

Workers Compensation and Injury Management Act 2023

Implementation proposals for regulations and administrative instruments

Implementation Consultation Paper 18: Catastrophic Workplace Injuries

October 2023

Public comment on the implementation proposals
should be submitted to:

consultation@workcover.wa.gov.au by **1 December 2023**

All submissions will be publicly accessible unless confidentiality is requested.

For further details on making a submission see:

<https://www.workcover.wa.gov.au/resources/modernising-was-workers-compensation-laws/>

*****Draft proposals only*****

The proposals in this consultation paper are in draft form to facilitate public comment and do not represent the final position of WorkCover WA, the Minister or Government.

Implementation Consultation – Catastrophic Workplace Injuries

Scope

This document outlines key implementation requirements and processes relating to the extension of the existing Catastrophic Injuries Support Scheme to workers catastrophically injured in workplace accidents by operation of the *Workers Compensation and Injury Management Act 2023* (WCIMA23) from 1 July 2024.

Background and intent

Under the WCIMA23, catastrophically injured workers who have a compensable workers compensation claim will be able to access lifetime care and support services under the Insurance Commission of Western Australia's (ICWA) Catastrophic Injuries Support Scheme (CISS).

The CISS covers the following catastrophic injuries: spinal cord injury, traumatic brain injury, amputations, burns and permanent blindness.

Lifetime care and support services under CISS include medical (including pharmaceutical), dental treatment, rehabilitation, ambulance services, respite care, attendant care, domestic assistance, aids and appliances, prosthesis, educational and vocational training, and home and transport modifications.

ICWA will continue to manage the CISS, including assessing eligibility for catastrophically injured workers.

Participation in the CISS will not impact on a worker's entitlements under the WCIMA23 other than medical, health, miscellaneous, and workplace rehabilitation expenses which will cease under the WCIMA23 if the worker becomes a participant in the CISS.

Common law rights of workers will be preserved though there will be constraints on receiving damages for future treatment, care and support costs if those services are provided through the CISS.

The cost of injured worker participation in the CISS will be funded by an annual levy on licensed insurers and self-insurers under the WCIMA23, collected by WorkCover WA and paid to ICWA.

Licensed insurers and self-insurers also have notification and information disclosure obligations to ICWA in relation to workers compensation injuries or claims that are, or appear likely to be, catastrophic injuries.

Extending the CISS to catastrophically injured workers is provided for in the following Acts:

- *Workers Compensation and Injury Management Act 2023*
- *Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016*
- *Insurance Commission of Western Australia Act 1986*
- *Civil Liability Act 2002*

ICWA will progress amendments required to the MVWA Regulations and its administrative arrangements, forms and processes resulting from the extension of the CIIS to catastrophically injured workers before 1 July 2024.

Key legislative provisions

As amended by the *Workers Compensation and Injury Management Act 2023*:

<i>Workers Compensation and Injury Management Act 2023</i>	ss. 80, 92, 96, 151, 297-302
<i>Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016</i>	ss. 3(1), 5A, 8, 9, 13, 14, 15, 18, 24, 27, 30A Clauses of Bill: 661-677
<i>Civil Liability Act 2002</i>	ss. 13A Clause of Bill: 626
<i>Insurance Commission of Western Australia Act 1986</i>	ss. 6, 15, 16, 18, 49 Clauses of Bill: 641-648

Key terms

‘Worker’, ‘workplace injury’ and ‘workplace accident’

The term ‘worker’ has the same meaning given in s. 5 of the *WCIMA23*. The term ‘workplace injury’ means an injury to a worker in respect of which compensation under the *WCIMA23* is payable.

Workplace accident means an incident that results in a worker suffering a workplace injury.

Catastrophic injury

The term ‘catastrophic injury’ means a motor vehicle injury or workplace injury that satisfies the prescribed criteria for eligibility for participation in the CISS. The prescribed criteria are set out in Part 2 Division 1 of the MVWA Regulations for each the following five types of catastrophic injury:

- Brain injury
- Spinal cord injury
- Amputations
- Burns
- Permanent blindness

Catastrophic injuries support scheme or ‘CISS’

The terms ‘catastrophic injuries support scheme’ or ‘CISS’ means the scheme provided for in the *Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016* for the lifetime care and support of certain people catastrophically injured in motor vehicle accidents or workplace accidents.

Treatment, care and support needs

The treatment, care and support needs of a person are the needs of the person for or in connection with any of the following —

- (a) medical treatment (including pharmaceuticals)
- (b) dental treatment
- (c) rehabilitation
- (d) ambulance transportation
- (e) respite care
- (f) domestic assistance
- (g) attendant care services
- (h) aids and appliances
- (i) prostheses
- (j) education and vocational training
- (k) home and transport modification
- (l) any other kinds of treatment, care, support or services that are approved by ICWA (either generally, for specified classes of cases, or for a particular person).

Part 3 of the MVWA Regulations provides for the principles to be observed by ICWA in the assessment of treatment, care and support needs (regulation 22).

The MVWA Regulations also set out treatment, care and support needs that are excluded - see Schedule 1 of the *Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Regulations 2016*.

ICWA

ICWA means the Insurance Commission of Western Australia under the *Insurance Commission of Western Australia Act 1986*.

ICWA administers the CISS for motor vehicle accidents which came into effect in 2016. ICWA's functions include:

- assessing eligibility for participation as an interim or lifetime participant
- funding necessary and reasonable treatment, care and support to people who have been catastrophically injured
- registering and paying service providers to deliver treatment, care and support
- administering the *Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016* and supporting regulations.

Process overview

The following provides an overview of key implementation processes and requirements relating to eligibility and participation of catastrophically injured workers in the CISS from 1 July 2024.

1. Injured worker eligibility

Participation in the CISS is as an interim participant or as a lifetime participant.

Part 2 of the *Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016* provides for both interim and lifetime participation in the CISS.

To be eligible for participation in the CISS, an injured worker must have a catastrophic injury and meet the following criteria:

- The catastrophic injury must be a workplace injury resulting from a workplace accident
- The workplace injury must have occurred on or after the commencement date of the *WCIMA23* (1 July 2024) – the changes are prospective in operation
- There must be an established entitlement under the *WCIMA23* in respect of the workplace injury - a claim has been made under the *WCIMA23* and liability to pay compensation has been accepted (or taken to be accepted) by the licensed insurer or self-insurer, or determined by an arbitrator.

The MVWA Regulations and ICWA administrative forms and fact sheets will be updated from 1 July 2024 to explain participation as an interim and lifetime participant and how catastrophically injured workers may apply.

Exclusions

A person is not eligible to be a participant in the CISS in respect of a motor vehicle injury or workplace injury if the person has been awarded damages, pursuant to a final judgment entered by a court or a binding settlement, in respect of the future treatment, care and support needs of the person that relate to the injury.

A person is not eligible to apply to become a participant in the CISS in respect of a workplace injury unless the person resides in Australia at the time of the application. Note: Participation in the CISS in respect of a workplace injury is suspended while the person is absent from Australia.

2. Notification of catastrophic injuries

The *Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016* provides for notification and disclosure of information about injured workers if the worker's injury is, or appears likely to be, a catastrophic injury.

This alerts ICWA to a potential claim under the CISS and is essential for ICWA to assess eligibility for an injured worker's participation in the CISS (as an established entitlement under the *WCIMA23* is one of the eligibility criteria).

Section 30A(4) of the *Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016* requires licensed insurers and self-insurers who have received a claim for compensation in respect of an injury that is, or is likely to be, a catastrophic injury, to:

- provide to ICWA details of the claim and copies of any medical reports or certificates; and
- notify ICWA within 7 days after liability is accepted or determined.

The following proposed notification forms are proposed to facilitate timely notice:

- [Attachment 1 – Notification of Workers Compensation Claim – Catastrophic Injury](#) and
- [Attachment 2 – Notification of Workers Compensation Claim Acceptance – Catastrophic Injury](#)

This obligation applies irrespective of any notification given to ICWA by a health professional as required under the *Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016* – see *Notification of Catastrophic Injury Form* at: [Resources - Insurance Commission of Western Australia \(icwa.wa.gov.au\)](#)

3. Management of worker participation in the CISS

ICWA will assess applications for worker participation in the CISS from 1 July 2024, against the eligibility criteria.

If a worker is accepted as an interim or lifetime participant in the CISS the level of treatment, care and support provided will be determined based on what is necessary and reasonable for each person catastrophically injured.

ICWA's CISS team works directly with people who have been catastrophically injured, their families and support teams. This approach allows for collaboration when determining the rehabilitation program, the recovery goals, return to work/home arrangements and ongoing support needs.

ICWA publishes fact sheets that provide further details on access to and provision of the various types of treatment, care and support services that may be provided along with information on dispute resolution and service provider registration and oversight: [Resources - Insurance Commission of Western Australia \(icwa.wa.gov.au\)](#)

4. Impacts of CISS participation on workers compensation and damages

Impacts on workers compensation entitlements

Participation in the CISS does not affect a worker's right to receive income compensation or permanent impairment compensation under the *WCIMA23*.

However, an employer ceases to be liable for compensation in respect of medical or health expenses compensation, miscellaneous expenses compensation or workplace rehabilitation expenses compensation to the extent that the compensation is for expenses incurred or to be incurred after the worker becomes a participant in the CISS. This is because those same services will be provided to the worker as a participant in the CISS.

It is expected ICWA will notify the worker's employer or insurer of the worker's employer when a decision is made to accept a worker as an interim or lifetime participant. This notification can then be used by the insurer or self-insurer to cease the worker's entitlement to medical, health or workplace rehabilitation expenses which will be provided to the worker by the ICWA as a CISS participant.

If a worker and employer agree to settle a workers compensation claim, the *WCIMA23* provides that a statutory settlement agreement registered under the *WCIMA23* must not provide for compensation in respect of medical or health expenses compensation, miscellaneous expenses compensation or workplace rehabilitation expenses compensation for which an employer has ceased to be liable as a result of the worker becoming a participant in the CISS.

Registration of a statutory workers compensation settlement will extinguish the employer's liability and prevent the worker from commencing or receiving common law damages in relation to the catastrophic injury. Registration of a statutory workers compensation settlement will not affect a worker's rights and entitlement as a CISS participant.

Impacts on common law rights

Participation in the CISS does not affect a worker's right to pursue common law damages.

In order to pursue common law damages a worker with a catastrophic injury has the same rights and constraints as any other worker seeking common law damages. The *WCIMA23* provides the following procedural constraints on common law damages:

- the worker's degree of permanent whole of person impairment resulting from the injury must be at least 15% as assessed by an approved permanent impairment assessor
- the worker has elected in accordance with the regulations to retain the right to seek damages and the Director has:
 - (i) registered the election and supporting assessment; and
 - (ii) notified the worker that the election has been registered.
- the worker's statutory workers compensation claim has not been settled via a registered settlement agreement under the *WCIMA23*.

If a worker pursues common law damages, there may be some constraints on the type and amount of damages awarded. The *Civil Liability Act 2002* (s13A) prevents double recovery by providing that no damages can be awarded in respect of any treatment, care and support needs of the worker that relate to a workplace injury and that:

- have arisen during the period in respect of which the person is a participant in the CISS; or
- will or may arise in the future

Other heads of damage can still be awarded.

Section 30A(5) of the *Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016* provides for ICWA to be informed if there is a common law claim on foot that may affect the worker's participation in the CISS.

For example, a person is not eligible to be a participant in the CISS in respect of a motor vehicle injury or workplace injury if the person has been awarded damages, pursuant to a final judgment entered by a court or a binding settlement, in respect of the future treatment, care and support needs of the person that relate to the injury.

Section 30A(5) of the *Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016* provides a worker who has suffered an injury that is a catastrophic injury must notify ICWA within 7 days after —

- an election is made by the worker to retain the right to seek damages in respect of the injury
- any payment of damages in respect of the injury is received by the worker, or any claim for damages by the worker in respect of the injury is settled, if the damages include an amount for expenses in relation to future treatment, care and support needs.

The following proposed notification forms are proposed to facilitate timely notice:

- [Attachment 3 – Notification of Common Law Election – Catastrophic Injury](#) and
- [Attachment 4 – Notification of Receipt of Common Law Damages – Catastrophic Injury](#)

5. Funding of catastrophic workplace injuries

The cost of injured worker participation in the CISS will be funded by an annual levy on licensed insurers and self-insurers, collected by WorkCover WA and paid to ICWA.

ICWA manages the Motor Vehicle and Workplace Accidents (Catastrophic) Injuries Fund, which is a statutory fund under the *Insurance Commission of Western Australia Act 1986*.

There are controls in the *WCIMA23* for determining the amount required to be credited to that fund to meet the cost of injured worker participation in the CISS, and accountability and reporting mechanisms under the *Financial Management Act 2006* and *Auditor General's Act 2006* for ICWA's administration of the fund.

Determination of levy contribution

ICWA will be required to determine each financial year the total annual contribution payable in respect of catastrophic workplace injury liabilities.

In determining the annual contribution, if any, ICWA must have regard to:

- the amount standing to the credit of the Motor Vehicle and Workplace Accidents (Catastrophic) Injuries Fund in respect of workplace injury liabilities
- any amount that WorkCover WA has arranged to remit to ICWA for crediting to the Motor Vehicle and Workplace Accidents (Catastrophic) Injuries Fund in the financial year (see below).
- the amount required to pay for existing and expected workplace injury liabilities of the Motor Vehicle and Workplace Accidents (Catastrophic) Injuries Fund, determined having regard to independent actuarial advice obtained by ICWA.

The annual contribution will ordinarily be funded by an annual levy on licensed insurers and self-insurers collected by WorkCover WA and paid to ICWA.

If there is a surplus in WorkCover WA's Default Insurance Fund, the *WCIMA23* provides flexibility for WorkCover WA to remit that surplus, or part thereof, to ICWA for crediting to the Motor Vehicle and Workplace Accidents (Catastrophic) Injuries Fund.

Calculating and collecting the levy contributions

ICWA is required to notify WorkCover WA of the total annual contribution so that WorkCover WA can calculate and collect the contributions from licensed insurers and self-insurers and remit the payments to ICWA for crediting to its Motor Vehicle and Workplace Accidents (Catastrophic) Injuries Fund.

The contribution methodology is set out in the *WCIMA23* and mirrors that of the insurer and self-insurer contributions to WorkCover WA's General Account and Default Insurance Fund. It is based on premium income for licensed insurers and notional premium income for licensed self-insurers, subject to a minimum amount for each.

The *WCIMA23* requires each licensed insurer and self-insurer to pay WorkCover WA for crediting to the Motor Vehicle and Workplace Accidents (Catastrophic) Injuries Fund the required contribution based on WorkCover WA's calculation. Debt recovery and offence provisions apply to non-payment.

The contribution is required to be paid by a licensed insurer or self-insurer at the times and in accordance with the arrangements WorkCover WA determines and notifies to the licensed insurer or self-insurer.

The indicative timeframes that will apply to ICWA's notification to WorkCover WA of the required annual catastrophic workplace injury levy contribution, WorkCover WA's calculation and determination of each insurer and self-insurer's share of the contribution, and payment due dates for the 2024/25 financial year, is set out at: [Attachment 5 - Indicative timeline for determination and payment of catastrophic workplace injury levy contribution 2024/25](#)

It is intended the same timeframes will apply for each subsequent financial year unless WorkCover WA or ICWA determines otherwise.

WorkCover WA expectations

WorkCover WA expects:

- Licensed insurers and self-insurers to comply with their obligations to notify and provide information to ICWA with regard to possible catastrophic workplace injuries.

Attachment 1: Notification of Workers Compensation Claim: Catastrophic Injury

Section 30A(4)(a) – *Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016*

To: Insurance Commission of Western Australia

We give notice that [insert name of licensed insurer or self-insurer] has received a claim from an injured worker [insert name of worker] that is, or appears likely to be, a catastrophic injury.

The catastrophic injury is or appears to be:

Brain injury	<input type="checkbox"/>
Spinal cord injury	<input type="checkbox"/>
Amputation	<input type="checkbox"/>
Burns	<input type="checkbox"/>
Permanent blindness	<input type="checkbox"/>

Date of notice:

/ /

Details of the worker's claim are below. Copies of the worker's claim, certificate of capacity and any medical reports in connection with the claim are attached.

Worker: _____

Employer: _____

Insurer/self-insurer: _____

Claim Number: _____

Date of Injury: _____

Date Claim Received by insurer: _____

Attachment 2: Notification of Workers Compensation Claim Acceptance: Catastrophic Injury

Section 30A(4)(b) – *Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016*

To: Insurance Commission of Western Australia

We give notice that [insert name of licensed insurer or self-insurer] has received and accepted liability for a claim from an injured worker [insert name of worker] that is, or appears likely to be, a catastrophic injury.

The catastrophic injury is or appears to be:

Brain injury

Spinal cord injury

Amputation

Burns

Permanent blindness

Date of notice:

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Details of the worker’s claim are below. Copies of the worker’s claim, certificate of capacity and any medical reports in connection with the claim and our liability acceptance notice¹ are attached.

Worker: _____

Employer _____

Insurer/ self-insurer _____

Claim Number: _____

Date of Injury: _____

Date Claim Received by insurer: _____

Date liability accepted/ determined¹: _____

1. A licensed insurer or self-insurer must notify the Insurance Commission within 7 days after liability has been accepted (or is taken to be accepted) by the licensed insurer or self-insurer or has been determined by an arbitrator. If liability is accepted attach liability decision notice. If liability is taken to be accepted provide relevant date liability is taken to be accepted. If liability is determined by an arbitrator provide date of determination and attach copy of any decision.

Attachment 3: Notification of Common Law Election: Catastrophic Injury

Section 30A(5) – *Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016*

To: Insurance Commission of Western Australia

This notice confirms that [insert name of worker] has made an election¹ to retain the right to seek damages in respect of a catastrophic workplace injury for the purposes of the *Workers Compensation and Injury Management Act 2023*, section 421.

Details of the workplace injury claim made under that Act are below. The election to retain the right to seek damages has been registered by the Director and confirmation of the registration of the election is attached².

Worker: _____

Employer _____

Insurer/ self-insurer _____

Claim Number: _____

Date of Injury: _____

Date liability accepted/ determined: _____

Date of notice:

Worker or representative’s signature:

.....

1. A worker who has suffered an injury that is a catastrophic injury must notify the Insurance Commission of Western Australia within 7 days after an election is made to retain the right to seek damages for the purposes of the *Workers Compensation and Injury Management Act 2023*, section 421. A worker’s representative may provide the notice on the worker’s behalf.
2. The Director notifies the worker that the election has been registered under the *Workers Compensation and Injury Management Act 2023*, section 421.

Attachment 4: Notification of Receipt of Common Law Damages: Catastrophic Injury

Section 30A(5) – *Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016*

To: Insurance Commission of Western Australia

This notice confirms that [insert name of worker] has a catastrophic workplace injury and has received a payment for damages for expenses in relation to future treatment, care and support needs¹ as set out in the Table below.

Date and reference No. for judgment (including acceptance of offer to consent to judgment) or settlement	Amount received for future treatment, care and support needs	Contact details of representatives

Worker/ plaintiff: _____

Employer/ defendant: _____

Insurer/ self-insurer: _____

CISS status²: _____

Date of notice:

/ /

Worker or representative’s signature: _____

1. A worker who has suffered an injury that is a catastrophic injury must notify the Insurance Commission of Western Australia within 7 days after any payment of damages in respect of the injury is received by the worker, or any claim for damages by the worker in respect of the injury is settled, if the damages include an amount for expenses in relation to future treatment, care and support needs. A worker’s representative may provide the notice on the worker’s behalf.
2. Specify whether worker is or has been an interim or lifetime participant in the CISS or has made an application to be a participant in the CISS.

Attachment 5: Indicative timeline for determination and payment of catastrophic workplace injury levy contribution 2024/25

ICWA notifies WCWA of total levy contribution	WorkCover WA collection of insurer and self-insurer information to calculate each contribution	WorkCover WA notifies each insurer/ self -insurer of its contribution	Payment due date by insurers/ self-insurers	WCWA remittance to ICWA
December 23 ⁱ	May- August 24 ⁱⁱ	28 August 24	1 October 24 1 January 25 1 April 25 1 June 25	31 October 24 31 January 25 30 April 25 30 June 25
i. This is done to meet ICWA budgetary requirements and to ensure the cost is factored into WCWA recommended premium rates for 2024/25	ii. Requires recommended premium rates to be published for 2024/25 and statements from insurers and self-insurers about premium income and notional premium income, before WCWA can make calculations and determine levy amount for each insurer and self-insurer			