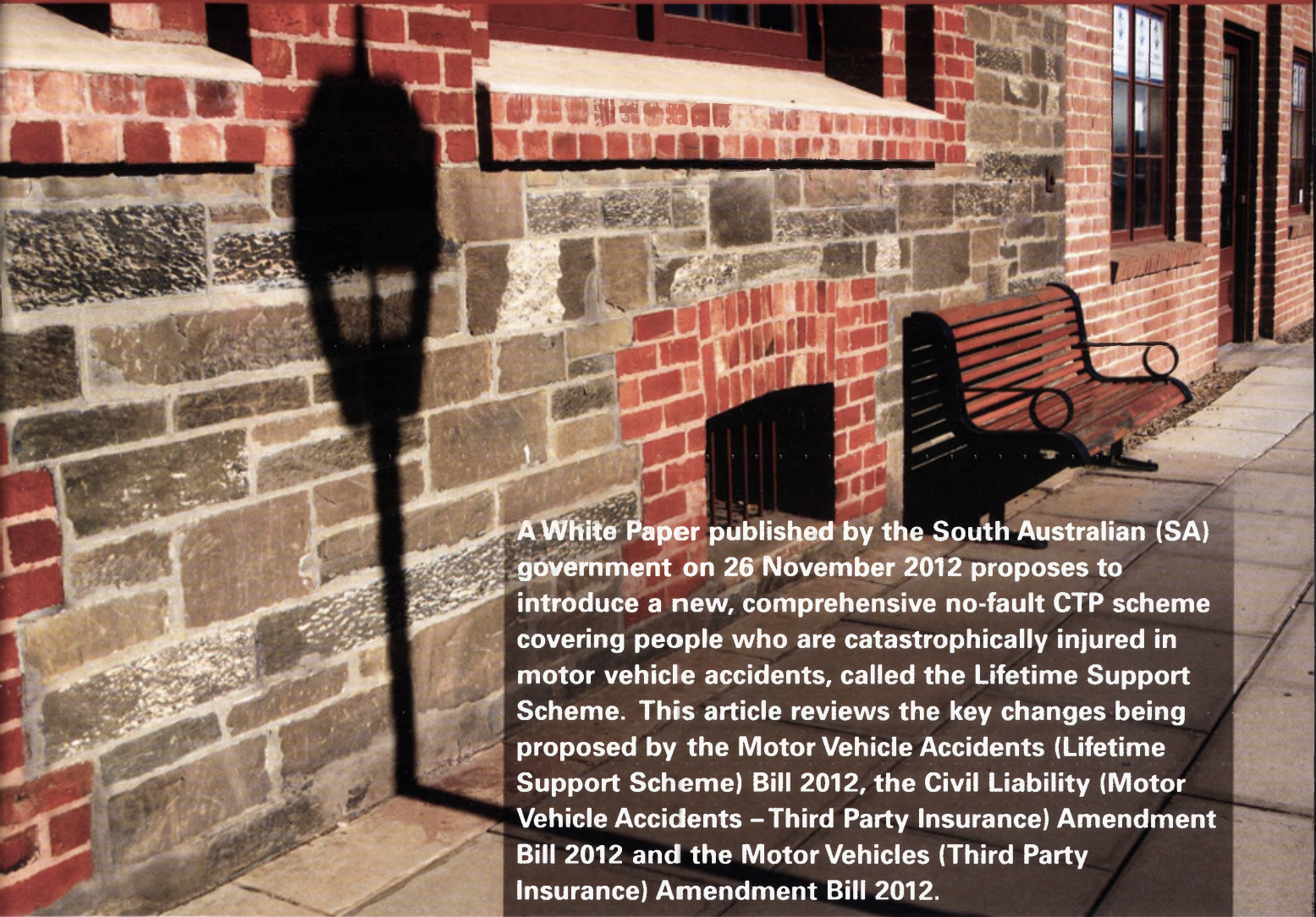


No-fault accident compensation scheme for South Australia?



A White Paper published by the South Australian (SA) government on 26 November 2012 proposes to introduce a new, comprehensive no-fault CTP scheme covering people who are catastrophically injured in motor vehicle accidents, called the Lifetime Support Scheme. This article reviews the key changes being proposed by the Motor Vehicle Accidents (Lifetime Support Scheme) Bill 2012, the Civil Liability (Motor Vehicle Accidents – Third Party Insurance) Amendment Bill 2012 and the Motor Vehicles (Third Party Insurance) Amendment Bill 2012.

BACKGROUND

The timescales for these major changes have been very hasty. On 4 March 2012, the SA government published a Green Paper examining the state's compulsory third party insurance schemes. On 6 September 2012, the Economic and Finance Committee of the Parliament of SA resolved to inquire into and report on the 2012 Green Paper. Submissions to this inquiry

closed on 9 November 2012.

On 26 November 2012, the SA government and the Motor Accident Commission published a White Paper entitled *Reforms to Compulsory Third Party Insurance for South Australian motorists*. The White Paper was accompanied by proposed Bills and supporting documentation.

The proposed changes can be summarised as follows:

- The introduction of a no-fault

scheme to provide lifetime care and support for anyone catastrophically injured in a motor vehicle accident;

- Changes to current entitlements and, in particular, the introduction of thresholds; and
- Limits to the entitlement to legal costs.

THE PROPOSED LEGISLATION

The three proposed Bills are:

1. Motor Vehicle Accidents (Lifetime >>

- Support Scheme) Bill 2012;
2. Civil Liability (Motor Vehicle Accidents – Third Party Insurance) Amendment Bill 2012; and
 3. Motor Vehicles (Third Party Insurance) Amendment Bill 2012.
- The Motor Accident Commission website states that the SA guidelines (LSS Guidelines) will be similar to the NSW guidelines.

MOTOR VEHICLE ACCIDENTS (LIFETIME SUPPORT SCHEME) BILL 2012

This Bill introduces the no-fault scheme to deliver lifetime care and support to anyone catastrophically injured in a motor vehicle accident, and draws heavily from the Lifetime Care and Support Scheme model operating in NSW.

Benefits

The benefits are confined to treatment and care and do not include income support (Part 4).

Eligibility

Only the catastrophically injured as defined in the LSS Guidelines (see s3 interpretation and s25) are covered. Section 6 of the Bill provides that persons injured before the commencement of the scheme can ‘buy in’ and become participants in it.

An application to participate in the scheme can be made by the injured person, the insurer or the Nominal Defendant. An application by the insurer or the Nominal Defendant

does not require the consent of the injured person.

Expert review panels

Expert Review Panels are established under Schedule 1 of the Act. The members of the panel are confined to medical experts who are registered health practitioners under the Health Practitioner Regulation National Law.

Disputes and reviews

- **Eligibility** – Disputes about eligibility (s36) may be referred to an expert review panel (refer to Schedule 1). The determination of the expert review panel is asserted to be final and binding for the purposes of the Act and in any proceedings under the Act (s36(4)).
- **Treatment and care needs assessment** – The authority or the injured person may refer a determination of an assessor about treatment and care needs for a review by an expert review panel. The expert review panel may confirm the assessor’s determination or substitute its own determination. Again, the determination or decision of an expert review panel is final and binding (s37).
- **Disputes about non-medical matters (Part 5, Division 3)** – This Division deals with prescribed determinations including whether the injury is a motor vehicle injury, whether the motor vehicle accident occurred in SA and whether a person in relation to whom an application has been

made is excluded by s25(4) (road-racing). The process for a dispute is a review by the review officer and if s/he considers that one or more of the issues involve a significant or complex question, the matter is referred to a legal review panel, consisting of three legal practitioners selected by the Authority. An appeal lies to the District Court against a determination of a review officer or a legal panel.

CIVIL LIABILITY (MOTOR VEHICLE ACCIDENTS – THIRD PARTY INSURANCE) AMENDMENT BILL

These amendments to the *Civil Liability Act 1936* will reduce the entitlements of current motor vehicle accident injury claimants.

Economic loss

- All damages awarded for any form of economic loss after applying a discount rate and any other principle arising under the Act or at common law are to be discounted by a further 20 per cent.
- Damages for future economic loss are available only if the Injury Scale Value (ISV) exceeds 15.

Non-economic loss

- The previous 0-60 scale has now been replaced by a 0-100 scale. The injuries are all set out in the ‘ranges of Injury Scale Values (ISV)’.
- There are no damages for non-economic loss for injuries attracting a scale value of 15 or less. Awards

We Are Forensic Experts In

- Engineering Analysis & Reconstruction
- Traffic Crashes & Road Safety
- Workplace or Mining Incidents
- Reporting & Experts Court testimony
- Failure Analysis & Safety Solutions
- Physical, Crash, Incident & Handling Testing

Delta-V Experts

- Clarifies the facts in a situation
- Scientifically substantiates the evidence
- Strengthens your communication
- Diverse experience and expertise



Delta-V Experts

 **1300 DELTAV**
1300 335828
24hr Incident Response Line

 03 9481 2200  03 9481 2277  www.dvexperts.net

377 St Georges Road, Fitzroy Nth VIC 3068

are as follows:

ISV 16-31	\$7,000.00 plus \$1,000 per point;
ISV 32-45	\$23,000.00 plus \$3,000 per point;
ISV 46-66	\$65,000.00 plus \$5,000 per point;
ISV 67-78	\$170,000.00 plus \$10,000 per point;
ISV 79+	\$300,000 (capped).

Gratuitous services

Damages for gratuitous services are payable only where the ISV is greater than 15 points and services must be required for at least six hours per week for six consecutive months. The hourly rate will be prescribed.

Treatment or care expenses

There will be no damages for treatment and care needs where a person is covered under the Lifetime Support Scheme; this includes an 'interim participant'.¹

Consortium

Damages for consortium will be available only where the injuries attract an ISV of 16 points or more.

MOTOR VEHICLES (THIRD PARTY INSURANCE) AMENDMENT BILL

This Amendment Bill introduces the following relevant amendments:

- A notice of claim will now be required, including a statement setting out details of the claim; a medical statement; a copy of any report provided to a police officer and any other information required by regulations. It is intended that this amendment will be retrospective.
- A requirement for a person under the age of 16 who suffers any injury in a motor vehicle accident to have all treatment and care costs paid irrespective of fault, but not including participants in the lifetime support scheme.
- The legal costs to be paid by the insurer are now controlled. The awards are as follows:

1. Claims not exceeding \$30,000 – no liability.
2. Claims between \$30,000 and \$50,000 – maximum liability \$2,500.
3. Claims between \$50,000 and \$100,000 – maximum liability as per the designated scale, which is the Magistrates Court of South Australia scale.

ANALYSIS – WINNERS AND LOSERS

Winners

Improving rights for injured people by including a catastrophic injury scheme has great merit. There is no doubt that in the case of those who are not covered by the at-fault scheme, or for those who are but who wish to elect not to receive a lump sum for future treatment and care, such a scheme is a worthwhile innovation. However, the proposed legislation provides no certainty of treatment standards and no guarantees as to minimum levels of treatment and care. Even a cursory examination of the various workers' compensation schemes and the New Zealand Accident Compensation Scheme shows that long-term lifetime care and support schemes are always

more expensive than anticipated, and that the standard method of dealing with costs blowouts by governments is to reduce benefits. Those who are covered by the at-fault scheme should have the option to pursue a claim for a lump sum – that is, to commute their future entitlements – but many catastrophically injured people, given the uncertainties about mortality, the advances in medical technology and the high discount rates that courts are required to apply, may be best advised to continue with the scheme and not commute their entitlements.

Losers

In the White Paper, the Motor Accident Commission divides victims of motor vehicle accidents into the badly injured (catastrophic), moderately injured, and those with minor injuries. Economic loss for all three categories is reduced by 20 per cent and there is no justification provided for this. Is this simply providing 'legal oxygen' to the urban myth that everyone is 20 per cent to blame just for being on the road?

In addition, those falling into the category of minor injuries – that is, having a scale value on the ISV of 15 or less – will not be entitled to damages for future economic >>

BENCHMARK
the practice pty ltd

MEDICAL NEGLIGENCE SPECIALISTS

Benchmark the Practice has brought together the expertise of a range of medical specialists to provide independent expert opinions relating to medical negligence issues.

Our specialists are qualified to assess cases involving a wide variety of medical craft groups.

- Anaesthetics
- Cardiology
- Dental/Orthodontics
- Dermatology
- E.N.T.
- General Practice
- General Surgery
- Gynaecology and Obstetrics
- Haematology
- Neurology
- Oncology
- Ophthalmology
- Orthopaedics
- Paediatrics – All Subdivisions
- Plastic
- Radiology
- Urology
- Uro-gynaecology
- Various Complementary Medicine Groups
- Vascular Surgery

Additional specialists available upon request.

55/87 Avenue Road, Mosman NSW 2088
Ph (02) 9901 4573 Fax (02) 9436 1035 Email info@benchmarkthepractice.com.au
Website www.benchmarkthepractice.com.au

loss. This measure is destined to result in unfairness. The ISV do not take into account any pre-existing conditions from which a person may suffer. It is not difficult to envisage a situation where an injury resulting from a motor vehicle accident does not attract a scale value of 16 or more but the person already has limited capacity and, as a result of the additional injury, is unable to work. The egg-shell-skull rule will not apply, yet what would be classed as a minor injury may have a major impact on the injured person. The young person who sustains an injury attracting an ISV of 15 or less, where the injury forces a career change or job retraining, will not be compensated for the clear loss due to retraining and other career setbacks.

Non-economic loss

With respect to non-economic loss, the use of ISV is a blunt instrument for what should be a careful and considered assessment that takes into account the effect of the injury on the person. The current scale makes no provision for psychiatric or psychological injuries or *sequelae*. In an age where psychological injuries are generally much more recognised and accordingly given more weight, it appears that the Motor Accident

Commission has taken the view that only physical injury is real. The elderly and already injured or ailing will be disadvantaged, as a 15 point or less ISV may have a marked effect on the individual but not result in any entitlement to damages.

Legal costs

In terms of legal costs and access to justice, the proposed legislation significantly reduces the reimbursement of costs. It is fundamental to our system of justice that a wrongdoer should have to pay the reasonable costs of an injured person, including their legal fees. Injured people turn to lawyers because they do not have the capacity or energy to deal with the claim or the claims manager. The Motor Accident Commission acts in a way that best protects the integrity of the fund (that is, paying out as little as possible), and this priority is of course at odds with the best interests of the injured person. There is clearly a tension, and always will be. A claim for less than \$30,000 where no legal fees are paid is not an insignificant claim. The costs provisions allow the Motor Accident Commission to make unreasonable demands on injured people and their lawyers and 'deep pocket' (that is,

financially intimidate) plaintiffs into accepting a lesser settlement or not engaging lawyers at all.

Much has been spoken and will continue to be spoken of cost savings for motorists. It is not within the scope of this article to explore those issues. It is clear that the proposal for a lifetime care and support scheme is meritorious subject to legislative safeguards, proper costs and appropriate benefits. In the writer's opinion, a proposal that will effectively exclude approximately 4,000 claimants per year in order to cover approximately 12 additional claimants who have been catastrophically injured in motor vehicle accidents is clearly neither cost-efficient or morally defensible. ■

Note: 1 For definition of 'interim participant', please refer to s27(3) and (4) of the Civil Liability (Motor Vehicle Accidents – Third Party Insurance) Amendment Bill 2012.

Patrick Boylen is a partner at Duncan Basheer Hannon Lawyers in Adelaide. He specialises in motor vehicle accidents and workers' compensation claims and is currently president of the SA branch of the ALA.

PHONE (08) 8216 3311

EMAIL pboylan@dbh.com.au.

DX Express is a new, quick and reliable service for DX Members

TOLL

any street address
Urgent documents are delivered to any street address next business day to most locations in Australia.

simple to lodge
Simply lodge your DX Express at any DX Exchange or organise a regular pickup to make it easier for you.

flexible product options
There are a range of options to choose from, starting at DLX envelopes to 5kg satchels.

price competitive
DX Express is price competitive compared to other document delivery services.

delivery confirmation
Real-time delivery confirmation is easy to access on our website.

customer service support
Enjoy the assistance of your account manager and our professional customer service team.

Call 13 88 44 **dxmail.com.au**

DX

