



# **National Injury Insurance Scheme (Queensland) Bill 2016**

**Report No. 13**

**Education, Tourism, Innovation and Small Business Committee  
May 2016**



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## Education, Tourism, Innovation and Small Business Committee

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## Abbreviations and glossary

agreed minimum benchmarks	Minimum national benchmarks for the provision of no-fault lifetime care and support for people with catastrophic injuries from motor vehicle accidents – see 2.1.4
ALA	Australian Lawyers Alliance
committee	Education, Tourism, Innovation and Small Business Committee
CTP Scheme	Compulsory Third Party Insurance Scheme
Headway	Headway Gold Coast Inc.
ICA	Insurance Council of Australia
Insurance Act	<i>Motor Accident Insurance Act 1994</i> (Qld)
MAIC	Motor Accident Insurance Commission
MAT	Medical Assessment Tribunal or medical tribunal
NDIS	National Disability Insurance Scheme
NIIS	National Injury Insurance Scheme
NIISQ	National Injury Insurance Scheme Queensland, proposed to be established by the Bill
NIISQ agency	National Injury Insurance Scheme Queensland agency, proposed to be established by the Bill to administer the scheme
Productivity Commission Report	Productivity Commission, <i>Productivity Commission Inquiry Report No.54 – Disability Care and Support</i> , 31 July 2011
QCAT	Queensland Civil and Administrative Tribunal
QLS	Queensland Law Society

## Chair's foreword

On behalf of the Education, Tourism, Innovation and Small Business Committee of the 55th Parliament of Queensland, I present this report on the National Injury Insurance Scheme (Queensland) 2016.

The Bill was introduced into the Legislative Assembly by the Treasurer, Minister for Aboriginal and Torres Strait Islander partnerships and Minister for Sport on 19 April 2016. The committee was required to report to the Legislative Assembly by 19 May 2016.

In considering the Bill, the committee's task was to consider the policy to be given effect by the Bill, and whether the Bill has sufficient regard to the fundamental legislative principles in the *Legislative Standards Act 1992*. The fundamental legislative principles include whether legislation has sufficient regard to the rights and liberties of individuals and to the institution of Parliament.

On behalf of the committee, I thank the organisations that made written submissions on this Bill. Thanks also to officials from Queensland Treasury who briefed the committee, the committee's staff, and the Technical Scrutiny Secretariat.



Scott Stewart MP  
**Chair**

## **Recommendations**

### **Recommendation 1**

**8**

The committee recommends a minor amendment to the definition of 'serious personal injury' in Schedule 1 of the Bill to insert the word 'of' in (g) so that it states 'a full thickness burn to all or part of the body'.

### **Recommendation 2**

**36**

The committee recommends that the Treasurer ensure that future Explanatory Notes accompanying Bills comply with the requirements of section 23 of the *Legislative Standards Act 1992*.



## 1 Introduction

### 1.1 Role of the committee

The Education, Tourism, Innovation and Small Business Committee (the committee) was established by resolution of the Legislative Assembly on 27 March 2015. The committee consists of three government and three non-government members.

The committee's areas of portfolio responsibility are:

- education
- tourism and major events
- innovation
- science
- the digital economy and small business.<sup>1</sup>

In relation to a portfolio committee's responsibility for examining legislation, section 93 of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for considering:

- the policy to be given effect by the Bill, and
- the application of the fundamental legislative principles to the Bill.

### 1.2 Referral of the Bill

The National Injury Insurance Scheme (Queensland) Bill 2016 (the Bill) was introduced into the Legislative Assembly on 19 April 2016 by the Hon Curtis Pitt MP, Treasurer, Minister for Aboriginal and Torres Strait Islander Partnerships and Minister for Sport. The Bill was initially referred to the Finance and Administration Committee, and the Committee of the Legislative Assembly varied the referral of the Bill to the Education, Tourism, Innovation and Small Business Committee, as advised to the House on 19 April 2016. The committee was required to report to the Legislative Assembly by 19 May 2016.

### 1.3 Committee inquiry process

The committee received oral briefings on the Bill from Queensland Treasury 26 April and 12 May 2016. Transcripts of the briefings are available on the committee's website.

The committee invited submissions by notice on its website and by email to subscribers and 94 stakeholder organisations. Submissions closed on 3 May 2016 and 13 submissions were received. The submissions are available on the committee's webpage at [www.parliament.qld.gov.au/work-of-committees/committees/ETISBC](http://www.parliament.qld.gov.au/work-of-committees/committees/ETISBC).

The committee held a public hearing on 9 May 2016 to hear from invited witnesses who had made submissions in relation to the Bill.

### 1.4 Should the Bill be passed?

Standing Order 132(1) requires the committee to recommend whether the Bill should be passed. The committee considered the Bill, information provided by the department and the information and views expressed in submissions.

After considering the policy issues discussed in this report, and considering whether the Bill has sufficient regard to the fundamental legislative principles, the committee did not reach agreement on whether the Bill should be passed. The vote on a motion to recommend that the Bill be passed was tied (three 'ayes' and three 'noes') and therefore the question on the motion failed in accordance with section 91C of the *Parliament of Queensland Act 2001*.

The committee has made comments on a number of issues in the Bill. In addition, comments from government members and non-government members are included in this report.

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<sup>1</sup> Schedule 6 of the *Standing Rules and Orders of the Legislative Assembly*, effective from 31 August 2004 (amended 17 July 2015).

**Government members comment**

The government members of the committee support the establishment of the NISQ and believe they have been afforded enough information from the initial *Inquiry into to a suitable model for the implementation of the National Injury Insurance Scheme* and subsequent public hearings associated with the Bill, to make a recommendation on whether or not the Bill should be passed. Government members have ensured consistency and continuity in committee membership through the enquiry and the legislative process. Government members note the significant work done by Treasury to reduce the costings and minimise the financial impact on Queenslanders through the legislative processes.

**Non-government members comment**

The non-government members support the establishment of the NISQ; however, do not believe they have enough information available to them to make a recommendation on whether or not the bill should be passed. The non-government members do not believe their concerns have been ameliorated by Treasury's advice. The non-government members are of the view the advice provided is lacking in credibility and not reliable particularly in light of the inconsistencies between their advice and the Treasurer's statement to the Parliament with respect to the savings achievable and the impost on Queensland families. Further, there are a number of assumptions upon which Treasury rely, particularly with respect to the savings to be achieved; however, no detail has been provided with respect to how these savings are to be achieved.

## 2 Background to the Bill

### 2.1 National Injury Insurance Scheme

#### 2.1.1 Introduction

The establishment and implementation of a National Injury Insurance Scheme has its roots in the findings of the Productivity Commission's *Disability Care and Support* report.<sup>2</sup> The Productivity Commission reviewed the costs and benefits of replacing the current system of disability services in Australia with new arrangements which would ensure all Australians with significant and ongoing disabilities were delivered essential care and support.

The investigation uncovered a poor, inequitable and under-funded disability support system and also highlighted the inability of the current system to adequately support those individuals who were catastrophically injured in motor vehicle accidents. In particular The Productivity Commission found that existing common law based injury insurance schemes, like Queensland's current CTP scheme, were less effective and efficient than no-fault schemes in delivering care and support, particularly to catastrophically injured people. For example, it was found that many individuals who acquired spinal or brain injuries in motor vehicle accidents were unable to sue because there was no at-fault party.

#### 2.1.2 Productivity Commission recommendation

Accordingly The Productivity Commission recommended a national roll out of two separate schemes:

- a **National Disability Insurance Scheme** (NDIS) – similar to Medicare, in that all Australians with a significant and ongoing disability would get long-term care and support, and
- a **National Injury Insurance Scheme** – (NIIS) to cover the lifetime care and support needs of people who sustain a catastrophic injury from an accident, regardless of fault, based on the motor vehicle accident schemes that operate in some States and Territories.<sup>3</sup>

#### 2.1.3 Heads of Agreement between Queensland and the Commonwealth

On 8 May 2013 the Australian and Queensland Governments signed the Heads of Agreement on the NDIS with Queensland's transition to the full NDIS to commence from 1 July 2016.

According to the explanatory notes of the Bill, this agreement required Queensland to:

*...implement a NIIS for motor vehicle accidents, or, from 1 July 2016, meet 100 per cent of the costs of participants who enter the NDIS because a NIIS has not been implemented.*

#### 2.1.4 Agreed minimum benchmarks

For motor vehicle accidents the Queensland Government agreed in principle with the NIIS minimum national benchmarks. States and Territories agreed to implement minimum benchmarks for the provision of no-fault care and support for people who are catastrophically injured in motor vehicle accidents. The minimum benchmarks stated that each jurisdiction should cover catastrophic injuries arising from motor vehicle accidents which:

- involve at least one registrable vehicle
- occur on a public road or other locations where registrable vehicles are commonly driven, e.g. driveways and car parks, and
- are the result of the driving of the vehicle, the vehicle running out of control, action taken to avoid a collision with the vehicle, or a collision with the vehicle while it was stationary.

<sup>2</sup> Productivity Commission, *Productivity Commission Inquiry Report No.54 – Disability Care and Support* (Productivity Commission Report), 31 July 2011.

<sup>3</sup> Productivity Commission, *Productivity Commission Inquiry Report No.54 – Disability Care and Support – Plain English version*, 31 July 2011, p.2-3

In addition, the agreed minimum benchmarks specify the catastrophic traumatic injuries which were to be covered by the NIIS, the minimum exclusions from the NIIS and the services to which a catastrophically injured person would be entitled. The agreed minimum benchmarks state that entitlements would only be provided within the Commonwealth of Australia.

In determining what are reasonable and necessary supports, the agreed minimum benchmarks list the following factors for consideration:

- benefit to the participant – to progress or maintain the participant’s recovery, management and participation
- appropriateness – services provided are consistent with the participant’s current medical or rehabilitation needs, are consistent with current clinical practices and are congruent with other services provided to the participant
- cost effectiveness of the services – the benefits and expected outcomes outweigh the costs, the cost is comparable to those of other providers, no other services would achieve comparable outcomes and alternatives to purchasing equipment or undertaking modifications have been considered
- that the services relate to needs arising from the injury sustained in the motor vehicle accident.<sup>4</sup>

## **2.2 Current Compulsory Third Party insurance scheme in Queensland**

### *2.2.1 What does CTP cover?*

Queensland’s compulsory third party (CTP) insurance scheme is a common law ‘fault’ based scheme. An injured person may claim a lump sum from the CTP insurer where another person can be established to be at fault. If the claimant was partially at-fault for their injuries, they can still make a claim but the compensation they receive may be reduced (contributory negligence). If an injury results from an accident where fault cannot be established (for example a motor vehicle colliding with an animal), or the injured person was at fault, the injured person is not able to claim against the insurer. It is estimated that almost half of all people catastrophically injured in motor vehicle accidents in Queensland fall into this category. In these circumstances, the injured person will need to rely on their own resources, sick leave entitlement, Medicare, private health insurance, any income protection and family support.

### *2.2.2 Components of the current CTP premium*

The CTP Scheme is currently funded via insurance premiums paid by motor vehicle owners when paying their motor vehicle registration. The premiums consist of the insurer’s premium, which varies between insurers, and a number of levies and administration fees.<sup>5</sup> The Queensland Treasury advised that the average CTP premium is approximately \$336 per annum for each registered motor vehicle.<sup>6</sup>

## **2.3 Committee inquiry into a suitable model for implementation of the National Injury Insurance Scheme**

### *2.3.1 Considerations in former inquiry*

The committee considered the two options identified in the Terms of Reference of the committee’s *Inquiry into a suitable model for the implementation of the National Injury Insurance Scheme*:

- a full no-fault Lifetime Care Scheme(LCSS) where there would be no lump-sum compensation for lifetime care and support costs (as is the case with a common law settlement), instead the

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<sup>4</sup> The agreed minimum benchmarks are available at:  
[http://www.treasury.gov.au/~media/Treasury/Policy%20Topics/People%20and%20Society/National%20Injury%20Insurance%20Scheme/Downloads/PDF/benchmark\\_MVA.ashx](http://www.treasury.gov.au/~media/Treasury/Policy%20Topics/People%20and%20Society/National%20Injury%20Insurance%20Scheme/Downloads/PDF/benchmark_MVA.ashx)

<sup>5</sup> These include a Statutory Insurance Scheme Levy; Hospital and Emergency Services Levy; Nominal Defendant Levy and an Administration Fee.

<sup>6</sup> Hansard, Public briefing 2 December 2015, p 5

claimant's lifetime care and support costs would be met by the LCSS as they arise, over their lifetime, and

- a hybrid model of the existing common law scheme and LCSS. Under this model, a person who is catastrophically injured in a motor vehicle accident who can establish that another driver was at-fault for the accident would be eligible to claim from the existing CTP Scheme.

In addition, the committee considered a variation on the hybrid model proposed during the inquiry.

### 2.3.2 *Committee's report on the former inquiry*

In March 2016 the committee reported to the Queensland Parliament on the implementation of the NIIS in Queensland. After considering the evidence the committee was unable to reach a majority decision about which model was the most suitable for the implementation of the National Injury Insurance Scheme in Queensland, as per the Terms of Reference.

Whilst non-government members of the committee supported establishing the NIIS, they did not support the adoption of a hybrid model, as in their view it did not meet the affordability test. Government members supported a hybrid model as they believed it provided participants with greater choice and control, especially with regards to participants seeking to opt out of the scheme to pursue common law damages.

In the former inquiry the committee unanimously recommended some design features for the scheme to be adopted.

#### **Non-government members comment**

The non-government members of the committee note that during the course of this inquiry membership of the committee changed and the Members for Cleveland and Gaven were discharged and the Members for Broadwater and Buderim appointed. The Members for Broadwater and Buderim had not previously had the opportunity to consider which model was the most appropriate, a factor in their not being able to be fully satisfied by Treasury's advice. The non-government members of the committee would like to acknowledge the contribution of the Members for Cleveland and Gaven to the former inquiry and the initial stages of this inquiry.

### 3 Examination of the Bill

#### 3.1 The Queensland National Injury Insurance Scheme

##### 3.1.1 Purpose of the Bill and scope of NIISQ

The purpose of the Bill is to ensure that people who suffer particular serious personal injuries as a result of a motor vehicle accident in Queensland receive necessary and reasonable treatment, care and support, regardless of fault. The Bill establishes:

- a ‘no fault’ National Injury Insurance Scheme Queensland (NIISQ) for assessment of the treatment care and support needed by participants and making payments for their treatment, care and support
- a National Injury Insurance Agency Queensland (the NIIS agency) to administer the NIISQ, and
- a national injury insurance scheme fund.<sup>7</sup>

The Bill is to implement the NIISQ in parallel with the National Disability Insurance Scheme (NDIS), in line with an in-principle agreement between Queensland and the Commonwealth in 2013.

At a briefing to the committee on 27 April 2016 Queensland Treasury summarised the NIISQ scheme which the Bill proposes to implement:

*The National Injury Insurance Scheme in Queensland incorporates a no-fault model and retains common law rights to recover the costs of treatment, care and support for those who are not at fault for their injuries. Under the NIISQ, all people catastrophically injured in a motor vehicle accident in Queensland would immediately become participants in a no-fault scheme irrespective of fault, with care and support services managed by a national injury insurance agency instead of through a CTB insurer. Persons who may have a claim against a CTP insurer – that is, where they can assert fault – may also pursue a claim for non-economic loss and economic loss. In addition, certain participants will be able to elect to opt out of the no-fault scheme and pursue a common law lump sum amount for care and support from the NIISQ.<sup>8</sup>*

Submissions and oral evidence to the committee indicated broad support for the implementation of the NIISQ. Stakeholders had some concerns about the scope of eligibility for NIISQ, the model proposed by the Bill, rights to review of decisions made by the NIIS agency and appeal, the effect of contributory negligence on a person’s option to pursue a common law damages claim for treatment, care and support, and the clarity of drafting of some provisions of the Bill.

##### 3.1.2 Who will be covered by the NIISQ

Broadly, people who suffer from particular serious personal injuries as a result of a motor vehicle accident in Queensland on or after 1 July 2016 will be eligible to participate in the NIISQ. The estimated number of new participants annually, based on existing CTP data, is approximately 136.<sup>9</sup>

The Bill specifies the circumstances where the proposed Act will apply and who will be eligible to participate in the NIISQ in more detail. In addition, further detailed eligibility criteria are proposed to be included in a regulation.

##### 3.1.3 Application of the proposed Act

Clause 4 provides for when the proposed Act will apply. The Explanatory Notes state:

*Clause 4 limits the application of the Act to a serious personal injury caused by, through or in connection with a prescribed vehicle if the injury is a result of:*

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<sup>7</sup> Clause 3

<sup>8</sup> Hansard, Public briefing 26 April 2016, p 1

<sup>9</sup> Hansard, Public briefing 2 December 2015, p 5

- *the driving of the prescribed vehicle; or*
- *a collision, or action taken to avoid a collision, with the prescribed vehicle; or*
- *the prescribed vehicle running out of control; or*
- *a defect in the prescribed vehicle causing loss of control of the vehicle while the vehicle is being driven.*

*In addition, the motor accident resulting in the injury must happen in Queensland, on or after 1 July 2016.*

A **prescribed vehicle** (see clause 4 above) is defined in clause 7 as:

- (a) *a motor vehicle or a trailer for which a CTP insurance policy is in force; or*
- (b) *a trailer to which a CTP insurance policy extends; or*
- (c) *a motor vehicle of which a self-insurer is the registered owner; or*
- (d) *a trailer for which a self-insurer would be the insurer under the Insurance Act or a corresponding law if the trailer were involved in an incident in Queensland resulting in personal injury; or*
- (e) *a motor vehicle or a trailer to which a nominal defendant scheme would apply if the motor vehicle or trailer were involved in an incident in Queensland resulting in personal injury.*

A **motor vehicle** (used in the definition of ‘prescribed vehicle’ above) is defined in Schedule 1 of the Bill by reference to the *Transport Operations (Road Use Management) Act 1995*, which defines a motor vehicle to mean:

- .. a vehicle propelled by a motor that forms part of the vehicle, and –*
- (a) *includes a trailer attached to the vehicle; but*
- (b) *does not include a motorised scooter, a personal mobility device or a power-assisted bicycle.<sup>10</sup>*

A ‘serious personal injury’, to which the NIISQ will apply, is defined in Schedule 1 of the Bill, and includes the injuries specified in the agreed minimum benchmarks for the NIIS<sup>11</sup> and expands on those injuries.

**serious personal injury** – means a personal injury that is -

- (a) *a permanent spinal cord injury resulting in a permanent neurological deficit; or*
- (b) *a traumatic brain injury resulting in a permanent impairment of cognitive, physical or psychosocial function; or*
- (c) *a forequarter amputation or shoulder disarticulation amputation; or*
- (d) *the amputation of a leg through or above the femur; or*
- (e) *the amputation of more than 1 limb or parts of different limbs; or*
- (f) *a permanent injury of the brachial plexus resulting in an impairment equivalent to a shoulder disarticulation amputation; or*
- (g) *a full thickness burn to all or part the body*
- (h) *an inhalation burn resulting in a permanent respiratory impairment; or*
- (i) *permanent blindness caused by a trauma.<sup>12</sup>*

Youngcare, Vision Australia and Headway all suggested that a broader range of injuries should be included in the scheme.<sup>13</sup>

#### Committee comment

The committee notes that the types of injury, and the categories of treatment, care and support are based on the agreed minimum benchmarks for those matters. The committee also notes the advice of well-respected and known organisations and service providers with respect to the scope and range of injuries which should be included in the scheme and has given consideration

<sup>10</sup> Schedule 4, *Transport Operations (Road Use Management) Act 1995*, available at [www.legislation.qld.gov.au](http://www.legislation.qld.gov.au)

<sup>11</sup> See footnote 4

<sup>12</sup> Schedule 1 of the Bill

<sup>13</sup> Submissions 3, 7 and 8

to those recommendations. However, at the first instance and on the balance the government members of the committee believe the current range of injuries as defined in Schedule 1 is appropriate.

The committee also notes a minor drafting error in the definition of 'serious personal injury', and unanimously recommends an amendment to address this.

#### **Recommendation 1**

The committee recommends a minor amendment to the definition of 'serious personal injury' in Schedule 1 of the Bill to insert the word 'of' in (g) so that it states 'a full thickness burn to all or part of the body'.

#### *3.1.4 Injuries resulting from accidents that will not be covered by the NIISQ*

As noted in chapter two of this report, it is proposed that over time the NIISQ will cover catastrophic injuries in accidents of four types: motor vehicle accidents; workplace accidents; medical accidents and general accidents.<sup>14</sup> The Bill under consideration by the committee is the first stage of implementation and applies only to injuries arising from motor vehicle accidents.

Clause 4 of the Bill also sets out who will not be covered by the NIISQ. The proposed Act will not apply to a serious personal injury caused by, through or in connection with an uninsured vehicle, unless the accident happens on a road and the vehicle is one of the types specified in clause 4(3); they include for example, agricultural machinery, a bulldozer, industrial crane or hoist and others specified in the Bill. A prescribed vehicle that is being used for a threat of or actual terrorism is also excluded from the operation of the proposed Act.

The committee sought clarification of the application of the Bill to an injury arising from an accident related to a registered vehicle that is being driven off-road. Queensland Treasury advised "the structure of the National Injury Insurance Scheme minimum benchmarks is that the scheme should mirror the CTP scheme coverage, so that's coverage for registered vehicles on a road."<sup>15</sup> Therefore the NIISQ scheme would not apply to an injury arising from an accident that is not on a road (as defined below), and noted that a road is a public place.<sup>16</sup> Schedule 4 of the *Transport Operations (Road Use Management) Act 1995* defines a road as follows:

**road—**

- (a) includes a busway under the Transport Infrastructure Act 1994; and
- (b) includes an area that is—
  - (i) open to or used by the public and is developed for, or has as 1 of its uses, the driving or riding of motor vehicles, whether on payment of a fee or otherwise; or
  - (ii) dedicated to public use as a road; but
- (c) does not include an area declared under a regulation not to be a road.

**Example of an area that is a road—**

a bridge, cattle grid, culvert, ferry, ford, railway crossing, shopping centre car park, tunnel or viaduct.

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<sup>14</sup> *Meeting the care and support needs of all Queenslanders with a disability*, <http://lifetimecare.initiatives.qld.gov.au/the-current-situation/>

<sup>15</sup> Transcript, Public briefing, 12 May 2016, p 1

<sup>16</sup> Transcript, Public briefing, 12 May 2016, p 1

**Committee comment**

The committee has considered whether the scope of accidents which would allow an injured person to enter the NISQ is appropriate and is satisfied with the advice from Queensland Treasury and that clause 4 is consistent with the agreed minimum benchmarks.

**3.1.5 Eligibility to participate in NISQ**

Clause 12(1) provides that a person is eligible to participate in the NISQ in relation to a ‘serious personal injury’, where the injury meets the criteria which will be prescribed in a regulation. The Explanatory Notes state that other jurisdictions have taken a similar approach to drafting NIS legislation, with detailed specifications of injury categories in guidelines or regulations.<sup>17</sup>

**Non-government members comment**

The non-government members of the committee note that clause 12 provides that further eligibility criteria will be prescribed by regulation. The non-government members are concerned that the full detail and range of the additional eligibility requirements and criteria have not been made available to stakeholders or the committee for consideration.

**3.1.6 Treatment, care and support needs**

The nationally agreed minimum benchmarks include the types of services for participants in the NIS. They are set out in clause 8, which defines the meaning of ‘treatment, care and support needs’ as needs relating to:

- a) medical or pharmaceutical treatment
- b) dental treatment
- c) rehabilitation
- d) ambulance transportation
- e) respite care
- f) attendant care and support services
- g) aids and appliances, other than ordinary personal or household items

*Examples of ordinary personal or household items-*

an air conditioner, a laptop, linen, a mobile phone, a personal computer or a washing machine

- h) prosthesis
- i) educational or vocational training
- j) home or transport modification.<sup>18</sup>

Vision Australia suggested the services provided to meet ‘treatment, care and support needs’ under the NISQ should include counselling. The Australian Pain Management Association proposed that participants should be able to claim for management of chronic pain, which is often associated with serious personal injuries.<sup>19</sup> Griffith University submission suggested the cost of counselling for family carers should be included in treatment, care and support.<sup>20</sup>

The Australian Lawyers Association (ALA) submission raised concerns about the examples of ‘ordinary personal or household items’ which are excluded from the services that could be provided by paragraph (g) of clause 8 (see above). The ALA suggested that for some participants, some of the items excluded by clause 8(g) may be essential. For example “if a participant is quadriplegic and loses

<sup>17</sup> Explanatory Notes p 3. The use of a regulation raises fundamental legislative principle issues, which are discussed in chapter 4 of this report.

<sup>18</sup> Clause 8

<sup>19</sup> Submissions 3 and 7

<sup>20</sup> Submission 6, p 6

temperature control in the lower body then [air conditioning] becomes essential. .... Another example is someone who is incontinent and soils the sheets nightly, meaning they will use more linen.”<sup>21</sup>

#### **Non-government members comment**

The non-government members of the committee note that the treatment, care and support needs were agreed national minimum benchmarks. The non-government members also note that the Explanatory Notes state that a regulation under clause 12 is proposed to expand the injury coverage to include, for example, people who sustain permanent brachial plexus injuries resulting in an impairment equivalent to multiple shoulder disarticulation amputations.<sup>22</sup>

#### **3.1.7 Housing**

The committee notes that the ‘treatment, care and support needs’ which form part of the nationally agreed minimum benchmarks include home modification. The committee recognised the importance of appropriate housing for a person with a serious personal injury and explored what options may be available to an injured person whose housing may not be suitable after an injury. While home modification could be funded by NIISQ, home purchase is not an explicit benefit under the NIISQ. Queensland Treasury told the committee there are opportunities, outside the NIIS, for an injured person to use a lump sum damages settlement for house purchase.

*If a claimant has a common law entitlement and received their benefits as a lump sum, which would then be passed to a trustee, the person could negotiate with their trustee as to how those funds would be used, so it would occur outside of the NIIS.*<sup>23</sup>

#### **3.1.8 Applications to NIISQ**

An injured person, a parent of an injured child, an insurer against whom a claim has been made or someone else on the injured person’s behalf may apply under clause 16 for approval to participate in the NIISQ within a year of the injury. The NIIS agency must decide on an application within 28 days (the ‘decision-making period’), or within a further 28 days.<sup>24</sup>

The NIIS agency has discretion on whether to accept an application which is made more than one year after the injury.<sup>25</sup> If the injured person intends to make a claim against an insurer, the application must state this and provide details if a claim has been made against an insurer.<sup>26</sup>

Clause 17 provides for the circumstances when an application may not be made, including where an application has already been made, or the person is already an interim participant in the NIISQ. If an application has been made and refused, or if the person was an interim participant and their participation has ended, they may re-apply under clause 17 only if the application includes medical information that has not been previously considered, or medical information which shows that the injured person’s condition has deteriorated.<sup>27</sup>

If a person has received a payment under section 44(3) of damages for treatment care and support, in relation to an injury, clause 17 provides that an application in relation to that injury may be made only in circumstances to be prescribed in a regulation, and not for at least five years after receiving the payment.<sup>28</sup> Queensland Treasury advised that a person may re-apply only if their lump sum payment has exhausted, but that a person who has ‘bought-in’ to the scheme may not re-apply.<sup>29</sup>

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<sup>21</sup> Submission 12, p 5

<sup>22</sup> Explanatory Notes, p 3

<sup>23</sup> Hansard, Public briefing, 26 April 2016, p 5

<sup>24</sup> Clause 22((7) and (8), and definition of ‘decision-making period’ in Schedule

<sup>25</sup> Clause 16

<sup>26</sup> Clause 19

<sup>27</sup> See clause 17(2) and (3)

<sup>28</sup> Clause 17

<sup>29</sup> Hansard, Public briefing, 12 May 2016, p 11

### 3.1.9 *Interim participant - coverage after catastrophic injury*

If the NIIS agency decides under clause 22 that the injured person is eligible to participate in the NIISQ, the person may be accepted for the 'participation period' for an interim participant. The 'participation period' is defined in Schedule 1 of the Bill, and is two years from acceptance into the scheme, or for a child under four, for two years from the day they turn six. Clause 22 also provides that if the NIIS agency is satisfied the serious personal injury is likely to continue to meet the eligibility criteria after the participation period of two years, the person may be accepted as a lifetime participant.

### 3.1.10 *Permanent participant*

An injured person may become a permanent participant in the NIISQ at the time an initial application is decided under clause 22, or after a review of the person's eligibility under clause 45 while they are an interim participant. At least one review must occur while a person is an interim participant. After a review, if the NIIS agency decides under clause 46 that a person is no longer eligible, or that the injury is not likely to meet the eligibility after the interim participation ends, the person may seek a review of the decision.<sup>30</sup>

### 3.1.11 *Ability to buy-in to NIISQ in certain circumstances*

A person who is not eligible under clause 12 to participate in the NIISQ because they have been awarded damages under a final court judgment or accepted a binding settlement in relation to treatment, care and support may apply under clause 13 to 'buy-in' to the scheme. The Explanatory Notes describe the effect of clause 13:

*In this situation, the period of participation in the scheme will be agreed between the injured person and the agency and could potentially relate to, for example, a fixed period of time, or, the remainder of a person's life.*

*If the person is accepted as a participant in the scheme, the person must pay to the agency a contribution towards the person's treatment, care and support needs. This contribution will be used to fund the person's future treatment, care and support.<sup>31</sup>*

Queensland Treasury advised it is intended that people whose serious personal injury occurred before 1 July 2016 may apply to buy-in to the scheme. In response to a committee question Treasury officials advised that it is not intended that a person who has been a participant and received a lump sum award of damages could buy-in to the NIISQ.

Clause 13(6) provides that a regulation may make provision about accepting people as participants in the scheme after a final court judgment or binding settlement for treatment, care and support in relation to a serious personal injury.

## **3.2 Treatment, care and support for participants**

### 3.2.1 *Principles – participant goals, independence, choice and rights*

The NIIS agency will be responsible for administering the scheme (section 3.6 below describes the NIIS agency's functions), and it must have regard to the principles set out in clause 59, which include:

- assisting participants to set and achieve individual goals
- supporting participants to maximise independence, participation in the community and employment
- encouraging participants to take part in decision making and to exercise choice and control
- respect for participants' dignity and rights
- collaboration and open communication between the participant, the NIIS agency, family and care givers and service providers

<sup>30</sup> Clause 47

<sup>31</sup> Explanatory Notes, p 10

- treatment, care and support that is evidence-based, reflects community expectations and provides value for money.

The principles also include management of the scheme in a way that ensures its operation is financially sustainable.

#### **Committee comment**

The committee is pleased to note the principles in clause 59 are consistent with Recommendation 6 of the committee's report on its *Inquiry into a suitable model for the implementation of the National Injury Insurance Scheme*, that the "scheme provide for the maximum level of choice, flexibility and independence for catastrophically injured people, subject to appropriate safeguards to ensure the affordability and long term sustainability of the scheme".<sup>32</sup>

#### **3.2.2 Assessment of participant needs**

The NIIS agency is required by clause 25 to assess participants' treatment, care and support needs resulting from their injury, and may also assess their other treatment, care and support needs. When assessing a participant's needs the NIIS agency must, to the extent practicable, consult with the participant about the treatment, care and support the participant considers necessary, their abilities and limitations and their individual goals. Clause 25 also enables the NIIS agency to consult with others. A regulation made under clause 25(4) of the Bill may prescribe the way an assessment must be carried out and the intervals between assessments.

#### **3.2.3 Support plans**

After assessment of a participant's treatment, care and support needs, a support plan is required by clause 26. The support plan must include the treatment, care and support the NIIS agency considers is necessary and reasonable as a result of the participant's serious injury. A support plan may also include treatment, care and support that is needed as a result of something other than the serious injury.<sup>33</sup> A regulation made under clause 26(1)(f) may prescribe additional matters that are required in a support plan.

A principle in clause 59 is relevant to the development of a support plan. The agency must have regard to the principle that:

*... identifying effective treatment, care and support for a participant requires collaboration and open communication between the participant, the agency, the participant's family and care givers, and service providers.*<sup>34</sup>

Queensland Treasury advised that it is anticipated that the process of preparing a support plan will be collaborative and will involve the injured person, their family or support people, consistent with the principles in clause 59 of the Bill which emphasise independence, participation and exercise of choice and control by the injured person. Queensland Treasury told the committee that:

*This is very much going to be a person centred scheme, so the person will be at the centre of that care plan. It will not be prepared in isolation of the person.*<sup>35</sup>

In response to committee questions Queensland Treasury described the intended operation of a support plan:

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<sup>32</sup> Education, Tourism, Innovation and Small Business Committee, *Inquiry into a suitable model for the implementation of the National Injury Insurance Scheme*, Report No. 11, 55<sup>th</sup> Parliament, pp 11 and 68, <http://www.parliament.qld.gov.au/documents/committees/ETISBC/2015/09NIIS2015/09-rpt-011-21March2016.pdf>

<sup>33</sup> See clause 26(1)(e) for the matters the NIIS Agency may consider

<sup>34</sup> Clause 59(e)

<sup>35</sup> Hansard, Public briefing, 12 May 2016, p 13

*[The] support plan will capture their current needs ... and their goals. It will also record the types of treatment and support they get and then the actual payments made in that regard. It really depends on an individual's circumstances. If they own their own home and they require modification to enable them to get back home, modification will be contemplated and assessment will be done by a medical provider in terms of what the requirements are. Then a decision will be made in relation to a number of factors: the cost of that, whether it links in with their goals, the fact that it is reasonable and necessary—all of those considerations. There will be a number of considerations under the regulations, which will mirror the minimum benchmarks in terms of appropriateness of service, the cost, the benefit to the individual.<sup>36</sup>*

In relation to interpretation of what is 'reasonable and necessary' care, the committee notes the agreed minimum benchmarks (see section 2.1.4 of this report). Queensland Treasury advised the committee that other jurisdictions provide the treatment, care and support that is 'reasonable and necessary' and the NDIS and interstate NIIS have a body of decisions about what is 'reasonable and necessary', which the NIISQ will consider.<sup>37</sup>

A support plan made under clause 26 of the Bill must be given to the participant. Clause 27 provides that a support plan may be amended after a further assessment of the participant's treatment, care and support needs is undertaken.

#### **Non-government members comment**

The non-government members of the committee note that clause 26 allows for additional matters relevant to a support plan to be prescribed by regulation. The non-government members believe the development of a support plan is important for the wellbeing of the injured person. It is very concerned by the use of regulation to prescribe matters.

#### **3.2.4 Service requests and services provided to participants**

As noted previously, clause 8 lists the types of services that will be provided under the NIISQ. Some services, particularly in the early period after a serious personal injury, will be provided in public hospitals. Queensland Treasury advised that it expects to engage external staff or organisations to some degree for case management, and would certainly do so for attendant care services and where the injured person elects a service provider mechanism. "It is very much around the injured person's choice, so we would honour and recognise the injured person's needs as well, but we do not have the operating model determined as yet."<sup>38</sup>

The committee was interested in the accessibility of services in regional areas. Queensland Treasury advised the committee that:

*... the service delivery will be very much a face-to-face model. .... The early part will be a bit problematic but we will be looking to have local resources working with local medical practitioners and service providers. As the scheme grows, we will have the infrastructure available. We will be working with WorkCover Queensland, through their resource network around Queensland, and we will be looking to the NDIS to see where we can leverage off resources that they have, building capability across Queensland. We very much see this as a regional service delivery model with a very lean, modest head office infrastructure, which could be in Brisbane but could be anywhere.<sup>39</sup>*

Clauses 28 to 32 of the Bill provide for requests for the NIIS agency to fund particular treatment, care or support services. The NIIS agency must assess a service request, and make a decision with the 28 day 'decision making period'. A service request may be made before or after a support plan has been

<sup>36</sup> Hansard, Public briefing, 26 April 2016, p 5

<sup>37</sup> Hansard, Public briefing, 26 April 2016, p 5

<sup>38</sup> Hansard, Public briefing, 26 April 2016, p 2

<sup>39</sup> Hansard, Public briefing, 26 April 2016, pp 7 - 8

developed. Clause 30 sets out the matters the NIIS agency must consider in deciding on a service request, including whether the service relates to the person's treatment, care and support needs, and whether the needs are reasonable and necessary in the circumstances.

A participant may seek a review if the NIIS agency refuses the request for a service. An information notice must be given under clause 30(6) and include how to apply for a review of the decision.

Clause 131 enables the NIIS agency to give personal information about a participant to an entity that provides services under the scheme, if it may help in providing services. Personal information may also be given to an entity engaged in work relating to the administration of the NIISQ, monitoring or reviewing the scheme, conducting research, or to an insurer or another entity prescribed by a regulation. An entity that is given personal information may not disclose the information, unless disclosure is authorised or required by law.

### **3.3 Payments for treatment, care and support**

#### *3.3.1 Three ways payments may be made*

The Bill provides that payments may be made for a participant's treatment care and support in one of three ways:<sup>40</sup>

- a funding agreement for a specified period of time, under which the NIIS agency pays an amount to cover particular expenses for treatment, care and support of a participant
- reimbursement by the NIIS agency of expenses for treatment, care and support for a participant
- if a lifetime participant has made a claim against an insurer, the NIIS agency may contribute toward an insurer's liability for treatment, care and support damages in particular circumstances.

#### *3.3.2 Funding agreement*

The Bill enables a participant to receive funding to pay for services for their treatment, care and support under a funding agreement. This arrangement appears to be in keeping with the principles in clause 59, such as maximising independence, exercising choice and control and respect for participants' dignity and rights. Clause 34 provides for a funding agreement between the NIIS agency and a person to cover particular expenses to be incurred for a participant's treatment care and support for a stated period. Requirements for funding agreements may also be specified in a regulation.

#### *3.3.3 Reimbursement of participant expenses*

A person who incurs an expense for treatment, care or support of a participant may, under clause 35, request reimbursement of expenses, provided the expense was not during the period of a funding agreement. The NIIS agency may request information from the person who made the request and the participant, and if the information is not provided by the due date the payment request lapses.<sup>41</sup>

Under clause 37 payments to reimburse expenses for participants must be approved by the NIIS agency if the treatment, care and support is an 'approved service' for the participant. Clause 37 also provides that payments must be made within 28 days of a decision by the NIIS agency.

An 'approved service' is defined in Schedule 1 of the Bill. If a support plan has been made, an 'approved service' is a treatment, care and support need that is stated in the plan as one that the NIIS agency considers is necessary and reasonable as a result of the participant's injury. Other treatment, care and support the NIIS agency considers should be funded under the scheme is also an 'approved service'. If

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<sup>40</sup> Clauses 33 to 44

<sup>41</sup> Clause 36

a support plan has not been made, then an ‘approved service’ is treatment, care or support approved under approval of a service request.<sup>42</sup>

Clause 37 provides that the NIIS agency is not liable to pay amounts that exceed the amounts prescribed in a regulation for treatment, care and support. If treatment, care and support is provided overseas, the NIIS agency is liable to pay the average cost of providing the service in Queensland. If the NIIS agency refuses a payment request, the person who made the request may apply for a review of the decision.<sup>43</sup>

The ALA and QLS were concerned that about ‘price setting’ of services in a regulation made under clause 37, which was described as ‘prescriptive’. The ALA submission suggested that there would be competition between NIIS and NDIS participants for scarce services, which would be a particular problem in rural and regional areas. The submission asserted that the proposed approach was rigid and inconsistent with the objectives of the Bill.<sup>44</sup>

The committee sought further information from Queensland Treasury and was advised that the proposed regulation would take account of cost differences between south east Queensland and rural and regional areas.

*The price-setting mechanism is one which will take account of local cost and service delivery. It is not intended to be a one price across all of Queensland. It is there really to put an upper level cap on costs to keep costs reasonable. It is not there to be a cost constraint to force people to go to the lowest common denominator, so to speak.<sup>45</sup>*

### 3.4 Lifetime participant’s claim against an insurer

#### 3.4.1 Overview

An injured person may pursue a common law claim against an at-fault driver’s insurer for different heads of damage, for example, a claim for economic loss. This could occur while a person is receiving treatment, care and support through NIISQ, and, in certain circumstances, while making a common law claim for treatment, care and support. While the common law action was underway, the person would receive treatment, care and support under the NIISQ. The NIIS agency may contribute toward an insurer’s liability for treatment care and support under Division 4 of Part 4, Chapter 2 (clauses 40 to 44).

The process, if a NIIS participant pursues common law damages is illustrated in the flow chart prepared by Queensland Treasury in appendix C. Queensland Treasury explained to the committee:

*The person would come into the scheme from day 1 and would receive the necessary and reasonable care and support. If they have a common law claim that their lawyer is pursuing against the CTP insurer, we would anticipate that the NIIS common law claim would be brought on at the same time. Typically, these claims would need at least four to five years to resolve ..... The person stays in the scheme throughout that. Benefits are not suspended once a common law claim is started. When the common law claim is concluded, the person receives their lump sum from the CTP insurer. It is then proposed that they have 14 days to decide whether to accept the lump sum from the NIIS or return to the NIIS and remain in the NIIS as a lifetime participant. It is the person's election at that point.<sup>46</sup>*

<sup>42</sup> See Schedule 1

<sup>43</sup> Clause 38 and definition of ‘information notice’ in Schedule 1

<sup>44</sup> Submission 12 pp 8-9

<sup>45</sup> Hansard, Public briefing, 12 May 2016, p 13

<sup>46</sup> Hansard, Public briefing, 26 April 2016, p 6

Clauses 160 and 163 of the Bill insert new provisions in the *Motor Accident Insurance Act 1994*. Queensland Treasury advised that those provisions allow the streamlining of the processes under the Motor Accident Insurance Act to be aligned with the processes the NIIS agency will follow, ensures the processes run concurrently, that critical processes are adhered to and the NIIS Agency becomes a party to the proceedings.<sup>47</sup>

#### 3.4.2 *Preservation notice and legal disability*

The NIISQ scheme does not remove a lifetime participant's ability to claim at common law for damages, including heads of damage such as economic loss. If a lifetime participant wants to preserve any right they may have to be awarded damages for treatment, care and support under a court judgment or a binding settlement, they must give the NIIS agency a 'preservation notice' under clause 41 of the Bill. The Explanatory Notes state that giving a notice "does not oblige the participant to take the final assessed treatment care and support damages, in the form of a lump sum. It operates to create this as a possible method of the participant receiving those damages."<sup>48</sup>

Clause 41 provides if the NIIS agency considers the person who made a 'preservation notice' is under a legal disability,<sup>49</sup> the agency must apply to a court, which then decides whether or not to sanction the preservation notice.

#### 3.4.3 *NIIS agency liability to contribute toward damages*

If a preservation notice is given, clause 42 provides that the NIIS agency is liable to contribute towards the insurer's liability, if any, on the claim for treatment, care and support damages. Proposed amendments to the *Motor Accident Insurance Act 1994*, inserted by clause 161, provide for the role of the NIIS agency in relation to a common law claim towards which it is liable to contribute.

Clause 42 provides the NIIS agency stops being liable to contribute towards the insurer's liability if:

...a court decides, or the parties to the claim agree by way of settlement, that—

- (i) the participant is guilty of contributory negligence in relation to the claim; and
  - (ii) the damages that the participant would otherwise be entitled to in the absence of contributory negligence are to be reduced, because of the contributory negligence, by 25% or more; or
- (b) a court decides, under section 41(7), not to sanction the preservation notice; or
- (c) a court makes an order, under section 43, preventing the participant from being awarded treatment, care and support damages; or
- (d) for a participant other than a participant whose preservation notice has been sanctioned by a court—the participant, by notice to the agency and the insurer, withdraws the preservation notice.

(3) In this section—

*party*, to the claim, includes the agency.

The ICA and Suncorp were concerned the drafting of clause 42 could be interpreted as meaning that the insurer is liable for payment of treatment, care and support damages. They submitted that the legislation must be absolutely clear that insurers are not liable to fund care and support costs for catastrophically injured claimants.<sup>50</sup>

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<sup>47</sup> Hansard, Public briefing, 12 May 2016, p 9

<sup>48</sup> Explanatory Notes, p 15

<sup>49</sup> A legal disability means the person does not have the legal capacity to do something, for example: the person is a child; the person has impaired decision making capacity for the matter under the *Guardianship and Administration Act 2000*; or is in another way lacking legal capacity.

<sup>50</sup> Submissions 2 and 10

**Committee comment**

The committee is concerned the confusing wording in the drafting of clause 42 may lead to unintended consequences through potentially incorrect interpretation, as highlighted in the committee's public hearings. The committee seeks clarification regarding the intention of clause 42 and its outcome for participants.

If a participant decides to accept damages for treatment, care and support under a final judgment of court or a binding settlement, and if the NIIS agency is liable to contribute, clause 44 provides that the participant must notify the NIIS agency and the insurer. Under clause 44(3), if a participant accepts an award of damages for treatment, care and support, the NIIS agency "must pay to the participant the amount of the awarded treatment care and support damages, less any amount that relates to the period of the participant's participation in the scheme". The person then stops being a participant in the scheme. If the participant decides not to accept damages, they remain a lifetime participant in the NIIS scheme.<sup>51</sup>

**3.4.4 Contributory negligence**

Clause 42 sets out circumstances where a participant may not be able to obtain a common law settlement of damages for treatment, care and support but may continue to receive lifetime treatment, care and support through NIISQ. Those circumstances include where a court decides (or the parties agree) the damages the injured person would otherwise be entitled to would be reduced by 25 per cent or more because of contributory negligence.

The submission from Headway argued that a common law lump sum payment should not be an option where there is contributory negligence.<sup>52</sup>

The submission from Griffith University suggested that the legislation make clearer the position of a claimant who claims damages and is found to be greater than 25 per cent responsible for their injury, and submitted that the Bill is ambiguous in respect of that group of claimants.<sup>53</sup>

The ALA submission argued that "contributory negligence reductions ought only apply to non-care heads of damage. That is, no contributory negligence reductions be permitted (including under the Civil Liability Act) for care and equipment heads of damage for the catastrophically injured."<sup>54</sup> The committee notes that proposed new section 52C(3) of the *Civil Liability Act 2003* (inserted by clause 149 of the Bill), in relation to a personal injury claim from a NIISQ lifetime participant under the Insurance Act, where there is no, or less than 25 per cent contributory negligence provides as follows:

(3) However, if the court awards treatment, care and support damages, the court must not, in assessing the amount of the treatment, care and support damages, take into account any contributory negligence of the person.<sup>55</sup>

The committee also sought clarification from Queensland Treasury on the effect of the contributory negligence component of clause 42 and was advised that:

*...the care and support they receive does not differ. Whether you are partially at fault, fully at fault or entirely not at fault, everyone comes into the NIIS. Everyone receives the same care and support. There is no distinction. The only factor that is under consideration is whether you receive this as a lump sum or not*<sup>56</sup>

<sup>51</sup> Clause 44(3)(a)

<sup>52</sup> Submission 8

<sup>53</sup> Submission 6, p 1

<sup>54</sup> Submission 12, p 11

<sup>55</sup> Proposed section 52C, *Civil Liability Act 2003*, inserted by clause 149

<sup>56</sup> Hansard, Public briefing, 12 May 2016, p 4

Queensland Treasury further advised that:

*The way this system will work is that if someone progresses to receive a lump sum they will receive 100 per cent of their entitlement. Effectively, it is either they stay in the NIIS for life or they receive their lump sum at 100 per cent of their assessed entitlement.*

*If you take a 25 per cent contributory negligence example, it is not proposed that they receive 75 per cent of their damages by way of lump sum and 25 per cent through a lifetime care stream. That is just unworkable.<sup>57</sup>*

In response to questions Treasury further clarified that a person who accepts a common law damages payment will:

*... receive 100 per cent of their entitlement as their lump sum. There is no reduction due to the contributory negligence from the NIIS benefit, their CTP claim benefit would be reduced by that component - their pain and suffering and economic loss - but the NIIS benefit is treated very differently.<sup>58</sup>*

The committee also sought clarification of whether the contributory negligence provisions in clause 42 of the Bill would have any impact on the levy under the NIISQ. Queensland Treasury advised that quantifying any difference in the costings was not achievable in the time frames and noted there is no precedent or scheme like this in Australia from which to obtain data. The State Actuary advised:

*...you have already seen that the costings are greater when lump sums are around for a number of reasons. To the extent that this was changed and the 25 per cent threshold was removed and perhaps a court process was in place, which is what I believe the ALA is suggesting, to the extent that there is a greater number of lump sums as a result of that change the actual costs— and when I say ‘actual costs’ I mean the difference between what we are estimating now and what really happens—the final cost is what is really paid out. That actual cost would increase.<sup>59</sup>*

#### **Government members comment**

The government members of the committee note the advice of Treasury with respect to the consideration of the contributory negligence of the injured person. The government members believe that the incorporation of contributory negligence in determining whether a person progresses to a common law settlement is unnecessary and inconsistent with the underpinning principle of ‘no-fault’ policy approach of the scheme and the 2013 Heads of Agreement between Queensland and the Commonwealth.

#### **Non-government members comment**

The non-government members also accept the advice of Treasury with respect to the consideration of the contributory negligence of the injured person. The non-government members note that clause 42 is relevant only if the hybrid model in the Bill is implemented.

#### **3.4.5 Risk that lump sum damages would be exhausted**

Stakeholders informed the committee’s earlier inquiry into a suitable model to implement the NIIS scheme there was a risk that lump sum payments for an injury may sometimes be exhausted, for example because of inexperience, repayment of debts, or poor return on investments.

Concerns about the risk that common law lump sum damages may be exhausted were again raised during the committee’s examination of the Bill. Griffith University’s submission informed the

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<sup>57</sup> Hansard, Public briefing, 12 May 2016, p 4

<sup>58</sup> Hansard, Public briefing, 12 May 2016, p 5

<sup>59</sup> Hansard, Public briefing, 12 May 2016, p 4-5

committee that some recipients of lump sum damages dissipate the funds, but there was currently no available evidence about the prevalence of lump sum exhaustion. The submission noted the protections contained in the Bill but did not consider those protections likely to be sufficient to prevent premature dissipation of lump sum payments due to factors beyond the individual's control.<sup>60</sup>

Headway was concerned that Centrelink payments would be suspended if a lump sum payment was made for treatment, care and support.<sup>61</sup> Concerns were also raised that a lump sum payment would be divided if a marriage ended.<sup>62</sup> There were differing views as to whether a lump sum award of damages for treatment, care and support would be quarantined in a family law settlement.

Mr Murphy from the Queensland Law Society indicated that his understanding is:

*...that the very nature of the lump sum compensation payments for ...treatment, care and support will be excluded from the matrimonial property. I think the only way I could rationalise the nature of the submission made by the representative of Headway is that the lump sum payment in those circumstances would have included some payment for economic loss, some payment for general damages. That may not be excluded, particularly the economic loss component and any superannuation component. ... damages for treatment care and support ... should be protected.*<sup>63</sup>

Ms Williams from Headway stated:

*Having worked within ABI where people have received lump sum payments, that is not always the case. People have purchased houses with their lump sum payments. We currently have a man who is homeless. He was injured, received a lump sum payment and bought a property. That is usual. The marriage broke down, he was ejected from the house and he was homeless. We ended up taking him on in Queensland—he was in New South Wales—and he has lived in our transitional accommodation for a number of years. The family have the assets. He lives in one of our houses. He is essentially homeless. We have had situations where the lump sum has not been quarantined.*<sup>64</sup>

The Bill provides some safeguards to reduce the risk that lump sum payments will be exhausted. Clause 43 enables the NIIS agency to apply to a court to prevent a participant from being awarded damages for treatment care and support, for example, if the person has a legal disability. The court must consider the participant's ability to manage an award of damages for treatment, care and support in a way that will not compromise the participant's prospects of improvement or rehabilitation or future health and well-being.

#### **Non-government members comment**

The non-government members of the committee are very concerned about the possibility of lump sums being dissipated and the impact this will have, not only on the health and wellbeing of the injured person, but also on the NIISQ and the NDIS. The non-government members note dissipation of a lump sum and the potential impact on the scheme and the injured person would be a moot point if the life-time care option were to be implemented in lieu of the hybrid model as currently proposed by government. The non-government members of the committee also note the evidence provided by frontline service providers and academics with respect to the risk of dissipation through a range of factors, including but not limited to: divorce and poor investment of the lump sum in an attempt to extend its life.

<sup>60</sup> Submission 6

<sup>61</sup> Hansard, Public hearing, 9 May 2016, p 3

<sup>62</sup> Hansard, Public hearing, 9 May 2016, p 8

<sup>63</sup> Hansard, Public hearing, 9 May 2016, p 17

<sup>64</sup> Hansard, Public hearing, 9 May 2016, p 9

Clause 17 provides that a person who has accepted a lump sum under clause 44(3) may apply to return into the NIIISQ:

*They do have to wait a period of five years and there will be some conditions placed in a regulation as well. The agency will consider on a fair and reasonable basis the individual, their circumstances and how the lump sum was paid in the initial part. If a lump sum was paid for an individual and they outlived their expectation, the agency has an opportunity to reconsider whether that lump sum was sufficient if a period of five years has passed, and there will be a number of other conditions.*<sup>65</sup>

In addition to the safeguards in the Bill to reduce the risk of exhaustion of any lump sum payment for treatment, care and support, trustee arrangements, either with the Public Trustee or private trustee companies, are common when an award of damages is made for a personal injury. The ALA stated that there “are excellent existing safeguards in the form of trustee arrangements” and that funds management fees for trustees are claimable in damages actions.<sup>66</sup> Queensland Treasury advised that “[the] trustee process essentially is a result of a court determination—if there were a lump sum action and the court determines that there be a trustee. That is a result of that court decision and that is consistent with what currently happens with CTP arrangements.”<sup>67</sup> Treasury officials also advised the committee that “the expectation is that it would be highly unlikely that a person would dissipate those funds.”<sup>68</sup>

### 3.4.6 Comments about the NIIISQ model in the Bill

#### Government members comment

The government members of the Committee have noted the views of the QLS and the ALA and remain resolute that the funding model as described in the Bill delivers the best outcomes for all Queenslanders. The funding model affords the individual’s rights to access a common law resolution to pursue a lump sum payment through CTP insurance for lifetime care and support while remaining affordable for motor vehicle owners.

Mr Hodgson from the ALA cited problems with other jurisdictions implementing long tail schemes without common law practice incorporated.

**Dr ROBINSON:** . . . You made a comment along the lines of the long tail of some other schemes that in the past have failed, or something along those lines.

*Mr Hodgson: The shifting of the cost burden for negligent behaviour from the wrongdoer and their insurer to the taxpayer has meant two things have operated in lock step. . . . The first thing they do is they screw the benefits down to the very people that it is intended to benefit, so the benefits become far less appropriate for the needs of the participants. The second thing they do is they need to top the scheme up with funds from consolidated revenue, so the taxpayer ends up picking up the burden. It ends up being the worst of all worlds in that the participant gets—I am trying to think of polite phraseology—minimalist benefits, the scheme becomes a huge bureaucratic nightmare and it becomes extremely costly for the taxpayer.*

*The second example is South Australia’s workers compensation scheme. About 11 or 12 years ago South Australia, which had up until that point common law access similar to the structure of Queensland’s workers compensation scheme today, decided it was a really good idea to remove all common law rights. Almost immediately the scheme went into the red. Its unfunded liabilities increased and this unsatisfactory situation snowballed such*

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<sup>65</sup> Hansard, Public briefing, 26 April 2016, p 8

<sup>66</sup> Hansard, Public hearing, 9 May 2016, p 14

<sup>67</sup> Hansard, Public briefing, 26 April 2016, p 9

<sup>68</sup> Hansard, Public briefing, 12 May 2016, p 2

*that a couple of years ago they in a tiny state, effectively population wise, had unfunded liabilities of well north of a billion dollars in their scheme. You might think that removing common law rights might lead to lower premiums for employers. No, that did not happen. Employer premium rates went higher as well, so it was, again, the worst of all worlds: participants missed out, this great big long-tail scheme spawned a huge bureaucracy and the people paying for the scheme—employers—paid more. The detriment of long-tail schemes—large-scale long-tail schemes—are writ large. We need to have the economics of this as well as the fairness addressed squarely.<sup>69</sup>*

#### **Non-government members comment**

Some submitters, to both the former inquiry and this inquiry, consider the funding model provided for in the Bill is not the most appropriate to deliver lifetime care for the catastrophically injured. At the committee's public hearing Dr Robinson asked representatives of Youngcare, Headway, Vision Australia and Community LifeCare & Support Service:

*I have an opening question to all of those on the panel including those via teleconference. You all raise specific matters of some concern about the current bill and how we need to look at those specific issues. I am wondering if you could tease that out a bit further. I am hearing some general concern about the bill as it currently stands—the adoption of that particular hybrid model. Some of you have touched on it in different ways. Perhaps you could speak to that more specifically as to whether there is a preference or a strong preference for a different model.*

Mr Nelson from Community LifeCare & Support Services responded:

*Certainly 75 per cent of initial views were that we should go option A. However, the government has chosen option B. Our initial approach is option A would be the preferred choice, but that is not going to happen so option B will be installed. Let us get it right.<sup>70</sup>*

In its submission to the committee the ICA stated:

*The ICA provided feedback to the inquiry into a suitable model for the implementation of the National Injury Insurance Scheme which concluded in March. Our submissions supported a no-fault lifetime care model whereby catastrophic injuries are managed by a statutory scheme and the scheme is funded through a levy paid by motorists.<sup>71</sup>*

Griffith University's submission stated:

*As suggested in previous submissions, we strongly support the introduction of a no-fault lifetime care and support scheme for serious motor vehicle injuries in Queensland. We note the model adopted by the NISQ bill provides for a hybrid long term care and support scheme with the ability for some participants to opt out of the NISQ and access common law lump sum damages for lifetime care and support costs.<sup>72</sup>*

And,

*The calculation of the lump sum awarded at the time of settlement or judgment for lifetime care and support may prove very inadequate in the long term due to factors such as deterioration in the claimant's medical condition, increase in care and medical costs*

<sup>69</sup> Hansard, Public hearing, 9 May 2016, p 13

<sup>70</sup> Hansard, Public hearing, 9 May 2016, p 8

<sup>71</sup> Submission 2

<sup>72</sup> Submission 6, p 1

*and increased lifespan. These factors can be more adequately provided for and managed in the NIISQ scheme.*<sup>73</sup>

Suncorp Group stated:

*We are disappointed that the Queensland Government has chosen not to implement a full lifetime care model for individuals injured in catastrophic motor accidents.*<sup>74</sup>

Treasury also responded to Mr Dickson's question, that the government's model in the Bill was the more expensive option:

*Mr DICKSON: ...You are telling me now that it would be cheaper if we just had the model where people are guaranteed that they are going to be looked after. If we go down the path that we are looking to go down is it more expensive?*

*Mr Singleton: It is slightly more expensive.*

*Mr DICKSON: What does 'slightly' mean? Does that \$32 turn to \$31.50 or \$31.95 or is it \$15? Wayne, you sound like the person who can answer that question. What is it?*

*Mr Cannon: It would be cheaper. The options were previously costed. They are evidence before the committee. There was a net cost on a long-term basis of a pure long-term care scheme of \$60 per vehicle. The hybrid that has been costed was showing as \$68 per vehicle. Those are the long-term costs. There are some adjustments that can be made to the CTP premiums that reduce those costs for motorists so that the net cost comes down. The 32 that you are speaking of is the 68 less those savings.*

*Mr DICKSON: And the other one is?*

*Mr Cannon: Twenty-four; \$8 less.*

*Mr DICKSON: That is the answer I like. Thank you so much. So there is a difference between \$24 per community member and \$32?*

*Mr Cannon: Per vehicle registration on average, yes.*<sup>75</sup>

#### **Non-government members comment**

The non-government members of the committee are disappointed the advice and views of CTP insurers, service providers and academics have not been taken into account by the government when determining the appropriate model for implementation of the NIIS. The non-government members are yet to be persuaded as to the increased efficacy of the hybrid model (as proposed by government) against the life-time care model supported by relevant stakeholders. In addition, the non-government members are concerned by advice provided by Treasury which confirms this model is the most expensive option for owners of registerable vehicles in Queensland. The non-government members of the committee sought further detail with respect to the costings in light of the inconsistency between the advice of Treasury and the statements made by the Treasury when introducing the bill; however, attempts to seek this information were ruled out of order.

### **3.5 Review of NIIS agency decisions**

#### **3.5.1 Introduction**

In its former *Inquiry into a suitable model for the implementation of the National Injury Insurance Scheme* the committee recommended that the government establish a robust and independent review mechanism for decisions under the scheme about an injured person's eligibility to enter and to remain

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<sup>73</sup> Submission 6, p 3

<sup>74</sup> Submission 10

<sup>75</sup> Hansard, Public briefing, 12 May 2016, p 6

in the scheme, and the level and type of care deemed reasonable and necessary for a person when accepted into the scheme.

### 3.5.2 Internal review

The Bill provides for review of decisions by the NIIS agency by requiring that notice of certain decisions is given as an 'information notice'. An information notice must state the decision; the reasons for it; when it has effect; that the person may apply to the NIIS agency for a review of the decision within 28 days; and how they may apply.<sup>76</sup>

Queensland Treasury advised that:

*...within the insurance industry, there is a strong focus on having an internal dispute resolution focus. It is a body that is separate to the original decision-maker and they are clearly focused on trying to make sure if the wrong decision was made it is rectified quickly. If they believe the correct decision was taken, the person can then elect to continue with that appeal, if you like, through other external mechanisms.*<sup>77</sup>

An internal review must occur before an application to QCAT or the medical tribunal for an external review. An information notice is required to be given to the applicant about the following decisions, which triggers the right to a review of the decision:

- a decision not to approve a person's participation in the NIISQ
- a decision to refuse a payment request for expenses incurred for treatment, care or support
- a decision not to approve a service request, or to approve it with conditions
- a decision that an interim participant is no longer eligible to participate in the scheme, and
- a decision to amend a support plan or suspend participation in relation to a participation who is outside Australia.

Part one of chapter six of the Bill (clauses 105 to 111) sets out internal review processes, and require the NIIS agency to make an internal review decision within 28 days of receiving an internal review application. A notice of the decision must be given to the applicant and any other affected person by the NIIS agency within 14 days.<sup>78</sup>

### 3.5.3 External review

#### Medical tribunal

An external review which involves a medical matter is undertaken by an independent medical tribunal under clauses 112 to 125. A medical matter could include, for example, whether a motor accident is the medical cause of a serious personal injury, or whether a serious personal injury meets the eligibility criteria for the injury.<sup>79</sup> The NIISQ will utilise medical assessment tribunals established under the *Workers' Compensation and Rehabilitation Act 2003*.<sup>80</sup> The Bill provides that the members of a medical tribunal must not include an employee of the NIIS agency or the insurer.

Medical assessment tribunals established under the *Workers' Compensation and Rehabilitation Act 2003* are drawn from a panel of doctors. The ALA submission encouraged a flexible approach to medical tribunals for the NIISQ, and recommended that an occupational therapist should be included, particularly for disputes relating to care and support.<sup>81</sup>

<sup>76</sup> Definition of 'information notice', Schedule 1

<sup>77</sup> Hansard, Public briefing, 12 May 2016, p 3

<sup>78</sup> Clause 110

<sup>79</sup> Clause 112

<sup>80</sup> Definition of 'medical tribunal', Schedule 1 of the Bill

<sup>81</sup> Submission 12, p 15

A decision by a medical tribunal is final and is not reviewable by QCAT.<sup>82</sup> The ALA argued that there should be a right to pursue an application under the *Judicial Review Act 1991*, which it stated would be consistent with the medical assessment tribunals operating under the *Workers' Compensation and Rehabilitation Act 2003*.<sup>83</sup>

#### *Queensland Civil and Administrative Tribunal*

The external review of non-medical decisions made by NIISQ is to QCAT under clauses 127 to 129. An external review may be initiated after a person receives a notice of an internal review decision. Where an application for review to QCAT also involves a medical matter that is referred to a medical tribunal, the Bill provides for the medical tribunal decision to be finalised before QCAT makes a decision.<sup>84</sup> Dispute resolution may include mediation on referral by the tribunal or the principal registrar of QCAT.<sup>85</sup>

#### **Committee comment**

The committee notes that failure to make a decision assumes the question has been negated (clause 39). The committee seeks a guarantee to the effect that no claims will slip through the cracks.

### **3.6 National Injury Insurance Agency, Queensland**

#### *3.6.1 Establishment, functions, powers and staffing*

The Bill establishes the NIIS agency as a body corporate, which may sue and be sued, and which represents the State.<sup>86</sup> Clause 61 provides that it has the powers of an individual and may, for example, enter into contracts, employ staff, engage consultants and do anything necessary or convenient in the performance of its functions.

The NIIS agency functions are set out in clause 58. In summary they are to:

- administer the scheme
- provide information about the scheme to the community
- monitor and review the operation of the scheme, including the treatment, care and support received by participants
- conduct research and collect statistics about the scheme
- give advice and information about the administration, efficiency and effectiveness of the scheme to the Treasurer and the Motor Accident Insurance Commission
- provide support and funding for programs, research and education relevant to the treatment, care and support of participants in the scheme
- manage the fund
- keep a register of providers of services under the scheme
- other functions given under the Act or another Act.

As noted above, the NIIS agency is required to have regard to the principles in clause 59 of the Bill when performing its functions. Clause 62 provides that the agency may perform its functions in or out of Queensland, including outside Australia.

Clause 60 enables the NIIS agency to enter an agreement with another entity that has functions under Commonwealth or State legislation that is the same or similar to the scheme, or is a scheme for compensation, care or support to people who have suffered an injury.

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<sup>82</sup> Clause 123

<sup>83</sup> Submission 12, pp 15-16

<sup>84</sup> Clause 129

<sup>85</sup> *Queensland Civil and Administrative Tribunal Act 2009*

<sup>86</sup> Clauses 55 – 57 and 61

Clause 63 provides that staff of the agency are to be employed under the NIISQ Act, and not as public servants. The NIIS agency may delegate the performance of particular functions to the board, a board member, the chief executive, a staff member, staff of another entity under a contract or other arrangement. Advisory committees may be established, consisting of people appointed by the Minister on the NIIS agency's recommendation.

### 3.6.2 Board and chief executive officer

Clauses 66 to 80 provide for the establishment, functions and operation of a board as the governing body of the agency. The board will have at least four, and not more than nine members, appointed by Governor in Council, which also determines remuneration and allowances. Board members may be appointed for terms of up to five years, and may be reappointed. A person is disqualified from appointment or continuing an appointment to the board if they have a conviction for an indictable offence, are insolvent under administration under the Corporations Act, or are disqualified from managing corporations under the Corporations Act.

The board's functions include to:

- manage the agency
- ensure it performs its functions in a proper, effective and efficient way
- develop strategies and policies about performance of the agency's functions
- set investment objectives for the fund and establish strategies and policies to achieve the objectives, and
- other functions given under the Act.

The board may appoint an entity to set investment objectives, strategies and policies. The entity is to be either nominated by the Treasurer or to be the Long Term Asset Advisory Board established under the *Queensland Treasury Corporation Act 1988*.

Clauses 81 to 84 provide for appointment of the chief executive of the NIIS agency. The chief executive is to be appointed by the board with the prior approval of the Treasurer for a term of up to five years, and the person may be reappointed. The chief executive is appointed under the NIISQ Act, and not the *Public Service Act 2008*.

Transitional provisions in clauses 141 to 143 provide for the Insurance Commissioner under the Insurance Act to constitute the first board and to be the first chief executive officer. The Insurance Commissioner would constitute the first board until at least four members are appointed under the proposed Act. The Insurance Commissioner's temporary role as chief executive officer would finish on the earlier date of a board appointing a chief executive officer or Governor in Council appointing a chief executive officer on the recommendation of the Treasurer.

### 3.6.3 Initial operation of the NIIS agency

Queensland Treasury advised the committee that the initial staffing requirements of the NIIS agency will be minimal. Based on actuarial numbers,

*...we would expect three people a month to come into the scheme and, sadly, the start of their experience in the scheme will be in hospital. So for the first several months the [staffing] requirements of the NIIS will be quite minimal, but that will ramp up over time. The insurance commission already has resources in terms of systems and finance and HR which will be available to the NIIS. Over time we would expect to see some claims managers and case managers come into the structure, but that will be a very gradual build-up.<sup>87</sup>*

<sup>87</sup> Hansard, Public briefing, 26 April 2016, p 4

### 3.6.4 Reporting and accountability

Clause 85 provides that the NIIS agency is a statutory body for the *Financial Accountability Act 2009* (FA Act) and the *Statutory Bodies Financial Arrangement Act 1982*. Annual reports of the NIIS agency are required under the FA Act, and clause 89 of the Bill specifies information which must be included in the report, in addition to the requirements of section 69 of the FA Act.

Quarterly reports to the Treasurer about the NIIS agency's financial position and performance are required by clause 86. In addition clause 87 requires the board of the NIIS agency to immediately inform the Treasurer if an issue arises that in the board's opinion may significantly affect the agency's financial position or ability to perform its functions. The Treasurer may also require the board to report to the department on stated information for the purpose of monitoring, assessing or reporting on the agency's performance of its functions.<sup>88</sup>

## 3.7 Funding of the NIIS scheme

Chapter 4 of the Bill (clauses 93 to 102) provides for the establishment of the national injury insurance scheme fund, payments to and from the fund, the fixing of a levy for the financial year, and the recovery of funds resulting from fraud, from persons in default, and from interstate CTP insurers.

### 3.7.1 Sources of funding

Clause 93 provides that the fund consists of the amounts: received by way of the levy; received or recovered by the NIIS agency in connection with the scheme; income from investment of the fund; an amount transferred from the nominal defendant fund under clause 95; and an amount paid to the NIIS agency under proposed section 96(2). Clause 93 also provides for payments from the fund.

### 3.7.2 Levy

Clause 97 sets out a process for the NIIS agency to calculate, based on actuarial advice, the amount required for the fund for the next financial year, and to give the calculations and a recommendation about the amount of the levy to the Motor Accident Insurance Commission. MAIC, under clause 98 must consider that advice and any other matter and give the Treasurer a recommendation about the amount of the levy at least four months before the end of each financial year.

The levy is proposed to be fixed by a regulation made under clause 99 three months before the start of the next financial year. If a regulation is not made within that time, it commences three months after it is notified or on a later date.

The committee was interested in whether different rates would apply to the levy, based on accident risk and on road usage. When asked about the potential for a different rate of levy for example, for a motorcycle Queensland Treasury advised that the funding model for the levy had not been determined by government at that time.<sup>89</sup> In response to questions about the levy for a tractor which is infrequently used on public roads, Queensland Treasury advised that it would be proportionate, and that how the levy could be scaled for vehicles such as tractors and vintage cars was being examined.<sup>90</sup>

When introducing the Bill the Treasurer advised that it is proposed "to implement an adjusted NIISQ model at a net additional cost to CTP insurance of \$32 per vehicle".<sup>91</sup> During a public briefing the committee sought advice from Queensland Treasury about the proposed levy, which is lower than the estimates provided to the committee during its former inquiry. Queensland Treasury advised:

*[The Treasurer] outlined the net cost of the scheme and indicated that the savings would be achieved through MAIC working with CTP insurers to improve current CTP premium*

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<sup>88</sup> Clause 88

<sup>89</sup> Hansard, Public briefing, 26 April 2016, p 5

<sup>90</sup> Hansard, Public hearing, 12 May 2016, p 2

<sup>91</sup> Hansard, 19 April 2016, p 1023

*affordability and returning the part year unearned CTP premium where cover will now be provided by the NIISQ. There are couple of areas in the coming days that MAIC will commence working with CTP insurers to see where some costs can be taken out of the CTP premium as it currently stands.*<sup>92</sup>

In response to committee questions about the possibility of dramatic or general increases in the levy over coming years because of the absence of a future funding buffer, Queensland Treasury advised:

*There is no expectation of that. The scheme experience will determine the levy over time. Being a very long-tail scheme, it will probably take some time for experience to emerge in a way that can lead to an informed decision around the levy. I would say there would not be any material shift in the levy in the early years while that experience unfolds.*<sup>93</sup>

Treasury further advised that funds transferred from the Nominal Defendant (discussed below) do not affect the amount of the levy. “[We] will be using that \$600 million for cash flow but it does not enter into the actuaries’ calculations of how they have arrived at the premium.”<sup>94</sup>

For the first levy, for 2016-2017, clause 145 of the Bill provides that the three month delay in commencement of a regulation (in clauses 99(2) and 99(4)) does not apply. A regulation to fix the 2016-2017 levy may start after the financial year commences and fixes the levy for the remainder of the financial year.

### 3.7.3 Transfer from the nominal defendant

The Treasurer may, under clause 95, transfer an amount from the nominal defendant fund to the NIISQ fund. Queensland Treasury provided background to the proposed transfer at the committee’s public hearing:

*The Nominal Defendant scheme has existed since the 1960s. Over recent times a surplus of funds has built up in the Nominal Defendant through a number of sources, most notably in 2000 the collapse of HIH and it also involved the failure of a licensed CTP insurer in Queensland, FAI, where the Nominal Defendant then stepped in and met the outstanding claim liabilities on behalf of FAI. Subsequent to that, the HIH liquidator has achieved a full recovery of those funds so we received 100 cents in the dollar which was in excess of \$400 million. Those moneys have been invested and over recent years the investments have performed very strongly, so a surplus has built up in the Nominal Defendant over a number of years and we are currently satisfied that here is in excess of \$600 million within the fund that is not required by the Nominal Defendant and that money can be transferred to the NIIS to help with solvency and initial set-up solvency of the NIIS itself with no detrimental effect on the Nominal Defendant.*<sup>95</sup>

In response to committee questions, Queensland Treasury clarified that the transfer of funds from the Nominal Defendant does not affect the calculation of the proposed levy for the NIISQ. “The \$600 million is to secure the solvency of the fund, so it does not enter into the calculations around premium. It is there to provide essentially a positive cash flow for the early years of the scheme.”<sup>96</sup>

### 3.7.4 Payments from the fund

Clause 93 provides that amounts are to be paid from the fund for administration of the scheme, costs of managing the fund, costs of the agency in performing its functions and exercising its powers under the Act; an amount that must be paid under section 94 and an amount to reimburse the

<sup>92</sup> Hansard, Public briefing, 26 April 2016, p 2

<sup>93</sup> Hansard, Public briefing, 26 April 2016, p 4

<sup>94</sup> Hansard, Public briefing, 26 April 2016, p 3

<sup>95</sup> Hansard, Public briefing, 26 April 2016, p 3

<sup>96</sup> Hansard, Public briefing, 26 April 2016, p 3

Commonwealth for expenses incurred by the Commonwealth under the National Disability Insurance Scheme in relation to people to whom the Bill applies.

Clause 94 provides for payment from the fund of amounts decided by the Treasurer, to relevant government departments and statutory bodies to cover a reasonable proportion of the estimated cost of providing public hospital services and emergency services in relation to participants in the scheme.

### 3.7.5 *Payments of unearned insurers' premiums*

Based on actuarial advice, clause 96 provides that the Treasurer may decide an amount that is payable by an insurer for 'unearned premiums'. The Explanatory Notes outline the rationale for this one-off payment into the fund:

*From 1 July 2015 to the commencement of the fund levy, insurers will have been collecting premiums in relation to risks covered and funded by the scheme. This provision facilitates the recovery of this one-off windfall sum from the insurers.<sup>97</sup>*

#### **Non-government members comment**

The non-government members are concerned about the impost of a levy on all owners of registerable vehicles in Queensland. The model that has been proposed by the government is, according to Treasury's own evidence, the more expensive of the models and the non-government members of the committee are concerned Treasury didn't recommend the most cost-effective way of delivering the NIIS in Queensland. The non-government members are particularly concerned by the inconsistency between the advice provided by Treasury to the Committee and the comments made by the Treasury in introducing the Bill. Treasury provided advice the savings would be of up to \$36 while the Treasurer said the savings would be \$44. Treasury informed the committee the savings are a result of completed negotiations between the government and CTP insurers. Further, Treasury informed the Committee there would be a meeting held with CTP insurers; however, was unable to even confirm the meeting they said would happen has happened. Also of concern is Treasury's failure to demonstrate a clear understanding of how the savings have been achieved in their most recent appearance before the Committee and a continued refusal to demonstrate how these savings have been achieved. To that end the non-government members of the committee are concerned, given we have no detail about how the savings are achieved, with how long the savings will be in place and the impact corporate decisions of the CTP insurers will have on the levy beyond this financial year; further, the non-government members of the committee question why, if savings are achievable through CTP efficiencies why this has not already been done. Without the provision of adequate evidence as to the extent of these savings it is reasonable for the non-government members to be very concerned about how realistic the assumptions are. The non-government members of the committee are concerned with the lack of detail regarding the possible long-term impacts on the levy and are very concerned such ambiguity leaves it open to significant price rises beyond this first financial year. Such an impost would obviously have an impact on the cost of living for Queensland families.

### **3.8 Motor Accident Insurance Commission role in the scheme**

The Motor Accident Insurance Commission (MAIC) has a monitoring, research and advisory role in relation to the NIISQ. Clause 103 provides that the MAIC functions in relation to the NIISQ are:

- monitoring the operation of the NIISQ, including:
  - the effectiveness and efficiency of administration of the scheme
  - the NIIS agency's compliance with the Act
  - interactions between the NIISQ and the statutory scheme under the Insurance Act
- research and statistical collection about the NIISQ

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<sup>97</sup> Explanatory Notes, p 21

- to make recommendations to the Treasurer about changes to the scheme
- to make recommendations to the Treasurer under section 98 about the levy.

Consistent with MAIC's proposed role in monitoring, research and advice, clause 130 requires the NIIS Agency to give the MAIC relevant information that is requested by notice, agreed between the NIIS Agency and the MAIC or is prescribed in a regulation.

Clause 103 also enables the MAIC call centre to provide information about the NIISQ as well as the about the statutory scheme.

### 3.9 Parliamentary committee role

In its earlier inquiry about implementation of the NIIS scheme the committee recommended that a parliamentary portfolio committee be given ongoing oversight responsibility for the scheme, including to review and report to the Parliament on the scheme's operations on an annual basis for the first five years after establishment of the scheme.

Portfolio committees are established by the Legislative Assembly under the *Parliament of Queensland Act 2001* and by resolution under the *Standing Rules and Orders of the Legislative Assembly*. Clause 138 enables a parliamentary committee to examine issues, while recognising that it is up to the Legislative Assembly to decide whether a particular portfolio committee has responsibility for oversight. Clause 138 provides that the Treasurer may refer a matter about the operation of the scheme to a parliamentary committee, including about the efficiency and effectiveness of the scheme, treatment, care and support received by participants, and interactions between the scheme and the statutory insurance scheme. Clause 138 expires after five years.

### 3.10 Other matters

#### 3.10.1 Offences against the proposed NIISQ Act

Clauses 132 to 135 create offences and provide for evidence and proceedings. The offences are fraud, misleading the NIIS agency and knowingly giving false or misleading information to the NIIS Agency. Offences against the proposed Act are summary offences.

#### 3.10.2 Treasurer's directions to NIIS Board and NIIS Agency

The Bill enables the Treasurer to give a written direction to the NIIS Agency or the NIIS Board about the performance of its functions or exercise of its powers. The Treasurer's power to give a direction under clause 136 is limited, and must not be about the content of advice, information, a recommendation or report prepared by the NIIS Agency. The NIIS Agency must include any such direction in its annual report under clause 89.

### 3.11 Amendment of the Civil Liability Act 2003

A new Part 2A (proposed sections 52A to 52C) is inserted into Chapter 3 of the *Civil Liability Act 2003*. Chapter 3 of that Act sets out the damages that a court may assess for personal injuries. Proposed section 52B provides that damages may not be awarded by a court for treatment, care and support needs for the period that a person was a participant in the NIISQ.

Proposed section 52C applies to a claim against an insurer, and is discussed earlier in this report in relation to contributory negligence. The Explanatory Notes in relation to proposed section 52C state:

*If a court awards treatment, care and support damages, in assessing such damages, the court must not take into account any contributory negligence of the person where the court decides the person is less than 25% contributorily negligent.<sup>98</sup>*

<sup>98</sup> Explanatory Notes, p 26

### 3.12 Amendment of Motor Accident Insurance Act 1994

The Bill contains amendments to the *Motor Accident Insurance Act 1994* (the Insurance Act). The amendments include insertion of new definitions in the Insurance Act which reference the proposed NIIAQ Act (clause 152), insertion of notes and a definition regarding the Insurance Commission's functions and annual report (clauses 153-154), and a minor amendment to section 28 of the Insurance Act to enable some payments from the Motor Accident Insurance Fund to be made for ambulance services.

Clauses 156 to 162 amend the Insurance Act in relation to the claims process after a motor vehicle accident. The Explanatory Notes describe those amendments to the Insurance Act as follows:

- an accident claim notice must also authorise the NIIS agency to exchange information to an entity prescribed under the proposed NIIS Act (clause 156, amends section 37)
- an insurer may ask a claimant to provide additional information for the purposes of considering whether the injury comes within the NIISQ scheme or the claimant is an eligible person under clause 12 of the Bill (clause 157, amends section 37A)
- reference to new divisions in the Insurance Act (clause 158, section 38)
- an insurer is required to confirm in its response to the claim notice whether it will meet the reasonable costs of the claimant's rehabilitation for the period the claimant is not a participant in the scheme (clause 159, amends section 39)
- an insurer is required to give consideration to whether a claimant may be eligible to participate in the NIIS scheme (clause 160, amends section 41)
- makes clear that an insurer does not have to pay the medical expenses of a claimant who is a participant in the NIIS scheme or where a payment has been received under the scheme (clause 161, amends section 42)
- makes clear that an insurer does not have to provide rehabilitation services to a claimant in relation to a claimant's treatment, care and support needs if the claimant is a participant in the scheme or the claimant, or a person acting for the claimant, has received a payment under the scheme (clause 162, amends section 51).<sup>99</sup>

Queensland Treasury advised the committee that clauses 160 and 163:

*...allow the streamlining of the processes under the Motor Accident Insurance Act to be aligned with the process that the [NIIS] agency will follow. It ensures that those processes run concurrently and that the pre court processes under the Motor Accident Insurance Act are adhered to and that the [NIIS] agency becomes party to those process. If a matter does not resolve at an informal conference, pursuant to the Motor Accident Insurance Act a compulsory conference may be held. If the matter does not settle there, it may go to trial. When a matter goes to trial, the [NIIS] agency will also be joined as a party, as a defendant, so the matter can be settled at the same time.<sup>100</sup>*

Clause 163 inserts proposed sections 61A and 61B into the Insurance Act. Proposed section 61A sets out the claims processes under the Insurance Act if the NIIS Agency is liable to contribute to the claim. It includes, that the insurer and the NIIS Agency must cooperate, provide each other with information, agree on the content of notices and offers to be given by the insurer to the claimant, and if the claimant brings an action in court for damages for personal injury, the NIIS Agency is a defendant to the action.

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<sup>99</sup> See Explanatory Notes, pp 26-27

<sup>100</sup> Hansard, Public briefing, 12 May 2016, p 9

Proposed section 61B of the Insurance Act requires the insurer to give the NIIS Agency a notice of claim if a claimant is a participant in the NIISQ scheme or an application has been made to participate in the NIISQ scheme. In addition proposed section 61B requires an insurer to give the NIIS Agency notice of specified events in relation to a participant in the NIISQ scheme.

Other amendments to the Insurance Act provide for matters including:

- insertion of references to the proposed NIISQ Act
- a new definition of the 'injury insurance scheme levy'
- enabling the NIIS levy to be collected as part of an insurance premium
- enabling the existing statutory insurance scheme levy to be applied to MAIC's new functions under the proposed NIISQ Act
- clarifying that the hospital and emergency services levy under the Insurance Act does not cover the cost of participants in the NIISQ
- the MAIC role in making recommendations about the NIIS levy
- consideration of the NIISQ when the MAIC reviews the affordability of CTP insurance
- disbursement of gross premiums by transport administration and by insurers, as it relates to the NIIS levy and NIIS Agency.

## 4 Compliance with the Legislative Standards Act

### 4.1 Fundamental legislative principles

#### 4.1.1 Introduction

Section 4 of the *Legislative Standards Act 1992* states that ‘fundamental legislative principles’ are the “principles relating to legislation that underlie a parliamentary democracy based on the rule of law”. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill and brings the following to the attention of the Legislative Assembly.

#### 4.1.2 Rights and liberties of individuals

The Bill contains a number of provisions which could be seen to breach section 4(2)(a) of the *Legislative Standards Act 1992* (LSA), which provides that sufficient regard should be had to the rights and liberties of individuals.

Clause 130 provides that the National Injury Insurance Agency (the agency) must give the Motor Accident Insurance Commission (MAIC) information that is relevant to the performance of MAIC’s functions under section 103(1), if:

- (a) the information is prescribed by regulation; or
- (b) MAIC, by notice to the agency, asks for the information; or
- (c) MAIC and the agency agree that the agency must give the information to MAIC.

Under clause 131(1) the agency may give personal information about a participant in the NIISQ to an entity that provides services under the scheme to the participant, if giving the information may help in providing the services. Clause 131(2)(a) provides that the NIIS agency may give personal information about a participant, or a person who applies to participate, in the scheme, to an entity engaged in work relating to: administration of the scheme; monitoring or reviewing the operation of the scheme; conducting research or collecting statistics about the scheme. The information may be given only if it is necessary to help the entity do the work. Clauses 131(2)(b) and (c) provide that personal information that relates to a claim against an insurer may also be given to an insurer or an entity prescribed by regulation.

Clause 131(4) provides that an entity that is given personal information under this section must not disclose the information to anyone, unless the disclosure is authorised or required by law.

It is arguable that the rights and liberties of an individual are breached by clauses 130 and 131 which allow personal information to be provided to certain entities. The committee notes that both clauses allow for personal information to be prescribed by regulation.

The Committee considers that the clauses, which allow for the effective operation of the NIISQ, have sufficient regard to fundamental legislative principles in this instance.

#### 4.1.3 Retrospective application

Clause 96(1) provides that the Treasurer may decide, based on actuarial advice, an amount that is payable by a licensed insurer in relation to:

- (a) the amount derived, or to be derived, by the insurer from insurer’s premiums relating to its liability, or potential liability, for damages for the treatment, care and support needs of persons covered by a CTP insurance policy; and
- (b) the extent to which the liability, or potential liability, mentioned in paragraph (a) is reduced after the commencement.

The Explanatory Notes state that:

*Clause 96 provides for the recovery of ‘unearned premiums’ from insurers. From 1 July 2015 to the commencement of the fund levy, insurers will have been collecting premiums in relation to risks covered and funded by the scheme. This provision facilitates the recovery of this one-off windfall sum from the insurers.*

Clause 96 potentially breaches section 4(3)(g) of the LSA which provides that legislation should not adversely affect rights and liberties, or impose obligations retrospectively. Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively.

The Explanatory Notes justify the retrospective nature of the provision:

*Clause 96 has retrospective operation to enable the Treasurer to decide an amount that is repayable by a licensed insurer. The Treasurer will decide the amount based on actuarial advice and the amount is limited to the amount that the insurer’s liability is reduced for damages for the treatment, care and support after the commencement of the NIIS(Q).*

*The ability of the Treasurer to recover this payment is justified to avoid this windfall to insurers and to enable the net amount paid by motorists to be reduced in proportion to the amount recovered.*

*A review of the legislation in other jurisdictions shows a similar clause was provided in the legislation to recover premium.*

The committee notes the amount payable is limited to the amount that the insurer’s liability is reduced for damages for treatment, care and support after the commencement of the NIISQ. In light of the justification provided in the Explanatory Notes the committee considers the clause to be appropriate in the circumstances.

#### 4.1.4 Does the Bill allow or authorise the amendment of an Act only by another Act?

The Bill contains several clauses which allow for matters to be prescribed by regulation. These include clauses 4, 9, 12, 13, 14, 15, 17, 19, 25, 26, 34, 37, 99, 112, 130, 131, 141, 156 and 174.

Section 4(4)(c) of the LSA provides that a Bill should only authorise the amendment of an Act by another Act.

A clause in an Act, which enables the Act to be expressly or impliedly amended by subordinate legislation or executive action is defined as a Henry VIII clause. The possible use of Henry VIII clauses may be justifiable in the following limited circumstances:

- to facilitate immediate executive action
- to facilitate the effective application of innovative legislation
- to facilitate transitional arrangements
- to facilitate the application of national scheme legislation.<sup>101</sup>

In relation to clause 12, which provides that a person is eligible to participate in the scheme in relation to a serious personal injury and the injury meets the criteria prescribed by regulation, the Explanatory Notes acknowledge the potential FLP issue and provide the following justification:

*A review of the legislation in other jurisdictions shows a similar drafting approach has been taken. The primary legislation of other jurisdictions either does not define the injury categories or contain broad definitions. All other jurisdictions have either separate guidelines or regulations which contain detailed specifications about the injury categories. The advantage of this is that a more detailed explanation of the injury categories can be*

<sup>101</sup> Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, page 159.

*given in order to provide greater certainty for people in relation to whether they meet the eligibility criteria.*<sup>102</sup>

The committee notes the widespread use of regulations throughout the Bill. In view of the fact that subordinate legislation is subject to parliamentary scrutiny, the committee considers that sufficient regard has been given fundamental legislative principles with respect to these clauses. In relation to clause 12, the committee notes that detailed specifications in relation to injury categories have been placed in regulations in other jurisdictions, and considers that this approach is appropriate in the circumstances.

## **4.2 Explanatory Notes**

### *4.2.1 Requirements for Explanatory Notes*

Section 23 of the *Legislative Standards Act 1992* requires that an Explanatory Note be circulated when a Bill is introduced into the Legislative Assembly and sets out the information an Explanatory Note should contain.

The Explanatory Notes for a Bill must include the following information about the Bill in clear and precise language:

- the Bill's short title
- a brief statement of the policy objectives of the Bill and the reasons for them
- a brief statement of the way the policy objectives will be achieved by the Bill and why this way of achieving the objectives is reasonable and appropriate
- if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives and why the alternative was not adopted
- a brief assessment of the administrative cost to government of implementing the Bill, including staffing and program costs but not the cost of developing the Bill
- a brief assessment of the consistency of the Bill with fundamental legislative principles and if it is inconsistent, the reasons for the inconsistency
- a brief statement of the extent to which consultation was carried out in relation to the Bill
- a simple explanation of the purpose and intended operation of each clause of the Bill, and
- if the Bill is substantially uniform or complementary with legislation of the Commonwealth or another state – a statement to that effect and a brief explanation of the legislative scheme.

If the Explanatory Note does not include the information above, it must state the reason that it is not included.<sup>103</sup>

The committee, other Members, and a variety of stakeholders use Explanatory Notes when considering Bills and forming a view about the extent to which they support the legislation. The committee relies on the Explanatory Notes being clear, precise and sufficiently detailed to be useful in explaining the policy that a Bill is to implement, and all aspects of the Bill.

### *4.2.2 Compliance with section 23*

Explanatory Notes were tabled with the introduction of the Bill. The Notes include most of the content required by section 23, however, the committee considers that the Explanatory Notes could have been improved in a number of respects which are detailed below. Of particular concern to the committee is the "Consultation" section of the Explanatory Notes.

### *4.2.3 Clear and precise explanation of the purpose and intended operation of clauses*

The Bill contains a degree of complexity. It establishes a scheme that will operate in parallel with the existing CTP insurance scheme, and which enables participants, in certain circumstances, to seek common law damages. The way that the NISQ will operate will in part be operationalised by

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<sup>102</sup> Explanatory Notes, National Injury Insurance Scheme (Queensland), page 3.

<sup>103</sup> See section 23, *Legislative Standards Act 1992*

amendments, contained in the Bill, to both the *Civil Liability Act 2003* and the *Motor Accident Insurance Act 1994*. The Bill implements some agreed national minimum benchmarks as elements of the NIISQ. In addition, the Bill provides for entry and exit from the scheme in more than one circumstance.

In a Bill such as this, the committee and stakeholders would have been assisted by Explanatory Notes that were clear and precise, and contained sufficient detail to understand the purpose and intended operation of all aspects of the Bill. It was evident to the committee that a significant number of the stakeholders who made submissions about the Bill misunderstood some aspects of it. Queensland Treasury acknowledged this in its comments on submissions made to the committee.

*The submissions indicate a number of aspects with the Bill where stakeholders will benefit from future explanation and clarification of legislative intent, rather than actual amendment to the Bill. This can be achieved by way of reference to the Explanatory notes and education by the Agency upon establishment.*<sup>104</sup>

Future explanation of the legislative intent may not be sufficiently timely to inform Members about the actual effect of clauses of the Bill before it is considered by the Legislative Assembly. Clear, precise and sufficiently detailed explanations of the purpose and operation of each of the clauses could have reduced stakeholder concerns about the proposed operation of the NIISQ, and enabled stakeholders and others to focus on issues of substantive concern, rather than on misunderstandings of the Bill.

For example, significant concerns were raised about clause 42, which provides for the circumstances in which the NIIS agency is liable to contribute toward an insurer's liability. Possibly the most contentious issue in the Bill was the impact of contributory negligence, which clause 42(2) provides for, in the context of the NIIS agency's liability. The Explanatory Note did not assist in understanding the intended operation of the clause, and did not mention contributory negligence. The note for clause 42 states:

*Clause 42 provides that if the participant gives a notice under section 41 indicating that the participant wishes to preserve any right the participant may have to be awarded treatment, care and support damages under a final judgment of a court or a binding settlement, the agency is liable to contribute towards the insurer's liability, if any, on the claim for treatment, care and support damages.*

*Subsection (2) sets out the circumstances in which the agency stops being liable to contribute.*<sup>105</sup>

When preparing Explanatory Notes, departments must recognise that stakeholders who use Explanatory Notes generally do not have detailed knowledge of the policy that the Bill proposes to implement. Explanatory Notes should assist with understanding the Bill, including understanding of the effect and operation of inter-related provisions, and of clauses that are complex. Sufficient detail is required to enable readers to readily understand a Bill.

#### 4.2.4 Assessment of the consistency of the Bill with fundamental legislative principles

The committee notes that while some potential breaches of fundamental legislative principles were addressed in the Explanatory Notes, others were not mentioned. The section of the Explanatory Notes "Consistency with fundamental legislative principles" describes clause 12, and notes that it infringes fundamental legislative principles. The Explanatory Notes provide a justification for the departure from those principles (see discussion in section 4.1.4 above). As noted in 4.1.4 above, the Bill contains a number of provisions that allow for further detail to be prescribed in a regulation. While the committee considers that the use of regulations is appropriate in the circumstances of establishment of the NIISQ, it nevertheless believes that all the potential breaches of fundamental legislative principles should be identified in the Explanatory Notes.

<sup>104</sup> Queensland Treasury, Correspondence dated 10 May 2016

<sup>105</sup> Explanatory Notes, p 15

#### 4.2.5 Consultation on the Bill

Of particular concern to the committee is the “Consultation” section of the Explanatory Notes. As noted above, Explanatory Notes must include a brief statement of the extent to which consultation was carried out in relation to the Bill, and if the information is not included, the Explanatory Notes should state the reason for its non-inclusion.

The Explanatory Notes describe the consultation undertaken by this committee and its findings in the committee’s former *Inquiry into a suitable model for the implementation of the National Injury Insurance Scheme*. The committee has two fundamental concerns about the approach taken in the Explanatory Notes: first, the consultation described was not consultation in relation to the Bill, but was about options for implementation of a scheme; and secondly, the consultation was undertaken by a committee of the Legislative Assembly, and not by government.

The committee notes that section 23 of the LSA refers to consultation on the Bill, and that the Department of Premier and Cabinet has provided clear guidelines for the preparation of Explanatory Notes. The committee considers it is inappropriate for Explanatory Notes prepared by a government agency to assume that the consultation undertaken by a portfolio committee of the Legislative Assembly is “consultation in relation to the Bill”. In the committee’s view, its consultation is not a replacement for consultation that government should undertake in developing legislation.

The committee recommends that the Treasurer ensure that future Explanatory Notes comply with the requirements of section 23 of the LSA, and reminds all departments and agencies that consultation during the development of legislation is expected to be undertaken by government. The consultation undertaken by a portfolio committee on a Bill as introduced into the Legislative Assembly is a distinct and separate exercise.

#### **Recommendation 2**

The committee recommends that the Treasurer ensure that future Explanatory Notes accompanying Bills comply with the requirements of section 23 of the *Legislative Standards Act 1992*.

## Appendices

### Appendix A – List of submissions

<b>Sub No.</b>	<b>Submitter</b>
001	John Nash
002	Insurance Council of Australia
003	Australian Pain Management Association
004	Youngcare
005	Community LifeCare & Support Service
006	Griffith University
007	Vision Australia
008	Headway ABI Australia
009	Spinal Life Australia
010	Suncorp
011	Actuaries Institute
012	Australian Lawyers Alliance
013	Queensland Law Society

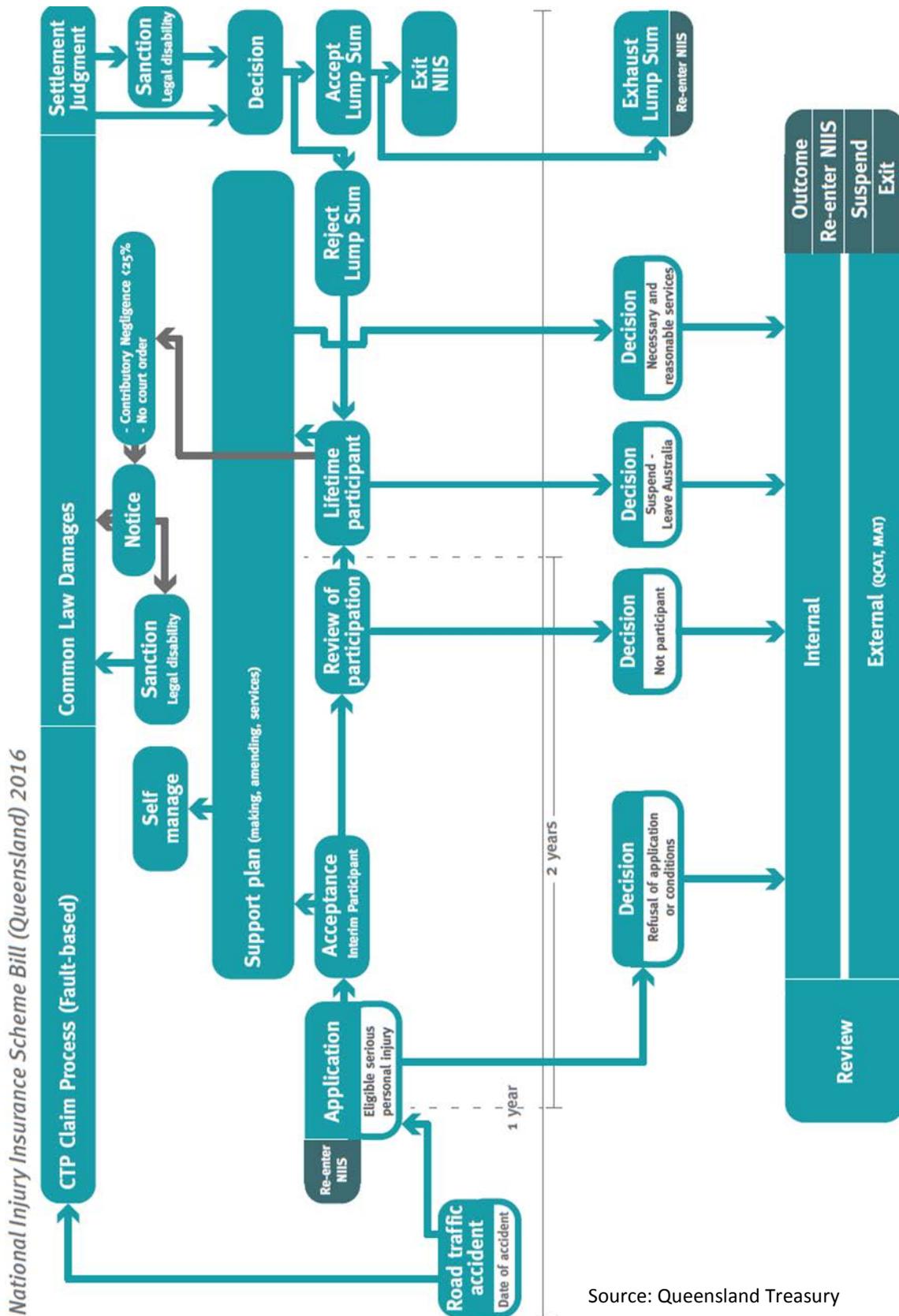
**Appendix B – List of witnesses at public briefings and public hearings**

<b>Public briefing 26 April 2016</b>
Mr Geoff Waite, Assistant Under Treasurer, Queensland Treasury
Mr Neil Singleton, Insurance Commissioner, Motor Accident Insurance Commission
Ms Carmel Harkin, NIIS Program Manager, Queensland Treasury
Ms Yasmin Kennedy, Senior Legal Officer, Queensland Treasury

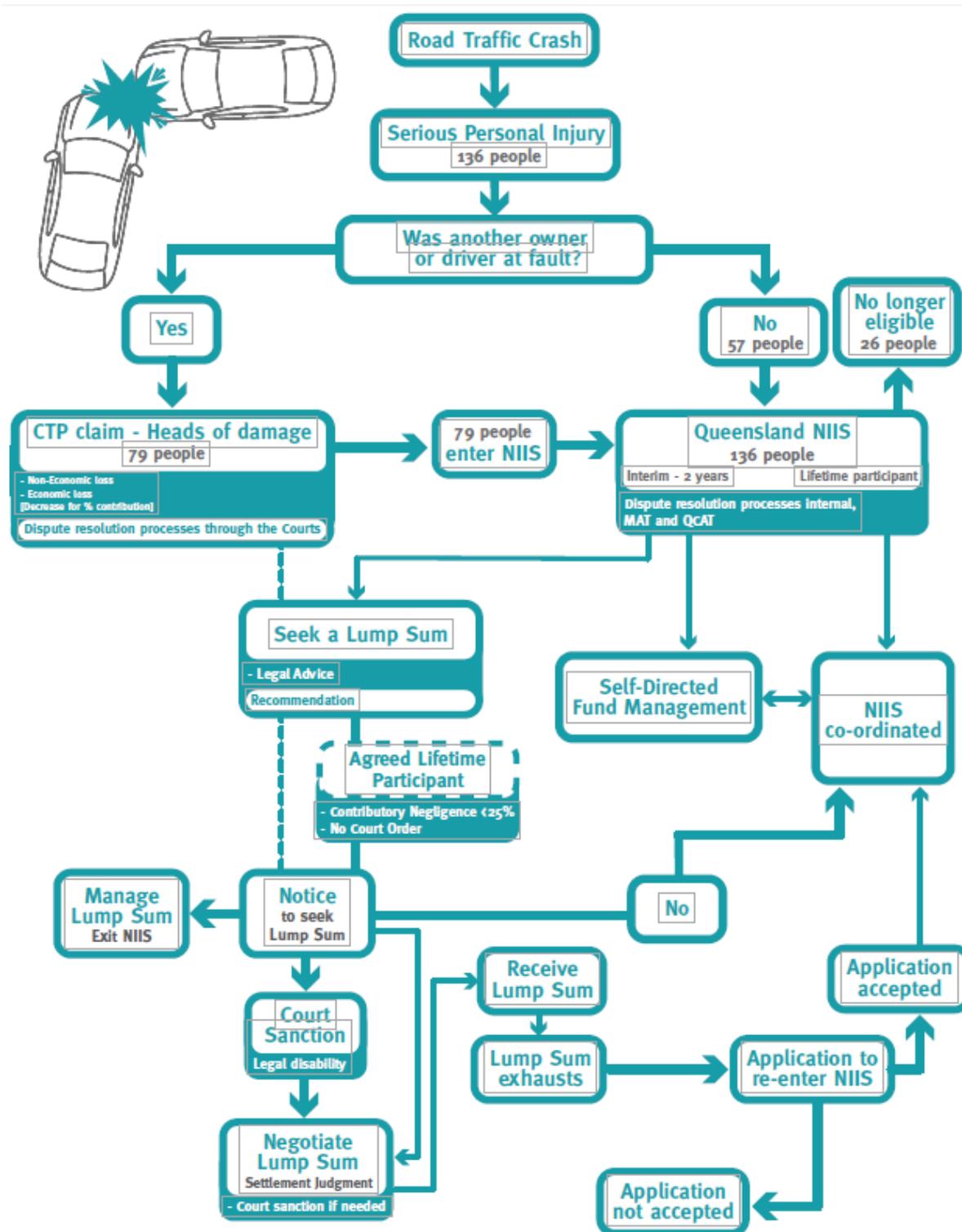
<b>Public hearing 9 May 2016</b>
Mr Shane Jamieson, Connect Manager, Youngcare
Mr Russel Nelson, Convenor, Community Lifecare & Support Service
Ms Julie Williams, General Manager, Headway
Ms Julie McKay and Ms Kate Begley, Vision Australia
Mr Luke Murphy, Queensland Law Society
Mr Rod Hodgson, Queensland President and National Director Australian Lawyers Alliance
Mr Bill Potts, President, Queensland Law Society

<b>Public briefing 12 May 2016</b>
Mr Geoff Waite, Assistant Under Treasurer, Queensland Treasury
Mr Neil Singleton, Insurance Commissioner, Motor Accident Insurance Commission
Mr Wayne Cannon, State Actuary, Queensland Treasury
Ms Carmel Harkin, NIIS Program Manager, Queensland Treasury

Appendix C – National Injury Insurance Scheme (Queensland) Bill 2016 Overview



Appendix D – Process to pursue damages



Source: Queensland Treasury

## Statement of reservation – non-government members

The non-government members of the Education, Tourism, Innovation and Small Business Committee support the establishment of the National Injury Insurance Scheme in Queensland; however, they do not believe the hybrid model proposed by the government in the National Injury Insurance Scheme (Queensland) Bill is the most effective way in which to deliver this important reform. There are a number of concerns the non-government members of the committee have with respect to the Bill before the Committee some of which will be outlined in this Statement of Reservations; other concerns will be addressed during our respective contributions to the Second Reading Debate.

One of the primary concerns the non-government members of the committee has is with respect to inconsistencies between statements made by the Treasurer in introducing the Bill and advice, written and oral, provided to the committee by representatives of Treasury. In his First Reading contribution, the Treasurer indicated that the government had been able to achieve savings through CTP efficiencies; however, there is quite a significant inconsistency between the Treasurer and his Department as to what the savings actually are. This discrepancy is not a minor one and is not one which engenders confidence in the scheme nor its solvency. In his Introductory Speech, on 19 April 2016, the Treasurer indicated the savings, which are savings on the increased CTP premium all owners of registerable vehicles in Queensland will pay, were \$44. In a letter to the committee, dated 4 May 2016, Treasury advised the potential savings were up to \$36. In order to understand the \$8 difference the non-government members of the committee sought details, from Treasury, of how these savings will be achieved; attempts to discover detail of discussions with CTP insurers were ruled out of order, as were attempts to confirm discussions, which Treasury advised were to happen, even happened. Further, during their most recent appearance before the committee there was some confusion amongst Treasury officials themselves with clarifications required as to the cost efficiencies of the life-time care and hybrid models. The inconsistency between Treasury advice and the Treasurer's statements in the House has led non-government members to doubt the credibility of the information before us; and as such, we do not believe we can have confidence in the advice we've been provided.

The non-government members of the committee are particularly cognisant that the introduction of an NIIS will result in an impost for all Queenslanders who own a registerable vehicle. To that end, we believe it critical we understand the assumptions upon which Treasury rely and that we have confidence in how those assumptions have been borne out; however, as earlier noted, any attempt to secure the requisite detail was ruled out of order. In their final appearance before the committee Treasury acknowledged the life-time care model, as adopted by all other Australian jurisdictions except Western Australia, was more cost effective for both the scheme and Queenslanders who own a registerable vehicle. In evidence before the committee, once they'd corrected their misstatement, Treasury officials confirmed the net cost on a longer term basis of the life-time care model is \$60 per vehicle (before any discounts might be applied) and the net cost on a longer term basis of the hybrid model is \$68. In providing evidence before the committee on the net cost to car owners, Treasury assumed the discount would be \$36, not the \$44 as indicated by the Treasurer in the House, therefore making the life-time care model \$24; \$8 cheaper than the hybrid model which is preferred by the government. According to the Motor Vehicle Census, conducted by the Australian Bureau of Statistics, as at 31 January 2015 there were 3, 771, 321 vehicles registered in Queensland; therefore, the cost of the government's preferred hybrid model is in excess of \$30,000,000 each year, assuming the differential is \$8. The non-government members of the committee believe this is a significant additional impost in the cost of living being imposed by this government on Queensland families. Treasury, upon questioning, admitted they didn't make a recommendation to the government to select the model which would have the least impact of Queenslanders' cost of living.

In addition to their concerns about the cost of living impacts for Queensland the non-government members of the committee are concerned about the model the government have chosen to implement. There was clear evidence, to both the original inquiry and this inquiry, that frontline service providers, insurers and academics believe the life-time care model, as adopted by all other Australian

jurisdictions except Western Australia, is the most appropriate model. It provides those who are catastrophically injured, and their families, with confidence in the knowledge there will be a minimum standard of treatment, care and support for the rest of their lives. The hybrid model allows people to avail themselves of their rights under common law to seek a lump sum; should that lump sum dissipate before the end of the catastrophically injured person's life they may, after a period, seek to re-enter the scheme for the provision of life-time standard, care and support. It would appear the only submitters who support the government's hybrid model are the Queensland Law Society and the Australian Lawyers' Alliance.

Additionally, the non-government members have concerns that many provisions of the bill allow further conditions and criteria to be prescribed by regulation. Further, we believe the Explanatory Notes for the bill were woefully inadequate which, in concert with the inconsistency between Treasury's evidence and the Treasurer's statements, meant the non-government members of the committee did not feel sufficient evidence and information had been provided to ameliorate their significant concerns and therefore didn't feel a recommendation could be made on whether or not the Bill should pass.



**Verity Barton**  
**Member for Broadwater**



**Mark Boothman**  
**Member for Albert**



**Steve Dickson**  
**Member for Buderim**

