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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**LIFETIME CARE AND SUPPORT (CATASTROPHIC INJURIES)
AMENDMENT BILL 2016 (No 2)**

EXPLANATORY STATEMENT

**Presented by
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Treasurer**

LIFETIME CARE AND SUPPORT (CATASTROPHIC INJURIES) AMENDMENT BILL 2016 (No 2)

Introduction

This explanatory statement relates to the Lifetime Care and Support (Catastrophic Injuries) Amendment Bill 2016 (No 2), as presented to the Legislative Assembly. The statement has been prepared to assist the reader of the bill and to help inform debate on it. It does not form part of the bill and has not been endorsed by the Assembly.

The statement must be read in conjunction with the bill as presented. It is not, and is not meant to be, a comprehensive description of the bill. What is said about a provision is not an authoritative guide to the meaning of a provision, being a task for the courts.

Overview

The bill amends the *Lifetime Care and Support (Catastrophic Injuries) Act 2014* (the Act). The purpose of the Act was to introduce a scheme to provide treatment and care for those catastrophically injured in a motor accident in the ACT from 1 July 2014. It is a no-fault indemnity insurance scheme.

The Act helped to fulfill the first stage of the ACT Government's commitment to the introduction of a National Injury Insurance Scheme (NIIS) by introducing a Lifetime Care and Support (LTCS) Scheme consistent with the nationally agreed minimum benchmarks for a NIIS for motor accidents.

The principal features of the LTCS Scheme are:

- provide reasonable and necessary treatment and care for participants in the Scheme (including medical treatment, rehabilitation, attendant care services and home and transport modification);
- provide for eligibility to participate in the LTCS Scheme (the person has suffered a motor accident injury that satisfies the eligibility criteria set out in section 15 and the LTCS Guidelines issued by the LTCS Commissioner);
- participation in the Scheme is either as an interim participant or a lifetime participant (all participants are interim participants for 2 years until such time as they are accepted as a lifetime participant);
- an application for participation in the LTCS Scheme can be made by or on behalf of the injured person, or by an insurer for a motor accident claim in respect of the injury;

- a person is not eligible to participate in the Scheme if the person has been awarded common law damages for their treatment and care needs. Participation in the Scheme means that a person's treatment and care needs will be met by the Scheme and are not recoverable as damages;
- funding for the LTCS Scheme is by way of a levy paid by persons who pay a CTP premium under the *Road Transport (Third-Party Insurance) Act 2008*.

Following the first year of operation of the LTCS Scheme, it was identified that there is a need for the Scheme to provide for lump sum or periodic payments in certain limited circumstances, where a scheme participant is residing overseas. As a result, amendments are proposed to include provisions in the Act that provide this flexibility.

Further, an oversight was identified in relation to the application of the Act to ACT Government owned vehicles. The eligibility for the LTCS Scheme is provided for by section 6(3) of the Act. If there is a compulsory third-party (CTP) insurance policy in force (ACT or another jurisdiction); the vehicle is owned by the Commonwealth; or a right of action against the nominal defendant exists/may exist, the Act applies. The ACT Government has in place self-insurance arrangements meaning some ACT Government owned vehicles will not have a CTP policy, resulting in any person catastrophically injured by an ACT Government vehicle not being eligible for the LTCS Scheme. An amendment is proposed to address this oversight.

Notes on Clauses

Clauses 1 and 2 – name of Act and commencement

Clause 1 provides for the name of the bill to be the *Lifetime Care and Support (Catastrophic Injuries) Amendment Act 2016 (No 2)*. The commencement of the bill is provided for by clause 2. The commencement of the bill is contingent on the commencement of the *Lifetime Care and Support (Catastrophic Injuries) Amendment Act 2016*. This is to ensure that the amendments included in this bill commence after the first amendment bill is commenced, as this bill reflects the clause numbering contained in the first amendment bill.

Clause 3 – legislation amended

This clause provides for the amendment of the Act. The notes also alerts to amendments to the *Road Transport (Third-Party Insurance) Act 2008* (CTP Act) and the *Workers Compensation Act 1951*. These further amendments are located in Schedule 1 to the bill.

Clauses 4 and 5 – application of Act

Clause 4 provides for the amendment of section 6 of the Act to provide for the application of the LTCS Scheme to a motor vehicle owned by the Territory or a territory authority. It is contingent on there not being a CTP policy in force for the

motor vehicle. Some ACT Government entities will have purchased a CTP policy when registering the motor vehicle. As a result, the LTCS levy will have already been paid for the purpose of the Scheme. If that is the case, the vehicle will already be covered by section 6(3)(a) of the Act.

Clause 5 inserts a note after section 6(3) referring to the application of the CTP Act in relation to Territory and Commonwealth motor vehicles by section 272 of the CTP Act. This section provides there is no requirement to have a CTP policy but the Territory and Commonwealth (including authorities) have the same liabilities and rights as a licensed insurer. For the ACT, the management of insurance is undertaken by the ACT Insurance Authority.

Clause 6 – payment of participants assessed treatment and care needs

This clause amends section 30 of the Act, which is about payment of participants' assessed treatment and care needs. It substitutes section 30(3)(b) by inserting new sub paragraphs about the mechanisms by which the LTCS Commissioner may give a participant an amount to cover their assessed expenses. This may be under a payment agreement with the participant; a periodic payment agreement for an overseas participant or a lump sum agreement where the person is a foreign national.

Clause 7 – periodic and lump sum payments

This clause inserts new sections 30A and 30B to provide for the option for a periodic payment where the participant is overseas and a lump sum payment for a foreign national participant. These options provide payment flexibility in recognition of the specific challenges of overseas participation.

Section 30A provides that a payment agreement may be made between the LTCS Commissioner and an overseas participant. A payment agreement will only be made if both the Commissioner and the participant agree to the arrangement. An overseas participant is an Australian citizen or Australian permanent resident who is living outside of Australia and intends to do so permanently or for an extended period of time. This section recognises that a participant may have been injured in the ACT but is now living overseas. Coordinating the services between countries can delay the care and treatment of the participant which can potentially result in sub-optimal health outcomes. Under the agreement, the overseas participant would manage their treatment and care needs from the periodic payment.

Until an agreement is made, the LTCS Commissioner is required to pay the expenses of the participant. Guidelines may be made under subsection (4) to determine the period an overseas participant must live outside Australia to be eligible for a periodic payment agreement; and the total amount and frequency of the periodic payment.

If the overseas participant returns to Australia to live before the end of the periodic payment agreement, the agreement ceases to have effect and the LTCS Commissioner will recommence paying the expenses of the participant in accordance with section 30. To avoid payment duplication, the former overseas participant will be required to refund any amount remaining under the agreement. The guidelines may provide the process for calculating the amount to be repaid.

Section 30B provides that an agreement may be made between the LTCS Commissioner and a foreign national participant who has been accepted as a lifetime participant in the LTCS Scheme. A lump sum payment will only be made if both the Commissioner and the participant agree to the arrangement. The section recognises that a participant may be injured in the ACT but is the national of another country and lives outside Australia. Coordinating services between countries can delay the care and treatment of the participant which can potentially result in sub-optimal health outcomes. Under the agreement, the foreign national will receive a lump sum from the LTCS Scheme. The intention is that a lump sum payment under the LTCS Scheme will be calculated having regard to the assessed reasonable and necessary treatment and care needs of the foreign national participant for the rest of their life. If a lump sum agreement is made, the foreign national then ceases to be a participant in the LTCS Scheme. To avoid potential duplication of payment, the bill makes it clear that the injured person receiving the lump sum will not be able to also claim compensation in relation to treatment and care needs under either compulsory third-party insurance legislation or workers compensation legislation.

Until an agreement is made, the LTCS Commissioner is required to pay the expenses of the participant in accordance with section 30. Guidelines may be made under section 30B(3) to determine the period the foreign national participant must live outside Australia to be eligible for a lump sum agreement and calculation of the total amount of the lump sum payment.

Clause 8 – appropriation of certain amounts for LTCS fund

This clause provides for the appropriation of amounts paid to the LTCS fund in relation to a motor accident injury that involved a motor vehicle owned by the Territory or a territory authority at the time of the accident. This clause is to ensure that the funds that are determined in accordance with new section 83A are appropriated to the fund.

Clause 9 – determination of amount to be contributed to the fund

This clause amends section 83(1) of the Act, which provides for the determination of the amount to be contributed to the fund for the contribution period for motor accident injuries. This amendment specifies that the determination of the required contribution be calculated excluding estimated injuries resulting from motor accidents involving ACT Government owned vehicles that are separately determined in accordance with new section 83A, inserted by clause 10.

Clause 10 – provisions for the funding of the LTCS Scheme where an ACT Government owned vehicle is involved in a motor accident

Section 83A provides that the section applies if a person is catastrophically injured in a motor accident involving a vehicle owned by the Territory or a territory authority at the time of the accident; there was no CTP policy in force; and the injured person becomes a participant. The LTCS Commissioner must then determine the amount the ACT Insurance Authority (ACTIA) needs to contribute to fully fund the present and likely future liabilities of the LTCS fund in relation to the injuries suffered by the person, as well as any other payments required to be made in relation to the person. In making the determination, the LTCS Commissioner needs to also consider anticipated investment income in assessing the amount. Before making the determination, the LTCS Commissioner must obtain the report of an independent actuary and apportion liability if more than one motor vehicle was involved in the accident, in accordance with issued guidelines.

The contribution method ensures that the LTCS fund receives the funding from ACTIA for these particular circumstances. It recognises that under the ACT's self-insurance arrangements there is no 'motor vehicle policy' to attach a LTCS levy.

Section 83B provides for contributions to the LTCS fund by ACTIA where a determination has been made under section 83A. This section requires ACTIA to make the payment as determined by the LTCS Commissioner.

As the payment amount determined under section 83A is calculated on a lifetime basis, the section further provides that if the person is not accepted as a lifetime participant in the LTCS Scheme after their interim participation finishes, ACTIA must be refunded the part of the lump sum that is not needed by the LTCS fund as a result. Guidelines may be made regarding dispute resolution; calculating the refund of a lump sum and the application of interest from the investment of lump sums.

Clause 11 – Determination of LTCS levy

This clause amends 84(1)(a) to provide that for a levy determination for motor accident injuries, injuries suffered by people to which section 83A applies are excluded. This is a similar amendment to clause 9. It should be noted that this section reference relates to the *Lifetime Care and Support (Catastrophic Injuries) Amendment Bill 2016* that provides the LTCS Commissioner may determine levies for motor accident injuries and work injuries.

Clauses 12, 13 and 14 – Dictionary amendments

These clauses insert notes and definitions in the dictionary to the Act. Territory authority is inserted as a note as it is defined in the *Legislation Act 2001*. A definition of ACTIA is inserted and the definition of lifetime participation is substituted for lifetime participant, providing a more accurate definition.

Schedule 1

This schedule provides for consequential amendments to the *Road Transport (Third-Party Insurance) Act 2008* and the *Workers Compensation Act 1951*.

Road Transport (Third-Party Insurance) Act 2008

This amendment inserts a new section 156E to provide that an LTCS Scheme foreign national participant is not entitled to damages etc for their treatment, care and support if they received a lump sum under a lump sum agreement with the LTCS Commissioner.

Any award of damages or an offer of settlement that is made to the person in relation to the motor accident injury must not include an amount for the person's treatment and care needs or excluded treatment and care that arose while a participant or arose while in receipt of the lump sum. This clause is to ensure that a person injured in a motor accident does not receive 'double compensation' for their motor accident injury. This is consistent with section 156D where a LTCS Scheme participant is not entitled to have an amount included for treatment and care in their damages. It is noted that for a foreign national no amount may be included after they receive the lump sum. The intention is that a lump sum payment under the LTCS Scheme will be calculated having regard to the assessed reasonable and necessary treatment and care needs of the foreign national participant for the rest of their life.

Workers Compensation Act 1951

Section 70(2A) is proposed as an amendment by the *Lifetime Care and Support (Catastrophic Injuries) Amendment Bill 2016*. That amendment inserts new provisions to provide that an employer is not liable for any treatment and care needs or excluded treatment and care needs of a worker while the injured worker is a participant in the LTCS Scheme. This bill substitutes the amendment to section 70(2A) to also include the circumstances where a worker receives a lump sum under a LTCS Scheme lump sum agreement.

Section 70(2C) is also proposed as an amendment by the *Lifetime Care and Support (Catastrophic Injuries) Amendment Bill 2016*. The amendment makes clear that the employer remains on risk to pay the costs of any treatment and care needs of a worker until the worker is accepted as a participant in the LTCS Scheme and after the worker ceases to be a participant. The bill substitutes the amendment to also include the circumstances of a participant not receiving a lump sum under a lump sum agreement.

A cross-reference to lump sum agreement is inserted at new section 70(5).