

Green Paper

Options to add No-Fault Catastrophic Injury Cover to Western Australia's Compulsory Third Party Insurance Scheme

To
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Treasurer

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Date
9 December 2014

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Introduction

1. The Law Society of Western Australia is pleased to make the following submission in response to the *Green Paper: Options to add No-Fault Catastrophic Injury Cover to Western Australia's Compulsory Third party Insurance Scheme* (the Green Paper).
2. The Society takes into account that:
 - (a) the community continues to regard a person at fault (or their insurer) as having the primary responsibility for any damage they cause.
 - (b) whilst current standards of care in the public health system for the catastrophically injured meet minimum standards, there is a need for those who cannot look to a person at fault for compensation to be dealt with on a basis consistent with the NDIS.
3. The Society's overriding concern is that existing rights should not be diluted. Those who seek compensation under the current fault-based system have the following advantages over those who are in no-fault systems in some other jurisdictions:
 - (a) They receive an amount for pain, suffering and loss of enjoyment of life.
 - (b) They receive payment for future needs by way of lump sum so that the victim is in control of the choices that need to be made and can get on with his or her life.
 - (c) There is a lower administrative burden through a once-and-for-all payment, as opposed to a lifelong supervision by a government delegate.
4. Those considerations suggest to the Society that 'Option 3' is the best approach. Those entitled under the current scheme would not lose anything. The statistics in the Green Paper (referred to at p11) show that the current scheme is administratively efficient. Those whose rights under the public system need to be augmented and integrated (about 44 per year) are better dealt with in a discrete scheme.

Other schemes

5. Victoria

5.1 Under the Victorian *Transport Accident Act* there are “no fault” benefits including hospital, medical, rehabilitation and disability services and a common law scheme for general damages and pecuniary loss only. Injured motorists entitled to bring a common law claim are prohibited from seeking damages for future medical and like expenses. This applies to all injured motorists, irrespective of whether they are catastrophic or not, and hence differs slightly from the proposed Option 2.

5.2 The Victorian experience raises several concerns:

- (a) Entitlements to medical and care services are restricted under the legislation. Therefore, if a requested service is outside the legislative definition it cannot be provided irrespective of the benefit to the injured person;
- (b) There is no discretion available in applying care or treatment outside of the legislative definitions;
- (c) An injured person must perpetually justify the ongoing need for the requested medical or like assistance;
- (d) An injured person is forced into a life-long relationship with the TAC. As a result, the injured person is not able to completely move on with his/her life or obtain closure;
- (e) Review of the TAC claims officer’s decision is common. Any dispute of a decision requires either informal review or the commencement of court proceedings at the Victorian Civil and Administrative Tribunal. Such reviews cause delay in the provision of needed services, and stress for the injured person;

- (f) Entitlements are subject to legislative amendment. There is no certainty that required services will be provided in the future;
- (g) Payments to the service providers are at the rates paid by the TAC. Not all service providers are prepared to work for the lesser TAC rate rather than the market rate. This eliminates choice of service provider (unless the injured person has independent means to fund the costs gap) and can impact on the quality of the service provided;
- (h) Some treatment providers refuse to treat TAC claimants due to the bureaucratic requirements imposed upon them. This has led to a diminishing pool of treatment providers available to TAC claimants and impacts on the standard of treatment (for example the most appropriate provider may not be willing to treat a TAC claimant) and leads to delays in the provision of services;
- (i) The TAC can compel a claimant to attend for an independent medico-legal examination to assess treatment and rehabilitation needs. This can cause delays in the provision of or funding of services.
- (j) The interests of the TAC are not the same as the claimant.

6. **New South Wales**

- 6.1 NSW provides no-fault lifetime care and support to people who are catastrophically injured in a motor vehicle accident in NSW. The Lifetime Care & Support Scheme is established under the *Motor Accidents (Lifetime Care and Support) Act 2006*.
- 6.2 A review of the New South Wales Lifetime Care Scheme Annual Report for 2013/14 shows the significant administrative costs of lifetime care:

- (a) Yearly administrative personnel and operating expenses were \$15.73 million¹.
- (b) Yearly participants' care and support expenses were \$79.81 million².
- (c) 933 participants in the scheme³.

- 6.3 These figures demonstrate that the administrative costs of the scheme in the 2013/14 were approximately 20 per cent of the funds spent on care and support services to catastrophically injured individuals.
- 6.4 In fact more money was spent in 2013/14 on actuarial fees, financial assets management fees, service partnership agreement fees, consultants and contractors (\$7.637 million)⁴ than on home modifications (\$2.846 million), equipment (\$5.772 million) or medical expenses (\$5.996 million)⁵.

Option 1

7. 'Option 1' entails no change and that option is not supported by the Society.

Option 2

8. The experience in other jurisdictions suggests to the Society that:
- (a) those currently under the common law system would lose the lump sum payment with all the attendant advantages of being able to decide what level of care they require and who should provide it;
 - (b) these rights would be replaced by a system where they must constantly justify to a government delegate the care they need, without necessarily being able to receive it from a provider of their choice;

¹ LTCS Annual Report 2013/2014 page 62

² LTCS Annual Report 2013/2014 page 63

³ LTCS Annual Report 2013/2014 page 6

⁴ LTCS Annual Report 2013/2014 page 62

⁵ LTCS Annual report 2013/14 page 63

- (c) there will need to be administrative reviews of the delegate's determinations, which will be a hidden cost of 'Option 2' – even if such reviews can be managed without legal assistance.

Option 3

9. 'Option 3' on the other hand, provides an injured person with self-determination, autonomy and the ability to rebuild their life free of government-imposed decisions as to their entitlements. It, unlike 'Option 2', satisfies the "no-disadvantage" test.
10. The statistics referred to in the Green Paper (at p11) show that the current scheme is administratively efficient and this is reflected in the lower premium anticipated for 'Option 3' (at p7).
11. The Productivity Commission conclusions referred to at p13, have previously been analysed by the Law Council of Australia. The Productivity Commission assumed that current taxpayer-funded services were inadequate, assumed that fault-based systems needed "*lengthy*" court processes and assumed that no-fault schemes would have better outcomes. All of those assumptions were unsafe. The Productivity Commission does not take account of the likely administrative review procedures that would be a part of a no-fault system with lifetime administration. The Society notes that there are no regulatory provisions for a no-fault scheme referred to in the Green Paper.

Other comments

12. **Definitions**

The Society recommends that the definitions of "*catastrophic injury*" and "*reasonable and necessary services*" be carefully considered and clear. The Society is happy to provide further submissions when the wording is finalised.

13. **Exclusions**

Page 26 of the Green Paper raises this issue.

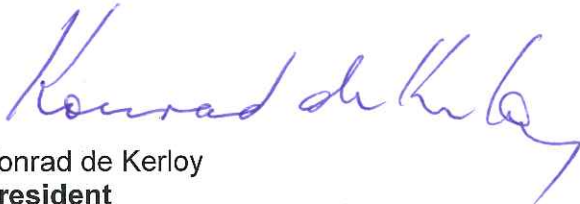
In answer to the question, "*should a person be entitled to receive reasonable and necessary support under the no-fault catastrophic CTP insurance scheme if they are responsible for catastrophically injuring themselves whilst driving in breach of a CTP policy warranty or condition?*", the Society's answer is "Yes".

In answer to the question "*if there are to be exclusions, should the conditions and warranties be expanded to include:*

- *Being a passenger in a stolen vehicle*
- *Vehicle being used for other criminal activities*
- *Driving to escape pursuit*
- *Driving under the influence of illicit drugs;*

the Society's answer is "No".

The Society comments that, historically, remedial legislation to meet the social problem of motor vehicle accidents has virtually eliminated exclusions; liability has never been defeated by breaches of the insurance policy, or the fact that the vehicle was not insured at all. Nor, consistently, should it be defeated by the fact that the catastrophically injured person did not have a motor driver's licence, or was under the influence of alcohol at the time. The fewer distinctions that might require dispute resolution the better for a no-fault system.



Konrad de Kerloy
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