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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(As presented)

(Treasurer)

## Road Transport (Third-Party Insurance) Amendment Bill 2011

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2011

THE LEGISLATIVE ASSEMBLY  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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(As presented)

(Treasurer)

## **Road Transport (Third-Party Insurance) Amendment Bill 2011**

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### **A Bill for**

An Act to amend the *Road Transport (Third-Party Insurance) Act 2008*, and for other purposes

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The Legislative Assembly for the Australian Capital Territory enacts as follows:

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J2009-447

Authorised by the ACT Parliamentary Counsel—also accessible at [www.legislation.act.gov.au](http://www.legislation.act.gov.au)

## Section 1

**1 Name of Act**

This Act is the *Road Transport (Third-Party Insurance) Amendment Act 2011*.

**2 Commencement**

This Act commences on the 7th day after its notification day.

*Note* The naming and commencement provisions automatically commence on the notification day (see Legislation Act, s 75 (1)).

**3 Legislation amended**

This Act amends the *Road Transport (Third-Party Insurance) Act 2008*.

*Note* This Act also amends the following legislation (see sch 1):

- *Civil Law (Wrongs) Act 2002*
- *Road Transport (Third-Party Insurance) Regulation 2008*.

**4 Section 27 heading**

*substitute*

**27 CTP policy not affected by errors etc****5 New section 27 (2) and (3)**

*insert*

- (2) The validity of a CTP policy is not affected by payment of an incorrect CTP premium for the policy.
- (3) A licensed insurer who has been paid an incorrect CTP premium may recover any outstanding amount as a debt owing to the insurer.

*Note* An amount owing under a law to a person may be recovered as a debt owing to the person in a court of competent jurisdiction (see Legislation Act, s 177).

1 **6 Sections 37 and 38**

2 *substitute*

3 **37 What is a CTP premium?**

4 In this Act:

5 *CTP premium*, for a CTP policy, means—

- 6 (a) the insurance premium approved under this part for the CTP  
7 policy; or  
8 (b) another premium worked out by the insurer in accordance with  
9 the CTP premium guidelines.

10 **38 What premium licensed insurer may charge**

11 A licensed insurer may charge a premium for a CTP policy only if  
12 the premium is—

- 13 (a) approved under this part; or  
14 (b) worked out in accordance with the CTP premium guidelines.

15 **7 What kinds of expenses must be paid by insurer?**  
16 **Section 73 (2), note 1**

17 *omit*

18 4.11

19 *substitute*

20 4.16

Section 8

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1 **8 Respondent to pay injured person's medical expenses**  
2 **Section 122 (3), note 1**

3 *omit*

4 4.11

5 *substitute*

6 4.16

7 **9 What is *rehabilitation*?**  
8 **Section 123 (a)**

9 *omit*

10 ; or

11 *substitute*

12 ; and

13 **10 Respondent to pay for rehabilitation services**  
14 **Section 132, note 1**

15 *omit*

16 4.11

17 *substitute*

18 4.16

19 **11 Cost of rehabilitation services—mediation**  
20 **Section 133 (2) (b)**

21 *omit*

22 claimant

23 *substitute*

24 respondent

1 **12 Procedures before compulsory conference**  
2 **Section 139 (1) (d), new note**

3 *insert*

4 *Note* If a form is approved under s 276 for this provision, the form  
5 must be used.

6 **13 New section 139 (1A)**

7 *insert*

8 (1A) If the claim includes a claim for damages for non-economic loss, the  
9 respondent must give a statement to the claimant about whether the  
10 respondent agrees that the degree of permanent impairment of the  
11 injured person caused by the motor accident is more than the  
12 impairment threshold that applies under division 4.9B.2.

13 **14 Section 139 (3), definition of *certificate of readiness***

14 *after*

15 a certificate

16 *insert*

17 under this Act

18 **15 Mandatory final offers**  
19 **Section 141 (5)**

20 *omit*

21 pain and suffering

22 *substitute*

23 non-economic loss

- 1 **16 Timing of mandatory final offers**  
2 **Section 143 (1) (a), note**
- 3 *substitute*
- 4 *Note* A compulsory conference may be dispensed with by court order  
5 (see s 137).
- 6 **17 Working out costs for mandatory final offers**  
7 **New section 144 (4)**
- 8 *insert*
- 9 (4) In this section, a reference to an amount in relation to a mandatory  
10 final offer does not include any amount for non-economic loss.
- 11 **18 Court proceedings not to begin if mandatory final offer**  
12 **open**  
13 **Section 145 (5)**
- 14 *before*
- 15 costs
- 16 *insert*
- 17 interest or
- 18 **19 Time limit—no compulsory conference**  
19 **Section 148 (1), note 1**
- 20 *substitute*
- 21 *Note 1* A compulsory conference may be dispensed with by court order (see  
22 s 137).
- 23 **20 Section 148 (3) (b), note**
- 24 *substitute*
- 25 *Note* A compulsory conference may be dispensed with by court order  
26 (see s 137).

1 **21 Sections 155 and 156**

2 *omit*

3 **22 New parts 4.9A to 4.9D**

4 *insert*

5 **Part 4.9A Damages for economic loss**

6 *Note* The *Civil Law (Wrongs) Act 2002*, pt 7.1 also applies to the award of  
7 damages for motor accident claims (see that Act, s 93).

8 **155 Damages for future economic loss—claimant’s prospects**  
9 **and adjustments**

- 10 (1) In a court proceeding based on a motor accident claim, the court  
11 may award damages for future economic loss in relation to loss of  
12 earnings only if satisfied that the assumptions about future earning  
13 capacity or other events on which the damages are to be based  
14 reflect the claimant’s most likely future circumstances were it not  
15 for the injury.
- 16 (2) If the court decides the amount of an award of damages for future  
17 economic loss in relation to loss of earnings, the court must adjust  
18 the damages that would be payable if the assumptions were correct  
19 by the possibility, calculated as a percentage, of the events occurring  
20 were it not for the injury.
- 21 (3) If the court awards damages for future economic loss in relation to  
22 loss of earnings, the court must state—
- 23 (a) the assumptions and evidence on which the damages are based;  
24 and
- 25 (b) the percentage by which the court has adjusted the damages.

Section 22

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- 1 (4) In this section:  
2 *loss of earnings* means loss of prospective earnings or the  
3 deprivation or impairment of prospective earning capacity.
- 4 **155A Damages for future economic loss—discount rates**
- 5 (1) This section applies if an award of damages in relation to a motor  
6 accident claim is to include a lump sum for future economic loss in  
7 relation to—  
8 (a) loss of earnings; or  
9 (b) loss of expectation of financial support; or  
10 (c) the value of future services of a domestic nature or services  
11 relating to nursing and attendance; or  
12 (d) a liability to incur expenditure in the future.
- 13 (2) The present value of the future economic loss is worked out by  
14 discounting the future economic loss in accordance with—  
15 (a) a discount rate of the percentage prescribed by regulation; or  
16 (b) if no percentage is prescribed—a discount rate of 5%.
- 17 (3) Except as provided in this section, nothing in this section affects any  
18 other laws in relation to discounting amounts awarded as damages.
- 19 (4) In this section:  
20 *loss of earnings*—see section 155 (4).

1 **Part 4.9B Damages for non-economic loss**

2 *Note* The *Civil Law (Wrongs) Act 2002*, pt 7.1 also applies to the award of  
3 damages for motor accident claims (see that Act, s 93).

4 **Division 4.9B.1 Preliminary**

5 **155B Meaning of *non-economic loss***

6 In this Act:

7 *non-economic loss* includes the following:

- 8 (a) pain and suffering;  
9 (b) loss of amenities of life;  
10 (c) loss of expectation of life;  
11 (d) disfigurement.

12 **155C Definitions—pt 4.9B**

13 In this part:

14 *combined medical assessment* means an assessment of the degree of  
15 permanent impairment of an injured person made by a medical  
16 assessor under this part that combines assessments made by 2 or  
17 more medical assessors in relation to the injured person.

18 *impairment dispute* means a disagreement between the parties to a  
19 motor accident claim about whether the degree of permanent  
20 impairment of an injured person caused by the motor accident is  
21 more than the impairment threshold that applies under  
22 division 4.9B.2.

23 *impairment guidelines*—see section 155P.

24 *medical assessment* means an assessment of the degree of  
25 permanent impairment of an injured person made by a medical  
26 assessor under this part.

Section 22

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1 *medical assessment certificate* means a certificate about the matters  
2 referred to a medical assessor for medical assessment.

3 *medical assessor* means a person appointed under section 155N.

4 **155D Parties may settle claim at any time**

5 Nothing in this part prevents the parties to a motor accident claim  
6 from settling the claim at any time.

7 **155E Court need not award damages for non-economic loss**

8 Nothing in this part requires a court to award damages for  
9 non-economic loss if the court considers that it is not appropriate to  
10 award the damages.

11 **Division 4.9B.2 Impairment thresholds for damages**  
12 **for non-economic loss**

13 **155F Impairment thresholds for damages for non-economic**  
14 **loss**

15 Damages for non-economic loss for a motor accident claim in  
16 relation to an injured person are not payable unless—

17 (a) the degree of permanent impairment of the injured person  
18 caused by the motor accident, excluding any psychological or  
19 psychiatric injury, is 15% or more; or

20 (b) the degree of permanent impairment of the injured person  
21 caused by the motor accident in relation to a psychological or  
22 psychiatric injury only is 15% or more.

23 *Note* For how the degree of permanent impairment of an injured person is  
24 assessed, see s 155L.

1 **Division 4.9B.3 Medical assessments**

2 **155G Medical assessment required if impairment dispute**

3 If there is an impairment dispute in relation to an injured person,  
4 damages for non-economic loss are not payable unless a medical  
5 assessment has been made of the degree of permanent impairment.

6 *Note* Also, damages for non-economic loss are not payable unless the degree  
7 of permanent impairment is more than the impairment threshold that  
8 applies under div 4.9B.2 (see s 155F).

9 **155H Allocation of impairment disputes for medical**  
10 **assessment**

11 (1) The CTP regulator must allocate the impairment dispute to a  
12 medical assessor for a medical assessment—

13 (a) on application by a party made at any stage in a claim and in  
14 accordance with the requirements (if any) in the medical  
15 assessment procedural guidelines; or

16 *Note* If a form is approved under s 276 for this provision, the form  
17 must be used.

18 (b) on request of a court under section 155K.

19 (2) However, if a medical assessment has already been made in relation  
20 to the impairment dispute, an application by a party may only be  
21 made on the grounds that—

22 (a) the injury has deteriorated since the last assessment and the  
23 deterioration could have a material effect on the outcome of a  
24 previous assessment; or

25 **Example—material effect**

26 a deterioration of an injury that increases the degree of permanent  
27 impairment of the injured person (other than because of a psychological or  
28 psychiatric injury) to 15% or more



- 1 (2) In assessing the degree of permanent impairment, the medical  
2 assessor must disregard—
- 3 (a) any impairment that existed before the motor accident; and
- 4 (b) unless the only injury being assessed is a psychiatric or  
5 psychological injury—any impairment resulting from a  
6 psychiatric or psychological injury.
- 7 (3) A combined medical assessment made by a medical assessor must—
- 8 (a) assess the injured person's total degree of permanent  
9 impairment resulting from all injuries to which the medical  
10 assessments allocated to the medical assessor under  
11 section 155H (5) relate; and
- 12 (b) be based on the matters in medical assessment certificates for  
13 the medical assessments.
- 14 (4) A medical assessor may refuse to make a medical assessment if the  
15 medical assessor is not satisfied that the injured person's impairment  
16 has become permanent.
- 17 (5) If a medical assessor refuses to make a medical assessment, and a  
18 court proceeding based on the motor accident claim has been  
19 started, the court may adjourn the proceeding until an assessment  
20 has been made.

21 **155J Medical assessment certificates**

- 22 (1) On making a medical assessment, including a combined medical  
23 assessment, for an impairment dispute, a medical assessor must give  
24 the CTP regulator a medical assessment certificate.
- 25 (2) The medical assessment certificate must set out the reasons for any  
26 findings by the medical assessor in relation to any matter stated in  
27 the certificate.

Section 22

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- 1 (3) The CTP regulator must allocate the medical assessment certificate  
2 to another medical assessor (the *peer review assessor*) to review the  
3 certificate to ensure it is not incorrect in a material respect.
- 4 (4) A medical assessment certificate is conclusive proof in a proceeding  
5 of the matters certified if the peer review assessor for the certificate  
6 is satisfied that the certificate is not incorrect in a material respect.
- 7 (5) If a medical assessor makes an error in a medical assessment  
8 certificate the assessor may give a replacement certificate to correct  
9 the error.
- 10 (6) A medical assessment certificate for a further medical assessment  
11 prevails over a medical assessment certificate for the previous  
12 medical assessment to the extent of any inconsistency.

**155K Court may reject medical assessment certificates**

- 13 (1) This section applies if a medical assessment certificate in relation to  
14 an impairment dispute has been given in a court proceeding based  
15 on a motor accident claim.
- 16 (2) A court may reject the medical assessment certificate if satisfied that  
17 admitting a matter in the certificate into the proceeding would cause  
18 a party to the proceeding substantial injustice.
- 19 (3) If a court rejects the medical assessment certificate, the court  
20 must—  
21
- 22 (a) ask the CTP regulator to allocate the impairment dispute to a  
23 medical assessor for another medical assessment under  
24 section 155H; or
- 25 (b) make its own assessment of the injured person's degree of  
26 permanent impairment in accordance with section 155I  
27 (Assessment of degree of permanent impairment).

- 1 (4) If the court asks the CTP regulator to allocate the impairment  
2 dispute to a medical assessor under subsection (3) (a), the court  
3 must adjourn the proceeding until another medical assessment  
4 certificate has been given.

5 **155L Injured people to attend medical assessments and**  
6 **comply with requests**

- 7 (1) This section applies if an injured person for a motor accident claim  
8 fails to—  
9 (a) attend an appointment for a medical assessment; or  
10 (b) comply with any reasonable request of the medical assessor in  
11 relation to a medical assessment.  
12 (2) If satisfied that the injured person has no reasonable excuse for the  
13 failure, a court may, on application by the respondent for the claim,  
14 by order, do 1 or more of the following:  
15 (a) direct the injured person to—  
16 (i) if the injured person failed to attend an appointment for a  
17 medical assessment—attend another appointment for a  
18 medical assessment on a date stated by the CTP  
19 regulator; or  
20 (ii) if the injured person failed to comply with a reasonable  
21 request in relation to a medical assessment—comply with  
22 the request;  
23 (b) direct that a medical assessment be made on the available  
24 evidence;  
25 (c) direct that the injured person pay the costs associated with a  
26 medical assessment;  
27 (d) strike out the motor accident claim or part of the motor  
28 accident claim;

## Section 22

- 1 (e) if a court proceeding based on the motor accident claim has  
2 been started—
- 3 (i) adjourn the proceeding until the injured person—
- 4 (A) if the injured person failed to attend an appointment  
5 for a medical assessment—attends another  
6 appointment for a medical assessment; or
- 7 (B) if the injured person failed to comply with a  
8 reasonable request in relation to a medical  
9 assessment—complies with the request; or
- 10 (ii) strike out the proceeding or part of the proceeding.
- 11 (3) Also, if a court proceeding based on the motor accident claim has  
12 been started, the court may draw an unfavourable inference from the  
13 injured person's failure to attend an appointment for a medical  
14 assessment or comply with a reasonable request in relation to a  
15 medical assessment.

16 **Division 4.9B.4 Other matters**17 **155M Guidelines to assist determining non-economic loss**

- 18 (1) The CTP regulator may make guidelines (the *non-economic loss*  
19 *guidelines*) setting out information to assist courts in deciding the  
20 appropriate level of damages for non-economic loss in motor  
21 accident claims.
- 22 (2) A court may have regard to the non-economic loss guidelines when  
23 awarding damages, but is not bound by the guidelines.
- 24 (3) A non-economic loss guideline is a notifiable instrument.
- 25 *Note* A notifiable instrument must be notified under the Legislation Act.

1 **155N Appointment of medical assessors**

2 (1) The CTP regulator may appoint a suitably qualified person as a  
3 medical assessor for this Act.

4 *Note 1* For the making of appointments (including acting appointments), see  
5 the Legislation Act, pt 19.3.

6 *Note 2* In particular, a person may be appointed for a particular provision of a  
7 law (see Legislation Act, s 7 (3)) and an appointment may be made by  
8 naming a person or nominating the occupant of a position (see  
9 Legislation Act, s 207).

10 (2) An appointment must not be for longer than 3 years.

11 *Note* A person may be reappointed to a position if the person is eligible to be  
12 appointed to the position (see Legislation Act, s 208 and dict, pt 1,  
13 def *appoint*).

14 (3) The CTP regulator may appoint a medical assessor generally or for a  
15 stated impairment dispute.

16 (4) An appointment may be conditional.

17 **Example**

18 a medical assessor may only make medical assessments in relation to a stated  
19 specialty

20 *Note* An example is part of the Act, is not exhaustive and may extend, but  
21 does not limit, the meaning of the provision in which it appears (see  
22 Legislation Act, s 126 and s 132).

23 (5) The CTP regulator must end the appointment of a person as a  
24 medical assessor if the person stops being suitably qualified to be a  
25 medical assessor.

26 (6) A regulation may make provision in relation to the appointment of a  
27 medical assessor, including when the CTP regulator may or must be  
28 satisfied that a person is suitably qualified to be a medical assessor.

1 **155O Medical assessment procedural guidelines**

- 2 (1) The CTP regulator may make guidelines (the *medical assessment*  
 3 *procedural guidelines*) for procedures in relation to medical  
 4 assessments under this part, including the following:
- 5 (a) applying for a medical assessment;
- 6 (b) referring an impairment dispute for a medical assessment;
- 7 (c) the requirements for a medical assessment certificate;
- 8 (d) the time for undertaking a procedural requirement in relation to  
 9 a medical assessment;
- 10 (e) reviewing a medical assessment.
- 11 (2) A medical assessment procedure guideline is a notifiable instrument.

12 *Note* A notifiable instrument must be notified under the Legislation Act.

13 **155P Impairment guidelines**

- 14 (1) The *impairment guidelines* for assessing the degree of permanent  
 15 impairment of an injured person are—
- 16 (a) in relation to an injury other than a psychological or psychiatric  
 17 injury—
- 18 (i) the guidelines made under subsection (2) (a); or
- 19 (ii) if there are no guidelines under subsection (2) (a)—the  
 20 American Medical Association's Guides to the  
 21 Evaluation of Permanent Impairment, Fifth Edition (the  
 22 *AMA 5*); and
- 23 (b) in relation to a psychological or psychiatric injury—
- 24 (i) the guidelines made under subsection (2) (b); or

- 1 (ii) if there are no guidelines under subsection (2) (b)—the  
2 WorkCover Guides for the Evaluation of Permanent  
3 Impairment, 3rd Edition, chapter 11 (Psychiatric and  
4 psychological disorders).

5 *Note* The WorkCover Guides for the Evaluation of Permanent  
6 Impairment, 3rd Edition are accessible at  
7 [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au).

- 8 (2) The CTP regulator may make impairment guidelines (the *approved*  
9 *impairment guidelines*) for assessing the degree of permanent  
10 impairment of an injured person in relation to either or both of the  
11 following:

- 12 (a) an injury other than a psychological or psychiatric injury;  
13 (b) a psychological or psychiatric injury.

14 *Note* The power to make guidelines includes the power to amend or repeal  
15 the guidelines. The power to amend or repeal the guidelines is  
16 exercisable in the same way, and subject to the same conditions, as the  
17 power to make the guidelines (see Legislation Act, s 46).

- 18 (3) An approved impairment guideline may apply, adopt or incorporate  
19 a law or instrument, or a provision of a law or instrument, as in  
20 force from time to time or at a particular time.

- 21 (4) An approved impairment guideline is a notifiable instrument.

22 *Note* A notifiable instrument must be notified under the Legislation Act.

- 23 (5) If there are no approved impairment guidelines, the CTP regulator  
24 must ensure that—

- 25 (a) a copy of the AMA 5 is available for inspection at a place  
26 prescribed by regulation; and  
27 (b) a person may inspect them, on request, at the prescribed place  
28 during normal business hours.

1 **155Q Costs of medical assessments**2 (1) The costs of an injured person's medical assessment under this part  
3 are payable—

4 (a) as prescribed by regulation; or

5 (b) if there is no regulation—as agreed under the industry deed; or

6 (c) if there is no agreement under the industry deed—by the  
7 respondent's insurer.8 *Note Insurer*, of a person—see s 81.9 (2) The CTP regulator may make arrangements for the costs to be met  
10 by the CTP regulator or by someone else.11 *Note* A fee, charge or other amount payable may be determined under the  
12 *Road Transport (General) Act 1999*, s 96, for this section.

13 (3) In this section:

14 *costs*, of a medical assessment, mean the following:

15 (a) the remuneration of medical assessors;

16 (b) the reasonable and necessary costs and expenses incurred by an  
17 injured person, or the injured person's carer, to attend the  
18 medical assessment;19 (c) any costs incurred by the CTP regulator in relation to the  
20 medical assessment;

21 (d) any other costs prescribed by regulation.

22 **155R Monitoring and oversight of medical assessments**23 (1) The CTP regulator may arrange for the provision of training and  
24 information to medical assessors to promote accurate and consistent  
25 medical assessments.

- 1 (2) A medical assessor is not subject to the direction or control of the  
2 CTP regulator or a public servant in relation to any decision of the  
3 assessor that affects the interests of the parties to a medical  
4 assessment.
- 5 (3) The CTP regulator or a public servant must not overrule or interfere  
6 with any decision of a medical assessor in relation to a medical  
7 assessment.

8 **155S Protection of medical assessors from liability**

- 9 (1) A medical assessor is not civilly liable for anything done or omitted  
10 to be done honestly and without recklessness—  
11 (a) in the exercise of a function under this Act; or  
12 (b) in the reasonable belief that the conduct was in the exercise of  
13 a function under this Act.
- 14 (2) Any civil liability that would, apart from this section, attach to the  
15 medical assessor attaches instead to the Territory.
- 16 (3) A medical assessor is not compellable in a proceeding to give  
17 evidence or produce documents in relation to any matter in which  
18 the medical assessor was involved in the exercise of a function  
19 under this Act.

1 **Part 4.9C Interest**

2 **156 Payment of interest**

- 3 (1) Interest is payable in relation to damages for a motor accident claim  
4 only if 1 or more of the following apply:
- 5 (a) the respondent has not made an offer, or revised offer, of  
6 settlement even though—
- 7 (i) the claimant has given the respondent information that  
8 would enable a proper assessment of the claimant's full  
9 entitlement to damages of any kind in relation to the  
10 motor accident claim; and
- 11 (ii) the respondent has had a reasonable opportunity to make  
12 an offer, or revised offer, of settlement;
- 13 (b) if the respondent is insured under a CTP policy or is the  
14 nominal defendant and the preconditions to payment of  
15 medical expenses under section 121 are met—the insurer has  
16 failed to comply with its obligations under part 4.6;
- 17 (c) if the respondent has made a mandatory final offer or other  
18 offer of settlement in writing—
- 19 (i) the total amount of damages awarded by a court (without  
20 the addition of any interest) is more than 20% higher than  
21 the highest amount offered by the respondent; and
- 22 (ii) the highest amount offered by the respondent is  
23 unreasonable having regard to the information available  
24 to the respondent when the offer was made.
- 25 (2) For subsection (1) (c), the highest amount offered by the respondent  
26 is not unreasonable if, when the offer was made, the respondent was  
27 not able to make a reasonable assessment of the claimant's  
28 entitlement to damages of any kind in relation to the motor accident  
29 claim.

1 **Part 4.9D Costs**

2 **156A Costs—small awards of damages—generally**

- 3 (1) This section applies if a court awards \$50 000 or less in damages in  
4 a proceeding (other than an appellate proceeding) based on a motor  
5 accident claim.

6 *Note Damages* does not include damages for non-economic loss (see s (5)).

- 7 (2) If the court awards \$30 000 or less in damages, the court must apply  
8 the following principles:

9 (a) if the amount awarded is less than the claimant's mandatory  
10 final offer but more than the respondent's mandatory final  
11 offer, no costs are to be awarded;

12 (b) if the amount awarded is equal to, or more than, the claimant's  
13 mandatory final offer, costs must be awarded to the claimant in  
14 the way prescribed by regulation as from the date on which the  
15 proceeding began (but no award is to be made for costs up to  
16 that date);

17 (c) if the amount awarded is equal to, or less than, the  
18 respondent's mandatory final offer, costs must be awarded to  
19 the respondent as prescribed by regulation.

- 20 (3) If the court awards more than \$30 000 but not more than \$50 000 in  
21 damages, the court must apply the following principles:

22 (a) if the amount awarded is less than the claimant's mandatory  
23 final offer but more than the respondent's mandatory final  
24 offer, costs must be awarded to the claimant in accordance  
25 with the *Civil Law (Wrongs) Act 2002*, chapter 14, up to the  
26 maximum amount prescribed by regulation or, if no amount is  
27 prescribed, \$2 500;

Section 22

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- 1 (b) if the amount awarded is equal to, or more than, the claimant's  
2 mandatory final offer, costs must be awarded to the claimant as  
3 follows:
- 4 (i) costs up to the date on which the proceeding began must  
5 be awarded in accordance with the *Civil Law (Wrongs)*  
6 *Act 2002*, chapter 14, up to the maximum amount  
7 prescribed by regulation or, if no amount is prescribed,  
8 \$2 500;
- 9 (ii) costs on or after the date on which the proceeding began  
10 must be awarded on an indemnity basis;
- 11 (c) if the amount awarded is equal to, or less than, the  
12 respondent's mandatory final offer, costs must be awarded as  
13 follows:
- 14 (i) costs up to the date on which the proceeding began must  
15 be awarded to the claimant in accordance with the *Civil*  
16 *Law (Wrongs) Act 2002*, chapter 14, up to the maximum  
17 amount prescribed by regulation or, if no amount is  
18 prescribed, \$2 500;
- 19 (ii) costs on or after the date on which the proceeding began  
20 must be awarded to the respondent in accordance with the  
21 *Civil Law (Wrongs) Act 2002*, chapter 14.
- 22 (4) This section is subject to section 156B.
- 23 (5) In this section:
- 24 ***damages*** does not include damages for non-economic loss.

1 **156B Costs—small awards of damages—exceptions**

- 2 (1) This section applies if a court awards \$50 000 or less in damages in  
3 a proceeding (other than an appellate proceeding) based on a motor  
4 accident claim.

5 *Note* *Damages* does not include damages for non-economic loss (see s (7)).

- 6 (2) This section applies in addition to section 156A.  
7 (3) The court may make an award of costs to compensate a party for  
8 costs resulting from a failure by another party to comply with a  
9 procedural obligation under this part.  
10 (4) The court must not award costs to a party related to the introduction  
11 of evidence by the party that is unnecessarily repetitive.

12 **Example**

13 If a claimant calls 2 or more expert witnesses from the same area of expertise to  
14 give evidence to substantially the same effect, and the claimant is entitled to costs  
15 under s 156A, the court must only allow costs related to 1 of the expert witnesses.

16 *Note* An example is part of the Act, is not exhaustive and may extend, but  
17 does not limit, the meaning of the provision in which it appears (see  
18 Legislation Act, s 126 and s 132).

- 19 (5) Unless an award of damages is affected by factors that were not  
20 reasonably foreseeable at the time of the exchange of mandatory  
21 final offers, the court must not award costs to a party related to  
22 investigations or gathering of evidence by the party after—

- 23 (a) the end of the compulsory conference; or  
24 (b) if the parties or the court dispenses with a compulsory  
25 conference—the date when the parties completed the exchange  
26 of mandatory final offers.

27 *Note* A compulsory conference may be dispensed with by court order  
28 (see s 137).

## Section 23

- 1 (6) If an award of damages is affected by factors that were not  
 2 reasonably foreseeable by a party at the time of making the party's  
 3 mandatory final offer, the court may, if satisfied that it is just to do  
 4 so, make an order for costs under section 156A (2) or (3) as if the  
 5 reference to a mandatory final offer in the relevant subsection were  
 6 a reference to a later offer made in the light of the factors that  
 7 became apparent after the parties completed the exchange of  
 8 mandatory final offers.

**Example**

9  
 10 If a claimant's medical condition suddenly and unexpectedly deteriorates after the  
 11 date of the mandatory final offers and the court makes a much higher award of  
 12 damages than would have been reasonably expected at that date, the court may  
 13 ignore the mandatory final offers and award costs on the basis of later offers of  
 14 settlement.

- 15 (7) In this section:

16 *damages* does not include damages for non-economic loss.

**23 Parts 4.9A to 4.12**

17  
 18 *renumber as parts 4.10 to 4.17*

**24 Divisions 4.9B.1 to 4.9B.4**

19  
 20 *renumber as divisions 4.11.1 to 4.11.4*

**25 Divisions 4.11.1 to 4.11.4**

21  
 22 *renumber as divisions 4.16.1 to 4.16.4*

1 **26 Section 157 heading**

2 *substitute*

3 **157 Definitions—pt 4.14**

4 **27 Section 275**

5 *substitute*

6 **275 Review of Act**

- 7 (1) The Minister must review the operation of this Act as soon as  
8 practicable after the end of 5 years after the commencement of the  
9 *Road Transport (Third-Party Insurance) Amendment Act 2011*.
- 10 (2) The Minister must present a report on the review to the Legislative  
11 Assembly within 3 months after the review is started.
- 12 (3) This section expires 6 years after the day it commences.

13 **28 New part 9.3**

14 *insert*

15 **Part 9.3 Transitional—Road Transport**  
16 **(Third-Party Insurance)**  
17 **Amendment Act 2011**

18 **291 Transitional—personal injury**

- 19 (1) This section applies to a claim for personal injury that arises out of a  
20 motor accident that happened before the commencement of the  
21 *Road Transport (Third-Party Insurance) Amendment Act 2011*.
- 22 (2) The claim for the personal injury must be dealt with as if that Act  
23 had not been enacted.

Section 29

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1 (3) This section is a law to which the Legislation Act, section 88  
2 (Repeal does not end effect of transitional laws etc) applies.

3 **292 Expiry—pt 9.3**

4 This part expires 1 year after the day it commences.

5 **29 Dictionary, new definition of *combined medical***  
6 ***assessment***

7 *insert*

8 *combined medical assessment*, for part 4.9B (Damages for  
9 non-economic loss)—see section 155C.

10 **30 Dictionary, definition of *compliance notice***

11 *omit*

12 4.10

13 *substitute*

14 4.14

15 **31 Dictionary, definition of *costs***

16 *omit*

17 4.11

18 *substitute*

19 4.16

1 **32 Dictionary, definition of *enforcing party***

2 *omit*

3 4.10

4 *substitute*

5 4.14

6 **33 Dictionary, new definitions**

7 *insert*

8 *impairment dispute*, for part 4.9B (Damages for non-economic  
9 loss)—see section 155C.

10 *impairment guidelines*, for part 4.9B (Damages for non-economic  
11 loss)—see section 155P.

12 **34 Dictionary, definition of *late party***

13 *omit*

14 4.10

15 *substitute*

16 4.14

17 **35 Dictionary, new definitions**

18 *insert*

19 *medical assessment*, for part 4.9B (Damages for non-economic  
20 loss)—see section 155C.

21 *medical assessment certificate*, for part 4.9B (Damages for  
22 non-economic loss)—see section 155C.

23 *medical assessor*, for part 4.9B (Damages for non-economic loss)—  
24 see section 155C.

Section 36

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1            *non-economic loss*—see section 155B.

2    **36**    **Dictionary, definition of *relevant notice claim***

3            *omit*

4            4.10

5            *substitute*

6            4.14

7    **37**    **Dictionary, definition of *required thing***

8            *omit*

9            4.10

10          *substitute*

11          4.14

1 **Schedule 1 Consequential amendments**  
2 (see s 3)

3 **Part 1.1 Civil Law (Wrongs) Act 2002**

4 **[1.1] Section 98, new note**

5 *insert*

6 *Note* Damages for loss of earnings for injuries caused by motor accidents are  
7 also dealt with in the *Road Transport (Third-Party Insurance) Act 2008*,  
8 pt 4.9A.

9 **[1.2] Section 99, new note**

10 *insert*

11 *Note* Damages for non-economic loss for injuries caused by motor accidents  
12 are subject to limitations under the *Road Transport (Third-Party*  
13 *Insurance) Act 2008*, pt 4.9B.

14 **Part 1.2 Road Transport (Third-Party**  
15 **Insurance) Regulation 2008**

16 **[1.3] New sections 27A and 27B**

17 *insert*

18 **27A Appointment of medical assessors—Act, s 155N (5)**

19 The CTP regulator may be satisfied that a person is suitably  
20 qualified to exercise the functions of a medical assessor if the  
21 person—

22 (a) is, or has a similar level of skill, expertise and training as—

23 (i) a medical assessor under the *Motor Accidents*  
24 *Compensation Act 1999* (NSW); or

**Schedule 1** Consequential amendments  
**Part 1.2** Road Transport (Third-Party Insurance) Regulation 2008  
 Amendment [1.4]

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- 1 (ii) an approved medical specialist under the *Workplace*  
 2 *Injury Management and Workers Compensation Act 1998*  
 3 (NSW); or  
 4 (iii) a legally qualified medical practitioner appointed under  
 5 the *Workers Rehabilitation and Compensation Act 1986*  
 6 (SA); and  
 7 (b) is suitably qualified to apply the impairment guidelines.

8 **27B Prescribed place for AMA 5—Act, s 155P (5) (a)**

9 The Canberra Hospital, Building 5, Yamba Drive, Garran,  
 10 ACT 2606 is prescribed.

11 **[1.4] Section 28**

12 *omit*

13 155

14 *substitute*

15 156A

16 **[1.5] Section 29**

17 *omit*

18 155

19 *substitute*

20 156A

21 **[1.6] Section 30**

22 *omit*

23 155

24 *substitute*

25 156A

- 1 **[1.7] Section 33 (2) (b)**  
2 *omit*  
3 4.11  
4 *substitute*  
5 4.16
- 

### Endnotes

- 1 **Presentation speech**  
Presentation speech made in the Legislative Assembly on 2011.
- 2 **Notification**  
Notified under the Legislation Act on 2011.
- 3 **Republications of amended laws**  
For the latest republication of amended laws, see [www.legislation.act.gov.au](http://www.legislation.act.gov.au).
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2011

THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY

ROAD TRANSPORT (THIRD-PARTY INSURANCE)  
AMENDMENT BILL 2011

EXPLANATORY STATEMENT

Presented by  
Ms Katy Gallagher MLA  
Treasurer

### Road Transport (Third-Party Insurance) Amendment Bill 2011

#### Overview

The Road Transport (Third-Party Insurance) Amendment Bill 2011 introduces amendments to the *Road Transport (Third-Party Insurance) Act 2008* (CTP Act) that are intended to further facilitate the objectives of the CTP Act.

The objectives of the CTP Act are set out in section 5A of the Act as follows:

1. to promote and encourage the rehabilitation of people injured in a motor crash;
2. to encourage speedy resolution of motor crash claims;
3. to continue to improve compulsory third party insurance in the ACT;
4. to keep the costs of insurance at an affordable level;
5. to promote competition for CTP premiums;
6. to promote measures directed at eliminating or reducing causes of motor crashes and mitigating their results;
7. to provide for the licensing and supervision of CTP insurers; and
8. to establish and keep a register of motor accident claims to help the administration of the scheme and the detection of fraud.

The key goal of the Act is to get injured people to access medical diagnosis, treatment and health services as soon as possible to facilitate quicker return to health and a reduced propensity to develop long term injuries. In other words, injuries treated now are better than injuries treated tomorrow.

These amendments are designed to establish a modern, evidence based statutory entitlement process in substitution for non-economic loss damages (NEL damages, commonly known as general damages) in the case of relatively minor injuries. It will also assist in the shift towards transparency under the CTP Act, in particular, the awarding of damages for motor crash claims.

NEL damages are now a largely outdated measure, arising in the common law at a time in history when an injured party was unlikely to have the medical and rehabilitation facilities available to recover from an injury sustained in an accident. Now that the focus is on early treatment, and given the availability of modern diagnostic, treatment facilities and technologies, the majority of claimants (who suffer relatively minor injuries) are able to fully recover. They no longer have to rely on NEL damages as a substitute for treatment and recovery.

These amendments will enable scheme funds to be redirected from NEL to diagnosis, treatment and recovery for the purpose, as far as is possible, of returning motor crash victims to health and wellbeing.

**Access to the Common Law**

All persons injured in a motor crash will continue to have access to the common law. The proposed amendments do not put a bar on any claimant's access as a whole to common law compensation under the CTP Act. Moreover, the amendments will not affect a claimant's ability to take their claim to court. What these proposed amendments do is facilitate the objectives of the CTP Act by improving the scheme; through facilitating the speedy resolution of relatively minor personal injury claims, encouraging the rehabilitation of all claimants, the affordability of premiums and competition in the ACT CTP market.

In a fault-based common law system of compulsory insurance access to compensation is an opportunity, not an entitlement. Claimants are able to access common law damages as compensation once liability has been established. As a compulsory statutory insurance scheme, it is necessary to ensure that the cost of insurance is reasonable and justifiable. This is because compulsory statutory insurance schemes compel people to purchase insurance but are justified as necessary where they are required in the public interest, in the case of CTP, to ensure that funds are available to compensate those who are injured negligently in a motor crash. Third party insurance is compulsory all over Australia. In summary, the costs of compensating claimants under the CTP scheme should be consistent with the objectives of the scheme, i.e. the treatment and rehabilitation of people who are injured in a motor crash.

The key components of a compulsory statutory scheme of insurance are:

- that the community must be insured – ie motorists are given no choice but to pay a CTP premium on registration of their vehicle(s);
- an insurance product must be offered by a licensed insurer for that purpose – in this case insurers are licensed as CTP insurers under the CTP Act;
- the insurance product is the policy which is defined in the legislation, in this case the CTP Act. This provides the insured with insurance cover where they are at fault in a motor crash that causes personal injury to another involved in the motor crash.

Compulsory insurance schemes ensure that where someone in the community is injured or suffers loss caused by someone else, there is an affordable scheme that is able to provide compensation to those who claim against the scheme. CTP is a statutory form of insurance that is built around tort law. Without it, people would be forced to establish a claim for compensation under the *Civil Law (Wrongs) Act 2002* directly against at-fault drivers, who in many cases will not have the financial capacity to provide that compensation.

The need for third party insurance to be compulsory has long been recognised in Australia: it follows that as a compulsory statutory form of insurance, Governments must be able to decide where the boundaries of compensation under that insurance lie. There is no other way to ensure that the scheme is sustainable in the long term.

In considering common law rights and the reasonableness of any restrictions or controls that are put around damages, it must be remembered that compulsory third party insurance is exactly that. It is a compulsory scheme of insurance that creates by statute, the specific opportunity for members of the community to seek compensation

under the common law if they are injured in a motor crash and not at fault with the certainty that there are funds available to compensate them.

It therefore stands that in a system of compulsory statutory insurance there are only ever four stakeholders:

- 1.) those who must pay premiums;
- 2.) those who are injured in a motor crash;
- 3.) those who insure/underwrite the cost of insurance; and
- 4.) those who regulate the scheme.

Other participants, such as the legal profession and medical providers are merely service providers within the scheme.

Moreover, the CTP Act provides additional benefits to those that are injured in a motor crash as the legislation requires insurers to make early payments for medical expenses available under Part 3.2 of the Act before liability is determined in a claim. Additionally, it compels the provision and payment of medical expenses and rehabilitation services where liability is admitted by the CTP insurer. Discretion is also allowed under the legislation for insurers to provide these services without there being an admission of liability. In these circumstances liability is not to be inferred from such payments being made.

In imposing a threshold in relation to the most arbitrary and subjective common law head of damage, the proposed amendments do not affect the ability for all claimants to access compensation for economic losses, such as medical and rehabilitation expenses and loss of past or future earnings. In fact, the legislation is designed to ensure that all claimants are able to receive all necessary and appropriate medical and rehabilitation treatment before their claims are settled or decided by a court. This is because there can be no doubt that the chances of the fullest possible recovery from an injury are significantly improved the earlier treatment is commenced.

The treatment of an injury does not have to wait until that injury has stabilised. In fact, delaying that treatment would be prejudicial to the fullest possible recovery. The proposed amendments do not alter this and in fact build upon the emphasis on ensuring the greatest possible opportunity for claimants to get better.

#### **Detail**

##### **Clauses 1 - 3**

These clauses set out the name of the Act, the commencement date and the legislation amended by the Act.

Specifically, the Act is to commence on the seventh day after its notification.

##### **Clauses 4 – 5**

These clauses amend s27 of the CTP Act to clarify the existing provision. The CTP Act provides that a CTP policy is not affected by an error of the Road Transport Authority (RTA) or licensed insurer.

This amendment makes it clear that, in addition, the payment of an incorrect CTP premium does not affect the validity of a CTP policy. The amendment also gives CTP insurers the power to recover any outstanding premium owing as a debt to the insurers. As CTP premiums are paid by ACT motorists to the RTA, this provision is necessary to give the CTP insurers the ability to recover any outstanding premium owing, directly from ACT motorists, thus avoiding additional administrative burdens on the RTA.

**Clause 6**

This clause amends sections 37 and 38 in relation to the CTP premium. It is in anticipation of the making of revised CTP premium guidelines which will provide for the process of working out (calculating) the CTP premium.

**Clauses 7 – 11**

These clauses make technical amendments to the nomenclature of provisions of the CTP Act.

**Clause 12 – 14**

These clauses make minor technical and consequential changes to s139 of the CTP Act in relation to the compulsory conference procedures.

Specifically, clauses 12 and 14 clarify the existing law with regard to the certificate of readiness as part of the compulsory conference procedures in s139 of the CTP Act.

The procedures under the CTP Act are designed to ensure that the compulsory conference does not occur until all relevant information has been disclosed to both parties under part 4.3 of the Act. The intention this is to mandate full and open disclosure between the parties given this is a compulsory statutory insurance scheme. Accordingly, holding a compulsory conference prior to this would be premature. While the parties are free to and may settle a claim at any stage, full and open disclosure is one of the key principles in the CTP Act. Further, as all the information will have been disclosed prior to the compulsory conference, the claim will be ready for litigation in accordance with the intentions of the Act, should it not be settled at the compulsory conference (ie there should be few circumstances in which new information arises, such as the deterioration of an injury).

The amendments in clauses 12 and 14 make it clear that the certificate of readiness is a term used for the purposes of the CTP Act. The local legal profession had asked for clarification of the procedures in light of the forms already used in the Supreme Court of the ACT. Further, the provision will be amended to specify that the certificate may be an approved form under the CTP Act. This will mean that parties whose lawyer is required to sign the certificate of readiness under s139 (1) (d) because they legally represent that party in a claim, must ensure that the approved form under the CTP Act is used.

Clause 13 requires the respondent to give a claimant a statement setting out their agreement or otherwise in relation to whether the claimant meets the requirements for NEL damages under the Act. This will be a procedural requirement for the compulsory conference and is in line with the objectives of the CTP Act.

As the compulsory conference is the last procedural step prior to commencing court proceedings in a claim (ie all material that is relevant for the proceedings has already been disclosed by both parties) it is appropriate that the parties have turned their minds as to whether the claimant, should the respondent be liable, meets the requirements for NEL damages under part 4.9B (4.11).

This provision is not intended to prevent a party from disputing whether the requirements for NEL damages have been met later in the claim where new information or deterioration of an injury becomes known. This is facilitated, in appropriate circumstances, by the continuous disclosure provisions under part 4.3.

The provisions that establish the framework for NEL damages are found in clause 22. The subsequent medical assessment provisions in that part will only become applicable if there is a dispute about whether the claimant's degree of permanent impairment has met the required threshold. It is intended that a dispute will only arise if the disagreement between the parties cannot be resolved through the ordinary course of negotiations.

**Clause 15**

This clause is a consequential change because non-economic loss is now defined in the CTP Act in the new Part 4.9B (4.11) inserted under clause 22.

**Clauses 16 – 20**

These clauses make technical corrections applying to some of the notes in the CTP Act in line with the provisions referred to by those notes.

Specifically, clause 17 clarifies the intention of s144 in line with the original intention of this provision, making it clear that the amount of the settlement used to work out the legal costs in small claims is not to include NEL damages. This is consistent with the objectives of the CTP Act as outlined in the Explanatory Statement for the CTP Act (refer to Part 6, section 27 of the Explanatory Statement).

**Clause 21**

This clause removes sections 155 & 156 of the CTP Act from their current location in the CTP Act and replaces them under a new part 4.9D (4.13). This reflects the insertion of new parts 4.9A – 4.9C (4.10 – 4.12).

**Clause 22**

This clause inserts new parts 4.9A – 4.9C in the CTP Act and part 4.9D which relocates the existing s155 and 156 of the CTP Act (see clause 21). (See clauses 23-25; these parts are renumbered as 4.10 – 4.13 respectively. A reference to part 4.9A will mean a reference to 4.10 as it appears in the CTP Act and vice versa, same as for 4.9B/4.11, 4.9C/4.12 and 4.9D/4.13.) Parts 4.9A – 4.9B (4.10 – 4.11) create the damages framework to apply to CTP claims with respect to economic loss and NEL damages.

Damages for economic loss – new part 4.9A (4.10)

Sections 155 and 155A have been modelled on s126 and 127 respectively of the NSW *Motor Accidents Compensation Act 1999* (MACA).

The new s155 will apply to future economic loss in relation to loss of earnings. Specifically, it mandates the “vicissitudes of life” principle that applies to the amount of damages a claimant is to receive for future loss of earnings. Further, this provision under subsection (3) will serve to enhance the transparency of a decision that determines the amount for future loss of earnings.

Whilst future loss of earnings is a subjective exercise based on the circumstances of the particular claimant, an award of damages by the court serves as a general guide to the expectations of other claimants as to what they may receive. This is important in the context of settlement negotiations between the parties such that the parties are better able to arrive at a reasonable settlement offer or mandatory final offer under Part 4.8 of the CTP Act.

New section 155A applies to the broader head of future economic loss damages, being defined as including an award for:

- loss of earnings;
- loss of expectation of financial support;
- the value of future services of a domestic nature or services relative to nursing and attendance; or
- a liability to incur expenditure in the future. This last head of future economic loss is designed to take into account future expenses that may be necessary in particular cases, for example future medical expenses.

This section will operate to apply a discount rate of 5% to lump sum amounts for future economic loss to work out the present value for that amount. The effect of this will be to modify the discount rate applied by the High Court in *Todorovic v Waller* (1981) 150 CLR 402 (*Todorovic*) in relation to motor vehicle claims.

These provisions increase the transparency and clarity around damages awards in relation to economic loss as defined in this part. Increased transparency in this area will mean increased certainty in damages awards that can be expected to lead to the speedier resolution of claims, facilitate settlement negotiations and assist in monitoring the administration of the CTP scheme.

Specifically, in relation to the discount rate, a rate of 3% is already applied under the common law principle in *Todorovic*. What the proposed amendment in s155A seeks to do is increase that rate by 2% to 5%, in line with other CTP jurisdictions. NSW and Queensland already apply a 5% discount rate. As this is a concept that is already applied to damages awards in the ACT, the increase is justifiable in the context of the CTP scheme which facilitates the earlier recovery of claimants. In particular, the early payment of medical expenses prior to any determination of liability under Chapter 3 of the CTP Act and the discretionary, (and in cases where liability has already been admitted, mandatory) payment of medical and rehabilitation expenses under Part 4.6 of the CTP Act.

Damages for non-economic loss (NEL) – new part 4.9B (4.11)

This part inserts a new framework applying to damages for non-economic loss.

Sections 155B and 155C set out the definitions for this part. Section 155D makes it clear that nothing in this part is to prevent the parties from settling a motor accident claim at any time. Whilst the CTP Act sets out mandatory procedural requirements,

such as the compulsory conference, nothing precludes the parties from informally settling a claim.

Section 155E is to make it clear that even in a case where the threshold applied under s155F is met; this does not preclude a decision against NEL damages in cases where it would be appropriate not to award them. Whilst not detracting from the objectives of the CTP Act, this provision allows flexibility in decision making. However, it does not operate so as to allow an award for damages in circumstances where the threshold has not been met.

Division 4.9B.2 (4.11.2)

Section 155F is the operative provision of the new part, establishing that damages are not payable unless the required degree of permanent impairment threshold is met.

There are two options available for meeting the threshold:

- firstly, a claimant will meet the threshold if their degree of physical permanent impairment is 15% or more — this assessment is not to include psychological or psychiatric injuries; or
- secondly, a claimant will meet the threshold if their degree of permanent impairment only in relation to psychological or psychiatric injury is 15% or more.

Importantly, psychological and psychiatric injuries are not to be aggregated with other (physical) injuries in order to work out the degree of permanent impairment.

As previously stated, the amendments proposed in this part will not affect a claimant's ability to access the courts or common law generally. These amendments are about ensuring that the premium dollar that ACT motorists are compelled to pay is being spent on returning claimants to health. It is the intention of the proposed permanent impairment threshold that those claimants with minor injuries are encouraged to use the early medical and rehabilitation services that are already provided under the CTP Act rather than relying on lump sums. High claims costs for minor injury claims cannot be justified in a compulsory statutory insurance scheme that requires all ACT motorists to pay a premium that reflects those high costs. In particular, where those high costs are not being spent on the health and rehabilitation of claimants under the scheme. All claimants are still able to receive amounts for medical and rehabilitation, economic loss and other heads of damages. The proposed amendments are consistent with the objectives of the Act by encouraging the rehabilitation of all claimants, improving the scheme in line with the experience of other jurisdictions (primarily NSW for the medical assessment mechanism) and ensuring premiums are affordable.

Division 4.9B.3 (4.11.3)

This division sets up the procedures for undertaking medical assessments in order to work out the degree of permanent impairment of an injured motor accident claimant.

In particular s155G determines when the medical assessment process will be invoked. Under s155G, medical assessments will only be required if there is a dispute between the parties such that they cannot agree on whether the degree of permanent impairment of the claimant is above or below the threshold under s155F. It is intended by this provision that a dispute becomes a dispute under this part where it cannot be resolved through the ordinary course of negotiations between the parties.

Unless the parties have agreed that the threshold under s155F has been met or a medical assessment certificate states that the threshold has been met, then a claimant will not be able to receive NEL damages (as a portion of their settlement or court awarded damages).

Under s155H, if a medical assessment is required, an application must be made to the CTP regulator, who is then responsible for allocating the application to a medical assessor. This will be done in accordance with the approved application form and the medical assessment procedural guidelines. An application may be made by either party or by the court.

In the case of an application by either party, s155H (1) (a) requires the application to be in accordance with the medical assessment procedural guidelines. (Refer to s155P for the medical assessment procedural guidelines.)

In the case of an application from the court, refer to the power of the court to reject a medical assessment certificate in certain circumstances under s155K. Specifically, the court is only able to reject a medical assessment if it would cause substantial injustice to the claimant. These circumstances should only arise in limited claims as a medical assessment certificate will only ever be issued as final and conclusive proof of the degree of permanent impairment of the claimant. This medical assessment will have been peer reviewed (see s155J (4)).

The parties themselves are also able to apply for a further assessment in cases where the claimant's injuries deteriorate or new information comes to light under s155H (2).

Subsections 155H (2)-(3) set out the two grounds on which a further assessment may be made. The CTP regulator must be satisfied that one of the two grounds has been met if the application is to be allocated for a further assessment. The first ground is based on whether the injury has deteriorated since the last medical assessment. The second ground is based on whether additional information has become available that was not available under both party's obligations in part 4.3 (Obligations to give documents and information).

In both cases, the effect must be such that the deterioration or additional information would be material ie it would cause the degree of permanent impairment of the injured claimant to meet the threshold in s155F. This test of materiality is used because the critical feature of this process is whether or not the threshold has been met, after which, the injured person is entitled to NEL damages. Once NEL damages are payable, whether by agreement between the parties or following a medical assessment, it will then be a decision for the parties or the court as to the amount of NEL in a particular claim.

Subsections 155H (4)-(5) allow the CTP regulator to allocate an application to more than one medical assessor in cases where the injuries suffered by the claimant require more than one medical assessor. Each of the assessors that are allocated an assessment will issue an assessment that will be referred to a single medical assessor to make a combined medical assessment of the total degree of the permanent impairment of the claimant as a whole (see s155I (3)).

Section 155I describes how the degree of permanent impairment is to be assessed. Specifically, subsection (1) sets out that an assessment must be made in accordance with impairment guidelines and expressed as a percentage of the person as a whole. This later requirement emphasises the fact that an assessment of the permanent impairment of the injured claimant is to be an assessment of the person as a whole. Additionally, any impairment that existed before the motor accident must be disregarded by the medical assessor under subsection (2). Subsection (2) also makes it clear that psychological or psychiatric injuries are not to be aggregated with other injuries when making a medical assessment.

Under subsection (3), an injury can only be assessed by the medical assessor if they are satisfied that the claimant's impairment has become permanent. Permanency is to be dealt with under the impairment guidelines as this is a medical concept. If litigation is on foot and a medical assessment cannot be made because the injury is not permanent subsection (5) allows the court to adjourn proceedings until the assessment has been made.

Section 155J sets out the requirements once a medical assessment has been made. A medical assessor is required to give the CTP regulator a medical assessment certificate in relation to a medical assessment which must set out the reasons for any findings of the assessor for the matters certified. All certificates will go through a peer review process before they become final and conclusive proof of the matters certified in the certificate. This applies to both single medical assessments and the combined medical assessment. The medical assessment procedural guidelines will set out the process for peer review.

Section 155K provides that the court may reject a medical assessment certificate if it is satisfied that admitting a matter in the certificate would cause a party to the proceeding substantial injustice. In such a case, the court may either refer the matter to the CTP regulator for allocation for another medical assessment or make its own assessment in accordance with s155I. If the court asks the CTP regulator to allocate the assessment then proceedings on foot may be adjourned until a new medical assessment certificate is issued.

As indicated above, these circumstances should only arise in limited claims as a medical assessment certificate will only ever be issued as final and conclusive proof of the degree of permanent impairment of the claimant where it has been peer reviewed (see s155J(4)). The parties are also able to apply for a further assessment in cases where the claimant's injuries deteriorate or new information comes to light under s155H (2).

If proceedings are already under way, and an impairment dispute arises in circumstances where a medical assessment has not already been made, there is nothing to prevent the parties from making an application under s155H (1) (a).

Section 155L requires the injured person to attend a medical assessment if one has been allocated by the CTP regulator. These provisions will ensure the efficacy of the medical assessment mechanisms introduced by this part so that claims are proceeded with quickly and without unnecessary delays.

#### Division 4.9B.4 (4.11.4)

This division relates to other matters as part of the medical assessment mechanism.

Section 155M allows the CTP regulator to make guidelines that can assist the courts. Consequently parties when negotiating an early settlement or at the compulsory conference stage can decide what an appropriate level of NEL damages are for claimants with similar injury profiles.

Section 155N gives the CTP regulator the power to appoint a suitably qualified person as a medical assessor for this Act. In particular, appointments made by the CTP regulator will stipulate the areas that a medical assessor is qualified to assess under this part.

Section 155O allows for the making of medical assessment procedural guidelines. These will set out the procedural requirements for the medical assessment process including the things mentioned in subsection (1) (a)-(e).

Section 155P states the impairment guidelines to be used for the purposes of a medical assessment. The impairment guidelines to be used are the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA 5). If however, impairment guidelines are made (as a notifiable instrument) by the CTP regulator, then these are the guidelines to be used in assessing the degree of permanent impairment of an injured claimant and will be available on the ACT legislation register website at [www.legislation.act.gov.au](http://www.legislation.act.gov.au).

Section 155Q provides for the payment of costs for an injured person's medical assessment.

Section 155R makes it clear that the medical assessor, in making a medical assessment, is independent and not influenced by the ACT Government or the CTP regulator. The only direction a medical assessor will receive is the allocation of a medical assessment in relation to specified injuries and the assessor must comply with the CTP Act.

Section 155S makes it clear that a medical assessor is not civilly liable in relation to anything done or omitted if done honestly or without recklessness in the exercise of their functions under the CTP Act.

Interest – new part 4.9C (4.12)

This part inserts a provision, s156, which provides that interest will not be payable in relation to damages in a motor accident claim unless the circumstances set out in this section are met.

- Firstly, interest will be payable if the respondent has not made an offer, or revised offer, of settlement despite having the relevant information and reasonable opportunity to do so.
- Secondly, interest will be payable if the CTP insurer does not comply with its obligations under part 4.6 where liability has been admitted and a police officer attended the motor crash (or it was officially reported to the police). Importantly, an insurers obligations as the respondent are to pay medical expenses under s122 and provide rehabilitation services under s127 (noting that the obligation under s127 also arises where liability is admitted).

- Thirdly, interest will be payable if the respondent has made a mandatory final offer (MFO), or other settlement offer in writing and the damages awarded by a court are 20% higher than the offer and that offer is not reasonable based on the information available to the respondent. Noting that subsection (2) makes it clear that an offer is not unreasonable if the respondent was not able to make a reasonable assessment of the claimant's entitlement to damages.

This provision applies the restriction on interest payments to all heads of damage. It is designed to operate as a disincentive to insurers where they do not comply with their obligations under the CTP Act. A restriction on interest payments is appropriate within the CTP framework given the key procedural elements of the CTP scheme focus on achieving an early resolution of claims and earlier treatment and rehabilitation for injured claimants. In this context the Act is designed to put claimants on the road to recovery almost immediately after being injured in a motor crash and as such interest payments (made necessary in a litigious framework where delays are the norm) are no longer required.

This provision is based on s137 (4) of the NSW MACA. The NSW legislation goes further in restricting the payment of interest under s137 (2) and s137 (3), such that it will never be payable in relation to certain heads of damages: being attendant care and NEL damages. However, the provision in the CTP Act is intended to allow for the payment of interest in certain circumstances as specified in that section, which will apply to all heads of damage.

#### Costs – new part 4.9D (4.13)

Refer to clause 21, sections 156A and 156B reflect a restructure of the provisions of the CTP Act in light of the above new parts 4.9A – 4.9C (4.10 – 4.12). These sections have merely been relocated under this Bill and do not reflect a change in the law.

#### **Clause 23 - 25**

These clauses renumber parts of the CTP Act to reflect the new parts inserted in the Act.

#### **Clause 26**

This clause amends the heading of s157 to reflect the new numbering of that part of the CTP Act.

#### **Clauses 27**

This clause inserts a review clause to replace the existing three year review. The review has been set at five years from the commencement of the *Road Transport (Third-Party Insurance) Amendment Act 2011* and is to be a review of the Act as a whole. In light of the timing of these amendments it is considered that a review in five years will enable sufficient time for these most recent amendments to have taken effect.

#### **Clause 28**

This clause inserts the transitional provision that applies under s88 of the Legislation Act 2001. This will mean that claims in relation to a person injured in a motor crash occurring prior to these amendments will be dealt with under the law applying prior to the *Road Transport (Third-Party Insurance) Amendment Act 2011* being enacted.

**Clauses 29 - 37**

These clauses reflect the new numbering of the parts in the CTP Act and the new definitions under part 4.9B (4.11).

**Schedule 1**

**Part 1.1, clauses 1.1 – 1.2**

These clauses cross reference the new provisions (part 4.10 and part 4.11) that have been inserted in the CTP Act with the provisions relating to damages under the *Civil Law (Wrongs) Act 2002*.

**Part 1.2, clause 1.3**

This clause inserts a new section 27A in the *Road Transport (Third-Party Insurance) Regulation 2008*. Medical assessors that are appointed under the CTP legislation must be qualified to apply the impairment guidelines under the CTP Act and meet the same standard of practice (skill, expertise and training) as medical assessors that are appointed under the NSW MACA legislation, the NSW *Workplace Injury Management and Workers Compensation Act 1998* (NSW) and South Australia's *Workers Rehabilitation and Compensation Act 1986* (SA).

This clause also specifies the place where the AMA 5 (impairment guidelines) can be accessed.

**Part 1.2, clause 1.4 – 1.7**

These clauses merely reflect the relocation and renumbering of parts of the CTP Act and certain provisions made necessary by the enactment of the *Road Transport (Third-Party Insurance) Amendment Act 2011*.



## APPENDIX B: List of written submissions

Written submissions received by the Committee:

No. 1	Mr Rodney Luke (Private citizen)
No. 2	Joint submission by the ACT Law Society, the ACT Bar Association and the ACT Branch of the Australian Lawyers Alliance
No. 2a	Joint submission by the ACT Law Society, the ACT Bar Association and the ACT Branch of the Australian Lawyers Alliance— <i>Figures for claims for injuries from ACT Motor Vehicle Accidents after 1 October 2011</i>
No. 2b	Joint submission by the ACT Law Society, the ACT Bar Association and the ACT Branch of the Australian Lawyers Alliance— <i>ACT Bar Association, comment on effect of the proposed Bill.</i>
No. 2c	Joint submission by the ACT Law Society, the ACT Bar Association and the ACT Branch of the Australian Lawyers Alliance— <i>Treasury Directorate's Review of the Road Transport (Third-Party Insurance) Act 2008 (ACT) under Section 275.</i>
No. 3	Insurance Council of Australia
No. 4	NRMA Insurance
No. 4a	NRMA Insurance
No. 5	Law Council of Australia
No. 5a	Law Council of Australia
No. 5b	Law Council of Australia
No. 6	Mr Kevin Cox (Private citizen)
No. 7	Mr Tony Rial and Ms Angela Reynolds (Private citizens)
No. 8	ACT Human Rights and Discrimination Commissioner



## **APPENDIX C: Committee public hearings**

List of witnesses who appeared before the Committee at public hearings:

### **Public hearing of Thursday 6 October 2011**

- Mr Andrew Barr MLA, Treasurer
- Ms Megan Smithies, Under Treasurer, Treasury Directorate
- Mr Roger Broughton, Executive Director, Investment and Economics Division, Treasury Directorate
- Mr Tom McDonald, Director, Legal and Insurance Policy, Investment and Economics Division, Treasury Directorate

### **Public hearing of Wednesday 12 October 2011**

- Mr Nick Parmeter, Director, Civil Justice Division, Law Council of Australia
- Mr Simon Morrison, Member, Law Council of Australia—Personal Injuries and Compensation Committee

### **Public hearing of Monday 31 October 2011**

- Ms Noor Blumer, President, ACT Law Society
- Mr Philip Walker, President, ACT Bar Association
- Mr Angus Bucknell, President, ACT Branch of the Australian Lawyers Alliance
- Mr Andrew Stone, NSW Director, Australian Lawyers' Alliance
- Ms Natalie Spearing, Australian Centre for Economic Research on Health

### **Public hearing of Thursday 10 November 2011**

- Ms Mary Maini, General Manager, Long Tail Claims, NRMA Insurance



**APPENDIX D: Comparative summary of compulsory  
third-party (CTP) insurance schemes  
across Australia<sup>316</sup>**

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<sup>316</sup> Sourced from Submission No. 4 (NRMA Insurance), September 2011, p. 4.



Comparison of CTP Schemes by State / Territory								
	VIC	NSW	QLD	WA	SA	TAS	ACT	NT
i) States Applicable	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
ii) Definition of Accident	Indemnity - arising out of the use	Caused by fault in use or operation of a motor vehicle resulting in injury to arise from driving collision or out of control	Driving, running out of control, collision, action to avoid a collision, or defect causing loss of control	Directly caused by or by the driving of a motor vehicle	Driving vehicle running out of control, or person traveling on road colliding with vehicle when stationary, or action taken to avoid collision	Where personal injury results directly from the driving of, or collision with a motor vehicle	caused by or arising out of the use of a motor vehicle in any part of the Commonwealth	caused by or arising out of the use of a motor vehicle; resulting in death of or injury to a person.
iii) Benefits & Compensation								
• Access	Serious Injury	Pain & Suffering - >10%	Restrictions on legal costs and loss of consortium or smaller claims, and GPK payments)	Threshold for Pain and Suffering	Threshold for eco loss (see below). All reasonable treatment expenses paid. 1st week of eco loss not paid	Threshold for Pain and Suffering	No Restrictions	Non-NT residents only or NT residents injured interstate by an NT vehicle
• Pecuniary Loss								
	Threshold	None	None*	None	See above	None	None	None
	Maximum	2,834 net per week	3 times AWE	Unlimited	\$2,281,400* (subject to CPI)	4.25 AW	3 times AWE	\$188,405.40
• Non Economic Loss								
	Threshold	None	None	\$13,000	See footnote 14	\$4,000	None	None
	Maximum	\$309,000	\$250,000	\$257,000	\$241,500*	Unlimited	Unlimited	\$170,060.80
• Excess								
	Nil	\$500 excess on insured if >25% at fault	Nil	No	\$300 excess on insured if > 25% at fault	No	\$500 excess on insured if >25% at fault	No
iv) Discount Rate	6%	5%	5%	6%	5%	7%	3%	6%
iv) Limitation of Actions	6 years	3 years, unless leave of court given	3 years (for adults)	6 years (for adults)	3 years (for adults)	3 years 5 years on application to court	3 years (for adults)	3 years

<sup>13</sup> Deductible on awards up to \$39,500; phased out from \$39,500 to \$52,500; no deduction after \$52,500  
<sup>14</sup> Significant impairment for ≥7 days or ≥\$2,850 medical expenses, subject to CPI (Note: Effective 1 January 2003, under a revised scheme, the max for P&S will be \$241,500 subject to CPI for accidents occurring in 2003

<sup>15</sup> leave must not be granted unless full and satisfactory explanation is given and the total damages are likely to be over 25% of maximum for non-economic loss.  
 If a matter is going through assessment at Claim Assessment & Resolution Services (CARS), limitation period does not run until 2 months after a certificate of assessment or exemption is issued.  
<sup>16</sup> Injury Scale Value applied to GD's on incidents post 2 December 2003