REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

ELEVENTH REVIEW OF THE MOTOR ACCIDENTS AUTHORITY AND MOTOR ACCIDENTS COUNCIL
AND
FOURTH REVIEW OF THE LIFETIME CARE AND SUPPORT AUTHORITY AND LIFETIME CARE AND SUPPORT ADVISORY COUNCIL

At Sydney on Monday 10 October 2011

The Committee met at 9.30 a.m.

PRESENT

The Hon. D. Clarke (Chair)

The Hon. S. MacDonald
The Hon. S. Mitchell
The Hon. S. Moselmane
The Hon. P. T. Primrose
Mr D. M. Shoebridge

CHAIR: Thank you very much for attending this public hearing of the Law and Justice Committee on the Eleventh Review of the Motor Accidents Authority and Motor Accidents Council and the Fourth Review of the Lifetime Care and Support Authority and Lifetime Care and Support Advisory Council. We will be hearing from witnesses from the Law Society of New South Wales, the New South Wales Bar Association, the Australian Lawyers Alliance and the Insurance Council of Australia. We will also be hearing from representatives of the Motorcycle Council of New South Wales, the Australian Physiotherapy Association, the Children's Hospital at Westmead and the Australian Medical Association—a wide range of stakeholders.

The Law and Justice Committee has resolved to conduct the Motor Accidents Authority and the Lifetime Care and Support Authority reviews concurrently. However, because the reviews relate to different bodies, two reports will be released, one for each review, and during today's hearing witnesses will be questioned according to each review separately to ensure the distinct issues of both reviews are given adequate attention and are dealt with independently. Before we commence questions I would like to make some comments about aspects of the hearing and the way the hearing will be conducted.

First, with regard to broadcasting guidelines, the Committee has previously resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of guidelines governing the broadcast of the proceedings are available from the table by the door. In accordance with those guidelines, members of the Committee and witnesses may be filmed or recorded. However, people in the public gallery should not be the primary focus of any filming or photographs. In reporting the proceedings of this Committee the media must take responsibility for what they publish or what interpretation is placed on anything that is said before the Committee. Witnesses, members and their staff are advised that any messages should be delivered through the attendants or the Committee clerks.

I also advise that under the standing orders of the Legislative Council any documents presented to the Committee that have not yet been tabled in Parliament may not, except with the permission of the Committee, be disclosed or published by any member of such committee or by any other person. Committee hearings are not intended to provide a forum for people to make adverse reflections on others. The protection afforded to committee witnesses under parliamentary privilege should not be abused during these hearings and I therefore request witnesses to avoid the mention of other individuals unless it is absolutely essential to address the terms of reference.

I welcome our first witness, Ms Danielle De Paoli, representing the Law Society of New South Wales.

DANIELLE DE PAOLI, Member, Law Society Injury Compensation Committee, sworn and examined:

CHAIR: You are here today representing the Law Society of New South Wales?

Ms DE PAOLI: Correct.

CHAIR: You are a member of the Law Society Injury Compensation Committee?

Ms DE PAOLI: I am.

CHAIR: If you should consider at any stage that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. If you take any questions on notice the Committee would appreciate it if the response to those questions could be forwarded to the Committee secretariat within 21 days of the date on which the questions are forwarded to you. Would you like to make an opening statement?

Ms DE PAOLI: By way of introduction, I am here as a member of the Law Society Injury Compensation Committee. At the outset, the Law Society thanks you for the opportunity to give evidence here today. By way of background, the Law Society is a representative of all lawyers across New South Wales, acting for the injured people themselves and also lawyers who act for the insurance companies. I, disclosing my prejudices, work out at Parramatta in predominately a motor accident practice and represent injured people from motor vehicle accidents. So I see several injured people on a weekly basis who fall within this scheme and we deal with these issues on a daily basis.

From the Law Society's perspective there are a number of major issues which we have identified where we think amendment needs to be made to the legislation and the scheme overall. The majority of those are addressed in our submissions but, summarising them briefly, our position is that we should move away from the 10 per cent impairment threshold and to the 15 per cent for most extreme cases adopted under the Civil Liability Act; that Motor Accidents Scheme [MAS] assessors are not the appropriate people to be dealing with issues as to causation as it is more of a legal issue. The third issue is an opportunity for claimants to opt out of the Lifetime Care and Support Scheme. Fourthly, late claims seem to be an ongoing problem in terms of the Motor Accidents Scheme and proceedings for a special assessment through the Claims Assessment and Resolution Service [CARS]. Finally, the need to review the cost regulations and the impact they have on injured claimants and, ultimately, the effect on the scheme.

The Hon. PETER PRIMROSE: During the Committee's tenth review the Motor Accidents Authority advised that an independent competition review of the scheme was being undertaken. The Committee recommended that this review include consultation with stakeholders such as the Law Society of New South Wales. Your submission states that the authority did not consult with the association on this matter. There are two things: What do you think of this process and, secondly, what would you have told the independent consultant?

Ms DE PAOLI: As far as my understanding is, the Law Society was not consulted as part of this process. With regards to competition, it is obviously a difficult area. I would be inclined to say that insurers are not likely to compete against each other to a great extent, as to who wants to write the cheapest premium in terms of the risks that they are going to be faced with. My experience is that of the competition and it is mainly dealing with the claims issues and managing the process and whatnot. Without wanting to defer the question, I think it is probably something that is better deal with by the Bar Association later on. It is not within my area of expertise.

The Hon. SCOT MacDONALD: From my reading, your submission has a couple of common elements with a few of the others—I forget who they were. Just on the costs, one of the refrains was that

there is minimal or about $1,600 that comes out of the insurance and then anything above that has to be met by the claimant. The point is made that there is minimal insurance cover for those initial costs and anything above that—I think it might be $1,600, is it?

Ms DE PAOLI: I think the reference is with regard to the MAS processes, that you are allowed up to a maximum of $1,600, from memory, regardless of how many times the matter may be referred back to the MAS.

The Hon. SCOT MacDONALD: After that, any other costs above that come out of the claimant's pool. I do not see any suggestion beyond the obvious that it should come out of the insurance pool. Has the Law Society got any methodology in mind for meeting some of those costs—the ongoing legal costs above that cap?

Ms DE PAOLI: If I could give an example, which is probably the best way to illustrate it. A person may need to go to the MAS for an assessment of whole person impairment. So whether they are over or under the 10 per cent threshold they would get a determination from the MAS assessor. That MAS assessment could be incorrect with regard to causation or a variety of other issues, so that is then reviewed. Following the review, if new evidence comes to hand we can then go back for a further application, and so the process continues. The $1,600 would potentially cover no more than that first application. So the reviews and the subsequent applications are just not paid for through the scheme and they are borne by the claimant. In terms of making it fairer, there should be a set figure for each individual application that is made and not a figure regardless of how many times a matter needs to go back to MAS.

The Hon. SCOT MacDONALD: My point is that concern comes up in a few submissions but no-one seems to come up with anything more definitive than that, whether it be an actual cost or a percentage or a time limit or anything. I see the problem but I just do not quite see the answer.

Ms DE PAOLI: I think the answer is changing the regulation so that the costs are reflective of the actual task that is being undertaken—I do not know that time limits are going to be relevant in this particular example—but each time that an application needs to be made to MAS that there is a set figure for that individual application and then a set figure for any subsequent applications that need to be made.

The Hon. SCOT MacDONALD: I am asking, Chair, if it is possible to ask the Law Society to come back with something with a bit more meat on the bone. Is that a fair thing to ask?

Ms DE PAOLI: I am happy to take that on notice.

The Hon. SARAH MITCHELL: I just wanted to ask a question in relation to something you touched on in your opening remarks to the Committee in relation to the 10 per cent whole person impairment. I was wondering if you could explain the rationale behind the proposal to replace the 10 per cent whole person impairment threshold with the threshold set by the Civil Liability Act and perhaps tell us a bit about what the ramifications might be of such a change.

Ms DE PAOLI: I am unsure as to how much information each of you has in terms of the scheme, so apologies if I am bringing it down a level for you. The process itself is a person is injured, they are assessed by their own doctors; they are then assessed by the insurance company's doctors and then if there is no agreement as to whether the person is over the threshold or otherwise they head off to MAS for medical assessment. The MAS doctor is determining this person's entitlement to non-economic loss—the compensation for their pain and suffering—and it is an arbitrary threshold if it is greater than 10 per cent, based on the AMA guidelines, as they have been amended by the motor accident guidelines. The effect is essentially that 90 per cent of claimants who have a claim are prevented from claiming compensation for pain and suffering because of this 10 per cent threshold.

There are people out there who are falling between that 7 to 10 per cent threshold who are seriously injured, who are not able to return to their pre-injury employment, whose lives are affected and

their lives are in serious upheaval, and they are not entitled to anything for this particular head of damage. To receive zero dollars from a motor accident perspective as it stands at the moment is, in my view, completely unjust, and it is difficult to explain to somebody who is out there paying their premiums that they are just not entitled to anything for their pain and suffering because they do not get over this arbitrary threshold. The Civil Liability Act for the most extreme case, while the person may not be entitled to as much compensation for pain and suffering, it is using this particular threshold and it is actually spreading it out a little bit more broadly to more claimants so they are able to receive something for their pain and suffering as opposed to the vast majority not receiving anything.

There were some figures and I am not entirely sure where they have come from exactly but I think it is from the 1995 amendments where if people were to be assessed under the threshold of 15 per cent of the most extreme case, 40 to 50 per cent of claimants would actually be entitled to something for their pain and suffering, whereas compared to at the moment it is only 10 per cent of those who are making a claim.

CHAIR: What level of profit does the Law Society consider appropriate for insurance companies to earn from the Compulsory Third Party scheme?

Ms DE PAOLI: The Law Society's position is that they have no issue with the eight per cent profit margin that the Motor Accidents Authority allows under the scheme. What the Law Society does have an issue with is the super profits that are being made and the disparity and the gap between the premiums that are being written versus the ultimate outcome of the profits. So in terms of the appropriate percentage figure, the eight per cent is something that the Law Society would consider appropriate.

CHAIR: You talk about super profits. Would you elaborate on that?

Ms DE PAOLI: So far as to say that the profits that are being made are up to three times what the allowable eight percentage is and those super profits or those excessive profits in my view are not being directed to those injured people but rather are pure profits for the insurance company. I understand that my colleague Mr Stone on behalf of the Bar Association will be elaborating more on the profit issue.

CHAIR: Over what period of time have these more than three times the amount of eight per cent been—

Ms DE PAOLI: In terms of more than three times I cannot tell you exactly over what period but I can state that it is my understanding that the profits have been consistent over the past 11 odd years that the scheme has been in place. It is not a one or two-year issue, it has been a consistent issue.

CHAIR: Can you see any explanation for that?

Ms DE PAOLI: Other than the premiums are too high, no. The Law Society's view is that while the premiums may be higher and the profits are being made, those profits should be better redirected into compensation for those that are actually injured rather than any discounting in premiums themselves. But the profits that are being made should be redirected to the actual injured people.

CHAIR: Could you elaborate on the Law Society's view that the Medical Assessment Service assessors are not the appropriate persons to determine issues of causation?

Ms DE PAOLI: Certainly. To put it quite simply, and it is often best illustrated in an example, but the majority of Medical Assessment Service doctors are simply getting it wrong. They do not understand the legal causation issues. There are medical causation issues which I accept, but there are also complicated legal causation issues. As an example: I have a client who has fractured his leg. He has an altered gait, he has had to have surgery. That in itself is not putting him over the 10 per cent threshold. That altered gait is causing lower back injuries. Medical Assessment Service doctors are considering that that lower back injury is not related to the motor accident because he sustained a fractured leg in the

motor accident. Common sense and a legal causation test would tell you that that back injury is actually related to the motor vehicle accident but doctors are not saying that it is.

The other issue that arises is that for this same chap who has fractured his leg, he may have been wheelchair bound or on crutches for a period of time, not able to walk, and because there have not been any contemporaneous complaints of a lower back injury initially, because the bigger issue was the fractured leg, the lack of contemporaneous records would lead a doctor to say that there is actually no back injury and so it is not causally related. It is the Law Society's position that these issues are best dealt with by Claims Assessment and Resolution Service assessors and not by doctors.

CHAIR: That is a pretty broad statement to say that most doctors are getting it wrong, is it not?

Ms DE PAOLI: It is a broad statement but my experience has been that the vast majority of doctors—some doctors do it get it right and it is not all doctors but there are doctors who just do not understand the complicated causation issues.

The Hon. SCOT MacDONALD: Again an issue that crops up time and time again is the time and the delay. I think when I read your submission a question came to my mind whether they should be compelled to report at a monthly basis or two monthly basis or six monthly basis or whatever. Do we need more frequent, relevant reporting requirements to move those things along to get over this delay problem?

Ms DE PAOLI: I am not entirely sure I understand exactly the issue that you are talking about in terms of the delay.

The Hon. SCOT MacDONALD: I think it was delay in just getting that assessment.

Ms DE PAOLI: From the Medical Assessment Service, okay. Again as another example: We prepared an application for the Medical Assessment Service back in February for a person's injuries to be assessed at greater than 10 per cent and just last week we received details of that appointment. So we are looking at six to seven months just waiting for medical appointments to be arranged by the Medical Assessment Service. It is nothing that either the insurer or we could do; it is purely bureaucracy and delays within the Medical Assessment Service itself. One of the benefits if we were to move away from this 10 per cent threshold and into a 15 per cent of a most extreme case is that there would be no need for the Medical Assessment Service and so that delay would be abolished, it would go away by itself.

The Hon. SARAH MITCHELL: The six to seven months, do you find that is an average?

Ms DE PAOLI: That is a bit of an extreme. The average is at least four to five. We are waiting usually four to five months for medical assessment to be arranged. Then obviously the appointment is a month or so later. So that entire process can take at least six months.

CHAIR: The Motor Accidents Compensation Regulation 2005 was to have been repealed on 1 September this year but has been extended for 12 months. Did the Law Society contribute to a working party looking at the regulation and, from the Law Society's perspective, what are the main issues in modernising the regulation?

Ms DE PAOLI: My understanding is there have been two working parties in terms of the cost regulations. The Act was rewritten back in 2007 to impose greater administrative changes to the scheme. At the time that those changes were introduced we had been told that there would be changes made to the cost regulations. The predominant issue with the cost regulations is that for all claims made after 1 October 2008 we are required to have a compulsory settlement conference, a section 89A settlement conference.

What we are required to do in preparation for that settlement conference is to have all the documentation available prior to that conference—so copies of submissions, all of our medical evidence,

our schedule of damages. So the entirety of what the claimant intends to rely upon needs to be available at the time of this section 89A conference. The biggest issue is that the system is now front-end loaded and the cost regulations do not reflect the front-end loading of the system in itself. One of the main challenges is going to be amending the regulations so that they actually reflect that the nature of the work that is done is done at the beginning and not at the end when it comes time for a Claims Assessment and Resolution Service assessment.

The other issue that arises in terms of the 89A conference is that at no time is a claim stagnant. A person's injuries may deteriorate, they may lose their job, they may find a new job, there may be an increase in their wages, family situations change. The 89A conference itself, if it is taken in its true context, you cannot amend any of your material. So what you rely upon at that 89A conference cannot be changed later on as the situation changes as you move forward to the Claims Assessment and Resolution Service assessment.

CHAIR: You are saying that inability to amend is a major problem?

Ms DE PAOLI: I say it is obviously secondary to the cost issues, but it is an issue.

The Hon. PETER PRIMROSE: If I can just now go to the lifetime care and support scheme. I refer to page 11 of your submission. In relation to the Lifetime Care and Support Authority, your submission states the Law Society's strong support for a provision that would allow participants to opt out of the scheme subject to appropriate safeguards being put into place, including legal advice. What other safeguards do you foresee would be necessary for an opt-out provision?

Ms DE PAOLI: Two issues. The first is that a person who is opting out of the scheme should have mental capacity and be able to manage the funds themselves and understand the ramifications of the decision that they are making. So a minor, a person under the age of 18, or someone who has sustained a serious brain injury clearly cannot understand the ramifications of their decision and so that is a safeguard we need to protect the vulnerable people in our society and that is something that should be in place. The other issue as well is making sure that the people that are making the decision are making the decision for the right reasons and how this is done I do not know that I can offer the answer, but the lifetime care scheme is another organisation where a person is going cap in hand asking for something time and time again. A person wanting to opt out of the scheme should not necessarily opt out because they are sick of dealing with the bureaucracy and sick of going cap in hand asking for something. So there needs to be appropriate safeguards put in place that they are making a sensible decision in terms of opting out.

The Hon. SCOT MacDONALD: Can I ask a supplementary question to what Peter asked there. I was pretty interested to read about the opt-out or the exit and a few of them have commented on that. Do you have personal experience or professional experience of people wanting to opt out? Can you give me some real life examples, without the names?

Ms DE PAOLI: Absolutely. The classic example is people who are quadriplegics. They are in the scheme, they have their full capacity to understand the decisions that they are making. They have not sustained brain injuries and they are capable of looking after themselves. If a person wants to go in and they are playing basketball, for example, and they need a special chair to play basketball, having to go back to the authority and asking for this specialised wheelchair where they are likely to say no because they already have their existing wheelchair that they are using on a daily basis, it does not afford them the independence that they rightly deserve and that they rightly want. A particular client of mine is loath at the thought of having to go back to the authority time and time again for the rest of his life where he is capable of making decisions of his own accord and, secondly, he has the mental capacity and fortitude to be able to manage his own life and move on it with it. They are not wanting to have their family life impacted because they cannot do various activities. It happens all the time.

The other issue as well with the lifetime care scheme, another client of mine is in a slightly different situation. He also suffers from a pre-existing psychological injury of bipolar disorder. He is a member of the lifetime care scheme. It is currently to be determined at the moment whether he becomes

a lifetime participant or whether he is out following that initial two-year period. During the initial two years he has received absolutely no assistance from the authority at all. Whether it is because of his not wanting to be part of it and not wanting treatment is one issue. But he has a brain injury, he cannot make these decisions for himself and it is obviously complicated by the bipolar disorder as well. So there are people who are certainly falling through the gaps in the lifetime care scheme where they would be better off managing the money themselves.

CHAIR: You talk about an opt-out scheme. How would you see that working? Who at the end of the day would be making the decision? Someone is going to have to make the decision. What would you foresee in that regard?

Ms DE PAOLI: In terms of who makes the decision to opt out of the scheme? It should be an application made by the individual themselves.

CHAIR: That is who the application is made by, but who would decide?

Ms DE PAOLI: I think that is probably best taken on notice so that I can seek some counsel from the rest of the committee.

CHAIR: Is it something that the Law Society has considered?

Ms DE PAOLI: Certainly in my discussions with the Law Society we have not considered an alternative as to who the appropriate person or organisation is that okays the opting out.

CHAIR: So you will take that on notice?

Ms DE PAOLI: I will.

The Hon. SCOT MacDONALD: Again I suppose supplementary to that, I think you mentioned at the start of it all the legal advice, but surely one of the most important things would be the financial advice because you would be getting the lump sum payout, would you not, so you would need some pretty good number crunching to say that that amount of dollars is going to serve me for the next 30 or 40 years at a discounted rate of whatever somebody calculates it to be. You have healthcare costs arising at six or eight per cent, et cetera. So I understand the legal requirements to get it properly, but to my mind the financial advice would probably be just as or more important.

Ms DE PAOLI: Certainly.

The Hon. SARAH MITCHELL: It would be interesting to hear if you can report back with the views of other members of your committee, but my understanding of the point you were trying to make was that at the moment there is no mechanism at all and that you would like it to be something that was considered to opt out even if the details are not yet proposed.

Ms DE PAOLI: Correct. There is no mechanism at all at the moment.

The Hon. PETER PRIMROSE: I have got a specific question but I would like to ask just following on from this: This sounds remarkably similar to the debates going on in the disability sector generally about personalised funding and the need between the concept that people were simply given a lump sum as opposed to what you are talking about at the moment where individuals have to go cap in hand to a large authority asking for things, as opposed to the middle ground which is trying to get the best of all possible worlds by guaranteeing funding for that person but allowing them to make decisions about how the funding goes. Has the Law Society thought about or been engaged in that personalised funding debate at all?

Ms DE PAOLI: As far as I am aware, no. I assume you are alluding to a periodic payment so they can manage those funds themselves. It is not something the society has considered at this stage and I

certainly have not been involved in those discussions if it has. Again, that is something we can take on notice and provide some further submissions.

The Hon. PETER PRIMROSE: In the Committee's third review, the Lifetime Care and Support Authority advised that it was in the process of developing guidelines to allow participants to receive periodic payments. What is your view of periodic payments for self-management as distinct from a lump sum payment? I know we have just addressed that in part. Do you think that either of those strikes the right note?

Ms DE PAOLI: If there is no provision for a person to opt out of the scheme in its entirety, a periodic payment whereby a person can manage the funds themselves over a 12-month period does provide some independence. Again, I will take that on notice and see what the Law Society considers is the appropriate thinking. To my thinking it goes some way to allowing independence for that individual over a 12-month or longer period.

CHAIR: I refer to the review of decision and dispute resolution. Your submission expresses concern that there is no avenue for external review of Lifetime Care and Support Authority decisions and argues that the independent tribunal established by the authority is not truly independent. You state that this is especially concerning given the vulnerability of scheme participants. Can you propose an appropriate and efficient alternative model?

Ms DE PAOLI: Without wanting to sound repetitive, the alternative model is not something that the society has considered and formed a position on so perhaps that can be taken no notice and further information provided in due course.

CHAIR: The society is raising this issue but there need to be some alternatives. It does not take it very far to say it is not working and then not put forward some alternatives. Would you agree with that?

Ms DE PAOLI: I agree.

CHAIR: The Committee is considering whether our review of the scheme should be conducted biennially. What do you think of that idea?

Ms DE PAOLI: My view, and the society's view, is that the scheme is still relatively in its infancy. The Lifetime Care Scheme has been around for less than five years and the Motor Accidents Scheme for 11 years, so in the grand scheme of things they have not been around for a long time. There are also sufficient issues being raised frequently that warrant this review being conducted on an annual basis and not biennially.

CHAIR: What sorts of matters?

Ms DE PAOLI: Late claims issues that the Australian Lawyers Alliance has raised in its position paper, which the Law Society has also raised. There are ongoing changes to schemes that are now starting to have ramifications, such as the section 89A settlement conferences, which are compulsory. The three-year limitation is now falling due as they commenced in 2008. While these changes are constantly being introduced by the authority we need to be able to review them and see how they affect people practically two to three years down the track, which is when their true effect comes into play.

CHAIR: Are you saying some of the issues and problems are only now starting to manifest themselves?

Ms DE PAOLI: Absolutely correct.

CHAIR: Therefore, we should be keeping this under annual review?

Ms DE PAOLI: That is correct.

The Hon. SARAH MITCHELL: In relation to entry into the scheme you were saying that basically the consent of the injured is not required. How does that fit with the earlier comments that if they are impaired they may not be able to make the right decisions to exit? Is there some potential ramification if they have the opportunity to decide whether they want to be involved or not? They might be affected in such a way that they choose not to be involved when in fact they probably should be.

Ms DE PAOLI: You are automatically in the scheme so once you are in hospital and have sustained a brain injury and are a quadriplegic or paraplegic the hospital completes the paperwork, and if not the hospital the insurers, to get you into the scheme. At that time, when a person's life has been thrown into chaos and turmoil, I do not know that they should be opting in and out of the scheme. They have not had the opportunity to obtain legal advice. This is the first time these people have been thrown into a situation where they need assistance. I do not know that I can speak on behalf of the Law Society because it is not something that has been discussed but I do not think opting into the scheme would work because at this crucial time in a person's life they need all the assistance they can get and to have their treatment paid for and not have to worry about who is funding what.

The Hon. SARAH MITCHELL: On page 11 of your submission you say the committee believes their consent must be obtained before they are forced into a scheme from which they may never be able to exit. I wonder about the context of that.

Ms DE PAOLI: I will take that on notice. It is slightly contrary to my understanding.

The Hon. PETER PRIMROSE: Could you comment on the issue of the right of appeal to an independent body based on the merits of an authority decision? Do you believe there is an appropriate mechanism at the moment that gives an independent right of appeal or do you believe that something else needs to happen?

Ms DE PAOLI: My understanding is there is no independent right of appeal. A person in the Lifetime Care and Support Scheme is able to challenge that but the challenge is made to a panel of doctors who are essentially employed by a contractor to the authority, so it is not by any means an independent panel.

CHAIR: What is your view of that situation?

Ms DE PAOLI: My view is that from an injured person's perspective they should be able to go somewhere else. If they do not accept the decision made by the authority they should be able to take it somewhere else where they will get an independent viewpoint as to whether they fit into the scheme or otherwise.

CHAIR: Is this something the society has considered?

Ms DE PAOLI: Considered but not come up with an alternative, which I suspect is the next question. I will take that on notice and come up with an alternative to satisfy you.

CHAIR: Would you like to make any further comments?

Ms DE PAOLI: Just that the Committee consider the recommendations made and seek its own independent review of the system and not something done by the Motor Accident Authority itself.

CHAIR: On the whole are your members happy with the way the scheme has been working?

Ms DE PAOLI: I do not know that I can speak on behalf of the entirety of the members but the Claims Assessment Resolution Service system is workable and the society is happy with those matters that remain within the resolution service. Some tweaking is required, for example with late claims issues. Overall it works.

CHAIR: So on the whole your members are quite content with the way the scheme is going?

Ms DE PAOLI: Aside from the issues we have raised with regard to the Motor Accident Scheme and some minor tweaking, yes.

CHAIR: We would be grateful if you would respond to the questions you have taken on notice within 21 days. We may have further questions and we ask that you respond to those within 21 days of receiving them. Thank you for coming today. You have been most helpful to our deliberations.

(The witness withdrew)

ALASTAIR JOHN McCONNACHIE, Deputy Executive Director, New South Wales Bar Association, and

ANDREW JOHN STONE, barrister, member of the Common Law Committee, New South Wales Bar Association, affirmed and examined:

CHAIR: I welcome the witnesses from the New South Wales Bar Association. Both of you have had a strong commitment to this whole issue and have taken a great interest in it and over the years that has been very helpful to the deliberations of our Committee. The aim of the inquiry is to work through the terms of reference. Committee hearings are not intended to provide a forum for people to make adverse reflections about others. These are things you are well aware of. If either of you considers at any stage that certain evidence you may wish to give or documents you may wish to tender should be heard or seen only by the Committee please indicate that fact and the Committee will consider your request. If you take any questions on notice the Committee would appreciate the response to those questions being forwarded to the Committee secretariat within 21 days of the date upon which they are received. Would either or both of you like to make an opening statement?

Mr STONE: I will make a brief opening statement and, unusually for us, I have written some of it down. Firstly, we thank you for the opportunity to be here. The Bar Association enjoys the opportunity to talk about the Motor Accidents Scheme and to interact with those responsible for it. Secondly, because the membership of this Committee is largely new we are conscious that there is no doubt a learning curve for you as there continues to be a learning curve for us.

Whilst the social utility of driving motor vehicles is unarguable, so too is the fact of the social cost that comes with it. Part of that social cost is paid by the innocent victims of those accidents; they pay it with broken limbs, psychological scars and loss of life. The price we as a society extract from others for the right to let us drive to work, drive the kids to school and drive on holidays is paid for by others with their lives and limbs. The reason we have a Motor Accidents Scheme is to ensure fair and proper compensation for those who pay that social price, usually through no choice of their own. It can be easy sitting here in a room engaged in academic debate to forget what this scheme is all about. It is about trying to help fix as best we can the lives of those who can no longer walk in comfort, pick up a child, carry out a day's work or enjoy retirement with a much-loved spouse.

As the Committee engages in its deliberations the Bar Association urges the Committee to bear in mind that this is all about trying to compensate those whose lives have been torn apart as they pay the social cost of motor vehicle accidents. Those people are my clients. I sit with them day in, day out talking about their lives and the effect this has had upon them. For me this is very real. I appreciate your request at the outset, Mr Chairman, to avoid talking about individuals and I certainly accept and understand that, but you will see that the Bar Association submission this year has largely focused on the Medical Assessment Service process and we have given you a series of case studies. They are real people suffering from exactly the issues we raise in the submissions. How can we help?

CHAIR: Mr McConnachie, would you like to comment?

Mr McCONNACHIE: I have nothing to add at this point.

The Hon. PETER PRIMROSE: During the Committee's tenth review the Motor Accidents Authority advised that an independent competition review of the scheme was being undertaken. The Committee recommended that this review include consultation with the stakeholders, such as the Bar Association. Your submission states that they did not consult with the association on this issue. What do you think of this process and, secondly, what would you have told the independent consultant?

Mr STONE: In short—two questions; two answers. One, it is very hard to comment on the workings of a process you were not invited to participate in. I think one of the points we would have raised, and perhaps this is a useful point for the Committee to understand, is that the free market does

not work very well in the Motor Accidents Scheme. The free market is driven by the competitive urge to have a lower price, outdo your competitors and gain market share. But, by and large, the compulsory third-party insurers do not want to have the lowest price. That is a major barrier to the operation of a free-market. If you have the lowest price you attract those who buy the policy purely on the basis of the compulsory third-party price. If you can bundle it up with other insurance products, such as comprehensive insurance, you will get drivers who are comprehensively insured. If you are an insurer you like drivers who are comprehensively insured because they are generally older and they generally have newer and safer cars and they do not have as bad a driving record.

What you really do not want is the 17 and 18-year-olds in the 10 or 15-year-old cars. If insurers could write a product that allows them to have none of those buying from them, they would all do it, because they are by far the worst risk. So, there is a fundamental flaw in the competitive model. One of the things that I would hope this competition review will look at is how to address that issue, that none of them particularly want to seriously outbid the others on price, because you do not want the customers who buy solely on the basis of price. It is a real challenge to free-market economics.

CHAIR: How would you respond to that challenge? What would you suggest?

Mr STONE: That is a question for an actuary or an economist, and I do not pretend to be either. I have been hanging around this scheme long enough that I understand where the problems are. The reason there is a review is presumably to look at and address questions like that one. For all I have learned about the operation of the scheme, I do not have easy answers.

The Hon. PETER PRIMROSE: If you do not have an easy answer to an alternative model, can you possibly elaborate on the consequences of the current model?

Mr STONE: That is an issue I would have raised with the competition review on the basis that you are the competition experts, you tell us. I suspect this is a question better asked of the Motor Accidents Authority: Is what I am saying right, and I think it is, and, secondly, what are you doing about it? I do not know the answer about what it is doing about it.

The Hon. PETER PRIMROSE: No, my question was, what is the consequence for those people in the case studies that you have given us and for drivers generally?

Mr STONE: That is a different issue, and, sorry, I had not appreciated the switch in topic. At the moment we are talking about the broad competitiveness of premium setting. The case studies are all about the operation of the Medical Assessment Service within that. We are giving 10 per cent of people in this state compensation for pain and suffering; 90 per cent of people injured in a motor vehicle accident get nothing for pain and suffering. They were the case studies we raised to look at some of the people who were missing out. I cannot look at that group of people that we gave you the case studies for and say these are people clearly unworthy of receiving compensation for their pain and suffering. Some of them had enormous pain and suffering—people who lost children in accidents.

That is a separate issue aside from the competition review about fixing the Medical Assessment Service. Our primary position is that you abolish the Medical Assessment Service and you return to awarding compensation as a percentage of the most extreme case, as currently happens if you are negligently injured in some other way and your claim falls under the Civil Liability Act. It is the motor accident regime rather than the civil liability regime that dramatically reduces compensation for pain and suffering. You do not get mothers who lose children in civil liability claims who get told you are not upset enough to qualify under the nervous shock provisions of the motor accident regime.

CHAIR: Was there a second point?

Mr STONE: There was, and that was to say this. Again, a question for the competition review is why is there this gap between projection and reality? I think you will come to talk on profits and if I can briefly address that issue now. The Bar Association does not have an issue with a premium being written

that projects an 8 per cent return on investment. We have no issue with that whatsoever. That is all the Motor Accidents Authority ever seems prepared to talk about: The insurers write a premium and we give it a tick when they file it and they are meant to make 8 per cent. But, when year in year out the actual result is 25 per cent, 30 per cent, once that year matures and develops, something has gone wrong somewhere between stage A, approval of the premium, and stage B, what actually happens. What really matters to people is what happens, not the theory of the setting of it. That is what the injured people care about, and they see 25 to 30 per cent of the premium going back to the insurers and 90 per cent of them missing out on compensation for pain and suffering. I would have been saying to the competition review, why is this consistently happening?

There are a number of reasons you can look at. One is, if accident numbers fall insurers will make higher profits. We can accept that, because they bear the risk that if accident numbers go up they make less profit. There are also suspicions—and they rise no higher than suspicions—that the prudential margins being allowed for in the filings are overestimates. The prudential margin is basically a contingency allowance for what might go wrong. Again, this is more an issue for the Motor Accidents Authority and its actuaries to address and explain why is it when we write a premium that says you will make 8 per cent return on it and the reality turns out to be 25 or 30 per cent, why does that happen? I am a lawyer, not an actuary or an accountant or an economist but what deeply distresses us is that the Motor Accidents Authority does not give you any answers as to why this happens.

Look through the 100-plus pages of its annual report and try to find a single paragraph that says why this happened. What is our analysis, what are we now doing differently to make sure it does not happen again? Surely that is what responsible advice to government is, addressing the reality, not saying do not worry about it anymore, we know that has happened in the past—although it does not even say that—but it is all right now because we know we have the current year right. When you get a bit further on it turns out that year was not right either and it is just a one-way trend. That would have been the second issue for the competition review, why is there this persistent and one-sided gap between the projections of what profits will be and the reality of what profits turn out to be.

CHAIR: You have given one possible reason for this gap. What other reasons come to mind?

Mr STONE: I do not suspect there is just one reason. These are complex, it will be multifaceted. I have identified falling accident numbers as one potential factor. Another you put into the mix is investment returns and interest rates going up and down. Another one—and what we say is the significant one—prudential allowances are made for the scheme, in effect, being more generous than the insurers anticipate, and it has consistently turned out to be just as mean as we think it is. So, is too large an allowance being made for contingencies and what other factors, I do not know, but I would like the Motor Accidents Authority to explain.

You have to understand that the premiums filed are commercial in confidence, it is not like I have ever seen them. I do not know what the insurers are saying when they are putting in their premiums and I do not see what the Motor Accidents Authority says when it ticks them off. I do not see the advice the Motor Accidents Authority gets from its own professional actuaries saying, yes, these projections are good and they should return only 8 per cent profit. Nor do I see the discussions that take place between the Motor Accidents Authority and its actuaries three or four years later saying, "we got that one wrong, why? Was it entirely factors out of our control or were there factors within our control from which we could learn?"

In response to your questions on notice, I drafted out a series of additional questions you might like to ask the Motor Accidents Authority when you hear from it on this topic. I will tender this, if I may, at the conclusion. It starts with the first question being: Where in the last annual report is there any analysis of why insurers have made such high returns above and beyond projected profits between 2000 and 2006? We think that is a really good question. It finishes five or six questions later with the question you just asked me: What are the reasons for it? That is for the Motor Accidents Authority to explain, not for us to try to speculate as to the reasons why. There are limits to what a group of lawyers can tell you, although they will never admit that.

CHAIR: But it is a reasonable question to put to you. You are complaining about these high levels and it is an issue you would have considered, so it is appropriate to get your response as to the reasons you consider for that position.

Mr STONE: I am happy to try to answer, and I keep asking the same questions of the Motor Accidents Authority. I never really got a breakdown. It should be possible now to go back to the first two years and say for year one we set the premium at 8 per cent, they made more than 30 per cent, where did that extra 22 percentage points come from? We can attribute X percentage to a fall in accident numbers. We can attribute Y percentage to excess of prudential margins. We can attribute Z percentage to any other factors. That is the sort of retrospective analysis you would not only expect the Motor Accidents Authority can do, but that it would do. How else does it learn where the premium-setting process misfired or not? I have never seen that sort of analysis from it that says now that year one is almost complete, 99 per cent complete, and it was 22 percentage points out; 8 per cent became over 30 per cent profit. It has never presented an analysis as to why.

CHAIR: Do you consider 8 per cent a reasonable figure?

Mr STONE: I do not have a problem with that, if only it ever happened.

The Hon. SCOT MacDONALD: Can I flesh that out a little bit more? Of all the submissions, yours seems to be the most forthright about insurers' profits. It puzzles me a bit. Is this about insurers' profits or is it about the integrity of the scheme? I am curious why the Bar Association thinks it is such an important issue. Do you think it affects the integrity of the scheme or the care given to the clients? I see the issue. We were looking at 18 per cent and more and that sort of thing, but is it a function of government to try to set the profits of companies, if you like? I get the minimum bit. I get the 8 per cent, and some people think 15 per cent. Are there issues we can deal with? Are there barriers for entry to the market for insurers that we can be addressing? Are there prudential margins, as you mentioned, that we should be looking at? I would think our role might be more saying we have to look at this a bit like the banking oversight where you have a statutory reserve deposit or reserve set of accounts that covers the scheme, because as we all talked about the number of accidents and all those other factors go up and down. I think the Minister put out a press release today concerned about the number of road accidents going up again. I guess these things go up and down. I don't understand why the association or this Committee should be concerned about that profit level?

CHAIR: To add to what the Hon. Scot MacDonald said, could one response be that it is because you feel what you consider to be this high rate in excess of 8 per cent manifests itself in underpayment of benefits or it manifests itself in overpayment of compulsory third-party fees?

Mr STONE: The chair largely predicts my answer. To be blunt, I do not care how much insurers make. Good luck to them and their shareholders. I care for two reasons. First of all, going back to 1999, we were told we had to take compensation for pain and suffering away from, effectively, 30 per cent to 40 per cent of those injured in motor accidents who were receiving compensation for that, to keep green slip prices down. In other words, these profits have come off the back of the injured, and that concerns me. Secondly, it concerns me because when we say to the Motor Accidents Authority, with all these profits we can afford some scheme redesign to give some benefits back to the injured. It says no, you must look at the current year and in the current year the insurers are slated to make no money. If we do anything to return benefits to the injured now it will put the scheme out of kilter.

The reason we go through all the profit details is, in effect, to say you cannot trust the current year's figures because historically the current year's figures showing minimal profit have over time turned into substantial profits. In other words, the initial year's predictions are out, badly out, and are always out in the same direction, namely, to show the scheme working when, historically, when you look at the trends, it is not working. That is why I care, because I want to try to get some of these profits back to people who are missing out on compensation for pain and suffering. You cannot do it retrospectively, there is nothing we can do to claw it back, they took the risk and they got the money. But what I want to

do is not have the Motor Accidents Authority coming forward and saying there is nothing we can do, our hands are tied, the scheme is only just in balance at the moment, it is in grave danger of you putting it out of balance. That is why I care and that is why we care.

The Hon. SARAH MITCHELL: My questions relate to the single system of injury compensation which you speak about in your submission on page 7. You say there should be a unified system of compensation in which accident victims are not discriminated against on the basis of the mechanism of their injury. The three parts to my question are: Can you elaborate on how this would work? What are the ramifications for the motor accident scheme? And, following from that, what would the financial implications be of the proposal and how would it affect green slip prices?

Mr STONE: If I can deal with the first part as to how it would work, the short answer is to abolish the Medical Assessment Service and make more payments for noneconomic loss. That would be the only significant difference. I am still happy with the early claims notification, accident notification forms, even happy to keep the claims assessment and resolution service. It gives commensurable benefits without the variance between accident types. For example: if a crane drops a car on you that would be a civil liability accident; if the same car runs into you on the street that would be a motor vehicle accident. Your injuries might be identical but you will receive very different compensation depending upon that mechanism of injury. With a motor accident you have to get the 10 per cent whole person impairment threshold and that is judged by a doctor. With the civil liability claim you get to go before an arbitrator or a court and most of the time you settle it in settlement negotiations being assessed as a percentage of a most extreme case.

It is worth remembering that the assessment as a percentage of a most extreme case was how we did motor accidents between 1988 and 1999. There was some feeling that the 1988 Act was being too generous, so in 1995 there were amendments made to it which became section 79A of the Motor Accidents Act. Section 79A is exactly the same as what operates in civil liability now. We have the bizarre outcome that we have taken it away from motor accidents but said it is all right for civil liability. When we talk about unification we talk about putting it all on to section 16 of Civil Liability Act, or what was section 79A of the motor accident legislation. I notice tucked into the back of the Motor Accident Authority's answers to your questions is a response, because we have made the submission that the motor accident regime as between '95 and '99 was working, we did not need the radical '99 changes and the scheme actuaries have said so.

Apparently, according to the Motor Accidents Authority, that was a private comment at the end of a meeting taken out of context—open square brackets—and any other reasons we can think of that it might not be true without actually engaging in the substance—close square brackets. I was there, the actuaries were there, the Motor Accidents Authority was there—they put up the data. I asked a straight and square question: Between '95 and '99 was it stable operating under section 79A? The answer I got was, yes. I do not think you can be more straightforward than that. The big point behind unification is to get that part of it right. We say it has previously been affordable and we say it can still be affordable.

The Hon. SCOT MacDONALD: I wrote a note to myself when I was reading your submission about section 89A. Can you take me through that, the difficulties there? I guess I am saying I do not quite understand what you are going through there on a real life—

Mr STONE: Most people want to resolve their claims. Firstly, they want it over and done with and, secondly, they are conscious, because of the stinginess of the costs regime, that the longer the claim goes on the less they are getting out of it because you are dipping more in to the claimant's money to recover the costs. Most of the time parties will have an informal settlement conference and try to resolve the matter. Section 89A is a big stick to make you have informal settlement conferences, which most people were doing anyway. It was designed to catch the recalcitrant few who were not and there are a recalcitrant few who view the scheme as trench warfare and do not. The problem is you place a burden on the 90 percent who were playing nice to punish the five or 10 per cent who were not. That is by way of background.

What it says is: This is not just an informal settlement conference; this is a conference prior to which you have fully prepared the case. Every single document you want to take to the claims assessment and resolution service assessment you give to the insurer. They then fully prepare their case and give you every single document in reply. You then have a formal settlement conference and following that formal settlement conference you exchange offers in envelopes and there are certain penalties associated with not participating fully in the process. It is a massive amount of bureaucracy wrapped around what used to be as simple as, "Let's get together and talk settlement." It is so complex that you now have people holding pre-section 89A settlement conferences because you want to try to settle it before you have to have all the work with the section 89A conference.

Secondly—this will sound critical of the insurers and I do not blame them for it—it in effect gives them a defence. It allows them to stall the claim where they want to—not all of them want to, but some of them do—"that is not a section 89A conference, that is a pre-section 89A conference because you have not done this". Whenever you give them something that allows them to object to something, that is a stick they can use over the claimant through noncompliance with the technical provisions of section 89A.

CHAIR: Do they use that frequently?

Mr STONE: I do not know. I cannot answer that.

The Hon. SCOT MacDONALD: To me you are talking about a section in the Act, if it means improving or tidying up, that is exactly what we can do here as a committee. We can talk about a lot of issues such as profits and things like that, but you are talking about a section of the Act that could possibly be improved. Other people might have other views. I am asking the Bar Association if they want to be in the game to draft up improvements, specifically to a section of an Act. That is how I would read it.

Mr STONE: The problem is, having been to many meetings with the Motor Accidents Authority where there are these discussions about how can we make the scheme operate more efficiently, my usual plea to them is: For every statutory compliance step you put in, with everything you put in saying here is another step to be done before your case can be finished, take something else out. I will get into enormous trouble for this—it is like saying to your wife: If you want a new pair of shoes throw out an old pair of shoes. Like it never works at home, it never works with the Motor Accidents Authority either. There is always a new layer being put on but nothing taken away. Our answer is to repeal it. We can do without it. The 90 per cent who were compliant before will continue to be compliant, the 5 to 10 percent who were making a mess of it before will continue to make a mess of it. All you are doing is capturing some of the good 90 per cent in the net because this thing is so complex they are finding it difficult to comply with. Do away with it. That is very straightforward drafting.

CHAIR: I have a question relating to this whole person impairment. The Committee put forward your concerns about scarring and whole person impairment to the Motor Accidents Authority in prehearing questions on notice and the Motor Accidents Authority replied as follows:

> A subcommittee of the Motor Accident Council, on which the bar association representative participates, is reviewing cases that fall close to the WPI threshold of which it is envisaged scarring will be considered. Plastic surgeons who assess bodily scarring advise that they do take account of multiple scars as an integral part of assessing the skin as a body organ.

What is your reaction to the response from the Motor Accidents Authority?

Mr STONE: I think it is the Mandy Rice-Davies response: They would say that, wouldn't they? No. I have seen very clear cases where they are not getting skin impairment right. It is a relatively technical issue. Minor cases of scarring are assessed under AMA 4, the American Medical Association guidelines, on a discretionary basis between 1 and 10 per cent. To try to bring greater clarity to that and greater consistency, because doctors were picking different figures between 1 and 10, they developed their

own guidelines: table for the evaluation of minor skin impairment. That was meant to regulate what is a 1 per cent scar, what is a 5 per cent scar, what is a 9 per cent scar, to give consistency over that 10 per cent range. I have not got a problem with that.

That works relatively well. The problem is, if you have a 2 per cent scar, what happens if you have a second 2 per cent scar, a third 2 per cent scar and even a tenth 2 per cent scar? I have seen two cases in recent times where they have said we will just assess the worst scar and, in effect, every other scar after that does not get counted. The table for the evaluation of minor skin impairment does not cover cumulative situations. It just does not. It is a lacuna in the drafting of it. We have taken it to them and it is a problem that needs fixing.

To say the doctors are getting it right—well, we have given you two clear case studies where they did not. It would be more helpful if just for a change the Motor Accidents Authority were prepared to say: Yes, Houston here we have a problem and here is what we are doing to fix it. Instead you get back the response: No, our doctors tell us it is all working. The guidelines just do not allow it to. They are drafted to cover single scars; they are not drafted to cover multiple scars.

The Hon. PETER PRIMROSE: If I could ask a brief one about the Motor Accident Council. The Bar Association has expressed dissatisfaction with the operation of the council in previous reviews we have had. Could you tell us what your experience has been over the last 12 months with the council?

Mr STONE: I am the Bar Association representative on the Motor Accident Council and have been for close to a decade. I have to very carefully say I am not here in that capacity. I do not purport to speak for the council; I do not purport to speak for anybody else on the council. As the Bar Association representative on the council let me say that the last 12 months have been the best in the past decade. The council has engaged in better debate, it has had a more robust approach to issues, it has set up a subcommittee, it has made some recommendations—which is a historic first for it—it is a lot closer to working in the way it ought to have worked for a long time. I have to say that a good deal of that has to be credited to the chairing of it by Ms Aplin, who did a terrific job. Unfortunately, she has moved on to a permanent position at WorkCover. We have a new chair, whom I have not yet met. I hope he continues in the same spirit and vein. See, I am capable of saying nice things.

CHAIR: You say that one of the good things was the recommendations put forward. Have those recommendations been acted upon?

Mr STONE: Yes, they have been, in that they are issues that are being taken forward for further investigation. Two that spring to mind are that there is an issue about the edge of the scheme in terms of coverage of unregistered trail bikes and motocross motorbikes. That is an issue that has been the subject of considerable debate at council and debated at a wider governmental level. There is a committee out of the Cabinet office or Premier's department—there is a broader whole-of-government committee that is looking at those issues. That is being productively looked at and moved forward. A second is I took back to the council an issue I first raised years ago in relation to death benefits largely arising out of some of the case studies we gave you for parents who lose children. That is an issue they have agreed to look at further and take forward. The New South Wales Law Reform Commission will look at the issue as well. It has been more productive as being an ideas generator rather than being purely a feedback mechanism for stakeholders from the authority.

The Hon. SCOT MacDONALD: I have a couple of questions. The first one was pretty easy. I read in the submission somewhere you want us to get back to a February-March timetable.

Mr STONE: It was pointed out to me that I had perhaps been overly forthright in the suggestion. You can, of course, hold meetings whenever you like. I think we can be of maximum help to you if we are working off the recent annual report because we then have up-to-date data.

The Hon. SCOT MacDONALD: You are 18 months or so behind.

Mr STONE: We are getting the annual report tabled by the end of November and it is effectively data from mid-2010. It is not as if we are talking about the most current trends in the scheme; we just do not know them.

The Hon. SCOT MacDONALD: I asked the previous witness the question, and you raised it as well, about legal costs. It is fairly quickly capped before it falls in the lap of the client. Did you want to add to that?

Mr STONE: The only statistical evidence is a report commissioned by the Motor Accidents Authority from a group called FMRC, and it was a couple of years ago. It established that lawyers were not overcharging. There was no overcharging going on.

The Hon. SCOT MacDONALD: No super profits.

Mr STONE: No super profits for us. Secondly, it established, on average, that claimants were recovering about 40 per cent of the actual legal costs. You take any other case to court and you are likely to recover 65 per cent, 70 percent of your legal costs as party-party costs, leaving a 30 per cent solicitor-client gap. Here we are talking about a scheme that has a 60 per cent solicitor-client gap. That is just straight up the injured subsidising the operation of the scheme. I come back to my opening statement: these are not people who can afford to do that.

The Hon. SCOT MacDONALD: Did you have a specific recommendation? Again, as I think I mentioned to the previous witness, a time, a dollar figure or something like that? We need meat on the bone if we are going to consider it at all.

Mr STONE: There has been a lot of work done on that already. Admittedly, in fairness to the Motor Accidents Authority [MAA], there is one complexity to the issue of their own making. Regulations should have been ready and in place when they did the extensive amendments to the Act in 2008 and started imposing a much higher bureaucratic burden on those preparing cases, including compliance with section 89A. They were not ready. They did a year of consulting with the Law Society. The Bar Association was not a part of it, it was not invited. They got to the end of that year, had some ideas and then restarted the whole process the next year. So they spent another year consulting with the insurers and the Law Society. They have apparently come up with some ideas of what they want to do. That is apparently now within the works of government waiting to be done. It has just dragged on. Apparently there are ideas as to how to address this. We just want them to actually happen. It has been over three years since the changes were brought in in 2008 and it has just taken too long. They have just, in fact, prorogued the regulation for another 12 months. We just despair that it will ever actually happen.

The Hon. SCOT MacDONALD: Can you give me a ballpark figure, if it is possible, of the burden on the client above those caps? Would it be $10,000, $20,000, $30,000?

Mr STONE: It very much depends where the case goes to and the point at which it resolves. If you run a fully contested Claims Assessment and Resolution Service[CARS] assessment at which you have had to be through the Medical Assessment Service [MAS] two or three times, you are certainly looking at a minimum $10,000, $15,000 gap. In larger and more complex cases—where anybody is self-employed it is always more complex because you have to go through much more complex economic loss analysis—the gap could get up to $30,000, $40,000. You have Ms Gumbert from the Australian Lawyers Alliance coming up next. She is a plaintiff solicitor. She is probably better qualified to answer that question than I am.

The Hon. SARAH MITCHELL: My question relates to CARS. In your submission you mentioned that the Bar Association fully participated in the MAA review of the Claims Assessment and Resolution Service and that you presented a number of concerns to the review. Would you tell us, firstly, more about your main concerns and, secondly, update the Committee on the progress of the review and your involvement in it?

Mr STONE: Certainly. If I could take those in the reverse order, we had private meetings with the consultants they retained. We had a group meeting with the consultants with other stakeholders. We provided very detailed and lengthy written submissions, a copy of which I think was annexed to our submission to you. If not we will give them to you but I think you have them. We certainly were fully consulted and we fully engaged in the process. I gather the consultants have now given the report to the MAA. I gather they contain extensive recommendations. Apart from that, I can tell you no more about them because, as I understand the MAA's position, they will not be releasing the report until they have worked out their response to it. It was suggested to them, "We could help you work out your response." They said, "No, that is a matter for us. That is the way government works. We will work out what our response to it is and we will then release it when we have that response prepared."

Things that we hope the review addresses and that we certainly raised with them are, first of all, the late claim regime. We have built up this enormous bureaucracy about people who put in their claim form after six months having to give a full and satisfactory explanation. You might think that is a simple process but it is appallingly complex. We have ended up with a case going to the High Court about what a full and satisfactory explanation is. We have a section in the Act that defines it, yet regularly we have lengthy arguments. I have seen insurers put in 10 pages of written submissions arguing why an explanation that is four months late is not full and satisfactory. It absorbs vast amounts of costs, it absorbs vast amounts of energy and it does not work. We accept there has to be some penalty imposed on people who bring their claim late, for the reason that early claims are good. We accept that too. Early notification leads to early treatment and better health outcomes. That is fine.

But the fact is that over 95, 96 per cent of claims are lodged within that six months' time period. There is a good culture that works, but again I refer to the effort we put into that last 4 or 5 per cent—a substantial number of whom are people on workers compensation rights and do not realise that they also have a motor accident claim. We are just putting vastly disproportionate effort into it. It is an area that needs to be addressed and fixed. We have been raising that with the MAA for a while and we hope they will do something about it. In the course of the CARS review we also raised the section 89 issue and the legal costs issue and a variety of others. We generally approve of and support the CARS process but that is not to say that there are not finetuning things that can make it work better. We hope that is what comes out of this process.

The Hon. SCOT MacDONALD: If a section of an Act is not working, surely we would look forward to suggestions to tidy it up so that it does not end up in the High Court.

Mr STONE: We made what I will admit to is a relatively radical but we thought constructive alternate suggestion in the course of the CARS review on the late claim regime. You want to have an encouragement for late claims but you want it to be, first of all, cost efficient. The current system is not cost efficient, it is very cost intensive. Secondly, you want it to be proportionate. The punishment for being late should not be all or nothing. It currently is all or nothing: your claim proceeds or it does not. We put up an admittedly radical solution but one we were prepared to talk around—that is, for everybody who is over six months late put in a financial penalty which is to take 5 per cent, 10 per cent off your damages up to a capped limit, say, $10,000. That would be an incentive for solicitors to get it in and for claimants to get it in.

We do not think that will unduly impact on the cost for insurers because the reality is most late claims after an awful lot of time, expense and effort are allowed to proceed. Somebody would need to do the costings on it. To be frank, the driver for that sort of change has to come out of the authority. They are the ones who have the actuaries who can cost it and can give you the statistics on what is involved. We put suggestions like that to the authority and we hope they do something with it. We did not just come in with a whinge. We came in with "and here is what we would like you to do about it".

The Hon. SHAOQUETT MOSELMANE: I apologise for my late attendance. I have read your submission, which throughout shows a great deal of frustration and I can hear the frustration in your voice today and understandably so. On page 5.26 you say halfway through the paragraph that the association has seen examples of insurers making seemingly spurious allegations of contributory

negligence simply to generate and preserve a right to rehearing. Can you provide us with examples of that? Have you taken up this issue with any other body within the law fraternity?

Mr STONE: It is not so much a matter for any other body within the law fraternity. It is the MAA, the regulator and the insurers. I am not saying it is every insurer doing it and I am not saying it is every claims officer within every insurer doing it. In effect, you have built a perverse incentive into the scheme. A CARS assessment is binding on an insurer whether the damages are assessed at $10,000, $100,000 or $2 million. They live with the result. It is only the claimant who gets a right of rehearing. In fact, claimants very rarely exercise their right to rehearing because you have to improve by more than 20 per cent to recover any costs and the costs that you are recovering are still regulated and make it very cost ineffective. I have been practising almost exclusively in this area for the 11 years since the 1999 Act was introduced and I have not run a single rehearing from a CARS assessment.

There is one caveat to the insurer being stuck with a result, that is, if they allege contributory negligence—not if they prove it, simply if they allege it, that gets them a get-out-of-jail-free card to say, "We want this to go around again before a court". Of course, if you give them that incentive their commercial reality is, "If we can find an excuse to do it, why wouldn't we make the allegation?" It makes commercial sense for them to do so. So we get allegations of failing to instruct the driver to slow down when it is the back-seat passenger who is 15 and the driver is a licensed driver. That is the best one that springs to mind. We get allegations of failure to get out of the car when the driver is driving recklessly but they are in the middle of nowhere. Realistically, who is going to get out? I am not saying it occurs in every case. A lot of the examples are contributory negligence. The two big ones in motor accident cases are drunk drivers and people who are in cars with them and the failure to wear a seat belt. They are the two obvious ones and they are usually at least founded on blood alcohol readings and seat belts.

I am not saying by any means that all contributory negligence allegations are spurious. But there are others on the fringe where you do see some weird and wonderful allegations: for example, the bicyclist where somebody opens the car door and somehow it is the cyclist's failure to keep a proper lookout. The person crossing the pedestrian crossing, nonetheless they will throw in the 5 per cent contributory negligence for failure to keep an eye out for the car bearing down and bowling them over on the pedestrian crossing. Again, I am not saying it is universal but it happens and we know exactly why it is happening. It is because that buys you the right of rehearing that you otherwise cannot have if you do not make the allegation. It is not entirely uncommon when you challenge them—after the insurer has done this and they eventually appoint solicitors, you will say to the solicitor, "We are not going to negotiate with you if you want that contributory negligence because we think it is rubbish." At that point you are told, "No, that is not going to be an impediment to settlement negotiations"—nudge, wink.

The Hon. SHAOQUETT MOSELMANE: On page 7.40 towards the end of the paragraph you say that the Motor Accidents Scheme [MAS] could afford to scrap the 10 per cent whole person impairment [WPI] threshold gateway and reinstitute section 79 at no cost to premium. Could you explain that further? Does that take us back to square one with the 10 per cent WPI?

Mr STONE: There had been considerable discussion on that issue before you got here. If I can perhaps not repeat everything I previously said but say we would be returning to what was in place between 1995 and 1999 and produce an economically stable scheme and we would be doing what currently applies in relation to civil liability accidents—so anything that occurs from falling off a horse, a horse riding accident, to the defective waterslide and councils and unsafe whatever. It would be consistent with what has previously been the case in motor accidents and would be consistent with what is in place in civil liability claims now. We say, given the super profits that have been made, it is affordable. The size of the super profits should not be underestimated. It is projected to be about $1.5 billion over the first seven, eight years of the scheme. We somewhere said, and no-one challenges the accuracy of this, that if the insurers made not a cent of profit for the next decade profits would be even over the 20-year span of this scheme as in they would have made their 8 per cent. To get them back to where they should be you would have to take away every cent of profit for a decade. That is how good it has been for them.

The Hon. SHAOQUETT MOSELMANE: In other words, they have operated on 8 per cent but they also have obtained 5 per cent profits. So they could go on 3 per cent and still develop their institutions and businesses?

Mr STONE: Again without wanting to repeat where we have been earlier, the 8 per cent is what is projected when the premium is written. You then have to go three, four, five, six years down the track and look at what they have actually paid out and what they have actually kept. It turns out they are not keeping 8 per cent. They get to keep 30, 25, 24 per cent. It is that difference between the projection and the post-event reality.

CHAIR: Are there any further comments that you would like to make?

Mr STONE: Perhaps if I could, by way of concluding comment, say this: You asked a question of Ms De Paoli about the operation of MAS. We have given you a very considerable number of case studies in relation to MAS and where it does not work and people who it is not working for. We talked about a merry-go-round. I think for some people you can certainly say that. I just look at the case that I was reading yesterday in preparation for Wednesday.

After a 2007 accident, on the first trip to MAS the client was not stabilised; they then had another accident; on the second trip they were stabilised and they were over on physical and not under on psychiatric. We have got a CARS assessment on Wednesday and at various stages along the way there have been applications for review and we have now got the insurer saying, "We still think they are under; we would like them to go back one more time". For some people MAS just goes on and on and on, and for them it really does not work. I am the first to accept that they are a minority but, boy, do they have a lousy experience with the system. The last and concluding note is that in response to the questions on notice, we have prepared over the weekend some written responses. I like to think they are consistent with what we have said but could I table those please?

CHAIR: Was that the document you were referring to earlier?

Mr STONE: That was a document I referred to at the outset, and I have multiple copies of it here.

Document tabled.

CHAIR: I cannot remember if there were any questions taken on notice during the proceedings, but if there were we request that you get answers to us within 21 days.

Mr STONE: I think we have answered everything on the spot. We are clean so far, but if you come back with more we would be delighted to try and answer those for you.

The Hon. SCOT MacDONALD: Regarding the issue of questions on notice, I am not quite sure if it was flippant but on a section 89A repeal, is there anything between repeal and improving?

Mr STONE: I do not think there is, no. My only suggestion would be, and what I have left out of my answer, that if you have not complied properly with section 89A then when you lodge your CARS application to get your claim assessed it gets rejected by the principal claims assessor who says, "No, you have not complied with section 89A. Back you go and do it again properly". My understanding is that the principal claims assessor may have rejected the first 80 or 90 cases that came in where they were meant to have complied with section 89A, saying none of them had complied. It might be worthwhile asking the MAA if that is right and, if so, does that not indicate that this is a problem.

To be frank, the reason most cases get past section 89A is because the insurer, wanting to get the case resolved, does not take the point. If the insurer takes the point it is almost certain that you have not complied with it. My view is that the only way you can properly comply with section 89A is to fully prepare your CARS application—your statements, your submissions, your schedules—serve the lot, wait

for the insurer to put on its reply, then hold your settlement conference, then lodge exactly the same material with the authority. You can appreciate just how much that makes it an expensive process. To take up on Danielle's point, when you first do that you then see the insurer's material, so that might mean you need new evidence to respond to issues they have raised, plus life goes on over the intervening six-month period between A and B and that means you want to put new material in. We are hoping that the assessors will, in effect, help us fudge around it by allowing new material once you get to the CARS end of it. One of the advantages of being coalface practitioners is that they will hopefully be sensible about it. But it just creates a remarkable bureaucratic mess and opportunities for point-taking by the insurer along the way—sometimes they do, sometimes they do not.

CHAIR: We thank you both for being here today. You have certainly been very helpful to the deliberations of the Committee. We also thank you for your submission.

(The witnesses withdrew)

(Short adjournment)

JNANA GUMBERT, New South Wales Branch President, Australian Lawyers Alliance, affirmed and examined:

ANDREW STEWART MORRISON, SC, Representative, Australian Lawyers Alliance, sworn and examined:

CHAIR: You are both representing the Australian Lawyers Alliance?

Dr MORRISON: Yes, and it might be worth noting that I am a former member of the board of the Motor Accident Authority as a Bar representative back in the days of the Motor Accidents Act.

CHAIR: If you should wish at any stage that certain evidence you should wish to give or documents you may wish to render should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. If you do take any questions on notice, the Committee would appreciate it if the response to those questions could be forwarded to the Committee within a period of 21 days from you receiving them. Would either you like to make an opening statement?

Ms GUMBERT: I will, if I may. The Australian Lawyers Alliance thanks the Standing Committee for the opportunity to give evidence at these inquiries. The Australian Lawyers Alliance is a national association of lawyers who have joined together to advocate for justice, freedom and the rights of the individual. We estimate that through our members we represent approximately 200,000 people each year. The Australian Lawyers Alliance has outlined a number of concerns in our submissions in relation to the motor accidents and the lifetime care and support schemes in New South Wales. In the motor accidents scheme our primary submission and our overriding concern relates to the injustices that are occasioned by reason of the greater than 10 per cent whole person impairment threshold that exists in the legislation. We believe that there should be a single system of compensation in New South Wales in line with the provisions of the Civil Liability Act.

I would also like to add that our submissions do not contain anything relating to the pre Claims Assessment and Resolution Services procedures in section 89A but we do have a view about this and we share the concerns that the Bar Association has raised and would be happy to comment on them if that would be of assistance. In relation to the lifetime care and support scheme our concerns relate particularly to the lack of legal advice and representation that is available to scheme participants and the lack of avenues of appeal to external bodies in relation to decisions made by the Lifetime Care and Support Authority.

The Hon. SHAOQUETT MOSELMANE: In your submission you propose that there should be a single system of compensation in New South Wales and you have outlined a number of possibilities. Can you elaborate on how this would work, what are the ramifications for the motor accidents scheme, and what are the financial implications of the proposal and how would it affect green slip prices?

Dr MORRISON: First of all it has to be appreciated that there are in New South Wales a multiplicity of personal injury tortious schemes. There are four major ones. For those who are directly injured by an intentional act there are common law rights largely of the traditional variety with a three per cent discount rate. For those injured in a motor accident or a deemed motor accident—you should appreciate that some but not all rail and ferry accidents are deemed motor accidents. Even though there are no third party premiums being paid and no green slips to be kept low, they fall within motor accidents. So you have got the motor accidents scheme.

In respect of work injuries, if the injury is by the employer it falls under workers compensation and you have a totally different scheme, different threshold, different caps, different rights and very limited, indeed almost useless, common law rights. Then for the balance you have the Civil Liability Act. So if you are injured through medical negligence, or if you are injured through trip and slip, you are injured in a public place or you are injured in a private home through someone's negligence then your rights lie in the Civil Liability Act. They are the four major schemes, but there are others. For example,

the coalminers have their own scheme because they managed to do a private deal some years ago with government. So do the police. So do emergency services. The schemes are all different and not consistent with each other. Your rights and the obligations of the negligent party vary dramatically according to which scheme you fall under.

Let me give you what I hope might be a practical example. You suffer injury through falling at a railway station. As a result you are rendered a paraplegic, a serious injury. What determines your rights? Well, if you were an employee your rights would be under the Workers Compensation Act and you will be on the miserable drip feed for the rest of your life unless you choose to bring common law proceedings and you are in that limited category of people for whom that would be worthwhile. For a paraplegic, almost certainly you would not and you are left impecunious for life and unable to pay your mortgage and to pay for school fees. If on the other hand you tripped on stairs because they were to the knowledge of the Roads and Traffic Authority left in an unsafe state, they did not have appropriate capping and a nonslip area, then your rights are under the Civil Liability Act and they are much more reasonable and a much larger percentage of people get damages for pain and suffering. If you were assaulted and you are able to sue the person who assaulted you, you get full common law rights. If on the other hand as you step out of a carriage the door closes on you because it was poorly maintained, and that was to the knowledge of the owner of the train, then you are a deemed motor accident and only 10 per cent of people, as we have heard, get the right to sue for pain and suffering. And you have a very different regime for recovery and restrictions on recovery. That is putting aside all of the complexities of what happens if it is a police officer or emergency services worker or any of those sort of things.

What a shambles the law is in this State. It is an embarrassment. When I go and appear in cases over in Western Australia or in other States they have a unified system. Employees have the same rights as motorists. They might not be as generous with their damages, but at least they have consistency; we do not. And the injustice is obvious. We have in New South Wales some of the lowest third party premiums in Australia. Why? Well, we have heard what Mr Stone has said and we would endorse what he has said in relation to insurer super profits and the reasons for it. And they are complex and they are not simply a matter of intending to set out to deceive the scheme. But the fact of the matter is that excess of profits over time is at the expense of the injured in New South Wales, injured in motor accidents, and the extent of the lack of compensation or inadequate compensation to motor vehicle victims is illustrated by one thing: When the Waterfall disaster occurred a large number of people were injured and had claims. They were deemed motor accidents, therefore their rights were restricted to those of motor vehicle victims.

The Government was so embarrassed by that that it announced that it would give those people what it called common law rights but in fact they gave them Civil Liability Act rights—the Government I do not think knew the difference. The consequence was that those people got the far more generous provisions of the Civil Liability Act, but someone who suffered the same injury in a motor accident down the street, a less publicised accident, gets the miserable lack of benefits under the Motor Accidents Compensation Act. What justice is there in that? What consistency is there in that? What fairness is there in that? So that when you get an answer as this Committee has got from the Motor Accidents Authority to say that one of the things that the scheme has achieved is fairness, we just say that that is utter rubbish. There is nothing fair about our system in New South Wales. We have the situation that in 2001 and 2002 the Ipp inquiry recommended a single scheme of compensation in tort law, consistent across all forms of injury. In 2005 the Standing Committee of the Legislative Council of New South Wales, an all party committee, unanimously recommended the same thing. It is time it was done, principally because motor accident victims are amongst those who are suffering the worst injustices under the current situation.

In terms of the ability to do so, Mr Stone has spoken about the level of profits and the admission by actuaries that in fact there was adequate money to continue to provide the same system as existed under section 79A of the Motor Accidents Act, which is the same as section 16 of the Civil Liability Act. For pain and suffering the percentage of a most extreme case starts at 15 per cent at a very low level and increases gradually until at about 31 per cent the reduction cuts out and after that you get the full percentage of a most extreme case. That system is not perfect, but at least it offers justice across a range of injuries and it is consistent and, clearly on the information that Mr Stone has provided, it is a system

that was financially viable at the time it was changed despite the fact that the insurers said something very different at the time in order to bring about the present situation.

In terms of the financial implications of the proposal and how it would affect Green Slip prices, we say that at the moment the injured are subsidising the motorists of New South Wales. We do not suggest that should be entirely removed but that the situation where motorists are left without adequate compensation in such a huge range of cases can be alleviated by redirecting the super profits into bringing us back to a consistent system, which both this Committee and the Ipp inquiry recommended. That clearly is the way to go.

The Hon. SHAOQUETT MOSELMANE: You mentioned that a number of States have a unified system. Can you tell us which States, how they unified those systems and what process they used? Was it a complex process?

Dr MORRISON: It is the other way round. All of us started with a single system. It is the fact that Parliaments have removed, for varying reasons, certain parts of tort law from the common law that has made the difference. For example, when you restrict rights of employees to sue their employer, employees are removed from the ordinary tortious system. When you restrict the right of motor vehicle victims to sue in the same way, the same applies. It is not a question of what you need to do to unify it. All you need to do is go back to a similar system. It does not have to be identical in every respect. There are aspects of the Motor Accidents Compensation Act you might well wish to retain; for example, the Compensation and Rehabilitation Scheme works efficiently and well and probably provides real cost savings. For the reasons given earlier, the Motor Accidents Scheme does not. It is both inefficient and unjust, and indeed capricious in its operation.

Changing the scheme is very simple. All you need do is get rid of the Motor Accidents Scheme and provide that section 16 of the Civil Liability Act applies. It brings us back to where we were in 1979 before a total unnecessary change was made to differentiate between motor accident victims and other tort law victims. I am not an expert on all States. I have been practising recently as a silk in Western Australia and I can say that it has a single system of tort law, including employment and motor vehicles. It does not mean there are not some additional notice requirements for motor accidents. They have a single government insurer there, much as we used to have the Government Insurance Office here. It is not a difficult thing. The Australian Capital Territory has also had a single system. Queensland has something closer to a single system although they have some peculiarities in some areas of law. Victoria does not and I would not like to comment on South Australia as I have not appeared there for many years.

The Hon. SHAOQUETT MOSELMANE: On page 3 of your submission you say this would bring the threshold of entitlement to compensation for pain and suffering to 15 per cent of the most extreme case. Many of the submissions nominate 15 per cent and the Law Society, for example, says "until the severity of non-economic loss reaches 33 per cent". Why is it specifically 15 per cent? Can it be lower or higher? All the submissions nominate 15 per cent.

Dr MORRISON: Fifteen per cent was fixed under the Motor Accidents Act as a percentage of "a most extreme case", not "the most extreme case", as a broad category that applied at which compensation should start. The intention was to get rid of minor whiplash injuries and small claims and leave them without compensation for pain and suffering and redirect the money to the more seriously injured. From 15 per cent to 33 per cent, or thereabouts, is a sliding scale and the restriction on recovery gradually cuts out, so at 33 per cent you get a third of a most extreme case, at 30 per cent you get a bit less than 30 per cent of a most extreme case and at just over 15 per cent you get a few hundred dollars for non-economic loss. It is a sliding scale. It worked pretty well in practice and it works pretty well under the Civil Liability Act. It is not perfect but we can live with that as a means of balancing the cost to the community and the needs of the injured. What we find very hard to stomach is that a person who is injured and receives the same injury in the same location in a variety of different ways has totally different rights and there is no consistency or logic as to which category he falls in.

It should be borne in mind there is a good deal of litigation directed by insurers to try to push a person out of one category of law and into another. If a person is injured by something falling in a factory and it has been pushed by an unregistered forklift there will be significant litigation as to whether that is a motor accident or an employment accident or whether it is occupier's liability and falls under the Civil Liability Act. It may be the person was an employee, in which case his rights would be quite limited. It may be that person was there on day labour supplied by an agency, in which case they have Civil Liability Act rights. Compensation in this State has become a lottery. It was recognised by a Standing Committee of the Legislative Council in 2005 and it is very sad that nothing has been done to implement that committee's unanimous recommendations. One thing we would strongly suggest is that this Committee ought to set up an inquiry into the implementation of the recommendations of the Ipp inquiry and its own recommendations in 2005. You need good actuarial advice. As Mr Stone said earlier, we are lawyers, not actuaries. There are good independent actuaries out there who can provide that information. On the face of it, it seems a very good reason to believe that Civil Liability Act rights could be provided within the funding of the present third party scheme.

CHAIR: Following on from that response to the Hon. Shaoquett Moselmane's question and your comments in favour of a single system of compensation in New South Wales as they have in other jurisdictions around Australia, the Motor Accidents Authority was asked to comment on a central aspect of your submission. The authority said: "Amendments to the Act made over the last decade were aimed at sustainability, fairness, affordability and effective rehabilitation of injured people. These have resulted in more timely intervention and treatment for injured people." The authority went on to say, "This is in line with similar reforms in most other personal injury jurisdictions in Australia." Would you like to comment on that because it appears to be in complete contradiction to what you have put forward to this Committee about the situation in the other jurisdictions around Australia?

Dr MORRISON: First of all there is nothing fair about the present system. That is manifest. It is nice to use these sorts of words in a formal response from the Motor Accidents Authority but any examination would suggest it is rubbish. Why should a person who is on a ferry excursion have their rights determined under the Civil Liability Act but a person suffering the same injury when the ferry is on a regular run, whether it is a private or a public ferry, is determined under the Motor Accidents Compensation Act? Why should a person on a railway have their rights determined under the Motor Accidents Compensation Act when no third party premiums are paid? There are no premiums to keep down. There is no Green Slip. In terms of fairness, it is just utter rubbish.

As to the second point, steps have been taken in a number of jurisdictions throughout Australia to reduce the liability of defendants, and ultimately of insurers to pay, but for the most part—not entirely—they have tried to be consistent across various areas of tort law. Certainly motor accidents are differentially treated in Victoria and New South Wales, but they are much more consistently treated in jurisdictions like Queensland and Western Australia. So whilst it is true there is separate legislation for motor accident claims it does not necessarily mean they do not have access to the same compensation in a place like, say, Western Australia or Queensland. In Western Australia it is the identical level of recovery, as it has been in the Australian Capital Territory, although that is under question at the moment. There are some proposals for change there and we do not know what the outcome will be. In Queensland it is largely similar. The sweeping statement made by the Motor Accidents Authority is partially correct but partially inaccurate.

The Hon. SCOT MacDONALD: I refer to the 5 per cent discount rate. Who sets that rate? Is it the Motor Accidents Authority?

Ms GUMBERT: The rate is included in the legislation.

The Hon. SCOT MacDONALD: I imagine the difference between a 5 per cent discount rate and a 3 per cent discount rate on the sums of money and the length of time we are talking about would end up being in the tens of thousands, if not hundreds of thousands of dollars.

Ms GUMBERT: In a multimillion-dollar case it may end up being in the many millions over a person's lifetime; it can be that significant. It is less relevant now in the Motor Accidents Scheme given that catastrophic injury cases are taken into the Lifetime Care and Support Scheme, but it is still of concern as it still affects damages over a person's lifetime and it also relates to the other systems as well where a 5 per cent discount rate is imposed.

Dr MORRISON: You need to understand perhaps a little of the history of the discount rates. The 3 per cent discount rate was a compromise rate which the High Court laid down in *Todorovic v Waller* in about 1981 and was generally accepted throughout Australia from that time. In England currently it is a 2.5 per cent discount rate and it is under review, and I understand likely to drop to 1.5 or 2 per cent. The Lord Chancellor has not handed down his final decision.

The Hon. SCOT MacDONALD: I am sorry to interrupt but we are running out of time. If it is in the Act would you be attracted to the idea of three yearly or five yearly reviews, taking into account, to use your words, the current economic conditions? Five per cent strikes me as a pretty high figure that would drive a lifetime payment down.

Dr MORRISON: The Ipp committee recommended a 3 per cent rate for all tort law claims, including motor accidents. So did a standing committee of this House in 2005. We say that is the position that should be adopted. Let me give you a practical example. Supposing you have a child who was injured and has a further 75 years of life expectancy, that is say, a 13-year-old girl will have a further 75 years of life expectancy. Their money will run out, assuming the 5 per cent discount rate, about 25 to 30 years too early than the 3 per cent discount rate. You would be multiple millions short of what you needed for that person to survive and their needs to be met.

The Hon. SCOT MacDONALD: Surely the answer would be not to have something enacted and regulations saying—we review these things across government all time. At the moment we are grappling with the GST and we think that rate would be down around the 2s or 3s or whatever, but in five years time 4 per cent or 5 per cent might be appropriate. So should we not be looking at a three-year, four-year or five-year rolling review or something like that?

Dr MORRISON: Bitter experience would suggest that is not a good solution, for this reason. The 5 per cent discount rate was brought in in New South Wales for motor accidents only in 1983. It was brought in at a time, you might recall, of 17 per cent inflation. It was brought in on the basis that it be reviewed regularly. It has never been reviewed, and there will always be political pressure on governments not to review it. It was extended to all other areas in 2002 save for intentional injuries, which still remain at 3 per cent but there is nothing in the second reading speeches that have ever given any rationale for a 5 per cent discount rate. It has never been justified, it has never been explained, it is simply subsidising the scheme out of those who are most severely injured.

Mr DAVID SHOEBRIDGE: With regard to that 5 per cent, could you think of a way an appropriate discount rate could be set that would take some of the politics out of it? Rather than simply by statute, put it to the Independent Pricing and Regulatory Tribunal or something?

Dr MORRISON: We have not considered that but no doubt that is something that could be considered. But there is something to be said for standardising the rate and something to be said for adopting a rate which over many decades is likely to be broadly settled. The figure of 3 per cent is probably a little high but the Ipp committee recommended that as a reasonable compromise and given that you have the advantages of being able to make your own decisions about the money other than for those under the lifetime care scheme, there is something to be said for saying you might lose a little money for your future needs but on the other hand you have the decision-making power, and 3 per cent is a reasonable compromise. It might be a little high but on balance, regular review is unlikely to suggest anything higher than 3 per cent.

I might add, the lifetime care scheme assumes in relation to its own income a 2 per cent return after tax and inflation. You might like to ask the Motor Accidents Authority about that. If it says the 5 per

cent is a fair figure, why is it that it assumes 2 per cent of return? We know that because when you talk to us about buy-in provisions to the lifetime care scheme it did so on the basis of capitalising the buy in at 2 per cent and we pointed out that anyone who buys in and receives lump-sum compensation is going to be multiple millions of dollars short of what is needed to buy in because you have so grossly undercompensated the buy in at the discount rate.

Mr DAVID SHOEBRIDGE: So, the more catastrophic the injury the greater the injured person is contributing because of the high 5 per cent?

Dr MORRISON: Yes. One of the things that was a catchcry when the changes were made in 1999 and 2002 was to say it is only the less seriously injured that was affected. The discount rate impacts primarily on those who have suffered the most serious injuries and whose needs and care and financial loss are greatest over a long period of time.

The Hon. PETER PRIMROSE: On page 6 of your submission you indicate that if a whole person impairment threshold assessment entitlement to non-economic loss is retained impairment from psychological injuries should be able to be combined with physical injuries. Can you elaborate on that?

Ms GUMBERT: Absolutely. As the system stands currently, in order to be entitled to compensation for pain and suffering you have to be assessed as having greater than 10 per cent whole person impairment. That in itself is a very high threshold. However, there is a further restriction, which is that you cannot combine whole person impairment for physical injuries with a psychological injuries. There is no justification for this. It is not logical in any way, and you can be left with the situation where someone has, for instance, 10 per cent physical whole person impairment and 10 per cent psychological whole person impairment, both of which are extremely severe in their own right and yet that person will have no entitlement whatsoever to be compensated for non-economic loss. All we are suggesting is that you just remove that restriction so you can combine the two. It seems to make sense and it would be far more fair than the current system.

CHAIR: We have heard a lot about insurer profits. We heard some comments from the representatives of the Bar Association. Would you like to make some comment on that issue? What level of insurer profit do you consider reasonable as a percentage of the compulsory third party premium paid?

Dr MORRISON: The scheme was designed around 8 per cent on the basis that it was a reasonable level of profit. We think that is a reasonable level of profit. But each year insurers put in their level of profit at 8 per cent and each year we see down the track the level of profit is anything between 18 per cent and 30 per cent because they have made excessive prudential allowance for future liabilities. If it happened once or twice, you could understand it. If on occasions they had underestimated future claims, that would balance it, but such consistent overestimating future liabilities and such consistent super profits suggest to us that there is money there that would be going back to the undercompensated or inadequately compensated victims.

CHAIR: Are you saying this consistent overestimation demonstrates a predetermined pattern?

Dr MORRISON: I think it is hard to say exactly what the cause is. Those are matters that ought to be directed towards the Motor Accidents Authority and, as Mr Stone rightly pointed out, one of the things that has been quite noticeable is the failure of the Motor Accidents Authority to address this issue. It is its obligation to accept the level of premiums. It is its obligation to ensure that excessive profits are not made. It should be the one doing the explaining as to why this has occurred year after year. Will the cry that this year will be different, that the money is short this year—we have heard that every year since the scheme came in.

CHAIR: The reasons it is giving for this situation, you are basically not buying them? You do not believe they are valid reasons at all?

Dr MORRISON: If it happened a few times it might be credible but it has happened every single year since this scheme started—and it is now a mature scheme—in 1999. It is not credible that they could simply underestimate their future profitability to this extent without the Motor Accidents Authority taking some effective action to look into it and explain it and to redirect those profits where they ought to be going, namely, to the victims who have been suffering injuries and are left without adequate compensation.

Mr DAVID SHOEBRIDGE: In the absence of the Motor Accidents Authority taking any action over the last decade, do you think it is time for Parliament to rejig the Act to increase those benefits to injured people and redirect them by statute?

Dr MORRISON: We have suggested quite simply the solution is if you have a single system you give motor accident victims the same rights as those who suffer injury and occupiers liability and medical negligence. That is, you bring them under section 16 of the Civil Liability Act. That is the very simple way of redirecting it. You can keep some of the structure, you can keep the notice provisions and deal with some problems relating to those, but a single system of compensation based on section 16 of the Civil Liability Act would be logical and coherent and would seem to be well supported by such information we have in relation to the level of profits.

Mr DAVID SHOEBRIDGE: On your analysis we could hold green slips basically constant, improve the benefits and simply be redirecting money from insurer profits to those seriously injured, through that kind of threshold?

Dr MORRISON: You would need good actuarial advice to deal with that and I say you would need good independent actuarial advice to deal with it, and preferably, may I say, from actuaries who are not servicing insurers in this State, and not those who are in the employee of the Motor Accidents Authority either. Given the Motor Accidents Authority's failure to take any action on this issue, get independent interstate actuarial advice. Our suspicion is that there would be sufficient money there because there was in 1999. We now know in retrospect there was no problem with the previous scheme, which was identical with the Civil Liability Act. At the time the insurers cried poor. They will cry poor again. Every time you try to do anything that will alter their super profits they will say doom and disaster are about to land on us. We know from bitter experience since 1999 that is not true and there is no reason to suppose the often repeated cries will be any more true in the future. But, we are not actuaries and you need to obtain support on that issue.

Mr DAVID SHOEBRIDGE: You would be urging this Committee to do that independent of the view of the Motor Accidents Authority, to get our own independent actuaries to do that analysis?

Dr MORRISON: Very much so.

CHAIR: And you are suggesting a single system, a pathway going to a single system, is that right?

Dr MORRISON: Yes.

CHAIR: What if that was not followed? What would you suggest then, if we did not go down that path?

Ms GUMBERT: Sorry, I would like to make it abundantly clear, if I may, when we say a single system we are not trying to suggest that the Motor Accidents Scheme should be dismantled. We are simply suggesting that the benefits for pain and suffering should be altered to accord with the Civil Liability Act standard. It is really quite a minor change. It does not alter scheme design in any way other than in the compensation payable for that one head of damage.

CHAIR: What will that do for premiums?

Ms GUMBERT: That is the issue that we are unable to comment on and that we need independent actuarial advice on. But we anticipate it will not have any significant effect on premiums. Again, as Dr Morrison has said, we need independent advice.

CHAIR: Have you sought any of that advice?

Ms GUMBERT: Annexed to our submission were two reports which look at the scheme and the profits and look at that issue. But I think both of those reports are now several years old at least and more up-to-date evidence would be required. If I may answer the second part of your question about the alternatives—if the scheme is going to retain the whole person impairment threshold for entitlement to non-economic loss, we would suggest that the threshold needs to be lowered because the greater than 10 per cent threshold is too high. In particular, a number of injuries are assessed at 10 per cent, and the way the guidelines are is such that it often results in a mathematical calculation of 10 per cent exactly. A number of people are being excluded who fall within seven, eight, nine or 10 per cent. They are very significant injuries and we believe that, if nothing else, the threshold should be brought down significantly so that people with high-end percentages currently would be entitled to compensation.

The Hon. SHAOQUETT MOSELMANE: Bring it down significantly to what?

Ms GUMBERT: That is something that I think an inquiry would need to look at to determine what would be fair and sustainable, but certainly several percentage points lower.

Dr MORRISON: Of course, that would be very much a second-best and rather a poor second-best, to providing logical consistency across other areas of tort law. For that purpose, we say, as the Law Society and the Bar Association and the Law Council of Australia say, there should be a single scheme and the Civil Liability Act the basis for it. The question about actuarial support, we provided an actuarial report that comes from Cumston Sargent Consulting Actuaries of Melbourne to the 2005 inquiry.

We provided an update last year from the same actuaries to the equivalent sitting committee. Those reports suggested that the money was there to permit the Motor Accidents Compensation Act to be brought in line in respect of non-economic loss with the Civil Liability Act. We have no reason to suppose that position has changed, but you would be wise to obtain your own actuarial support on that. We certainly have twice undertaken that task ourselves and everything we found suggested that the money was available.

Mr DAVID SHOEBRIDGE: Your concern with the whole person impairment assessment basically is founded on its arbitrariness, is it not?

Ms GUMBERT: That is correct.

Mr DAVID SHOEBRIDGE: It does not look at the impact of injury on a person? The argument often put is that losing a finger will have a catastrophic impact upon the concert pianist, yet that is not taken into account in the arbitrary nature of WPI?

Ms GUMBERT: I will try to answer that quickly, which is yes. There are so many things that simply are not taken into account with whole person impairment assessments. The most significant one that springs to mind is pain. Pain cannot be taken into account. As you pointed out, specific restrictions on a person's life by reason of their injury cannot be reflected either. The concert pianist is a perfect example. There are all sorts of things that are unable to be considered by an assessor assessing whole person impairment that nevertheless might be very significant for the injured person.

Mr DAVID SHOEBRIDGE: If you remove that whole person impairment assessment scheme, you could actually make savings from the scheme. Have you considered that?

Ms GUMBERT: Absolutely. I think that is one of the things we might have mentioned in our submissions. Not only are there existing profits in the scheme, but if you abolish the medical assessment service there would be savings in administrative costs that could be redirected to injured people.

Dr MORRISON: The Civil Liability Act does take into account the difference between someone like myself losing a finger and a concert pianist losing finger, unlike MAS and unlike the Motor Accidents Compensation Act.

Mr DAVID SHOEBRIDGE: Yours should be cheaper?

Dr MORRISON: A lot cheaper.

CHAIR: Unfortunately, we are out of time for this section of the inquiry. The Committee has a number of questions that it did not reach today and would like to send them to you, if you would take them on notice. There may be some additional questions. We would appreciate if you could respond to those questions within 21 days. You raised also compulsory settlement conferences under section 89A. You may like to put forward further submissions on that issue.

Ms GUMBERT: Yes, we would be very happy to do that.

(The witnesses withdrew)

ANTHONY ERIC DRAYTON MOBBS, Insurance Council of Australia, affirmed and examined, and

MARY MAINI, Insurance Council of Australia, sworn and examined:

CHAIR: Thank you for attending today as witnesses. If at any stage you should consider that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. If you take any questions on notice, the Committee would appreciate if the responses to those questions could be forwarded to the Committee within 21 days of them being forwarded to you. Would either of you like to make an opening statement?

Mr MOBBS: Thank you for the opportunity to give evidence. As mentioned, we represent the Insurance Council's Motor Accident Insurance Policy Committee. The scheme, on the whole, is running reasonably well. It is fully funded. There is competition amongst insurers. Motorists can freely elect which insurer they would like. Increasing amounts of the compensation dollar are being paid to injured parties and the time to resolve claims has been trending down the same. In summary, we enjoy being part of the scheme and there are many stakeholders with whom we get along very well.

CHAIR: The Bar Association in its submission and this morning has put forward concerns about insurers taking technical points in section 89A compulsory settlement conferences, hence leading to pre-section 89A conferences. Do you have any comments on this issue?

Ms MAINI: I will answer that one. I am curious to know which insurers they are and I would like to start by saying that there are two avenues for complaints if any insurers are taking those spurious points. The first is through the Motor Accidents Authority. All insurers are governed by a regulatory enforcement framework, and an insurer has an obligation to act dutifully and expeditiously in resolving claims. We take that obligation extremely seriously. If there are any breaches, then anyone—that is, a member of the public or anybody—can raise those issues with the Motor Accidents Authority. The licensing division of the Motor Accidents Authority will investigate any complaints. The other avenue is one we also would like to encourage the Bar Association or the Law Society or anyone who has given evidence today to follow. If there are any issues with insurers and they can point to specific insurance companies, take them either through the Insurance Council or directly to insurers and the relevant claims managers or relevant managers within the insurance companies themselves.

CHAIR: If the Bar Association assertion is correct your council would be deeply concerned?

Ms MAINI: Extremely.

Mr DAVID SHOEBRIDGE: In your role on the managers committee, what is your view about the section 89A conferences? Do you think they are as good as they thought they would be when they were proposed a couple of years ago or are you finding there is some procedural cost associated with them?

Ms MAINI: As to the cost, we have not quantified the cost. The reason they were introduced was that we found, and this was as a result of discussions held with insurers, the Bar Association, the Law Society and various stakeholders, there were delays in having matters go through the CARS process. One of the recommendations was that if we had a mechanism that would actually compel both parties to present material early, it would resolve it. To answer the question directly—

Mr DAVID SHOEBRIDGE: That sounded nice in a second reading speech, but how has it turned out in practice?

Ms MAINI: It is really very early days in seeing whether that is resolved. I know the Bar Association made a recommendation to repeal the legislation. I would like to take that question on notice

and then look at our experiences to date alongside what the Motor Accidents Authority's data shows. Without that, it is difficult to answer the question.

The Hon. SHAOQUETT MOSELMANE: As you have heard, there are many questions about the profitability of insurance companies and clear criticism of the amount of profits, although it is not clear as to the exact amounts. Do you believe we need independent actuarial advice? Who do you think would be best to give this advice?

Mr MOBBS: Insurer profits have been considered by the authority and by this committee and others, including the scheme's independent actuary over several years. The Insurance Council contends that the profits over many years have been derived because there has been an unexpected, unexplained and unprecedented reduction in claims frequency over 10 years. That is highly unusual and insurers have benefitted from that. The analysis of it has been undertaken several times. I cannot remember the exact date—about six or nine months ago—the authority had Taylor Fry Consulting Actuaries review this in detail. Essentially, it concluded that very fact that claims have reduced and insurers have benefitted from it. The process of premium setting at this time involves insurers having their own actuaries examine the information. We then have an external actuary review our numbers and that is a very robust process. Then we submit our rate filings to the authority and the authority has an independent actuary. There are already three stages of actuarial advice that oversee each and every rate filing.

Any suggestion that there is any form of bias or incorrectness in that process surely would be identified in that three-stage actuarial review at this time. There are already good processes in place. In addition, the authority recently has changed the premium determination guidelines, as it does periodically, to increase the level of disclosure within each rate filing and there are an additional five points we have to now consider in our rate filing process. From my perspective, the changes to the premium determination guidelines would give the authority a great deal of evidence and information upon which to base further inquiry and investigation, should it see fit.

CHAIR: If the profits are coming in at an excessive rate over a long period of time, are you in favour of reducing premiums?

Mr MOBBS: Insurers do that as a matter of course. That is part of competition. In real terms, the premiums have declined over the past 10 years. That has been well documented in the authority's annual returns. In fact, the premiums remained fairly flat over the 10-year period, and that is a significant reduction of premiums in real terms.

CHAIR: Do you see a concern with the figure of 8 per cent being regarded as reasonable and each year the figure has been considerably in excess of 8 per cent? Can you understand the community's concern about that position?

Mr MOBBS: I certainly can. Insurers in all of their classes of business will make a profit in some lines and in other years they will make a loss.

CHAIR: But in this one they are making a profit far in excess of that anticipated?

Mr MOBBS: That is correct. And that anticipation is the key point. I do not think anyone anticipated the reduction in claims frequency virtually halving over a 10-year period. If someone could have predicted that, if someone could have foreseen that, we would have set our premiums on the basis of a much lower claims frequency. But no-one did foresee that. After three sets of actuarial review, no-one foresaw that unprecedented fact occurring.

CHAIR: But it is pretty clear now, is it not?

Mr MOBBS: Yes. Now that the claims frequency has stabilised, you will see the premiums reflect that accordingly.

Mr DAVID SHOEBRIDGE: But surely you understand that the Parliament must act when it compels motorists to take out insurance and then in one particular year 38 per cent of every dollar insurers paid for their compulsory third party premiums went straight into insurer profits, into your members' profits?

Mr MOBBS: I understand that.

Mr DAVID SHOEBRIDGE: That cannot have come as a surprise to your members? Why were you not pushing back and saying, "We're getting these untoward profits"? Why were the insurance companies not saying, "We're getting these super profits, something should be done"?

Mr MOBBS: The competition process deals with that issue.

Mr DAVID SHOEBRIDGE: For 10 years the competitive process has seen super profits reaped by your members.

Mr MOBBS: Over 10 years the claims frequency has halved and that was completely unexpected and unforeseen. No-one foresaw that. So no-one could have anticipated the profits, including insurers. We were not to know.

Mr DAVID SHOEBRIDGE: You say that the Motor Accidents Authority has a third actuary that reviews the premiums. How many times has that actuary acted to direct insurers to reduce their premiums, do you know?

Mr MOBBS: On behalf of the Insurance Council that is a difficult question to answer.

Mr DAVID SHOEBRIDGE: Can you think of one instance?

Mr MOBBS: I can certainly say from my own company's experience we are in regular discussions with the scheme actuary and we consider all manner of points of our rate filing process. The rate filings we prepare are in excess of 100 pages long and cover a multitude of subjects. The scheme would have reviewed assumptions up and down on a tremendous number of occasions.

Mr DAVID SHOEBRIDGE: On how many occasions has the Motor Accidents Authority actuary directed you to reduce premiums because they say their analysis differs?

Mr MOBBS: We have not been directed to reduce premiums. We would be directed to alter assumptions that feed into that process.

The Hon. SCOT MacDONALD: On another tack, one of the submissions that came in late was a recommendation to adopt web-based claims management. I think it was recommended mostly or largely because the clients, families and representatives have a great deal of difficulty understanding where they are up to if something is challenged—what is the next port of call, who do they go to? That seems to be a pretty good idea. Are your companies moving along that pathway?

Ms MAINI: I cannot speak for all the various companies. I think any technological improvement would be a good thing. Whatever we introduce we need to ensure that the Motor Accidents Authority really is the keeper, so to speak. Any web-based system that organisations would need to introduce would have to sit alongside the Motor Accidents Authority, only because all the documentation is regulated. One of the things that we want to ensure—I am not talking for the authority here—is consistency. Because of that it is a matter that the Motor Accidents Authority would have to provide the frameworks for the web-based process and each insurer would have to develop it. Otherwise you have a situation where you will end up with a different experience with one organisation and another one with someone else. For injured people that are participants in this scheme you want to ensure that all the insurers are consistent.

The Hon. SHAOQUETT MOSELMANE: You mentioned that some of the insurance companies were made to increase their levels of disclosure. Can you tell us what areas of disclosure they were required to increase their levels in?

Mr MOBBS: The premium determination guideline, which is the regulation to the Act, gets amended periodically. The most recent changes dealt with capital allocation and the basis of allocation, the risk margins that we file, our investment policy and a profile of the assets that support our profile, our expected investment returns on the asset mix, and the calculations used to convert the return of capital to our profit margin. All of the insurers have to submit a compulsory rate filing at least once per annum and all insurers submitted that a week ago. All of our recent rate filings contained a great deal of additional disclosure in compliance with those five areas.

The Hon. SARAH MITCHELL: My question relates to a single system of compensation that has been raised by the two previous sets of witnesses. Dr Morrison gave some of the examples in Western Australia and the Australian Capital Territory and I wanted to know from the insurance perspective your thoughts on a single system.

Ms MAINI: What we would like to do is answer that in two parts. I would like to, on behalf of the Insurance Council, within the 21-day period, submit the differences within each jurisdiction across the nation. In relation to New South Wales the proposal has merit. What the Insurance Council would like to do is look at what that means in terms of not just the line in civil liability, which was the suggestion, but looking at civil liability, workers compensation, coalmine, all the different schemes within New South Wales, and ask: What would that look like? I do not think you can look at a single system and say here is one system and that is to align liability with CTP. If you are going to do this exercise and cost it you would look at all schemes across New South Wales.

Mr DAVID SHOEBRIDGE: In terms of moving towards a uniform model do you see the Civil Liability Act as the most readily adaptable to the various schemes?

Ms MAINI: If you look at the current model probably not would be the answer. I would say that the model that would be readily adaptable would be the workers compensation and the CTP schemes. The reason I say this is there are more people injured on the way to work, so we have a lot of overlap between workers compensation and CTP. If there was one model you might look at adapting immediately—this is a huge exercise—it would be those two schemes.

Mr DAVID SHOEBRIDGE: You would not come up with something for coalminers, something for prisoners, something for motor accidents, something for workers compensation and something for strangers—all being separate? That would not be a preferred model?

Ms MAINI: No. The preferred model is that whoever is injured in New South Wales, whatever the mechanism of injury, they should all be treated the same.

The Hon. SCOT MacDONALD: We had a little discussion about the discount rate sitting at 5 per cent. Would you have any view about a rate-setting mechanism rather than the rate, I suppose?

Ms MAINI: As an Insurance Council we have not considered that but we would like to take that on notice and make a supplementary submissions on that point.

Mr DAVID SHOEBRIDGE: When you do that could you cast an eye back on your historical assumptions of the capital returns you have been factoring in and see if they accord with a 5 per cent real return rate? I rather suspect the scheme operates such that the assumptions you feed in on the profits you will derive from invested premiums would be at a far lower rate than the assumed profits that would be derived from injured person's payouts. Do you follow that?

Mr MOBBS: We disclose a great deal of additional information. That 5 per cent is an assumption that goes into our premium calculations. We rely on the legislature and authority and we strike our premiums accordingly.

Mr DAVID SHOEBRIDGE: I understand that. I assume part of your assumption is that when you take a premium you are going to invest it and get a certain return on that premium over time. In your answers could you review your assumptions over the last 10 years on your investments and compare that with the 5 per cent that has been assumed for injured persons?

Mr MOBBS: We can do that.

Ms MAINI: Yes.

CHAIR: To either witness: In response to a prehearing question on notice the Motor Accidents Authority responded that it had recently updated premium determination guidelines requiring greater insurer disclosure on matters related to their profit and rates of return. Have you seen those guidelines on the authority's website, and what impact do you think they will have?

Mr MOBBS: We have seen them and we were involved in the process of commenting on those amendments to the premium determination guidelines. Those amendments were made four or five months ago. Our rate filings, which were recently submitted, were all made in accordance with those additional disclosures. We are well familiar, we are happy to comply, we have complied and we expect that the authority will have further discussions with us in due course about those disclosures.

CHAIR: Coming back to the issue of profits, what is your reaction to the Committee's comments in its 2010 review in relation to insurer profits? It said this:

> The Committee is sufficiently concerned about the issue of the perceived excessive insurer profit to have considered whether it is appropriate to recommend that this matter be referred to the Independent Pricing and Regulatory Tribunal to examine. Unlike the Committee IPART could avail itself of the necessary technical expertise to examine this issue fully in order to determine whether changes need to be made to the scheme. Now that the scheme is in its eleventh year it may be appropriate that such a review be undertaken.

What is your reaction to those comments by the Committee in its 2010 review?

Mr MOBBS: The Insurance Council would contend that the existing processes are robust and the cause of the increased profit that we have experienced is well known and understood, being a reduction in claim frequency. The authority has made changes increasing our level of disclosure and there are three actuarial processes that consider our premium setting at the moment. We believe that to be sufficient; others may take a different view.

Mr DAVID SHOEBRIDGE: They have comprehensively failed, have they not, because they were meant to assume an 8 per cent return and in different years you have 40 per cent of all premiums going to insurer profits? You talk about these systems in place but they have failed to date, have they not?

Mr MOBBS: No.

CHAIR: When the profits are continually in excess of what was thought to be reasonable and appropriate and expected, why do you say that the system has not failed?

Mr MOBBS: The process in place allows insurers to consider the claims over an extended period of time and we consider the claims about two years prior to when we set a rate filing. From that year two years ago that year is sufficiently developed which enables us to make assessment of what the future is likely to hold. Two years ago—any part of the last 10 years—claims frequency was higher than what was to be experienced in the future period that we are considering. That is unexpected and

unprecedented. It has not occurred in any jurisdiction around the world as far as I am aware. That process has enabled insurers to derive a high rate of return in those years. The same would be true if the claims frequency were to increase. If and when the claims frequency increases insurers will feel the brunt of that in exactly the same way we have made profits over the last 10 years.

If anyone could have predicted that claims frequency would have halved, through our competitive process insurers would have responded to that and reduced the premiums. No one foresaw it, no one predicted it. There is no legislation. There has been a significant amount of analysis as to why that is the case—it could be better roads, the weather, it could be driver education. No one has been able to pinpoint the reason for the reduction in claims frequency. Because there is no explanation for it no one can predict where it will go to.

The Hon. SCOT MacDONALD: Do you see any risk to the taxpayer or the Government with the scheme as it is today? I am coming from the point of view of another HIH experience where the taxpayer, through a levy or some sort of other contribution, gets to pick up the pieces from a gross failure such as that. If any of your companies miscalculate on the boating insurance and that crosses over into the CTP—is there any risk to the Government and taxpayer where we stand today?

Mr MOBBS: The issue of the amount of capital that is sufficient to prevent failure has been of worldwide debate over the last 10 years but more like 20 years. Over that 10-year period the Australian Prudential Regulation Authority is the main governor of how much capital we have and is the governor of how much capital we need to prevent failure, and has increased the sophistication of those tools dramatically. If we go back 10 years there were only three rules that governed how much capital an insurer was required to have, and now there are no less than six prudential standards covering that issue. The risk of failure has dramatically diminished over the last 10 years.

The Hon. SCOT MacDONALD: I have a supplementary question. I think I did ask it at one of our other meetings. The timeliness of that prudential framework is something at the back of our minds. A lot of that reporting is done retrospectively. It might be six months, a year or 18 months before those figures come to light. Do you see any potential flaws there or ways that prudential timing of information could be improved to give us comfort?

Mr MOBBS: I am probably outside my area of expertise here in dealing with the Australian Prudential Regulation Authority [APRA] issues. However, I am aware that insurers have more of a continuous reporting obligation with APRA. If we become aware of anything that would give rise to concern we would bring that to APRA's attention as and when we became aware of it, rather than 12, 18 months—

The Hon. SCOT MacDONALD: In a report.

Mr MOBBS: Yes.

The Hon. SCOT MacDONALD: So almost real time?

Mr MOBBS: Again, it is outside my area of expertise but I am certainly aware that there is a great deal of additional exposure to reporting on a real-time basis.

The Hon. SCOT MacDONALD: Chair, may I ask a question on notice along those lines?

CHAIR: Yes.

The Hon. SCOT MacDONALD: For my clarification, what would be the timing of a serious risk to your capitalisation? How quickly would that come to the attention of APRA or government?

Mr MOBBS: I will have to take that on notice.

CHAIR: Mr Mobbs, for a number of years there have been greater than expected profit levels. I think you agreed that one way to deal with that is to reduce premiums. I think you said that is one way that insurance companies respond. Is not the truth of the matter that over the past 10 years premium levels have remained roughly the same percentage level of average weekly earnings? When you compare it to average weekly earnings, there has not been any real drop in premium levels? Would that be the situation?

Mr MOBBS: I do not have the statistic in front of me. I have to take that on notice. I certainly am aware that the dollar has been stable. Therefore, in real terms the cost of a green slip has reduced. It has not been inflated with inflation.

CHAIR: Would you take that question on notice and come back with greater detail?

Mr MOBBS: I would be happy to.

The Hon. PETER PRIMROSE: This may also be a question on notice. If the trend in claims frequency continues for, say, the next five years, can you project forward as to what you expect an average compulsory third party [CTP] green slip may cost in New South Wales over that period?

Mr MOBBS: I can answer some of that immediately. The claims frequency stopped reducing in about 2008 and has now started increasing. Was there a second part to the question?

The Hon. PETER PRIMROSE: The cost.

Mr MOBBS: When you project in the future the basic projection is on the cause. If we understood a cause for claims frequency reducing then we could make a prediction on that basis.

The Hon. PETER PRIMROSE: We cannot know the cause, as you indicate. That is why I indicated trend.

Mr MOBBS: Sure. Do you still want me to take that on notice given that claims frequency is increasing?

The Hon. PETER PRIMROSE: I am interested simply in terms of the trends that you refer to. What will that mean in terms of your expectation of price?

Mr MOBBS: I can take that on notice.

The Hon. SARAH MITCHELL: Earlier you made comments about reducing the price of CTP insurance. When there are more competitors in the market, obviously they can offer their own incentives to try to get people to sign up with them. Do you anticipate in the near future there are likely to be new entrants in the CTP market in New South Wales or, conversely, any leaving the market?

Mr MOBBS: I am not aware of any competitors contemplating entering the market. I would suggest that an existing insurer would be amongst the last to know. Such things are normally kept completely under wraps until such time as someone is ready to enter the market. I am not aware of any insurer intending to leave the market. I would say there is no reason for anyone to leave or any reason to prevent someone from entering the market. There are barriers to entry but they are not dissimilar to any other industry. You need the expertise and capital. Those matters aside, there is no reason why someone would not enter the market.

Mr DAVID SHOEBRIDGE: You have a far more perfect knowledge about your rate of profit two or three years out than you do at the time you set your premium, is that right?

Mr MOBBS: That is correct. After two or three years we have experience of what will actually occur in terms of the actual claims frequency.

Mr DAVID SHOEBRIDGE: What about a scheme where the Motor Accidents Authority could put a separate levy on insurers two or three years out to claw back some of the super profits and redirect that money to injured persons? Would that be a more rational way of going about it?

Mr MOBBS: That would be an interesting approach. I suppose the flipside of that would be in a year when the insurers made a loss on the portfolio the insurers would expect the government to indemnify them for any such loss.

Mr DAVID SHOEBRIDGE: It would be only a proportion over and above the super profits. A proportion of the super profits would be brought back and redirected to injured persons. It would not necessarily have the flip side that you mention. What do you say about that?

Mr MOBBS: If it occurred one way, it would occur the other way as well if we made losses. What we are talking about there is the capital. Where does the capital lie? If we hold—

Mr DAVID SHOEBRIDGE: To be clear, I am talking about a levy on a proportion of your super profits. Your 8 per cent would be left untouched. To the extent that something close to 40 per cent of all premiums ended up in insurance companies' profits, a proportion over and above 8 per cent would be clawed back and redirected to injured persons. What do you say about that?

Mr MOBBS: I do not think it is required. I do not think it really fits in with any economic theory about how you allocate the capital within an insurance company. If you had any mechanism to claw back in one way, it would have to be mirrored by a claw back in the other way. I do not see it as holding merit; others may.

The Hon. SHAOQUETT MOSELMANE: During the last review by the MAA, in 2010, it stated that an independent competitive review of the CTP scheme has been held and that the MAA consult with the Insurance Council. What input did the Insurance Council have?

Mr MOBBS: The Insurance Council made submissions to that inquiry. They met with the insurers individually and also held a workshop, which we all contributed to.

The Hon. SHAOQUETT MOSELMANE: Could you tell us more about it?

Mr MOBBS: The competition review covers a range of elements, including whether there might be additional insurers coming in or any insurers exiting. There are considered efficiencies that might be gained. Many of those efficiencies would be on the claims side of things, such as, the redesign of forms and the MAA's website. It has been suggested by some it could be made simpler. There are a range of things considered by that competition review. We also consider inefficiencies with the community rating structure we have in place. It is a balance between what is fair and what is efficient. People have different views as to what could be made fairer versus slightly less efficient. Others would have the view it should be made more efficient. Those are the many things that can happen. We have not seen the outcome of that report as yet. It would be the normal protocol for us to receive the complete report and for us to comment.

The Hon. SHAOQUETT MOSELMANE: Is there any discussion about profitability?

Mr MOBBS: Those have been held separately. The authority did ask Taylor Fry to prepare an analysis of retrospective profits, which has been referred to by others before us and is why we are discussing it more now. That is not really part of the competition review. It is being reviewed but separately from that process.

CHAIR: How would you describe the activities of the Motor Accidents Council over the last 12 months?

Ms MAINI: I am a member of the Motor Accidents Council, so I will speak to that but I am not here in terms of expressing views on the council. I can and do agree with Andrew Stone's comments that in the last 12 months the council has been quite robust. We have discussed and are still discussing a number of issues. An agenda has been put forward. Some of the items on the agenda involve structural or scheme design principles. Others involve tweaking and operational issues. By and large, it has been quite successful. I have not been a member of the council before but some of the things I find are quite leading in the way we are structured.

We have set up a subcommittee, which has representation of me as the insurance representative, Andrew Stone representing the Bar Association, two of the medical practitioners and some of the Motorcycle Council, looking at whole person impairment and the cases that potentially fall under the 10 per cent threshold. We are looking at how many there are and what they are, especially things like the Table for the Evaluation of Minor Skin Impairment [TEMSKI] and whether we can look at making recommendations to align those. To me, that is one of the positives of being part of the Motor Accidents Council. It is not just looking at operational. We are actually looking at scheme design issues as well.

The Hon. SCOT MacDONALD: We had a discussion earlier about opting out. Has the council considered that? Would the actuaries cope with that? It seems attractive to me in this day and age that, where possible, people are able to exercise their civil liberties.

Ms MAINI: To clarify the question, when you say "opting out", do you mean opting out of the Lifetime Care and Support Scheme?

The Hon. SCOT MacDONALD: Yes.

Ms MAINI: That does not come into the functions of the Motor Accidents Council or the powers of the council. We do not discuss anything to do with the Lifetime Care and Support Scheme other than are we experiencing any issues in terms of the interplay between the motor accidents and the Lifetime Care and Support Scheme.

Mr DAVID SHOEBRIDGE: I know some people like to paint claims managers as heartless bureaucrats protecting insurance profits. There must be a number of instances where you talk to claims managers and from your own experience as a claims manager where you see the impact of the whole person impairment assessment and the arbitrary nature of the assessments producing unfairness. Can you elaborate on that?

Ms MAINI: It is an interesting question. To clarify, not all claims managers are heartless.

Mr DAVID SHOEBRIDGE: I started with that assumption.

Ms MAINI: We look at the opposite—

Mr DAVID SHOEBRIDGE: That is why I am asking you because you have your personal experience of claimants. How do you see it operating?

Ms MAINI: There are always going to be exceptions. That is one of the reasons why I am very supportive of the work of the Motor Accidents Council to look at those exceptions. The opportunity that we have is in correcting those defects and looking at the people who fall between the cracks. How do we alter the scheme to ensure consistency so those arbitrary issues do not come up? There are other things as insurers that we also want to ensure we do. Putting aside the whole person impairment test, one of the things we want to ensure is that we determine liability quickly, that we make necessary expenses for out-of-pocket expenses early, and that we pay medical treatment very quickly. Everything we do is to support someone's injury, to help them get on with their lives and to restore them to the way they were prior to the accident.

Mr DAVID SHOEBRIDGE: If I can ask again about the whole person impairment, you must see cases where some people have a 7 or 8 per cent whole person impairment, the injury has had a catastrophic impact on their life but they are not getting general damages. Do you accept that happens with the current scheme?

Ms MAINI: It is all relative. I do not want to sit here and say that someone's injury has not been catastrophic because it is relative to that individual. It comes down to the scheme design principles. The scheme design principles that were established for pain and suffering or damages for non-economic loss are structured in a way where the more seriously injured get access to that. Unfortunately, someone will fall outside that scheme. What I can do as an insurer is to provide guidance as part of the Motor Accidents Council to ensure that those people, that population is minimised.

The Hon. SARAH MITCHELL: In your submission you referred to the detailed submissions you made last year to both the Motor Accidents Authority and the Lifetime Care and Support Authority. Since the reviews were completed in October last year you say you have been working collaboratively with the Motor Accidents Authority. You spoke briefly about the review of the CTP scheme. Have you been working on any other areas with the Motor Accidents Authority since October last year?

Mr MOBBS: We have. There are a great many reviews that we undertake with them. We have looked at legal cost regulations, we have looked at the national heavy vehicle registration project and the personal injury register replacement project. There are specific sorts of vehicles known as car share vehicles, which are a new phenomenon; we have looked at how we might treat those vehicles. We have undertaken reviews of the geographic boundaries within the scheme. There is the motorcycle review, which has been referred to, the regulatory enforcement policy. I have got a list of a few others, but we are in constant discussion with the authority over the many aspects of the scheme and how we might work better and resolve the emerging issues.

The Hon. SARAH MITCHELL: And with the contact with the authorities is it usually the practice that you make submissions or have working parties, or are there other ways in which you engage?

Mr MOBBS: All of the above. Some matters call for a greater level of technical expertise and we would normally take those on notice and prepare submissions. There are various forums—the claims managers, which claimants have been part of, but that is more of a discussion forum—and emerging issues get discussed and they may filter off into other areas. I am more on the underwriting side and those are often very technical discussions involving a great deal of actuarial science, which we will need written submissions on.

CHAIR: I thank you both very much for being with us this morning. There may be a few more questions that members of the Committee would like to put forward and we would be grateful if you could answer those and provide responses within 21 days from the time of the proceedings, if that is convenient to you. Your input is very important to us and will certainly help us in our deliberations.

(The witnesses withdrew)

(Luncheon adjournment)

CHRISTOPHER JAMES BURNS, Chairman, Motorcycle Council of NSW**,** and

GUY JOHN STANFORD, Adviser, Motorcycle Council of NSW, affirmed and examined:

CHAIR: I welcome you here this afternoon. Thank you for coming. Mr Stanford, what is your occupation?

Mr STANFORD: I am a researcher. I am here as an adviser with the Motorcycle Council of NSW. I have appeared here before as chairman of the council.

CHAIR: Mr Burns, what is your occupation?

Mr BURNS: Motorcycle courier.

CHAIR: You are here as the membership and liaison officer—

Mr BURNS: I am here as the Chairman of the Motorcycle Council of NSW, recently elected.

CHAIR: If you should consider at any stage that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee please indicate that fact and the Committee will consider your request. If you take any questions on notice the Committee would appreciate it if the response to those questions could be forwarded to the Committee secretariat within 21 days of the date on which the questions are forwarded to you. Would either of you like to make a short opening statement?

Mr BURNS: Yes, please. With regard to the Motor Accidents Authority I would like to state that they are very willing and open to ideas and they are very open to the idea of working as a gatekeeper for the citizens of New South Wales to keep an eye on the CTP scheme. Our submission outlines the fact that we feel they need better tools to do it, and one of those is a better crash data facility to give them better base information so that they can do their job more effectively.

Mr STANFORD: I will go with that 100 per cent. Most of the things we had to discuss are symptoms of that one core problem.

CHAIR: Mr Burns, could you outline your concerns about traffic crash collection data in New South Wales?

Mr BURNS: The MAA appears to be at the mercy of insurance data, which is split between the seven insurers and gives small groups. So that any errors or padding that they put into their data is amplified by the fact that they have got small groups, so much so that when Finity, who are employed as actuaries for the Motor Accidents Authority, went to review all the CTP relativities last year and this year, the sample sizes are so small that they had to use a model. That indicates that we need one complete lump of data for the MAA to use to better enforce their overseeing position on CTP.

The other source of data they use is the RTA database, and we have highlighted in our submission that there are errors in the RTA database. When they input data from the COPS system into the RTA system they are effectively changing the risk by the way they input the information to suit the fields they have got in their database. So it is giving erroneous data back to the MAA.

CHAIR: To rectify that situation where do you suggest that the additional data should come from?

Mr STANFORD: I think where we see the problem is that the MAA does not maintain its own dataset of the types of crashes which cause a CTP claim to arise or that may go on to cause an LTCS claim to arise, and they try to override that data from what is provided by the RTA. I do not think that

the reporting requirements of the insurers are adequate to populate a database sufficiently for the RTA to be able to supervise the broad picture of what is happening within the State and that each insurer has its own little pocket of information of the experience only of each of those insurers. So each one is doing their own sums based on what they see are the risk relativities or the chances of payouts having to occur. If they have only got a small section of the market, they have only got a small pool of premiums, their chance of having a large claim has to be put against how many premiums they are going to have. Pricing is then on a very small box.

So we do not have an overall broad view available to the MAA to be able to look at the whole picture and say how much does this individual insurance company, individual pricing, change the pricing as if we were supervising this as one unified scheme. That complete picture is not available to anybody in this State let alone to the organisation, which is charged with having to supervise the scheme.

Mr BURNS: Can I just add to that? The Western Australian Crash Reporting Scheme appears to be world's best practice at the moment. There is input from police, ambulance, insurers, and it is all independent.

CHAIR: Which scheme?

Mr BURNS: The Western Australian Crash Reporting Scheme, which has been set up recently—www.crashreport.wa.gov.au.

CHAIR: You are suggesting a similar model here in New South Wales to what they have in Western Australia?

Mr BURNS: A similar model would go a long way to giving the MAA the tools it requires to effectively do its job, yes.

Mr STANFORD: There are shortcomings with the RTA system. It is a very descriptive system and can give a rough idea of what is going on there, but in terms of trying to connect cause and effect, in terms of what types of injuries arise from what types of crashes, that is like a holy grail. The RTA database will not permit that kind of connection, so we need a system in which we can start to see what types of injuries arise from what types of crashes. For example, the Motor Accidents Authority equivalent in South Australia was looking at rear-ender crashes on cars because they noted that they had a very large number of their payouts going to whiplash injuries. So in trying to identify where these whiplash injuries were occurring they discovered that the normal police reporting system was not giving them a clear view of where they were occurring and in fact was misidentifying black spots and misidentifying where these crashes were occurring. That is exactly the same problem that we have here in New South Wales—and it is not limited to New South Wales, it is just that the systems that we are using are hopelessly inadequate for the MAA.

Mr BURNS: To validate what Guy was saying, that information was from Ross McColl—I am not sure if that is his first name. He did a presentation for the Motor Accidents Commission in South Australia and his presentation highlights that the difference between CTP and crash data leads to erroneous data.

Mr STANFORD: I am happy to pass that up. That was a paper that was presented at one of the road safety conferences. While we are at it, we have some prepared information based on the questions that were put to us in writing, so we will table that as well.

Documents tabled.

The Hon. SHAOQUETT MOSELMANE: Just a question in regard to information you have given on page 4 of your submission. You request that the Law and Justice Committee seek an independent opinion on the mathematical effect of subdivision of a population into smaller portions for

the purposes of premium calculations. Can you explain what that means and what you hope to achieve with mathematical calculations and what impact it will have on premiums, if any?

Mr STANFORD: That is about managing the scheme. For example, if you put all cars into one bucket and you have no distinction between what type of vehicle, what type of drivers, whatever, you would end up with a set of numbers from across the whole State, from across the whole scheme, that would give you, because of that large number, one set figure. Once you start dividing up and you say let us cut them in half and put all lightweight cars in one category and all heavyweight cars in another category and then try and calculate within those divisions only, the risk of any one particular crash is actually a relatively rare event, but when it does come up it is going to be expensive. So if you are trying to price the risk of that coming up, as you cut the sample size in half you increase the uncertainty factor of whether that expensive claim is going to come up within that group. If you then divide that by another seven, that uncertainty factor then has to be priced up even higher again because it is not working on the pool of all the premiums; it is only working on the pool of premiums within that one-seventh of one half.

So as you continue to divide you have to add an additional factor to increase the premium for each of those buckets to cover off that uncertainty factor of that large claim arising within a small group. What ends up happening is that whilst with cars we have one division, for motorcycles we have five divisions broken up across seven insurers, so the numbers end up being quite small. You do not have large numbers of people pooling their premiums into each bucket but you are still increasing the risk of an expensive claim arising. So those small numbers have to pay a higher premium in order to make sure there are enough funds there to cover that.

The Hon. SHAOQUETT MOSELMANE: Are you proposing to break them up or put them all together?

Mr BURNS: Putting them all together would give a better picture.

Mr STANFORD: My last point is that if we look at the numbers as they are at the moment on the basis that they are, all that gets lost in the confusion of all of these small buckets. But if, as we are proposing, you have a database of all crashes which have occurred and which have caused a CTP claim to arise and you know the outcomes, the types of injuries, and that is connected back to the type of crash which had occurred, not only are you able to develop better policy for injury prevention and, basically, a reduction of trauma in general, but you are also able to get a very accurate view then of what the correct price would be across the scheme and what the effect would be of the breaking up into five categories and seven different companies selling into those categories. You would be able to measure what those differences are and determine whether that is a good thing for the community or not.

The Hon. SHAOQUETT MOSELMANE: Do you believe that motorcyclists are now paying too much in premium?

Mr STANFORD: We do think we are paying high premiums.

The Hon. SHAOQUETT MOSELMANE: By how much?

Mr STANFORD: This is one of the things that we have been trying to work with the Motor Accidents Authority on and Chris can give you a lot more information about that, but certainly the recent Finity review, as Chris pointed out, does make the point that the numbers in each of these small divisions are so small that they cannot actually use real numbers, they actually have to make up numbers and do mathematical modelling to try and work out whether it is fair or not. So if you have to go into that degree of mathematical modelling on such small sample numbers you are already in a lot of trouble and really just at the mercy of how the mathematics works.

The Hon. SHAOQUETT MOSELMANE: Have you devised such a plan or such a mathematical model to make your case even stronger?

Mr STANFORD: This gets into the area of actuarial studies and from that point of view, whilst we are fairly good at doing sums on the back of an envelope, I would not suggest that we would pass the actuarial exams on the subject. So we have encouraged the Motor Accidents Authority to bring in the actuaries as required to look at this. So our dilemma has been to make sure that we keep asking the right questions, or questions which are going to elucidate good and useful answers in this.

The Hon. SHAOQUETT MOSELMANE: The comment we have heard before is that the actuarial advice should come from independent actuaries rather than actuaries employed or related to the Motor Accidents Authority. What is your view on that?

Mr STANFORD: I think the Motor Accidents Authority should be the one who is calling in the actuaries but, look, I can see that everybody wants independence in all of these things to make sure that—when you move into a complex area of course there is always the risk that somebody is going to sort of make decisions that may assist their own particular case, and so ensuring you have got independence is a game that we all have to play here. And we certainly, as motorcyclists, are very hopeful that this Committee is going to be independent on this because we are interested in getting the right answer out of this. We are not here just because we think we should not pay as much. We just do not think the system is being operated on a fair basis.

Mr BURNS: Can I just throw a couple of things in here as well. Just to follow on from Guy's comments, the Motor Accidents Authority does use an independent-ish actuary, Finity Consultants, and in their latest actuarial report which is available on the Motor Accidents Authority's website, on page 16, section 2.11, Class 10 motorcycles, it says there that they have to model what their relativities are going to be for motorcycles. That is essentially because the sample sizes are too small. So modelling is an actuarial word for best guess. And as a consequence they are going to reduce it from last year where they did best guess, but we believe the real answers will be in the independent audit from Ernst and Young which was commissioned by the previous roads Minister.

Mr DAVID SHOEBRIDGE: Daley.

Mr BURNS: Daley, that is right. Thank you very much for that. We are still waiting to hear the results of that. I believe it is out and ready but it is with the finance Minister's office at the moment.

Mr STANFORD: So we do not know where things are up to at this stage.

The Hon. SCOT MacDONALD: I have a few general inquiries. I read your part about deficiencies as you saw them in local government engineering. Did you have any suggestions there? Out in a lot of the smaller councils I suppose, the regional councils, they are really struggling to make that road budget stretch, so a sort of isolated council with a poor little road engineer who is probably trying to do a lot on his own, how can he be skilled up or how can he make that situation better?

Mr BURNS: Anecdotal stories from motorcycle riders up in the northern regions, work on Summerland Highway, they had a Roads and Traffic Authority inspector at each end and one of the guys up there said the road works were awesome. The local councils were being checked, everything was being ticked off, it was being done according to—I believe Austroads have got guidelines for this sort of thing. When they are doing local patching, for instance Tweed Shire Council, they do have a limited budget, correct. They use a unit called a jet patcher where they basically fire high velocity stones into a hole on the side of the road, it packs itself down and then they drive away and leave it. It is a one man operation, one truck. Very efficient. Good use of time. Fantastic.

The Hon. SCOT MacDONALD: With a bit of tar shot over the top of it.

Mr BURNS: Yes. We come round the corner ten seconds later, hit the loose stones on top and end up in the shrubbery. Tweed council's response to that was to put sand hoppers on the back of their jet patchers and throw sand over it rather than sweeping away the debris. The only thing worse they could have done was probably put diesel on top of it. We are currently discussing that with Tweed Shire

Council at the moment. The short answer as to what the local councils can do with limited funds and limited money is that they need to speak to the Roads and Traffic Authority about the right way to do this and the most efficient way. They need that broom on the back of their truck and to sweep it up.

And if we had a crash reporting database that was independent—for instance the ambulance turn up to a crash in a regional area, they GPS it. When the police turn up for a crash they do a general best guess, for instance Old Pacific Highway, somewhere between Cowan and Mooney Mooney, which is a 10 kilometre stretch. The ambulance officers go there, they GPS it. If there was an independent database and the ambulance officers were having input and they GPS'd the site people would be sitting back going: Hang on, there have been six crashes on this one corner. Why? It all fits in together. The Roads and Traffic Authority, a decent database for the Motor Accidents Authority and then the local councils—they can spend their money more efficiently, they can see where the real areas need to be targeted to stop motorcycle crashes. As a consequence then there are fewer people in the lifetime care scheme, everybody wins.

The Hon. SCOT MacDONALD: It is a little bit off target—I realise we are talking about long-term care—but I refer to quad bikes or farm bikes. I realise they are not necessarily registered or on roads but some of them are. Quad bike crashes are increasing too much. Do you have any views on that?

Mr STANFORD: Yes. Quads are an interesting issue by themselves. We have an increasing degree of issues. One is there are just as many off-road unregistered, unregistrable motorcycles in New South Wales as there are on-road registered bikes. The trouble is they have got nowhere to ride and so there is nowhere for them to be supervised in that activity so they end up down the creek, in a paddock somewhere, with old lumps of iron lying around. The injuries from that kind of thing are kind of hard to follow up. They just turn up at hospital eventually one way or the other. Increasingly we are seeing injuries from quad bikes from the same unregistered, nowhere to ride issue.

It is quite separate to quad bikes on farms. Quad bikes on farms have particular operator issues and we have actually started looking at that through our Australian Motorcycle Council. I am very happy to talk to you about that off line from this. But we are seeing some very severe injuries from small kids on quad bikes in local parks and things like that. Parents will often buy a quad bike for a little kid because they believe it is way more stable but they are not. They weigh 300 kilos and when they land on top of a little kid it is not a good outcome.

So the biggest problem with this is the supervised riding areas. We do not have supervised riding areas. All through the suburbs we get noise complaints from pit bikes, unregistrable little bikes that kids are using. The parents go out, the kids jump on, they whizz around the streets in the middle of the night. Reports come into the police about noise complaints and the next day every motorcyclist that lives in the area gets nailed for a noise complaint because he can be found because he is on the road. So, yes, from our point of view there are big issues here—very big issues.

Mr DAVID SHOEBRIDGE: It seems to me that one concern you have is data sharing amongst insurers—pooling their data for motorcycles in order to increase the pool. Is that one thing you are looking at?

Mr STANFORD: Yes. We do not know whether data pooling is occurring or not. We suspect that it is probably not. But if they are pooling they are only pooling amongst themselves. They are not sharing that information with the Motor Accidents Authority.

Mr DAVID SHOEBRIDGE: Maybe that is something we will ask the insurers, whether or not they pool that data for all motorcycles. I thought they did but I could be wrong.

Mr STANFORD: There is a question about whether they are pooling that for price setting amongst a cartel or whether they are sharing that with the Motor Accidents Authority for open inspection and I think that sort of independence is a question that needs to be asked.

Mr DAVID SHOEBRIDGE: Then in terms of the categories, you criticise the current five categories for different premium setting for compulsory third party and lifetime care and support because you say that produces the data pool to make it statistically unreliable?

Mr STANFORD: That is right. Whilst on one side you can say it is fair to break them up into those groupings on one basis—

Mr DAVID SHOEBRIDGE: Could I just ask you to address that tension, because there does seem to be that tension. I am in that nice class, I have looked at the statistics, that sort of getting to 40, decide to buy a motorbike, the one that I can now afford that I have always wanted since I was 18, I get out and I find myself benefiting from the lifetime care and support scheme. There is that group of cyclists, 40 to 45. There is another group that are 18 to 24. These are high-risk groupings. Would it not be equitable that they pay a different premium?

Mr STANFORD: In the same way that we see that with just trying to get vehicle insurance for example for a kid. I have got kids and of course the price the insurers demand for their insurance—

Mr DAVID SHOEBRIDGE: Could you just address that tension? You have dealt with one which is the small data sample. Could you say how we should resolve that tension between the small data samples but also equitable pricing? You seem to have a very direct answer which is one price.

Mr STANFORD: We do not think the answer has really been found. There is a lot of evidence which is kind of contradictory. For example, from the Motor Accidents Authority website you can find the report there from Christie and Harrison where they looked at the propensity of different groups to crash and they reached the conclusion that engine capacity was not really a good indicator of that. So we have to split here the rider characteristics and the vehicle characteristics and at the moment all that is being rolled together. We also think there is a third factor which needs to be included which is the road risk factor. That is not included as a separate item. There seems to be a willingness to just try and bundle everything into one fudge factor and I think that a lot of factors get hidden.

Mr DAVID SHOEBRIDGE: How would you price road risk in? If someone is driving on the North Coast they pay a higher premium than if they are driving in the inner city? How would you factor that in? Is that what you are thinking?

Mr STANFORD: No, I think that here we have to take recognition that there are certain risks which you can guard against as a driver or a vehicle owner but there are certain risks that you cannot guard against. This goes back to Scot's issue about how a local council finds itself in this. Say we said that we are going to price all these risks. Then we say the best way to price a risk is to sue somebody on the basis that the car has slid off the road or the motorcycle has slid off the road on a corner up near Kyogle and now the local council is up for a very large bill because instead of the lifetime care scheme saying yes, we will wear that cost—

Mr DAVID SHOEBRIDGE: They can recover against the authority.

Mr STANFORD: The lifetime care scheme says they will recover against the road owner. Ultimately the road owner is the community. So there is a certain amount of road risk which must be borne by the community overall. We need to be certain in doing the numbers that, for example, the reason that the motorcyclist speared off near Kyogle. Was it because he was on a motorcycle, was it because he was the rider, or was it because of the road risk factor in that location?

Mr DAVID SHOEBRIDGE: So is the nub of what you are getting at in terms of the data collection that if we get more data collection you have a suspicion that it will show that a proportion of the accidents that are currently being classed by being at fault by the motorcycle rider will actually be classed as being produced by the road conditions and, to that extent, that should be a cost that is borne equitably across all road users?

Mr STANFORD: Correct.

Mr BURNS: Yes.

Mr STANFORD: That is exactly where we are going. In some of the papers we have just tabled we have provided a little piece of information there where at the motorcycle council we asked Liz de Rome from LdeR Consulting to do a data request on the Roads and Traffic Authority for us to look at the reclassification of all crashes in which the police had reported that a road hazard was a contributing factor to the crash. What we found was that the Roads and Traffic Authority reclassified most of those.

Mr BURNS: Twenty per cent of those from road hazard to speed as a major contributing factor.

Mr STANFORD: So we had about a 20 per cent higher indication of at fault with motorcycles due to speeding. A similar figure has been found by forensic engineers.

Mr BURNS: Yes, in a recent study. One was done in 2005 and one was done in 2007, when there was a reclassification. The figures are very similar. I think one figure is 21 per cent and the other is about 19.5 or 20 per cent. This information is then fed to the Motor Accidents Authority, which then uses its actuaries and they say that X number of single vehicle motorcycle accidents are speed-related when in fact 20 per cent of the speed-related accidents are due to road conditions. Going back to the point you made about pricing of compulsory third party insurance for different areas, that currently happens.

There is a different price for a different area. If I live in postcode 2038, for instance, I pay a higher compulsory third party premium than I would if I lived in 2580, which is Tarago, New South Wales, which is a country region. Also, a 39-year-old rider with 20 years experience will pay more for compulsory third party for his motorbike in, say, postcode 2380, than a 41-year-old rider with two years experience and full comprehensive insurance. The 41-year-old will pay a lower compulsory third party premium by virtue of the fact that he has comprehensive insurance. That does not make him or her any less of a risk. He may have had his licence for 20 years but he may not have ridden for the past 18 years. The system is not quite fair and if the Motor Accidents Authority had the right tools and independent data they could make it fairer for everybody.

CHAIR: Unfortunately that concludes our time. We thank you for coming. The Motorcycle Council of NSW is a regular attendee at our reviews and we always appreciate your input, which is valuable to us. We have not been able to ask a number of questions so we will send them to you and we ask you to respond within 21 days.

Mr STANFORD: We are very happy to tackle them and provide answers in as much detail as we can.

(The witnesses withdrew)

GARY ROLLS, President, NSW Branch, Australian Physiotherapy Association, and

CHRISTOPHER WINSTON, NSW Branch Manager, Australian Physiotherapy Association, sworn and examined:

TAMER SABET, specialist musculoskeletal physiotherapist,

PETER MAGNER, physiotherapist, and

PAULA JOHNSON, Senior Policy Officer, Australian Physiotherapy Association, affirmed and examined:

CHAIR: I welcome the witnesses from the Australian Physiotherapy Association. If you consider at any stage that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee please indicate that fact and the Committee will consider your request. If you take any questions on notice the Committee would appreciate it if the response to those questions could be forwarded to the Committee secretariat within 21 days of receipt of those questions. Would any of you like to make a short statement?

Mr ROLLS: I will make an opening statement. The Motor Accidents Authority has made numerous improvements to the way in which people suffering the effects of motor accidents receive much-needed rehabilitation for their injuries and I would like to put this on the record. In recent years there has been a shift in the operation of the scheme to help ensure that clinical decision-making is in the hands of the health practitioners most capable of helping people to regain their function and independence and we strongly support that change. In short, we support the timely provision of reasonable and necessary treatment for the benefit of those injured in motor vehicle accidents and we support strategies that will facilitate such treatment.

The Australian Physiotherapy Association therefore wishes to express its support of the current Motor Accidents Scheme and the Motor Accidents Authority that manages it. The scheme has provided claimants with greatly enhanced care and has done much work, in association with some of our members, to improve the management of injuries such as whiplash. We wish to continue this to assist the Motor Accidents Authority in further improvements to the scheme. The position of the Australian Physiotherapy Association is that more could be done to facilitate the most appropriate treatment for people injured in motor accidents. Our members have consistently raised issues with us and we would like to discuss those issues today.

I will start by clarifying the importance of physiotherapists in assisting people injured in motor vehicle accidents to restore optimal function. Physiotherapy is needed across a broad spectrum of injuries and conditions caused by motor accidents, from acquired brain injuries to people who require extensive physical therapy initially to restore basic everyday functions and who are likely to be affected for the rest of their lives to people with whiplash-associated disorders that can be completely resolved given quality care from a physiotherapist. Physical injury can have significant and widespread negative effects on an injured person with direct and indirect social and economic impacts. Physiotherapists have a focus on helping people to return to normal function with direct consideration of structuring treatment to influence the social and working capacity of an injured person. Intervention delivered in this manner also directly benefits families and friends, employers and society in general.

Of course, while it is hoped that all injured people will return to normal social and working lives, not all injured people succeed. In some cases, such as people with catastrophic injury, it is vital that physiotherapy services continue to be available. Provision of treatment by physiotherapists to restore or maintain function is in common with the Motor Accidents Authority vision of reducing the social and economic impacts of motor accidents. Access to physiotherapists in the community, particularly Australian Physiotherapy Association physiotherapists, is important for people injured in motor accidents. Australian Physiotherapy Association physiotherapists have an additional code of conduct with which

they are expected to comply and our association's physiotherapists have worked with the Motor Accidents Authority to develop treatment guidelines. Australian Physiotherapy Association physiotherapists are connected with their profession through increased access to quality evidence-based professional development and a defined career pathway.

Australian Physiotherapy Association credentialed physiotherapists have additional experience and training. Australian Physiotherapy Association titled physiotherapists include but are not limited to Australian Physiotherapy Association musculoskeletal physiotherapists, neurological physiotherapists and occupational health physiotherapists. Additionally, specialist physiotherapists are fellows of the Australian College of Physiotherapists. These practitioners have been recognised as some of the most skilled and respected physios in the profession. These specialised physiotherapists have been recommended for the early re-assessment of people suffering from acute whiplash-associated disorders where their second opinion is sought. The Australian Physiotherapy Association commends the Motor Accidents Authority for recognising the role of specialist physiotherapists in the guidelines for the management of acute whiplash-associated disorders.

Our written submission to you referred to our concern about fees paid to physiotherapists. This was not meant to be a concern about fees per se but a concern about how the regulating of fees by insurance companies can affect the provision of adequate services for injured patients. The Motor Accidents Authority does not operate all aspects of the scheme. Insurance companies receive premiums and make decisions about the treatment offered to patients, including how much treatment and by whom. They have the opportunity to regulate these factors directly by approving or not approving treatment. They also have the ability to decide whether or not a patient is able to see any physiotherapist and the type of physiotherapist they are able to see. Insurance companies can do this directly or indirectly with the fees they are willing to pay for treatment. We should not forget that insurance companies are commercial businesses and they must make a profit.

In directing the reasonable and necessary care of a person injured in a motor vehicle accident physiotherapists are required to submit an extensive document that outlines the injured person's details, their pre-injury status, diagnosis, history and examination findings, goals of treatment and the treatment type and frequency. Significantly, a separate document is required to be submitted for each individual injured region of the body. This documentation is required to be submitted on the commencement of treatment and for any subsequent sessions extending outside the initial proposal. A physiotherapist is required to attach their own schedule of fees with this documentation. In effect, the physiotherapist is putting forth a proposal to achieve a specific outcome that ultimately benefits the injured person's recovery to facilitate a return to pre-injury condition. The proposal is then reviewed by the insurer against the specific criteria for reasonable and necessary treatment.

It is fair and reasonable that titled and specialist physiotherapists may charge more for their services. It is equally fair and reasonable to expect, if necessary, that more complex or difficult patients can be sent to these physiotherapists. Our primary concern is that while the scheme presently enables physiotherapists at varying levels of expertise to put forth treatment proposals and their individual fees for treatment, some of our members have experienced great difficulty in ensuring that the fees payable by insurers are proportionate to the proposal put forth for each individual injured person and their treatment needs. We believe the failure by insurers to insure appropriately the requirements of an injured person, the expertise of the physiotherapist and suggested treatment needed to achieve a meaningful outcome has the potential to create a dearth of physiotherapists willing to treat motor accident patients and reduce the overall outcomes for persons involved in motor vehicle accidents.

We propose that the situation be addressed via a much-needed review of the documentation submitted by physiotherapists, namely the physiotherapy notice of commencement and the physiotherapy review forms. These documents can be simplified to achieve the same result for the claimant while clearly articulating the claimant's problems, the outcome measures and goals and the proposed treatments. The addition of the physiotherapist's type and level of expertise can also be included in these forms and that would better inform the insurer during their consideration of reasonable and necessary treatment.

In summary, we believe the current scheme greatly enhances the management of people injured in motor accidents. Our wish for the future is that that members of the public can be assured there are sufficient physiotherapists offering excellent treatment services but if such members suffer an injury from a motor vehicle accident they will continue to receive appropriate, evidence-based treatment from the most capable physiotherapy practitioners. We believe this will continue to fulfil the Motor Accidents Authority's key result areas of optimal recovery and scheme viability and to achieve its vision of reducing the social and economic impacts of motor vehicle accidents upon injured individuals. We propose to assist with the review and changes to the current documentation submitted by physiotherapists in a manner that ensures the scheme facilitates optimal recovery and ensures insurers do not prevent access of people injured in motor vehicle accidents to a highly skilled physiotherapist. Each patient deserves choice, certainty and the best chance of recovery around what is already a traumatic event in their lives.

The Hon. SARAH MITCHELL: Thank you for those informative opening remarks. I think you answered a lot of the questions I had. When reading your submission, the thing that was clear to me was the concern for payment for physiotherapists and the ramifications that has, not only to physiotherapists but to patients as well. In reply to a prehearing question on notice in relation to physiotherapy that we put to the Motor Accidents Authority, it was stated by the authority that the payment scales from compulsory third-party insurers compared favourably with physiotherapy rates provided by the WorkCover Authority of New South Wales and Medicare Australia, and that the authority does not propose to regulate physiotherapy fees. I wondered what your thoughts or reaction to that statement might be?

Mr ROLLS: Are you happy to take answers from any of the panel?

The Hon. SARAH MITCHELL: Yes.

Mr SABET: In answer to your question, probably the most striking response to this is the fact that a fee schedule exists. That has been our concern. It is probably something that we are not sure why it exists but certainly one insurer has gone ahead and produced a fee schedule. Hopefully we will come to some additional questions later as to what the ramifications of that are. Interestingly, the Motor Accidents Authority has put forward that it is not endorsing that a fee schedule exists in the first place which, in essence, is the principle of the scheme, that there is no fee schedule and the physiotherapist is required to put forward a proposal. In that there is consideration for the individual needs of the person. There is obviously consideration of the expertise of the person they are seeing. Whether that is needed at that point, that comes into the decision-making itself and therefore a cost proposal. I hope I have answered your question. I am not sure why a fee schedule exists—and that is probably why we are here—given that the scheme does not endorse such a fee schedule.

The Hon. SHAOQUETT MOSELMANE: Does the fee schedule differentiate between the expertise of physiotherapists?

Mr SABET: No, it does not differentiate at all.

The Hon. SHAOQUETT MOSELMANE: It is just a flat rate?

Mr SABET: It is a flat rate, not considering for injury type. Again, if I paint a picture of people I would see, all my patients would be on the far end, those who have had chronic symptoms for some time. Included in that is whiplash. If you have had the fortune of meeting people in chronic pain, it is not something for half an hour, it takes at least one hour-plus to get through all the issues. More often than not they are psychosocial in nature although masked as a physical injury. Getting through that in itself is a tedious process. Having results, on the other hand, as well is a difficult and challenging process. For some we succeed and for some we do not.

The Hon. SHAOQUETT MOSELMANE: Somebody with the expertise of about 10 years, what would be their hourly rate, if it is an hourly rate basis, and what is the Motor Accidents Authority hourly rate? In other words, I am asking what is the difference?

Mr MAGNER: There is no Motor Accidents Authority scheduled rate. It is just that one particular insurer has created a schedule. There is no particular scheduled rate.

The Hon. SHAOQUETT MOSELMANE: Is the Motor Accidents Authority going with that schedule that one insurer has created? Is it using that as its basis?

Ms JOHNSON: The Motor Accidents Authority does not regulate the fees. That schedule is used by that insurer. Each insurer will have some guidance for its agents about what schedule of fees they will pay. This is one example, which is probably the biggest insurer in the scheme, it is quite a rigid schedule that their agents will pay for physiotherapy fees. It is not an hourly schedule. There is no time basis on it. It talks about initial consultations and standard consultations. It does not differentiate by the expertise of the physiotherapist at all. It has been our members' experience in some instances that there has not been any negotiation entered into regardless of the extra expertise of the physiotherapist.

The Hon. SHAOQUETT MOSELMANE: Mr Rolls, on page 2 the submission under your name says this means that the physiotherapists currently required to subsidise the Motor Accidents Authority system. What do you mean by that?

Mr ROLLS: In a situation where the fees reimbursed to the physiotherapist are lower than what the physiotherapist would normally charge under a market rate, given the type of patients they are seeing and the intervention they need to provide, the level of fees is lower. So, to a certain degree, to treat the patient optimally the physiotherapist is subsidising the system, providing extra care at a higher rate than they are being reimbursed for.

Mr DAVID SHOEBRIDGE: You say in your submission that it may mean people are not receiving treatment. Do you have any examples of people not being given treatment because a physiotherapist has rejected the rate? I am looking at it from the perspective of injured people being treated, that is good. Are there any instances where they are not being treated?

Mr MAGNER: Yes, a lot of physiotherapists will flatly say I am not going to be working with compulsory third-party patients, and they will only be treating private patients because they do not want to go through the process of getting approval for treatment, the administration involved with that, and then the fees they are paid, which are not at the same levels that they are charging their other private patients.

Mr DAVID SHOEBRIDGE: I think the Hon. Shaoquett Moselmane was asking for an idea of the differential, what a physiotherapist in that situation might be charging their private patients and what they are being offered by insurance companies. I am not asking you to set the entire market, just to give us some idea about what the differential is.

Mr SABET: I will give you an example for a private patient that I would see for one hour duration at the moment, and I will give you some colleagues as well in the city. My current rate for private patients is $170 for the initial consultation, that is one hour, and it is $80 for a follow-up session thereafter. These are my rates again. My colleagues charge substantially more, working in the city. That is the other thing to consider, demographics are not considered where you work and other running costs are not considered in what I am quoting at the moment. The initial consultation for the Motor Accidents Authority is $75 and, again, irrespective, I will treat these patients for one hour. So in response to the question Mr Rolls was asked to answer, technically speaking my ethical responsibility overrides the financial constraint in that example. Whether I see them or not, again, it is a decision for me to make over time, but I continue to treat them irrespective. However, in saying that, I am not one of the physiotherapists currently having difficulty with my submission because more often than not two other insurers pay the rate I ask for.

Mr DAVID SHOEBRIDGE: I hear you are very strongly against having any kind of schedule, even as an indicative rate you could bargain against? Would you be against a schedule that sets an

indicative rate but there is an opportunity to suggest you may get a higher rate. Would you be against that as a concept?

Mr ROLLS: I guess that is something we have not canvassed a great deal across our members. Nevertheless, it would be a complicated schedule to cover people with brain injuries, people who have had burns, people who have psychosocial issues associated with that and the different levels across physiotherapists. My first reaction is it would be a complicated guideline and we have not done work with the Motor Accidents Authority in regard to that.

Mr DAVID SHOEBRIDGE: There are some benefits, though, once you have an accepted treatment schedule with a statutory authority because then you have certainty of payment over time, which can sometimes be easier than with private patients? Is that true or not?

Mr SABET: In saying that, the cost repayment is essentially outlaid against the proposal put forth by paperwork, that is, the notice of commencement form and the review form. Technically the certainty of payment is based on the outcome that you propose for a given person with a given problem at any point in time. Technically the certainty is in that documentation.

Mr DAVID SHOEBRIDGE: What about a scheduled fee for the documentation?

Mr SABET: I believe there is a scheduled fee for the documentation and bearing in mind there are some problems with that too, one of the procedures for that documentation, if a person presents with multiple injuries, you are required to complete the same documentation for each body area for the same given charge.

Mr DAVID SHOEBRIDGE: For the one fee?

Mr SABET: For the one fee, that is correct.

Mr MAGNER: And the documentation has not been reviewed for some time and it is confusing to clearly create some clear outcomes from the documentation. We believe that needs to be reviewed also.

The Hon. SARAH MITCHELL: Mr Magner, you said there are some physiotherapists who will not treat compulsory third-party patients and you said you did not have that problem. In percentage terms, how many physiotherapists would not be seeing compulsory third-party patients or how many would be adversely affected by this?

Mr MAGNER: The percentage of our caseload that is compulsory third-party patients is quite a small group. It is about 3 per cent of our caseload. There could be quite a lot of physiotherapists who say I am not treating those patients. It is hard to say how much it is, but it is small, only 3 per cent of our caseload. On that too, the review forms we have to go through and all the administration that goes alongside that, it is quite a bit of work to become skilled in that for only a small percentage of our caseload.

CHAIR: Do you have any comments about the Lifetime Care and Support Authority and the way in which it administers the Lifetime Care and Support Scheme?

Mr ROLLS: No, we do not.

Mr DAVID SHOEBRIDGE: We are happy for you to say it is going well.

Mr ROLLS: Anecdotally it is going well.

Mr WINSTON: We believe it is, yes.

The Hon. SHAOQUETT MOSELMANE: In reply to a prehearing question on notice in relation to physiotherapist fees, the Motor Accidents Authority stated that the payment scale from compulsory third-party insurers compared favourably with the physiotherapy rates provided by the WorkCover Authority of New South Wales and Medicare Australia. The authority does not propose to regulate physiotherapy fees. What is your reaction to this statement from the Motor Accidents Authority?

Mr ROLLS: Our first reaction is that we are very happy that the Motor Accidents Authority is not going to regulate fees. The second response is that our data shows that while it is variable, fees paid by compulsory third-party insurers are lighter on average than rates set by WorkCover New South Wales, and those fees do not make any allowance for the higher fees normally charged by prudential physiotherapists.

Mr DAVID SHOEBRIDGE: Would you be able to provide us, on notice, with that analysis? If we ask you now to give us your analysis of the different fees paid by WorkCover as against compulsory third-party, would you be able to provide us with those figures in the next few weeks?

Ms JOHNSON: Yes. We do annual surveys of the average rates physiotherapists charge in the community. We also have a maximum and a minimum charge on average, so we can provide you with that.

Mr DAVID SHOEBRIDGE: In terms of fee setting, you are not suggesting simply whatever the physiotherapist puts as his or her tariff for private patients has to be accepted by the insurers? You are accepting there will be negotiation? You just do not want it predetermined by a fixed schedule?

Mr SABET: That is right. In the decision-making, what is termed reasonable and necessary intervention is a process that is underpinned, and in that is the cost of the proposal. Basically what it means is are there alternatives available? A case manager, on receipt of this information—and I suppose I should highlight here it is the case manager making the determination more often than not. If they need additional input, they seek it. Again, we do not know where that input is coming from. It could be from an internal injury management adviser or an external way if it goes as far as a medical assessment person. It can go that far as well. But the point is that the proposal itself is weighed up for what it is going to yield at that point in time via a process, which is the process required for determining what is reasonable and necessary, which is undertaken by the insurer. Ultimately, if the cost is ridiculous for a basic presentation, the alternative is that the person go somewhere else, and that is reasonable. It is weighed up against the proposal itself.

Mr MAGNER: In line with that reasonable and necessary actually is when the reform goes into the insurers—that real speed of decision-making. So optimising decision-making; we can commence treatment as soon as possible. The earlier we can commence treatment the greater long-term outcomes we will have for our patients. Any delay in initiating treatment is going to have significant changes to the outcome of the patients where patients are more likely to develop more psychosocial factors, which then are going to impact on their long-term recovery.

CHAIR: Thank you for attending today. The Committee may have further questions and will forward them to you. We would be grateful if you could respond to those questions within 21 days. Again, thank you for attending and helping us with our deliberations.

Mr ROLLS: Thank you for the opportunity.

(The witnesses withdrew)

(Short adjournment)

MARTINE SHOSHANA SIMONS, Senior Social Worker, Brain Injury Service, The Children's Hospital Westmead, and

HELENE MARY CHEW, Coordinator, Brain Injury Service, The Children's Hospital Westmead, sworn and examined:

CHAIR: Thank you for attending today and welcome. If at any stage you consider that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. If you take any questions on notice, the Committee would appreciate if the responses to those questions could be forwarded to the Committee secretariat within 21 days of receipt. Would either of you like to make a short opening statement?

Ms CHEW: I have prepared an opening statement I would like to read.

CHAIR: Yes.

Ms CHEW: Thank you for the opportunity to provide evidence. The partnership of care Brain Injury Service has entered into with the Lifetime Care and Support Scheme is significant. It provides a pathway for ongoing rehabilitation for paediatric participants who have acquired a catastrophic brain injury. We believe that the delivery of service to any child or adolescent with a brain injury requires a deep level of clinical understanding of the profound impact that developmental issues have on delivery of rehabilitation services, and the changing clinical profile of the child and family as the child matures. For this reason our team and the paediatric Brain Injury Services of New South Wales welcome the continued consultation with the Lifetime Care and Support Scheme to ensure that service provision to children adolescents with a brain injury is appropriate to support recovery and promote return to family and community life.

As a team we are concerned that the family is given respect for the significant and often lifelong role they play in the life of their child, that their goals and choices for their child are dealt with respectfully and with the flexibility that family life demands—there is not a one rule fits all—and that greater dialogue and consultation take place around issues of patient confidentiality. This is particularly important in the delivery of psychological services but applies generally to therapeutic relationships established between clinicians and families. This issue is significant as the outcome of therapeutic processes as they attract from plan to plan are used by the Lifetime Care and Support Scheme to inform decision-making for future service delivery. We feel we need to work together to get the information-sharing balance right.

We believe that it is crucial that families have access to advocacy, particularly in the situation where the funding body is also making judgements about what is reasonable and necessary, and is at times directive about what services and assessments should be sought. This is an aspect of our current role with our patients and one that we are keen to preserve. We are interested also to understand how the proposed accreditation of case managers might impact on this advocacy role and the process of line management as employees of NSW Health. Finally, we acknowledge that we are currently involved in a number of collaborative projects with the Lifetime Care and Support Scheme, which work towards improving our working relationship but, more importantly, work towards better understanding the rehabilitation needs of children and young people with a brain injury.

CHAIR: What has been your general experience as a hospital supporting paediatric participants in the Lifetime Care and Support Scheme?

Ms CHEW: I would say overall it is emerging as a very important relationship with the Lifetime Care and Support Scheme. I think the situation now is that many of our clients, because there is a no-fault system, have access to better rehabilitation opportunities. We feel the Lifetime Care and Support Scheme has been paramount in really promoting the rehab of these children and young people.

CHAIR: Your relationship with the scheme has been good?

Ms CHEW: It has been overall positive. There certainly have been challenges along the way, particularly in working out processes—the different cultures between our two organisations. But if you look at the outcome for the child, then I would say that it has been a positive one.

The Hon. SCOT MacDONALD: I wrote a couple of quick notes when I read your submission. I should have written a bit more but you must have mentioned something about choice?

Ms CHEW: That is right.

The Hon. SCOT MacDONALD: Is there not enough choice? Or how do we go about getting better choice?

Ms CHEW: In making decisions about the way service delivery will be provided, as the primary rehabilitation provider to our clients there are times when we feel that the lifetime care scheme has actually, I guess, limited choice for the client and their family.

Ms SIMONS: A number of things have occurred. We have some concern that at times lifetime coordinators have initiated conversations directly with the family. Where we are the primary clinical rehabilitation provider, they have initiated conversations with the family about changing the provision of services—whether it is physiotherapy or clinical psychology services.

The Hon. SCOT MacDONALD: These are not minor things, they are fairly significant things?

Ms SIMONS: A range of services that are actively taking place for which we have submitted community care plans and they have been approved. At some time during the time we are still providing that service we will find—sometimes from the family, on one occasion the conversation was initiated with the clinician—the lifetime care coordinator saying something to the effect of, "We think it's about time that the child stopped coming to the hospital and actually moved out in to the community. We think it would be better" or "Don't you think it would be better for them to be in the community?" Or they might have said to the family—I do not know the exact wording—"We want you to consider not attending your occupation therapy at the hospital but going to somewhere locally so you don't have to travel so far."

I am sure those suggestions or comments are probably made from the Lifetime Care's point of view with the best interests of the child and family perspective, but initiating those conversations with families, some of whom are very vulnerable can be very destabilising for families. They are still recovering from the psychologically catastrophic nature of their child's injury and the fact it will have long-term effects for that child's life. They are coping with all of that. They are attending for treatment, they are receiving perhaps multiple treatments from our team—occupation therapy, physiotherapy, speech therapy, a combination of those things—and the funding body says, "Oh, we think that maybe you should change." That might lead them to think, "Well, does Lifetime Care think that my therapist isn't the right therapist for my child" or "If I don't do what the Lifetime Care coordinator suggests, will that have an impact on my future care?" Those are issues that we certainly help families sort out and we have conversations with Lifetime Care about them. But in the meantime, it has quite a significant impact not only on the family but also on the time of the team taken up trying to deal with an introduction of quite a new issue at a time when clinically we do not think the child and family may be ready for that move.

Ms CHEW: In answering your question, the limitation of choice comes in that families generally seem to be in a more vulnerable position and if we make a recommendation for something to happen, whether it was from us or the Lifetime Care and Support Scheme, families often will be easily directed on that path. I guess when you are set up with a service provider such as our own and they are given an instruction or encouragement to think about another path, in some ways their choice is limited because one of their choices is to actually stay where they are with the service that is currently being provided.

Mr DAVID SHOEBRIDGE: Are you saying that those conversations should first happen with the clinician rather than with the family?

Ms SIMONS: Yes.

Mr DAVID SHOEBRIDGE: Is that the nub of your complaint?

Ms SIMONS: I guess so because even if it takes us quite a while to then work out what might be the best pathway to travel, we actually have the capacity to hold that information and analyse it and have a professional discussion and work with the family and support them. We might say, "Look, actually, we were thinking about the next community living plan" that they were ready to actually consider private case management or private therapy. But it is done in a timely way. I guess I can speak as a social worker and also as the clinical psychologist in the team that to actually introduce those concepts for a family receiving counselling can be extremely destabilising. Because of the particular relationship, it may take some time to build up trust to work with the family.

Mr DAVID SHOEBRIDGE: That seems like something that should be able to be sorted out between the two agencies through communication. Have you tried that?

Ms CHEW: These situations do not happen with every client but, given that we have about 32 clients, it has happened with a significant number from our point of view.

Mr DAVID SHOEBRIDGE: Have you approached the authority and said, "Could we have a protocol where, if you are talking about treatment options, your first point of contact should be the clinician rather than the family?" Claims managers are not there to give treatment options.

Ms CHEW: We certainly, with each individual case, have taken up the issue with the Lifetime Care and Support Authority. We have not been so directive as to institute a policy of that nature.

Mr DAVID SHOEBRIDGE: Just a protocol, do you think that might be worthwhile exploring?

Ms CHEW: Absolutely.

Mr DAVID SHOEBRIDGE: Can I say, first of all, thank you for the work you do.

Ms CHEW: I have to say it is work that we really enjoy doing. One of the universal things about working with children, young people and their families is that we really see that it is an important role to take. We know that particularly for kids injured very young in life the influence we have in those early days will obviously have a part in setting a direction for where they go in the future.

CHAIR: What has been the response when you have raised this issue with the Lifetime Care and Support Scheme coordinator?

Ms CHEW: I can only speak to one issue particularly. Lifetime Care is very open to discussing these issues when they arise. I guess we have come to a point at different times—with one client in particular—where it is almost agree to disagree in terms of the direction we take, and at some point we would go into negotiation. That needs to involve the family and the participant where it is possible.

CHAIR: The fact you are raising it here today means it is a matter of continuing concern to you. Would that not be solved by, as has been suggested by Mr David Shoebridge, a protocol between the two agencies?

Ms CHEW: I think a protocol between the two agencies would be desirable. One of the issues we feel is fundamentally challenged in the work we do is the issue regarding clinical judgement and

clinical decision making. That is not an issue we have been able to overcome with Lifetime Care. There is a disputes policy or process that Lifetime Care has and as far as I am aware our clients have not gone along that path, which reflects that we have been able to negotiate with them for services, but clinical judgement is often challenged by Lifetime Care. I guess that is something we do continue to work towards improving.

Mr DAVID SHOEBRIDGE: You say that you need to ensure that families have access to advocacy. Are you talking about in those kinds of situations where you need to have someone in your team that can be an advocate for a particular course of treatment and take the fight up, if I can put it in those terms, to the Lifetime Care and Support Authority?

Ms CHEW: Yes.

Mr DAVID SHOEBRIDGE: How is that currently funded?

Ms SIMONS: It is not funded separately. Those of us who have direct contact with children and families would all take on at times the role of an advocate in terms of what reasonable and necessary treatment we think a child should have or how best to support the families so they can understand what their child needs and they can support them in their rehabilitation. Case managers certainly, I would say, play a major role in that clinical advocacy. Certainly as a social worker I consider that to be part of my role as an advocate for families and also on a broader level, which is why I am able to be here today.

We mention advocacy because to us we would like to differentiate it somewhat from the advocacy that Lifetime Care offers, for which they have a policy, acknowledge in material on their web site, and list a number of agencies who are advocacy agencies. By and large because we have close relationships with the children and the families we work with we actually advocate as a rehabilitation team. I will use a very social work expression: we actually hold a lot of these issues such as the difficulties of negotiating with Lifetime Care if they do not agree with the number of hours we might provide of a service, or for how much or how long or in what way. We do not get on the phone and burden families with that. We consider that to be our role to work that out, to have the conversations with Lifetime Care, to come to an understanding and then let the family know how far we have moved along. The families already worry about their daily lives, their child's interests and the other children.

Mr DAVID SHOEBRIDGE: Is a substantial proportion of time taken up with those negotiations, and would there be a better way of doing it?

Ms CHEW: A significant amount of time is taken up with negotiating treatment plans that we feel should be implemented. In terms of the process, there is the paperwork. There is definitely a paper trail and a need to resubmit and resubmit to try to get the wording and the numbers right. I guess as a service we see children with acquired brain injury, not just with traumatic brain injury, and we will provide to all of our clients, regardless of how they receive their injury, the service we feel should be provided to them. The children and young people from Lifetime Care, or the Lifetime Care participants, we do not see any differently. We want to give them the services we feel are required. We would not ask for the services unless we felt they needed them.

The Hon. SHAOQUETT MOSELMANE: I was surprised to read in your submission, particularly when it comes to issues about consultation in situations where there is horrific injury—where you would think there would be significant consultation with all the people involved to ensure the best care is provided—that there is no real consultation between service providers, Lifetime Care and the family. I would have thought the first thing would be to have all three parties, all relevant people, sit together in the first instance and work out a plan for the injured person. Is that what you mean when you say in your submission on the second page, "The coordination and administrative burden continues to be significantly higher than for clients with similar needs who are not in the scheme"?

Ms CHEW: That is correct.

The Hon. SHAOQUETT MOSELMANE: That encapsulates what you are saying?

Ms CHEW: Yes.

Ms SIMONS: Yes.

Ms CHEW: And it is not that we do not come to the table. We are talking with Lifetime Care a lot, we are meeting with coordinators a lot, but during the acute phase of a child being injured there is a lot of energy from all stakeholders to try to support the family and child as much as possible. Again, at the time of transition when the child is leaving hospital there is a great influx of energy from all parties to help with that transition and in fact with most transition points. As rehabilitation goes on over time and you go from plan to plan—and if you consider that the number of participants increases and another child is injured and energy goes back in—there is a lot of tracking of clients that are long-term participants and a lot of energy going in to the newer ones. There are a growing number of children and a finite number of workers. That is one of the things that our team is struggling with at the moment and we are talking about amongst ourselves at the moment as to how we are going to navigate that in the future.

The Hon. SHAOQUETT MOSELMANE: You say that kids rehabilitation service providers should be recompensed directly for the actual hours it takes to provide a report. What do you mean by "actual hours" and what recompense are you talking about?

Ms CHEW: This is a reasonably simple point. Currently we provide a service, there is a charge attached to that and a payment received. Similarly, that occurs with generation of the reports that we provide—for example, the community discharge plans and the community living plans. It seems particularly with the community living plans, which can be quite long and incredibly detailed, that there is a capping of the time associated with putting one of those plans together. As it is a clinical plan, we feel that a clinician is required to gather information from a number of different sources, assimilate information, consider goals and how they are tracking plan to plan, and we feel that our staff should be recompensed for the actual time it takes to put that together.

The Hon. SARAH MITCHELL: I wanted to ask a couple of questions in relation to the educational support that you talk about in your submission. It is made very clear that support of learning for the children after they have had the brain injury is very important.

Ms SIMONS: Yes.

The Hon. SARAH MITCHELL: There seem to be some issues around the current system. Could you tell us a little more about what the issues are in terms of how it works between the schools and rehabilitation services and what you would suggest would be a way forward to improve how all that operates?

Ms CHEW: The first thing to say is that the interface between health and education is at the core of the business that the rehabilitation service provides to clients with a brain injury. It is integral to our role that we consider how the impact of the injury might influence the child's future education and the support needs that they may have. Education varies between public schools, Catholic schools and independent schools.

Even though they have access to the same types of support, how you get support from these different types of education varies and can vary even within the public health system. That is one of the challenges we have as rehabilitation providers going to work with schools. You need to build up a rapport with the school, understand who the key worker will be and also work with them and within the resources they have got to negotiate the best support possible for the child that is returning to that environment. That is a challenge that I am sure Lifetime Care are experiencing also.

I guess Lifetime Care at the moment have been doing quite a lot in terms of trying to improve the situation with schools and we really appreciate the effort they are making to have consultation with

the Department of Education and Communities, because it is opening doors to try to set up better protocols in how we deal with department of education schools.

Ms SIMONS: There are many issues that we have when we are working with schools. As Ms Chew has said, we consider our work with the schools as an integral part of what we do. In term one when that child returns to the local public school or starts at that school there is a meeting with the principal and other key teachers. The nature of the child's brain injury is discussed and a plan set up for that term, the next few terms or maybe for the rest of the year. You discuss how the school might request funding to support the child, or how the child might have a gradual return to school and expect that the next year the school will be on board and understand that that child has a brain injury and we need to think about that.

In fact we do that. We consult with every school by phone, by fax, by email. We attend meetings or facilitate meetings and support parents at meetings throughout the year. We also do quite a lot of, I guess you could call it, therapy. Sometimes members of our team provide therapy in the classroom. They may provide assistance to the teacher and the learning support officer—those people who used to be called teachers aids—to assist the child in accessing the curriculum. The way that children who have extra needs are able to access the curriculum, how that is funded within the system of the Department of Education and Community, brain injury is not considered a separate disability.

Most of our children have some sort of cognitive disability, whether it is in speech or language or fatigue or comprehension. They all have varying needs within the classroom but not all of those needs attract extra funding. So many schools are trying to meet those child's educational needs within their current funding. That is where we are working very closely with Lifetime Care to advocate that. If the school cannot access funding through their system, Lifetime Care is funding that.

Mr DAVID SHOEBRIDGE: Do they fund that?

Ms SIMONS: They do and I understand the need for that. A difficulty that arises is just like we have talked both in this inquiry and, you may remember, in last year's inquiry about some of our administrative burden, the school has now taken on an administrative burden as well because Lifetime Care would like the school to be commenting on the educational needs of the child and completing forms and measuring how the child has progressed. One of the concerns that we have, which I am sure a number of you will be familiar with, is standardised testing, such as NAPLAN. All of the children are doing it at various times in their schooling. You probably would be aware that there has been a lot of discussion in educational settings and in the media about how those results are used.

At times we have concerns that Lifetime Care may want to use the child's NAPLAN results as an indicator about whether they should have continued funding. Whereas one of our goals from a brain injury rehabilitation point of view is not so much that we want to help the child achieve a change from getting 8 out of 20 in their spelling test to 18 out of 20 but just to be able to hold their own in the classroom, to want to go to school every day, to not feel that they are so different from their peers. That is particularly important to those children who entered at a time when they remember being much more academically capable than they may be following their injury.

CHAIR: A final question from the Hon. Peter Primrose.

The Hon. PETER PRIMROSE: My question, which may seem like a relatively boring but important one, relates to page 3 of your submission about the administrative burden of the Lifetime Care scheme on your service. You say it is "almost untenable". Can you make any recommendations as to what we may consider recommending that would relieve some of those administrative burdens without diluting the information that the Lifetime Care scheme needs?

Ms CHEW: We have thought about that question long and hard. It is a real difficulty because we understand some of the boundaries of the legislation and the need to track clients from plan to plan. Our understanding is that when plans go to Lifetime Care they are not necessarily going to the same

person, they are going to different people. We understand their need for all the information about the client to have to be re-represented in those documents. One of the things that we have talked about is there may be a benefit to everyone, to the client and the service providers such as ours, if there was perhaps more consistency in terms of the person who looks at the plans and makes decisions about whether those plans will be accepted or not. What we were thinking about is the corporate memory of that child gets lost every single time a new person picks up the form unless all that information is represented again. That is possibly one of the only things that we have been able to see as a way forward, except perhaps we can certainly employ more people. But that does not take away the very strong tracking of clients.

CHAIR: It may be a matter that you want to take on notice and respond to us.

Ms CHEW: It certainly is one we have talked about and talked about and we have discussed it quite a lot with Lifetime Care.

Mr DAVID SHOEBRIDGE: I have two matters to be taken on notice. One relates to the aspect of confidentiality. Could you flesh out the issue where the scheme wants full information to work out future participants and how that relates to the individual patient's confidentiality?

Ms CHEW: Yes.

Mr DAVID SHOEBRIDGE: The other matter I found quite concerning was that you said projecting forward you see the number of participants increasing but your current staff numbers remaining static. Could you give us further information on that, who determines headcounts and how that is decided looking forward? That is a disturbing factor.

Ms SIMONS: Yes.

CHAIR: You may be sent further questions from Committee members. We ask that you respond within 21 days, if possible.

Ms SIMONS: Yes.

CHAIR: Thank you for coming today. The Committee compliments and congratulates you and thanks you for the good and noble work that you do.

(The witnesses withdrew)

FIONA CLARE DAVIES, Chief Executive Officer, Australian Medical Association (NSW) Ltd, and

SARAH LOUISE DAHLENBURG, Director, Medico Legal and Employment Relations, Australian Medical Association (NSW) Ltd, affirmed and examined:

CHAIR: Thank you for attending today. The Committee appreciates the time you have taken to be here. If you should consider at any stage that certain evidence you wish to give or documents you wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. If you take any questions on notice the Committee would appreciate it if responses to questions are forwarded to the Committee secretariat within 21 days, if possible. Would either of you like to make an opening short statement?

Ms DAVIES: We are happy to simply take questions.

The Hon. SCOT MacDONALD: I have made two notes. One was about payments to doctors. Do you believe the payments should be indexed, reviewed frequently or linked to Medicare? Do you have a model or a scheme in mind?

Ms DAVIES: It is one of the areas of significant concern for our members simply because our doctors are very good at looking after their patients and that is what they want to spend their time doing. Any matter involving medico legal processes is obviously an additional burden on their time. We have made a number of submissions to the Motor Accidents Authority particularly that there should be a schedule of fees that fairly addresses the time and clinical input that is required to give good quality reports so that people can access services quickly. In general we are happy with the CPI arrangement, although there is a problem in that the fees have got to a level where they are significantly behind those paid in other jurisdictions. So a combination of both would be required for this jurisdiction.

The Hon. SCOT MacDONALD: Are there gaps in the coverage?

Ms DAVIES: In terms of those people who are not covered by the various types of disability?

Mr DAVID SHOEBRIDGE: Pedestrians, cyclists and the like.

Ms DAVIES: I guess it is more a general comment about support for the National Disability Scheme and ensuring that as many people as possible are able to access some form of medical jurisdiction.

The Hon. SHAOQUETT MOSELMANE: Arising from your comment about a schedule of fees, the Motorcycle Council prefers no schedule of fees.

Mr DAVID SHOEBRIDGE: That was the Australian Physiotherapy Association.

Ms DAVIES: I should have been clearer in my answer. Our preference is that doctors are able to determine their own fees. But we have recognised that in workers compensation and motor accidents that is not the framework that necessarily applies. So if there is to be an arrangement with regard to these, it should more adequately address the time and professional input. My colleague will clarify this. There can also be instances in which there should be some difference between the treating doctor's fees where the approach taken should be more about it being a minimal fee because those are the fees and arrangements that people need quickly and need good access to good reports.

Mr DAVID SHOEBRIDGE: Are you saying that treating doctors should be paid on a higher or lower rate or are you saying the scheduled fee for a treating doctor should be a minimum fee with the ability to negotiate a higher rate? What is your distinction between treating and non-treating doctors?

Ms DAVIES: On fees I will defer to my colleague.

Ms DAHLENBURG: The issue for a treating doctor is that often the insurer or the scheme will want something that is fairly preliminary in its nature. That should be made very clear to the treating doctor that the opinion they are giving does not need to be unnecessarily lengthy and that unnecessary questions are not asked. If that is the case and it is a genuinely fairly preliminary report, then the fee could be less on that basis. The most important thing is to allow the treating doctor to have the time to treat the patient rather than giving unnecessarily long reports.

The Hon. SARAH MITCHELL: I want to ask you about the care by family and friends that you speak about in your submission. You note that you have concerns over a proposal to remove the payment to family carers in certain circumstances and you refer to regional areas particularly. Could you tell us more about why that concerns you and is the answer to keep the current system as it is or are there other ways to address this issue?

Ms DAVIES: This is an issue that has come out of a joint committee that the AMA has with the Law Society where we try to find issues of shared concern. We share the concern that there may be instances in which the best or most appropriate person to provide the care is a family member. We think that the current situation, which seems to provide a range of issues that should be considered in making that decision, is probably a reasonable way of balancing. What we acknowledge is what I would hope to be a very limited number of circumstances of some of the potential risks. We feel that it should be an option that is available to people and that is explored where it is considered to be in the best interest of the patient and the family. Particularly in rural and regional areas GPs and treating doctors will often be a very important part in helping to decide if that is in fact in the best interest of the family and patient.

The Hon. PETER PRIMROSE: What challenges may face the medical community in relation to significant new developments like the national disability insurance scheme in relation to, obviously, lifetime care and support? What do you think they may be looking at doing to overcome some of those challenges?

Ms DAVIES: As I mentioned from the outset, the AMA has been one of the leading advocates for a no-fault comprehensive care scheme. So we very warmly welcome the national disability scheme. Our immediate past president was involved in the review. We think it is going to be very positive for the reason that the lifetime care scheme has been positive in New South Wales, which is that the focus should be on the injury and the disability in the patient and not the legal framework in which the injury was encountered. But there is no question that doctors have a level of concern about how it will be funded and what the implications will be between the ranges of different jurisdictions. I think the general feeling is that the report has acknowledged lots of those limitations. Doctors know better than anyone else the difficulties of working in State and Federal systems—anyone who works in our public hospital system knows that.

Those are the sorts of concerns that doctors have about ensuring that it does not become another layer of complexity and add difficulties to their patients, and what the impact will be in terms of not the cost of medical indemnity insurance but the certainty and the framework around which medical indemnity is provided. One of the strengths of the Australian medical indemnity market—and I just went to a conference on this recently—is that it has been a very stable environment, and that has been good for a range of reasons. So I think it is just that concern about how those issues will be addressed in the move towards a national disability scheme. But, in a general sense, from the report that has been produced so far, we are very positive about it and we feel the proposal to incorporate the best of the State's systems is probably going to be a good way of managing the complexities.

Mr DAVID SHOEBRIDGE: You said earlier in your submission that you had begun an analysis on the fees payable under the motor accidents schemes as against other comparable schemes in other jurisdictions. Could you provide us with some material on that analysis over the next couple of weeks?

Ms DAVIES: Certainly.

Mr DAVID SHOEBRIDGE: In terms of your call to retain the ability to pay relatives, friends and family, where is that up to at the moment with Lifetime Care and Support? Your submission says Lifetime Care and Support is looking to remove the ability in unusual circumstances to provide payment. Where is that up to, do you know?

Ms DAVIES: It is something that we had understood they were considering. We have not raised it directly with Lifetime Care and Support, but we are certainly happy to go back to them now in the context of that and consider what the issues are.

Mr DAVID SHOEBRIDGE: So you are comfortable with it being a relatively high threshold? It is not the ordinary thing but where clinical and special circumstances militate in that direction it is an option?

Ms DAVIES: Yes.

The Hon. SARAH MITCHELL: In your submission you say that the former president wrote to the AMA raising concerns about the cost-setting regime for motor accidents and you also said that nothing has happened since that letter was sent in January of last year. I just wondered whether you have any more information on the concerns that were contained in that letter that the Committee could be made aware of and also if you have suggestions for improving the scheme in that regard.

Ms DAVIES: We have not had any satisfactory response to the concerns about more appropriate fees to apply and so we believe that the issues that we set out in that correspondence still need to be addressed by the Motor Accidents Authority. We are happy to provide you with that.

Mr DAVID SHOEBRIDGE: Could you provide us with that correspondence and any response and also your analysis?

Ms DAVIES: Certainly.

Mr DAVID SHOEBRIDGE: We will have the Motor Accidents Authority here next week on 17 October. If we could have it before then that would be good.

The Hon. SHAOQUETT MOSELMANE: Just following on my colleague's comment in relation to reimbursement of carers and your opposition to removal of that money being paid to carers, I know you have not considered it fully but could you also consider what alternative could be considered as opposed to that removal or continuance of the system and possible alternatives in this area?

Ms DAVIES: Certainly.

CHAIR: What are your observations about the first five years of the Lifetime Care and Support Scheme and the impact that the scheme has had, particularly on your members, in a general sense?

Ms DAVIES: I think my main observation would be that there is probably still an insufficient understanding of the scheme for those who have—

CHAIR: Among your members?

Ms DAVIES: Among our members, yes. We are very positive about the concept of the scheme but in seeking to consult with our members about their experiences with the scheme there still seems to be a lack of understanding, and that is to be expected; it is not a scheme that they would be required to interact with regularly. But even just listening to the most recent discussion has shown that there would seem to be some benefit in providing better advice, particularly to general practitioners, who are often the patient's advocate—they are the first port of call when terrible accidents and impacts happen to families.

In general our experiences have been positive but we think there would be benefits in providing clearer information, particularly to general practitioners.

CHAIR: Are you saying there is insufficient information coming through to your members from the administrators of the scheme?

Ms DAVIES: Yes, and not in any particularly critical way but more as an issue. I think particularly now there is so much more discussion about the national disability scheme it would be very timely and very useful to provide some more information to general practitioners about how the scheme works, what the intentions are and how they can assist their patients to get the best outcomes possible out of the scheme.

CHAIR: Does your association have a scheme to acquaint your members with details of how the scheme operates?

Ms DAVIES: Yes. We have communications with members and I think it would be an issue that would be very useful for us to communicate with and to work with the scheme on how best to get the information out to our members. That is something we are very happy to look at.

CHAIR: You think there is an area there for both your association and the administrators of the scheme to be up there—maybe the two working together to fully acquaint your members?

Ms DAVIES: Yes, I think it would be useful.

Ms DAHLENBURG: If I can comment there too. I think that is equally true for the motor accidents scheme because we have a medico-legal line that our members can ring to find out about medico-legal issues, and a lot of the issues concern what they should get paid for certain reports, et cetera. But it does come to our attention that really there is a fairly low level of understanding about why they are required to complete reports, what impact that might have on their patients and the schemes generally. Particularly as it gets more complex with the national scheme as well, the different schemes, how they interact and what their different areas of coverage are would be particularly useful for our general practitioners.

The Hon. PETER PRIMROSE: This is a more generic question but relevant to what you are talking about. Talking to people, particularly parents of children with disabilities, all over New South Wales, both Federal and State, I have endless reports to me about endless reports needing to be filled in an endless number of times involving endless numbers of, but usually the same, general practitioners. Can you comment on that? We had a similar concern expressed about repetitive form filling-in in a digital age by a social worker from the Children's Hospital only a few minutes ago. Just for the record I was wondering if you could comment on that.

Ms DAVIES: We can probably provide you with more detail, but it is consistent feedback that we receive, particularly in instances where it is, sadly, unlikely that there is going to be any particular change to the condition of the child, that it is still necessary to replicate reports and processes. I am certainly happy to provide you with some further more specific examples from our general practitioners, but it is very regular feedback we receive from a range of different State and Federal agencies.

Mr DAVID SHOEBRIDGE: You could send them a form about their response to forms.

The Hon. PETER PRIMROSE: One of the standard solutions that have been proposed is having an identified common form that all agencies accept, rather than having different information again and again. I welcome getting any information that may make things easier for the doctors, particularly in rural and regional New South Wales who see the same person again and again, filling in different forms.

Mr DAVID SHOEBRIDGE: And what the key information in that form should be. What is the absolutely common material that you would just fill in in digital form and then print out to add new material in?

Ms DAVIES: I think that would be very welcome by doctors. From my experience in the past the distinctions of the things that seem to be different information do not appear to be of any particular substance.

The Hon. SHAOQUETT MOSELMANE: Just a question about the biennial review. The Committee is considering whether the review of the Lifetime Care and Support Authority should be conducted biennially. What do you think about that?

Ms DAVIES: We would not have any objection to that change.

CHAIR: If there was one matter that you wanted to really impress upon this Committee, one thing above all else, what would it be?

Ms DAVIES: It would be the issue of trying to ensure that there was an appropriate arrangement for the fees for doctors to ensure that patients immediately were at the top of the pile of the to-do list, that the report needs to be done, rather than at the slightly heart-sink middle level of the report list.

CHAIR: You have found your efforts to be not very fruitful in that regard?

Ms DAVIES: No.

Mr DAVID SHOEBRIDGE: The January 2010 letter is an example.

Ms DAVIES: As our councillor Brian Owler says on TV, we would love to have our members not do any of this work. That would be the ideal, that people were no longer catastrophically injured in motor vehicle accidents. But until that happens we would just like to ensure that for the busy treating doctor who wants to spend their time looking after their patients that they are able to arrange appropriate fees and get that work done.

The Hon. SARAH MITCHELL: We heard from the physiotherapy association earlier about the percentage of workload patients that they have who have been affected and who are part of either of the schemes and that some physios just reach a point where the burden is too much for them and they do not accept or will try not to have to treat patients coming in from either scheme. Is that similar for general practitioners as well?

Ms DAVIES: Yes, it is. I think it is very uncommon that they make the decision that they will no longer treat the patient because that is a very hard decision to make, but there is a significant amount of evidence that patients injured in different types of compensable injuries have very significant needs and require a significant workload to navigate their way through the system and they add a lot of complexity to the patient load, particularly for doctors in rural and regional areas who are, sadly, all too often burdened with high rates of motor vehicle injuries. It is an issue where finding the time is a real challenge.

The Hon. SARAH MITCHELL: Do you think if they were better compensated that would be enough to resolve the issue?

Ms DAVIES: I think it would assist. Both in terms of the report and also in the instances in which people are required to attend court to give evidence, obviously there is some virtue in the lifetime care scheme, but the very common complaint from our doctors in outer metropolitan Sydney and in regional New South Wales is that you close your practice for the day and you do all of those sorts of aspects. It is many of the additional parts of caring for patients with significant compensable injuries that add to the burden.

Mr DAVID SHOEBRIDGE: In terms of that burden of going to court, has that reduced over time? That burden of going to court, have your members noted changes in court practices and that it has reduced?

Ms DAVIES: Yes.

Mr DAVID SHOEBRIDGE: So it is less of a burden now than it would have been 10 years ago?

Ms DAHLENBURG: I think that is where making sure that medico-legal reports are well compensated will complement that because there is less likelihood of needing someone to attend court if those reports are well done and comprehensive. Certainly it is a preference of our doctor members not to have to go to court because of the impost that is. I think that is important.

CHAIR: I thank you both very much for giving your time to be with us today. There may well be some more questions that will be sent to you from the Committee. We would appreciate a response to those if possible within 21 days.

(The witnesses withdrew)

(The Committee adjourned at 4.15 p.m.)