LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

(Reference: Inquiry into Motor Accident Injuries Bill 2018—exposure draft)

Members:

MRS G JONES (Chair)
MS B CODY (Deputy Chair)
MR M PETTERSSON

TRANSCRIPT OF EVIDENCE

CANBERRA

FRIDAY, 2 NOVEMBER 2018

Secretary to the committee:
Mr A Snedden (Ph: 620 50199)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

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Amended 20 May 2013

The committee met at 10.20 am.

ARUNDELL, MR LEON

THE CHAIR: I declare open this first public hearing of the Standing Committee on Justice and Community Safety's inquiry into the exposure draft of the Motor Accidents Injuries Bill 2018. The committee has received a total of 75 written submissions on the reference, all of which are published on the committee website.

The first witness appearing today is Mr Leon Arundell. Thank you for appearing today and for your written submission. I remind you of the protections and privileges afforded by parliamentary privilege and draw your attention to the privilege statement on the table. If you would take a moment to look at that and let me know if you understand and accept the privilege implications of the statement.

Mr Arundell: Yes, I do understand and accept that.

THE CHAIR: I remind witnesses that the proceedings are being recorded for Hansard for transcription purposes and are being webstreamed live and broadcast.

Before we proceed to questions from the committee, Mr Arundell, would you like to make any opening remarks?

Mr Arundell: Yes, thank you. I am appearing in a personal capacity. I would like to mention that I was recently elected as chair of a community organisation. I understand congratulations are due to the chair of this committee for having just been re-elected.

I would like to start by telling you a story. Many years ago a lady was waiting at a stop sign to turn on to the Channel Highway in Hobart. She looked to her right and there was no traffic. She looked to her left and she saw me. I was about this high and about this wide and I looked pretty much like a pedestrian, so she turned onto the Channel Highway.

From my perspective it was a bit different. I was riding my motorcycle down the Channel Highway at about 60 kilometres per hour. I saw a car at a stop sign waiting to turn onto the Channel Highway and I thought, "Not a problem. They have to give way to me," so I just continued. Then I noticed the car starting to move and I thought, "Well, she's going to do a smooth turn onto the highway and there'll be enough room for me to get through on the left. So, not a problem. I'll keep going."

Then I realised that because she was coming up hill she would have to accelerate fairly hard to get onto the highway and she was going to take up the entire lane. At that point I thought it was time for a change of plan. There was an access road parallel to the highway for the local houses, so I made an emergency turn into that access road and I thought, "Well, problem solved." But then I realised there was a hedge in front of me, because it was only a short road, and I thought, "Maybe I should put on the brakes." At that point I clipped the gutter, the motorbike went over and I sprawled all over somebody's front lawn. The damage done was I needed a new pair of trousers because I had knocked the knee out of them.

We all make judgments when we are driving, and the consequence of those judgments, as in that case, can be non-existent; a slight change of plan from either of us would have meant no problem at all. The consequences can be minor, as they were in that case, or I could have hit the side of the car and gone sprawling over the top of the car into the path of an oncoming vehicle and I would have had lots of injuries and problems.

So decisions like whether we wear a seatbelt or a helmet or obey the traffic laws can have minor consequences—you can be fined a few hundred dollars—or if this bill gets up they can cost you potentially tens of thousands of dollars in compensation you are disqualified from receiving.

Going back to about 10 years before that happened, if I had needed to claim compensation for serious injuries, I would have had to employ a lawyer, pay him or her a lot of money and take up a lot of court time to prove that the other driver was legally at fault and then take up more court time to determine how much compensation was due to me.

Governments realised that a lot of the money for compulsory third-party insurance was going to lawyers and the court—well, not so much the court; that was coming out of a separate budget—and it would make sense not to have to do that so they introduced no-fault compulsory third-party insurance which means you can just make a claim against the insurer. That is the system we have had broadly for about 50 years.

Without a compulsory third-party insurance system, or an insurance system, basically the costs of car crashes would be borne entirely by the victims of those crashes. They would suffer the cost of repairing their vehicles which is outside the scope of compulsory third-party insurance. They would incur pain and suffering, injuries, medical costs, loss of income and various things like that.

This inquiry is about who should pay either those direct costs or, in the case of things like pain and suffering, who should pay those costs, and which of those things should be compensated for. I do not have a high income, so even though I pay the same compulsory third-party insurance premiums as somebody on a high income, if I were to have a crash I would only be getting $400 a week in compensation where they would be getting $900 a week.

In fact, because I am over 65 I would not be getting a cent, even though I work. I still work for a living. A substantial part of my income comes from a pension because I am lucky enough to have one. General living expenses could be based on average weekly earnings, which would mean that everybody would get the same amount; it would not be more compensation for the rich people and less compensation for the poor people.

Another factor which is interesting is that somebody who has a permanent whole person impairment of less than 10 per cent completely misses out on the relatively small compensation that would otherwise be due to them, which sounds a bit strange to me. And anybody whose injuries are not permanent but which go beyond five years will miss out on benefit.

So if, five years after a collision, I need some sort of medical thing I would not have otherwise needed, such as a hip replacement, I would not get any compensation for that. That is my understanding, anyway. That might only be for income replacement.

There seems to be an issue with the cost of reasonable and necessary care in that if you pay somebody to give it to you then you get compensated but if somebody foregoes having an income, like your spouse, so they can stay home and care of you, you do not get that covered.

One of the biggest anomalies I see is the proposal for compensation to depend on whether you are charged with or convicted of certain offences, partly because a very small range of offences is covered, partly because "driving offences" does not seem to be defined so people will end up going to court arguing what is a driving offence and what is not, and partly because in my ideal world if you drive without a seatbelt, for example, then the penalty should be that you get fined. If you do not think that is enough of a penalty, then you can raise the fine.

My wife and daughter were in our car ten years ago waiting at an intersection for the traffic to clear so they could proceed. Another car ran up the back of the car. This was a car designed in the 1960s when they could not roll the steel very thin; it was a very solid car but it got shortened by about two inches. Had they been wearing seatbelts it would not have mattered because it was a rear-end crash, but under this scheme they would miss out on compensation.

We have 3,500 rear-end crashes each year in Canberra, and legally the person who runs into the back of the other car is the person at fault. The police charge about 200 of those people for failing to leave a sufficient distance between the vehicle in front. So if you make the amount of compensation you get dependent on whether you are charged with or convicted of failing to leave a sufficient distance it becomes a real lottery because 90-plus per cent of people who cause crashes like this do not even get charged and a smaller number, being the 10 per cent, get convicted. But the ones who are convicted will miss out on compensation while the other 90-plus per cent will still get their full compensation, and that does not really seem fair to me.

There is a general anomaly in our insurance in that if I go to get comprehensive insurance for my car they will ask me questions like what colour it is—the colour of your car makes a 20 per cent difference to how likely you are to be in a crash—how old you are, what sort of licence you have, what is your driving experience and what you use the car for. All those factors mean they can provide me with a premium that fairly accurately reflects the risk of me causing a crash or being involved in a crash. But it seems to be a one-size-fits-all thing for compulsory third party unless you happen to be riding a motorcycle, in which case you have a different premium. But all other matters seem to be ignored.

MS CODY: They were quite interesting comments you were making. You have not personally been involved in an accident where you have received compulsory third-party compensation?

Mr Arundell: No.

MS CODY: That is just a general question.

Mr Arundell: Just to emphasise one of the points, I have run into the back of another car, reported it to the police, and heard nothing of it.

MS CODY: You talk in your submission about compensation that accurately addresses the severity and duration of injuries. Can you expand on that a little bit? I know you were talking about the time of compensation for income, but you talk in your submission more about the severity and duration of injuries.

Mr Arundell: The particular point with severity is if it is less than 10 per cent, instead of getting 5 per cent or some other figure that could be easily calculated—and you could say, "If you don't like it you don't have to take it but you will get some compensation"—the current draft says you do not get a thing.

The duration is the five-year term, the fact that it cuts out once you get to a certain age and a couple of things like that which mean that one person will get a certain amount of compensation and a different person will get a different amount of compensation from injuries that, to my mind, look equally severe.

MS CODY: You spoke about age as a concern in payment of compensation. You seem to have done a lot of research into this. Have you looked at types of injuries versus roles of employment, so an injury to a person who does manual labour versus an injury to a person who sits behind a desk?

Mr Arundell: I have not looked into it, but I can see your point that some injuries will allow you to continue to work at a desk while those same injuries might prevent you from working in manual labour. That is a good point.

THE CHAIR: I want to ask you about the police discretion element that you were talking about. We know that we have some issues with police availability. We have good response times, but how much do you think the proposed system is reliant on police issuing infringements to make sure that there is a fair outcome?

Mr Arundell: It is entirely reliant on that. If the police issue an infringement notice of a certain type, your payment is suspended until something is determined, and if you are convicted, your payment is affected. None of that can happen if they do not issue an infringement notice or a fine in the first place.

THE CHAIR: So basically it is your understanding of the exposure draft bill that if infringements have not been given, people could end up in a situation where they literally cannot get anything?

Mr Arundell: No. If infringement notices have not been given, you do not have a problem; you get the full compensation.

THE CHAIR: Sorry, if they are given?

Mr Arundell: Yes.

THE CHAIR: You could be entitled to nothing.

Mr Arundell: If they are given, your entitlements would be reduced. I do not think you get nothing; I think you would just get a lesser entitlement. It is very much a lottery at the moment.

THE CHAIR: Can I also ask you about point 3 in your submission, compensation for reasonable and necessary care. Can you please explain to me your understanding of the word "gratuitously"?

Mr Arundell: That is a word that came up in conversations with some lawyers. I expect that the legal organisations will be able to explain that, but my understanding is that if you pay a housekeeper to come in and do things for you, you have a record that says how much you have paid them and you can be compensated for that payment, but if your wife or your husband takes time off work and gives up, say, rec leave time or leaves work completely to do the same job, there is no provision for compensation for that. One way to do it would be to say that if you need that sort of assistance, the calculation would be according to the number of hours at a certain rate or something like that.

THE CHAIR: Thank you for the explanation. Mr Pettersson, do you have a question?

MR PETTERSSON: I do. How should we determine the financial support for people who are injured?

Mr Arundell: That is a broad question. Do you mean living expenses?

MR PETTERSSON: More income replacement.

Mr Arundell: Income replacement? One possibility would be to say, "This is the average wage and your income replacement for the period when you cannot work at all is in proportion to the average wage," or something like that. One way would be to say that it is a proportion of the wage that you would have expected to earn if you had not been injured. But it does not arbitrarily stop at a certain point.

MR PETTERSSON: Do you have a preference between the two: everyone getting the same amount or it being determined by someone's earning capacity or their previous earnings?

Mr Arundell: I would probably have a preference, but I cannot provide a good argument one way or the other.

MS CODY: Mr Arundell, do you believe that the current system, as it is, is fair and equitable as opposed to the system that is being proposed?

Mr Arundell: I believe that the system that is being proposed is less fair and less equitable than we have got at the moment, but I have not looked in detail at what we have got at the moment.

THE CHAIR: In point 5, you talk about risk-based premiums. Is there anything to

think about with regard to people not driving their own cars? If the risk is based on not only the vehicle itself and its likelihood of being in a crash but the driver—at the moment we pay CTP as part of the rego for the car. Can you see anything in that suggestion about the risk-based premiums that might need to be considered with regard to who is driving?

Mr Arundell: Yes. I cannot think of a particular reason why compulsory third party should be based completely on the vehicle and not at all on the driver.

THE CHAIR: Only that you make a payment at the moment without nominating, I presume, who the drivers of the vehicle are. Essentially it is attached to the vehicle.

Mr Arundell: Yes. We have had four kids who have learned to drive and now are qualified drivers, but while they were driving our car we had to pay a much higher premium for third-party property insurance.

THE CHAIR: Perhaps there should be a higher premium if your car is going to be driven by learners as well.

Mr Arundell: It would make sense that the people who pose the highest risk should pay the highest premiums. That principle is embodied in the way that we have different premiums for motorcycles compared with cars. It is not a completely new idea for compulsory third party.

THE CHAIR: No; that is right. I am not sure that it has been done before, but I am not pretending to be an exact expert at this point in time.

Mr Arundell: The insurers who provide our compulsory third-party insurance have a lot of experience and knowledge in risk-based premiums, which they do for their other insurance policies.

THE CHAIR: Yes, that is true.

Mr Arundell: They also have all the statistics to be able to work out what is the most appropriate premium in a particular case.

THE CHAIR: In point 4 you spoke about the possible increase of workload for the courts. I imagine that it is possible that part of the motivation for this change that we are looking at is to decrease the workload of the courts.

Mr Arundell: Yes.

THE CHAIR: Can you add a few words about your concerns about increased workloads and how that might occur.

Mr Arundell: If you are in a crash, you suffer injury and you are presented with an infringement notice for one of the offences that would affect your compensation eligibility; then, if you pay that fine, you automatically lose what could be tens of thousands of dollars. With a fine of a few hundred dollars, you could automatically lose potentially tens of thousands of dollars worth of compensation payments. The

other option is to not pay the fine and potentially take it to court, which takes up court time, or—as in the case of a speeding fine that was issued for a vehicle that I am pretty sure I was driving earlier this year—you might just ask for clarification and then, months later, be told that the date for processing the fine has lapsed and you are free.

THE CHAIR: On a slightly broader question, you have pointed out a number of the potential pitfalls of this exposure draft bill. If you were designing the system from scratch or you had a blank canvas, what are your thoughts on what would be a fairer model?

Mr Arundell: There are competing priorities here. One is how much you would be expected to pay if you were going to get different amounts of compensation. But I suppose the difficult issue is how much compensation should go to a person who has caused a crash. That is not one that I can answer for you.

THE CHAIR: It is a judgement call, isn't it? Politicians often have to make them.

Mr Arundell: Yes. I do not think that basing that on whether you have been given an infringement notice or a conviction for an offence that may or may not have contributed to the severity of your injuries is an efficient way to do that. I would prefer that people who break the law by not wearing seatbelts or not wearing bicycle helmets be fined for it and not be penalised in other ways that depend very much on matters of chance as to whether they happen to be involved in a crash, whether or not they caused it themselves and whether that was a factor in their injuries.

THE CHAIR: You must understand that I have been picking up the details of this inquiry in the past couple of days since returning from maternity leave. Can you just give me your views? Having had an infringement notice against you in order to impact on the claim: does that have to be relevant to the actual incident?

Mr Arundell: It has to relate to the crash. If, for example, I was given an infringement notice for not wearing a seatbelt at the time of the crash, that would mean that some of the payments that might have come to me would be withheld until either I am cleared of the charge, in which case I would get those payments, or I am convicted, in which case I would not get them at all.

THE CHAIR: But the actual crash itself may or may not have been caused by or been influenced by that illegal act?

Mr Arundell: That is right.

THE CHAIR: And that is the point that you are trying to make?

Mr Arundell: Yes.

THE CHAIR: If it is going to affect compensation payments, is justice really served by the act of not wearing the seatbelt being the deciding factor as to whether you get compensation, not whether your choices were harmful in the actual accident itself?

Mr Arundell: I think you have put it better than I could.

THE CHAIR: We are all learning today, and that is very good.

MR PETTERSSON: What kinds of offences do you think would contribute to crashes and what kinds of offences would not? Wearing a seatbelt would not contribute?

Mr Arundell: In general, wearing a seatbelt contributes to the severity of the injuries but rarely contributes to whether a crash happens or not.

MR PETTERSSON: Are there any other traffic offences that do not contribute to the likelihood of the crash occurring?

Mr Arundell: Parking offences, probably, although if you park too close to a corner, then—

THE CHAIR: Just to play devil's advocate, if you were looking at your phone and you had an accident, you could say that looking at the phone impacted on the accident.

Mr Arundell: Yes.

THE CHAIR: If you did not have your seatbelt on, it might not be part of the cause of the problem but it is just another illegal act that you were involved in.

Mr Arundell: Yes.

MR PETTERSSON: My question is this: I can only think of that one, but can anyone think of any others?

Mr Arundell: Wearing a helmet.

THE CHAIR: Indicating.

MR PETTERSSON: That contributes to the crash.

THE CHAIR: It may or may not have contributed to the particular crash you are talking about. That is a very interesting point. It is a simplistic view, in a way, to say that if you have an infringement you are entitled to less.

Mr Arundell: Yes.

THE CHAIR: Because you are then a less worthy person rather than because what you did was impacting on the crash.

Mr Arundell: Yes. And if the infringement contributed to the likelihood of a crash happening, there is an argument for reducing your compensation.

MS CODY: When you were giving your opening statement, you said that you did, and possibly still do, ride a motorbike?

Mr Arundell: I do not ride one anymore.

MS CODY: I do not know if you had cause to listen to 666 radio this morning.

Mr Arundell: No.

MS CODY: They were talking about helmets for pushbike riders in the ACT. It is compulsory to wear a helmet if you are on a pushbike. People were asking whether we should take away that law. I think it is quite relevant in this discussion for third-party insurance. Some of the callers were saying that if you choose not to wear a helmet and you are injured on your pushbike, you should not receive any compensation at all. Is that the sort of thing that you say is fair or not fair?

Mr Arundell: It should depend on whether the helmet would have made a difference.

THE CHAIR: To your personal injuries that you are claiming against?

Mr Arundell: Yes. Normally, except in summer, when it is too hot, I have converted to riding a bicycle with a full-face BMX helmet. It is a bit too hot to wear in summer. I had a crash about five years ago wearing an Australian standard bicycle helmet. An Australian standard bicycle helmet is not required to protect your face. My life was saved by the tooth that used to be here. It took the impact. I was concussed; I was barely conscious for several days. If that tooth had not taken the impact, like somebody else, I would have been dead.

MS CODY: Ooh.

THE CHAIR: You can take a moment. Please, take a break; make yourself comfortable.

MR PETTERSSON: There is a rule somewhere about using props. We will let that one slide.

THE CHAIR: The chair is not at all concerned. Continue. You were saying that two different helmet types in a way make a difference to the impact and the injury.

MS CODY: I ride both a bicycle and a motorbike. I wear a full-face helmet on my motorbike, but I had never thought of wearing one on my pushbike.

THE CHAIR: BMX bike riders do, for that very reason.

MS CODY: Yes.

Mr Arundell: Let me explain that BMX bike riders start on the top of a hill and they go down. They do not have to put in a huge amount of energy for very long. On an ordinary bicycle, in weather like this—

THE CHAIR: It is too hot.

Mr Arundell: a full-face helmet—certainly the one I have, which cost $200—is just too hot.

THE CHAIR: It is both expensive and too hot.

Mr Arundell: Yes.

THE CHAIR: Any further questions?

MR PETTERSSON: In your cover letter you say that this piece of legislation would artificially reduce financial costs for car owners. Why do you think it would reduce costs?

Mr Arundell: It will reduce the cost of third-party insurance, because the insurers will have less money to pay out.

MR PETTERSSON: But won't they be paying out to people who were previously considered at fault as well?

Mr Arundell: I think we already have a no-fault insurance scheme, so you do not have to prove anybody is at fault to be able to claim compensation.

THE CHAIR: I think the matters that Mr Pettersson is referring to are covered in more detail in the submission from Mr Browne. There are more statistics involved there, which came out of the jury process. That is probably a more appropriate place to find out about the details on the financial load on insurers. Possibly the next witness might help as well. Is there anything you want to add, Mr Arundell, before we conclude?

Mr Arundell: No; I think that is fine.

THE CHAIR: Thank you for appearing today. You will be sent a copy of the *Hansard* transcript from today, and you will have an opportunity to correct anything that has been mistyped or if you have a difference of opinion on how it has been presented. If we have any additional questions for you, we will let you know the time frame for responding.

Mr Arundell: I expect that if you have any questions, you will have plenty of other people who can answer them for you.

THE CHAIR: Yes; that is true as well.

Short suspension.

ISLEY, MS MEGHAN, Senior Manager, Scheme Design, Policy and Injury Prevention, Insurance Australia Group

KING, MS NADINE, Manager, Regulatory Policy, CTP Portfolios, Insurance Australia Group

THE CHAIR: We will now move to our next witnesses, representing IAG. On behalf of the committee, thank you for appearing today and for the written submission that IAG has given to the inquiry. I remind witnesses of the protections and obligations afforded by parliamentary privilege and draw your attention to the pink privilege statement before you on the table. Please take a moment to read that and confirm for the record that you understand the implications of the statement.

Ms King: Yes.

Ms Isley: I do as well.

THE CHAIR: Thank you. I remind you that the proceedings are being recorded by Hansard for transcription purposes and are being webstreamed and broadcast live. Before we go to questions, does either of you have any opening remarks?

Ms Isley: I have some opening remarks I would like to make. We thank the committee for providing us with the opportunity to contribute further to your inquiry into the exposure draft of the motor accident injury bill 2018.

IAG, through its NRMA insurance brand, has an extensive history in the ACT: over 30 years of providing CTP insurance. IAG also provides CTP insurance in New South Wales and South Australia, and in the past we have also provided it in Queensland.

Our submission has been prepared with our customers' needs front of mind, as we hold a firm view that if our customers thrive, we will also thrive. This means that we have committed to supporting injured people in their recovery from motor accident injuries and providing policyholders with value for money by operating efficiently and responsibly.

In regard to the reform in the ACT, we acknowledge that the citizens jury were provided with clear boundaries that shaped their reform proposal, including requirements that the CTP scheme must remain compulsory for all motorists, the scheme must continue to be privately underwritten, and the overall scheme design cannot raise the cost of premiums; that the CTP scheme in the ACT must remain community rated; that the types of vehicles for which the CTP must be purchased and the way premiums are calculated between the types of vehicles cannot change as part of the process; that the scheme must be workable and fit within our legal regulatory frameworks; and that the deliberations will not examine the established lifetime care and support scheme.

In operation, these requirements resulted in the jury focusing almost exclusively on a scheme benefit design rather than the underwriting principles. The jury decided that people injured in motor vehicle accidents should be eligible to obtain support and the type of support that should be made available to injured people.

As mentioned, IAG provides CTP in a number of jurisdictions in Australia. The schemes are all different and have changed enormously over the years to reflect changing community standards. The design of each of the CTP schemes, the scope of the policy and the benefits are a decision for the government, here in consultation with the community. It is the role of insurers to price the policy and handle claims for benefits, in accordance with our legal obligations set by parliament and the expectations, importantly, of our customers.

We have noted over time that providing benefits on a no-fault basis has gathered support. Scheme changes are trending towards broadening eligibility to benefits rather than narrowing it, and keeping costs affordable for motorists, while limiting access to common law damages, by placing caps, for example. In our view, the ACT reform proposal is in line with the general trend that we are seeing in other jurisdictions.

In respect of the model selected by the jury and underpinning the bill, IAG considers that the model is closely aligned with our views of reform in the CTP space, that is, a scheme that provides support to more injured people when people need it and provides damages to compensate those people injured through no fault of their own who have significant ongoing needs.

We understand that great care is needed in benefit design and delivery to ensure that an injured person does not experience additional disruption or hardship as a direct consequence of making a claim. That is why our submission focuses on the ease with which an injured person can navigate the claim process and the manner in which the benefits are calculated and assigned.

If we consider all of our customers, both the injured and those who pay the CTP policies, we must also prioritise efficiency, that is, the allocations of funds collected to pay as benefits. This means that claim procedures that are administratively complex and costly and that erode funds that can otherwise be paid to the injured need to be avoided.

To avoid any confusion at the outset, we think it is important to distinguish CTP insurance from general insurance. CTP insurance, like workers compensation, is a statutory class of insurance. This means that the purchase of the policy and the coverage offered under it have been set out in statute, and to varying degrees so have prices, market practice, claims processes and entitlements. Statutory schemes such as CTP are extensively regulated, closely monitored and measured to ensure that insurers deliver value to the community.

We are pleased to respond to any questions that you may have on the exposure bill or arising from our submission.

THE CHAIR: Thank you. I might start with the community rated concept. Can you add a bit more understanding for me about what that exactly means?

Ms Isley: I can provide some understanding. I am not one of the actuaries from the insurance company but, essentially, community rated means a single price, with the exception of the difference between regular vehicles and motorcycles, which means

that the good risks are subsidising the bad risks.

THE CHAIR: Okay, got it. Everyone pays the same price.

Ms Isley: That is right.

THE CHAIR: The previous witness talked about the possibility of risk being taken more into account in the price that individuals pay, but I think the point you are making is that that was not something that the citizens jury was allowed to look into.

Ms Isley: That is right. That is why we have not even contemplated it in our submission.

THE CHAIR: No. It is a very narrow allowance for change, essentially.

Ms Isley: Yes. I guess it would be something that I am not sure the general community would be in great favour of.

THE CHAIR: It would be a big change. I guess we are used to it when it comes to our own personal insurance, but yes.

Ms Isley: Yes. One of the benefits from a community perspective is perhaps the signalling to encourage good road behaviour through better price.

THE CHAIR: Yes, that is right. You mentioned that administrative costs are, in a way, a waste of money if they can be avoided. Do you have an opinion on the amount of administration required for the proposed system as opposed to the current system here?

Ms Isley: Given that they are very different schemes, it is hard to do a direct comparison. As you saw in some of the things we have pointed out in our submission, with some subtle changes to the way an injured person moves through the scheme being proposed, I think you can substantially reduce the administrative costs and also the burden on the injured person.

THE CHAIR: What kinds of things could be done to make it easier?

Ms Isley: I would like to start off by talking about the whole person impairment example. We are in favour of having an objective approach and measure like the whole person impairment as part of the scheme, because it is a reliable and consistent way to assess and measure injury severity, and then use that to determine who should get access to what benefits.

THE CHAIR: Are you saying that you think that the whole person impairment is a good measure?

Ms Isley: We do, yes. It is a measure that is used throughout jurisdictions in Australia; it is used in all the workers comp jurisdictions.

MS CODY: It is not used currently in CTP in the ACT, though?

THE CHAIR: No; that is right.

Ms Isley: No, not in the ACT. It is used in the workers comp system in the ACT, but it is not used in CTP. It is used in New South Wales—

THE CHAIR: But it is being proposed.

Ms Isley: and, in combination, in Victoria as well.

THE CHAIR: What do you mean by "combination"?

Ms Isley: Victoria also has a verbal threshold as well so you either meet the bar based on the description in the legislation or by being assessed as a certain whole person impairment. So consistency with a measure that is reliable is really important not only for us in terms of being able to predict what the scheme is going to cost us but also for communications and providing information to the injured person so that as we move through the scheme we can help them understand whether they will meet the threshold and provide necessary support in terms of what they will be eligible for.

MS CODY: The proposed changes suggest a WPI of 10 per cent, is that correct?

Ms Isley: That is right.

MS CODY: How does that compare to other jurisdictions?

Ms Isley: It is pretty similar. I should say that it depends on which WPI version you are using.

MS CODY: So there is more than one?

Ms Isley: There is a single WPI assessment but some jurisdictions have not moved on to the latest version. There are some subtle differences depending on the edition used. New South Wales use the previous edition and it is a 10 per cent threshold.

Ms King: The 10 per cent is a threshold to accessing damages in the proposal. In New South Wales over 10 per cent is a threshold to accessing a particular type of damages, the non-economic loss damages, which here would broadly equate to the quality of life benefit.

Ms Isley: So how the WPI assessment is used varies, of course.

MS CODY: From my understanding, WPI does not necessarily take into consideration the type of employment.

Ms Isley: That is correct. It is a measure of injury severity; it is not a measure of injury disability. It is not a perfect measure. I would like to talk a bit more about things we can do to address some of those concerns in relation to the WPI. I think the proposal for the ACT to have the quality of life payment goes some way to that.

If you introduced ranges in the quality of life—for example, rather than having a single figure for each point of WPI if you said between five and 10 per cent the range of quality of life payment that you would be eligible for is $10,000 to $20,000 or whatever—then you would be able to adjust it to provide a bit more to the labourer who is more impacted by injury severity than someone who is working behind a desk, as in the example you provided to the previous witness.

MS CODY: The quality of life payment, is that what you called it?

Ms Isley: Yes.

MS CODY: That is basically looking at how you manage to live, work, survive throughout the next however many years?

Ms Isley: No, the quality of life payment proposed in the legislation matches the WPI assessment percentage. At the moment there is no flexibility in that particular payment in relation to other concerns such as what you do for work, but I think that there is opportunity to put ranges in.

MS CODY: And I remember reading that in your submission.

Ms Isley: Yes.

MR PETTERSSON: If you put ranges in, what is the process for determining what end of that spectrum you fall into?

Ms Isley: The process is considering all the information on the file, so the person's occupation. Is that what your question is getting at?

MR PETTERSSON: Yes. So let's say it is the labourer and they fall into this band, what is the process for determining that they would fall at the higher end of the band?

Ms Isley: It is like the process for considering anything on a file where there is some discretion. It is considering all aspects of the case. It gives you the opportunity to consider the disability impact on the person more so than just the injury severity.

Ms King: To distinguish the use of WPI for the purposes of deciding how much quality of life benefit you should be entitled to is quite separate from your income replacement benefit. It is, as mentioned, the equivalent to the loss you have suffered that is not a tangible loss in the sense of you can straight away put a dollar figure on it because you have had an economic loss of a particular type. It is that more nebulous loss known as non-pecuniary losses.

Allocating a dollar amount by a percentage point becomes very cumbersome in that circumstance, but then you are looking at WPI as a threshold to access damages. So they are used in quite different ways in the proposal. I think it is helpful to think of the ranges where you have one figure and whether you are at the low end or the high end of the range it is really immaterial because you do not actually need to compete. There is one sum ascribed to that range so you do not need to go through multiple assessments to see whether you have seven or nine per cent whole person impairment;

you just fall in the range and get the amount that is prescribed.

MR PETTERSSON: But if I have seven per cent and I find out I am getting paid the same as someone who has got nine per cent, would I not feel cheated in the system?

Ms King: It would depend upon how your expectations are informed I would think. The payment is so much more the quality of life payment than injury severity; it is a more generalised payment. Reducing it to a single percentage point probably is not helpful.

MR PETTERSSON: If you do not like reducing these things to percentage points, why are we setting any percentage point thresholds?

Ms Isley: I think you misunderstand us. We agree that the WPI is a great objective measure, but we are saying that bringing it down to a single percentage point and single payment is very restrictive. As a threshold it has been proven to work well in other jurisdictions, but if you have a single point you end up creating disputes around those single point movements for not a lot of benefit to be honest.

MR PETTERSSON: So if we expand that and not have single percentage points and we do have bands and things are more subjective, how do we determine in that subjective situation where these payments actually land? If we are going to put in a band and someone is at the higher end and someone is at the lower end and you are saying the insurer can be subjective and provide more to the labourer, how do we come to that point? Are we just saying the insurance company is going to say, "This guy's a labourer. He looks like a nice guy. We'll chip in a bit more"?

Ms King: No. Lots of factors will be considered. Do you mind explaining a bit more the labourer example and why the labourer would be expected to get more?

MR PETTERSSON: This is the example you brought up before.

Ms King: Yes, but I think it was based on somebody else's example.

MS CODY: I am a hairdresser by trade. That is what I do. If I were in an accident today and I injured my left arm and could never regain the full use of my left arm, that would have very little impact on the job I am doing now but I would never be able to go back to hairdressing because I need the full use of both arms. I am using my example rather than a labourer because I get that.

Ms King: Yes, fair enough.

MS CODY: What I think Mr Pettersson is asking and what I am getting a bit lost on is, how do we determine that even though not regaining full use of the left arm is classed as a very low injury, the impact on a hairdresser is much higher than the impact on a person who can sit behind a desk, an MLA, for example. How do we compensate for that? The WPI does not take that into account. You mentioned the quality of life benefit and that there was a way we could scale that. Is that what you were trying to ask, how that difference happens?

MR PETTERSSON: Yes.

Ms Isley: I will start off by talking about the WPI and then I will transfer over to Nadine. It is important to distinguish that the quality of life payments are different to the threshold for general damages with the WPI.

MS CODY: Absolutely they are; 100 per cent.

Ms Isley: So my suggestion of allowing some flexibility in the quality of life payment arena is not an argument for a change in the threshold. It does not change getting the hairdresser, for example, across the threshold for that general damages payment, but creating a range in the quality of life payment would allow some flexibility to acknowledge the extra impact of your injury dependent on your occupation.

MR PETTERSSON: The crux of my question is: how do we determine that? You have got the hairdresser, and we are trying to determine the quality of life payment. How do we determine that?

Ms Isley: From a process point of view?

MR PETTERSSON: Process or—

Ms Isley: By absolutely considering all the facts in the case, talking to the injured person about the impact on their life—

MR PETTERSSON: So it is an internal decision?

Ms Isley: We are talking within a range, so it is still—

THE CHAIR: So is that based on a questionnaire process or something internally?

Ms Isley: It is based on the evidence on the file. Treatment providers, for example: the information we are getting from them is going to be critical to making an assessment like that, which it already is in all the CTP claims that we manage.

MR PETTERSSON: So it is an internal decision? You assess all the factors—

Ms Isley: No, I would not say it is an internal decision; it is a decision with all the stakeholders on the file, so the injured person, their treatment providers and all their representatives.

MR PETTERSSON: And how do you solve that dispute? One of the big sections of your submission is dispute resolution. That is in the broader sense. How do you resolve those disputes?

Ms Isley: Before we move on to disputes, there are a couple of points about WPI which are from a journey through the claim which I would really like to raise because I think they are incredibly important.

THE CHAIR: Yes, please.

Ms Isley: Then I am absolutely happy to talk about the disputes. You would have seen that in our submission we made a couple of points around improving the customer experience of WPI and the way it is proposed to run in the proposed scheme, because at the moment we think that there is quite a bit of decision burden or administrative burden on the injured person, which is really not how it should be.

The first concern that we have is the requirement for the injured person to pay an excess to the insurer if the insurer does not agree that there is a permanent impairment. This may be an unusual position for an insurer to take but we think that if the injured person feels that they have got a disability or an impairment they should be allowed to go and get that assessed. Having an excess requirement really makes it difficult for those people who are low income earners, which is not fair.

In addition to that, we are concerned about the requirement for an injured person to select whether the insurer pays for a physical assessment or a psychological assessment. I think the case example that we wrote up in our submission was in relation to Daria, who is someone involved in a big accident with multiple injuries and pressure financially. Because she has got multiple physical injuries, it is likely that she will have to see a number of doctors, so she elects for the insurer to pay for the physical assessment. It seems unfair that then she has the requirement to fund her psychological assessment. That is unusual. We have not seen that in any other jurisdiction, and we would like to see that changed.

We would also like to note—I know it comes up in a number of other submissions—that there is no special provision made for children in terms of timing of the assessment either. With a child who suffers an injury, it may take longer than five years for that injury to stabilise as the child grows, so it is not fair to push for the assessments to be done within that five-year time period for them. So I think there needs to be some—

THE CHAIR: What do you think would be a more reasonable timeframe?

Ms King: It may be possible not to express it. You can accommodate potentially in the legislation by just stopping the calculation of time for the purposes of limitation. So you do not need to set an absolute timeframe. You could just reverse engineer it as such.

MS CODY: How does that compare with the current CTP in the ACT? How are children managed in that scheme?

Ms Isley: There must be some sort of extension of the limitations period, because I know we have got children's cases that are open for a long period of time—

MS CODY: Yes, I do too. I know that myself. I just wondered if you knew more specifics from an insurer perspective.

Ms Isley: I do not know off the top of my head but there is certainly an allowance for it, because those cases stay open. Maybe they make the damages claim within the limitations period and while it is being ready to assess that is allowed to continue.

Ms King: That would be the case.

Ms Isley: Did you want to move to talking about the disputes framework?

MR PETTERSSON: Yes.

THE CHAIR: That is what you needed to say about WPI and how that is—

Ms Isley: Yes.

THE CHAIR: Okay, let us do disputes, and then I have got another question to come back to on WPI.

MR PETTERSSON: In your submission, you do not provide comment on a preferred dispute resolution model. What do other jurisdictions do? What do you encounter in other jurisdictions?

Ms Isley: I might start by talking about internal review, and then pass over to Ms King. In other jurisdictions, and in particular New South Wales, it is new to have an internal review at the insurer before it goes to a question, or a concern goes to an external dispute framework. I would like to talk to that, because I know that a number of submissions have made comment on that. From our point of view, the insurers having an internal review of an injured person's concern is critical. It means that we can quickly review a decision by someone who is independent from the original decision-maker. We can review the decision. Sometimes we maintain a decision, and our indication from New South Wales is we are certainly overturning decisions in that internal review process. Because it is much faster than going to an external dispute, it means that our staff are able to change the way they are making decisions when things are being overturned. If this scheme rolls out there will be some teething problems, and certainly there will be some decisions made by insurers that—

THE CHAIR: People will disagree with—yes.

Ms Isley: Yes, that is right. The internal review process allows us to quickly get on top of those and make the right decisions.

Ms King: It is also so much easier for the injured person to have someone consider their perspective or the issues that are eating away at them. They do not have to go through complex application processes, and the level of formality—

THE CHAIR: And you are not suggesting that those other processes should not exist, but merely that—

Ms King: Absolutely not.

THE CHAIR:—they should be a second step rather than a first step.

Ms King: For sure; that, where possible, the injured person's issues are dealt with and can be resolved as informally as possible. And of course it is going to depend on the

issues that are in dispute. That, in large part, is why we were quite general in our response on dispute resolution, because it is not clear at this point—

THE CHAIR: How much you will be doing.

Ms King: We agree with other submitters that there will be a range of disputes in a scheme design such as this, and we will need to decide where the best forums are. It is not necessarily a one size fits all, and we wanted to avoid suggesting one place as the one-stop shop, because our experience in other jurisdictions, using New South Wales as an example, is that sometimes it is very useful to have experts in particular areas deal with their area of expertise.

For example, with medical disputes the regulator operates a dispute resolution service, and in that service you can have a medical dispute assessed by a medical assessor. You can have low-level—I say low-level in the sense that compared to, say, a liability dispute, they are of smaller consequence—disputes dealt with very quickly through a merit review process.

Alternatively, where there is liability, to stop clogging the courts they first need to go to a more formal assessment process, where a great deal more documentation is required than what you would need to have a lower level procedural decision reviewed through merit review. So it is a proportionate response to that issue. That was where we wanted to go with that, but it was a little bit difficult without the detail.

THE CHAIR: Is this because, essentially, the regulations that would sit under a scheme like this have not been released?

Ms King: There is that, but also that the dispute resolution section of the legislation was not included in the exposure bill. I think reference is made in the accompanying documentation to the intention to include more detail in the bill, but it just was not there on this occasion.

MR PETTERSSON: In terms of those different avenues you have suggested as possibilities, what types of representation do you think should be available to claimants as they go through those processes?

Ms King: Drawing on the principle of proportionality, it should depend on the issue and what is at stake. In using New South Wales as an example again, the cost regulation has set fees for particular types of disputes that go through the process in recognition that some of these administrative disputes are sufficiently complex as to warrant having professional services in support of the claimant but for lesser issues it is unnecessary.

THE CHAIR: Is that defined in the legislation in New South Wales?

Ms King: New South Wales is outlined in the cost regulation that sits under their legislation, which was made subsequent to the passage of the legislation.

THE CHAIR: I think that is what often happens. If I can just go to your recommendation about retirement-aged injured people, our previous witness spoke

about that as well. The ACT is full of very competent retired people, some of whom continue to work and earn above their retirement benefits or their pension. You suggest that clause 93 be revised to mirror division 3.13 of the Motor Accident Injuries Act for New South Wales. Can you explain what the New South Wales provision does that we do not have in our current suggested legislation?

Ms King: Essentially it provides a person who is working beyond retirement with some benefits for 12 months or so after the accident in recognition that they have suffered a financial loss.

Ms Isley: The 12 months gives them an opportunity to get their affairs in order rather than just cutting them off.

Ms King: We saw that as more consistent with the jury's principles of equity.

THE CHAIR: And do you think 12 months is reasonable? I wonder where that figure came from. I suppose often these decisions just have to be made about what the cut-off point is.

Ms King: We used it as an example of a provision that was already in operation. The reform in New South Wales was motivated by a whole lot of other forces. It is not essential to transport that exact provision if you feel it does not appropriately reflect the policy you are trying to achieve.

Ms Isley: Having said that, 12 months I think is a good period. If it was significantly shorter than that I would consider it unreasonable.

Ms King: You would think 12 months at a minimum.

THE CHAIR: Point 3 in your submission refers to allowable expenses during the initial period. It is obvious that there are guidelines that have not yet been developed. The nature of looking into an exposure draft is that a lot can change between now and the day we enact something on this. Obviously there is the issue of the initial period expenses, but if we are going to recommend that the guidelines include certain things what is the list from your perspective?

Ms Isley: Specifically to allow more expenses, we just want it to be clear so when we are having conversations with injured people they are very aware of what they are entitled to and we know what we are required to pay. We thought that there was a little bit of confusion between the initial allowable expenses and those that we are expecting to have to pay for afterwards. It is more ensuring that it is very clear.

THE CHAIR: The initial expenses concept, if I understand it correctly, is so that while claims are being decided treatment can occur. Is it common for more things to be paid for than are covered in the later payments?

Ms Isley: I think I understand your question on that; maybe I can paraphrase. So the reason for including early treatment expenses is that masses of medical research evidence suggests that early treatment is the key. So having allowable expenses early is about getting those people to their GP, and we would argue for an evidence-based

health provider so their injuries do not get to a chronic state. The ACT currently has early payments allowable but not as early as what is being considered in this legislation.

MS CODY: I want to follow on from the allowable payments. You mentioned that for the allowable expenses during the initial period you do not consider investigations such as MRIs should be considered as initial treatment options. Is that correct?

Ms Isley: That is correct. The reason for that is a large of majority of injuries we see coming through the scheme are soft tissue injuries. The evidence-based medical guidelines are very limited in when you would use an MRI for those injuries. In other jurisdictions we are seeing a really rapid increase in requests for MRIs. Partly that is because of the design of some of those schemes.

We would not want that as an allowable expense because we want to have time to consider whether that is appropriate for that injury. We do not want injured people going through assessments that are unnecessary; we would like the opportunity to talk to their treatment provider about that. But also we want to be able to manage scheme costs and ensure that appropriate treatments are being done in that early phase.

I should clarify that we are not saying that MRIs should not be done for injured people who, for example, are in hospital or the like. We are talking about the soft tissue injury category.

MS CODY: In the proposal insurers must pay within 28 days of the initial period but that the application must be lodged within 13 weeks of the motor vehicle accident. So you could lodge it 12 weeks after the accident and it could take that long before get treatment. By then you may have already seen doctors because you have had niggling things that you did not realise were happening. So by the 12th week you may have to have an MRI.

Ms Isley: To go back a step we would like anything to encourage people to get their claims in earlier so that we can work with them to help them recover. I would have to consider more about how the allowable expenses work with the following expenses because it is a bit unclear in the legislation, and that is what we are asking.

THE CHAIR: We might ask you to consider that and get back to us.

Ms Isley: Yes I can take it on notice.

THE CHAIR: Do you have any other views about matters that should be covered in the regulations that are not clear at this stage? I understand it is a very broad question, but we may not have the chance to talk to you again.

Ms Isley: Can we take that on notice?

THE CHAIR: Yes, please do. That would be a great idea.

MR PETTERSSON: What, if any, problems do you encounter with our current system?

Ms Isley: That is also a very broad question. I will start off by naming a few. Firstly, claims coming in very late. It can be months before we know that we have an injured person who needs support. That is the number one concern. Claims are very slow to resolve: in the new scheme you are getting defined benefits very early on; in the current scheme it can be years before you have any income support. Reasonable treatment is, of course, paid for, but income support is not paid for until the end of the claim, some three to five years, or longer, down the track.

Ms King: If we consider what we do for injured people generally, we do not do a lot for people who are at fault in this current scheme. I think it is about $5,000. You would like to help more people recover from injuries.

Ms Isley: I think it is important to say that we do try to work with injured people, but it can be difficult in the current scheme. There is a high level of legal representation. We have varied success in working with the injured person. That is certainly not to say that it is always a problem, but it does create a certain amount of difficulty.

The other thing to say is that, from a research point of view and an injured person's point of view, being involved in a compensation scheme is not actually helpful for your recovery. There is lots of research that suggests that those in compensation systems do worse than those who are injured and do not have a claim.

I think where there is a defined benefit, that goes some way to correcting the problem, assuming that administratively it is okay. It is also an argument for having a WPI. In the current scheme, everyone has a common law claim, so you almost have to demonstrate some disability for everyone in order to get that money at the end. In the current scheme, the focus, with the threshold, is on paying the money to the people who need it most and who are most injured. It allows those with minor injuries, I hope, to focus on their recovery, get on with it, get back to their activities and not get caught up in the—

THE CHAIR: In the waiting.

Ms Isley: Yes. I say that both coming from an insurance perspective and coming from my previous life working as a physiotherapist. It is much nicer to work with people who are not thinking about the final outcome in terms of compensation but are just focusing on what they need to do to get back to their life.

MS CODY: I have a quick follow-up question. We have seen some experience in New South Wales where the weekly benefits scheme has seen insurers not have appropriate staff to manage that side of things. How do you see ways in which that can be managed in the ACT? There have been claims in New South Wales where advice has been inappropriate or sometimes there has even been dishonest advice. We obviously do not want to see that in the ACT.

Ms Isley: I agree. There have certainly been some teething issues in New South Wales, and it is disappointing, certainly from an injured person's perspective. As insurers, we are learning a lot through that process, and I think there is some guarantee that that would not be repeated in the ACT.

THE CHAIR: Given you have just been through it.

Ms Isley: Yes. It is actually great timing for us, because those lessons learned are so fresh that I would hope that we will not repeat them in the ACT; not that we were responsible for some of the things that have been in the press.

It is tricky, in these new schemes, when you are completely changing everything. There will certainly be some teething issues. But we are committed to ensuring that we do our best to make sure, first, that the customer is not impacted where there are teething issues. We certainly should not be going after the customer, where it is a mistake on the insurer's part, to get them to pay money that was not paid by them initially.

Do you have anything to add to that?

Ms King: No.

Ms Isley: There is no way we can guarantee that there will not be teething issues. I think it is about how you handle those teething issues after the fact, from an IAG perspective.

Ms King: I suppose we can take some comfort in the relationship with the regulator. Where there is uncertainty, you work with them to try to get some clarity, to understand the outcome you are supposed to achieve and work towards that. That has certainly helped us in New South Wales.

Ms Isley: Yes. And we have a very close and transparent relationship with the regulators for that reason. If we come across something that is not done correctly, we are talking to them about it and providing them with oversight on how we intend to correct the problem as soon as possible.

MS CODY: It seemed that there were not enough staff, and staff may have been inappropriately trained. From your perspective, as an insurer that offers CTP in the ACT, is there a view that you have learned enough that there will be better training provided to staff and ensure that there are more staff to cope with the changes? Are they going to be completely briefed on what the changes mean?

Ms Isley: Absolutely.

MS CODY: From an IAG perspective, how are you going to manage it so that it does not impact the residents of Canberra?

Ms Isley: We are already looking at establishing a big project to roll out our management of these claims even before legislation has passed, in preparation. The proposed time frames are quite tight. That is to ensure that, when and if the scheme is live, we are prepared.

Something that does make it tricky for us is that in New South Wales the regulations and guidelines were coming down at the very last minute as the scheme start date was

coming. That does make it difficult to train, when there is some guesswork in how things are expected to be done.

Having said that, we managed. As I said, certainly there were some teething issues, but we have got through those. The internal review process is important to that, because it allows us to pick up those issues quickly and roll the training back to our staff generally to make sure that any problem is not systemic.

THE CHAIR: I wonder if you could go to page 11 of your submission. In the very first box, it talks about Daria's case study. It says:

> Daria is aware that by taking the defined benefit payment and not waiting for the damages claim to be resolved she will have to take a lesser amount. However, she needs the money now so feels like she has no choice.

Can you add a bit more information for us as to how that would occur?

Ms King: This takes us back to the quality of life benefit that has an equivalent in the damages space. The quality of life payment in defined benefits is calculated at a lesser rate. If you select the option of taking a quality of life defined benefit, it precludes you from getting a quality of life damages payment, so the differential is never topped up. So it is at a cost. Again, it is more likely to affect people who have an immediate need for finance.

THE CHAIR: So a lower income person?

Ms King: Absolutely. People who are cash-strapped are not going to wait for the higher amount.

Ms Isley: Our suggestion is that they should be able to get that amount later, that you just take the difference: you take the quality of life payment that they have already received—

Ms King: And offset it.

THE CHAIR: That seems like a reasonable suggestion.

MS CODY: You mentioned gross income.

Ms King: Yes.

MS CODY: You talked about overtime, which again comes back to it often being tradespeople or shiftworkers.

Ms King: Yes.

MS CODY: You talked about the fact that at the moment there is less ability to think about how those overtime payments are considered in the gross income context.

Ms King: Yes. That discussion was part of a broader discussion of where the

language is not particularly certain—

MS CODY: Clear?

Ms King: That it gives rise to disputes and different interpretations. Our recommendation was that you either just put it in, rather than have some quite—

MS CODY: Ambiguity?

Ms King: Yes. Quite impenetrable language about a substantially uniform and established pattern. You can use just gross earnings over a specified period.

MR PETTERSSON: I understand you need a 10 per cent WPI to make a commonwealth claim. How do we compare to other jurisdictions in terms of that threshold?

Ms Isley: As I mentioned earlier, New South Wales is at 10 per cent. But we need to take note of the different versions of the WPI tool that are in use in different states. It is not a straight equivalent comparison, but it is similar.

Ms King: In New South Wales, of course, it is just a 10 per cent threshold to a particular head of damage, non-economic loss. You still just need to prove fault for the purposes of making a claim for economic loss or loss of impairment of economic loss, provided, of course, you have suffered more than a minor injury.

Ms Isley: I would have to check the facts in the workers comp scheme in the ACT, but I think it is at 15 per cent. We can certainly provide you with that detail on notice if you would like a table of it broken down.

THE CHAIR: Yes, please.

MR PETTERSSON: I am not sure if we have covered this, but what is the difference between WPI in different jurisdictions? I am struggling to express how they are different. Is it in the classification of certain injuries? Is it weighted differently? Is it some different form of variation?

Ms Isley: There are subtle differences in the version of the tool that is used, but they are just subtle differences. Then some of the jurisdictions have developed guidelines that go along with the whole person impairment assessment tool.

MR PETTERSSON: Is there any rhyme or reason as to which version of the WPI jurisdictions use?

Ms Isley: I think some of it goes to reluctance to move onto the newer version because we have so much experience with the current version, in New South Wales, for example. That is really a legacy thing.

To add to that, when a new assessment tool is released, it takes some time for the medicos to get across it and agree that this is a solid tool that is appropriate to be used in jurisdictions such as ours. Then there is reason to hang onto the one that you know

is solid and is valid for making the assessments that you are using it for.

Ms King: And you have already calibrated your overlaying guideline as well, to account for the idiosyncrasies of the environment which we work in. Workers comp is very different from CTP in the injuries that you get and the people that you are assessing.

Ms Isley: Which is how guidelines that go along with the assessment tool can make adjustments to account for the injuries that you are more likely to see in the particular schemes.

THE CHAIR: I am aware that we could easily have you here answering questions for the entire day and still probably have more to ask. We will let you go now and definitely be looking for that detail from the questions that we have asked you to take on notice. We will make sure we forward you a copy of those from *Hansard* so that you know exactly what we need from you. And, if you do not mind, we would like to be able to get back in touch if we have any further questions.

Ms Isley: Absolutely, yes.

THE CHAIR: We want to get it right. It is a fairly complex area for us as well.

When available, a proof transcript will be forwarded to you both. You will be able to check it for accuracy in case there is anything you think has been mistyped. We will give you a time frame, within two weeks, if that is possible, to get that info back to us. We have quite a tight response time line, and we want to do the report justice.

On behalf of the committee, I thank you very much for appearing today on behalf of IAG and for the work you have done in the ACT over many years.

Short suspension.

BROWNE, MR BILL, Member, CTP Citizens Jury

THE CHAIR: Welcome. Mr Browne, on behalf of the committee, thank you for appearing today and for your written submission. I remind you of the protections and obligations afforded by parliamentary privilege and draw your attention to the pink privilege statement next to you on the table. Could you confirm, for the record, that you understand the privilege implications of the statement?

Mr Browne: Yes.

THE CHAIR: Thank you. Before we proceed to questions, do you want to make any opening remarks about your submission and your thoughts?

Mr Browne: Yes, thank you. I was on the citizens jury that looked at compulsory third-party insurance last year and earlier this year. I was a co-author of the minority report, which expressed the opinion of some jurors that the model that the jury voted for has flaws. I should note up front that the majority of jurors supported the model but I did not. I cannot claim to speak for them or for the jury process as a whole but I think I have some insights into the process, and there are ways that the legislation can be improved that do not involve disregarding the jury process altogether.

I am very worried that steep cuts to compensation for victims of negligent drivers are going to do a lot of harm to people living in Canberra. Much of the jury's attention was focused on allegedly high rates of fraud, on long delays in processing claims and on the wastefulness of the adversarial legal process. But the changes in the scheme are mostly paid for by cutting compensation, not by making the process less wasteful or less vulnerable to fraud. I agree that our scheme should make some payments to negligent drivers, but we should not halve the compensation of those who were not at fault in order to pay those who were at fault. And we certainly should not cut compensation in order to lower premiums. Lower premiums should come from cuts to insurer profits, legal fees or administration costs, and by reducing the overall number of accidents on ACT roads.

I am not criticising the decision to have a citizens jury look at a public policy issue like CTP. I think these processes can be done well. But the weaknesses in the citizens jury process mean that the Legislative Assembly also has a role to play. One juror boycotted the jury over his concerns, especially related to WPI, whole person impairment.

The jury's ability to reach a radical compromise was limited by its narrow terms of reference. We could not look at raising premiums, even though polling done by Piazza Research for the citizens jury showed that 49 per cent of Canberrans would prefer to pay higher premiums to get more generous coverage. We could not move to a government-run scheme, even though Dr Ian Cameron, a member of the stakeholder reference group, said, "Model D is not the model that could provide greatest equity and value for money. A more completely no-fault system, as in Victoria, would do that better." We also could not propose a scheme where some people would pay more than others and where some people would pay less, or look at other ways of encouraging drivers to take out insurance that would protect them, so ways of

increasing first-party insurance rates.

Between the four models that we could choose from, there was no option for high compensation, high defined benefits. Jurors who wanted the scheme that was least based on fault, had to choose the scheme that cut compensation the most. And although the modelling was detailed in some ways, it had little information on who would benefit or lose out from these changes, in terms of classes of road users for example. My rough calculation suggests that pedal cyclists could lose millions of dollars in compensation each year. There is also a problem that gratuitous care, the kind of care provided for free by a loved one, is going backwards in the sense that it is currently compensated but it will not be under this legislation.

And although the citizens jury chose a scheme that is meant to be the most efficient, there is no cap on insurer profits in this legislation, and so no guarantee that it actually will become more efficient. New South Wales imposed a cap on insurer profits and I think the ACT should do the same.

THE CHAIR: Thank you for those opening remarks. I will start with the statistics that you have cited on page 4 of your submission, regarding percentages and the overall reduced cost and so on. Do you want to explain a bit where you got those statistics from?

Mr Browne: These statistics come from the modelling that was prepared by Ernst and Young for the jury for the final weekend. It is presented at the back, in appendix B. For each individual premium, tens of dollars will go to this, and so on. So what we did for the overall figure was multiply that by an indicative figure of 250,000 premiums, reflecting about that many cars in the ACT. In terms of the percentages, the current ACT total premiums given in the same column, there are no page numbers, but appendix B, model D, is the source for that.

THE CHAIR: In point 5(c) on that same page, you state:

> The Jury was not given enough information to make an informed decision.

I am sure designing a jury process for such a complex issue and actually hoping to come up with a viable scheme at the end of it is not an easy process. Can you perhaps talk about the experience of being on the jury and what you would have done differently were you the person designing the jury process, just so we can understand a little better what happened?

Mr Browne: When you hold various deliberative democracy mechanisms you can structure them either as kind of consultative processes that arrive at general findings or ones that go into great detail, as this jury did. And I think part of the concern here is that, in many ways, the first two weekends were spent on general principles. And I think the ones that the jury came up with are very solid general principles for CTP schemes. But then we were diving into this very detailed and potentially binding decision on models that are calculated down to how death distributions change.

So if you are going to do a public policy process like that, I think you would need to structure it differently. One thing might be having a slightly more formal arrangement

for talking to witnesses where the claims that they make are recorded and they take questions on notice and are otherwise required to furnish information to support their case. It struck me, for example, that the insurers were the ones who called for this process to happen but often when we inquired about how money was currently distributed, we heard that it was commercial in confidence or that they did not collect the information. One that stood out for me from looking at my notes before is that one of the insurers' representatives said that when they heard from people who went through a lawyer they were less happy than when people went straight through the insurer. But when I asked for that information they said that actually they did not collect that in any kind of systematic way.

THE CHAIR: That is just their impression. Yes, I see.

Mr Browne: Exactly, yes. And so—

THE CHAIR: If there were questions that you would like to have asked of the insurers, what would they be? We have the capacity to ask those questions.

Mr Browne: One thing I am very interested in is what the actual breakdown of costs looks like at the moment for the CTP scheme and insurer profits. We hear that they are kind of nominally set at nine per cent. But in practice does that vary year by year? New South Wales is a great example, because there they were nominally set at eight per cent but in practice profits were over 30 per cent in some years and averaged out to 19 per cent. That kind of information, I think, is particularly important.

And the other one, very prominent, is the implication that fraud, or claim maximisation, where someone kind of hams up the extent of their injury, was widespread in the ACT. But they do not have figures on that, at least none that they gave us. And they do currently have the option to pursue that through the courts but they say it is too costly to do. It is hard to tell exactly how extensive fraud is if it is not worth pursuing in the courts. So information about that, I think, would be particularly useful.

MS CODY: In your submission, in Argument 3, "We can collect information for years and then decide what an appropriate profit level is", you spoke about the insurers calling for sweeping changes. Can you expand a bit on why you made that call, what you are referring to?

Mr Browne: I think that goes to the commercial in confidence point. In many ways the insurers have been pushing for CTP changes for many years. They are a duopoly currently in the ACT and they have an extraordinary amount of power because of that. And I think if stakeholders do call for sweeping changes they should be prepared to provide more information than is normally expected from them. That is different from expecting people who are just reacting to the changes. If you are actually saying the system is broken, you should furnish the evidence that proves that that is the case.

MS CODY: During the citizens jury process, everyone was involved in the same discussions. There were group discussions going on; it was all together. How were the discussions formulated?

Mr Browne: There was quite a mixture of different discussion types. I think they called it speed dating, where we talked to different stakeholders for 10 minutes or so early on. There were joint sessions where a chunk of the jury could watch particular witnesses and ask them questions and then again I think we rotated, although I am not sure if you could end up seeing all of them or if you had to choose a selection; as well as joint briefings. The scheme designer and then the scheme modeller would do briefings to the entire jury. So it was a mix of discretion from the facilitators, who could convene particular groups to agree on particular areas. At the end of the second weekend, when we came up with a joint document expressing the jury's objectives, that was negotiation within particular groups that then had to be approved by the entire group. So there was a whole range of different ways of doing it. But there was always consultation, and the final group would always end up approving the final conclusion.

MS CODY: So there was quite a good opportunity to talk amongst yourselves as well as with stakeholders and relevant experts?

Mr Browne: Yes, definitely.

MR PETTERSSON: A large part of your submission talks about the effect on cyclists. Why will cyclists be affected so much?

Mr Browne: I am a cyclist so it was of particular interest to me. I tried to look at pedestrians and I could not find quite the same information available. Cyclists, as people who do not pay premiums, seem likely to mostly lose out. They are never going to be the person who has paid for the insurance that is in the accident.

Then I heard the counterview that if cyclists are more likely to be the ones at fault in an accident they might be currently not compensated under the scheme but would be for all the defined benefits that are not concerned with fault. So I thought that was an interesting case study to look at.

The reasons cyclists will lose out on compensation include a few factors. The first one is that overall compensation drops under the new scheme by about 20 per cent, from memory. The second is that cyclists are over-represented among those not at fault and under-represented among those at fault. So because the scheme cuts from those not at fault in order to compensate those at fault, cyclists are disproportionately affected there as well.

MS CODY: This morning on 666 ABC radio they were talking compulsory helmets for cyclists. We heard from a witness this morning that as part of the proposed scheme if you were doing something illegal your benefits are cut substantially. At the moment it is compulsory for cyclists to wear helmets. How do you see that part of the proposed scheme impacting on cyclists?

Mr Browne: In general it raises an interesting point that suddenly you are no longer talking just about fines. When you change the road rules you are also potentially changing how compensation is distributed. That might not be something that people pay attention to in these particular debates. I do not have particular observations there except that it changes the ramifications of other legislation in ways that people might

never realise.

MS CODY: Some of the feedback this morning was that if cyclists choose not to wear a helmet they should not be covered by any form of compensation because they are breaking the law. It was an interesting debate.

THE CHAIR: I take you to page 7 of your submission about care. You state that it is well documented that care and domestic work—sometimes stereotyped as women's or mother's work—is undervalued in the economy and sometimes in our society as well. It is an issue we talk about quite a bit in the Assembly. Can you expand on the points you are making with regard to how those people might be losing out? Is it because of income being the main source of the calculation?

Mr Browne: Yes. The changes to care under model D remove compensation for gratuitous care: the care provided for free by a loved one. That is understandable if you are trying to pare back the scheme and reduce costs. But in terms of getting good outcomes for people, encouraging care to be provided by people they know who are in the home and who have particular obligations to them that go beyond the financial is important. That is not to denigrate the paid care that happens because those people are often very competent and caring as well. But you would want to leave the option open for that care to be compensated and for people to not lose out when they decide to leave a high paying job or to cut back their hours in order to look after a loved one who has been injured.

That goes in some points to the design of the jury process as a whole. We heard a lot about how staying out of the legal process can help outcomes—the figure of 25 per cent better outcomes if you do not go through the courts versus if you do—but we did not look at what about being looked after by a husband or a wife or a mother or a father instead of a paid worker.

MS CODY: Do you know how that compares to the current scheme?

Mr Browne: As I understand it, under the current scheme part of your lump payment would account for the care that is needed for you regardless of the source.

MR PETTERSSON: One of the things you mentioned is that the jury never considered a model with higher compensation and also one with higher defined benefits and it is your view that this is the best model for Canberrans. Why do you think it is the best model for Canberrans and why do you think it was not looked at?

Mr Browne: As well as being the best model for Canberrans there potentially was a lot of appetite for it in the jury. I said before that I disagreed with them, but potentially this could have been a compromise outcome. The reason the jury was so keen on getting fault out of the picture was not just to save on those legal costs and to get people out of the legal process but also because we heard quite convincingly of small lapses that either excluded someone from receiving compensation or made a big difference to how much compensation they received.

As a moral principle, although levels of negligence are recognised by the law, they might be recognised by ordinary people as actually being worthy of affecting how

much compensation you would get. To some extent the way the stakeholder reference group was structured affected what models were looked at.

You had the lawyers arguing very strongly—and I think for good reasons—for why people not at fault should get more money. They had no particular incentive to recommend a scheme that would have higher defined benefits. Insurers, in turn, also have incentives to keep the cost of premiums low. So perhaps there was a missing voice on the group that might have said, "Actually, we need to try a different model that could be more palatable."

THE CHAIR: How you were selected for the jury process?

Mr Browne: I was one of the jurors who got a letter in the mail and I applied that way.

THE CHAIR: And you just ticked the yes box and got involved from there?

Mr Browne: That is right, yes.

MS CODY: Would you do it again—on a different matter obviously?

Mr Browne: On a public policy matter, potentially. I think we were way undercompensated for our time, so I think that is something to look at.

THE CHAIR: What was the compensation?

Mr Browne: It was $450 for three weekends, eight hours per day. In practice a lot of people did a lot of work outside of those assigned times as well.

THE CHAIR: That is about all we need to ask you about to understand your submission properly. Do you have any additional matters you would like to raise?

Mr Browne: No, I think that covered it.

THE CHAIR: If we have any further questions for you we will get them to you immediately. You will get a copy of the *Hansard* transcript of today's hearing for you to be able to respond if something has been mistyped or if you are not happy with the statements. Thank you, Mr Browne, both for your submission and for appearing.

Hearing suspended from12.24 to 1.03 pm.

WHYBROW, MR STEVEN, President, ACT Bar Association
RONALD, MR JAMIE, Barrister, ACT Bar Association

THE CHAIR: Good afternoon, and we will resume our hearings of the justice and community safety committee into the Motor Accident Injuries Bill. We welcome our next witnesses, representing the ACT Bar Association, Mr Whybrow and Mr Ronald. Thank you for appearing today and for the written submissions put in by you. I need to remind you of the protections and obligations afforded by parliamentary privilege and draw your attention to the privilege statement on the table. Could you please state that you understand the privilege implications of the statement?

Mr Whybrow: Yes, I understand, thank you.

Mr Ronald: I understand the statement.

THE CHAIR: Thank you. I also remind witnesses that proceedings are being recorded for Hansard and webstreamed and live broadcast.

Before we proceed to questions from the committee do you want to make any opening remarks?

Mr Whybrow: Yes, thank you. On behalf of the Bar Association we appreciate the opportunity to comment on the proposed exposure bill. Whether or not the members of this committee got the short or long straw I am not sure, but it is certainly one of the most important legislative proposals the association has seen in a long time, and we really appreciate the opportunity to speak about this most fundamental life-changing legislation for many Canberra citizens.

It is difficult for the association to reconcile the stated purposes of this reform and the need for this reform with the regime set out in the exposure draft. The committee is already aware of many submissions to the committee that identify a myriad of problems and, frankly, what we suggest are the draconian and unjust outcomes that would occur under this proposed regime.

The Law Society and the Bar Association's submissions identify numerous significant issues, not least of which is that 90 per cent of people injured in car accidents in the Australian Capital Territory would be worse off under this bill. It is not clear, then, why there is such momentum to change a system that has not been shown through any quantitative evidence to be in any way broken.

Mr Browne, whom you have just heard from, makes particularly pertinent and powerful points. As somebody who often speaks to juries, you do not get to find out from a jury what they thought was important, what they did not think was important. But here this committee has the benefit of a member of the jury telling you that certain matters were not explained to it, certain options were not provided to it. At the last minute they were taken to this whole person impairment process without any real explanation for or understanding of it.

Mr Browne is clearly a very committed citizen of Canberra and has no doubt put in a

lot of time and effort into identifying issues in this matter. The association certainly is grateful for the time and effort he has put in and urge the committee to pay special regard to the views, comments and observations of somebody who was on that actual jury.

THE CHAIR: Yes, indeed.

Mr Whybrow: We obviously have some real difficulties with what is seen as putting a lot of power into the hands of insurers. Even the IAG submission to this committee—whose interests include the NRMA, the CGU, the GIO—recognises that there are some significantly unjust aspects to this draft bill that they recommend be softened.

I have counted six times in its own submission where the IAG refers to the effects on individuals as being unjust by the terms of this bill and in one case what is proposed is "unreasonable and punitive" to individuals. That comes from the insurance company that is likely to be the greatest benefactor of this legislative change.

For example, people who are working beyond retirement age are entitled to zero income replacement. We are well aware of the need and the push for people to work later because of inadequate superannuation or other problems. If you are 68, are injured in a car accident, not your fault—or even if it is your fault under this scheme—you are entitled to zero income replacement.

The requirement of an insured person to pay the insurer an excess if they wish to challenge an insurer's assessment has been identified by the insurers as quite an unfair process. The requirement of an injured person to choose between an assessment for physical or psychological damage rather than just having an assessment where frequently the effects are hard to differentiate—and certainly the poor person who is suffering may not know if their incapacity is more a result of psychological aspects of their injury or the physical—is very unfair for them.

On behalf of the Bar Association, though, I would like to raise some more fundamental philosophical problems with this proposed regime. To put it bluntly, it is a regime that proposes to put Dracula in charge of the blood bank and to give Dracula a sheriff's badge.

The insurance companies decide all of these disputes. Initially they will determine whether a claim is accepted and whether there is a full and satisfactory explanation for delay. There is a 13-week period in which an injured person is required to submit a claim, and if it is outside that period they have to satisfy the insurer that they have provided a full and satisfactory explanation.

Ignorance of the law is not stated to be a full and satisfactory explanation, and generally it is not an excuse in other areas of the law. What is the insurer's position likely to be in these matters? This is a grey area. An explanation may to one mind be satisfactory and may to another be not. What is the insurer's position likely to be? The insurer, of course, has positive obligations to try to maximise returns to its shareholders. It is not minded to look at these things towards the whiter side of the grey scale one might think.

If the insurer is not fully satisfied by the explanation then it does not have to pay anything on that claim unless somehow that decision is overturned. Is putative claims officer Jessica, wanting to meet her key performance indicators and perhaps get bonuses to improve her career prospects, likely to take a more generous approach to this sort of decision or a less generous approach?

Then the scheme talks about automatic review—internal. Is her colleague Joe from three doors down the corridor with whom she has coffee each morning and probably chatted to about this case going to be more inclined to be fully satisfied by this explanation, doing an internal review? Presumably Joe also would like to meet his key performance indicators and enhance his prospects of a career in that insurance company, not to mention not wanting to undermine his professional relationship with Jessica by overturning her decisions too often.

It is really not a system designed with any transparency or any real motivation for an insurance company to determine issues where there is a degree of grey with anything other than the blackest side of that grey.

One aspect of this clause provides it to be a criminal offence if somebody does not provide the insurer with information that the insurer deems to be reasonable. That is the aspect of giving the insurer the sheriff's badge: they can make a complaint to the police that this person has not provided them with a reasonable explanation, and they will be subject to criminal sanction perhaps.

Since these proposals were proposed some time ago we have had in the interim the startling and extraordinary revelations about the banking and insurance industry through the royal commission. It has shown us countless examples of corporate abuse in this sector. Almost every decision that an insurer is empowered to make under this bill involves degrees of grey where there is a financial interest in the decision-maker not accepting benefits, not finding for a submission made by an injured person especially—and I will come to this as one of our significant concerns—where it appears everything is being done to deny injured people access to legal advice.

There is this as yet unspecified MAI commission referred to throughout this bill. This is, with respect, a half-written bill. It is a house which somebody started to build but has not even got the blueprint set down for. We do not know where it is going. We do not know what the guidelines are going to be. It is very hard for the Assembly, we would suggest, to make an informed decision to make these fundamental changes to a system that has not been shown to not be working without understanding what the effect of the changes would be.

What do we know about this MAI commission? Presumably it is going to be set up through the Assembly through subordinate legislation. It may be two, three, let's call it 10 people, and it will have a budget and expertise et cetera and it is expected to guard against unreasonable conduct by insurers. We know through the royal commission that ASIC, with a budget of over $300 million, has been unable to do that. Why does the ACT government think it could provide a better level of protection and oversight from insurers making decisions in their own financial interest?

The other main issue we have is that it appears to be some sort of attack on the legal profession through subterfuge. In the absence of any compelling reasons why the changes are there it appears to be, "Well, we can't trust the lawyers. They're ambulance chasing. They're making these things go longer. They're in it for their own financial reasons."

I say on behalf of the Bar Association and I expect the Law Society as well that the legal community, the legal profession, would welcome an opportunity to say we will put our integrity, honesty and interest in protecting the rights of ACT citizens up against that of the insurance companies. If this is really an attack on the legal profession by subterfuge, let's bring it out into the open and deal with it.

As the committee would be aware, there are some aspects of this bill where lawyers are positively banned from getting involved. What is the rationale for preventing legal practitioners from being information service providers other than, "We don't trust lawyers to tell people the right information"?

When you have a system that means that after 13 weeks you are prima facie locked out of bringing a claim, where lawyers are not permitted to be information service providers and where the insurers are going to make the decisions, one is left with a feeling that something sinister is on the agenda here.

Once you make it economically unviable for a lawyer to provide legal assistance you effectively remove lawyers from the process. If that is the intention, then it should be stated clearly up-front and the merits of that properly debated. If you do not want lawyers to be involved, say it up-front. Let's have a debate about the merits. Let's have people consider case studies and relevant examples.

This legislation is 400-odd pages; it is not straightforward. It is complex and it is written in a way that tries to keep the legal profession out of providing people of Canberra who are injured in car accidents from access to that legal representation.

The aim at the start of this as we understood it was to deal with what is an unjust and inequitable situation that somebody can be at fault in a car accident through momentary inattention—through going through a give way sign, through being distracted by a child—and are seriously injured and they miss out. You have heard evidence as to how many people that might affect and what the cost of that might be. It is not a significant proportion of this, but it is a worthy ambition to try to deal with that inequity.

There are other ways of dealing with that rather than a complete rewrite of this entire act. One that comes to mind is people get to make their own informed decision when they renew their registration: "Here is a box. Do you want to pay an extra $25 or $50 for no-fault CTP coverage and keep the same scheme?"

The last thing I would like to raise with you in my opening is the issue of these thresholds. They are a very insidious and difficult thing. There are two aspects of thresholds in this legislation: firstly, as you are aware, there are no thresholds at all in the ACT. In workers compensation matters, in common law injured people do not have to demonstrate a certain level of incapacity or permanent impairment before they

are entitled to damages.

Under this legislation there are two aspects this 10 per cent threshold would impact. The first is that if you get to 10 per cent you get a certain amount—I think it is $12,500—in terms of quality of life. It sets the amount of quality of life compensation. More importantly, if you do not get to that threshold, you are not entitled to seek common-law damages. You are not entitled to have compensation that might properly reflect the effect of an accident on you. I understand, Ms Cody, you may have raised the example of a left-handed hairdresser.

MS CODY: Not a left-handed hairdresser; just a hairdresser who injured their left arm.

Mr Whybrow: As a left-hander, let's say it is a left-handed hairdresser. Clearly, somebody who trains in such a profession may not have many transferable skills to take up another profession. They suffer an injury which would not be deemed as a 10 per cent whole person impairment but it effectively means that they cannot do that job. They all get five years of compensation and then they are on the scrap heap. That applies across so many examples of this bill.

Coming back to my opening point: what is the motivation of reducing the compensation rights of 90 per cent of injured people when there has not been demonstrated any qualitative or quantitative need to do so other than that it seems the insurance companies would like to do this?

THE CHAIR: Thank you. I will start with a couple of quick clarifications. I know it is always hard to be quick, but let us try to get through, because there is a hell of a lot we would like to discuss.

Mr Whybrow: Okay.

THE CHAIR: To start with, where did the 90 per cent figure come from that you rely on?

Mr Whybrow: Ninety per cent?

THE CHAIR: The 90 per cent being worse off?

Mr Whybrow: That is from the research from the Law Society's examination of the figures, I believe from Ernst & Young. I have taken that from the Law Society's submission.

THE CHAIR: I am sure we will talk to them as well at some stage. Secondly, if you had to define what you thought the purpose of this change was and what was given to you as the purpose, what we were trying to do here and why, how would you explain that? You have said that the proposal does not match the purpose. I just wonder if you could paraphrase your impression of the purpose.

Mr Whybrow: We understand that the purposes of the legislation are to ensure that the scheme remains financially viable; that it covers more holistically people who are

at fault, not, for example, drink-drivers, who, for policy reasons, should not necessarily be covered, but people who, through minor inattention, suffer disproportionate consequences under the current scheme; and that it reduces the premium burden, financial burden, on the citizens of Canberra, through some risk or fear that the current scheme is going to continue to spiral because there is some out of control cost aspect that is going on here. They are laudable principles. We want to keep a scheme—

THE CHAIR: Do you accept that those reasons stated are probably reasonably accurate?

Mr Whybrow: No. We do not see any evidence of any of those things.

THE CHAIR: I wanted to understand that a bit better.

Mr Whybrow: It may be that there is a famous person who will not hand over his tax returns. There are insurance companies who are not providing their profit-and-loss statements in relation to ACT claims such that somebody can check whether the assertions are actually valid. We do not know, because we do not see the full figures.

THE CHAIR: I want to go to your experience of being on the stakeholder group. During the citizens jury process, I believe, Mr Ronald, that you were on the stakeholder group.

Mr Ronald: I was.

THE CHAIR: I have had a look at the membership of that group. Can you give us your reflections on how that was held. I think that even for the members of the jury there is a bit of a mystery as to how the four proposals were come up with. Did you feel that it was a balanced group? What was the set-up of that group?

Mr Ronald: There were a number of meetings. Rarely was the time allocated long enough. It was very complex. This is not grabbing a scheme from another jurisdiction and slightly manipulating it. And the task was not just to design one scheme; it was to try to design multiple schemes.

THE CHAIR: Within the framework that was on offer?

Mr Ronald: Within the particular framework. There were various iterations. It was a very difficult task. The lawyers in that worked together really because of the difficulty of it—the Law Society and the Bar Association. Detailed submissions were provided. There were additional meetings with people from JACS and various places.

In the end, what has emerged in the exposure draft is not really even model D; it is another version again. There is so much that we do not know that can emerge from the exposure draft that it really is all uncertainty in this draft.

THE CHAIR: With two parts—the process to arrive at the four models and then the process from the model that was selected to the bill that we are now looking at, the exposure draft—in relation to the first part, can you say how you would characterise

that process?

Mr Ronald: That involved the stakeholder reference group and the jury; probably, though, most prolifically, the scheme designer and the actuary. The citizens jury had an online forum running throughout the process. The only people with access to the jury directly through that were the scheme designer and the actuary, as Mr Whybrow said, and I think Mr Browne, too. Many things remained unexplained and—

THE CHAIR: Were you paid to be on that?

Mr Ronald: No.

THE CHAIR: Were the insurance designer and the actuary paid to be on the committee?

Mr Ronald: Yes. As I understand it, they are. That was disclosed at the start. Everyone else was a—

THE CHAIR: Volunteer.

Mr Ronald: Volunteer or as part of their role. The insurance representatives did it, I assume, as part of their job.

THE CHAIR: Yes.

Mr Ronald: Whereas the legal representatives did it as volunteers.

THE CHAIR: It is good to understand how the process worked. In relation to the process from model D to the legislation we are looking at now, you are saying that more detail has gone into the exposure draft than was offered at the time model D was recommended? Have I got that straight?

Mr Ronald: And things that might have appeared to the jury to have been certain are now uncertain.

THE CHAIR: Right. Would you like to take on notice what they are? I know it is difficult.

Mr Ronald: I can give you one example.

THE CHAIR: Yes.

Mr Ronald: It was understood that the preferred venue for external review—which is a matter of great importance to lawyers, because we consider that injured people ought to have an opportunity to get before an independent tribunal and on a level playing field to sort out their differences with insurers—was to be the Magistrates Court. It has now become an undefined external reviewer to be appointed from time to time by the Attorney-General.

THE CHAIR: So not a standing body?

Mr Ronald: It could be a new body. It could be a person who is a recently retired insurance executive for all we know.

THE CHAIR: It could be ACAT.

Mr Ronald: It could be ACAT. It could be a new body. There is just no clarity about that. That is one example.

THE CHAIR: Let us move on and I will come back if there is time.

MS CODY: I have a couple of questions; I hope they are not too long. In your opening remarks you mentioned the WPI and just now you even mentioned the differences between what the proposed legislation looks like and that in other jurisdictions. My first question is: how do the proposed changes compare to our current scheme? I am not saying that our current scheme is perfect; I am sure you would agree. Secondly, how does it compare with other jurisdictions, with their CTP? I know that in some other jurisdictions they use WPI. We will start there.

Mr Whybrow: There are no thresholds in the ACT. Jamie will be able to speak better about the understanding of the jury as to this threshold question, but 10 per cent is a misleading notion because 100 per cent is effectively a tetraplegic person who cannot do anything. If you are above 30 or 40 per cent permanently impaired, you are incapable of working or having much quality of life as it is. So it is not 10 out of 100; it is 10 out of an artificial scale where it is not necessarily the case that the jury understood what they were agreeing to. They go, "Oh, yeah; 10 per cent is not that high a bar." It is a high bar, because of the nature of injuries and ongoing effects that might not reach that bar.

The Bar Association's submission has an example of somebody in a car accident with child.

MS CODY: I have read that.

Mr Whybrow: It would not be controversial; it would be the sort of case that comes up. Is this a 10 per cent whole person impairment? New South Wales for its common law has a 10 per cent bar. In that sense, we would be mirroring their bar. Queensland has a points system in relation to at least working out the quality of life compensation. It is difficult because the court would decide—I think it is Linda's case in our example—in terms of her quality of life damages. Under this system it is $15,400 at nine per cent. Obviously, it is a discretionary matter for a judge, who decides it based on Linda's specific case, the effects on her. It might be that she cannot drive anymore because of trauma associated with that. But this is a one size fits all where she gets $15,400. Even within that range, under the current scheme she would get four, five, six or potentially 10 times that amount, depending on the individual circumstances of the case.

Another example of the one-size-fits-all is somebody who has a severely broken foot and has to have a fusion. They might live in Canberra for its wonderful climate and because they like to go skiing every year. They can never ski again. They do not make

any money from skiing, but that is their passion in life; that is their hobby. The effect of their accident in terms of their quality of life is going to be significantly different from somebody who does not have that sort of interest or activity. Yet the number in terms of their compensation is exactly the same; it is one size fits all. And it is going to be multiple times less than what they would get under the current system. In the absence of evidence of the scheme being uneconomic, the scheme not being sustainable, there does not seem to be justification for doing that to the citizens of Canberra.

MS CODY: How many recipients who have received compensation under the current scheme would meet the 10 per cent whole person impairment?

Mr Ronald: The evidence, and I think it is even EY's evidence, is that 90 per cent of current recipients would be excluded from common law.

MS CODY: Excluded?

Mr Ronald: Yes. It is a high threshold.

Mr Whybrow: The other aspect I should have referred to is that that threshold does not just set you an arbitrary amount of compensation for your nine per cent or 10 per cent; if you do not get 10 per cent, you can have income protection benefits payable for five years. If you do not recover or you are the hairdresser who cannot retrain, that is the end of you. This current scheme does not really deal with the issues of children who are injured at five. How are they going to be at 18 or 23? It does not provide any flexibility for that. And if you do not get 10 per cent, you are shut out of seeking common law damages for negligence where the effects could be lifelong. So it is an important barrier that is fundamental to the way this scheme works.

MS CODY: Am I correct in assuming that, under the proposals, once a decision is made the decision is made and you cannot revisit it?

Mr Whybrow: It is part of the TBA in some respects.

THE CHAIR: Could you define TBA?

Mr Whybrow: Sorry: "to be advised".

MS CODY: We were not sure if it was some technical term.

Mr Whybrow: No. We do not know. And, in our submission to you, you should not be asked to decide on whether this is a good thing or a bad thing without knowing how it will be. There is a lot of legislation that gets passed where things will be done by the minister in regulation or there will be a disallowable instrument, but we all know the sorts of things it is going to encompass. But here most of the effects—who is going to be the external reviewer, what the rights of appeal are, if any, and all those sorts of things—are undefined as yet. What is the fee structure for lawyers? Of course the act says there is no intention to restrict a person's right to get legal representation. But if subsequently the guidelines are set that no lawyer is to charge, without its being a breach of their ethical obligations, more than X for assisting somebody, and X is set

at a wholly uneconomic scale, then you have effectively legislated lawyers out of the system.

THE CHAIR: And so the devil is in the detail, and the detail is not here.

Mr Whybrow: You do not know what you are signing up for.

THE CHAIR: I certainly get that feeling.

Mr Whybrow: I do not know if I answered your question, Ms Cody, or not.

MS CODY: That is okay. I have a follow-on from something you were talking about there. Currently it is very difficult for people who are injured in a motor vehicle accident to get compensation without seeking legal representation.

Mr Ronald: No, I do not think that is right. I think that they can always represent themselves.

MS CODY: How many cases do you find get adequate benefits by representing themselves?

Mr Ronald: Not many. Anecdotally what generally happens is that a significant proportion of people who ultimately get legal advice have not responded at first instance to having had an accident or heard an ad on the radio; they have engaged with the insurer for a period of time and then been offered a sum of money, maybe $40,000 or something, and then they think, "I'd better go and get some representation," because they think they need to test that or that it is just not right. I think Steve will agree that that figure will probably translate to often four or five times more than that in the hands of the injured person.

Mr Whybrow: And that is the nature of a financial institution. Their corporate responsibility is to protect shareholder funds. If there is somebody who is injured who may be entitled to compensation—there is no dispute: it is a rear-ender, you are injured, the police report has gone in—there is an offer: "We'll sign this up, all rights gone, $50,000 or $45,000." That is a lot of money for some people, especially if they are in a situation where they cannot work.

MS CODY: Yes, absolutely.

THE CHAIR: But is it the right amount?

Mr Whybrow: If the right amount happens to be $200,000, there is no incentive for the insurance company to assess it at that if it is a range, and minds can reasonably differ between the $45,000 and the $200,000. But they are not going to be economically minded to be looking towards the $200,000 range, because they are running a business. And if there is no oversight and no check and no balance, who knows? So at the moment that is when people come and ask for advice.

THE CHAIR: From the legal profession's side, I know that there are some people who offer no-win, no-fee services. Is that the standard approach for these cases, or is

it not really at all?

Mr Whybrow: It is.

Mr Ronald: No win, no fee in motor accident compensation is not something that you should make too much of, because in most at-fault motor vehicle accidents determination of fault is not difficult. They are usually rear-enders. So the claimant, the injured person, will win because they are not the liable person.

THE CHAIR: I understand that. We are just talking about access to justice and the differences between these schemes, and I guess the benefit of no win, no fee, which is highly advertised in the ACT but I had never really come across it before I came here. It is possibly a positive because it allows people to have the confidence to go through—

Mr Ronald: Absolutely it is. People can, and the solicitors bear the professional costs of paying their staff and running those files until the conclusion of the matter. And they often pay out of their own funds for medical reports and the like for their clients, and those things are expensive and people might not be able to do that for themselves.

MR PETTERSSON: What is it about the ACT jurisdiction that causes us to have such a large number of those legal advertisements?

Mr Whybrow: I think you just see it. In New South Wales there are firms. In Queensland you will drive past buildings with various legal advertising. There are football teams that are sponsored by lawyers. I would not agree that it is worse or bigger here; it affects a lot of people. Car accidents affect a lot of people. It is like any industry: there is competition to provide that advice. And these people who advertise are trying to be the first port of call if you need that advice.

THE CHAIR: I certainly did not raise it as a problem; I just thought it was interesting in that whole access to justice concept.

MR PETTERSSON: There is a lot of discussion about the 10 per cent threshold in WPI to access common law. Is there any threshold that would be amenable?

Mr Whybrow: Any threshold changes the current system. I am not speaking with anything like having gone back to colleagues et cetera, but 10 per cent is a very high threshold which cuts out a lot of people. I cannot tell you what the figures of what five per cent would be. I know there is a genuine interest to deal with small claims—minor accidents where there are transient injuries that resolve and recover quickly and do not become administrative and cost burdens to the scheme. Absolutely. Whether that number might be nine, eight, seven, six, five, I cannot tell you, but clearly there will be an effect that if, for example, it was set at five per cent, it may be that instead of changing the compensation rights to 90 per cent of people that might be 30 per cent of people.

So there is clearly something that needs to be looked at if we are going to have a look at this in that way. I cannot tell you with anything more than just guesswork, but clearly as you change that number the people whose rights are going to be adversely

affected will diminish.

Mr Ronald: There are two things I would like to say about that: firstly, whole person impairments are really determined by a doctor using a protractor as to a range of movement and the like. To use it as a threshold for access to all heads of damage, incapacity payments, treatment, all those things, is completely incorrect. It is not what it is designed to do. I think there was evidence from IAG this morning where they told you there is a 10 per cent threshold but only for non-economic loss damages in New South Wales.

MR PETTERSSON: Are there any alternative mechanisms for assessment that are not WPI that should be considered?

Mr Ronald: The second part is the narrative test, and I think it was also referred to this morning. A narrative test where the description of the injury is in the individual circumstances of the case used would be a better mechanism in our view.

MR PETTERSSON: That would be better?

Mr Ronald: A better mechanism, yes.

Mr Whybrow: Which also can be subject to some objective testing by a medical practitioner as to they are saying these are the effects.

MR PETTERSSON: What sort of dispute resolution mechanisms do you think are required for the proposed system?

Mr Ronald: For the statutory benefit system every page of the exposure draft that you turn there is a potential dispute in the substantive parts of it. A system that encourages people self-represented into even ACAT is going to introduce an unknown quantity of additional disputes into that jurisdiction. Those people will read all these things as rights that are important to them and will take them off to wherever it might be. A system in the court we think is better to manage that kind of dispute regime.

If you go to ACAT and watch for a morning and see disputes that involve self-represented people, you will see matters that might take five or 10 minutes if lawyers had been involved that, through no fault of their own, take self-represented people hours to get through. We fundamentally think it should be in the court with lawyers.

Mr Whybrow: One aspect is a process that involves greater rather than less flexibility. It is in insurers' best interests to have matters dealt with, resolved, both administratively and financially. It is for the injured persons' benefit where being involved in a compensation process in and of itself can provide ongoing trauma and anxiety and be a barrier to recovery sometimes. So greater flexibility is a desirable outcome. That exists at the moment in that there are not necessarily strict rules about what can be offered, what can be received.

Under this exposure draft, as I understand it, in relation to the economic benefits in terms of your employment benefits, there is no capacity—and I think it is a matter that

was identified by the NRMA itself or IAG—to commute payments. Where everybody can see your hand is not going to get better and you are not going to go back to being a hairdresser in the next five years, instead of paying you weekly payments for the next five years, how about we pay you a lump sum so you can perhaps put those moneys into retraining, into getting another skill set.

For some reason this exposure bill prohibits commutations or lump sum payments to buy out the rest of a right where it would be in everybody's interest: the individual who gets the funds to potentially retrain or get other treatment; and the insurance company that does not bear the administrative burden of having to keep paying and checking and getting medical certificates to confirm for the whole five years.

MR PETTERSSON: In any of these dispute resolution mechanisms, what would need to be implemented to make sure that people have adequate legal representation? I am assuming most people cannot afford to put out for a lawyer out of their back pocket all the time?

Mr Whybrow: When you say no win, no fee, if you like it allows access to justice in that somebody can come in and say, "This is my situation." They can be told over an hour's consultation, "This is your situation." At the moment it might be, "It looks like you're at fault. You're not going to be able to get more than this or that." But generally speaking an assessment can be made as to what their situation is. They can be given their general rights.

If it is only, "You need to fill in a claim form within this certain period and start doing this process. I'm not prepared to take on your claim, but I can provide you with this information so that you know what you are doing," that is what the current system allows. If the devil-in-the-detail guidelines said, "Motor accident insurance, maximum you can get is $2,000 or $5,000," it will inevitably lead to a concentration of legal services in this area.

Those people who have a broad practice that deals with some crime, some family law, some motor accident compensation will not be able to invest the time to get their procedures in place to be able to deal with something as now and again as a motor accident claim. Those firms that have a specific expertise in that area might be able to do something, but it will mean necessarily their concentration of legal services and a diminution of competition, if you like, in the market.

Where you set the numbers is going to depend on the access to justice. If you can only get $2,000 and it might be a protracted claim or it involves this, that or the other, you will find a lot of people are not prepared to provide a no win, no fee service because the fees are going to be restricted to nothing anyway. And so, "Look, we just don't do that. Thank you very much. I'm sorry. Go and see the community law centre; they might be able to help you."

MR PETTERSSON: I have seen on the submissions that there are potential conflicts between other insurance programs: workers compensation, travel insurance. What conflicts could arise under this proposed system?

Mr Ronald: With workers compensation this legislation forces certain choices to be

made between the CTP and the workers compensation schemes. That will put injured people in a difficult circumstance. They will not know necessarily which is the better way to go when they have to make that choice. That could cost people compensation in the long run.

MR PETTERSSON: Are there ways to improve that current conflict?

Mr Ronald: The difficulty is that you end up with two competing statutory schemes. At the moment what happens is that generally where there is a motor vehicle accident that claim will resolve later. This is where there is a work injury. The work injury will pay benefits immediately under the workers compensation and then ultimately the motor vehicle accident will resolve either by settlement or judgement and the workers compensation insurer will be repaid.

I am not sure with the two statutory schemes proposed that there is a good way to deal with it because they are different. There are differences in the workers compensation and CTP schemes. It is creating a difficult choice for an individual to make with this document and probably no lawyer.

MS CODY: I want to follow up on one of Mr Pettersson's questions. IAG mentioned a verbal assessment of injury and we were talking about the assessment of the 10 per cent WPI and all those sorts of things. This is a question that you may or may not be able to answer. What is the injury compared to? Say you are in an accident and you claim to have soft tissue damage that is quite significant and the doctor goes, "Yeah, your whiplash is pretty bad," or whatever. How do you know that before the accident that person did not already have a bad neck and their movement was not as free as an average person's? Does that play into any of this at all? Or is it just based on, "A normal person should have 100 per cent access to this, and this is what they've got now"?

Mr Whybrow: No. You have obviously heard of the eggshell skull sort of situation. If you injure somebody who was prone to be injured, you take them as you find them. That is the common law situation. You have to see if there was an injury caused by the accident. It is a fundamental fact-finding process. If somebody had a pre-existing injury that was already there—

MS CODY: Exacerbated.

Mr Whybrow: Yes. It is like if you run into the back of a car that already had a dent. Should you have to pay to take the whole dent out if there was already a dent? You have got to be able to show that there has been an injury. And in that respect this bill, like other compensation schemes, requires you to sign a medical release form so that people can check your medical history. The best way of doing that is that if you have no history of these issues, either from GP visits or radiography scans et cetera, it is a good indication that when the person says, "I didn't have a problem with my neck before this car accident," we are starting from a position of no injury.

It does get difficult when somebody does have a history of injury but often injuries will recover. Questions can arise as to whether it is an aggravation or whether it is the natural progression, and they will always be medical questions to be determined

where different experts might have different views. But when the insurance company is the gatekeeper for deciding whether you need treatment or whether it is a pre-existing injury, one might not unreasonably expect them to take the view, if there is any evidence of any previous similar injury, "We will err on the side of pre-existing, and you have to prove otherwise."

THE CHAIR: Yes. And according to the legislation at the moment, unless something occurs in the guidelines, it is all to be determined by the insurer as to how they manage that process?

Mr Whybrow: The only thing that is clear in the legislation at the moment is that the insurer makes that call and if you do not like it—

THE CHAIR: It can be reviewed.

Mr Whybrow: It is reviewed by somebody who does not necessarily even have to be independent of the process.

THE CHAIR: We just do not know.

Mr Whybrow: And then we do not know where you can go, if anywhere, after that, or where you can go if there is any obvious error of fact or law or anything after that. So the devil is in the detail, and you cannot decide if it is good or bad.

THE CHAIR: Yes. We are working from a table which—for the sake of Hansard—we are happy to have on the record. It is an explanation of the proposed system.

For those of us on the committee who are trying to make sure we do the best job we can in what is a very complex area, are you aware of any scheme like that which describes the current system, or who might be the repository of that, so that we are able to properly compare the two?

Mr Whybrow: Compare and contrast what exists at the moment as opposed to what is proposed here?

THE CHAIR: Do you have any interest in taking that on notice?

Mr Whybrow: Absolutely we do.

THE CHAIR: It would be very helpful for those of us who are trying to really understand the details of the difference.

Mr Whybrow: It is a complex area where there are a lot of flow charts, which is one of the reasons why we say people need to have advice. In making these important recommendations about this exposure draft, clearly if we can assist you—

THE CHAIR: We have just got an interest in getting to the heart of the truth of the difference between the two systems.

Mr Whybrow: We can take that on notice and provide a hopefully clear summary of

the current scheme.

THE CHAIR: Thank you. Normally we have two weeks for people to come back to us, so hopefully—

Mr Whybrow: That will be plenty of time, yes.

THE CHAIR: We will close now, unless there is anything you particularly wanted to add.

Mr Ronald: No.

Mr Whybrow: No. Thank you for your time.

THE CHAIR: When available, a proof transcript will be forwarded to witnesses, to provide an opportunity to check it and suggest any corrections. If you undertook to provide further information or have taken questions on notice, as you did, we would like to get the answers within two weeks, please. On behalf of the committee I thank you very much for appearing today.

The committee adjourned at 1.55 pm.