
Green Paper – No-Fault Catastrophic Injury Cover

Insurance Commission of Western Australia

22 December 2014

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Introduction

1. The Law Council of Australia is pleased to provide the following submission to the Insurance Commission of Western Australia in response to its Green Paper entitled “Options to add No-fault Catastrophic Injury Cover to Western Australia’s Compulsory Third Party Insurance Scheme”.
2. The Law Council is the national peak body for the Australian legal profession. Its profile is appended at **Attachment A**.
3. The Law Council supports the establishment of no-fault catastrophic injury insurance cover for Western Australian drivers, subject to there being no disadvantage for those injured as a result of negligence under the existing compulsory third-party insurance (CTP) scheme.
4. In accordance with this principle, the Law Council supports **Option 3**, as outlined in the Green Paper, as the least expensive and disruptive proposal, and most beneficial to Western Australian road users.
5. The Law Council commends the Insurance Commission on its Green Paper, which adopts a far-sighted and pragmatic approach to the task of establishing a no-fault motor accident compensation scheme. The Insurance Commission clearly recognises that the common law has served the community in Western Australia very well and that it should remain a central aspect of the scheme as it evolves in the future.
6. It has been a regrettable feature of public discourse around the establishment of no-fault injury insurance schemes in other jurisdictions that no-fault accident insurance must be funded by reducing benefits at common law. The effect of this is that those who are negligently injured, who previously enjoyed entitlements according to the ‘compensation principle’ – that plaintiffs be awarded “such sums of money as would restore them to the positions they would have been in, if there had been no negligence” – have their entitlements substantially reduced in order to fund a no-fault scheme for all others; effectively “robbing Peter to pay Paul.” This offends basic principles of justice and fairness, and ultimately leads to a poorer quality of life for those forced to sacrifice their common law entitlements to “pay” for the proposed scheme.
7. The experience of no-fault schemes in Australia and overseas strongly indicates that the best performing schemes invariably allow access to common law for those who suffer injury as a result of another person’s negligence. Such ‘hybrid’ schemes, generally funded through a levy on motorists or businesses (in the case of WorkCover) provide low cost insurance against individual mistakes, while retaining the benefits of the common law.
8. These benefits include:
 - (a) Incentives to take reasonable care;
 - (b) Flexibility, freedom of choice and closure for those who receive a lump sum;
 - (c) Reduced scheme liabilities and administrative costs, by ensuring there is a ‘safety valve’ through final lump-sum payments; and
 - (d) Efficiency, in terms of determining and delivering payments to negligently injured parties.

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9. Having regard to the strong performance of the existing scheme, the Law Council submits that the safest option would be to maintain the existing structure and simply introduce a levy to cover the cost of a no-fault scheme, as a safety-net for those who cannot allege negligence by another party.
 10. The Law Council also strongly urges caution with respect to any proposal to strip back common law rights in order to offset the cost of a no-fault scheme. Any such restrictions would result in injustice for victims of negligence and undermine the beneficial model that exists and works well in Western Australia.

Consideration of the Options

Option 1

11. Option 1 is characterised in the Green Paper as a “do nothing” option.
12. However, the Law Council regards this as misleading. Under the Heads of Agreement entered into between the Commonwealth and other States and Territories, a standard term of the agreement for access to the National Disability Insurance Scheme is that States and Territories will:

“...be responsible for 100 per cent of the costs of NDIS participants who are in the NDIS because they are not covered by an injury insurance scheme that meets the minimum motor vehicle benchmarks.”
13. While it remains unclear at this stage whether Western Australia will enter into a full-scheme agreement with the Commonwealth at the conclusion of the 2-year trial in the Perth Hills, and if so on what terms, the Law Council considers it likely that pressure will emerge to enter the full scheme, as all other jurisdictions have agreed, or agreed in-principle, to do so.
14. The Law Council suggests that the Insurance Commission should factor this into its analysis of Option 1, given the potential for the Commonwealth to transfer the costs of care and support for catastrophically injured motorists in Western Australia in the future; and for pressure to emerge to facilitate access to the NDIS for Western Australia.

Option 2: universal scheme

15. Option 2 appears to envisage a scheme modelled largely on the New South Wales Lifetime Care and Support Scheme (NSW Scheme).
16. The Law Council does not consider the NSW Scheme to be the best model for adoption in Western Australia.
17. Under Option 2, all persons who meet the eligibility criteria for catastrophic injury arising from a motor vehicle accident would be eligible to access the scheme. Once admitted, participants would have their reasonable care and support managed on a needs-basis and would lose the entitlement to claim a lump-sum for future care and support. They would also lose their entitlement to control their own care arrangements. Participants would retain the right to sue a negligent party under other heads of damages.

18. The Law Council submits such a scheme would be undesirable for the following reasons:

Loss of benefits of the existing CTP scheme

- (a) As outlined in the Green Paper, the existing Western Australian motor accidents compensation scheme has been highly successful. It is characterised by reasonable benefits and flexibility for negligently injured motorists, the lowest CTP insurance premiums in the country and low administration costs. The scheme also enjoys relatively low claims frequency, strong investment return and high profitability.¹ According to Finity Consulting's Affordability Index, the Western Australian CTP premium is currently at around 20 per cent of Average Weekly Earnings, less than half the premium charged in most other jurisdictions.²
- (b) If implemented, Option 2 is likely to significantly erode these benefits by:
 - (i) diminishing the freedom of negligently injured participants to direct their own care and introducing a prescriptive framework for determining their "reasonable" care and support needs. Ironically, those with serious, but not catastrophic, injuries, sustained through another person's negligence, would retain the right to claim a lump sum and to direct their own care and support needs;
 - (ii) unnecessarily increasing the scheme's administrative costs, through increased handling of participants' affairs and application of decision making processes around "reasonable and necessary supports" and eligibility;
 - (iii) increasing the prospect of disputation around administrative decisions of the Insurance Commission, or any other authority established to administer the scheme; and
 - (iv) threatening the financial viability of the scheme by creating greater long-tail liabilities, as the number of participants increases each year, for whom the scheme will face a lifetime of expenses and an increasing administrative burden.

Disadvantage to parties harmed by negligence

- (c) As noted above, the loss of the right to claim future care and treatment costs would disadvantage individuals who presently have the freedom to direct their own care.
- (d) The experience of other schemes which force participants to give up self-determination is that many participants are frustrated by the ongoing need to apply for each and every grant of care or support. These parties are also forced into an administrative framework which, from time to time, they will need to appeal against or challenge incorrect or questionable decisions in order to clarify what their entitlements are. Such a scheme may predetermine care priorities in a way the participant disagrees with, curtailing their

¹ See for example http://www.finity.com.au/wp/wp-content/uploads/2014/03/CTP_News_Mar2014.pdf?page=5. The WA scheme enjoyed net profits of \$439 million and investment return of over 14 per cent.

² Ibid, page

fundamental freedom of choice as to what is appropriate and necessary for them. This can wear down participants to a point of fatigue, which results in those people receiving far less than they would under the common law and leads to a substantially diminished quality of life.

Limited impact on claims management

- (e) Contrary to the assertions in the Green Paper, the Law Council submits that removing the entitlement of participants to claim a lump sum for future care and support will not reduce their need for legal representation and assistance in respect of their claim.
- (f) It is also unlikely that it will significantly affect the incidence or length of disputes over liability or quantum, or have any impact on the propensity of individuals to seek damages, particularly in respect of catastrophic injuries.
- (g) Given the general damages and economic loss components are likely to remain substantial in catastrophic injury cases, the Green Paper fails to justify the suggestion on page 22 that “there would be less need for legal representation since you would not have to contend that someone was at fault to receive reasonable care and support.” There is no evidence to suggest that the volume or duration of common law claims will change as a result of moving to a no-fault scheme (all other things being equal), or that legal need associated with claims management and settlement would diminish.
- (h) Fault, liability and quantum will remain live issues for any scheme participant wishing to sue a defendant for negligence. The experience of long-tail no fault schemes also appears to be that parties continue to require legal advice and assistance in disputes around eligibility and what constitutes reasonable and necessary supports, a burden that would be increased under Option 2.

Financial risk

- (i) The Law Council notes that Option 2 carries with it considerably greater financial risk to the Western Australian CTP scheme and policy holders. While it is estimated that the proposed scheme would admit approximately 92 people each year, this will depend in significant part on the definitions adopted by the scheme for eligibility and could result in greater numbers joining the scheme than anticipated.
- (j) The cost will also be determined by the generosity of the provisions concerning what is reasonable and necessary for the care and support of different participants.
- (k) The liabilities and administrative cost of the scheme can also be expected to rise each year as more people are admitted, without the capacity to settle by way of a lump sum.
- (l) Essentially, it would establish an expensive administrative framework for a group of people that are better-off under existing arrangements. The primary concern should be about providing a safety-net for those who cannot allege negligence by another party.

Lack of evidence with respect to theoretical “disadvantages” of lump-sum compensation

- (m) The Green Paper suggests the “possibility of the lump sum payment running out if inappropriately managed/invested or if the claimant’s condition worsens and care and support needs increase after the lump sum compensation payment has been made.” This claim is sometimes made by advocates for no-fault schemes, such as the New Zealand Accident Compensation Commission, though supporting evidence is rarely adduced. The reality is that the Law Council is not aware of any evidence, empirical or anecdotal, which supports this statement. In practice, those obtaining large lump sums are advised to and obtain expert financial advice to ensure that this does not occur.
- (n) A more likely occurrence (and there are many examples to cite here) is that the no fault scheme will run into financial difficulty and move to place limits on compensation entitlements for participants. For example:
 - (i) in 2008 the New Zealand Accident Compensation Commission announced unfunded liabilities of \$23.175 billion. This is roughly equivalent to 17.1 per cent of New Zealand’s Gross Domestic Product, a deficit that would be considered extraordinary in any jurisdiction. Around the same time, the scheme was less than 50 per cent funded.³ This led to enormous increases in compulsory contributions to its various injury compensation ‘accounts’, as well as moves to further limit benefits to injured persons.
 - (ii) Similarly, in 2010 South Australian WorkCover, which does not allow any access to common law, had unfunded liabilities of almost \$1 billion and charges employers the highest compulsory contributions in the country, at 2.75% of payroll. Since that time, WorkCoverSA was forced to increase premiums and overhaul the entire scheme to place it on a more stable footing (including access to common law) by 1 July 2015.
 - (iii) Comcare has been under almost constant review for years. It is now only 64 per cent funded and two separate processes are currently underway to further cut benefits to injured workers.⁴ This is notwithstanding that the injury profile of the majority of employees in the scheme is far less serious than State and Territory WorkCover schemes, which cover a substantially greater proportion of blue-collar workers in higher-risk industries. The most deficient aspect of the Comcare scheme is that it does not allow access to common law damages and commutation of benefits is only permitted in very limited circumstances.
 - (iv) In NSW, there have been repeated moves by the Government to restrict compensation entitlements for injured workers and motorists due to

³ http://www.finity.com.au/wp/wp-content/uploads/2014/03/CTP_News_Mar2014.pdf?page=5

⁴ The *Safety, Rehabilitation and Compensation Amendment Bill 2014* is currently before the Senate and, if enacted, will restrict compensation for injuries sustained during off-site recess breaks or as a result of serious or wilful misconduct. Concurrently, the Commonwealth Department of Employment has been engaged in consultations over a second tranche of proposed legislation, which will impose significant further limitations on compensation, including a step down of incapacity payments at 13 weeks (making it the worst in the country and returning public sector employees to a pre 1971 position), broadening "reasonable administrative action" exception to include reasonable directions for operative purposes, exclusion of secondary psychiatric conditions from eligibility for permanent impairment, and a schedule of costs for medical treatment, medical reports and legal costs.

concerns about scheme costs. Thresholds introduced in 2002 removed around 80 per cent of claims and allowed private insurers to achieve profits of over 25 per cent of written premium over the succeeding 10 years. This resulted in a NSW Parliamentary Inquiry in 2012 highlighting concerns about a scheme which had enabled insurers to claim such a windfall in a competitive private insurance market. Meanwhile, premiums continued to rise, to the point where NSW is now one of the least affordable jurisdictions in which to register a vehicle.

- (o) Given Western Australia currently has one of the best performing motor accident compensation scheme in the country, there would appear to be little sense in departing significantly from the existing model in favour of a universal no-fault scheme, with uncertain financial implications.
- (p) Further, given the existing scheme already covers care and treatment expenses on a pay-as-you-go basis, there is no disadvantage for participants if they continue on that basis. However, on balance there are identifiable disadvantages if they move into a prescriptive, no-fault scheme and lose the benefit of choice in directing their own care.
- (q) The delays referred to on page 19 of the Green Paper are not a peculiar feature of the common law. Under the present scheme, parties pursuing a common law claim can get access to immediate treatment and support on a pay-as-you-go basis. In the case of catastrophic injuries, it may take years before the full extent and impact of the injury is realised – this is the case whether the individual is brought within an administrative framework or compensated by an insurer. In either case, the person will have immediate access to care and support, and will pursue a compensation claim over the course of months or years while their injuries stabilise and the full extent of their loss crystallises. Removing the right to lump-sum compensation for future care and support does not alter this.
- (r) One of the supposed disadvantages identified in the Green Paper of lump-sum compensation, as opposed to lifetime care and support, is that it leaves the burden with family members and friends to act as carers. The Law Council submits that this would not necessarily be the case. Compensation for future care and support takes into account the probable needs of the plaintiff, including the need for paid care. The party would have the option of seeking referrals through the NDIS or through a disability support group. Inevitably, family and friends are likely to take on a role in assisting and supporting – which is likely to also occur under a no-fault scheme.
- (s) Similarly, projected inflation is a matter considered in the context of determining quantum, and the capacity to invest and earn interest on those funds provides an important safeguard against the rising cost of goods and services.

19. For these reasons, the Law Council recommends against adopting Option 2.

Option 3: latch-on scheme

20. Option 3 essentially proposes that the fundamentals of the existing scheme remain unaltered, but that a no-fault care and support scheme be established for those who do not have a common law claim.

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21. The Law Council strongly supports this as a model and considers it to be the most sustainable and fair of the three models presented.
 22. As noted above, the fundamentals of the existing scheme in Western Australia are clearly working well. Western Australian motorists currently enjoy the lowest CTP insurance premium in the country and those negligently injured enjoy reasonable benefits and autonomy in directing their own care.
 23. Option 3 would represent a safety net for those without a common law claim. It would be administratively more cost-effective than Option 2 and would not result in any disadvantage for any claimants, all other things remaining equal.
 24. Option 3 also ensures consistency for those catastrophically injured and those who are not. Under Option 2, a person with serious injuries but who is not eligible for the scheme due to the nature of their injuries, would enjoy greater rights and autonomy than a catastrophically injured person who was admitted to the scheme. Under Option 3, catastrophically injured people retain the same common law rights as other injured motorists, which the Law Council considers to be appropriate and fair.

Contributory negligence

25. The Law Council agrees with the approach under Option 3 that any reduction in damages due to contributory negligence would apply only to heads of damages other than for future care and treatment expenses.
26. This will ensure those who are awarded a lump-sum for future care and support do not have that amount reduced, leading to a much greater risk that the money would run out in their life-time.

Exclusions

27. The Law Council submits that the proposed exclusions run counter to the philosophical underpinnings of a no-fault regime. Someone who suffers catastrophic injury through a lapse in judgement or foolish endeavour is no less catastrophically injured. Moreover, the criminal justice system exists to censure and deter illegal activity. It should not be the role of the Insurance Commission to impose an additional quasi criminal and very harsh punishment (refusal to meet the care needs of those convicted of a crime).
28. Typically, many of those most harshly affected by such a policy would be young people, those who are subject to disadvantage and those suffering drug or alcohol addiction. For example, a disproportionate number of those convicted of traffic offences in Western Australia are Indigenous people. Accordingly, such a policy would have a disproportionate impact on those people, who are also more likely in any event to suffer from disability.⁵
29. A no-fault scheme recognises that there is often a lack of moral hazard involved where a person is negligent and caused their own injuries. This ought to extend to those people regardless of whether they were engaged in a criminal activity. The broader consequences of that conduct should be a matter for the police and the courts.

⁵ Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage 2014*, Productivity Commission, Commonwealth of Australia, Chapter 4.

30. Finally, the ostensible rationale for exclusions would be to provide some form of deterrent to criminal behaviour and to punish the perpetrator. However, there is no evidence that the exclusion in any way achieves the first rationale and, as already noted, the second rationale is the province of the courts.

Restrictions on benefits not necessary

31. The Law Council commends the Insurance Commission for implicitly recognising that restrictions on existing benefits or entitlements would be unnecessary, unfair and ultimately undermine the scheme.
32. On the Insurance Commission's estimates, implementing a no-fault scheme would increase the average cost of CTP insurance premiums by approximately one-third. The corollary of this is that the value of the insurance product would correspondingly increase, as around 50 per cent more people will have access to care and support in the event that they suffer a life-altering injury in a motor vehicle accident. The Law Council submits that, *prima facie*, this represents a very good investment.
33. Governments often focus on the assumed public reaction to a relatively minor increase in the cost of living, without seeking to make the case for the proposed reform, in the same way that the case has been made for the NDIS. It is then argued, erroneously, that one cohort (negligently injured people) should have their rights curtailed in order to pay for benefits to another cohort (participants in the proposed no-fault scheme).
34. The majority of those affected by these kinds of restrictions are not compensated for their loss. For example, introduction of a 10 per cent threshold under the NSW Motor Accident Compensation Scheme in 2002 resulted in an 80 per cent reduction in the number of people who were eligible to claim damages for pain and suffering. A similar outcome is now emerging in South Australia, following similar restrictions introduced in that State in 2012.
35. As noted in the Green Paper, a \$100 increase in the cost of the CTP premium would make it the third lowest premium in the country. This is likely to become the second cheapest when Queensland moves to introduce a no-fault scheme, as it is required to under the NDIS Heads of Agreement with the Commonwealth.⁶ However, given the existing premium is around 20 per cent of Average Weekly Earnings, a one-third increase in the cost of written premium would result in a premium roughly equal to 30 per cent AWE, which would still be the most affordable in the country.⁷
36. Western Australia is in an outstanding position to introduce a safety-net for motorists, without having a significant impact on the cost of living. This is achievable without paring away the rights of those who are negligently injured and would result in a first-class CTP compensation scheme for Western Australians.

Conclusion

37. The Law Council considers there is now an excellent opportunity to enhance the successful Western Australian CTP insurance scheme by introducing a safety-net for catastrophically injured motorists, without disrupting existing arrangements.

⁶ Available at <http://www.ndis.gov.au/sites/default/files/documents/Queensland-and-Federal-Government-Heads-of-Agreement-for-the-NDIS.pdf>, see paragraph 40.

⁷ http://www.finity.com.au/wp/wp-content/uploads/2014/03/CTP_News_Mar2014.pdf?page=5

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38. Option 3 offers the best model for achieving this. It would be administratively less costly than Option 2 and retains the flexibility of common law compensation and the freedom of choice for participants. There is also less financial risk to the scheme, as there will be fewer people forced into a life-long relationship with the Insurance Commission (or other authority established to administer the scheme).
 39. The Law Council supports removing reductions for contributory negligence in respect of lump sum awards for future care and support, but considers reductions should still apply to other heads of damages.
 40. The Law Council considers there should not be any exclusion for those whose injuries were sustained recklessly or in the course of criminal activity. It should not be the role of the Insurance Commission to punish criminal behaviour, which is more appropriately the role of law enforcement agencies and the criminal justice system.
 41. The Law Council is grateful for the opportunity to contribute to this important initiative. The Law Council also strongly encourages the Commission to have in mind the benefits of the common law and its role in ensuring the ongoing success of the Western Australian motor accident compensation scheme. This can best be improved with a safety-net insurance model for catastrophically injured people, leaving the fundamentals of the existing scheme unchanged.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.