



**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY**

**STANDING COMMITTEE ON PUBLIC ACCOUNTS**

**(Reference: [Inquiry into the Road Transport  
\(Third-Party Insurance\) Amendment Bill 2011](#))**

**Members:**

**MS C LE COUTEUR (The Chair)  
MR J HARGREAVES (The Deputy Chair)  
MR B SMYTH**

**TRANSCRIPT OF EVIDENCE**

**CANBERRA**

**MONDAY, 31 OCTOBER 2011**

**Secretary to the committee:  
Dr A Cullen (Ph: 6205 0142)**

**By authority of the Legislative Assembly for the Australian Capital Territory**

Submissions, answers to questions on notice and other documents, including requests for clarification of the transcript of evidence, relevant to this inquiry that have been authorised for publication by the committee may be obtained from the Legislative Assembly website.

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## **Privilege statement**

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*Amended 9 August 2011*

**The committee met at 10.34 am.**

**BLUMER, MS NOOR**, President, ACT Law Society

**BUCKNELL, MR ANGUS**, President, ACT Branch, Australian Lawyers Alliance

**SPEARING, MS NATALIE**, Australian Centre for Economic Research on Health

**STONE, MR ANDREW**, Director, New South Wales Branch, Australian Lawyers Alliance

**WALKER, MR PHILIP**, President, ACT Bar Association

**THE CHAIR:** Good morning everybody and welcome to this public hearing of the Standing Committee on Public Accounts inquiry into the Road Transport (Third-Party Insurance) Amendment Bill 2011. On behalf of the committee I would like to thank our witnesses for appearing today: Ms Noor Blumer on behalf of the ACT Law Society, Mr Philip Walker on behalf of the ACT Bar Association, Mr Angus Bucknell on behalf of the ACT branch of the Australian Lawyers Alliance and Mr Andrew Stone on behalf of the New South Wales branch of the Australian Lawyers Alliance, who is appearing by phone due to Qantas issues.

I understand also that later on today Ms Natalie Spearing will be appearing, also by conference phone because she is in Canada, on behalf of the Australian Centre for Economic Research on Health.

Have you read the blue privilege statement?

**Ms Blumer:** Yes.

**Mr Bucknell:** Yes, thank you.

**Mr Walker:** Yes.

**MR HARGREAVES:** Mr Stone probably has not.

**THE CHAIR:** Mr Stone, have you seen a copy of the privilege card?

**Mr Stone:** Yes, I have seen it by virtue of it being in the transcript from previous days' hearings.

**THE CHAIR:** My question then is: have you read the privilege card and do you understand the privilege implications of the statement?

**Mr Stone:** Yes.

**THE CHAIR:** I remind witnesses that proceedings are being recorded by Hansard for transcription purposes and are being webstreamed and broadcast live. Before we proceed to questions, would any or all of you wish to make an opening statement?

**Ms Blumer:** Yes, thank you. I will make a short opening statement, as will my colleagues Mr Bucknell, Mr Walker and Mr Stone.

The ACT Bar Association, the Australian Lawyers Alliance and the ACT Law Society

are presenting a joint submission and are represented, as I have said, today. Comprehensive submissions have been jointly filed and we also support the submission from the Law Council of Australia.

Mr Andrew Stone is from the New South Wales bar and is a person most experienced in the effects of a similar scheme introduced in New South Wales about 10 years ago. We now have the benefit of hindsight of that scheme and he will talk to us about that.

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.

We do know what these people are like, as we have spent many years acting for them to get adequate compensation for their injuries. Typically it is their first encounter with insurance companies and lawyers. Typically they delay making a claim for as long as possible. And their first words are often: "I'm not the type of person to make a claim. I was really hoping I would just get better."

Every day we hear stories of how even relatively minor injuries can play havoc with people's relationships, work and everyday activities. As those people cannot speak to you today, we humbly speak for those 80 to 90 per cent of Canberra people injured in motor vehicle accidents who will lose their right to claim damages for pain and suffering and loss of enjoyment of life, amongst other things.

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. We draw your attention to the work of Natalie Spearing, who has made herself available to give evidence today and whose paper has been provided to the committee.

The failure of the ACT government and the NRMA to provide any substantial figures about the performance of the 2008 scheme has made it difficult to understand the need for change to the scheme. In an attempt to provide some factual basis for discussion I have reviewed the internal figures of the firm of which I am a director, Blumers lawyers, and can provide a summary which may be of some assistance to the committee.

The few figures that have been provided during the evidence given by the ACT Treasury seemed totally different from the experience of ACT legal practitioners. For example, we heard that only seven per cent of ACT accident victims access the early treatment claim option. You will see when you look at the figures from Blumers lawyers that our figures show a very different picture.

We are also very concerned by assertions made based on anecdotal evidence that injured people are being advised to maximise their compensation by delaying medical treatment. This is totally contrary to the advice competent lawyers actually give to their clients. Our advice to our clients is always to get as much treatment as soon as possible; this is borne out by my investigations which show that the average time for

seeking initial medical treatment is two days, and 95 per cent of our injured people seek treatment within one week of being injured.

The bill does not deal with early treatment at all. The ACT Treasury justification for removing most people's ability to claim damages for pain and suffering is so that they "no longer have an incentive to hold off on medical treatment to try and maximise a payout". What a cynical disregard for the honesty and good sense of the citizens of Canberra. It would be adverse to a plaintiff's claim not to undertake medical treatment.

It was also our intuitive experience that the 2008 act has already significantly reduced costs, time to settlement and the amount of litigation, and my sample figures bear this out. Of the claims for accidents occurring in the first year of the 2008 scheme, 79 per cent of ours 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.

The society repeats its offer to work with the government to review and refine CTP insurance. We believe that that can best be achieved by, firstly, withdrawing the bill, secondly, carefully reviewing the effect of the 2008 scheme and, thirdly, by seeking and implementing sensible and fair improvements to the scheme. Thank you. I have those figures if you would like them.

**THE CHAIR:** Thank you very much.

**Mr Bucknell:** I endorse the comments of Ms Blumer. What I would like to draw to the attention of the committee is the principal concern that we have in relation to the proposed bill—that is, that the bill essentially does one thing, and one thing alone, and that is it takes away the rights and entitlements of injured motorists. What the bill proposes to do is to assert a 15 per cent whole person impairment, which will preclude somewhere between 80 and 90 per cent of claimants from claiming pain and suffering. This is an arbitrary assessment, and it is also defective insofar as it relies upon AMA 5.

AMA 5, as the committee has no doubt heard, is a document which is not intended for the use of determining compensation, certainly on a common law basis, or designed to be a threshold gate to claiming compensation. There are numerous flaws in relation to the whole person impairment system, the first of which is under the proposed bill itself, which disallows a combination of psychological injury and physical injury. In my experience, most motorists suffer from some amount of shock as a consequence of a motor vehicle collision. Some of the shock that they suffer resolves quickly; others continue to suffer from the effects of pain, the effects of the trauma of surgery and the effects of the trauma of the motor vehicle accident for a very long period of time. The proposed bill does not allow any combination of psychological and physical impairments to be read together. This is a manifest injustice in relation to those people who are affected.

Furthermore, the bill removes or retards the right of claimants to claim for future medical expenses, future rehabilitation expenses and future loss of income. The Treasury submission has essentially been that the main aspect has been the effect of

the pain and suffering of non-economic loss. That is not really the case. The increase of the discount tables from three per cent to five per cent is going to result in people not being afforded the proper medical treatment they need for the future, particularly those who have ongoing and serious injuries. It is going to affect all classes of claimants, not simply those who fall under the 15 per cent. It will also deprive them of their right in relation to proper compensation with respect to their loss of earnings in the future and it will also deprive them of their rehabilitation rights in relation to the future by the pegging back of the actuarial entitlement to which they would be entitled under the legislation as it is presently before the Assembly.

Those are the principal problems that the ALA has in relation to this matter, along with the comments that my friend has made. We see this essentially as striking at injured motorists, nothing more and nothing less.

**Mr Walker:** I also have a couple of papers that people may wish to look at. I do not propose to labour it, but it is a quick summary of some provisions of the bill.

**THE CHAIR:** Mr Stone, are you still hearing okay?

**Mr Stone:** I am, thank you.

**THE CHAIR:** Please continue, Mr Walker.

**Mr Walker:** You will have a short summary of some principles and parts of the bill. I want to divide what I say into two broad parts. The first is to some extent to emphasise part of what you have just heard. 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.

In fact, with respect to one of those Treasury officials, at a meeting after he had laboured that point, I said to him, "Could you please tell me what clause does what you said this legislation does?" He did not give me a responsive answer. I had the audacity, so it seemed he interpreted it as, to ask him the same question again. The response I got on that occasion was that he was not going to be cross-examined by me. I still did not get referred to a clause in the bill indicating how there were going to be more funds diverted to rehabilitation.

There is no such clause. The only clauses in this bill reduce compensation for medical treatment. Whereas nobody favoured you with that reference in the course of 50 pages of transcript, I can. The clauses of the bill 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 of course, as we also know, 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 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.

The other aspect I noted in the course of the transcript was that there were some fairly light references to matters such as pain and suffering. It should not be overlooked that 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. I should say that there is a deficiency in what I have written here. Under 155B in the second last line you should change the words “15% whole person impaired” to “15% whole person permanent impaired”.

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.

That is the first part. The second part of what I have written deals with the issue of medical tribunals. 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.

I have listed the various provisions of the bill which move your entitlements into the realm of control by the executive government. The first thing you might notice is that I have given you the indication of what the CTP regulator is. You should not overlook that he is actually a director-general, a senior public servant—one of the most senior public servants. But in addition the executive government determines the guidelines by which your permanent impairment might be assessed. They are not disallowable instruments. We have spoken about the AMA guideline, but they do not have to be the AMA guideline. The CTP regulator appoints people to the committee which assesses your injury. In fact, the CTP regulator may pick a particular individual to assess your particular injury. If the executive government had that capacity to pick a judge like that, people would be alarmed. There is only a three-year appointment if you are a permanent member, so it is possible to do away with people who do not—there is no security of tenure and there is a consequential effect for independence.

There is also a series of procedures before the panel which is again determined by the executive government. And if that is not enough, the executive government may now produce guidelines for the courts as to how much they award in relation to non-

economic loss in its various iterations. I am not going to suggest that this is unconstitutional—one thinks of cases like *Cable*. Nor am I here to give a lecture on constitutionality. But this takes us into an area where there is a substantial inroad into what courts do. I am suggesting to you that it is not appropriate to draw fine distinctions and say, “Look, we have just managed to stay this side of the line.” When you move into areas where the courts have said, “This is the territory which at times can be unconstitutional”—you should stop before you go there. That is my proposition: 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.

**THE CHAIR:** Mr Stone, do you have a statement?

**Mr Stone:** Yes, if I may. First of all, my apologies that I am not there in person, but Qantas intervened in that. Secondly, to give you some background as to who I am and what I do, I have practised as a barrister for 14 years doing almost nothing but motor accident cases. I have done so in New South Wales since 1999 under the operation of the Motor Accidents Compensation Act that has imposed a 10 per cent whole person impairment threshold applying AMA 4. I understand that what you are talking about is 15 per cent with AMA 5.

The starting point is that it is important to note that probably more important than the AMAs are the guidelines that come with them. Here we have 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.

My experience of dealing with this medical assessment process over the past decade is that it is, firstly, harsh, secondly, capricious, thirdly, inefficient and, fourthly, expensive, and I would like to briefly expand on each of those.

I do not know the extent to which you have got into the nitty-gritty. I have read the submissions people have made; I have read the evidence that has been given so far. But you need to appreciate that those you are cutting out of non-economic loss or compensation for pain and suffering include people who have complete loss of sense of taste and smell. That does not get you over 15 per cent whole person impairment on AMA 5.

Loss of both breasts does not get you over the threshold. Another example is a disc prolapsed in the lumbar spine. I will just briefly explain the medical jargon. 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 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."

These are all the types of things you are doing by imposing this sort of threshold. You are saying to all of these people, for the sake of a few bucks a week of premiums for motorists, "We ask you to take this and take nothing for your pain and suffering." That is just wrong.

Let me move on to the second, briefly, and I will speed up—the capriciousness. 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.

I move on to the third, which is the efficiency. What we are seeing in New South Wales is more and more delays being generated by disputes at MAS. Whereas a case could be brought on before a judge or an arbitrator and they could award an amount for non-economic loss and the case would be resolved, what we now have is where it takes upwards of six months and, in some cases, up to two years to get the MAS process over.

The MAA put out a MAS bulletin to inform the legal community and the medical community up here about the operation of the scheme, and the most recent bulletin had an article about a case. They gave it as a case study. On the first MAS assessment—MAS is Medical Assessment Service—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 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.

The experience with NRMA up here has been that they will not negotiate about pain and suffering unless you have a certificate putting you over 10 per cent or unless their own doctors put you over 10 per cent. So, in fact, what you are doing is slowing down

the resolution of claims as people wait for MAS, the Medical Assessment Service.

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.

Of course, you have also got to factor in the cost of administrative appeals, because 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. What you seem to be talking about down there is yet another variation on New South Wales, so it will not be the same as motor accidents in New South Wales and it will not be the same as workers compensation in New South Wales. You will have your own guidelines. So the doctors up here will have to not only be on top of New South Wales motor accidents and New South Wales compensation but now ACT motor accidents, and with the inevitable confusion between them, again, you are going to get more administrative appeals.

The final point I want to raise is the expense. All of these doctors and all of these panels cost money. Delay certainly costs money and adds to the cost of claims. They are the issues we have had with this system, and I am delighted to answer questions as people have them.

**THE CHAIR:** My first question is for Ms Blumer. In your opening remarks, you said something about there being a better way of improving the scheme. Would you like to elaborate on that?

**Ms Blumer:** In our submissions we have talked about various things that can be done. One of them is with respect to, for instance, the cost provisions, which are unclear and probably unhelpful for that reason and are still awaiting judicial determination. Unfortunately, lawyers cannot work out what they mean.

The other suggestions are 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.

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. I think they were the main areas where we felt that there could be some—

**Mr Bucknell:** If I may elaborate on that?

**Ms Blumer:** Yes, certainly.

**Mr Bucknell:** The society, the ALA and the bar have also suggested that a risk rating would be able to be attached to a CTP policy of insurance. 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. I took the liberty this morning of ascertaining, if I lived in Queanbeyan, what my cost of insurance would be. I am at a disadvantage because I have a 17-year-old son.

**MR HARGREAVES:** That is a disadvantage!

**Mr Bucknell:** That is a disadvantage.

**MR HARGREAVES:** Have you had that assessed, because I suspect ongoing pain and suffering is the go!

**Mr Bucknell:** I cannot do anything about that, I am sorry, Mr Hargreaves! The inquiries I have made, if I were registered in Queanbeyan, indicate that I would pay between \$525 and \$532 per year. It is \$526 in the ACT. If the government chose to accept a risk rating scheme you would have different classes. You would reward people with good driving histories. That would be one way around it.

The society also suggested that guidelines in relation to establishing non-economic loss or pain and suffering could be arrived at by the court and by the stakeholders in relation to the matter. Those guidelines would possibly take the form of the UK guidelines which are presently used to determine the entitlement to damages. They have also been referred to in the Ipp report.

The other aspect is the improvement to the mandatory final offer provisions which are contained within the present legislation. Those provisions are uncertain, as are the compulsory conference provisions. 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. Those are, in essence, the suggestions we have made.

**THE CHAIR:** Thank you. My next question is to Mr Stone. Mr Stone, you indicated that there were some substantive differences between our scheme and that of New

South Wales. Could you elaborate a bit on that? The Treasury gave evidence and it seemed to me that what we were doing was trying to line up with New South Wales, so we could entice additional third-party insurers in. From what you are saying, that is not the case. Can you elaborate?

**Mr Stone:** Certainly. Up here we use the American Medical Association guidelines, whole person impairment, fourth edition. As I understand it, what is being proposed that you use down there is the fifth edition, and indeed the sixth edition has just been issued. Moreover, the operation of AMA 4 up here in New South Wales is significantly modified by the use of the permanent impairment guidelines issued by the Motor Accidents Authority or, if you are into abbreviations, AMA 4 as modified by the PIG from the MAA.

If you do not adopt our guidelines root and branch then you start to get differences, as indeed you get differences from AMA 5. Let me say that last week I was at a committee meeting at the MAA where we were looking at six practice notes, with the practice notes being designed to effect the interpretation of the PIG, or the permanent impairment guidelines, in turn influencing how you interpret AMA 4, because there was still ambiguity as between AMA 4 and the permanent impairment guidelines—thus the need for yet more layers of complexity of the whole series of practice notes.

Really, unless you want to devolve all sovereignty in the ACT and say, “We’ll do what New South Wales do,” in terms of AMA 4, the permanent impairment guidelines and the practice notes that accompany them, you do not get the economies of scale. You have really got to be prepared to entirely walk away from having your own system and say, “We’ll have what New South Wales have,” or else you do not have the same thing, and the moment you do not have the same thing there is not the incentive for insurers to enter your market.

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.

**THE CHAIR:** In terms of being identical, would that also be in terms of the risk ratings which we do not have in the ACT?

**Mr Stone:** That is a different issue in terms of premium setting. The risk rating here is not a full and proper risk rating. If there was a full and proper risk rating then whoever it was with—and I am trying to put names to voices on the phone—a 17-year-old child trying to register in Queanbeyan would probably be paying \$800 or \$900 per premium. Up here, whilst there is an element of risk rating, you are only allowed to go so far in percentage terms from what I will call the core premium. In other words, you are allowed to give X amount of discount below and you are allowed to give X amount of excess risk on the top but you are still confined within a band.

Again, unless you just want to become New South Wales south, if you start engaging your own risk ratings then you will want actuaries. You will be engaged in discussions with the insurer. You are buying into an awful lot of time and expense to run your own system doing that level of complexity of risk rating.

**MR SMYTH:** Just to clarify something: how long have AMA 4 and the permanent impairment guidelines been in operation in New South Wales?

**Mr Stone:** Since 1 October 1999.

**MR SMYTH:** How many modifications have been issued in that time?

**Mr Stone:** I think we are on to the third or fourth edition of the permanent impairment guidelines. We are due for another update. They are currently looking up here at whether they can synthesise AMA 4 and AMA 5 to try and get a collective and agreed approach as between workers compensation and motor accidents because, as I pointed out earlier, motor accidents uses AMA 4 and workers compensation uses AMA 5. That project is probably at least another six months in the making, depending on whether it gets anywhere. It will no doubt require yet further guidelines to then control the use of the two.

**THE CHAIR:** Mr Hargreaves?

**MR HARGREAVES:** Mr Stone, you talk about AMA 4 and AMA 5 and a hybrid between the two, but you also talked earlier about AMA 6 being released.

**Mr Stone:** Yes, AMA 6 has been released and is now available. The only place in Australia where it is used is the Northern Territory, because their legislation says they must use the most recent edition. So as soon as the new one came out they all had to buy one up there and start using it.

**MR HARGREAVES:** So what is stopping everybody else from having the same sort of approach?

**Mr Stone:** Because it is so expensive and time consuming to retrain everybody to use a new set of guidelines that uses new approaches, it is much easier to stick with what you know and have learnt.

**MR HARGREAVES:** Even if it is so far out of date by using AMA 4.

**Mr Stone:** That is the issue.

**MR SMYTH:** This is a question for Angus. It is about the guidelines. Angus, you said that the AMA was not designed for what it is being used for in this case.

**Mr Bucknell:** That is correct.

**MR SMYTH:** What was the AMA designed for and what are the difficulties in using it in addressing the CTP cases?

**Mr Bucknell:** 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.

**MR SMYTH:** Yes, please.

**Mr Bucknell:** 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.

**MR SMYTH:** So what should be used to determine?

**Mr Bucknell:** At the moment, the court determines what a person's non-economic loss is. A matter will be listed for hearing—this is presuming that it does not resolve by way of settlement agreed between the parties. A matter will be listed for hearing. A plaintiff will be required to prepare a document called a statement of particulars in which the plaintiff has to list each and every manifestation of the way that the injury has affected them. That will be accompanied by medical evidence from treating doctors as well as possibly medico-legal doctors.

The plaintiff will then have the opportunity to tell the court in his or her own words exactly how he or she has been affected by the injury and a judge, after hearing that evidence, will determine, based upon guidelines and precedents that have been used by the ACT Supreme Court previously, what the level of entitlement to pain and suffering is. That is a very subjective approach.

**MR SMYTH:** But is it not unreasonable to have a standard approach to all cases?

**Mr Bucknell:** Yes, it is unreasonable, and the reason I say that is because everyone is affected differently. You will have people who are unable to work. You will have people who are unable to enjoy pastimes that they were enjoying. Everyone is affected differently. You will have people who, as Andrew has indicated, have lost their sense of smell or taste. That is a very highly and subjective and important thing.

So the answer I would say is, yes, it should be dealt with on a case-by-case and merit-by-merit basis, which AMA 5 simply does not allow for, nor does AMA 4.

**MR HARGREAVES:** Mr Smyth's question relates to a standard. If, in fact, the judge is going to apply precedence and apply former damages awards, they are going to apply presumably to somebody whose case is going to be considerably different from the one of the person before the court at the moment. If what you just said is right,

each person will have the rest of their life affected differently, which is a reasonable position to take. But applying precedent from the past is the same as applying a set of standard guidelines, I would have thought. If not, why not?

**Mr Bucknell:** It is not at all because the judge will hear the factual matrix put before him or her and determine on the basis of that evidence, and what is accepted and not accepted, the plaintiff's entitlement. The judge will not simply say that this sort of case is worth this much, that sort of case is worth X much. The judge has an obligation to hear the evidence and determine any award based on that evidence.

**MR HARGREAVES:** In that situation, does the representative of the injured party make a suggestion about what is a reasonable amount? If so, where does that amount come from?

**Mr Bucknell:** Yes, the representative, as well as the defendant, may make representations and that will be based on the experience of the representatives and the facts of the plaintiff's case.

**THE CHAIR:** I go back to human rights, because I understand that you are aware of the questions I asked of the government on this issue. You have identified some of these issues in your submission, which states that you do not believe that the bill would satisfy the section 28 test. Can you give us a little more detail, specifically in relation to fair trial and discrimination?

**Ms Blumer:** The fair trial issue touches on the points that have been addressed by Mr Walker, when you have medical panels established just for starters. But one of the other major issues with respect to the Human Rights Act is the effect that provisions have on non-working members of the Canberra community. Are you interested in that?

**THE CHAIR:** I am interested in that specifically—the discrimination part.

**Ms Blumer:** This is my major area of interest. We have talked about people losing fingers and so forth in the previous hearings. The example I would like to use is that of 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 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.

What the New South Wales experience has shown too is that what happened when they brought in the new scheme was that people were so frightened by it—a lady like that, why would she bother to go to the trouble of making a claim at all? She will probably just get her treatment on the ACT public health system. Because she does not make the claim, the ACT public health department will not be paid back for those expenses.

She will claim the rest of it on Medicare. They will not get the money back because she will not bother making a claim in the first place. What value is it to her to do that? What will happen, and the reason the New South Wales scheme has made such a motza is, No 1, there has been a huge drop in the number of people making a claim in the first place, which is what we have got happening here as far as Treasury was saying, if we can follow that. So the insurance companies have saved a fortune whereas the public health system is paying and that lady is paying.

**MR HARGREAVES:** Ms Blumer, I think you made a good point about the lessening of the quality of life going forward for these people and that is really the issue. Can you tell me how the award of an amount of money is going to affect the restoration of that quality of life?

**Ms Blumer:** I have seen it happen so many times.

**MR HARGREAVES:** How?

**Ms Blumer:** For a woman like that—we will go back to our lady—first of all it is a sense of justice and fairness. She has been injured by whatever stupid driver caused her accident and she has the feeling that she has got something to make up for it. Secondly, she can use that money in a number of ways, and people do. She might, for instance, enhance her quality of life by improving her living circumstances in some way.

**MR HARGREAVES:** Could you give us an example of how that might happen?

**Ms Blumer:** She might learn instead some other way of enjoying her life. She might take up different hobbies and she might buy clothes for her grandchildren instead of making them. She might instead take a trip and look at gardens somewhere. But she will have some restoration of her dignity and enjoyment of life—not in the same way but in a different way. Quite frankly, for us to assume that money does not make people's life better I think is grossly out of tune with the way the world operates. It is

generally assumed that having a little bit of money can be a very beneficial thing and provide some security and peace of mind to people that they otherwise would not have.

**MR HARGREAVES:** Ms Blumer, you used the term “a sense of justice”. I am struggling with two things and perhaps you can help me out. One of them is that I cannot escape the feeling that the sense of justice is accompanied by the need to have the application of punishment to somebody or a representative of somebody who has inflicted the injury and that having seen that application of punishment they are now feeling a bit better about it. I need you to address that for me.

**Ms Blumer:** All right. Let—

**MR HARGREAVES:** Also, how can you quantify the sense of justice in individuals? If we have three or four different manifestations of an injury and the only thing in common is that it happened in a motor vehicle or as a result of the application of a motor vehicle, how do you quantify that sense of justice?

**Ms Blumer:** I understand. They are very good questions actually. The punishment issue: first of all, the tort system is there for two reasons. One is to try to put people back in the place that they were—obviously it is not always going to be the same place—as best you can. That is the principle. The second thing is to discourage people from doing wrong in the first place. So, for instance—I will try not to think of too real an example—the government has a very bad step outside the front of the building and people keep falling on it. Unfortunately, sometimes, no matter how many people fall, things do not get fixed. However, if there is the threat of somebody suing, sometimes that makes a difference. I have seen that happen many times—that things actually get fixed—and that is the principle behind it.

As to punishment, punishment is a very hard word, and that is why I use “justice” instead.

**MR HARGREAVES:** I would use the word “revenge” then, if you like.

**Ms Blumer:** That is a very hard word too.

**MR HARGREAVES:** That is the feeling people have.

**Ms Blumer:** That is a very natural feeling, and I will give you an example. If a business is done wrong by another business, the business sues that business for the wrong that was done and gets the financial compensation or whatever it cost them. They are not restricted by law in getting what you might call punishment or revenge or what I might call justice. If they are not restricted, why should an ordinary person who is not a company, who leads a very small personal life, lose that right when everybody else has still got it and there is no talk about getting rid of their rights?

**MR HARGREAVES:** Yes. Could you now talk a little bit about how we can quantify the different bits?

**Ms Blumer:** Sorry; the quantification. That is a marvellous thing—the golden thread

going back. The common law stretches back, as we know, to England many years ago and has developed into a large bank of law. The Civil Law (Wrongs) Act, which applies to most of these claims in the ACT, specifically encourages and allows judges to look at verdicts in other places to try to come to a sensible arrangement. It is our skill as lawyers and their skill as judges to be able to look at what has happened in other places and in other circumstances and come up with what would be a reasonable amount, and if it is not thought to be reasonable it gets appealed and then it can be tested some other way.

It is not limited to motor vehicle accidents so, for instance, whether someone has injured themselves in a work accident or a fall off a bridge or different kinds of claims, the injuries can still be looked at as similar injuries insofar as how they affect the life of that particular person. For instance, the way it works is that we know a general range for minor whiplash as opposed to a major whiplash. However, if somebody is younger and they have an injury they might get a higher level of general damages than somebody who is older, because their future is longer. It is usually divided into past and future general damages; for instance, for pain and suffering.

A person who has young children to care for might have different needs from somebody else, so we look at the person themselves; the court starts with the person themselves, asking: who is this person; what is their life; what are their needs; how badly is that particular injury going to affect them? It is not an exact art; it is something that has grown up over many centuries. Judgements are being delivered all over the country and we refer to those when we talk about a particular case as to what it might be.

There is case law in the ACT and in other places that says that the barristers or the counsel representing both parties must be prepared to give a range—it is usually a range—of what they think the case might be worth and why. We divide it up into various sections, one of which is general damages. There is the past and future loss of income, any need for unpaid domestic assistance, treatment expenses—all of those issues are taken into account and then the package is produced within a certain range and the judge makes the decision. And that is what judges are for.

**MR HARGREAVES:** Most of those are quantifiable—the price of domestic assistance; I can understand that—but how about the non-economic application? How do you cost that—just by comparison?

**Ms Blumer:** We do it by comparison, yes, mostly. There are no insane judgements here. We are not the United States. You have seen the crazy judgements there, for instance, and that is usually for what we call exemplary damages or punitive damages. There is very little entitlement in the ACT to those types of damages, so you do not see those huge, ridiculous claims. The most that would be awarded as a general rule would be \$450,000, if you were completely stuffed, for general damages. We try to look at it as a percentage of that. It is not specifically done that way, but that is the general guide. So if you look at somebody really badly injured—perhaps a tetra, quad or something like that—you might be looking at that sort of area. When we are advising our clients, we say to them: “If you were a tetra, quad, that is what you would get for general damages. We don’t think you are near that. You might be worth \$50,000,” or \$10,000 or \$150,000, “because relative to that level of seriousness

you're not in that boat, but we feel that this is where you are, and our experience comes from other judgements."

**Mr Stone:** Could I just add that it is important to note that you are not talking with the change you are proposing about doing away with that judicial assessment or quantification of pain and suffering; you are just eliminating 80 or 90 per cent of people getting to it. The 10 per cent or the 15 per cent whole person impairment threshold is exactly that: it is a threshold. Once you are over the threshold it still comes back to a judge to make an assessment of the quantification of the pain and suffering.

**Mr Bucknell:** AMA 5 does not take into account any entitlement for the future. It is simply an assessment at that point in time.

**Mr Stone:** Correct, but once you get over that 15 per cent threshold—it is a qualifying test; once you get past the qualifying test you then have a judge deciding, taking into account the past, the future and everything else, what it is that you are then awarded, or the parties having to negotiate and agree to what it is you then are entitled to. What you are talking about in introducing this threshold is simply: here is an artificial barrier to get to pain and suffering.

**THE CHAIR:** We have just about run out of time. Mr Smyth, do you have anything very quick?

**MR SMYTH:** Yes. Ms Blumer, I would just like to go to your supplementary two pages. You talk about early resolution of matters within the first and second year of the new scheme. What was the resolution rate in the year previous to the start of 1 October 2008?

**Ms Blumer:** I did hope to get those figures, but I did not look at it. It has been the case in the ACT for many years that most cases resolve by way of informal settlement conference or negotiation between the lawyers and the insurer. My guess at what the rate would have been before the implementation of the 2008 amendments would be that it would have been perhaps a bit lower, because at that stage we were in a position to issue court proceedings at an early stage. However, it is probably a bit higher because there is a bit more motivation to try and resolve the matter. Certainly the insurance company is usually very keen to resolve the matter from an early stage.

One of the reasons why we do not resolve everything immediately is that we always advise our clients not to try and quantify their matter until we know the extent of their injury. That is why the early treatment is really important. If people have not had their treatment, we advise them against resolving their claim. So a lot of the delay is simply from their medical condition. I do not know what the difference is. I would not expect that it would be greatly different, but I would have thought that it would have been perhaps a bit lower. Do you agree with that, Angus?

**Mr Bucknell:** As a general proposition, yes.

**MR SMYTH:** And at this stage nothing has gone to court since the changes?

**Ms Blumer:** I have not issued anything except for interlocutory applications. I will have some matters coming up soon that will be running out of time if we do not do something. I am told by my colleagues that—certainly one of my colleagues has said that he has issued a couple of matters.

**Mr Bucknell:** The court has made no judgement in relation to any injury which occurred after the commencement of the 2008 proceedings.

**MR SMYTH:** So at this stage, given that there is a review clause in the current bill, we are better off to get the review and see whether the objectives are being achieved rather than having a wholesale rewrite of the act?

**Ms Blumer:** Absolutely. I think we would be really impressed actually.

**THE CHAIR:** On that note, we have to conclude this part of the hearing. We will have a brief intermission while we contact Ms Spearing, who is in Canada. Mr Stone, we only have one conference phone, but I believe the witnesses will be here for the second part of the hearing. Thank you, Mr Stone.

### **Short adjournment.**

**THE CHAIR:** I note that the witnesses Ms Blumer, Mr Walker and Mr Bucknell are still in attendance as witnesses.

**Ms Spearing:** I am having a hard time hearing you.

**THE CHAIR:** Sorry; I was looking at other people. I will concentrate on speaking into the microphone. On behalf of the committee, I would like to thank you for appearing today. I assume that you have seen a copy of the privileges card.

**Ms Spearing:** Sorry, I cannot hear you very well. Is there some way to increase the volume?

**THE CHAIR:** Can you hear me now?

**Ms Spearing:** That is much better, thank you.

**THE CHAIR:** I am pretty much shouting. We have a problem. We cannot really hear you. Ms Spearing, have you seen the privilege card?

**Ms Spearing:** I have not been able to get access to it today, and I understood that you were going to discuss it at the beginning of the session.

**THE CHAIR:** I only heard your first word, but I understand that was “No”. I am afraid I am going to have to read this out to you. The privilege statement says:

The Committee has authorised the recording, broadcasting and re-broadcasting of these proceedings.

All witnesses making submissions or giving evidence to committees of the Legislative Assembly for the ACT are protected by parliamentary privilege.

“Parliamentary privilege” means the special rights and immunities which belong to the Assembly, its committees and its members. These rights and immunities enable committees to operate effectively, and enable those involved in committee processes to do so without obstruction, or fear of prosecution.

Witnesses must tell the truth: giving false or misleading evidence will be treated as a serious matter, and may be considered a contempt of the Assembly.

While the Committee prefers to hear all evidence in public, it may take evidence in-camera if requested. Confidential evidence will be recorded and kept securely. It is within the power of the committee at a later date to publish or present all or part of that evidence to the Assembly; but any decision to publish or present in-camera evidence will not be taken without consulting with the person who gave the evidence.

Ms Spearing, do you understand the privileges implications of the statement?

**Ms Spearing:** Yes.

**THE CHAIR:** Thank you. Ms Spearing, before we proceed to questions, do you wish to make an opening statement? Whichever you do, can I please ask you, if possible, to speak up because I am having great difficulty hearing you.

**Ms Spearing:** If you don't mind, I will listen to you through the computer and then respond to you through the telephone and speak as loudly as I can.

**THE CHAIR:** Certainly.

**Ms Spearing:** I think this is going to work better if you can hear me now.

**THE CHAIR:** This is a lot better. We can actually hear you, which is a step forward. Do you wish to make an opening statement?

**Ms Spearing:** There is just a bit of time lag. I do not wish to make an opening statement, thank you.

**THE CHAIR:** I have read your paper. It is very interesting. My question would be this: given that it appears that there is not a definitive relationship between payment and good medical outcomes or non-payment and good medical outcomes, do you have a view on what mechanisms or schemes best encourage good health outcomes?

**Ms Spearing:** In terms of my views on whether there is a scheme that encourages better medical outcomes, I have to honestly say that I do not think that the research has been done that would provide that answer.

**THE CHAIR:** This is a bit horrible at this end. We have got a lag of 10 or 15 seconds. Do you think we should email you some questions? This is almost unworkable as a public hearing.

**Ms Spearing:** Perhaps we could try going on the telephone.

**MR SMYTH:** I would suggest you are going to have to. There is feedback sometimes.

**Ms Spearing:** Perhaps we could see how we go that way—try that again.

**THE CHAIR:** I think you will have to, Ms Spearing. It is just not working. What we are saying and you are saying is happening twice and in delay. It is horrible.

**Ms Spearing:** How about if we try by the phone again and I will not listen in to the computer. Then we can see how we go. Do you want to just try that again and see how we go?

**THE CHAIR:** Yes. That actually was brilliant if we can keep it at that level. Mr Smyth, I have had a go.

**MR SMYTH:** On page 23 of your report, the final line in your conclusion simply says:

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.

What sort of consistent, high-quality evidence are you after?

**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 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?

**Ms Spearing:** I am sorry, I did not catch the last part of that.

**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.

**THE CHAIR:** My understanding is that you looked at quite a number of studies, and the majority of them claimed to see the relationship between compensation and health outcomes and it was the minority which did not have that relationship. Can you go through the problems with the studies which you felt, while claiming to show this relationship, did not really show this relationship?

**Ms Spearing:** Yes. I used a framework to look at the studies. There were 11 systematic reviews that I looked at, and they all involved different types of compensable injuries, and I looked at whether the studies had used proper health outcome measures. Much of the research that has been done, including a study in Saskatchewan, has used proxies of health outcomes, such as claim duration, which is an easily accessible measure but which we know does not correlate with health outcomes necessarily. Your claim might be completed but you might still have symptoms. In fact the authors of that paper have acknowledged that.

So I looked just at studies that used health outcome measures, because I was interested in health, not claim duration. I also looked at studies that had used a credible, robust process for selecting the studies and assessing the quality of the studies that they then summarised. They were the main criteria that I used to judge the studies. So I was interested in quality and in those studies measuring health outcomes.

On that basis, I came to the conclusion that only one was high quality and had looked specifically at health outcomes. In fact, it was quite ironic—I went through this process not knowing the answer before I got there—that the one study that met my criteria was the only one that had shown no relationship between litigation, in this case, and health outcomes. So that was the framework that I applied to look at the studies and that is where I got a strange result, I think, in some people’s eyes. Nevertheless, I would stand by the process that I applied.

**THE CHAIR:** So your analysis would be that, given the lack of conclusive evidence and given you had so many studies, no changes should be made to schemes until more research is done?

**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.

**MR SMYTH:** Did you find any evidence to the contrary in any of your reviews? Are there links, for instance, that compensation helps with recovery, or was that not part of the work you did?

**Ms Spearing:** I am sorry, I did not catch all of that.

**MR SMYTH:** I know it was not the primary focus of your document, but did you come across any evidence contrary to what was claimed—that is, compensation assisted with recovery?

**Ms Spearing:** Are you asking me did I come across any evidence that compensation or compensation processes improved recovery?

**MR SMYTH:** Yes.

**Ms Spearing:** No, I did not. In fact, I have not found any studies that have looked at whether or not compensation itself, in terms of the financial and monetary component of compensation, improves health or adversely affects health. I have not found any studies that have tested that directly.

**THE CHAIR:** Do you think it would be possible to do such studies? Would that be where we should be going next?

**Ms Spearing:** There are some difficulties in doing these studies because, ideally, you would have a randomised control trial where you have got a group of people who receive a particular amount of compensation or are exposed to a certain legal process or whatever your interest is, and you would have another group who are not exposed to that particular intervention. Obviously there are some feasibility and ethical problems in doing that, but there is some interesting research coming out of the United States in relation to health insurance, which I think might have some similarity to the questions that we are asking in relation to injury compensation.

That study in the United States that I am referring to is going at the moment. It has been going for about a year, and it is in Oregon. They have decided to allocate health insurance by lottery to a group of the population. And now they are able to study the health outcomes of the group of those people that were awarded insurance and compare their health outcomes with the people who were not awarded compensation. In fact, they have had some preliminary results published in the *New England Journal of Medicine* in July showing that the people that had access to health insurance or access to health services are actually achieving or seeing better health outcomes than the people who had no access.

You could argue that that is not a direct correlate, of course, but there are some similarities. It may well be that we are never going to be able to run the perfect test in our scenario of injury compensation. There are things that can be done and ways to improve research. Some of my papers in my thesis suggest ways to improve the research. One of them is in press now and it should be published in December, and I have got two more on the way. So I think people are starting to look at different ways, as you suggest, that we can improve what we are doing, and this is the way of the future. What my thesis has started to suggest are some of the ways that we could tackle those problems.

**MR SMYTH:** Just to test the validity of your outcome, how important is the AMSTAR rating?

**Ms Spearing:** I am sorry. I missed that. I heard a cough. It was something about outcomes.

**MR SMYTH:** I notice that you have used the AMSTAR tool to validate the outcomes. How important and how accurate a measure is that?

**Ms Spearing:** Validating health outcomes did you say?

**MR SMYTH:** Yes.

**Ms Spearing:** Referring to the different—I am sorry. I did not catch the whole—

**MR SMYTH:** Okay. You reviewed this independently using the AMSTAR tool—the 11 submissions?

**Ms Spearing:** Yes, sorry.

**MR SMYTH:** Scholten and Peters got a nine out of the 11. What does that actually mean?

**Ms Spearing:** I do not know if you have got the paper in front of you.

**MR SMYTH:** I do, yes.

**Ms Spearing:** If you look at table 1 on page 18 you can see on the left column under “AMSTAR criteria” that there are 11 criteria. You can see that of the 11 criteria with some of them there are sub-criteria. For nine out of 11 it was simply that the Scholten and Peters study met nine out of 11 criteria.

**MR SMYTH:** I understand that. Cote, of course, got 10 out of the 11.

**Ms Spearing:** Yes.

**MR SMYTH:** And a number of the other studies also got nine out of the 11. So what makes them less valid than the Scholten and Peters study?

**Ms Spearing:** It would be the framework of criteria that I applied. I looked at the quality, and that table, the AMSTAR tool, was just a way of measuring quality. It is a validated instrument designed specifically for this purpose. It was a way of measuring how well that particular systematic review was conducted. In addition to study quality, I also looked at whether or not the studies had used health outcome measures in their studies—whether or not they had used a direct measure such as pain or disability.

The other criterion I looked at was whether they had looked at just one type of compensation. Some of the systematic reviews had pooled studies that involved people who had been workers compensation claimants with people who had a CTP claim and so on. I really was looking at studies that had narrowed the focus a little bit more than that so that they were really focusing in on one particular process or one type of compensation scheme.

Looking through the lens of those three criteria, which were the AMSTAR criteria for quality, whether or not they had looked at health outcomes specifically and whether or not they had just looked at just one type of compensation intervention, I came up with that one study, the Scholten and Peters study, that met all three criteria.

It was a high quality study. It met nine of the 11 AMSTAR criteria. It looked at one compensation intervention and it looked at health outcome measures. Yes, other studies did do well in the quality review using AMSTAR but they did not meet the other criteria.

**MR SMYTH:** Just for personal interest, how many people or cases did the Scholten and Peters study look at?

**Ms Spearing:** They looked at seven.

**MR SMYTH:** Just seven.

**Ms Spearing:** Yes.

**MR SMYTH:** So what was the probability of that being accurate?

**Ms Spearing:** You can never truly say anything is absolutely accurate to the point that it covers everything across the board in every single systematic review. Everybody does their reviews slightly differently. They use slightly different techniques to determine which studies they are going to include in their pool. So the Scholten and Peters group used different criteria on how to include those seven studies—where their cut-off was.

They used different criteria to, say, the Cote study. They used another lot of criteria. You raise an important point. It is difficult to compare. We are not necessarily comparing apples with apples here. There are difficulties and differences in drawing these comparisons.

However, this sort of meta review is the best tool that we have, in effect, to look across different studies acknowledging, yes, that each study itself is not perfect and, indeed, the studies that they are looking at are imperfect as well. With respect to the probability—I do not know what the probability is; this is not a perfect system and research is not perfect.

**THE CHAIR:** Thank you very much, Ms Spearing. That is very interesting. I think we have run out of questions at this end. Thank you very much for interrupting what is, I believe, the middle of the night in Canada.

**Ms Spearing:** Yes, that is okay.

**THE CHAIR:** We will let you go back to bed. I understand, Ms Blumer, that you have things you wish to add.

**Ms Blumer:** Yes, just to clarify one question from you, Mr Smyth, and one question

from you, Ms Le Couteur. You asked about pre-2008 statistics. As you know, I have just done this on my own because nothing else was available. The reason nothing else was available is that we are still awaiting an FOI application that the Law Society made back in June asking for figures going back to 2006 and since then. Unfortunately, that matter is now in the hands of ACAT. There is mediation. We are waiting and waiting and we have been asking and asking for all sorts of figures and, unfortunately, we do not have them yet.

Just going back to the human rights issue—and I did not quite finish that point there—I talked about people being disadvantaged who were not working. It affects—and I know our Human Rights Act does not allow for the socially disadvantaged as yet—people who are not working. Most of the people who are not working are not working because they are children, because they have disabilities, because they are stay-at-home parents—these are mostly women—or because they are elderly. Those are the people who do not end up getting anything—and I use my lady doing her church piano ensemble. If she were a concert pianist she would still be entitled to some loss of income for the past and for the future for her inability to earn an income but, because she does not get that, then her entitlement has shrunk to virtually nothing.

While the economic loss is of course in addition to general damages usually, if you have the 15 per cent threshold then they still will not be getting that—the concert pianist will not be getting that—but they will still be entitled to loss of income, so at least they get something. There are also cost provisions in the act that also discriminate against people working because the amount of costs you get does not include the amount you would get for general damages and pain and suffering. That just brings that point to a close. Thank you for your indulgence.

**MR SMYTH:** What percentage of the ACT population are covered by those groups—the elderly who do not work, the young who are not in the workforce, the disabled or the stay-at-home parents?

**Ms Blumer:** You are the politician! I will let you find that one out from your end, Mr Smyth.

**MR SMYTH:** It is about 160,000 out of 360,000.

**Ms Blumer:** Is that right? That is a huge amount of people.

**MR SMYTH:** Yes. The workforce is around 200,000 at this stage. If people are not in the workforce then—

**THE CHAIR:** I actually thought it was higher than that.

**MR HARGREAVES:** Then we have got a graduating scale because some people work 20 hours a week and some people work 80 hours a week.

**MR SMYTH:** It was just to make the point that it is a lot of the population.

**MR HARGREAVES:** It is very difficult. As Ms Spearing said, it is an inexact science.

**THE CHAIR:** Have we any more questions?

**Mr Walker:** Just on that human rights matter, this is the easiest brief I have had for a long time, I have to say, given what I have had to say this morning. There are two 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. The point on which I concluded my opening in relation to the medical tribunals is that section 21 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.

Any impingement on that has to be demonstrably justifiable in a free and democratic society. As I said, if the head of a department could actually pick the assessor to do some aspect of any other right, could pick a specific assessor to deal with that aspect of your right and could set the guidelines by which that assessor determined your right, most people would be alarmed. If we applied the test: why is it so here—is it demonstrably justifiable in a free and democratic society?—it might be difficult to see how that test could be passed.

**THE CHAIR:** On behalf of the committee, I would like to thank you, Ms Blumer, Mr Walker and Mr Bucknell—and Mr Stone and Ms Spearing, who of course are not hearing me. When available, a proof transcript will be forwarded to you to give you an opportunity to check and suggest any corrections. The public hearing is now adjourned.

**The committee adjourned at 12.07 pm.**