

## EXPLANATORY MEMORANDUM

### Motor Vehicle (Catastrophic Injuries) Bill 2016

#### Introduction

The purpose of this Bill is to provide for an insurance scheme for the lifetime care and support of certain people catastrophically injured in motor vehicle accidents in Western Australia, who are unable to successfully claim under the existing Compulsory Third Party (CTP) insurance scheme.

The Bill achieves this by establishing the Motor Vehicle (Catastrophic Injuries) Fund and the Catastrophic Injuries Support Scheme (CISS), as well as consequential amendments to the *Motor Vehicle (Third Party Insurance) Act 1943*, *Civil Liability Act 2002* and the *Insurance Commission of Western Australia Act 1986*.

#### Part 1 - Preliminary

##### Clause 1 Short title

This clause formally names the Act.

##### Clause 2 Commencement

This clause provides for the commencement of the Act:

- i. Sections 1 and 2 on the day on which the Act receives Royal Assent; and
- ii. The rest of the Act, on a day fixed by proclamation, and different days may be fixed for different provisions.

##### Clause 3 Terms used

This clause defines certain terms used in the Bill, such as:

- i. ***catastrophic injuries support scheme (CISS)*** means the scheme provided for in the Act for the lifetime care and support of certain people catastrophically injured in motor vehicle accidents;
- ii. ***catastrophic injury*** means a motor vehicle injury that satisfies the prescribed criteria for eligibility for participation in the CISS;
- iii. ***participant in the CISS*** means a person who is a participant in the CISS (either as an interim or lifetime participant); and
- iv. ***treatment, care and support assessment*** means an assessment of the treatment care and support needs of a participant in the CISS in relation to the participant's motor vehicle injury.

##### Clause 4 Motor vehicle accident

This clause defines a motor vehicle accident as an incident caused by or arising out of the use of a motor vehicle, but only if it resulted directly from:

- the driving of the motor vehicle; or

- the motor vehicle running out of control; or
- a collision, or action to avoid a collision with the motor vehicle, whether the motor vehicle is stationary or moving.

Bodily injuries to a person or persons rendering or attempting to render assistance at the scene of a motor vehicle accident are to be taken as being as a result of the accident.

#### **Clause 5 Motor vehicle injury to which Act applies**

This clause limits participation in the CISS to catastrophic injuries resulting from motor vehicle accidents that occur in Western Australia on or after the day the Act comes into operation and where liability for negligence in respect of the injuries has not been incurred by the owner or driver of a motor vehicle involved.

The Act will not apply to catastrophic injuries resulting from motor vehicle accidents involving a motor vehicle taking part in a motor sports event or, resulting from a terrorist act.

The Act will not apply to injuries as a result of motor vehicle accidents that occur on private land unless at least one motor vehicle involved in the accident is:

- a motor vehicle in respect of which a contract of insurance is in force under the *Motor Vehicle (Third Party Insurance) Act 1943*; or
- licensed or registered under the law of another State or Territory to which a policy of compulsory third party personal injury insurance or a motor vehicle accident compensation scheme applies.

#### **Clause 6 Treatment, care and support needs**

This clause identifies the categories of treatment, care and support needs that are to be provided under the CISS.

The Insurance Commission may also approve other kinds of treatment, care, support or services not listed either generally, for specified classes of cases, or for a particular person.

#### **Clause 7 Act binds Crown**

This clause binds the State and as far as the powers of Parliament permit, the Crown in all other capacities. Nothing in the Bill makes the Crown in any capacity liable to be prosecuted for an offence.

### **Part 2 - Participation in catastrophic injuries support scheme**

#### **Clause 8 Eligibility to participate**

This clause provides that a person is eligible to participate in the CISS if the person has suffered a catastrophic motor vehicle injury to which the Act applies. Participation in the CISS may be as either an interim or lifetime participant.

Regulations will provide for the eligibility criteria consistent with the nationally 'Agreed Minimum Benchmarks for Motor Vehicle Accidents'.

A person will not be able to participate if they have been compensated for that injury.

**Clause 9 Application to participate**

Under this clause, a person injured in a motor vehicle accident may apply to the Insurance Commission to participate in the CISS, in a manner and form to be set out in Regulations.

**Clause 10 Acceptance as participant**

This clause provides for a person to become a participant in the CISS if the Insurance Commission is satisfied that the person is eligible for participation. Acceptance as an interim participant or a lifetime participant into the scheme must be in writing.

**Clause 11 Interim participation**

This clause provides that a person accepted as an interim participant retains this status for a period determined in accordance with regulations or until the Insurance Commission decides that the interim participant is no longer eligible.

A person that has ceased to be an interim participant is not to be prevented from subsequent participation in the CISS, provided that the eligibility criteria are met.

**Clause 12 Lifetime participation**

Under this clause, the Insurance Commission is required to make assessments and decisions regarding the lifetime participation of interim participants in the CISS.

A person accepted as a lifetime participant remains a participant in the CISS for life unless the Insurance Commission decides that a person is no longer eligible to participate in the CISS and notifies the person of the decision.

**Clause 13 Former interim participant may apply to become participant**

This clause provides for an injured person, who has ceased to be an interim participant in the CISS, to apply to become a participant again in relation to the same motor vehicle injury.

**Clause 14 Suspension of participation**

This clause provides for participants to be suspended from participation in the CISS while the person is absent from Australia.

The regulations may provide for the Insurance Commission to suspend participants in the CISS under prescribed circumstances, including failure to comply with the regulations.

### **Part 3 - Assessment of treatment, care and support needs**

#### **Clause 15 Assessment of participant's treatment, care and support needs**

Under this clause, the Insurance Commission must assess a participant's necessary and reasonable treatment, care and support needs that relate to the motor vehicle injury in respect of which the person is a participant.

Written notice of the assessment and the reasons for the findings must be provided to the participant by the Insurance Commission.

#### **Clause 16 Regulations about assessment of treatment, care and support needs**

This clause provides for regulations to be made in relation to the assessment of the treatment, care and support needs of participants of the CISS.

Provisions that may be made in regulations include assessment procedures, interval of assessments, the methods and criteria to be used to determine treatment, care and support needs and compliance matters.

#### **Clause 17 Commission not liable for legal costs for assessment**

This clause provides that the Insurance Commission is not liable for legal costs in respect of legal services provided in relation to a participant's assessment of treatment, care and support needs.

### **Part 4 - Payments under catastrophic injuries support scheme**

#### **Clause 18 Payment of assessed treatment, care and support needs**

This clause provides that the Insurance Commission must pay for all necessary and reasonable expenses in relation to a person's assessed treatment, care and support needs whilst a person is a participant in the CISS.

The assessed treatment, care and support needs are those as assessed by the Insurance Commission as being necessary and reasonable in the circumstances and related to the motor vehicle injury.

Necessary and reasonable treatment, care and support is to be determined in accordance with criteria set out in the regulations.

The Insurance Commission is not liable for any expenses that are:

- excluded treatment care and support needs;
- treatment, care and support needs that are not assessed needs; or
- excluded from the operation of this section by the regulations.

The Insurance Commission may, by agreement with a participant, fund the assessed necessary and reasonable treatment, care and support expenses by the payment of an amount to the participant to self-manage those expenses over a fixed term.

## **Clause 19 Payment not required in certain circumstances**

This clause removes any liability on the Insurance Commission under the CISS to pay for:

- gratuitous services provided to a participant;
- the ordinary costs of raising a child;
- treatment, care, support or service required to be provided by a registered provider but which are provided by a person that is not a registered provider at the time of provision; or
- any treatment, care, support or service provided to a participant while they are absent from Australia.

Medical practitioners and persons acting under circumstances allowed under the regulations are excluded from the application of this clause.

The Insurance Commission may elect to make a payment in relation to any treatment, care, support or service if it considers that such a payment is justified in the circumstances.

The Insurance Commission will not be required to make payments for any treatment, care, support or services provided to a person whose participation in the CISS is suspended.

## **Clause 20 Maximum amounts payable for certain treatment and services**

This clause provides for the Insurance Commission to set maximum amounts payable for certain treatment and services.

The regulations may fix maximum amounts by reference to fees recommended by a prescribed person or by reference to a schedule of fees published by a prescribed person.

## **Clause 21 Recovery of payments for injury involving interstate vehicle**

This clause defines an interstate vehicle as a vehicle that at the time of the injury was covered under a policy of compulsory third party personal injury insurance or a compulsory accident compensation scheme under the law of another State or Territory.

This clause provides for the Insurance Commission to recover payments made under the CISS in relation to injuries caused by the negligence of an owner or driver of an interstate vehicle from the relevant insurer or compensation scheme.

## **Clause 22 Injury compensable under *Workers' Compensation and Injury Management Act 1981***

This clause provides that if a participant in the CISS is compensable under the *Workers' Compensation and Injury Management Act 1981*, the Insurance Commission is not required to pay costs or expenses that have been paid under the *Workers' Compensation and Injury Management Act 1981*.

The Insurance Commission may recover from the participant's employer the value of amounts paid for costs or expenses under the CISS that would have been payable under the *Workers' Compensation and Injury Management Act 1981*.

### **Clause 23 Registered providers**

This clause provides for the Insurance Commission to register specified persons, or persons of a specified class, to provide treatment, care, support or services under the CISS, that are identified in the regulations as required to be delivered by a registered provider.

The regulations may make provisions for:

- the standards of competency of registered providers; and
- matters relating to registration under the clause.

This clause creates an offence, with a maximum penalty of \$10,000, for registered providers that, without reasonable cause, contravene a condition of registration.

## **Part 5 - Dispute Resolution**

### **Clause 24 Terms used**

This clause defines certain terms and expressions used in relation to dispute resolution.

***dispute resolution proceedings*** mean proceedings relating to the review of an injury decision or a treatment, care and support assessment.

***eligibility decision*** means a decision about whether an incident that results in catastrophic injury is a motor vehicle accident or a motor vehicle injury (as defined in section 4 and section 5 of the Bill) to which the Act will apply. An eligibility decision may also include decisions made by the Commission in relation to suspension matters under section 14.

### **Clause 25 Review of eligibility decision**

Under this clause, applicants may apply to the Insurance Commission for a review of the eligibility decision.

### **Clause 26 Review of treatment, care and support assessment**

This clause provides a participant of the CISS, or another person with the lawful authority to act on their behalf, to apply to the Insurance Commission to have their treatment, care and support assessment reviewed.

### **Clause 27 Appeals to District Court**

Under this clause, a party to dispute resolution proceedings may, with the leave of the District Court, appeal to the District Court against a review decision made in those proceedings. Appeals to the District Court are restricted to questions of law.

## **Clause 28 Regulations about dispute resolution**

This clause sets out provisions that may be made in regulations for or in relation to dispute resolution matters, including:

- the making of applications;
- practices and procedures;
- appointment or designation of review officers;
- expert review panels;
- functions of persons involved in dispute resolution;
- liability for legal costs and other costs;
- the review of decisions made; and
- conferral of jurisdiction on the District Court.

## **Part 6 Miscellaneous**

### **Clause 29 No contracting out**

This clause provides that the Act applies despite anything to the contrary in a contract.

### **Clause 30 Notification and disclosure of information by hospital**

This clause provides for the hospital staff to disclose to the Insurance Commission relevant information about a person admitted to hospital that has suffered or is reasonably believed to have suffered, a catastrophic injury.

Relevant information is defined as the patient records or other information about the patient that is, or is likely to be, relevant to the treatment, care and support of the patient.

No civil or criminal liability will attach to a disclosure made in good faith under this clause and cannot be regarded as a breach of any confidentiality, professional or ethical standard.

### **Clause 31 False or misleading information**

This clause makes it an offence, with a penalty of \$10,000, to knowingly give false or misleading information in relation to requirements under the Act.

### **Clause 32 Obstruction**

This clause makes it an offence, with a penalty of \$10,000, for persons who obstruct or hinder an Insurance Commission officer or other person, in the performance of a function under the Act.

### **Clause 33 Guidelines**

This clause provides for the Insurance Commission to issue guidelines on matters relating to the operations of the Act and would not have legal effect.

Guidelines issued under this clause are not subsidiary legislation for the purposes of the *Interpretations Act 1984* and must be published by the Insurance Commission on its website.

A person performing a function under this Act must have regard to the guidelines issued under this clause.

#### **Clause 34 Regulations**

This clause is a general regulation-making power that provides for the Governor to make regulations prescribing:

- matters required or permitted under the Act;
- matters necessary or convenient to be prescribed for giving effect to the Act; and
- to provide for offences and prescribe penalties, not exceeding \$10,000.

The regulations may also make provision for other matters under the Act, such as applications, assessments and consent to obtain information.

#### **Clause 35 Regulations may adopt codes or legislation**

This clause provides for the regulations to adopt any code or subsidiary legislation under any Act of the Commonwealth or another State or Territory, either in part or in full.

Code is defined as a code, standard, rule or specification published in or outside Australia, which does not by itself have legislative effect in this State.

Subsidiary legislation is defined as rules, regulations, instructions, local laws and by-laws.

### **Part 7 Other Acts amended**

#### **Division 1 – *Civil Liability Act 2002* amended**

##### **Clause 36 Act amended**

This clause provides that Division 1 amends the *Civil Liability Act 2002*.

##### **Clause 37 Section 13A inserted – Restrictions on damages if payments received under CISS**

This clause provides that no damages are to be awarded to persons for treatment, care and support for the period that they are participants of the CISS.

The restriction on damages includes domestic services, or attendant care provided by a member of the same household or family of the person.

## **Division 2 - *Insurance Commission of Western Australia Act 1986* amended**

### **Clause 38 Act amended**

Specifies that Division 2 amends the *Insurance Commission of Western Australia Act 1986*.

### **Clause 39 Section 6 amended**

This clause provides for the management, administration and monitoring of the CISS to be a function of the Insurance Commission.

### **Clause 40 Section 16 amended**

This clause provides for the establishment of the Motor Vehicle (Catastrophic Injuries) Fund as a statutory fund administered by the Insurance Commission.

Moneys or property received or acquired by the Insurance Commission in connection with its functions under the clause are to be applied for the purposes of managing and administering the CISS.

### **Clause 41 Section 18 amended**

This clause amends section 18 of the *Insurance Commission of Western Australia Act 1986*, to include the Motor Vehicle (Catastrophic Injuries) Fund as one of the funds which the Insurance Commission can temporarily transfer moneys or other property to or from.

## **Division 3 - *Motor Vehicle (Third Party Insurance) Act 1943* amended**

### **Clause 42 Act amended**

Specifies that Division 3 amends the *Motor Vehicle (Third Party Insurance) Act 1943*.

### **Clause 43 Section 3 amended**

Terms relevant to the Catastrophic Injuries Support Scheme are added under section 3 of the *Motor Vehicle (Third Party Insurance) Act 1943* by this clause.

### **Clause 44 Section 3EA inserted – Restrictions on damages if payments received under CISS**

This clause provides that no damages are to be awarded to persons for treatment, care and support for the period that they are participants of the CISS.

The restriction on damages includes domestic services, or attendant care provided by a member of the same household or family of the person.

### **Clause 45 Section 3FA and 3FB inserted**

Two new clauses are proposed for the *Motor Vehicle (Third Party Insurance) Act 1943* in relation to damages payable.

### **3FA - Restrictions on damages to be part of the substantive law**

At present, visitors from countries in the European Union that are able to make a claim under the *Motor Vehicle (Third Party Insurance) Act 1943* may have their damages assessed under the laws of their country of residence, rather than under the laws of the country where the accident occurred (i.e. Western Australia).

This convention can and has resulted in damages being awarded, far exceeding what would be payable had the entitlement been assessed under Western Australian law.

This clause provides that damages and treatment, care and support entitlements are to be assessed and provided under the laws of Western Australia, not a foreign court.

This clause thus provides that all people catastrophically injured in motor vehicle accidents in Western Australia have access to comparable compensation in relation to treatment, care and support.

### **3FB – Damages for treatment, care and support needs: catastrophic injury**

Under common law, deductions may be made to awards for damages for a claimant's contributory negligence.

This clause provides that no deductions are to be made for any contributory negligence of the person in relation to their award for treatment, care and support where a motor vehicle injury is catastrophically injured to the standard set out in the prescribed criteria for eligibility for participation in the CISS.

This clause thus provides that all people catastrophically injured in motor vehicle accidents in Western Australia have access to comparable compensation for treatment, care and support.

### **Clause 46 Section 3T amended**

This clause provides for reference to be made to the Motor Vehicle (Catastrophic Injuries) Act and Fund in the section of the *Motor Vehicle (Third Party Insurance) Act 1943* that deals with premiums.

### **Clause 47 Section 4 amended**

Subclause (8) in section four relates to the granting or renewal of motor vehicle licences.

The *Motor Vehicle (Third Party Insurance) Act 1943* currently requires that the policy of insurance is incorporated in the licence document.

The amendment provides that the grant or renewal of the licence is to be taken to constitute the issuance of a policy of insurance, which includes the catastrophic injury component provided for in the proposed amendment in clause 50 of this Bill.

The effect of this amendment is that the licence document is simplified and will incorporate a 'plain English' statement approved by the Insurance Commission that explains the policy of insurance.

**Clause 48 Section 6 amended**

Section 6 of the *Motor Vehicle (Third Party Insurance) Act 1943* deals with requirements regarding the issuance of policies of insurance under the Act.

The amendment proposed to subclause (1)(c) removes the words 'a form substantially similar to that' to shorten the subclause to read 'be in the form contained in the schedule'.

This is in conjunction with the replacement section 4(8) that includes a provision for a 'plain English' statement on the licence document that explains the effect of a policy of insurance under the Act.

**Clause 49 Section 6A inserted**

This clause provides that a policy of insurance complying with the *Motor Vehicle (Third Party Insurance) Act 1943* also insures any person against the risk of suffering a catastrophic injury that results from an accident involving the vehicle mentioned in the policy.

The additional insurance referred to in this clause extends only to the payment of assessed necessary and reasonable treatment, care and support expenses under the CISS.

**Clause 50 Section 21 replaced**

This replacement clause is consequential to the clause replacing section 4(8) of the *Motor Vehicle (Third Party Insurance) Act 1943*.

It deals with the term of the policy of insurance being extended in certain circumstances, and includes the expansion of the policy of insurance that provides for payments to be made under the CISS.

**Clause 51 Sections 27BA and 27C inserted**

These clauses are inserted into the *Motor Vehicle (Third Party Insurance) Act 1943* to harmonise the offences and penalties applicable to the CISS (clauses 31 and 32 of this Bill) and ensure consistency between the CTP and CISS schemes.

**27B – False or misleading information**

This clause makes it an offence, with a penalty of \$10,000, to knowingly give false or misleading information in relation to requirements under the Act, consistent with clause 31 of the Bill.

**27C – Obstruction**

This clause makes it an offence, with a penalty of \$10,000, for persons who obstruct or hinder an Insurance Commission officer or other person, in the performance of a function under the Act, consistent with clause 32 of the Bill.

**Clause 52 Section 30 replaced**

Section 30 of the *Motor Vehicle (Third Party Insurance) Act 1943* currently limits medical reviews of claimants to be conducted by medical practitioners only.

Examinations and reviews by non-medical practitioners are required by the Insurance Commission to consistently manage claims between the existing CTP scheme and the CISS scheme.

The replacement clause will extend the power of the Insurance Commission to refer claimants for examination and review by allied health practitioners such as vocational rehabilitation providers and occupational therapists.

The replacement clause defines a health professional as a person who is registered under the *Health Practitioner Regulation National Law (Western Australia)* to practise a health profession. This mirrors the meaning given in the CISS and is important to ensure equitable outcomes for claimants under the *Motor Vehicle (Third Party Insurance) Act 1943* and participants of the CISS.

**Clause 53 Section 34 replaced**

Transitional provisions for vehicle licensing before and after the commencement of the CISS are dealt with in this clause.

The effect of the transitional provisions will be that the extension of the policy regarding catastrophic injuries and the applicable premium will not apply until the commencement of the CISS.