



Speech By  
**Hon. Grace Grace**


**MEMBER FOR BRISBANE CENTRAL**

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Record of Proceedings, 30 August 2016

**WORKERS' COMPENSATION AND REHABILITATION (NATIONAL INJURY INSURANCE SCHEME) AMENDMENT BILL**

**Second Reading**

 **Hon. G GRACE** (Brisbane Central—ALP) (Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs) (4.50 pm): I move—

That the bill be now read a second time.

The Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016 represents the next stage in a process of significant social reform for Queensland. This reform commenced with the establishment by the Palaszczuk government of the National Injury Insurance Scheme Queensland for motor vehicle accidents on 1 July 2016. The bill continues this reform by implementing the National Injury Insurance Scheme for workers who are catastrophically injured in workplace accidents connected with Queensland. It will form yet another part of Labor's long and proud tradition of progressive social reform in support of those who need it most.

The National Injury Insurance Scheme for workplace accidents is a companion scheme to the National Disability Insurance Scheme. It will have a significant positive impact on the lives of Queenslanders who sustain life-changing injuries as a result of their work. The bill implements the National Injury Insurance Scheme by introducing compensation payments for lifetime treatment, care and support for serious personal injuries into Queensland's workers compensation scheme. By extending existing compensation entitlements, these amendments provide ongoing support for those workers who sustain the most serious injuries at work and ensure improved rehabilitation, health and lifestyle outcomes. Further, this meets the commitment made by the then government in 2013 through a national heads of agreement with the Commonwealth to implement from 1 July 2016 a lifetime care and support scheme for workplace accidents that meets the agreed national minimum benchmarks.

Queensland's workers compensation scheme is the best performing scheme in Australia. The scheme already provides no-fault statutory compensation benefits for workers who sustain a work related injury including for those who are catastrophically injured. Queensland is the only jurisdiction with a centrally funded, short-tail workers compensation scheme. This means that no-fault statutory benefits are currently provided to workers who have serious personal injuries for a maximum period of between two and five years. If a worker's injury is stable and stationary and is assessed for the degree of permanent impairment, the worker can accept an offer of lump sum compensation and will then have no further entitlement to compensation.

The short-tail nature of the scheme's statutory benefits is balanced by providing injured workers with unlimited access to lump sum common law damages if they can establish their employer was at fault in causing their injury. The damages may include loss of future earnings, pain and suffering, and future care and support to fund the worker's ongoing care and support needs. Extending statutory

benefits to provide lifetime support for serious personal injuries will enable greater certainty and stability in the provision of treatment, care and support to those workers to assist them to maximise their health, work and community participation goals in the face of what is a life-threatening event. It is estimated that providing this additional care and support to the small number of workers impacted by catastrophic workplace accidents will have a minimum impact on overall scheme costs and the average premium rate.

In developing the bill, the government was guided by the Education, Tourism, Innovation and Small Business Committee's report on its inquiry into a suitable model for the National Injury Insurance Scheme for motor vehicle accidents which recommended that the scheme serve as a platform for other National Injury Insurance Scheme arrangements in Queensland. Consequently, the bill proposes arrangements for treatment, care and support payments within Queensland's workers compensation scheme which align with the arrangements under the National Injury Insurance Scheme Queensland for motor vehicle accidents established under the National Injury Insurance Scheme (Queensland) Act 2016.

To implement the National Injury Insurance Scheme for serious personal injuries resulting from workplace accidents connected with Queensland, the bill inserts a new chapter 4A, which establishes an additional no-fault compensation entitlement to ensure that workers who sustain a serious personal injury receive the necessary and reasonable treatment, care and support. There is no change to the existing process for applying for compensation and injured workers can apply for statutory compensation benefits on the basis that they are a worker who has a work related injury. Where a worker has an accepted statutory claim, the insurer may decide, or the worker may request, to have the worker's injury assessed to decide whether the worker has a serious personal injury. Serious personal injuries include a serious permanent spinal cord injury, a traumatic brain injury, high level or multiple limb amputations, severe burns or permanent traumatic blindness. Serious permanent brachial plexus injuries which result in the shoulder, arm and hand being paralysed with a loss of function and sensation are also included for consistency of coverage with the National Injury Insurance Scheme Queensland in recognition that the functional impact of such an injury is similar to the loss of a limb.

The scope of coverage for entitlement to treatment, care and support payments excludes journey claims, ordinary recess claims, injuries caused by serious and wilful misconduct and people covered under the WorkCover Queensland insurance policy who are not workers. This aligns with the national minimum benchmarks for workplace accidents. This also reflects arrangements across various workers compensation jurisdictions which may restrict access to compensation entitlements depending on the status of the claimant and the circumstances in which the injury occurred.

Claimants excluded from entitlement to treatment, care and support payments will still have access to their existing compensation and damages entitlements. Those seriously injured in a motor vehicle accident may apply for lifetime care and support from the National Injury Insurance Scheme Queensland. Claimants may also have entitlements under the National Disability Insurance Scheme after the workers compensation claim ends. Because they are not covered by the minimum benchmarks, the Queensland government would not be liable under the heads of agreement to cover the costs if a claimant enters the National Disability Insurance Scheme in the future.

If the worker's serious personal injury meets the eligibility criteria, the insurer must decide that the worker is entitled to treatment, care and support payments. This entitlement also extends to any other work related injury that was caused by the same work event that caused a serious personal injury. This is consistent with the approach taken for the National Injury Insurance Scheme Queensland and ensures consistent, coordinated delivery of treatment, care and support services for all injuries caused by the work event. Also consistent with the National Injury Insurance Scheme Queensland, in the first instance the insurer may assess a worker as being entitled to treatment, care and support payments for an interim period of up to two years initially or for their lifetime. Allowing this entitlement for an interim period will provide immediate benefit to those workers whose serious personal injuries may change over time and will require review during this period to determine if the injury will continue to meet the eligibility criteria in the long term. If it is deemed that the worker does not have a lifetime entitlement to treatment, care and support payments by the end of the interim period, they revert to existing compensation and common law damages.

Workers assessed as having a lifetime entitlement will have treatment, care and support provided for their lifetime unless they opt out of these payments as part of a common law claim. Consistent with the Education, Tourism, Innovation and Small Business Committee's recommendation in its report into a suitable model for the National Injury Insurance Scheme for motor vehicle accidents, the design of the scheme provides for the maximum level of choice, flexibility and independence for seriously injured workers about the care and support they receive. In particular, needs assessments, service planning and payment options for workers are designed to maximise an injured worker's choice, flexibility and

dependence. In preparing an individualised support plan the insurer must consult with the worker and any other appropriate person about their treatment, care and support needs, their abilities and limitations and their individual goals. The worker and insurer may also enter into a funding arrangement that covers particular expenses for a set period and allows a worker to self-direct these funds to the treatment, care and support services they desire.

The bill also retains an injured worker's common law rights to claim damages for treatment, care and support if they can establish their employer was at fault in causing their injury. Like the National Injury Insurance Scheme Queensland, this model preserves an injured worker's freedom of choice and self-determination. Seriously injured workers whose employer is not at fault in relation to the injury will continue to receive lifetime treatment, care and support payments. Workers may also choose to continue to receive lifetime treatment, care and support payments and seek damages for the other non-treatment care and support heads of damage.

Where seriously injured workers claim damages for their injury, they will be able to elect to opt out of receiving lifetime treatment, care and support payments and accept a lump sum award of damages for treatment, care and support. In line with their eligibility period, workers will continue to receive treatment, care and support payments while their damages claims are being finalised. Where the worker decides to accept a lump sum of treatment, care and support damages, this head of damage cannot be reduced for contributory negligence. This will ensure that the damages lump sum is adequate to meet the worker's future treatment, care and support needs and will minimise any adverse impact on a worker's capacity to fund their future needs by a reduction for contributory negligence of the other heads of damage.

Stakeholders have raised the risks and challenges inherent in workers managing large lump sum payments to ensure they continue to meet the recipient's need. In recognition of these concerns, and consistent with the National Injury Insurance Scheme Queensland, the worker's election to opt out will be subject to meeting certain safeguards. These safeguards include that the worker's damages claim is not subject to contributory negligence of 50 per cent or more and the court has not prevented them from being awarded a lump sum payment for treatment, care and support. The purpose of these safeguards is to minimise risks in relation to a worker making a reasonable and informed decision about seeking damages and optimally managing the damages lump sum to fund their future treatment, care and support needs. These provisions also support the policy objective of providing no-fault treatment, care and support in particular by providing that there is no ability to opt out of statutory payments if the reduction for the worker's contributory negligence is 50 per cent or more. A worker's inability to seek treatment, care and support damages has no impact on their ability to pursue the claim for the other heads of damage.

To mitigate the low risk that a worker will exhaust a damages lump sum prematurely, the bill enables a worker to apply to an insurer to receive additional treatment, care and support payments if the damages lump sum they accepted turns out to be insufficient to meet their necessary and reasonable treatment, care and support needs. This will reduce the likelihood of these workers seeking to enter the National Disability Insurance Scheme and shifting this cost to the Queensland government. This also ensures that the National Injury Insurance Scheme for workplace accidents in Queensland meets the national minimum benchmarks.

Consistent with the National Injury Insurance Scheme Queensland, the bill provides that a worker must wait at least five years after accepting a treatment, care and support damages lump sum before applying for additional statutory payments. The bill also allows for regulations to prescribe more detail around these requirements. These will be determined in consultation with the National Injury Insurance Scheme Queensland and scheme stakeholders.

Consistent with the National Injury Insurance Scheme (Queensland) Act 2016, workers compensation insurers—including WorkCover Queensland and self-insured employers—are able to engage the National Injury Insurance Agency Queensland, established for motor vehicle accidents, to perform some or all of their functions in relation to treatment, care and support arrangements. This will be achieved through a contractual arrangement between the relevant insurer and the National Injury Insurance Agency Queensland. Workers compensation insurers will continue to fund treatment, care and support payments and contribute to the agency's operating costs. This approach will ensure consistent standards of high-quality care and support for all seriously injured Queenslanders by leveraging the expertise that will be established within the National Injury Insurance Scheme Queensland.

The existing cost-effective and efficient dispute resolution processes and mechanisms within the Queensland workers compensation scheme will be used for disputes about treatment, care and support, including the Medical Assessment Tribunal, to resolve medical disputes, internal review by insurers, review rights to the Workers' Compensation Regulator and appeal rights to the Queensland Industrial

Relations Commission. These mechanisms have well-established legislative and administrative frameworks and have developed a body of expertise in determining workers compensation claims matters. Adapting these dispute resolution processes for treatment, care and support related matters will further ensure that all workers compensation applicants are treated consistently regardless of the nature of their injury, and seriously injured workers will have the same dispute resolution mechanisms for all aspects of their workers compensation claim.

The additional cost to Queensland's workers compensation scheme of incorporating treatment, care and support payments for serious personal injuries is estimated to be a maximum of \$16.4 million per year and will be met through employer premiums. While this equates to a nominal \$0.01 increase in the average premium rate, no impact on the current rate of \$1.20 per \$100 of wages paid is expected in the short to medium term.

As well as implementing the National Injury Insurance Scheme for workplace accidents, this bill will provide self-insurers with greater flexibility for managing claims liabilities, including additional liabilities which may arise due to providing lifetime treatment, care and support payments for serious personal injury. The bill provides for an alternative form of self-insurance security in the form of an unconditional financial guarantee issued by general insurers. The bill also removes the current minimum value of the guarantee of \$5 million while maintaining the requirement that the guarantee be set at 150 per cent of the self-insurer's estimated claims liability.

This bill also amends the Workers' Compensation and Rehabilitation Act 2003 to restore the original policy intent and provide certainty for insurers, employers, workers and the courts after recent court decisions have interpreted various provisions in ways that could adversely affect the operation of the scheme. Firstly, the bill responds to the *Byrne v People Resourcing (Qld) Pty Ltd & Anor* [2014] QSC 269 case. The *Byrne* case had the effect of validating the use of hold harmless clauses while indemnifying the employer for the cost of these claims. This judgement also found that WorkCover Queensland must indemnify a third-party liability holder against an employer's policy regardless of how the liability is assumed. Prior to the *Byrne* decision, where a worker was injured and both the worker's employer and the principal contractor or host employer were negligent, then WorkCover paid damages on behalf of the employer and the principal contractor or host employer paid their share of damages for negligence. The employer's direct damages were recorded against the employer's claims history and were used to determine their premium rate. A principal contractor or host employer's damages were paid either by them or their public liability insurer.

Principal contractors or host employers sought to circumvent their liability through the use of hold harmless clauses in contracts in which they transfer any liability for injury costs to the employer. Under these clauses the employer agrees to pay work related injury costs of the principal contractor or host employer. Following the *Byrne* decision, if a hold harmless clause is in place then the employer is liable to pay the full amount of the damages and WorkCover must pay that amount on behalf of the employer. This was irrespective of whether the principal contractor or host employer has a contract of insurance with WorkCover Queensland.

Small to medium sized contractors and labour hire employers typically have limited negotiating power when dealing with large contractors. This judgement encourages the use of hold harmless clauses by principal contractors and host employers. This is undesirable as it allows negligent principal contractors or host employers to avoid liability, which encourages further negligence and unsafe work practices and makes WorkCover Queensland jointly and severally liable for all damages, despite there being a negligent principal contractor or host employer.

The bill proposes to reverse the judgement by preventing the contractual transfer of liability for injury costs from principal contractors or host employers to employers with a workers compensation insurance policy such as subcontractors or labour hire employers. It also clarifies that an insurer will not be liable to indemnify an employer for a liability to pay damages incurred by a third-party contractor under a contractual arrangement.

Reversing the *Byrne* decision will ensure that small and medium sized contractors and labour hire employers have a level playing field when tendering for work and entering into contracts with principal contractors and host employers. Further, it will ensure that principal contractors and host employers keep work health and safety front and centre when scheduling their work and managing the workplace.

Secondly, the bill provides that where the Workers' Compensation Regulator commences certain prosecutions, including for fraud related offences against the act, it is the Workers' Compensation Regulator's knowledge of the commission of the offence that is relevant to the time frame for the commencement of the proceedings. The bill will clarify that insurers must immediately refer such matters as soon as they have a reasonable belief that fraud has occurred.

Thirdly, the bill provides for an alternative indexation method for statutory compensation and common law damages entitlements. Since 1996 Queensland ordinary time earnings, QOTE, have been used for the purposes of indexing a number of statutory workers compensation payments, both weekly and annual. On every occasion since 1996 QOTE has increased and the relevant workers compensation payments have been increased accordingly. However, this year, for the first time, QOTE has fallen, from \$1,456.90 to \$1,446.70—a drop of 0.7 per cent. Under the current act there is no discretion available to prevent a drop in payments. It was never envisaged that these payments would be reduced in that way. The link with QOTE was intended as a beneficial measure, to ensure workers compensation payments stayed in touch with increases in average earnings. To address this issue the bill provides that if QOTE does reduce then that will effectively be deemed a zero per cent increase in QOTE for that financial year and payments linked to QOTE will remain as they are. When QOTE increases in future years, those increases will be offset against the reductions that were not passed on when QOTE fell. This will mean that the correlation with QOTE continues over time. This is consistent with the approach used in both Victoria and New South Wales, and I think it will serve Queensland well.

I thank the Education, Tourism, Innovation and Small Business Committee for its report tabled on 19 August 2016 regarding the Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016. I also thank those who made submissions to the committee about the bill and those who appeared as witnesses as part of the committee's inquiry. The committee made three recommendations, each of which the government is happy to support.

First, the committee recommended that Queensland Treasury consult with affected stakeholders, in particular insurers, employers, unions and disability service providers and representative groups, on the drafting of the regulations to prescribe the assessment criteria for re-entry into the National Injury Insurance Scheme for workplace accidents after an injured person has received common law damages. The government supports this recommendation. The development of re-entry criteria to be included in the Workers' Compensation and Rehabilitation Regulations 2014 will occur in consultation with the NIIS Queensland agency to ensure consistency across the workplace accidents and motor vehicle accidents schemes as well as with key stakeholders.

Second, the committee recommends that a parliamentary portfolio committee be given ongoing oversight responsibility for the National Injury Insurance Scheme for workplace accidents, including to review and report to parliament on the scheme's operations on an annual basis for the first five years after the scheme is established. Again, the government supports this recommendation. To ensure consistency across all national injury insurance schemes, it is proposed that the annual review and report on the National Injury Insurance Scheme for workplace accidents be undertaken at the same time and by the same committee that is referred to by the Treasurer under section 138 of the National Injury Insurance Scheme (Queensland) Act 2016 in respect of motor vehicle accidents.

In response to the third recommendation, the government supports the further investigation of options for third-party liability indemnity. In fact, this recommendation is in line with steps I have already taken to get my department to work together with WorkCover, in consultation with key stakeholders, including the Master Builders Association, to develop an insurance product that provides appropriate coverage for these circumstances. There will be broad consultation with relevant stakeholders during the investigation of options for third-party contributor indemnity for common law damages claims. I am pleased to table the government's response to the committee's report.

*Tabled paper:* Education, Tourism, Innovation and Small Business Committee: Report No. 17—Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016, government response [\[1398\]](#).

This is a landmark reform. By implementing the National Injury Insurance Scheme for workplace accidents in Queensland, this bill continues to build on the Palaszczuk government's significant reforms, providing greater support and opportunities for the most vulnerable members of our community when they need it most. We will be failing the most vulnerable Queenslanders if we do not throw our wholehearted support behind this scheme and make it a reality. I commend the bill to the House.