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

**MOTOR ACCIDENT INJURIES BILL 2019 - AMENDMENTS**

**SUPPLEMENTARY EXPLANATORY STATEMENT**

**Presented by**

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## MOTOR ACCIDENT INJURIES BILL 2019 - AMENDMENTS

This explanatory statement relates to the Motor Accident Injuries Bill 2019 – Amendments as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the amendments and to help inform debate on it. It does not form part of the amendments and has not been endorsed by the Assembly.

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

### Background

The Government committed to comprehensively changing the compulsory third party (CTP) insurance scheme. The purpose of these amendments is to improve the operation and design of the scheme under the Motor Accident Injuries Bill 2019 (the Bill).

### Overview of the Amendments

The Motor Accident Injuries Bill 2019 – Amendments improves the scheme by removing obstacles to compensation, putting more power in the hands of injured persons, and making a number of technical amendments to improve the workability of the scheme. The amendments protect injured individuals, address power imbalances, and better secure individual human rights.

### Human Rights

The amendments have potential human rights implications. If an individual's human rights are affected in any capacity, the limitations are to be reasonable and in line with or less restrictive than the proposed legislation. Insurers and other corporate entities do not attract human rights.

A broad summary of the applicable human rights can be found in the Bill's explanatory statement, and similarly this commentary does not address each individual clause avoid repetition. The key concepts and nature of affected human rights are discussed at length in the Bill's explanatory statement and supporting materials, therefore this commentary is focused on a comparison of the limitations and impact of amendments.

The amendments may engage the following rights under the *Human Rights Act 2004* (HR Act):

- Section 8 – Recognition and equality before the law;
- Section 12 – Privacy and reputation; and
- Section 21 – Fair trial.

### *Eligibility criteria for access to common law proceedings*

The proposed amendments allow more individuals to access the common law scheme and provide greater access to compensation than the current Bill, this supports the right to equality before the law as well as privacy and reputation to a greater extent the legislation. For example, these amendments include:

- Lowering WPI thresholds for claims, introducing broad narrative tests, accepting certification from treating doctors, and allowing for physical and psychological injuries to be combined so individuals are more justly compensated as they are under the current scheme;
- Amending onerous thresholds to include the concept of reasonableness in relation to late applications and suspected fraud;
- Allowing for superannuation to be paid to ensure injured persons are restored to an equitable position;
- Ensuring gratuitous care is appropriately compensated where it may be in the best interests for a family member to provide support or care, for example an injured child with special needs;
- Enabling the payment of lump sums similar to foreign nationals;
- Allowing for courts to determine the quantum of damages payable up to a threshold amount;
- Ensuring insurance companies cannot unreasonably request information or that individuals undertake medical assessments without clear consent;
- Removing restrictions on claiming the difference between defined benefits and actual income in the first year after the accident; and
- Insurers taking into consideration the comments of the injured person’s doctor when amending recovery plans.

The Bill’s explanatory statement describes the social benefits of more equitable and broader coverage for injured motorists. These amendments support that aim. While the amendments retain some limitations on claims, they are less restrictive than those within the Bill. This allows for better compliance with human rights obligations, and better practical outcomes for injured individuals. There are a number of instances where the discretionary powers given to insurers meant that the rights of individuals were severely curtailed; however lowering thresholds, obtaining consent before assessments, and introducing reasonableness tests are a few ways that the amendments lessen the negative impact on an individual’s human.

When dealing with claims, more weight should be given measures that ensure individuals receive just and equitable compensation to restore them to the position they would have been but for the accident. The Bill is more restrictive than the current scheme, which means many not at fault victims will be significantly worse off than before. The amendments aim to address this imbalance while retaining reasonable limitations on access to the common law scheme. There is not thought to be any less restrictive means to achieve this purpose as the proposed Bill itself significantly diminishes the equitable avenues for compensation available to innocent victims.

### *Protection of legal rights*

The amendments also protect the rights of injured individuals under section 21 of the HR Act to a greater extent than the Bill by securing individuals’ rights as they relate to legal representation. For example, the amendments mandate:

- Introducing confidentiality protections for lawyers and other service providers to protect sensitive information;

- Ensuring insurers contact individuals through their legal representation to avoid insurers exercising any undue influence or pressure given the significant power imbalance between parties; and
- Eliminating passive acceptance of offers given the common law principle that silence does not equal consent.

While insurers have been given confidentiality protections, no such provisions exist for lawyers or other stated service providers. The legislation specifically requires these service providers to provide information about claimants which may impact on legal privilege and may also engage the right to privacy under the HR Act. The amendment addresses this by mirroring the confidentiality protections found elsewhere in the Act. There is not thought to be any less restrictive means to achieve this purpose.

By allowing insurers to circumvent a person's known legal representation, the Bill is intentionally putting injured individuals at a disadvantage and detrimentally impacting on their legal rights. While individuals may consult with their lawyers after interactions, there are risks that undue pressure may be exerted by an insurer to obtain agreement from a vulnerable person or someone who does not fully understand their rights. There are also clear common law principles that state silence does not equate to consent, the Bill significantly impacts on a person's legal rights by legislating de facto acceptance of an offer. There should be clear and unequivocal consent to any offers or settlements, and it is not appropriate that this right be eroded legislatively. The abrogation of an individual's legal rights is, on balance, not warranted. There is no less restrictive means to achieve this purpose.

## CLAUSE NOTES

**Amendment 1      Clause 14**

This amendment is consequential.

**Amendment 2      Clause 15(2)(a)**

This amendment is consequential.

**Amendment 3      Clause 15(3)(c)**

This amendment is consequential.

**Amendment 4      Clause 35**

This amendment omits clause 35, the definition of ‘full and satisfactory explanation’ is overly onerous in the context of an injured person who may be not well enough to attend to administrative requirements.

**Amendment 5      Clause 52(2)(f)**

This amendment changes the WPI threshold to 5%.

**Amendment 6      Clause 52(2)(g)**

This amendment changes the WPI threshold to 5%.

**Amendment 7      Clause 52(2)(g)**

This amendment changes the WPI threshold to 5%.

**Amendment 8      Clause 52(2)(g)**

This amendment changes the WPI threshold to 5%.

**Amendment 9      Clause 52(2)(h)**

This amendment is consequential.

**Amendment 10      Clause 53**

This amendment changes the meaning of information.

**Amendment 11      Clause 54(1)(b)(E)**

This amendment is consequential.

**Amendment 12      Clause 57(5)**

This amendment is consequential.

**Amendment 13      Clause 59(2)(b)**

This amendment changes the threshold for late applications to ‘reasonable excuse’.

**Amendment 14      Clause 71(2)**

This amendment changes the threshold for actions taken by insurers in relation to fraudulent applications or requests to ‘reasonably suspects’.

**Amendment 15      Clause 76(b)(i)**

This amendment ensures superannuation is included in gross income payable. Excluding superannuation from the gross income unfairly disadvantages injured people, particularly those who have been injured through no fault of their own.

It is essential that superannuation is paid to ensure individuals are adequately supported when they reach retirement age.

**Amendment 16      Clause 105(1A)**

This amendment specifies that the relevant insurer cannot request that an injured person undergo more than one medical or other examination to assess the person’s fitness for work in any 13-week period.

Under the current Bill insurers can suspend income replacement payments if the insurer determines the injured person has failed to comply with a reasonable request to undergo a medical or other examination to assess the person’s fitness to work. In the absence of any contrary direction, insurers could require injured people to constantly attend for medical appointments.

**Amendment 17      Clause 106**

This amendment removes the offence provisions in relation to failure to notify an insurer of a change in circumstances and extends the prescribed period to 20 working days.

An injured person commits an offence under the current Bill if the person has a change in circumstances and does not notify the insurer within the prescribed period (10 business days) after the change happens. The offence is overly harsh and the prescribed period is too short.

**Amendment 18      Clause 108**

This amendment removes the clause that restricts individuals from receiving income payments in a lump sum. Removal of the capacity to commute income replacement benefits is a significant change to the current scheme. In some circumstances, commuting enables claims to be resolved in a timely and cost-effective manner in a way which is satisfactory to both the insurer and the injured person.

**Amendment 19      Clause 113**

This amendment allows for gratuitous care to be claimed. Treatment and care expenses under the Bill unfairly excludes gratuitous care provided to the injured person by partners or family members.

**Amendment 20      Clause 114(1)**

This amendment allows for gratuitous care to be claimed. Domestic services expenses under the Bill unfairly excludes gratuitous care provided to the injured person by partners or family members.

**Amendment 21      Clause 123(3)(c)**

This amendment compels the relevant insurer to incorporate in the final version of the recovery plan comments from the injured person's doctor. As currently drafted, the insurer is not obliged to take into account any comments made by the injured person and the injured person's doctor when finalising the draft recovery plan.

**Amendment 22      Clause 127(3)**

This amendment makes it clear that any amendments to the recovery plan must be done in consultation with the injured person's treating doctor.

**Amendment 23      Clause 133 heading**

This amendment is consequential to changing the WPI threshold to 5%.

**Amendment 24      Clause 133(1)**

The amendment alters the exception to be based on the injured person's treating doctor certification that the injured person will require treatment and care beyond the 4 year and 6 month time period; or the injured person is a participant in the LTCS scheme in relation to their injury. This creates more equitable access to common law remedies.

**Amendment 25      Clause 139(2)(c)**

The amendment changes the process for the WPI assessment to ensure the insurer will not refer the person for an assessment unless the person confirms the request.

**Amendment 26      Clause 139(3)**

The amendment changes the process for the WPI assessment to omit the general excess payment by the injured person.

**Amendment 27      Clause 139(4)**

The amendment changes the process for the WPI assessment to the injured person paying an excess if the assessment finds the injured person's WPI is 0%.

**Amendment 28      Clause 141(4)**

The amendment omits clause 141(4) that specifies if a person refuses a WPI assessment, the person's quality of life benefits application is taken to have been finally dealt with.

**Amendment 29      Clause 149**

This amendment allows for physical and psychological whole person impairment (WPI) to be combined. The purpose of quality of life benefits are to compensate an injured person for the loss of quality of life they experience due to injuries sustained in a motor accident. Logically then, any WPI assessment undertaken, must consider the cumulative impact of all aspects of injuries which impact that individual's quality of life.

It is not unusual for injured persons to suffer both physical and psychological injuries associated with a motor accident, which both individually and in combination, can have a substantive impact on an injured person's quality of life. An injured person should not be required to elect just one of their injuries for assessment.

This issue is magnified by the current requirement that an injured person must have at least 5% WPI to be eligible for quality of life benefits. Under the current proposed legislation, an individual with 4% physical WPI and 4% psychological WPI would be excluded from quality of life benefits, even though the combined WPI would likely meet the threshold. In these circumstances, it is fundamentally unfair that the injured person be denied compensation

**Amendment 30      Clause 150(2)**

This amendment omits that the IME must only assess physical injuries (if the injured person nominated physical injuries) or psychological injuries (if the person nominates psychological injuries). This allows for physical and psychological injuries to be combined.

**Amendment 31      Clause 152**

This amendment is consequential to changing the WPI threshold to 5%.

**Amendment 32      Clause 153**

This amendment is consequential to changing the WPI threshold to 5%.

**Amendment 33      Clause 154 heading**

This amendment is consequential to changing the WPI threshold to 5%.

**Amendment 34      Clause 154(1)(a)**

This amendment changes the WPI threshold to 5%.

**Amendment 35      Clause 155 heading**

This amendment is consequential to changing the WPI threshold to 5%.



**Amendment 36**      **Clause 155(1)(a)**

This amendment changes the WPI threshold to 5%.

**Amendment 37**      **Clause 156(1)**

This amendment is consequential to changing the WPI threshold to 5%.

**Amendment 38**      **Clause 160**

This amendment is consequential to changing the WPI threshold to 5%.

**Amendment 39**      **Clause 161 heading**

This amendment is consequential to changing the WPI threshold to 5%.

**Amendment 40**      **Clause 161(1)(a)**

This amendment changes the WPI threshold to 5%.

**Amendment 41**      **Clause 161(3)**

This amendment omits the automatic acceptance of offer. If the injured person does not notify the relevant insurer within 28 days, the person is taken to have accepted the offer. It is not acceptable that silence be taken as acceptance of the offer.

**Amendment 42**      **Clause 161(4)**

This amendment omits the automatic acceptance of offer. If the injured person does not notify the relevant insurer within 28 days, the person is taken to have accepted the offer. It is not acceptable that silence be taken as acceptance of the offer.

**Amendment 43**      **Clause 162 heading**

This amendment is consequential to changing the WPI threshold to 5%.

**Amendment 44**      **Clause 162(1)(a)**

This amendment changes the WPI threshold to 5%.

**Amendment 45**      **Clause 162(4)**

This amendment omits the automatic acceptance of offer. If the injured person does not notify the relevant insurer by the due date, the person is taken to have accepted the offer. It is not acceptable that silence be taken as acceptance of the offer.

**Amendment 46**      **Part 2.9 heading**

This amendment substitutes the heading.

**Amendment 47      New clause 180A**

This amendment provides individuals the option of selecting their income payments to be made in a lump sum.

**Amendment 48      Clause 183**

The amendment specifies reviewable decisions are those listed under the Act, with a schedule consequentially created.

**Amendment 49      Clause 184(3)(a)**

This amendment changes the threshold for late applications to ‘reasonable excuse’.

**Amendment 50      Clause 189**

This amendment allows for the ACT Civil and Administrative Tribunal (ACAT) to review any internally reviewable decisions of the insurer.

**Amendment 51      Clause 195(1A)**

This amendment provides that the ACAT must not award the costs of, or incidental to, an application for external review against an injured person seeking a review honestly in the proceeding. This is based on the *Court Procedures Rules 2006* (3968).

**Amendment 52      Clause 200**

This amendment removes clause 200. Legal costs and charges are regulated under the *Legal Profession Act 2006* and the *Court Procedures Rules 2006*. The proposed clause is unnecessary and puts the subordinate legislation above the primary Act that deals with the matter.

**Amendment 53      Chapter 3**

This amendment omits Chapter 3 to create simpler exceptions set out in other parts of the Bill.

**Amendment 54      Clause 219(1)(b)**

The amendment alters the application for future treatment payments to be based on the injured person’s treating doctor certifying that the injured person will require treatment and care beyond the 4 year and 6 month time period. This creates more equitable access to remedies.

**Amendment 55      Clause 236(1)(a)**

This amendment changes the WPI threshold to 5%.

**Amendment 56      Clause 236(1)(b)(ii)**

This amendment changes the WPI threshold to 5%.

**Amendment 57**      **Clause 236(1)(c)**

This amendment is consequential to changing the WPI threshold to 5%.

**Amendment 58**      **Clause 236(1)(ca) and (cb)**

These amendments introduce a vocation exemption to capture workers permanently impacted by the accident; and allow for claims for significant injuries. These enable a broad alternative discretionary power and the use of a narrative style test to provide access to compensation.

**Amendment 59**      **Clause 236(1)(d)**

This amendment is consequential.

**Amendment 60**      **Clause 236(3)**

This amendment provides the definition of ‘serious injury’ as it relates to the clause.

**Amendment 61**      **Clause 237(2)(a)**

This amendment changes the WPI threshold to 5%.

**Amendment 62**      **Clause 238(3)(f)**

This amendment is consequential.

**Amendment 63**      **Clause 238(4)(a)**

This amendment is consequential to changing the WPI threshold to 5%.

**Amendment 64**      **Clause 238(4)(b)**

This amendment is consequential.

**Amendment 65**      **Clause 238(4)(c)**

This amendment is consequential to changing the WPI threshold to 5%.

**Amendment 66**      **Clause 238(4)(d)**

This amendment is consequential.

**Amendment 67**      **Clause 238(4)(e)**

This amendment is consequential.

**Amendment 68**      **Clause 238(4)(f)**

This amendment is consequential.

**Amendment 69      Clause 240(1) and table 240 and note**

This amendment sets the maximum quality of life payments that can be made \$500,000 with the court determining the quantum awarded. The thresholds and scaling set out in clause 240(1) are not practical and mean that virtually no injured persons will receive meaningful compensation.

**Amendment 70      Clause 240(5)**

This amendment is consequential.

**Amendment 71      Clause 243**

This amendment removes the restriction on common law claimants recovering their full loss of earnings for the first year following their accident. This means claimants can include in their claim the difference between their full first year loss of earnings and any income replacement payments received as a defined benefits payment during the first year.

**Amendment 72      Clause 244(1)**

This amendment is consequential.

**Amendment 73      Clause 244(2)(a)**

This amendment is consequential.

**Amendment 74      Clause 246**

This amendment allows for gratuitous care to be claimed. Treatment and care expenses under the Bill unfairly excludes gratuitous care provided to the injured person by partners or family members.

**Amendment 75      Clause 260(3)**

This amendment changes the WPI threshold to 5%.

**Amendment 76      Clause 263(2)**

This amendment ensures consistency and fairness in working out costs for mandatory final offers.

**Amendment 77      Clause 263(3)**

This amendment ensures consistency and fairness in working out costs for mandatory final offers.

**Amendment 78      Clause 265(2)**

This amendment is consequential.

**Amendment 79      Clause 268A**

This amendment introduces a new provision based on section 150 of the *Road Transport (Third-Party Insurance) Act 2008* which allows for urgent court proceedings.

**Amendment 80      Clause 273(3) and (4)**

This amendment provides for costs for awards of damages over \$50,000.

**Amendment 81      Clause 279(3) note**

This amendment is consequential.

**Amendment 82      Clause 280(2) note**

This amendment is consequential.

**Amendment 83      Clause 281**

Legal costs and charges are regulated under the *Legal Profession Act 2006* and the *Court Procedures Rules 2006*. The proposed clause is unnecessary and puts the subordinate legislation above the primary Act that deals with the matter.

**Amendment 84      Clause 429(1)**

The amendment ensures insurers contact injured persons through their legal representation if written notice has been received from the injured person. There is a clear power imbalance between the injured person and the insurer, this amendment protects individuals from undue pressure or an infringement of their legal rights.

**Amendment 85      Clause 429(1A)**

The amendment ensures insurers contact injured persons through their legal representation if written notice has been received from the injured person. There is a clear power imbalance between the injured person and the insurer, this amendment protects individuals from undue pressure or an infringement of their legal rights.

**Amendment 86      Clause 466(6), (7) and (8)**

This amendment provides lawyers and other service providers with protections against the publication of confidential information. A regulation may require lawyers and other service providers to give information to the commission. Information may include amounts paid to applicants/claimants, costs and disbursements paid by applicants/claimants and timing of payments. The Minister may require commission to publish statistical data based on the information. There is nothing about the protection of commercial in confidence information such as there is for the insurers in section 470(4) and (5).

**Amendment 87      Clause 482**

This amendment changes the Bill to be consistent with duty provisions in New South Wales.

**Amendment 88      New Schedule 1A**

This amendment inserts Schedule 1A which lists all internally reviewable decisions in legislation.

**Amendment 89      Schedule 2, part 2.2, amendment 2.13**

This amendment is consequential.

**Amendment 90      Schedule 2, part 2.2, amendment 2.13**

This amendment is consequential to changing the WPI threshold to 5%.

**Amendment 91      Schedule 2, part 2.2, amendment 2.13**

This amendment is consequential to changing the WPI threshold to 5%.

**Amendment 92      Schedule 2, part 2.2, amendment 2.13**

This amendment is consequential to changing the WPI threshold to 5%.

**Amendment 93      Schedule 2, part 2.2, amendment 2.13**

This amendment is consequential to changing the WPI threshold to 5%.

**Amendment 94      Schedule 2, part 2.2, amendment 2.13**

This amendment is consequential to changing the WPI threshold to 5%.

**Amendment 95      Schedule 2, part 2.2, amendment 2.19**

This amendment is consequential.

**Amendment 96      Schedule 2, part 2.2, amendment 2.25**

This amendment is consequential.

**Amendment 97      Schedule 2, part 2.2, amendment 2.69**

This amendment is consequential.

**Amendment 98      Dictionary**

This amendment is consequential.

**Amendment 99      Dictionary**

This amendment is consequential.

**Amendment 100     Dictionary**

This amendment is consequential.

**Amendment 101     Dictionary**

This amendment is consequential.

**Amendment 102     Dictionary**

This amendment is consequential.

**Amendment 103     Dictionary**

This amendment is consequential.

**Amendment 104     Dictionary**

This amendment is consequential.