



THE LAW SOCIETY  
OF NEW SOUTH WALES

CTP CHANGES

ADDING INSULT TO INJURY

## CTP – MARCH 2017

The Law Society of NSW notes that the Motor Accident Injuries Bill 2017 (“Bill”) to provide for a new compulsory third-party (“CTP”) motor accidents scheme in NSW passed NSW Parliament on 30 March 2017, and is now awaiting Royal Assent. The new CTP scheme is expected to commence in December 2017.

This is the outcome of a 15-month reform process, during which the Law Society has worked closely with the NSW Bar Association and the Australian Lawyers Alliance to jointly advocate to the Government on CTP reform.

Throughout the consultation process, the legal professional bodies have advocated in favour of upholding fairness for injured motorists by retaining access to adequate benefits, and preserving access to legal advice and representation in the scheme.

### Government’s initial proposal

In March 2016, the Government issued an options paper, setting out its options for reform of the CTP scheme. The Government’s stated objectives for CTP reform were to:

- increase the proportion of benefits provided to the most seriously injured road users;
- reduce the time it takes to resolve a claim;
- reduce the opportunities for claims fraud and exaggeration; and
- reduce the cost of Green Slip premiums.

In June 2016, following submissions on the options paper, the Government released a position paper outlining its proposal for reform of the CTP scheme. The Government proposed a hybrid, primarily no-fault (workers compensation-style) scheme with defined benefits. This scheme was to support at least 7,000 “at fault” drivers. Common law access was to be restricted to the most seriously injured innocent motor vehicle accident victims (approximately 10 per cent of all innocent victims). There was to be a significant reduction of benefits for up to 90 per cent of innocent motor vehicle accident victims in NSW. This was designed to provide benefits to the “at fault” drivers. The Government’s proposal was said to be costed so as to reduce Green Slip premiums by at least \$100. However, the proposed scheme would have presented significant access to justice issues in that legal representation in the proposed scheme was to be limited to the most seriously injured.

Between June 2016 and January 2017, the legal professional bodies made submissions to the Government, outlining their concerns with the Government’s initial proposal. The legal professional bodies opposed in principle the abandonment of the current NSW CTP scheme and its replacement with an inadequate and unfair workers compensation-style model. The legal professional bodies’ submissions outlined several problems with the Government’s initial proposal, including the long-tail scheme design, inadequate benefits for innocent victims with moderate and severe injuries, and the significant restraints placed upon legal representation.

After considerable policy and media engagement by the legal professional bodies, the Government announced that the introduction of legislative reform would be delayed until 2017, while further work and consultation was carried out.



In the meantime, the Government introduced amendments to the *Motor Accidents Compensation Regulation 2015*, which limit the recovery of legal costs for small claims, including children's claims. These proposals were put forward by the legal professional bodies in March 2016, and were aimed at disincentivising lawyers from pursuing minor or frivolous claims and preventing others from engaging in claims harvesting practices. These were part of the Government's concerns about the current CTP scheme. The amendments came into effect in November 2016.

The Law Society engaged an actuary and worked extensively with that actuary to demonstrate how a \$100 (or close to it) saving could be achieved while still keeping a viable and fair CTP scheme with fair compensation to injured persons and a substantial measure of legal representation. It was as a result of this intervention that the Law Society was able to persuade the Minister to move away from the Government's initial proposal, which would have had disastrous consequences for injured people and a serious impact on the practitioners who work in this field. It would not have been achieved without the Law Society's hard work and, as a result, lawyers will continue to provide legal advice to victims who will continue to be compensated.

## Major policy changes

The Law Society is pleased that the Government has listened to the concerns of the legal professional bodies and made a dramatic shift away from its initial proposal. The Law Society has been instrumental in turning the Government's attention to those innocent victims who were going to lose out under the Government's initial proposal, in particular, those with moderately severe injuries with less than 10% WPI but with long-term economic losses and treatment and care needs.

The major policy changes to the Government's initial proposal which have been secured by the legal professional bodies and are reflected in the Bill include the following:

- Common law damages have been retained for all claimants, except those with minor injuries.
- Medical treatment, and care, are available for life for innocent victims with more than minor injuries.
- Medical treatment, and care, are available under the no-fault defined benefits scheme for those at fault or with minor injuries for a period of 6 months post-accident.
- Payments for loss of earnings / earning capacity are available for innocent victims with more than minor injuries for up to five years. Payments for loss of earnings / earning capacity are capped at 2½ times average weekly earnings, or \$3,853.
- Under the no-fault defined benefits scheme, payments for loss of earnings are available for those at fault or with minor injuries for a period of 6 months post-accident.
- Access to non-economic loss damages has been retained for those with greater than 10% WPI.
- Better provisions for review of decisions than were provided under the Government's initial proposal.

In addition, the Minister has expressly agreed with the representation of the Law Society that, in respect of the majority of common law claims which do not involve minor injury, there will be legal representation with the right to contract out of scheduled legal costs. This is not in the Bill but to be contained in the regulations.

While the legal professional bodies still have concerns with a number of aspects of the Bill, it is a significant improvement on the Government's initial plans for the new scheme.



## Ongoing concerns and recommendations

The legal profession's ongoing concerns and recommendations regarding the Bill are as follows:

- **Dispute resolution** – The dispute resolution system relies heavily upon workers compensation-style internal reviews and merit reviews. The legal professional bodies invited the Government to defer implementation of the new dispute resolution system and to reconsider the Bill's approach, having particular regard to the issues raised by the Standing Committee on Law and Justice regarding the workers compensation system.
- **Treatment and care** – Treatment expenses will be drip fed, and the entitlement to recover for voluntary care has been removed. The legal professional bodies urged the Government to consider retaining the ability to commute or buy up those rights. The legal professional bodies urged the Government to retain gratuitous care for innocent victims with greater than 10% WPI.
- **Profit clawback** – The profit clawback is limited to three years. The legal professional bodies invited the Government to reconsider and impose a five-year profit clawback as a minimum, preferably on an ongoing basis, but with preservation of the reserve power if a defined timeframe is maintained.
- **Regulations** – The legal professional bodies have not yet seen the regulations that will accompany the new scheme. These regulations will cover everything from premium collection and profits through to providing definitional clarity around minor injury, regulating and prescribing benefits, addressing dispute resolution and prescribing costs.
- **Legal costs** – The legal professional bodies submitted that the following safeguards should be included in the Bill in relation to legal costs:
  - The Attorney General's concurrence should be required for any regulation made under Part 8 of the Bill regarding legal costs; and
  - There should be a presumption in favour of paid legal services in relation to notices to suspend, discontinue or dispute the payment of statutory benefits.
- **Workers compensation** – The legal professional bodies submitted that the acceptance of liability for a workers compensation claim should not automatically prevent an injured person accessing statutory benefits under the motor accident system because workers compensation benefits can be discontinued for a number of reasons without a denial of liability.
- **Other issues** – The legal professional bodies made recommendations on a number of other issues, including drafting issues, with the Bill.

## Moving forward

The Law Society will work collaboratively with the Government on the drafting of the regulations to ensure that they fairly reflect the intention behind the Act as embodied in the legislation.

The legal professional bodies have sought data on the effect of the amendments to the *Motor Accidents Compensation Regulation 2015* in order to advocate further in relation to legal costs and the provision of legal representation to those injured within the scheme. The Law Society will continue to monitor this issue.