

Consultation Regulatory Impact Statement

Regulating re-entry to the National Injury Insurance Scheme in Queensland after accepting treatment, care and support damages

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Executive Summary

Queensland's National Injury Insurance Scheme (NIIS) provides for lifetime treatment, care and support needs of people who have sustained serious personal injury in particular circumstances involving motor vehicle and workplace accidents.

In 2016, the Queensland Government introduced two separate but similar no-fault statutory lifetime treatment, care and support schemes to implement the NIIS:

- a scheme to support people seriously injured in **motor vehicle accidents**, by introducing the *National Injury Insurance Scheme (Queensland) Act 2016* (the motor vehicle scheme); and
- a scheme to support workers seriously injured in **workplace accidents**, by amending the *Workers' Compensation and Rehabilitation Act 2003* (the workers' compensation scheme).

For the purpose of this Consultation Regulatory Impact Statement (RIS), these two schemes are collectively referred to as the **lifetime schemes** and seriously injured people and workers are referred to as **participants** in these schemes.

Statutory responsibility for administration of lifetime treatment, care and support in the motor vehicle scheme lies with the National Injury Insurance Agency Queensland (the Agency), and for the workers' compensation scheme, workers' compensation insurers (Insurers).

Participants in the lifetime schemes whose injuries were due to the fault (or negligence) of another party may be entitled to seek common law damages for their injury. These participants have a choice to either:

- stay in the lifetime schemes for their lifetime treatment, care and support but pursue other heads of damages via a common law claim; or
- elect to opt out of the lifetime schemes and take a lump sum damages payment for their lifetime treatment, care and support needs (**TCS damages**).

In Queensland, the primary legislation for the lifetime schemes states that participants who have opted out of the lifetime schemes can apply for re-entry to the lifetime scheme if:

- a period, of at least five years, *as prescribed by regulation*, has passed from when the participant exited the scheme (the **preclusion period**); and
- the circumstances in which the participant seeks re-entry meets conditions *prescribed by regulation* (**pre-conditions for re-entry**), which currently includes considering whether the TCS damages awarded were sufficient to meet the participant's lifetime treatment, care and support needs (workers' compensations scheme) and if the participant is experiencing severe financial hardship (motor vehicle scheme).

Regulations specifying the preclusion period and pre-conditions for re-entry were not made at the time of commencement of the lifetime schemes. This has allowed for the development of scheme experience. As the lifetime schemes are maturing, and more participants must choose whether to stay in the lifetime schemes or take TCS damages, appropriate regulations for re-entry are necessary to provide certainty for participants, the Agency, Insurers and other stakeholders.

The purpose of this RIS is to consider the benefits, costs and issues associated with regulating an appropriate preclusion period and conditions required to be satisfied in order for a participant to re-enter the lifetime schemes.

Given the complementary legislation of the lifetime schemes, any regulatory changes arising from this RIS are proposed to be aligned for the motor vehicle and workers' compensation schemes, as far as practicable.

Two options are proposed for regulating the **preclusion period** for re-entering the lifetime schemes.

Option 1: Prescribing a five-year preclusion period, which is the shortest preclusion period allowed by the primary legislation (preferred option).

Option 2: Prescribing a longer preclusion period, either as a specific term or by reference to objective criteria.

Option 1 is the preferred option. This option maintains the status quo. This option limits the potential impact on potentially vulnerable participants and other stakeholders until there is a greater evidence base to support implementing a different preclusion period.

Three options are proposed for regulating other **pre-conditions for re-entry** to the lifetime schemes.

Option 1: Re-entry at the wide discretion of the Agency or Insurer (not preferred).

Option 2: Re-entry at the discretion of the Agency or Insurer, having regard to a regulated list of considerations when determining re-entry.

Option 3: Re-entry based on mandatory considerations which either require or prohibit re-entry and, if these do not apply, re-entry at the discretion of the Agency or Insurer having regard to the regulated list of considerations as for Option 2.

The key policy objective of this RIS is to ensure a clear, transparent framework which supports informed decision-making and the long-term viability of the lifetime schemes. The options for pre-conditions are scaled from applying a discretionary approach to more prescriptive regulatory approaches. Option 1 is not considered to achieve these objectives and is not preferred. Options 2 and 3 provide a more structured decision-making framework with the inclusion of a prescribed list of matters to be considered. Option 3 provides the greatest level of guidance and clarity with the inclusion of the additional mandatory considerations.

In recognition of the short duration that the lifetime schemes have been operating and the limited common law experience, the RIS proposes no preferred option in relation to the pre-conditions for re-entry.

While the primary legislation is complementary, there are existing but differing mandatory criteria to be applied when determining re-entry. Ensuring both schemes have regard to the same re-entry criteria promotes equity and consistent decision-making across the lifetime schemes. In giving effect to any of the above pre-condition options, it is envisaged that the lifetime schemes will effectively involve consideration of whether TCS damages were sufficient. In addition, to create a more consistent experience for participants across the lifetime schemes, consideration is also being given to prescribing severe financial hardship as an additional re-entry criterion for the workers' compensation scheme.

Compliance and enforcement of the re-entry to the NIIS will be achieved through existing requirements under the primary legislation. Subject to the outcome of the RIS process and Government consideration, implementation of any regulatory amendments is proposed by the end of 2020. Any proposed regulatory amendments will also be subject to the monitoring, evaluation and review mechanisms which currently exist for re-entry under the primary legislation.

How to have your say

The motor vehicle scheme falls under the portfolio of the Treasurer and Minister for Infrastructure and Planning. The workers' compensation scheme falls under the portfolio of the Minister for Education and Minister for Industrial Relations. Due to the complementary primary legislation of the lifetime schemes, the Queensland Government is undertaking this consultation through Queensland Treasury and the Office of Industrial Relations as a joint effort.

Through the RIS, the Government is seeking the view of affected stakeholders and the wider public about the proposed options for regulating the preclusion period and other pre-conditions necessary to determine whether a participant can re-enter the lifetime schemes after accepting TCS damages.

You are invited to have your say on regulating these issues. The Government will have regard to the issues raised in written submissions responding to this RIS, in regulating re-entry.

Closing date for submissions: 17 August 2020

Written submissions can be lodged via:

Email: niispolicy@treasury.qld.gov.au

Post: C/- NIIS Policy
Budget Strategy
Queensland Treasury
GPO Box 611 BRISBANE
QLD 4001

- **Enquiries about the lifetime scheme for workplace accidents** can be directed to wcpolicy@oir.qld.gov.au or by contacting the Office of Industrial Relations on 07 3406 9922 during business hours.
- **All other enquiries about this consultation** (e.g. inquiries specific to motor vehicle accidents and inquiries about the consultation process) can be directed to niispolicy@treasury.qld.gov.au or by contacting Queensland Treasury on 07 3035 6373 during business hours.

Important note about confidentiality

All submissions will be reviewed by both Queensland Treasury and the Office of Industrial Relations.

In the interests of transparency and to promote informed discussion, Queensland Treasury and the Office of Industrial Relations would prefer submissions to be made publicly available wherever this is reasonable. However, if a person making a submission does not want that submission to be public, that person should clearly note on the front page of the submission that they claim confidentiality in respect of the document (or any part of the document).

While Queensland Treasury and the Office of Industrial Relations will endeavour to identify and protect material claimed as confidential as well as information which under the *Right to Information Act 2009* is exempt or the disclosure of which would be contrary to the public interest, Queensland Treasury and the Office of Industrial Relations cannot guarantee that submissions will not be made publicly available. There is a possibility that Queensland Treasury or the Office of Industrial Relations may be required to reveal confidential information as a result of a right to information request.

1. Scope and policy objectives

1.1. Scope of the RIS

The purpose of the RIS is to obtain feedback about regulating the preclusion period and other pre-conditions a participant must meet to apply for re-entry to the lifetime schemes after receiving TCS damages.

The primary legislation for the lifetime schemes established that a participant may apply for re-entry to the lifetime schemes where:

- a period, of at least five years, *as prescribed by regulation*, has passed from when the participant exited the scheme; and
- the circumstances in which the participant seeks re-entry meets conditions *prescribed by regulation*.

Implementing changes to specify the preclusion period and pre-conditions for re-entry will fulfil the original intent of the Parliament when introducing the NIIS and provide clarity and certainty about the circumstances in which a participant will be permitted to re-enter the lifetime schemes after receiving TCS damages. This will be important as the lifetime schemes mature and these issues have real and potentially significant impacts for key stakeholders.

It is noted that establishing a preclusion period and pre-conditions for re-entry will affect rights at law and can only be effectively mandated through a regulatory approach. If no regulations are made, a range of risks associated with re-entry into the lifetime schemes will remain unaddressed. These risks include the financial sustainability of the lifetime schemes, potential flow through costs to motorists and employers funding the lifetime scheme, and potential inequity between participants. As a result, all proposed options require amending the *National Injury Insurance Scheme (Queensland) Regulation 2016* and the *Workers' Compensation and Rehabilitation Regulation 2014*.

While the Government recognises that navigating any statutory scheme can have a range of complexities, the purpose of this RIS is to address the need for regulating the preclusion period and pre-conditions for re-entry as foreshadowed in the primary legislation. As such, the scope of the RIS does not contemplate other changes to the lifetime schemes, such as changing the right to elect to receive TCS damages or the existence of an ability to re-enter the lifetime schemes.

1.2. Policy objectives

The primary policy objective of the RIS is to provide certainty around the regulatory conditions for re-entering the lifetime schemes following a payment of TCS damages. This objective is supported by the regulatory framework established in the lifetime schemes' primary legislation.

In achieving this policy objective, the RIS also seeks to balance a number of critical factors and policy objectives of the lifetime schemes, including:

- the broader objective of the lifetime schemes in providing for the lifetime treatment, care and support needs of participants;
- providing participants greater freedom of choice and self-determination through the ability to receive TCS damages;

- ensuring clarity, transparency and administrative simplicity in the operation of the lifetime schemes, for both participants, administrators, and other key stakeholders to ensure informed choice and efficiencies;
- ensuring equity and fairness between participants as to their entitlements;
- the ongoing financial sustainability of the lifetime schemes and any potential impacts on funding and costs to motorists, employers, and the broader public through levies and/or insurance premiums; and
- that the lifetime schemes are consistent and aligned as far as practicable.

2. Overview of the lifetime schemes

2.1. Background

The lifetime schemes provide for the lifetime treatment, care and support needs of people seriously injured in particular motor vehicle or workplace accidents on or after 1 July 2016. As the lifetime schemes are no-fault statutory schemes, participants will have coverage regardless of who caused or was at fault for the injury.

Under the lifetime schemes, serious personal injuries are defined to include serious injuries such as:

- traumatic brain injuries;
- permanent spinal injuries (e.g. quadriplegia and paraplegia); and
- multiple or high-limb amputations¹.

Participants in the lifetime schemes have an entitlement to receive necessary and reasonable treatment care and support for their injury for their lifetime. This can include:

- medical and dental treatment;
- rehabilitation;
- respite care and attendant care and support services; and
- home and transport modifications.

The types of treatment, care and support and the associated costs will vary widely from participant to participant depending on injury type and severity and the personal circumstances of each participant. For example, variations may occur in:

- treatment requirements and costs as participants progress through the stages post-injury. For example, costs for a participant in hospital will differ from a participant who has left hospital, has required home modifications and is receiving attendant care within the home;
- a participant's individual support requirements, for example attendant care, with some participants requiring extensive care, while others require little or no attendant care; and
- participants' 'lifetime' costs, due to differences of age at injury and, therefore, length of future lifetime.

Further detail on the eligibility criteria for who is eligible for lifetime treatment, care and support and their entitlements is outlined in **Attachment A**.

¹ 'Serious personal injury' is a defined term in schedule 1 of the *National Injury Insurance (Queensland) Act 2016* and in schedule 6 of the *Workers' Compensation and Rehabilitation Act 2003*.

It is noted that a participant may also have other entitlements outside of the lifetime scheme. Table 1 provides an overview of the types of benefits a participant may have an entitlement to and identifies those provided under the lifetime schemes.

Payments	Part of the lifetime schemes (relevant for RIS)	Liability for payments	
		Motor vehicle accident	Workplace accident
Treatment, care and support for participants of the lifetime scheme	Included	<ul style="list-style-type: none"> Agency 	<ul style="list-style-type: none"> Insurer
Weekly compensation / wages (prior to settlement of common law claim ²)	Excluded	<ul style="list-style-type: none"> income protection; or participant 	<ul style="list-style-type: none"> Insurer
Treatment, care and support damages	Included	<ul style="list-style-type: none"> Agency³ 	<ul style="list-style-type: none"> Insurer
Other damages e.g. <ul style="list-style-type: none"> general damages economic loss 	Excluded	<ul style="list-style-type: none"> CTP Insurer 	<ul style="list-style-type: none"> Insurer

Table 1: Liability for payments under the lifetime schemes

2.2. Operation of the lifetime schemes

Figures 1 and 2 provide an overview of the operation of each of the lifetime schemes, noting the matters in scope for this RIS are highlighted in yellow.

² However, upon settlement of a common law damages, refunds may apply.

³ The Agency has a statutory requirement to contribute towards the CTP Insurer's liability for treatment, care and support damages.

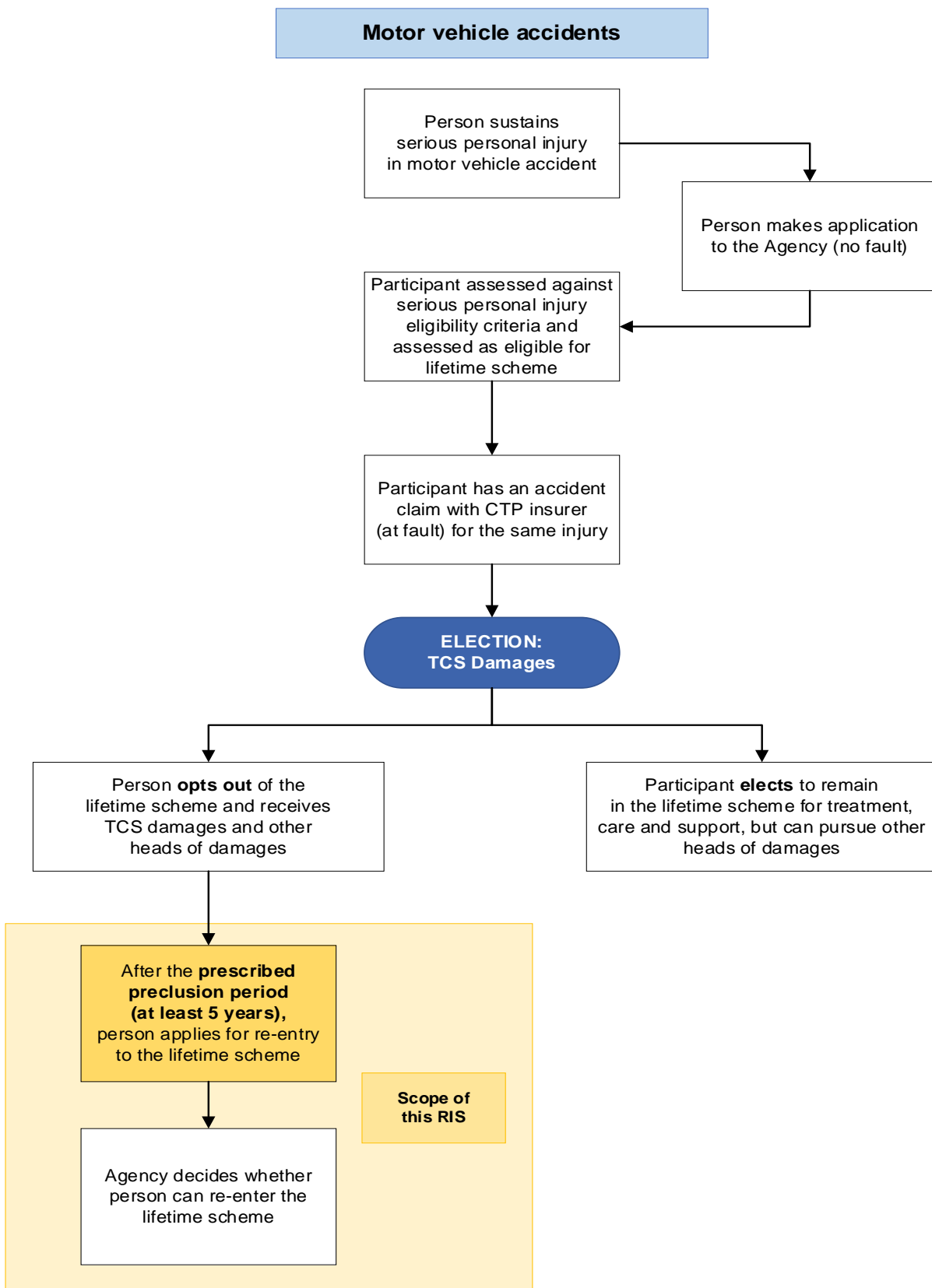


Figure 1: Operation of motor vehicle lifetime scheme

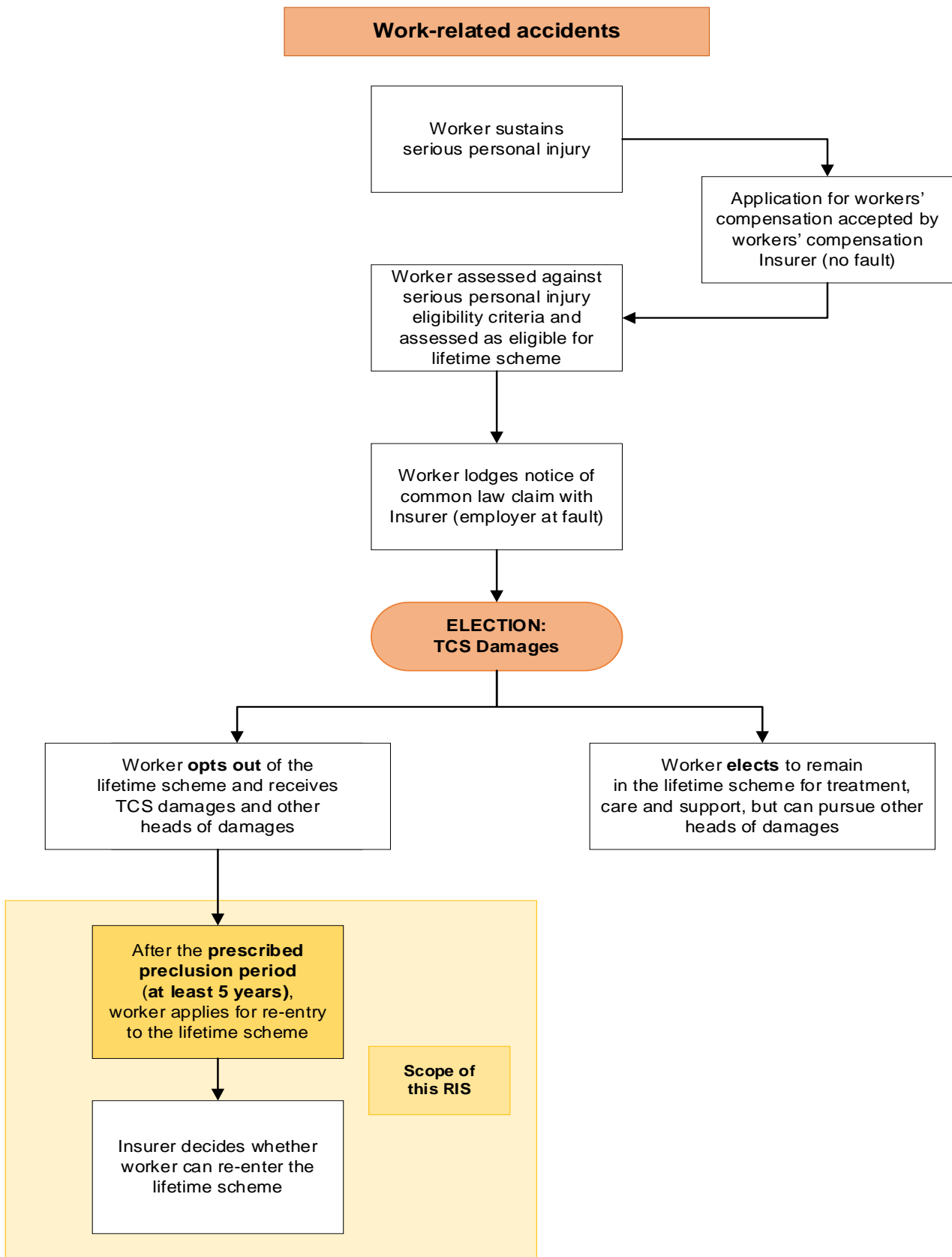


Figure 2: Operation of the workers' compensation lifetime scheme

2.3. Size and funding the motor vehicle scheme for lifetime treatment, care and support

The motor vehicle scheme for lifetime treatment, care and support is funded from a levy on Queensland motorists, which is set annually in accordance with the *National Injury Insurance Scheme (Queensland) Act 2016*.

The amount of the levy is calculated based on actuarial advice to fund present and likely future liabilities of the motor vehicle scheme having regard to the expected number of participants and the expected cost of meeting their lifetime treatment, care and support. The Agency gives a copy of its calculations to the Motor Accident Insurance Commissioner, who makes a recommendation to the Treasurer. The amount of the levy is fixed by regulation.

The levy is collected by the Department of Transport and Main Roads as part of the payments required from motor vehicle owners registering vehicles in Queensland, together with CTP premium and car registration fees.

From 1 July 2019, the annual levy for Class 1 vehicles (cars and station wagons) is \$90.50.

The number of interim and lifetime participants in the motor vehicle scheme are⁴:

Financial Year of operation	Interim and lifetime participants as at 30 June
2016-17	63
2017-18	139
2018-19	186 ⁵

The Agency's 2018-19 Annual Report outlines the average costs for participants based on injury type as follows⁶:

Injury type	Total average cost ⁷ (excluding case handling expenses)
Traumatic Brain	\$4.9M
Permanent Spinal	\$7.9M
Other	\$4.8M
Average	\$5.5M

Table 3: Total average cost per injury type for motor vehicle scheme

⁴ Based on data from the financial statements published in the Agency's Annual Reports, available from www.niis.qld.gov.au/about-us/corporate-publications/.

⁵ National Injury Insurance Agency Queensland. 2020. Retrieved from: www.niis.qld.gov.au/about-the-scheme/about-the-levy/ as at 1 June 2020.

⁶ National Injury Insurance Agency Queensland. 2018-19 Annual Report, p 57. Retrieved from: <https://niis.qld.gov.au/wp-content/uploads/2019/09/NIISQ-Agency-Annual-Report-2018-2019-ELECTRONIC.pdf>

⁷ The amounts expressed for the total average cost are averages only and are not indicative of the amount any participant will receive, or be entitled to, for their injury and the amount a participant actually receives may vary depending on a variety of factors.

The report notes that for accepted participants, the average cost has been actuarially based on each participant's age, injury severity, expected progress of the injury, and expected changes to required care and support needs over time. For participants who have not yet lodged or had their application accepted, the average cost allows for their expected age and injury severity mix.

It is further noted in the report that significant uncertainty exists due to the long-term nature of liabilities (participation may extend over decades in many cases), and volatility around the number of participants and their injury severity.

The potential for re-entry is an existing part of the scheme's design under the primary legislation. Even more than for other scheme assumptions, those relating to participants choosing to take TCS damages and subsequently seeking to re-enter the scheme are uncertain, as no scheme experience yet exists on which to calibrate.

In the context outlined above, the options proposed in this RIS for re-entry requirements are not expected to materially affect the calculation of the levy, pending emergence of relevant scheme experience. It will be important for this aspect of the motor vehicle scheme to be monitored, so that should this assumption not be borne out, adjustment of the preclusion period or re-entry conditions prospectively, can be considered.

2.4. Size and funding of the workers' compensation scheme for lifetime treatment, care and support

The workers' compensation scheme for lifetime treatment, care and support has significantly fewer active claims compared to the motor vehicle scheme. As at 30 June 2019, there were 31 active⁸ worker's compensation claims for serious personal injuries.

A breakdown of the accepted workers' compensation claims for serious personal injuries as at 30 June 2019 is provided in Table 4 below.

Injury Type	Active Claims
Traumatic Brain Injury	19
Multiple Amputations	2
Paraplegia	4
Tetraplegia	4
Burns to Body	2
Total	31

Table 4: Workers' compensation claims for serious personal injuries as at 30 June 2019

⁸ The number of active claims is current as at 30 June 2019. The number of active workers' compensation claims does not include serious personal injuries sustained on a journey to or from work involving a motor vehicle. The treatment, care and support needs for these claims are funded through the motor vehicle scheme.

The workers' compensation scheme is funded by Insurers, being either:

- **WorkCover Queensland** (WorkCover), Queensland's government-owned statutory workers' compensation insurer.

A WorkCover insurance policy indemnifies an employer for all legal liabilities for statutory compensation, medical expenses and damages claimed by seriously injured workers. WorkCover is funded primarily by the annual premiums paid by employers for their WorkCover insurance policy.

WorkCover's average premium rate⁹ for the 2019-20 financial year is \$1.20 per \$100 of declared wages.

- **Self-insured employers**, which are licenced to self-insure against their legal liabilities for statutory compensation and common law damages for an injury (including serious personal injuries) sustained by a worker employed by the employer.

Similar to the motor vehicle scheme, the number of active claims is cumulative and is anticipated to grow from year to year as more participants enter and remain within the scheme.

As at 30 June 2019, the total cost of serious personal injury claims paid by the workers' compensation scheme was approximately \$6.8 million. Over the last two years, active workers' compensation claims for serious personal injuries have grown from 19 (2017-18) to 31 (2018-19).

Due to the small number of claims and the short period the workers' compensation scheme for lifetime treatment, care and support has been operating, it is currently not possible to estimate the cost for serious personal injuries funded by Insurers in the workers' compensation scheme. However, as the lifetime schemes cover the same injuries, it is reasonably expected that the costs of providing lifetime treatment, care and support will be roughly equivalent to those of the motor vehicle scheme.

⁹ The actual premium paid by employers will depend on a range of factors, such as the employer's industry, their size and claims experience.

3. Common law damages and re-entry to the lifetime schemes

3.1. Common law damages

Some participants may be entitled to seek common law damages for their injury if it was caused by the fault (or negligence) of someone other than themselves e.g. another motor vehicle driver or the participant's employer.

Common law damages are a lump sum monetary payment designed, in simple terms, to put a person back in the financial position they would have been in had they not been injured. Common law damages may include payments to compensate a person for the following heads of damages:

- pain and suffering and loss of enjoyment of life;
- past and future economic loss;
- past and future medical, hospital pharmaceutical, rehabilitation and domestic assistance and care expenses (sometimes called 'special damages' or 'out of pocket expenses').

The expenses covered by TCS damages are similar to those covered in the 'special damages' category referred to above. Like other damages, TCS damages will be paid to the participant as a lump sum and are calculated based on a participant's assessed lifetime treatment, care and support needs.

Calculating the appropriate TCS damages to be awarded requires an assessment of the cost of the participant's future treatment, care and support needs. Many factors are considered when calculating the amount of TCS damages, such as the participant's age and their life expectancy, and reviewing the outcomes of medical examinations and medical reports about their injury.

In situations where a participant has been found to have partly caused their injury through their own negligence, common law damages can ordinarily be reduced by a percentage which reflects their contributory negligence. Contributory negligence can result in a 100 per cent reduction of damages if it is just and equitable to do so.

However, there are specific provisions dealing with contributory negligence and TCS damages under the lifetime schemes. Essentially, if damages are reduced by 50 per cent or more due to the participant's contributory negligence, the participant is not entitled to seek TCS damages. Conversely, if contributory negligence is less than 50 per cent, there is no reduction of the TCS damages and the participant will be paid 100 per cent of the calculated TCS damages.

More information about common law damages, TCS damages and the common law process is provided in **Attachment B**.

3.2. Electing to take TCS damages

Participants who are entitled to seek common law damages can elect to either:

- **remain in the lifetime schemes** for their ongoing lifetime treatment, care and support needs;

Note - A participant who either:

- is not entitled to elect to seek TCS damages, or
- despite an entitlement to seek TCS damages, chooses to stay within the lifetime scheme,

can receive common law damages for everything other than their treatment, care and support needs as part of the common law process e.g. pain and suffering and economic loss.

OR

- **exit the lifetime schemes** to receive TCS damages as part of the common law process¹⁰.

Additional safeguards in the primary legislation require:

- that the Agency or Insurer must apply to the court for its consideration of the appropriateness of sanctioning the participant receiving TCS damages if the participant is under a legal disability¹¹; or
- the Agency or Insurer may apply to the court for its consideration of the appropriateness of making an order preventing the participant receiving TCS damages¹².

In determining whether to prevent a participant from receiving TCS damages, the court must consider whether the participant is under a legal disability and factors relating to the participant's ability to manage an award of TCS damages, but there is also discretion for the court to consider any other matter it deems relevant¹³.

Queensland's lifetime schemes permit participants who elect to exit the lifetime schemes to apply for re-entry if the preclusion period and pre-conditions for re-entry have been satisfied. Re-entry to the lifetime schemes after receiving TCS damages requires formal application for re-entry to either the Agency or Insurers. Each scheme has its own specific administrative requirements for this process.

Rights of review apply to decisions of the Agency or Insurer in determining the validity and eligibility of re-entry applications¹⁴.

¹⁰ *Treatment care and support needs* and *TCS damages* are defined terms in the legislation for each of the schemes. Please see Attachment A for further information.

¹¹ *National Injury Insurance Scheme (Queensland) Act 2016* s 41(5); *Workers' Compensation and Rehabilitation Act 2003* s 232X.

¹² *National Injury Insurance Scheme (Queensland) Act 2016* s 43; *Workers' Compensation and Rehabilitation Act 2003* s 232Y.

¹³ The lifetime schemes require that the court must consider whether the participant will be able to manage their TCS damages in a way which will not compromise the participant's prospects for rehabilitation and future health and well-being and, for the worker's compensation scheme, the participant's likely legal costs for the damages claim (refer section 232Y of the *Workers' Compensation and Rehabilitation Act 2003*).

¹⁴ Further information about reviews of eligible decisions for the motor vehicle scheme can be found at <https://niis.qld.gov.au/about-the-scheme/reviews/> and for the workers' compensation scheme at <https://www.worksafe.qld.gov.au/claims-and-return-to-work/independent-review-of-a-claim-decision>.

3.3. Why might participants want or need to re-enter?

There may be a range of circumstances which might lead a participant who has received TCS damages to seek to re-enter the lifetime schemes after receiving TCS damages.

It is recognised that the Agency or Insurer considering an application to re-enter will be determining whether the TCS damages awarded were sufficient with the benefit of hindsight. Despite the TCS damages being *prima facie* sufficient at the time they were awarded, there are a range of circumstances which may ultimately impact on the whether these damages are sufficient for the participant's lifetime treatment care and support needs:

- the methodology for calculation of the common law damages may have failed to accurately predict actual treatment, care and support expenses due to:
 - standard discounting rules which reduce the expected expenses to allow for future investment returns if these returns were not able to be achieved in practice¹⁵; or
 - a material change in circumstances beyond what was contemplated which results in additional unexpected treatment, care and support costs, such as a further deterioration of the condition, or new unanticipated forms of treatment.
- other aspects of common law damages may affect their sufficiency. For example, as with any dispute process, common law proceedings involve competing expert opinion, and outcomes will be affected by relative persuasiveness of the parties' evidence. Outcomes can also be dependent upon a claimant's resilience¹⁶ within the claim process, and commercial considerations which factor into decisions around settlement, such as costs incurred and anticipated to take the matter forward, including any non-recoverable component of those costs. For example, legal fees are rarely recoverable from a liable party on a full indemnity basis.
- the TCS damages amount has been applied to expenses that do not constitute necessary and reasonable treatment, care and support for the relevant injuries—either despite reasonable care by the participant or otherwise. Examples may include:
 - failure to reasonably invest monies to ensure they achieve the future value of the present lump sum payment which is part of the methodology for calculation of lump sum common law damages;
 - application of the TCS damages to other expenses beyond the participant's control e.g. untested experimental treatments; and
 - misuse of the TCS damages by the participant or another person with or without the participant's consent (including where the participant had no legal capacity to provide such consent).

Further information about common law damages is set out in **Attachment B**.

¹⁵ The full Productivity Commission Inquiry report into Disability Care and Support can be retrieved from www.pc.gov.au/inquiries/completed/disability-support/report.

¹⁶ Australian Productivity Commission, Disability Care and Support Inquiry Report No 54, 31 July 2011, Chapter 17. Retrieved from: www.pc.gov.au/inquiries/completed/disability-support/report/disability-support-volume2.pdf.

3.4. Interjurisdictional comparison

There are no known interjurisdictional or international models that can inform an appropriate preclusion period or other pre-conditions for re-entry to the Queensland lifetime schemes.

Queensland's model of the National Injury Insurance Scheme is unique among the Australian States and Territories in allowing access to common law damages and consequently permitting participants who have exited the lifetime schemes a right of re-entry after accepting TCS damages.

At the Commonwealth level, neither the National Disability Insurance Scheme (NDIS) or Centrelink frameworks provide translatable models for re-entry to the lifetime schemes. The NDIS does not exit participants on receipt of common law damages, but rather adjusts ongoing entitlements. Centrelink also assesses or adjusts a participant's eligibility for assistance based on a consideration of their economic circumstances. Centrelink may also apply a preclusion period if a participant has received common law damages which includes an amount for lost income. The formula is complex and considers factors such as how the damages were settled (either court ordered or settled by consent) and the 'compensation part' of the award¹⁷.

¹⁷ Centrelink provides information about the formula for calculating the lump sum preclusion period at <https://guides.dss.gov.au/guide-social-security-law/4/13/2/60>.

4. Options for regulating the preclusion period

The primary legislation for the preclusion period states that a participant may apply to re-enter if a period of at least five years, *as prescribed by regulation*, has passed from when the participant exited the lifetime scheme.

The preclusion period sets the minimum time period a participant must wait before being permitted to apply for re-entry. Once this period has passed, the participant will be required to satisfy any regulated pre-conditions for re-entry (refer to section 5).

There are two proposed options outlined below which aim to provide clarity and certainty about the preclusion period.

As the primary legislation currently requires a period of not less than five years, options permitting a preclusion period of less than five years are not proposed for this RIS.

Option 1: Prescribing a five-year preclusion period, which is the shortest preclusion period allowed by the primary legislation (preferred option)

This option prescribes a five-year preclusion period before re-entry is permitted to the lifetime schemes.

Five years is the shortest preclusion period allowed under the primary legislation for the lifetime schemes. This option ensures participants are placed in no-less beneficial a position than currently provided for in the primary legislation while providing clarity and certainty on the preclusion period which will apply for re-entry.

4.1. Analysis of Option 1

Adopting this option will maintain the status quo for participants and other key stakeholders.

This option presents no additional financial impact or regulatory burden for participants, the Agency or Insurers, compared to the minimum preclusion period already established under the primary legislation.

The lifetime schemes have only been in operation since 2016. Given the five-year minimum preclusion periods, it will be a number of years before any participant can apply for re-entry. However, within the lifetime schemes it is recognised that there is, and will be, a diversity of participants in relation to injury, age and life expectancy. This option acknowledges this diversity and recognises that, at present, there is insufficient evidence to support adopting a greater preclusion period.

As the lifetime schemes mature and there is a greater evidence base, this preclusion period can be re-evaluated, and a different preclusion period can be prescribed by regulation, if appropriate.

Option 2: Prescribing a longer preclusion period, either as a specific term or by reference to objective criteria

This option prescribes a period longer than five years. For fairness and transparency in the re-entry process, regulating this option should be based on objective criteria. For example, this option could regulate:

- a prescribed term e.g. 10 years.
- a period calculated by reference to other criteria objectively ascertainable for each participant e.g. a period that represents a set proportion of the participant's remaining life expectancy upon which their TCS damages were calculated or the TCS damages amount awarded.

4.2. Analysis of Option 2

The lifetime schemes have been in operation since 2016. Given the five-year minimum preclusion period, it will be a number of years before any participant can apply for re-entry.

There is no way to determine who is an 'average' participant or what the 'average' participant's experience will be over their lifetime. As a result, the risks and the impacts of prescribing another set period or an alternative formula for calculating the preclusion period cannot be accurately predicted.

It is reasonable to assume that the longer the preclusion period, the greater the prospect that a participant needing to seek re-entry will be unable to do so. For example, if a period of 10 years is adopted, participants whose TCS damages are calculated based on remaining life expectancies of less than 10 years and who outlive that assumed life expectancy will be unable to re-enter the lifetime scheme for up to five years longer than at present. They will be disadvantaged in the sense of being precluded from access to the lifetime schemes for that additional period.

If participants have exhausted their TCS damages but cannot re-enter the lifetime schemes, they may be required to self-fund or access other means to pay for their ongoing treatment, care and support needs. This potentially results in an increased reliance upon, and cost shift to, the public health and welfare systems and other disability services, with potential implications for State and Federal funding arrangements. To that extent, this outcome would arguably be inconsistent with the intention of the lifetime schemes of being the primary treatment channel for participants.

Conversely, it is acknowledged that selecting a longer preclusion period may encourage participants to more carefully manage their TCS damages and use them in a way consistent with ensuring their sufficiency over the participant's lifetime.

A longer preclusion period may also reduce potential flow-through costs to motorists or employers funding the lifetime schemes as participants will not be able to re-enter for a longer period of time. However, these factors must be weighed against the primary objective of the lifetime schemes to provide lifetime care for participants who may be vulnerable.

Prescribing the preclusion period based on other criteria objectively ascertainable for each participant, rather than a static period, is not considered desirable as it adds complexity for all stakeholders. This option would:

- reduce clarity for informed decision-making by participants around the election to receive TCS damages;
- arguably increase red tape in the re-entry application process; and
- potentially result in inequity between participants given the absence of critical data and lead to disputes.

5. Options for regulating pre-conditions for re-entry

The primary legislation for the lifetime schemes includes existing—but limited—conditions which must be considered by the Insurer or Agency before re-entry will be permitted:

- for the workers' compensation scheme, the Insurer must be satisfied that the TCS damages awarded to the participant were *not sufficient*¹⁸; and
- for the motor vehicle scheme, the Agency's discretion to refuse to accept a person as a re-entering participant is conditional upon the Agency not being satisfied that the participant is suffering *severe financial hardship*¹⁹.

The primary legislation also currently provides that the circumstances in which the participant seeks re-entry must meet conditions prescribed by regulation. For the workers' compensation scheme, Insurers have regard to these pre-conditions when determining whether to accept liability on the basis that the TCS damages awarded were not sufficient. For the motor vehicle scheme, the Agency considers these pre-conditions to determine whether an application for re-entry may be made.

Considerations of any pre-conditions for re-entry only become relevant for consideration by the Agency or Insurer if the preclusion period has passed.

Three options have been identified for regulating pre-conditions for re-entry to the lifetime schemes.

These options represent a graduated approach to prescribing the regulatory oversight of considerations the Agency or Insurers should have regard to when determining re-entry applications. The options range from a more discretionary approach to a prescriptive regulatory approach with specific mandatory criteria²⁰.

Option 1: Re-entry at the wide discretion of the Agency or Insurer (not preferred)

Option 1 proposes no further prescription of criteria for consideration in relation to re-entry, with the Agency or Insurer having a wide discretion in determining applications for re-entry having regard to the overarching objects of the primary legislation, or any case law that may develop over time.

5.1. Analysis of Option 1

This option is based on principles-based regulation which involves setting high-level, broadly stated rules or principles, rather than prescriptive rules.

The primary benefit of principles-based regulation is that (where used appropriately) there is greater flexibility for administration of the lifetime schemes compared to prescriptive regulation. Principles-based regulation can be beneficial in an environment

¹⁸ The workers' compensation scheme does not define or provide criteria for what will constitute TCS damages not being *sufficient*. These matters are considered by Insurers on a case by case basis depending on a participant's individual circumstances.

¹⁹ The motor vehicle scheme does not define *severe financial hardship*. Concepts like this are commonly included in legislation for the administrator to develop an appropriate practice.

²⁰ All options represent an expression of the policy intent. While a sense of the potential mechanical operation of these options has been provided to assist in their consideration by stakeholders, ultimately the appropriate conversion of the policy decisions by Government as a consequence of this consultation into legislation will be subject to advice from the Office of Parliamentary Counsel.

where the decision-maker is the best placed to deliver the policy outcome desired by the legislation. For this reason, it is often used in the context of business regulation. It is also well-suited where a prescriptive approach risks becoming quickly outdated due to new technologies or increasing complexity. Principles-based regulation may not necessarily be well-suited to an environment where practice is still in development, which is currently the case for the lifetime schemes. This approach provides less certainty and is harder to administer, potentially leading to an increase in disputes and delays in decision-making. For example, without guiding criteria, participants may develop a false expectation that re-entry is permitted as a matter of course. Further, as there is no defined criteria for determining re-entry, and limited visibility over how or what circumstances will lead to re-entry, there is also the potential for increased inconsistencies and perceived or actual inequity in the application of the Agency's or Insurer's discretion compared to a more prescriptive regulatory approach.

If re-entry is not permitted, the participant may be required to self-fund or access other means to pay for their ongoing treatment, care and support needs. This may potentially result in an increased reliance upon and cost shift to the public health and welfare systems and disability services, with potential implications for State and Federal funding arrangements.

There is not sufficient scheme experience—or comparable experience in any other context—to determine the comparative economic or financial costs of this option, as compared to Options 2 or 3. However, as a general proposition, the more informed participants and all stakeholders in the lifetime schemes are as to the considerations relevant to appropriate re-entry, the better the prospects that re-entry risk, at least to the extent of matters within their control, is minimised. This is better achieved through Options 2 and 3.

It is not considered that Option 1 will achieve a core policy objective of providing transparency, clarity or consistency for stakeholders of the lifetime schemes. For these reasons, on balance, Option 1 is not preferred.

Option 2: Re-entry at the discretion of the Agency or Insurer, having regard to a regulated list of considerations when determining re-entry

Option 2 proposes the prescription of additional considerations relevant to the Agency or Insurer's discretion to permit a participant's re-entry to the lifetime schemes.

The proposed list of considerations to be prescribed by regulation includes:

- matters relating to the extent to which the assumptions used to calculate the common law damages are borne out, including in relation to the nature of the injury and the treatments available;
- how the TCS damages have been used and managed, including investment of the monies and conversely, any misuse or mismanagement of TCS damages; and
- refund of surplus TCS damages.

This proposed list provides a holistic overview of considerations to reasonably and appropriately determine re-entry. It is not proposed that a participant must be able to prove all or a majority of these considerations. Rather, the Agency or Insurer will consider those matters relevant to the participant's own circumstances and balance these factors to determine whether an application for re-entry may be made in the motor

vehicle scheme, or whether an application should be allowed in the workers' compensation scheme.

A full list of the proposed considerations is set out in **Attachment C**.

5.2. Analysis of Option 2

Option 2 provides some flexibility for the Agency and Insurers administering the lifetime schemes and compared to Option 1, it provides increased clarity for all stakeholders and more certainty for informed decision-making by participants around the election to receive TCS damages. This should result in greater equity between participants and less disputes than prescribing no re-entry conditions or adopting Option 1.

However, given that administrative practice is in development in the relatively new lifetime schemes, Option 2 may not provide an optimal structured framework for consistent decision-making and equitable outcomes for re-entry, as compared to Option 3.

While listing relevant considerations may be perceived to make re-entry more difficult for participants, Option 2 provides the Agency and Insurer flexibility to determine which considerations are relevant depending on a participant's circumstances and how these considerations should be balanced with regard to the objectives of the lifetime schemes.

If re-entry is not permitted, the participant may be required to self-fund or access other means to pay for their ongoing treatment, care and support needs. This may potentially result in an increased reliance upon and cost shift to the public health and welfare systems and disability services, with potential implications for State and Federal funding arrangements.

There is not sufficient scheme experience—or comparable experience in any other context—to determine the comparative economic or financial costs of this option, as compared to Options 1 or 3. Further, as scheme experience increases, the operation of these considerations can be monitored and adjusted as required through further regulatory amendments.

As compared to Option 1, Option 2 is considered to better achieve the core policy objectives of providing transparency, clarity or consistency for stakeholders of the lifetime schemes.

Option 3: Re-entry based on mandatory considerations which either require or prohibit re-entry and, if these do not apply, re-entry at the discretion of the Agency or Insurer having regard to the regulated list of considerations as for Option 2

Option 3 proposes that the considerations outlined in Option 2 would be subject to additional mandatory considerations for re-entry.

The proposed mandatory considerations are:

- re-entry must be permitted if the participant's TCS damages have been prematurely exhausted solely or primarily²¹ because the participant has **exceeded their life expectancy** beyond what was contemplated at the time of settlement or judgement (life expectancy criterion);
- re-entry must not be permitted if the participant's TCS damages have been prematurely exhausted because they have solely or primarily **used that sum for a purpose or purposes other than for payment of the treatment, care and support needs** for their eligible serious personal injury (use criterion).

It is unlikely that both of these mandatory considerations would apply to the same participant. TCS damages are calculated on the basis of life expectancy at the time of settlement. If a participant has managed their TCS damages to the point of reaching this life expectancy, it is considered unlikely that the sole or primary reason they are applying for re-entry would be due to misuse of the TCS damages awarded.

If these mandatory considerations do not apply, the Agency or Insurer would make their decision with regard to the prescribed list of matters as for Option 2. In that case, as for Option 2, the Agency or Insurer will consider those matters most relevant to the participant's own circumstances and balance these factors to determine whether to permit re-entry.

5.3. Analysis of Option 3

Option 3 provides the most structured framework for consideration of re-entry, giving greatest certainty to all stakeholders.

This option supports informed decision-making by participants around the election to receive TCS damages or remain a lifetime participant and minimises the scope for disputes over applications for re-entry. In particular, all parties to a common law damages claim will be able to take the re-entry conditions into consideration in entering settlements, or submitting on the appropriate form of judgments, to clearly identify information needed to address the mandatory considerations in a potential later application for re-entry. For example, parties could ensure:

- any TCS damages component in a settlement is separately identified; and

²¹ It is currently not intended to regulate what 'solely or primarily' or 'material' will mean for the purposes of the pre-conditions for re-entry. Given the varied circumstances, significant nature of these injuries and potential impact on participants if rigid regulatory rules are applied, it is proposed that the Agency and Insurers be permitted flexibility in their administration and assessment of these matters to develop internal processes and guidance to determine what 'solely or primarily' best reflects in particular circumstances. As an existing safeguard, these decisions by the Agency and Insurer are subject to internal and external review.

- the basis for and assumptions applied in reaching that sum are documented, including the participant's estimated life expectancy and treatment, care and support needs.

This will also ensure participants have a robust, clearly documented methodology, supported by evidence which can then be provided to the Agency or Insurer when determining applications for re-entry in the future.

The inclusion of the mandatory considerations makes clear the policy objective that participants receive necessary and reasonable lifetime treatment, care and support. It also minimises the risks of motorists and employers funding the lifetimes schemes bearing additional costs above and beyond a participant's necessary lifetime treatment, care and support. As a result, this option best supports the financial stability of the lifetime schemes for the benefit of all stakeholders of the lifetime schemes and Queenslanders in general.

In the event that the life expectancy criterion does not apply, the Agency or Insurer will decide re-entry with regard to the other considerations mentioned in Option 2, provided the use criterion is not applicable.

If re-entry is not permitted by the Agency or Insurer, the participant may be required to self-fund or access other means to pay for their ongoing treatment, care and support needs. This may potentially result in an increased reliance upon and cost shift to the public health and welfare systems and disability services, with potential implications for State and Federal funding arrangements. The proposed use criterion is considered to strike the appropriate balance here between the need to set a regulatory boundaries for re-entry to the lifetime schemes that limits the impact on motorists and employers funding the lifetime schemes, and the ongoing financial stability of the lifetime schemes, with the impacts on individuals who may be prevented from re-entry in the limited circumstances identified.

As noted above, there is not sufficient scheme experience—or comparable experience in any other context—to determine the comparative economic or financial costs of this option, as compared to Options 1 or 2. Further, as scheme experience increases, the operation of these considerations can be monitored and adjusted as required through further regulatory amendment.

Given that administrative practice is in development in the relatively new lifetime schemes, this option provides the optimal structured framework for consistent decision-making and equitable outcomes for re-entry compared with Options 1 and 2. Option 3 is considered to best achieve the core policy objectives of providing transparency, clarity and consistency for stakeholders of the lifetime schemes.

5.4. Aligning re-entry to the lifetime schemes

As noted above, while the primary legislation is complementary, there are existing but differing mandatory criteria to be applied when determining re-entry:

- for the workers' compensation scheme, the Insurer must be satisfied that the TCS damages awarded were *not sufficient*²²;

²² The workers' compensation scheme does not define or provide criteria for what will constitute TCS damages not being *sufficient*. These matters are considered by Insurers on a case by case basis depending on a participant's individual circumstances.

- for the motor vehicle scheme, the Agency's discretion to refuse to accept a person as a re-entering participant is conditional upon the Agency not being satisfied that the participant is suffering *severe financial hardship*²³.

Having regard to the policy objectives in section 1.2 above, ensuring both schemes have regard to the same re-entry criteria promotes equity and consistent decision-making across the lifetime schemes.

The options for pre-conditions to re-entry identified above represent considerations likely to be relevant to determining sufficiency for re-entry. In giving effect to any of these options, it is envisaged that both schemes effectively involve a sufficiency test.

In addition, to create a more consistent experience for participants across the lifetime schemes, consideration is also being given to prescribing severe financial hardship as an additional re-entry criterion for the workers' compensation scheme. This criterion provides an additional protection for vulnerable participants and will bring the workers' compensation scheme in line with the motor vehicle scheme in this regard.

If this approach was adopted:

- For the motor vehicle scheme:
 - as is currently the case, the Agency's discretion to refuse to accept a person as a valid applicant for re-entry being accepted as a re-entering participant will continue to be conditional upon the Agency not being satisfied the participant is suffering severe financial hardship; and
 - in the context of the options outlined in Part 5, both schemes will require consideration of whether the TCS damages were not sufficient.
- For the workers' compensation scheme:
 - as is currently the case, the Insurer must be satisfied that the TCS damages awarded were not sufficient in the context of the options outlined in Part 5; and
 - an additional criterion may be prescribed that the Insurer has discretion to take into consideration whether the participant is suffering severe financial hardship.

We invite stakeholder feedback on this.

²³ The motor vehicle scheme does not define *severe financial hardship*. Concepts like this are commonly included in legislation for the administrator to develop an appropriate practice.

6. Consistency with fundamental legislative principles

The Queensland Government Guide to Better Regulation requires that the preferred option in a consultation paper should be consistent with Section 4 of the *Queensland Legislative Standards Act 1992*. The meaning of 'fundamental legislative principles' is set out in the *Queensland Legislative Standards Act 1992*, which states that legislation should have sufficient regard to:

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

Having sufficient regard to the rights and liberties of individuals may depend on whether any regulatory changes:

- ensure access to review of administrative decisions;
- are consistent with natural justice;
- allow administrative powers to be delegated only to appropriate persons;
- do not reverse the onus of proof in criminal proceedings;
- confer search and seizure powers only with a warrant;
- provide appropriate protection against self-incrimination;
- do not have adverse retrospective impacts; and
- are drafted in clear and precise language.

Having sufficient regard to the institution of Parliament may depend on whether any regulatory changes:

- subjects delegated legislative powers to the scrutiny of the Legislative Assembly; and
- authorises the amendment of an Act only by another Act.

The proposed options for both the preclusion period and pre-conditions for re-entry are not currently contemplated to be implemented through primary legislation but rather through relevant regulations for the lifetime schemes. However, this will be reassessed, if necessary, in the context of the government determining its response to consultation. The proposed options are considered to have sufficient regard to both the rights and liberties of individuals and the institution of Parliament.

7. Compliance, implementation and evaluation

7.1. Administration, compliance and enforcement

The primary legislation for the lifetime schemes is based on front-end compliance through the application of eligibility criteria.

The Agency and Insurers will need to consider a risk-based approach to back-end compliance to ensure that any conditions upon which eligibility was accepted continue to apply. However, this will be aligned to existing procedures for eligibility control.

The primary legislation for the lifetime schemes includes offences for the provision of false or misleading information and for other fraudulent behaviour²⁴. These offences will also apply to any new regulations clarifying the prescribed period or pre-conditions for re-entry.

²⁴ *National Injury Insurance Scheme (Queensland) Act 2016* ch 8 pt 1; *Workers' Compensation and Rehabilitation Act 2003* ch 12 pt 2.

Compliance and enforcement will be achieved through existing administrative review mechanisms which provide for accountable decision-making.

7.2. Implementation

All feasible options require Government to prescribe regulations for both the preclusion period and pre-conditions for re-entry.

Subject to the outcome of the RIS process and Government consideration, the responsibility for implementing any reforms arising from this RIS will fall to Queensland Treasury (motor vehicle scheme) and the Office of Industrial Relations (workers' compensation scheme). The Agency and Insurers will also be required to develop and implement new administrative and decision-making processes to give effect to decision-making required in relation to re-entry, having regard to the preclusion period or pre-conditions for re-entry which are adopted.

Queensland Treasury and the Office of Industrial Relations have undertaken initial targeted consultation around the concepts proposed in this RIS with potentially impacted stakeholders. Consultation will be ongoing and informed by this RIS process. Consultation will be complemented by a targeted awareness and engagement strategy with affected stakeholders and the general public more broadly prior to commencement of any regulatory reform.

7.3. Monitoring, evaluation and review

The workers' compensation scheme has existing statutory requirements for the responsible Minister to ensure a review into the operation of Queensland's workers' compensation scheme occurs at least once every five years. The most recent review was completed in 2018 and did not identify any immediate concerns for the workers' compensation scheme. The next review is required to be completed by no later than 30 June 2023.

Annual reporting obligations of the Agency²⁵, the statutory process for the annual fixing of the levy for the motor vehicle scheme and the statutory monitoring obligations of the Motor Accident Insurance Commission in relation to the motor vehicle scheme²⁶ ensure the motor vehicle scheme is subject to monitoring. In addition, the motor vehicle scheme provides a statutory power to the Treasurer to refer a matter about the operation of the scheme to a parliamentary committee for up to 5 years after its commencement. No such referrals have yet been identified.

Following determination of appropriate options, any regulations to implement the outcomes of this consultation process will be subject to monitoring, evaluation and review through these existing mechanisms.

²⁵ As required by the *National Injury Insurance Scheme (Queensland) Act 2016* and the *Financial Accountability Act 2019*.

²⁶ *National Injury Insurance Scheme (Queensland) Act 2016* ch 4 pt 2 and ch 5.

Operation of the lifetime schemes

Eligibility and entitlements under the lifetime schemes

To be eligible for lifetime treatment, care and support under the lifetime schemes, a person must have sustained a *serious personal injury*²⁷ as a result of an eligible motor vehicle or workplace accident in Queensland on or after 1 July 2016.

Both lifetime schemes define a serious personal injury to include:

- a permanent spinal cord injury;
- a traumatic brain injury;
- multiple or high-level limb amputations;
- permanent injury to the brachial plexus;
- severe burns; and
- permanent blindness caused by trauma.

A person will be assessed against the specific eligibility criteria for serious personal injuries established under regulations for either the motor vehicle²⁸ or workers' compensation scheme²⁹ depending on how their injury was sustained.

Eligible participants are entitled to have the costs of their lifetime *treatment, care and support needs* (TCS needs) paid under the lifetime schemes. TCS needs is a defined term³⁰ in each of the schemes. While there is some variation in terminology, the lifetime schemes broadly cover the same range of entitlements, including but not limited to:

- medical and dental treatment;
- rehabilitation;
- respite care and attendant care and support services;
- home and transport modifications.

Entitlement to seek lump sum treatment, care and support damages

Participants whose injury has been caused due to the negligence of another party may be entitled to pursue common law damages for their serious personal injury. More information about common law damages, generally, is outlined in **Attachment B**.

These participants also have the option of receiving *treatment, care and support damages*³¹ (TCS damages) as an alternative to their ongoing participation in the lifetime schemes. As highlighted in the RIS, electing to take TCS damages requires the participant to exit the lifetime scheme.

²⁷ 'Serious personal injury' is a defined term in schedule 1 of the *National Injury Insurance (Queensland) Act 2016* (NIISQ Act) and in schedule 6 of the *Workers' Compensation and Rehabilitation Act 2003* (WCR Act).

²⁸ National Injury Insurance Scheme (Queensland) Regulation 2016 pt 2.

²⁹ Workers' Compensation and Rehabilitation Regulation 2013 pt 5A

³⁰ NIISQ Act s 8; WCR Act s 232J.

³¹ NIISQ Act sch 1; WCR Act s 232I.

Information about common law damages

Damages is monetary compensation designed, in simple terms, to put an injured person back in the financial position they would have been in had they not been injured.

What is a common law claim?

A person who has sustained an injury (or injuries) from a motor vehicle or workplace accident may be entitled to seek damages for negligence against the at-fault party e.g. another driver or their employer. A person may also be entitled to seek damages for a work-related injury if their employer has breached an express or implied term of their employment contract to provide a safe system of work.

Generally, the relevant insurer defends the claim on behalf of the liable party. The relevant insurer will depend on the scheme:

- **motor vehicle scheme:** either the CTP insurer, or if there is none and subject to criteria, the Nominal Defendant; or
- **workers' compensation scheme:** either WorkCover Queensland or the licensed self-insured employer.

There are statutory and court processes which govern how and when a person may commence a common law claim.

Generally, this process involves the injured person putting forward medical and other evidence about their injury(ies), the impacts of these, and a calculation of the damages this represents. The defending party will often require independent medical examinations to allow them to assess what they deem to be appropriate damages. Expert medical opinions can differ on the nature and extent of the injury, the impact of any pre-existing injury, prognosis and appropriate treatment.

The potential to negotiate an out of court settlement is required for all common law claims under the lifetime schemes. Parties to a damages claim must try to negotiate an out of court settlement by way of a compulsory conference before the injured worker is able to start court proceedings. In many cases, this process will result in the parties reaching an agreement on the damages to be paid for the claim.

While the majority of matters are settled by consent, if the parties cannot reach agreement, the claim will proceed to the relevant court. Court processes vary depending on the relevant scheme. Generally, court action will ultimately conclude with a trial, followed by judgment. If the court decides that the defendant has been negligent and is therefore liable, the court will award amounts for each head, or type, of damages.

What are the heads of damage traditionally awarded?

An injured person may be entitled to recover 'heads of damages' such as:

- pain and suffering and loss of enjoyment of life;
- past wages or economic loss, including interest and loss of superannuation contributions;

- future wages or economic loss, including future loss of superannuation contributions; and
- past and future medical, hospital, pharmaceutical, rehabilitation, domestic assistance and care expenses, including interest on past expenses (sometimes called 'special damages' or 'out of pocket expenses').

What are the considerations when calculating damages?

A range of facts and/or evidence is considered when calculating the damages which should be paid for common law claims, including:

- the injured person's age;
- medical records;
- medical examinations and reports obtained by the injured person and the defending insurer;
- Medicare and Pharmaceutical Benefits Scheme (PBS) records; and
- tax invoices and receipts for expenses incurred as a consequence of the injury.

The process of calculating damages requires an evidence-based finding upon the degree of impairment presented by the injury, and an assessment of the financial impacts of that injury under the recognised heads of damage (past and future) having regard to applicable statutory frameworks and common law precedent for determining fault-based liability.

Damages may be reduced for other reasons, such as contributory negligence (discussed below).

In projecting future damages, courts and negotiating parties make certain assumptions about matters affecting the damages including:

- the injured person's life expectancy; and
- discount rates to reflect the current value of amounts for damages realisable in the future (presuming investment returns will be achieved in order to produce the required future amount).

Some factors in the assessment of damages may be different from the approach required in administering treatment, care and support of a participant in the lifetime schemes on an ongoing basis. Where these differentiations occur, there is potential for TCS damages to prove insufficient to meet an injured person's lifetime TCS needs.

What heads of common law damages will equate to treatment, care and support damages?

The lifetime schemes define treatment care and support damages (TCS damages) in similar terms as being damages relating to the treatment, care and support needs (TCS needs) resulting from the relevant eligible injury³².

This is generally expected to be similar to the future³³ 'special damages' category in a common law claim.

The lifetime schemes set out what is excluded from treatment payments. These exclusions are expected to apply to the meaning of TCS damages. For example, express exclusions under the workers' compensation scheme³⁴ include treatment, care and support provided:

- by a person who, at the time of provision, is not a registered provider; or
- as part of a medical trial or on another experimental basis; or
- by State emergency services, including the Queensland Ambulance Service or the Queensland Fire and Emergency Service.

A similar list is provided for the motor vehicle scheme³⁵, with the additional category of treatment, care and support that is provided as part of a public sector health service³⁶.

Why is it relevant to identify the TCS damages?

The lump sum amount of TCS damages, and the way in which it is calculated, are relevant considerations for assessing the reasons why it may not be sufficient to meet the participant's necessary and reasonable lifetime TCS needs.

To assist the Agency or Insurer to assess whether the TCS damages awarded were sufficient, the amount of TCS damages must be identifiable in the settlement or judgment of the common law claim.

In practice, this is less likely to be an issue in the motor vehicle scheme. The Agency is only required to contribute towards the CTP Insurer's liability for the TCS damages component, which requires that component to be separately identified.

However, in the workers' compensation scheme, Insurers will often be liable for all heads of common law damages³⁷. This means there may be a greater incidence of calculating global damages (a single figure not broken up into heads of damage), which do not separately identify the TCS damages component.

³² NIISQ Act sch 1; WCR Act s 232I.

³³ For the motor vehicle scheme, the participant's past necessary and reasonable treatment, care and support needs having already been paid by the Agency.

³⁴ WCR Act s 232K.

³⁵ NIISQ Act s 9.

³⁶ The NIISQ Act provides that a public health service as defined in the *Hospital and Health Boards Act 2011* schedule 2.

³⁷ There are instances when a third-party contributor may be required to pay for TCS damages if the insurers employers is not liable by operation of the WCR Act.

Ensuring TCS damages are clearly identified is a practice issue for clarification as part of the front-end claims resolution process. There is no regulatory barrier for the Agency, Insurers, and legal practitioners representing participants to develop or implement solutions to address this issue. Therefore, issues around the identification and separation of the TCS damages component is beyond the scope of this RIS.

Contributory negligence

In the ordinary course of common law claims, it may be found that a person's injury was partly caused by their own negligence. This finding may reduce the gross award of damages (for all heads of damages) by a percentage which reflects the extent of the injured person's contributory negligence.

Contributory negligence can result in a 100 per cent reduction of damages where just and equitable to do so.

Examples of contributory negligence include:

- failure to wear a seat belt;
- intoxication; and
- failure to wear proper safety equipment provided by an employer.

The lifetime schemes include specific provisions about how a finding of contributory negligence will impact a participant's election to seek TCS damages. Essentially, where damages would be reduced by 50 per cent or more due to the participant's contributory negligence, the participant is not entitled to seek TCS damages and must remain within the lifetime scheme. Conversely, if contributory negligence is less than 50 per cent, there is no reduction of the TCS damages and the participant will be paid 100 per cent of the calculated TCS damages.

For context, historically, reductions in damages awarded to injured workers for contributory negligence rarely exceed 25 per cent unless a very senior, experienced employee is involved or where the employee has been particularly reckless or foolhardy.

Mitigation and aggravation

In the ordinary course of common law claims, if an injured person refuses to undergo medical treatment the defendant considers would improve their condition, the defendant may seek to have damages discounted on the basis that the injured person's refusal was unreasonable. The defendant must show how and to what extent the injured person's loss would have been diminished and that the injured person's refusal of treatment was unreasonable.

In assessing reasonableness, regard may be had to the prospect of improvement versus the risks associated with the treatment, inconvenience, discomfort and cost. It is not necessary to prove that the treatment would have been successful.

Unlike the statutory rules for contributory negligence outlined above, there is no equivalent to the framework for payment of full TCS damages despite any finding of failure to mitigate or aggravation. If TCS damages are discounted on this or another lawful basis, this may increase the prospects that TCS damages will be insufficient to meet the participant's necessary and reasonable lifetime TCS needs, precipitating an application for re-entry to the lifetime schemes.

Partial defences

Where a complete defence is established (or, conversely, negligence on the part of the defendant is not established), there will not be a lump sum payment and the question of re-entry will not arise. For the motor vehicle scheme, examples include:

- an obvious risk³⁸; or
- ‘inherent risk’ including from ‘dangerous recreational activity’³⁹.

However, in some cases, there may be a partial reduction of damages if a defence is established.

An example for the motor vehicle scheme might be if joint illegal enterprise is raised as a defence. An injured person may be prevented from recovering damages if they suffered an injury whilst engaged in conduct that was an indictable offence, and the conduct materially contributed to the risk of the harm which eventuated⁴⁰. This might be the case if the injured person was a passenger in a motor vehicle accident which occurred in the prosecution of an indictable offence (such as being complicit in the illegal use of a motor vehicle) in which they were a participant. The court has a discretion to award damages if it is satisfied that it would be harsh or unjust not to do so⁴¹. However, in that case, the court is obliged to reduce the damages by at least 25 per cent. The interaction with contributory negligence in this context is unclear.

As noted above, if the award of TCS damages is discounted on this or another lawful basis, this may increase the prospects that TCS damages is insufficient to meet the injured person’s necessary and reasonable TCS needs, precipitating an application for re-entry to the lifetime schemes.

Life expectancy

Life expectancy tables are generally based on the figures accepted by the High Court⁴². For example, the life expectancy of a 40-year-old is a further 45.43 years for a male, and 48.44 years for a female.

As an average, it would be expected that sometimes an injured person may not achieve this life expectancy, but on other occasions they may exceed it. A defendant is able to present evidence to establish that the injured person’s life expectancy is likely to be shorter than that estimated in standard life-expectancy tables—for example, where the injured person is a heavy smoker.

However, the serious nature of the types of injuries relevant to the lifetime schemes may also impact on life expectancy, with the result that averages are not necessarily relied upon.

³⁸ *Civil Liability Act 2003* (CLA) s 15.

³⁹ CLA ss 16 and 19.

⁴⁰ CLA s 45.

⁴¹ CLA s 45.

⁴² *Golden Eagle International Trading Pty Ltd v Zhang* (2007) HCA 15.

Discounting for present value of future expenses

Discount factors are applied to calculate the amount of damages that should be presently awarded to cover future losses. Expected future payments are discounted to present value using a statutory discount rate of five percent discount per year⁴³. This reflects the capacity of the recipient of damages to invest and earn interest on the presently received damages, to achieve the expected future payment amounts.

The statutory discount rate is a 'real' rate in that it implicitly allows for the effect of inflation on the cost of treatment care and support services into the future. That is, it reflects investment returns *above* future inflation.

Discounting for vicissitudes and contingencies

Damages are also generally discounted at common law in Queensland to account for vicissitudes and contingencies. That is, that the injured person may not need the full amount, might experience a recovery, might not reach their life expectancy. A standard percentage reduction of 15 per cent is often applied. This 15 per cent is not prescribed and might be reduced (e.g. if the future loss period is short) or increased (e.g. if the future loss period is exceptionally long).

What issues can arise when a common law claim is finalised?

As with any disputed process, common law claims may involve competing expert opinion and outcomes will be affected by the relative persuasiveness of evidence on multiple aspects of the claim. To some extent, outcomes can also be dependent upon an injured person's resilience⁴⁴ within the claim process. In considering whether to agree to a settlement of a claim, the injured person will also have in mind their costs to bring the claim to that point, and to take the matter forward, including any non-recoverable component of those costs. For example, legal fees are rarely recoverable from a liable party on a full indemnity basis.

Consequently, while a payment of damages would be hoped to fully discharge all treatment, care and support liabilities of the lifetime scheme for the injured person, where such factors impact, the TCS damages agreed or awarded may similarly prove insufficient to meet an injured person's access to necessary and reasonable lifetime treatment, care and support. Equally, the converse could occur—agreed or awarded damages may ultimately exceed requirements. However, in such circumstances, there is currently no legislative basis for the lifetime scheme to be reimbursed.

Where common law claims are settled, the injured person is required to sign a discharge document to confirm the settlement. By signing the discharge, the injured person acknowledges that they have no further entitlement to any monies for the injuries the subject of the claim. That is, the injured person agrees that if they spend all the money, they can't claim again for that injury. In the case of settlements, it is the law of contract which makes them binding, and which would also govern the extent to which they may be able to be set aside or qualified.

Similarly, where a judgement is handed down—subject to any rights of appeal—it is generally final. In the ordinary course, the injured person is not permitted to come back seeking further damages later.

⁴³ CLA s 57 by reference to section 61 of the *Civil Proceedings Act 2011*.

⁴⁴ Australian Productivity Commission, *Disability Care and Support Inquiry Report No 54*, 31 July 2011, Chapter 17. Retrieved from: www.pc.gov.au/inquiries/completed/disability-support/report/disability-support-volume2.pdf.

The public policy reasons underpinning the finality of judgments and settlements is the desirability of bringing the rights and liabilities of the parties to the claim to a certain conclusion. The availability of a right to apply for re-entry to the lifetime schemes represents a divergence from the expectations of finality in resolving common law claims in the normal course, as outlined above.

Clear identification of the components of damages which reflect the agreed life expectancy, treatment, care and support payments and how they have been calculated will be important to decision-making around re-entry. The best evidence of this will be a record of agreed amounts, decided at the time of settlement or judgment. Legal advisors will clearly have an important role to play in ensuring they position their client for re-entry, if required, in this regard.

Gross damages versus net damages

The judgement or settlement for common law claims represents the gross damages the injured person is entitled to. This amount is then subject to reductions⁴⁵ to determine the net damages the injured person will ultimately receive.

The amounts paid by the Agency for treatment, care and support needs of a participant under the motor vehicle scheme pending resolution of a common law claim do not form part of the liability for TCS damages (having already been paid). Consequently, there is no refund for those amounts required from any damages agreed or awarded.

⁴⁵ For example, this may include refunds to the Insurer for their statutory workers' compensation claim or disbursements incurred as part of the common law process.

Proposed regulated list of considerations for determining re-entry

This section outlines a proposed list of regulated considerations for the Agency or the Insurer when determining an application for re-entry to the lifetime schemes. This is the list of relevant considerations referred to in Option 2 and, where applicable, Option 3.

The proposed list provides a holistic overview of considerations to reasonably and appropriately determine re-entry. It is not proposed that a participant must be able to prove all or a majority of these considerations. Rather, the Agency or Insurer will consider those matters most relevant to the participant's own circumstances and balance these factors to determine whether to ultimately permit re-entry.

This list of matters is intended to be guidance for determining re-entry and is not settled in terms of final drafting for any proposed regulations.

Proposed regulated list of considerations

1. Whether the participant has exceeded, or is reasonably expected to exceed, the life expectancy for which the TCS damages were calculated.
2. Whether the participant's relevant injury(ies) has/have materially deteriorated beyond what was reasonably anticipated when their TCS damages were calculated.
3. Whether new or different necessary and reasonable treatments or care or support services have become reliably available since the TCS damages were calculated.
4. Whether other material assumptions relied on to calculate the TCS damages have or have not been borne out e.g. treatment costs have been impacted by the participant's reasonable and/or necessary requirement to relocate to a regional area.
5. Whether TCS damages paid to the participant were materially reduced by expenses other than treatment, care and support needs:
 - costs or expenses incurred for or during the common law process rather than the participant's treatment, care and support needs e.g. outlays necessary to finalise settlement or legal fees; or
 - by operation of, or in accordance with, current statutory and/or general law at the time of settlement or judgement e.g. the participant's TCS damages were reduced as they were injured in a motor vehicle accident while committing an indictable offence.
6. Whether the participant has managed the TCS damages in good faith and with reasonable care having regard to factors such as:
 - the investment of the TCS damages; and
 - how the TCS damages have been spent.
7. If a material contributing reason for TCS damages being exhausted is due to an action or omission by a third party, either during the common law proceedings or in the management or use of the TCS damages received, having regard to factors such as whether:

- the participant was knowingly complicit in the relevant act or omission by the third party; or
 - the participant has reasonable prospects of recovering damages to compensate for the lost TCS damages from the relevant third party, or otherwise have those amounts reinstated to the participant.
8. To the extent that the TCS damages are approaching but are not yet exhausted, whether the participant is reasonably able and willing to refund any unspent TCS damages to the lifetime scheme⁴⁶ or, alternatively, whether re-entry should be delayed until the TCS damages are exhausted.
 9. Any other matter the Agency or Insurer considers is materially relevant to determining whether the participant should be permitted re-entry to the scheme.

⁴⁶ It should be noted that this consideration, if regulated, is not intended to suggest a former participant is entitled to buy back into the scheme post receipt of TCS damages under section 13 of the NIISQ Act.

