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Dear Dr Cox

LAW REFORM COMMISSION PROJECT 109 DISCUSSION PAPER – CLAIMS FOR NON-ECONOMIC LOSS FOR WRONGFUL DEATH UNDER THE FATAL ACCIDENTS ACT 1959 (WA)

I refer to the Law Reform Commission of Western Australia's (LRCWAs) invitation to provide comment on the abovementioned discussion paper. The Insurance Commission has considered the discussion paper and our response to the matters identified in that paper is provided in this letter and its attachment**.**

The Insurance Commission has prepared this response from its perspective as the Western Australian Government's adviser on insurance matters[1].

To be consistent with the project's terms of reference, and with the discussion paper, we use the term 'non-economic loss' in our response.

We understand the LRCWA has been asked to consider whether there should be any reform to allow damages for non-economic loss under the *Fatal Accidents Act 1959* (WA) (**FAA**), and if so, the extent of that reform, as reflected in the various options outlined in the discussion paper. We will refer to the matters of 'whether to allow' and 'how they should be allowed' collectively in our response as 'contemplated damages'.

Merits of the Contemplated Damages
The Insurance Commission does not support allowing claims for non-economic loss for wrongful death under the FAA.

The contemplated damages would extend liability under the tort of negligence in Western Australia, increase the cost of liability risk for defendants and insurers and reduce claims cost predictability.

It should surprise few people that an expansion of the scope of damages and liability for insured parties will increase the price of insurance. The increased insurance cost is unlikely to be welcomed by those who can secure it.

[1] Section 6f of the *Insurance Commission of Western Australia Act 1986* refers.

Along with increased insurance costs, the contemplated damages may accelerate the withdrawal of insurance products now being seen in the hardening insurance market[2]. A reduction in the availability of insurance for those in the community that rely upon it would not be a desirable policy outcome.

In the absence of available and affordable insurance, business, community organisations, volunteer groups, governments and community members may curtail the provision of services that are necessary for a resilient economy and valued by the community.

Governments may also come under increasing pressure to assume greater risks via the consolidated account to provide insurance products that may no longer be commercially available.

Further, the contemplated damages may have other unintended consequences. Some of which we have endeavoured to identify in this document.

The challenges involved in putting a value on personal life and estimated loss is neatly summed up by Professor Atiyah in Accidents, Compensation and the Law (1970)[3] where he states:

> *"On the one hand, providing a small payment may be perceived as tokenistic and an inadequate recognition of a person's loss. Conversely, a large payment would be unaffordable for the community who would have to pay for it and out of proportion with compensation paid for other losses."*

As outlined in the discussion paper[4], there is a risk that assigning a financial value to the loss experienced by grieving relatives may insult rather than console or provide a tangible recognition for that loss.

Assigning a larger value might reduce the prospect of insult, but would likely come at significant cost. Large sums awarded through the contemplated damages under the FAA may also be out of kilter with the damages that may be awarded for pure mental harm elsewhere.

Some models may create or exacerbate disputes and tensions between relatives, especially if there is any discretionary scope to decide who is eligible and how much each relative should receive out of any fixed aggregate sum. It is conceivable that in some cases this may increase the burden on grieving families.

The frictional costs associated with providing a higher degree of confidence that the right amount of compensation is to be paid in the right circumstances would be high. Applying the necessary rigour to the assessment of claims to support the exercise of discretion on payment amounts would involve a degree of investigation into the private relationships of relatives that would potentially be perceived as intrusive.

Paying a pre-determined amount based on familial relationship would reduce frictional costs. But that course would likely result in such payments not being truly compensatory in nature – a payment made without knowledge of the quality of relationships and without regard to who may have suffered a genuine loss.

We have also suggested that amounts set by statute may be arbitrary amounts assigned to a subjective experience.

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[2] https://www.abc.net.au/news/2020-06-10/adventure-tourism-businesses-close-as-insurers-refuse-coverage/12333032
[3] Professor Atiyah (1970), 'Accidents, Compensation and the Law', p204.
[4] The Law Reform Commission of Western Australia, Project 109 Discussion Paper, p34.

Insurance Commission answers to the questions posed by the LRCWA shown at Attachment A reflect its view that it does not support the proposed damages. The answers point to challenges associated with damages amounts defined in statute. The answers also reflect the view that a model involving these challenges would be a 'less worse' outcome than a model involving significant frictional costs necessary to attempt to more accurately assess damages amounts in each case.

Need for Policy Change

While the discussion paper outlines a perceived gap in the legal framework, it does not clearly identify a public policy issue that it seeks to address. That presents some challenges for those who are to weigh the merits of change.

The Insurance Commission insures almost two million motorists and 120,000 Government employees for injuries they may incur in an accident. As the State's largest insurer, we have not seen evidence from claimants that there is a need for these damages and we are not aware of a broader community appetite to fund claims of this nature.

The New South Wales Law Reform Commission (NSW LRC) appears to have reached a similar conclusion, when it examined whether to introduce damages for non-economic loss under their comparable legislation (the *Compensation to Relatives Act 1987* (NSW)). It found 'no identified problem which would justify changing the established approach'[5].

Based on experience, it is our view that the common law, existing legislation and industry practices has in the recent past provided effective compensation in circumstances where a person is injured or killed by another party in Western Australia.

As outlined earlier, the proposed changes would extend liability in the favour of the plaintiff, at a time when the global insurance market is hardening. We recognise that the review was commissioned prior to reductions of capacity in the insurance market.

The discussion paper states the current law clearly, that while the FAA 'provides protection to those who were dependent on the deceased for financial support, the legislation does not permit the recovery of compensation for grief, mental anguish or sorrow suffered by those same dependents as a result of the deceased's death'[6].

The discussion paper advances that it 'is not foreign to the common law'[7] to allow damages for non-economic loss for wrongful death, that 'notwithstanding the ability to recover damages for in other comparable common law jurisdictions, Western Australia has not, to date, permitted awards of damages of this kind'[8].

While the Insurance Commission recognises that enacting the contemplated damages would not be without precedent, only two of the eight Australian states and territories allow such claims to be brought. South Australia introduced, in a limited form, damages for non-economic loss for wrongful death in 1940, and the Northern Territory did likewise in the 1970s.

The absence of similar legislative changes in other Australian jurisdictions, or an expansion of the regimes in South Australia or the Northern Territory, does not appear to be due to a lack of consideration of the matter in Australia. The issues have been examined in multiple jurisdictions over a number of decades.

[5] New South Wales Law Reform Commission, Report 131 'Compensation to Relatives', October 2011, p69.
[6] The Law Reform Commission of Western Australia, Project 109 Discussion Paper, p1.
[7] Ibid.
[8] Ibid.

As the discussion paper outlines, in Western Australia alone there have been two previous proposals to introduce damages for non-economic loss for wrongful death.

The first, during the enactment of the FAA in 1959, was described by the [then] Attorney General as having no 'proper relationship to the principles intended in this Bill, and the proposal [the payment of solatium] in general is contrary to the policy of the law'[9].

The [then] Attorney General further commented that he 'does not think that we can reasonably assess that loss in monetary value'[10] and that there would be 'far less chance of fairly assessing it'[11] than in the case of an actual financial loss. And that 'of the Australian States, South Australia is the only one to have adopted the principle'[12].

The second attempt, following the LRCWAs recommendations for project 66 (titled 'Fatal Accidents') that was completed in 1978, was also unsuccessful.

While seeking amendments to the FAA that expanded the list of relatives that could seek compensation in 1984, the [then] Attorney General stated that the Government[13] had rejected the recommendation to allow claims for non-economic loss for fatal accidents.

In the Legislative Council, the [then] Attorney General explained that it would 'require the courts to undertake a time-consuming and difficult task in assessing the appropriate award and, in any event, the amount awarded under such an arbitrary limit would be very likely to affront claimants as often as it might solace them'[14].

He further noted that 'there are few jurisdictions where such a provision exists'[15].

Since the [then] Attorney General made that comment over 35 years ago, other jurisdictions have considered making legislative change to allow damages for non-economic loss for wrongful death. We are not aware of any jurisdiction that has since made that change to allow them.

In 2011, the NSW LRC considered whether non-economic damages should be allowed for fatal accidents in that State. They concluded: '[t]here are not sufficient grounds for introducing'…a…'general bereavement damages award. Grief has never been recognised as compensable harm in NSW and there has been no identified problem which would justify changing the established approach'[16].

'Furthermore, there are problems inherent in determining who should be entitled to an award and the terms on which it should be available. Finally, the direct and indirect costs that would be associated with this new cause of action are not justified, given the lack of any compelling reason for its introduction'[17].

The LRCWA itself has identified in the discussion paper that the '…moral and ethical considerations inherent in the very notion of ascribing value to a life, the practical challenges would be, in the Commission's respectful view, almost insurmountable'[18] and that '[i]n truth, barring a fundamental shift in the philosophy underlying the assessment of damages, an award for non-economic loss in fatal accidents would not, and could not, be 'compensation as substitute'[19].

[9] Arthur Watts, Attorney General (25 August 1959), Legislative Assembly Hansard, Parliament of Western Australia, p1207-1208.
[10] Ibid.
[11] Ibid.
[12] Ibid.
[13] The decision was made by Cabinet (the Executive) on 16 May 1983; Parliament was informed later of that decision.
[14] Joe Berinson, Attorney General (22 March 1984), Legislative Council Hansard, Parliament of Western Australia, p6464.
[15] Ibid.
[16] New South Wales Law Reform Commission, Report 131 'Compensation to Relatives', October 2011, p69.
[17] Ibid.
[18] The Law Reform Commission of Western Australia, Project 109 Discussion Paper, p15.
[19] P Cane, Atiyah's Accidents, Compensation and the Law (8 th edition, Cambridge University Press, 2013), p89.

And further in the discussion paper, the LRCWA cite Justice Heydon, in Cattanach v Melchior[20] 'It is contrary to human dignity to reduce the existence of a particular human being to the status of an animal or an inanimate chattel or a chose in action or an interest in land. It is wrong to attempt to place a value on human life or a value on the expense of human life because human life is invaluable – incapable of effective or useful valuation' and further '[h]uman life is invaluable in the sense that it is incapable of valuation. It has no financial worth which is capable of estimation'.[21]

And again, the discussion paper cites the Scottish Law Commission that '…argued that awards for non-economic loss consequent upon the death of a relative were problematic in that they attempted to provide compensation for a loss that cannot be quantified; that is, the suffering caused by the wrongful death of a relative and the loss of their love and companionship.'[22]

We concur with those views raised in the discussion paper against allowing damages of this type, and note they remain relevant today.

And that the absence of further change over the last 35 years reflects a maturity of consensus that the difficulties of effectively allowing the contemplated damages as intended, would outweigh the perceived benefits of doing so.

The discussion paper also suggests that changes in the law since the last time they were considered in Western Australia (in 1983), warrants that they now be reconsidered.

The discussion paper states[23] that since the decision not to introduce non-economic loss under the FAA in the 1980s, the legislature has recognised claims involving pure mental harm (those not consequential to a claimant's physical injuries) in other legislation.

The discussion paper cites that claims involving pure mental harm have been recognised in legislation that provides compensation for injury that result from 'the commission of an offense and in the case of the *Civil Liability Act 2002* (WA), wrongful acts generally'[24].

Our understanding is that recognising those claims was not the purpose of the *Civil Liability Act 2002* or the amendments made to criminal injuries compensation legislation.

When the *Civil Liability Act 2002* was enacted, the common law had long allowed an injured person to recover damages for psychiatric and psychological injuries caused by wrongful acts, generally. We are not clear how far that goes back, but the LRCs working paper for project 66 titled 'Fatal Accidents'[25] suggests it was as early as February 1978.

The *Civil Liability Act 2002* had its genesis in the insurance crisis experienced in the years prior to its introduction.

In the period leading to its enactment, Australian governments (alongside community groups, business, the medical profession, individuals and insurers) had been growing increasingly concerned, not only by the size of the compensation payments for bodily injury, but also about increasing litigious community attitudes and the way in which the courts were prepared to extend liability for negligence at common law[26].

[20] Cattanach v Melchior (2003) 215 CLR 1 at [353].
[21] Ibid. at [356].
[22] Scottish Law Commission, Discussion Paper No 135 on Damages for Wrongful Death (2007).
[23] The Law Reform Commission of Western Australia, Project 109 Discussion Paper, p1.
[24] Ibid.
[25] 'Only if the plaintiff suffers an actual illness usually referred to in the law of tort as 'nervous shock' but recently said to mean "a recognised psychiatric illness" does any question of compensation arise.' P86.
[26] Commonwealth of Australia (2006), 'Available and Affordable – Improvements in Liability Insurance Following Tort Law Reform in Australia', p2.

The *Civil Liability Act 2002*, and subsequent amendments, are a result of those concerns. It was not intended to recognise broader claims. Rather, the legislature imposed restrictions[27] on claims involving pure mental harm, in recognition of the growing concern about the consequences of not doing so.

In his second reading speech for the *Civil Liability Amendments Bill 2003,* the [then] Parliamentary Secretary outlined its intent – 'these measures, along with other initiatives the Government has already undertaken, are intended to slow the rate of increase of premiums and made public liability insurance more readily available'[28].

Further, that 'the response needed is one that goes to the heart of the problem, that is, to the legal framework and community attitudes'[29].

The *Civil Liability Act 2002* (WA) sought to avoid the courts extending liability further and to reduce the scope of new opportunities for litigation. The contemplated damages may do the opposite.

Changes to criminal injury compensation legislation in 2003 had a similar intent. In his second reading speak for the *Criminal Injuries Compensation Bill 2003*, the [then] Attorney General stated, in reference to those who may bring a claim for pure mental harm, that 'this Bill imposes a limit on claims of this nature'[30].

The discussion paper then suggests that legislative changes recognising claims involving pure mental harm in other law, warrant that this matter now be reconsidered in relation to the FAA – this review presenting an opportunity to align the FAA with the law generally.

It states that '[n]otwithstanding developments in statute and common law [to allow claims involving pure mental harm], the FAA does not permit the recovery of damages recognising the grief and anguish of those dependents'[31].

As is reflected within section 4 of the discussion paper[32] – that explains some of the important differences between the contemplated damages and damages that may be recoverable in a negligence action for pure metal harm – that one is allowed but not the other is not anomalous. The NSW LRC[33] made similar comments about the importance of those differences when it examined these issues in that jurisdiction.

Rather than bring the FAA into alignment with the law generally – it would take it out of alignment with the current law in Western Australia that does not consider the losses identified in the paper to be compensable.

Impact of the Contemplated Damages

The extension of liability proposed would increase costs for defendants (governments, community groups, businesses and individuals). As the vast majority of defendants who would be liable for these increased costs would be insured, those additional costs would, as the discussion paper points out, then fall to insurers who will seek to pass on those increased costs.

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[27] The restrictions imposed are based on the recommendations of the Review of the Law of Negligence Final Report (2002) (the Ipp Report). The Ipp Report recommended (recommendation 34) that the 'proposed Act' (to be the *Civil Liability Act 2002* in Western Australia) should embody the following principles 'there can be no liability for pure mental harm unless the mental harm consists of a recognised psychiatric illness, and that, a person (the defendant) does not owe another (the plaintiff) a duty to take care not to cause the plaintiff pure mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken.' P144.

[28] Mark McGowan, Parliamentary Secretary (20 March 2003), Legislative Assembly Hansard, Parliament of Western Australia, p5691c-5694a.

[29] Ibid.

[30] Jim McGinty, Attorney General (24 September 2003), Legislative Assembly Hansard, Parliament of Western Australia, p11682c-11685a.

[31] The Law Reform Commission of Western Australia, Project 109 Discussion Paper, p1-2.

[32] Ibid. at p12.

[33] New South Wales Law Reform Commission, Report 131 'Compensation to Relatives', October 2011, p66.

The discussion paper mentions that premiums may rise as a result. And as outlined earlier, it may also reduce the availability of insurance – a mechanism that is essential for the effective transfer of risk across the economy.

Australia has recent lived experience of what can eventuate when liability is extended.

Between 1979 and 2001, while the consumer price index increased by just 212 per cent, the highest award for personal injury had grown by 5,000 per cent from $270,000 to $14.2 million[34]. Inflation had averaged 2.5 per cent per year in the 10 years to 2002, while awards for personal injury had increased at an average rate of 10 per cent per year[35].

By the early 2000s, increases in personal injury awards caused the cost of public liability insurance to increase to a point that some consumers were unable to find affordable insurance. Others found it difficult to find insurers willing to underwrite their risks at all[36].

These changes saw more consumers uninsured or underinsured for loss. The tort of negligence does not facilitate effective compensation to a wronged party when a defendant does not have the means or adequate insurance cover to pay that compensation.

As the [then] Secretary to the Commonwealth Treasury stated at that time '…when the insurance industry is in difficulty so too, unavoidably, is much of the rest of the economy. Indeed, it is not overstatement to say that society is weakened. A safe, stable insurance industry is vital for underwriting stability and confidence in economic and social interaction - in underwriting the economy and society'[37].

In response, all Australian jurisdictions introduced measures (such as those in the *Civil Liability Act 2002* (WA) outlined earlier) to narrow the scope of personal injury claims at common law, and to reduce the quantum of damages that may be awarded in such claims.

There are parallels now to the experiences of the early 2000s that predate the onset of the COVID-19 pandemic. As occurred then, the insurance market is currently hardening – resulting in a withdrawal of capacity, a changing view on risks and recent high global insured losses.

Premiums are rising generally, insurance policies are carrying broader and more comprehensive exclusions and, in some markets, insurance is difficult to secure.

Recent reports[38] post the onset of the global pandemic suggest that liability insurance products are even more difficult now for some businesses to acquire.

That an insurer may be exposed to the cost of new non-economic loss claims from multiple relatives of a person who dies, for example, participating in adventure tourism, would make it even more challenging to find insurers willing to offer the liability cover that has already been withdrawn for adventure tourism businesses as one current example.

This may also have the effect of placing pressure on governments to assume additional risks via the consolidated account by providing public liability insurance products that are no longer commercially available.

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[34] Commonwealth of Australia (2006), 'Available and Affordable – Improvements in Liability Insurance Following Tort Law Reform in Australia', p7.
[35] Ibid. at p7.
[36] Ibid. at p5.
[37] Address to the Insurance Council of Australia conference (August 2002).
[38] https://www.abc.net.au/news/2020-06-10/adventure-tourism-businesses-close-as-insurers-refuse-coverage/12333032

Recent experience also highlights the form in which that scenario may manifest. In response to the insurance crisis of the early 2000s, the [then] WA Government amended the Insurance Commission's enabling legislation to establish a community insurance fund[39].

That legislation enabled a fund to be established that would be underwritten by the State and managed by the Insurance Commission[40]. It was intended to enable the provision of insurance to eligible community organisations for 'public, professional and medical treatment liability, workers' compensation, and property, motor vehicle and personal accident'[41].

The State government insurance ceased when the insurance markets recovered.

Impact on Classes of Civil Liability

The Insurance Commission anticipates that the contemplated damages would have the greatest impact, by cost, on compulsory third-party motor injury insurance. The WA Government would be expected to need to agree to increase motor injury insurance premiums for almost two million Western Australian motorists to cover the additional claims exposure.

While there would also be an impact on workers' compensation premiums, that impact is expected to be less than for other types of insurance. That would largely be due to the relative infrequency of wrongful death in workplace accidents.

We do not anticipate that allowing claims for non-economic loss under the FAA would have a material cost associated with death caused by asbestos-related disease.

It is not clear from the discussion paper how the contemplated damages would apply to the relatives of those who have been wrongfully killed as a result of a criminal act. It does not indicate whether the payments of non-economic loss (of the type outlined) would be allowed in addition to, or under, the hard cap applied to the total compensation that can be paid.

The full detail of what is proposed in each class of civil liability and the magnitude of the financial impact would be determined by a number of key factors – many of which may not be known in advance.

We understand the LRCWA has been asked to cost the impact of the contemplated damages and that this information will be available in its final report. Notwithstanding the large number of variables that would affect potential future costs, we would be pleased to be able to assist the LRCWA with the provision of data to facilitate that important work.

Sincerely

ROD WHITHEAR
CHIEF EXECUTIVE

[39] *Insurance Commission of Western Australia Amendment Act 2002* – Assent date of 20 November 2002.
[40] Mark McGowan, Parliamentary Secretary (14 August 2002), Legislative Assembly Hansard, Parliament of Western Australia, p98b-p99a.
[41] Ibid.

ATTACHMENT A: RESPONSE TO DISCUSSION QUESTIONS

Question 1

Should the Fatal Accidents Act 1959 (WA) be amended to allow claims for non-economic loss for wrongful death?

The Insurance Commission does not support amending the FAA to allow claims for non-economic loss for wrongful death.

The contemplated damages would extend liability under the tort of negligence in Western Australia, increasing the costs of liability risk for defendants and insurers, while decreasing the predictability of claims costs.

The resultant increase in the cost of insurance may be challenging to meet for those who can secure it and, in the context of the current hardening insurance market, a further reduction in the availability of insurance for those in the community who rely upon it would be even less welcome.

The likelihood that a person injured needs to seek compensation from an uninsured defendant could also be expected to increase if insurance products are not available.

In the absence of available and affordable insurance, business, community organisations, volunteer groups, governments and community members, may curtail the provision services that are necessary for a resilient economy and valued by the community.

Governments may also come under increasing pressure to assume greater risks via the consolidated account by providing these types of insurance products. There is already established precedent in Western Australia for Government committing to underwrite liability risks for community organisations. When in response to the insurance crisis of the early 2000s, the [then] WA Government amended the Insurance Commission's enabling legislation to allow for the establishment of a community insurance fund.

The contemplated damages may have unintended consequences.

As identified in past debates in various jurisdictions, allowing damages of this type risks insult to grieving family members who may feel that an amount offered, if not material, would be seen to devalue the loss of their relative.

Conversely, opening up eligibility has the potential to significantly increase the cost of insurance for the broader community if amounts to be awarded were material. The number of people who may be able to make a claim that they suffered these sorts of losses as a result of a single act of negligence could be far greater and less easy to foresee than the number of people who may suffer physical harm.

The contemplated damages may also create or exacerbate disputes and tensions between relatives, especially when deciding who is eligible and how much each should receive if sums to be awarded are capped in aggregate. That risk would appear to be more likely where a single lump sum is paid, when an amount provided to one relative would reduce that which is available to others; or where the payment amount varies based on the nature of the relationship.

The contemplated damages would also present other challenges.

In the absence of attempts to target such payments it would appear that it may be, as often as not, that a financial benefit is derived by someone who did not suffer a genuine loss, or may provide a benefit to one person in a way perceived to be unfair when compared to the benefit derived by another.

Again, conversely, arrangements that attempt to improve the targeting of such a payment would require the courts, insurers and defendants to inquire into the private lives of individuals and interrogate the nature of relationships between relatives. This intrusion would likely be unwelcome and some may consider this necessary enquiry to be insensitive.

Where the matter were to be considered by the courts, it may also require a judge to be satisfied on the evidence that the claimant is grieving, or suffering from loss of companionship, guidance and/or counsel.

Claimants may need to 'prove' their grief or loss by giving 'convincing' evidence themselves or by obtaining expert evidence to attest to their grief or loss. That would reasonably be considered insensitive and unnecessary, but in the absence of that evidence, such claims could be easily brought and almost impossible to disprove.

It is not clear where the threshold would be to determine at what stage the normal grief suffered by a relative or a dependent upon the death of a loved one becomes compensable – unless the payment is an entitlement rather than compensation.

The Insurance Commission expects that the frictional cost associated with assessing these types of damages would likely exceed the value the payments in most instances.

More money would be expected to be spent on legal fees under any of the options. However, if the contemplated damages were implemented with any form of discretion allowed, the frictional costs could be prohibitive, and outweigh compensation value, while delaying the resolution of claims and significantly increasing use of court time.

Question 2(a)

If the FAA is amended to allow damages for non-economic loss, what type of non-economic loss ought to be compensable under the FAA?

The Insurance Commission does not consider that non-economic loss should be compensable under the FAA.

Question 2(b)

If the FAA is amended to allow damages for non-economic loss, should it be in the form of an award of damages to recognise the grief suffered by the claimant, and/or the loss of companionship, guidance and/or counsel provided by the deceased?

The Insurance Commission does not consider that non-economic loss should be compensable under the FAA.

Question 3

If the FAA is amended to allow damages for non-economic loss, what is the appropriate class of persons why may be awarded such damages?

If the FAA were to be amended to allow damages for non-economic loss, those damages should only be available to a narrow subset of 'close relatives' defined under the FAA.

Limiting access to these relatives would likely see the greatest alignment of those who receive benefit and those who may also have suffered a genuine loss. Although ensuring that is the case would likely be difficult, and perhaps impossible, in some instances.

It would also minimise the scope for broader family disputes and abuses (particularly as we expect the majority of such claims would be against a defendant who is insured).

Allowing all 'relatives' (as defined under the FAA) to make a claim for non-economic loss has the greatest potential to cause far-reaching financial consequences for insurers and the community who would, in the majority of cases, have to bear related costs.

Question 4(a)

If the FAA is to be amended to allow damages for non-economic loss, should those damages be determined according to common law principles and without any limitation or statutory cap?

If the FAA is to be amended to allow damages for non-economic loss, damages should be subject to a statutory cap to avoid the potential for unlimited liability – which would be more detrimental to the cost and availability of liability insurance for those who need it.

Unlimited liability would inevitably lead to the highest potential costs. It would likely give rise to the highest number and cost of new claims, and the highest frictional costs compared to other alternatives.

Further, by their nature, damages for non-economic loss are difficult to assess. The following statement made by Professor Atiyah[42], has application in this context:

> *"There appears to be simply no way of working out any relationship between the value of money — what it will buy — and damages awarded for pain and suffering and disabilities. All such damages awards could be multiplied or divided by two overnight and they would be just as defensible or indefensible as they are today."*

As any such loss would be difficult to value in financial terms, and the extent of any such loss would be subjective to the individuals who experience them, determining how much should be paid in recognition of this loss would be problematic.

On the one hand, providing a small payment may be perceived as tokenistic and an inadequate recognition of a person's loss. Conversely, a large payment would be unaffordable for the community who would have to pay for it and out of proportion with compensation paid for other losses.

Likewise, differentiating between the losses experienced by two different people by providing different payment amounts, in the absence of any objective means to distinguish one loss from another, would present difficulties.

Question 4(b)

If the FAA is to be amended to allow damages for non-economic loss, should those damages be determined according to common law principles and subject to a limitation or statutory cap?

If the FAA is to be amended to allow damages for non-economic loss, the Insurance Commission considers it is essential that those damages be subject to clearly defined statutory limitations and a statutory cap.

The damages available should be provided on a statutory basis – a single amount determined in statute available to each qualifying relative. To do otherwise with any degree of discretion maybe to involve defendants and insurers to value the subjective loss of one relative against the subjective loss of another.

[42] Professor Atiyah (1970), 'Accidents, Compensation and the Law', p204.

That legislation should clearly outline who qualifies, such that there is no need for defendants and insurers to be drawn into family disputes, nor would there be need to interrogate the nature of personal relationships at a time of loss in a family.

It could be anticipated that disputes about qualification and/or the amount that ought to be paid have the potential to significantly increase legal fees and occupy considerable court time. Less than one per cent of motor injury claims in Western Australia currently proceed to trial – we would suggest it is not the interests of any party to see that increase markedly as a result of introducing the contemplated damages.

Question 4(c)

If the FAA is to be amended to allow damages for non-economic loss, and such damages are to be determined according to common law principles subject to a limitation or statutory cap, should that statutory cap be:

(a) Determined according to a formula similar in effect to that set out in section 3C of the *MV(TPI) Act 1943* (WA), with appropriate adjustments to 'Amount A', 'Amount B', and 'Amount C' to take into account the reality that non-economic loss for relatives in the Fatal Accidents context is unlikely to include pain and physical suffering, curtailment of expectation of life or bodily harm?

The Insurance Commission does not support this option.

It is difficult to see how this apparatus could be used, in this context.

The Insurance Commission would also expect that this option, relative to the others, would see the greatest consumption of court resources, the highest frictional (and legal) costs and would result in extended delays in finalising claims.

(b) A lump sum payment to each relative entitled by reference to Schedule 2 of the FAA, or alternatively a more limited class of 'close relatives':

(i) in a set amount without differentiation between the relationship with deceased; or

(ii) in amounts pursuant to a table of entitlement, with the amount determined by reference to the relationship with the deceased?

The Insurance Commission sees this as the least problematic option – albeit only if it were available to a limited subset of relatives defined under the FAA (as outlined above).

A set amount without differentiation between relationships would minimise the need to enquire into the nature and quality of family relationships. It would also lessen the need for additional court time, minimise additional legal expenses and delays in finalising claims; that can be expected should these contemplated damages be allowed.

It may be argued that a table of entitlements may provide an amount that better reflects the typical relationships between the deceased and different 'categories' of 'relative'.

However, it is unclear whether that may result in a better alignment of those whose who benefit with those who suffer a genuine loss; or that this differentiation would any better recognise the relative losses of individuals more or less often than would a single tariff.

We agree with the view attributed to the Law Commission of England and Wales in the discussion paper[43] that 'distinguishing between the amounts recoverable in different relationships' would be 'fruitless'.

We also agree with the view expressed by the Scottish Law Commission as referenced in the discussion paper that 'under a tariff system, the deceased's relative would be entitled to the payment regardless of the quality of their relationship with the deceased'[44].

(c) A lump sum payment to be divided between <u>all</u> relatives entitled by reference to Schedule 2 of the FAA, or alternatively a more limited class of 'close relatives':

(i) in equal shares; or

(ii) according to a table of percentages based on their relationship with the deceased?

Under this option, an amount paid to one relative would reduce that which would be available to another, increasing the prospect of dissatisfaction in larger families and disputes between relatives.

We also contend that these sorts of payments have the potential to undermine the wellbeing of families already grieving and to invite unwelcome conflict – particularly where families have estrangement issues.

(d) Some other form of statutory limitation or cap?

Not applicable.

[43] The Law Reform Commission of Western Australia, Project 109 Discussion Paper, p25.
[44] Ibid. at p28.