REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

12TH REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE MOTOR ACCIDENTS AUTHORITY AND FIFTH REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE LIFETIME CARE AND SUPPORT AUTHORITY

CORRECTED PROOF

At Sydney on Friday 7 March 2014

The Committee met at 9.45 a.m.

PRESENT

The Hon. D. Clarke (Chair)

Mr. S. MacDonald
The Hon. S. Mitchell
The Hon. S. Moselmane
The Hon. P. T. Primrose
Mr D. M. Shoebridge

CHAIR: Ladies and gentlemen, welcome to the first hearing of the inquiry of the Standing Committee on Law and Justice into the twelfth review into the Motor Accidents Authority [MAA] and the Lifetime Care and Support Authority [LTCS]. The review is being conducted according to section 11 of the Safety, Return to Work and Support Board Act 2012, which designates the Committee to supervise the exercise of the functions of the authorities. Before I commence, I acknowledge the Gadigal people who are the traditional custodians of this land. I also pay respect to the elders, past and present, of the Eora nation and extend that to other Aboriginals present.

Today is the first of two hearings we plan to hold for the reviews. We will hear today from legal associations, disability and community groups, healthcare professionals and the Insurance Council of Australia. In accordance with the broadcasting guidelines, while members of the media may film or record Committee members and witnesses, people in the public gallery should not be the primary focus of any filming or photography. I also remind media representatives that they must take responsibility for what is published about the Committee's proceedings. It is important to remember that parliamentary privilege does not apply to what witnesses may say outside their evidence at the hearing. I urge witnesses to be careful about any comments that may be made to the media, or others, after your evidence is completed because such comments would not be protected by parliamentary privilege if another person decided to take action for defamation. If anyone has any doubts as to the guidelines for broadcasting, they are available from the secretariat.

Regarding questions on notice, there may be some questions that a witness could only answer if they had more time or certain documents to hand. In these circumstances, witnesses are advised that they can take questions on notice and provide an answer within 21 days. That is what we will be proposing to do today. Witnesses are advised that messages should be delivered to Committee members through Committee staff, who are seated to my left. Finally, mobile phones should be turned off because they can interfere with the recording and transcription.

ALASTAIR JOHN McCONNACHIE, Deputy Executive, New South Wales Bar Association, and

ANDREW JOHN STONE, Barrister and Bar Councillor, New South Wales Bar Association, affirmed and examined:

CHAIR: Welcome and thank you for giving us your time. Would you like to start with a short opening statement? We have the earlier submissions that you have made.

Mr STONE: Hopefully you have three submissions from us comprising our primary submission and then an individual submission in response to the annual reports of the Motor Accidents Authority and the Lifetime Care and Support Authority. We thank you for inviting us. I have been before this Committee a number of times in the past, and we have always enjoyed the opportunity to come here and talk about the interests of members and those that we represent: the injured. Normally my practice is to tell you that and then invite questions. Today, having seen with more advanced notice the responses of the MAA and the LTCS to the questions you have put, I would ask your indulgence for a slightly longer opening because I would like to make a few comments.

I will start with the Lifetime Care and Support Authority because that is the scheme that tends to slip under the radar a little bit more in a review—at least it receives less scrutiny. The Lifetime Care and Support scheme can be summarised in two words. It is all about service delivery. It is about looking after people who are catastrophically injured and getting the services to them. In that context, you could call it anywhere between disappointing and appalling that the annual report from that authority contains no more than two lines addressed to the subject of service delivery. They say that 90 per cent of their customers are happy full stop. There is no word about any aspect of service delivery. Because a large number of the people within that scheme have no legal representation, because they have "no-fault" based claims, a large number of their issues tend to go under the radar. We set out in the supplementary submissions from the Bar Association some very detailed questions designed to draw out standards of service delivery. We offer you every encouragement to pursue those questions because, to be frank, this is the only forum that can compel answers to those questions. They will not be asked anywhere else. That information will not be gouged out of the authority anywhere else.

I saw from the answers to the questions on notice that this Committee asked a question about the satisfaction and some important things emerged from that that cannot be found in the annual report. For example, in 2012, if you look at the second page of the answers, within three months of their survey, 32 per cent—nearly a third of scheme participants—had a problem with a service provider. You would like to follow that with qualitative questions: What was the nature of the problem? Was it a big problem? Was it a minor problem? You would like to have some analysis of that problem from the government body reporting, rather than just telling us that one-third of people had a problem. But they are not going to tell us what it was, what they are doing to address it, and they are not going to tell us anything about how they are going to fix it. Similarly, 15 per cent of people in a three-month period had an issue with the Authority. Again, no analysis of what the problem was and how it was resolved. What is truly frightening when you look at their own data is that 47 per cent of those problems had not been sorted out. Further, their data said 89 per cent of people know who their case manager is. Given that you are in this scheme because you are catastrophically injured, the case manager is pretty close to the most important person in your life. What frightens me is that 10 per cent of people did not know, and why not? None of those issues are addressed.

Returning momentarily to the Bar supplementary submissions, some of the questions we set out, and we encourage you to pursue with them, for example, relate to the training of carers. There will be a major issue in this country as we ramp up the National Disability Insurance Scheme in terms of shortage of carers. It is all very well to say that we want to provide better care for people, but where are the carers going to come from? In turn, as you have to stretch the pool wider and deeper to find the available carers, that creates reliability issues. One of the critical complaints we hear from the people we act for within the scheme is carers not turning up. We hear stories—and I do not know whether these are apocryphal and that is why it is important for this Committee to ask—about care agencies hauling in backpackers, giving them a morning training session and then sending them out to insert catheters. I do not know if that happens. You get nothing out of the Authority that tells you anything about the standards they impose or the quality control they impose on carers. This is the only group that has the power to ask. What I hear is reputable nursing agencies telling me they do not want to be involved in this scheme because the rates involved are below what they are prepared to pay quality staff. If we have got a cheaper tender system, then what are we paying in respect of quality in order to get the cheapest price? Again,

they are critical issues for the Authority that they ought to be more upfront in addressing. We encourage this Committee to ask the hard questions about service provision.

One last question that I will raise with you, and it is in the Bar's submissions, is the underutilisation rate. It is clear from the amount they are spending there is a gap between the service plans they write for the care people need and what is actually used. That is the underutilisation rate. They should be capable of measuring it, they should be capable of telling you about it, and they should be capable of addressing with you why there is an underutilisation rate and is it satisfactory. A large part of that will be families who choose not to have 24-hour carers in the home or 12-hour carers in the home because they prefer to do it themselves. The Authority has a very firm policy that if you want to do that, that is fine, but you are walking away from whatever money we are willing to invest in care. That is a topic that needs to be the subject of ongoing discussion. I encourage the Committee to ask about the underutilisation rate and the extent to which families are subsidising the scheme.

It is also our concern that participants are ill-informed about their rights in terms of extra things for which they can claim. It very much depends upon the proactiveness of the individual case manager you have as to whether you are getting the full gamut of services you are entitled to. We know nothing about the audit processes they have in place to ensure that their staff and their contractors are recommending the appropriate range of services.

I suggested a very simple test for them four years ago. I suggested it again a few weeks ago: print out next to every name—and they can do this on their computer systems—the amount being spent on everybody each year, and pretend it is medical treatment. Then print down on that sheet the amount that you have reimbursed them for travel expenses, because every time somebody has had medical treatment, and not been reimbursed for their travel expenses to get there, the case officer has not helped them put in the travel expenses claim. That is a case officer who is missing something fairly fundamental, fairly simple and fairly easy to identify in an audit. There is just one practical example of a way you can go about auditing whether case officers are doing their job, and they tell us nothing about it.

The final point before I finish on LTCS is this—you will see in their response that they say that the participants in the scheme can challenge determinations about their entitlement in terms of what is reasonable and necessary, and that is true but there are two important caveats on it. The first is that a right that you do not know about, or have the capacity to assert, is no real right at all. The question of resourcing for people to learn about their rights and to know how to challenge an Authority decision as to what is reasonable and necessary is important.

The Authority says, "Well, there are resources available for people in the volunteer sector to do it", but I can say, having assisted some people on a pro bono basis to assert their rights—and I think almost all of the lawyers who come before you today will have done that from time to time—is that it can be an almighty battle and I do not think the charitable sector are up to providing the necessary standard of advice to challenge the decision. I went over 12 months in a dispute to try to get a lady six hours a week of gardening assistance—for only six months—and the authority's assessors dealt with it for over 12 months. The initial assessor made an appalling decision. A review panel made such a poor decision that when I threatened a Supreme Court challenge the Authority was prepared to walk away from. Because there was a lawyer there able to point out the legal errors that the review panel had made this lady ultimately got her gardening. Without the legal assistance she received it just never would have happened.

The first issue in terms of reasonable and necessary services is the capacity to address it. The second is this: In 2012 the Parliament passed the Motor Accidents and Lifetime Care and Support Schemes Legislation Amendment Bill. It did so over the deep concerns of the legal profession that you were removing a fundamental right under this legislation. Until then the legislation had said, as a matter of legislative guarantee, that you got your reasonable and necessary treatment and care. The change the bill made was it let the Authority define in its own guidelines what was reasonable and necessary. You gave them the power to call black white. You gave them the power to say, "Wheelchairs are not reasonable and necessary for paraplegics." They have not gone that far but you have given then an enormous power to, in effect, say what they are prepared to treat as reasonable and necessary, irrespective of what common sense, logic or medical best practice might call reasonable and necessary.

If you are going to give somebody that power I urge you to carefully and thoroughly review the use of that power through this forum. The question that arises from that and for each and every inquiry of this Committee is: What services and equipment is the authority deeming to not be reasonable and necessary? What

are they ruling out? And to ask something about what are the nature of the treatments that they are knocking back? Try to find out what they are not prepared to pay for because, again, nothing in any of their published material will provide the answers other than to look at their guidelines. That is what I wanted to say about lifetime care.

I shall be much briefer in relation to motor accidents. I simply note that we are happy to assist the Committee with whatever technical questions you have about the operation of the scheme. It struck us that there were really five big picture questions, and I am happy to talk about these and, I think, those who follow me from the legal profession will be happy to talk about them. These questions arise out of the comments of the Motor Accidents Authority in its response to questions. First, is our scheme the most expensive in the country? If so, why? The answer will involve "Yes but it is not a bad thing". Second, is our scheme the most inefficient in the country, and why? The answer will involve "only if you manipulate the data". It is not. Third, where are insurer profits at? That is a continuing part of the first two questions. Fourth, as the authority has contended in its annual report: Is the only real solution to these issues to junk the scheme we have and move to a completely different scheme? Fifth: Does that alternate scheme as proposed work? That is something that took up a good deal of debate last year but it is the authority that has sought to revisit it at length in its response. They see the alternative as being the universal panacea, and given the chance I am here to tell you why not. I apologise that those comments are lengthier than usual, in particular in relation to lifetime care. It is something that can escape attention and I wanted to speak about.

CHAIR: You have covered insurer profits in your supplementary submission. I think it would be fair to say that the Law Society NSW and the Australian Lawyers Alliance are in harmony with you on this issue. You point out with regard to profits:

> NSW CTP insurers are meant to keep about 8 per cent of the premium written as profit and 8 per cent return is considered a fair profit. The scheme has never succeeded in confining insurance to recovering just that 8 per cent. Historically insurers have kept upwards of 20 per cent of the premiums as profit.

Is that year in year out?

Mr STONE: Yes.

CHAIR: Will you expand on that and tell the Committee what is going on from your point of view?

Mr STONE: Yes, certainly. I think Committee members have this with the material from the Bar Association. If you can lay easy hands upon it, do, and if you cannot I will pull out another copy. I will pass some copies around. This is, of course, a long-tail scheme and the final profit for current years is not known—it is many years away from being determined—but there are projections. The one thing we can say about the projections is that the profits go up over time. No-one has ever underestimated the profit to be made. I take you to the fourth last column from the right on that page. You will see the heading "2013 MAA Profit Projections". That is the projected share of the premium that the insurers are intended to retain for each premium collection year.

You see in the early years it ranged between 25 and 30 per cent. In more recent years we went to 22 and 18 per cent. Then we have a couple of years that are currently at 9 and 7 per cent, although if you look back across the column you will see they were initially projected to be only break-even years, 1 per cent above or below. The profits have come good, as they always do, when you follow this table across. At the moment there are only two years out of 12 that on current projections will come in, and I am willing to bet anybody in the room lunch somewhere that, in due course, those years will tick comfortably over that 8 per cent. This scheme has been extraordinarily profitable for New South Wales insurers.

There are a couple of reasons for that. One reason that you cannot blame them for is that accident numbers fell for a consistent number of years early on. They were the beneficiary. If you write a premium designed to pay out on 8,000 accidents and there were only 7,000 accidents you pocket 1,000 accident payouts worth of profit. If they took the risk that there were 9,000 accidents they would have come up short. On the other hand, it is amazing that they never come up short on that statistic. But where they have really done well is what they technically call prudential margins. For anyone who has ever done any home renovations or engaged a builder they pad out the end of the quote by putting in the contingencies, and prudential margins are effectively the contingencies that they build in.

Of course, if you can deliver on schedule and on time, or if the scheme works as intended, then prudential margin becomes profit—pure profit. What I think they have consistently managed to do—but these are better questions for the MAA—is to persuade the MAA to put in large prudential margins that have been unduly generous to them. In the early years that was based on fears that the scheme may not work as predicted. It worked as predicted and they just pocketed the difference. And that is one of the very good arguments against changing to a new scheme because the moment you introduce a new scheme, private underwriters say, "We have got no idea how this is going to work. We have no idea how many at-fault drivers there will be. We need much bigger prudential margins because of all the uncertainty." They will tell you that for five or six years into the new scheme. Any belief that a new scheme will help rein in profits is fallacious because all it does is invite a larger prudential margin for years to come. But this tells you the profits. We have not made up these figures; they are just extracts from the MAA annual report, presented in a way that it never chooses to present them.

CHAIR: A pretty consistent pattern, is it not?

Mr STONE: A remarkably consistent pattern.

The Hon. PETER PRIMROSE: If the cost of compulsory third party [CTP] greenslips were to go up again would that be because we do have a no-fault system in New South Wales?

Mr STONE: No. A no-fault system is likely to be a generator of costs, in that it expands substantially the number of people claiming benefits. The only way you can stop it putting costs up is to slash the existing benefits. One of the big issues with the debate last year, when the Government said that it wanted to broaden and introduce a no-fault scheme, was that there was never a willingness on the part of the Motor Accidents Authority [MAA] to disclose how much we are taking away from how many. Who were the losers? How badly were they being cut back? That set of figures was never identified in the debate. I would have thought in any informed policy debate that says you want to expand the number of beneficiaries but you want to do it at the cost of somebody else, you ought properly to identify those who are paying the price.

I have got to say that when we held the roundtable—it was very good of the Minister to get all the stakeholders in a room and have the roundtable; from a policy development perspective you might next time prefer to do that at the start of the process rather than the end of the process as it was falling apart, but it was to the considerable credit of the new Minister that he took such a consultative approach—what came out of some direct questioning of the Insurance Council Australia [ICA] representative at that meeting was that there were no guarantees that a no-fault scheme was going to reduce price. After that we started getting some arguments about maybe price would not go up by as much as projected, but at that point you are into some fairly rubbery assertions. There were no guarantees that that was the panacea solution.

Mr SCOT MacDONALD: Going back to the table, if you take projected profits over premium collected you get about 19.5 per cent?

Mr STONE: Yes.

Mr SCOT MacDONALD: That is a bit more than double what we are talking about, in terms of 8 per cent being a reasonable figure?

Mr STONE: The 8 per cent is not me; the 8 per cent is the Motor Accidents Authority.

Mr SCOT MacDONALD: Surely the counter argument is with the unknowns like the low bond rate—and I think you refer to that in your submission; are we not better off having a conservative, albeit quite profitable, system that we know is sustainable into the future when there might be other shocks down the system—whether they be bonds or changes in accident rates, et cetera? We could drag that back to 8, 9 or 10 per cent or something like that, but there is no fat then.

Mr STONE: No. We accept that there has to be a prudential margin to allow for contingencies, but the sorts of margins that we are talking about here—to put a dollar figure on it, $2 billion is the super profit. I do not mean the profit, I mean the super profit above reasonable return. That is a remarkable figure.

CHAIR: What you are saying is a fat margin of profit?

Mr STONE: Yes. The interesting question that no-one has really ever asked the insurers is—the insurers have engaged in a long-running battle with the Motor Accidents Authority over the 8 per cent figure but they do not like the 8 per cent figure; they do not accept the 8 per cent figure. I will let them say that for themselves.

Mr DAVID SHOEBRIDGE: They are never bound by it in reality.

Mr STONE: The question I have always been curious about but never really got to the bottom of is they participate in this scheme knowing they will never be held to 8 per cent but if they were genuinely held to the 8 per cent would they still stay in play? That is a question that I cannot answer, I can only speculate. Or is it in effect a nod and wink that they know that they will always get more than 8 per cent and therefore they are happy pretending that it will be 8 per cent?

Mr DAVID SHOEBRIDGE: Is not the issue from a public policy point that insurers in return for the chance of substantial profits need to take on some risk and when you look at this historically there is no risk; it is almost a certainty that they will get their 8 per cent as a bare minimum and then, in most years, a substantial amount of cream on top. If we are meant to be pricing products in the public interest then surely there needs to be some risk in the private sector if they have a chance of windfall profits. We just do not see that risk here.

Mr STONE: There is the serious question: Does the Motor Accidents Authority require additional regulatory power to rein in profit? The reason I say that is because during the course of the roundtable Mr Coutts-Trotter, then the head of the Finance department, advocated as one of the advantages of the Government's proposed bill was that it provided greater regulatory powers to rein in profits. You will see that we have made the comparison with Queensland, where the Queensland Government has been much more successful in restraining price than the Motor Accidents Authority has in New South Wales. I understand—but by all means ask the authority and the insurers who know this better than I do—that is because the Queensland Government has better regulatory power.

I asked Mr Coutts-Trotter at the roundtable when he said that this new beaut bill will have these regulatory powers in it: "Can't you sever those? You will find unanimous political agreement if there is more regulatory power needed. Does it have to be in the context of the new bill?" We went a couple of questions back and forth and, given that I was being given a small degree of cross-examination latitude, we actually got the direct answer out of him at the end that they are stand-alone issues and if the Motor Accident Authority needs more power in order to regulate price or in order to do its job better we are in favour of them having them, and I would not have thought that anyone in any political party was opposed to that occurring.

Mr DAVID SHOEBRIDGE: So you would be looking at what I think were transitional powers in that bill as potentially a model in terms of giving the Motor Accidents Authority regulatory powers in the current scheme?

Mr STONE: There were two components. One was a transitional provision to control things in the early years of it, but there were also some increased powers overall that I think were also, you know, if they need them, they need them.

Mr DAVID SHOEBRIDGE: What would you think about those transitional powers being effectively granted to the Motor Accidents Authority in addition to those other continuing powers? Do you want to take that question on notice?

Mr STONE: I would probably need to take that on notice, but my initial indication is that if that is a feasible way of providing a long-term mechanism, that they are entitled to make a fair return but not super fair returns, then it is worth looking at.

Mr DAVID SHOEBRIDGE: The Deputy-Chair asked you a question about a no-fault scheme. I think your answer was that there is a lot of uncertainty moving wholly into a new scheme and potentially large costs. But I thought the Bar Association had done some costing on expanding the no-fault scheme in the existing system—which I think is through the accident notification form [ANF] process, currently capped at $5,000 and there has been some modelling about expanding that to something like $20,000?

Mr STONE: Yes.

Mr DAVID SHOEBRIDGE: Can you explain how that might fit within the existing system?

Mr STONE: Certainly. Before the Government introduced the bill, when it was taking consultations on its white paper, we put forward a detailed proposal jointly on behalf of all the law bodies in the State—Bar Association, Law Society and the Australian Lawyers Alliance—setting out a way to deliver on the Government's objectives in relation to price while at the same time retaining the predictability and benefits of the current scheme. One of the suggestions we made in that was expanding the ANF. Currently you can lodge a short claim form, called an accident notification form. It gets you up to $5,000 in treatment and lost wages. It never involves the use of lawyers; there is no provision in it for legal fees. It allows small claims to be resolved rapidly and easily.

One of the complaints that the authority rightly makes is that with small claims in the $20,000, $30,000 or $40,000 range a disproportionate benefit from them is chewed up by legal fees and they are arguing over not very much. One way in which we could move a little towards a more no-fault scheme whilst still not having to slash benefits, is in relation to expanding the ANF. The actuarial modelling we did on that showed that if you took the ANF up towards $25,000 that would effectively pay for itself. It would not be an impost on premiums because although that might involve some more no-fault benefits, the savings would be made up in what you cut out of administrative and legal fees on those small claims. We have a tranche of ideas of ways to address and improve the current scheme—a good many of them were adopted in the Government's bill. It is perhaps unfortunate that with the bill not having gone forward the positive suggestions that everybody was behind and in favour of have been dropped, along with the more controversial ones that enjoyed little public support.

I am not sure that we have provided it previously, so if I could submit—the advocate in me wants to say tender—the joint submission that we prepared and provide the Committee with a copy of it. If you would like the actuarial costings that were provided behind it, we would be happy to provide those to you as well. But we had that professionally costed by independent actuaries.

CHAIR: I think it would be a good idea to have those actuarial costings.

Mr STONE: Happy to do that.

Mr DAVID SHOEBRIDGE: In other words, you could expand the small claims within the existing scheme and have it paid on a needs and loss basis?

Mr STONE: Yes.

Mr DAVID SHOEBRIDGE: Remove the lawyers, private investigators and investigative costs for the small claims and whilst you would pay more in benefits you would save on the investigative schemes and you have costed that as basically neutral?

Mr STONE: Yes.

Mr DAVID SHOEBRIDGE: And no doubt you would also get a more timely payment for those small claims.

Mr STONE: Much more, and you would improve scheme efficiency.

Mr DAVID SHOEBRIDGE: Have you had a response from the Motor Accidents Authority to that suggestion?

Mr STONE: I am given to unofficially understand that they had their actuaries have a look at our proposal and do some costings on it, but I only know that very unofficially and I have never seen them.

Mr DAVID SHOEBRIDGE: They would be the same actuaries doing the profit estimates?

Mr STONE: It is Ernst and Young.

The Hon. SHAOQUETT MOSELMANE: In your opening statement you have identified five issues in relation to the Motor Accidents Authority: The scheme is the most expensive and you question why; and it is inefficient and you have questioned why.

Mr STONE: Yes.

The Hon. SHAOQUETT MOSELMANE: What, in your mind, is the central issue that we should be focusing on?

Mr STONE: Let me deal perhaps with the first two in terms of expense and inefficiency because they are matters that are before the Committee: does the Motor Accidents scheme have a problem because it is expensive and inefficient? Let us first talk about expense. There is a flip side to expensive: If you are injured in a motor accident you want to have our benefits package rather than anyone else's: You want to have a lifetime care and support scheme that is not available in Queensland—the premiums in Queensland will be $100 higher within 18 months following the introduction of the Lifetime Care and Support scheme; you want to have the no-fault benefit for children that is not provided for in Queensland; and you want to have an accident notification form that is delivering quick and early services.

Although we are more expensive than some that is because we offer a very good benefit package. Part of the argument as to why we are expensive is that we offer benefits. The other reason we are more expensive is that we have been unable to restrain price and insurer profits like they have elsewhere. There are two ways to do that: You have the regulatory power that they have in Queensland and the capacity to keep prices steady; or, you move on to a scheme where you do not have private underwriting, like they do in Victoria and the other States. That, in turn, comes with its own cost. It is really a form of cost shifting. Victoria can arguably deliver cheaper premiums, although again our actuarial work showed that if you put the Victorian scheme onto a private underwriting basis it would be about as expensive as ours. The reason they can be cheaper is because, in effect, they move the risk on to the State balance sheet and the State credit rating whereas we do not. This is a scheme that does not threaten the taxpayers because it is fully privately underwritten.

Mr DAVID SHOEBRIDGE: It is like the Qantas debate, only at a State level?

Mr STONE: I would have to think that through some more. There is a lot more to the Qantas debate than that.

Mr SCOT MacDONALD: You are drawing a long bow there.

Mr DAVID SHOEBRIDGE: The public underwriting?

Mr STONE: I do not have any frequent flyer points invested in the New South Wales motor accidents scheme. There was one other part to that answer I wanted to get to, that was the efficiency. There the Motor Accidents Authority, to be frank, is selling you a pup.

Mr SCOT MacDONALD: Not a pub?

Mr STONE: No. The way in which you present our scheme as being the most inefficient is that you do not compare apples with apples: You first of all strip out all of the lifetime care claims, as they are the most efficient because of the large sums of money involved and the relatively modest amount of legal fees and investigative costs compared to the size of the claims. If you remove the subset of the most efficient claims out of the system it—

Mr SCOT MacDONALD: Because by and large the claims go through without legals?

Mr STONE: Other States include those efficient ones in their system; our State does not include those efficient ones in the comparison. Some of them have legal costs because they have fault and they still collect their pain and suffering and loss of earnings, but they do not collect the future care lump sum. You are not comparing apples with apples. The second thing they do is they have Ernst and Young look at it as a full 10-year comparison over the life of this scheme. Now, if you look at that table I took you to earlier you will see in the first five years the profits were up 25-30 per cent and efficiency measures what percentage of the premium goes back in benefits to the claimant. If you have 30 per cent profit, even if you gave every other dollar to the claimant and had no administrative costs, the highest your efficiency could hit would be 70 per cent.

By looking at efficiency as a 10-year average you include all those very inefficient early years. If you just looked at it after the last five years, where the average profit comes down closer to 20 per cent, the scheme

becomes more efficient. In other words, it has become more efficient over time. A 10-year comparison, rather than a five-year comparison, of a mature and stabilised scheme, and excluding the lifetime care, skews the efficiency. If you factor those two things back in the Motor Accidents Authority actuaries, when I questioned them about it, said, "Yeah, that gets us pretty close to comparable to everybody else on efficiency." We are only grossly inefficient because you are not comparing us fairly with everybody else.

CHAIR: The Law Society in its submission states that from 2000 to 2012 insurer expenses have amounted to 16 per cent and legal and investigation expenses have amounted to 12 per cent. Do you agree with that assertion by the Law Society?

Mr STONE: I would need to go back and check the figures; you are at a level of data that I do not carry in my head.

CHAIR: Would you like to do that?

Mr STONE: I am happy to take that question on notice. But they are wise folk at the Law Society and I would not imagine they would have said it unless it is what is in the reports, but I am happy to check for you.

The Hon. SARAH MITCHELL: I want to turn to the issue of stakeholder advisory committees that you talk about in your initial submission on the Motor Accidents Authority. I am paraphrasing but essentially you seem a little frustrated that they have not been established and that the current engagement the Motor Accidents Authority is having with stakeholders, in terms of less formal meetings and forums, is not sufficient. Will you elaborate on that?

Mr STONE: Yes. To give them credit the Motor Accidents Authority are good at having stakeholder interaction at a variety of levels. They have a user group meeting which is tintacks such as forms and process guidelines. We go to that and there are robust discussions at that meeting. I query whether any changes occur because of it but at least we have the discussion. When we asked them they agreed to have a specific meeting with the legal groups. They have a monthly meeting with all the insurers and we said, "Well, just to balance things out and so you are not always hearing their side of the story, meet with us occasionally." They agreed to have that meeting and again that is a useful and robust meeting.

The Hon. SARAH MITCHELL: How regularly do you have those meetings?

Mr STONE: There are four or so a year. We had the first for the year on Wednesday. The Motor Accidents Council had a statutory role. It had statutory issues on which it could inquire and it was all the stakeholders in the one room looking at policy at a more macro level, whereas the Motor Accidents Authority reference group tends to look at tintacks procedural issues. There is not a forum in which all of the stakeholders get together to talk broad policy about scheme operation. I was on the Motor Accidents Council for a decade and it was a useful forum in terms of delivering information back to the stakeholders on a macro level and also in terms of giving the authority policy input at a macro level from the stakeholders. I can think of things that came out of that at a macro level where we all reached agreement and it was a driver for policy change.

To give you an example: I raised at that forum a legal issue that had come up about the risk of parents teaching their kids to drive. There were some cases that said if you knew a learner driver was no good then effectively you were at risk and a learner driver did not owe you the same standard of care. I raised that at the Motor Accidents Council and, to the eternal credit of the representative of Allianz, having listened to me make the presentation he said, "As a parent I cannot argue with you and as an insurer I am not going to argue with you; that needs to change." That was the driver for an amendment that was passed through the House without controversy to provide that those instructing learner drivers got the full benefit of the insurance policy without that legal quibble arising.

It occasionally had the capacity to be a forum for policy generation and ideas and that is one of the values in it. It was a two-way exchange of information: We learnt things by going there and I think they learnt a little back from us from time to time. There is just not the same capacity to raise those policy issues when it is just you sitting with the Motor Accidents Authority as a legal group and they are not receiving broad input, and that was what we saw as the value in it.

The Hon. SARAH MITCHELL: You would like to see a more formal committee established?

Mr STONE: There is a capacity there to establish them. I should say that we have written to the Minister about it twice. The most recent reply was received a day or two ago and at the moment the answer is no: We asked and we have been told.

Mr SCOT MacDONALD: Can I go back to your table and I think everybody appreciates what you are saying in terms of super profits and the rest of it. Every time there is a super profit you usually get a flood of people trying to get access to those super profits. We have seven insurers?

Mr STONE: There are really only five.

Mr SCOT MacDONALD: There are a couple of double-ups there.

Mr STONE: There are seven licences, but Suncorp own both GIO and AAMI, and Allianz own both Allianz and CIC Allianz.

Mr SCOT MacDONALD: The suggestion from Mr David Shoebridge or others might be that it needs a heavier regulatory hand. In your view, are there barriers to stop more entrants, to drive that price down? Perhaps that is not an easy question to answer.

Mr STONE: That is an easier question for the Motor Accidents Authority and the insurers to answer. If you want to impress people at nerdy compulsory third party insurance gatherings, ask them to identify the 13 compulsory third party insurers there were in 1988 and why they are down to five now. The reality is that all of the marginal players have been driven out. The Australian Prudential Regulation Authority has certain prudential and capital requirements that do not make it easy to enter the market.

Mr SCOT MacDONALD: Is that due to the size of our market?

Mr STONE: We have the biggest market in the country.

Mr SCOT MacDONALD: I mean in Australia, on a world scale where people can shift their capital.

Mr STONE: I cannot answer that. That is getting into international insurance territory. It is a better question for the Motor Accidents Authority. They keep saying that they do everything they can to encourage new entrants. In the years since 1988, the total of new entrants stands at zero.

Mr SCOT MacDONALD: The number is shrinking, rather than going the other way.

Mr STONE: There has not been a new entrant in a quarter of a century.

Mr DAVID SHOEBRIDGE: There are some great neoclassical, oligopolistic market structures to look at in the driest of economic discussions. They talk about how to get to a comfortable price point and how an oligopolistic market operates.

Mr STONE: The interesting challenge for us is that this is not a pure market. The reason it is not a pure market is that nobody really wants to have the cheapest price, because the cheapest price brings the highest risk. By that I mean that young kids driving beaten-up cars and who are likely to have accidents are the ones—

Mr SCOT MacDONALD: Insurers do not want them.

Mr STONE: They certainly do not want them at the lowest price. Because they are a considerably high risk, insurers want to charge them a considerable margin. The distortion in the market is that there is a punishment for being the lowest priced. You really want people who comprehensively insure their cars. That is why insurers tend to package the discounts into comprehensive insurance rather than comprehensive third party insurance. You want people who drive cars that are valuable enough to comprehensively insure and who care enough about their valuable cars to comprehensively insure them. They are the gold risk.

Mr SCOT MacDONALD: I read that you want a bit of separation between the marketing and the promotion.

Mr STONE: That is a separate issue. This is a mandatory product, yet I think insurers are allowed to include it—ask the Motor Accidents Authority—as part of their overall marketing budget. Our point is that if QBE want to sponsor the QBE Swans or if Allianz want a stadium with their name on it, terrific. Good for them. They get their tax deduction for it. I do not think that it should be part of their allocation under this scheme. Given that this product is mandatory, the only thing they should be allowed as an advertising deduction is price advertising. If you want to advertise on price, fine. That is being market competitive. But simple slogans such as "Lucky I'm with AAMI" or "QBE Swans" should not be subsidised by this scheme.

CHAIR: Is the profit percentage between the different competitors, the various insurers, roughly the same?

Mr STONE: I have no idea. That figure has never been published.

CHAIR: We are talking about a figure of up to 20 per cent.

Mr STONE: That is collectively what they have taken out of it.

CHAIR: Yes. Are you aware of much variation?

Mr STONE: I am not aware of that information. I do not know whether the Motor Accidents Authority even has that information. Remember that what insurers keep is only a part of their profit. The other part of their profit is the investment return they make on the money for the period that they hold it. That part is completely unknown. The Motor Accidents Authority has never produced figures on individual profitability between insurers.

The Hon. SHAOQUETT MOSELMANE: In your introduction you outlined that the Lifetime Care and Support Authority report on support services was of disappointing quality. You referred to the fact that 90 per cent of people surveyed were happy but that 32 per cent had problems with the services and 40 per cent of issues had not been sorted out. Are you saying the report was—

Mr STONE: The 90 per cent figure came from their annual report. It was disappointing that that was the sole comment on service delivery. They said nothing else about service standards or performance. They were asked a question and provided a set of data, and that is where I got the additional information. Frankly, the information gives rise to more questions worthy of being asked, such as: Why are one-third unhappy with service provision and what is the level of that unhappiness? If the sole question they asked was "Are you happy?" what was that in comparison to? It might be that they included their staff in that answer as well as their participants. I saw that the survey involved staff. I have no doubt that, with 80-odd staff to administer 700 people, they are very happy. I am not sure how that skews their results either. They could be a lot more specific about the service standards involved.

Perhaps that is the appropriate note to conclude on, as it is where I started. There are some good, hard questions to ask of the Lifetime Care and Support Authority. Many people will be happy and will receive good service standards, but this is the only forum where the agency is held accountable and, in my respectful view, government annual reports should not be puff pieces.

CHAIR: Thank you very much for coming along and for your substantial submission. Your evidence and your submission will certainly help us a great deal in our deliberations. Thank you very much for being with us today.

Mr STONE: As always, we are delighted to be here.

(The witnesses withdrew)

TIMOTHY JOHN CONCANNON, Solicitor, Injury Compensation Committee, Law Society of New South Wales, sworn and examined:

CHAIR: I think you heard the evidence given by representatives from the Bar Association.

Mr CONCANNON: I heard the last section of the evidence, not all of it.

CHAIR: I will start by asking you about insurer profits. Reference is made to that in the Law Society's submission. We hear that the average is meant to be about 8 per cent but that it has consistently been about 19 per cent. Would you like to comment on the reasons for that?

Mr CONCANNON: The real issue is the variance in the prospective profit that is used as the basis for the calculation of premiums in the first place. That is provided to government. It is based on actuarial analysis of what the claims costs will be in the future—and that may be a number of years into the future. Regrettably, the reality is that over the history of the scheme those estimates, which have traditionally been around 8 per cent, have been affected by the far less than anticipated claims costs of the scheme. That has happened in almost every year of the system thus far, to the extent that there are variations of up to 18 per cent on an annual basis. I think the Law Society's point is that one has to look hard at why the actuaries are getting this wrong so regularly because that seems to me to be the source of these super profits that I heard Mr Stone discussing earlier.

CHAIR: Do you have any view as to why they are getting it wrong?

Mr CONCANNON: I am not an actuary, but I think they do tend to err on the conservative side. I know in the annual report they traditionally estimate a range of ultimate premium realisation, depending on whether claims are 10 per cent less than what they anticipate, or whether they are about right or 10 per cent more than they anticipate. Experience teaches us—and we have now been going for 15 years—that there is something going wrong. I am not an actuary, unfortunately. I cannot give you an answer to that, but it may well be simply that actuaries have just been too conservative and have allowed more margin for error for the insurers than should have been the case.

CHAIR: Consistently wrong since the beginning of the scheme up to the present time.

Mr CONCANNON: Exactly, yes.

CHAIR: In relation to the question of expenses, the Law Society's supplementary submission states that from 2000 to 2012 insurer expenses have amounted to 16 per cent and those for legal investigation expenses, 12 per cent. Can you amplify that statement?

Mr CONCANNON: I think that was taken purely from the annual report, so the figures speak for themselves. I have a feeling that you have a share of profits on top of that as well, obviously.

CHAIR: Yes.

Mr CONCANNON: If you add those two together, it is somewhere around about 35 per cent—I think, from recollection, 19 plus 16, by my maths.

CHAIR: Yes.

Mr DAVID SHOEBRIDGE: I was going to ask you about Smalley, or Smalleys?

Mr CONCANNON: I have heard pronounced in different ways, but I refer to it as Smalley. I could be wrong.

Mr DAVID SHOEBRIDGE: Let us call it Smalley, S-M-A-L-L-E-Y; the Smalley decision.

Mr CONCANNON: Yes.

Mr DAVID SHOEBRIDGE: Could you explain the Law Society's views about the original Smalley decision and the impact of the decision, and then what the Motor Accidents Authority has done in terms of the guidelines?

Mr CONCANNON: Obviously, when the society wrote these initial submissions, this was before the action had been taken by the Motor Accidents Authority in response to Smalley.

Mr DAVID SHOEBRIDGE: Have you read the Bar Association's submission?

Mr CONCANNON: I have not, I am sorry.

Mr DAVID SHOEBRIDGE: They have some issues with the guidelines.

Mr CONCANNON: I am aware of what their view was when the move for changes to the guidelines was being discussed. I suspect it is along similar lines to what they were talking about there. I think it would be fair to say, without adopting all of the reasoning that I saw the bar gave in its submissions, that the proposal it was talking about was certainly something that the Law Society supported.

Mr DAVID SHOEBRIDGE: Could you wind us back to what the Smalley decision is about? It is about section 81 and exemption from the low-cost cars process.

Mr CONCANNON: Yes. Smalley effectively made it a lot easier for exemptions to be obtained. It is as simple as that. If an insurer has not made a decision within three months, which they are required to do under section 81 of the Motor Accidents Compensation Act, they are deemed by reason of subsection (3) to have denied liability. What Smalley effectively decided was that all of those decisions would therefore be a denial of liability purely because an insurer has not made a decision within that three-month period. Experience tells us as practitioners that a significant proportion, if not most, of section 81 notices that are issued do not get issued within that three-month period. I have no doubt that, based on that reasoning, it was necessary for the Motor Accidents Authority to do something in response to the Smalley decision.

Mr DAVID SHOEBRIDGE: If there is a denial of liability, then under section 81 the Claims Assessment and Resolution Service cannot address it. It is dealt with in the District Court.

Mr CONCANNON: Exactly, yes.

Mr DAVID SHOEBRIDGE: That is a much more expensive hearing.

Mr CONCANNON: Yes.

Mr DAVID SHOEBRIDGE: A claimant can appeal from a Claims Assessment and Resolution Service hearing, but an insurer cannot appeal from such a hearing in most cases.

Mr CONCANNON: Yes, that is correct. There are administrative remedies that potentially are available to insurers for most purposes, yes.

Mr DAVID SHOEBRIDGE: For insurers getting all matters straight to the District Court, there may be a tactical benefit in that it does not give the claimant two chances to get a fair outcome.

Mr CONCANNON: Yes. The problem I envisage—you asked me about the position in terms of the guidelines—is that, unfortunately, you will have this enormous raft of cases that now have to be dealt with at the Claims Assessment and Resolution Service but which will be non-binding on the insurer because you still have the section 95 difficulty there.

Mr DAVID SHOEBRIDGE: If I understand what the guidelines have done, it is that previously if there was a denial of liability, they were more complex cases in which there is a need to call witnesses, and they are properly dealt with in the District Court. In response to the Smalley decision, which said that any time there was not a decision within three months there is a denial of liability, and they all go to the District Court under Smalley, the authority has now said that basically everything goes to the Claims Assessment and Resolution Service, unless it is deemed to be complex by the assessor.

Mr CONCANNON: No. You have to differentiate, and this is what Smalley did as well, between breach of duty of care and the various aspects of liability. A breach of duty of care is just one aspect of liability. You have got causation, you have got a duty in the first place and you have damage. If an insurer says that it does not have any responsibility to pay anything but admits a breach of duty of care, that is not liability. What they have effectively done in these amended guidelines is to say that only in circumstances when there is specifically a breach of a duty of care denied will you get an exemption. I think also that they have retained the exemption for infants or persons without capacity.

Mr DAVID SHOEBRIDGE: So you might have complex cases in which they say, "We are not going to pay you a dollar. We are not at issue about a breach of a duty of care but we say that none of your injury is caused by the motor accident", or, "You don't fall within the statutory scheme for a variety of reasons."

Mr CONCANNON: Correct.

Mr DAVID SHOEBRIDGE: So those complex cases are now going before the Claims Assessment and Resolution Service.

Mr CONCANNON: It could still be dealt with at the Claims Assessment and Resolution Service, yes.

Mr DAVID SHOEBRIDGE: And they are not binding on the parties. Then you can be re-litigating them in the District Court. Is that the issue?

Mr CONCANNON: Potentially, yes. The difficulty with that, as I say, is that the costs regulations as they are—which is another cause of ongoing concern, as you have seen in our submissions—just do not reflect the reality. If you get an exemption from the Claims Assessment and Resolution Service, you are not affected by the costs regulations. However, if you have to go through the Claims Assessment and Resolution Service and then have to go through court and it is really an insurer's decision that makes you go to court, all you get for that extra work, having gone to court, is a 2 per cent extra allowance under the costs regulations, and I think you get a $2,100 a day allowance for counsel. It seems to me that there is an inherent inequity there as far as the cost penalty on the claimant is concerned in those circumstances. That is certainly something that I think will have to be looked at. As I understand it, there will be another investigation into the costs regulations this year. It should be an essential tenet of that investigation, if it does proceed.

Mr DAVID SHOEBRIDGE: If I understand your position, it is not that you just increase the costs and pay for an extraordinarily lengthy process; it would be a more refined view of the guidelines so you are not constantly going through this two-step process, or doing an unnecessarily.

Mr CONCANNON: Yes, exactly.

CHAIR: The Deputy Chair has a question. I omitted to give you an opportunity to offer any additional comments following your written submission and whether there is anything you wanted to say in a general sense.

Mr CONCANNON: I did want to say just a few general things.

CHAIR: We will let you do that first, and then the Deputy Chair will have a question for you.

Mr CONCANNON: At the outset, I thank you on behalf of the Law Society for the opportunity to give evidence today. The society, as I am sure you well know, represents all lawyers in New South Wales, including those who act for injured people and those who act for insurance companies. As you have heard, I am a member of the injury compensation committee of the Law Society. I am also a practitioner with 25 years of private practice experience in the area of motor accidents. That was initially in the country and for the last 21 years has been in the city. I have also been a claims assessor for the Claims Assessment and Resolution Service for the past 10 years.

I should make it clear at the outset—and I know I have already said a few things—that I am giving evidence here today not as a claims assessor but as a private practitioner invited by the Law Society. I commend to you the written submissions the society has provided to the Committee dated 12 November 2013 and 30 January 2014. On rereading these submissions I accept that they do focus primarily on the functioning of the dispute resolution mechanisms at the Motor Accidents Authority rather than on, for instance, the regulatory

functions of the Motor Accidents Authority, but I think this focus is inevitable and it reflects the experience of my committee's members on a day-to-day basis.

Overall the society believes that the Motor Accidents Authority operates a very efficient and good system of dispute resolution. However, we believe that changes can be made which will improve scheme efficiency and reduce scheme costs. Most of those changes are outlined in our written submissions, but there is another I would like to raise. That relates to the insurers' obligations under section 83 of the Motor Accidents Compensation Act. That section obliges them, as the claim goes ahead, to pay for all reasonable and necessary medical treatment. My experience is that the dispute resolution system used to deal with any medical disputes about those treatment issues makes it far too easy for insurers to dispute the reasonableness of claimants. In my view this potentially serves to restrict the claimants' access to the medical treatment required, and in many cases that delays their rehabilitation.

I know that the Motor Accidents Authority was starting to look at this issue leading up to the latest reform process, but it seems that this should become a real priority. In my experience if there is one issue that impacts on client satisfaction levels with the scheme, it is whether they can access the treatment they require. Perhaps better use can be made of section 84A of the Motor Accidents Compensation Act, the section that enables the claimant in appropriate circumstances, for the avoidance of financial hardship, to access small lump sums for treatment purposes. In a lifetime care context, there is a pilot scheme where direct payments have been provided to some participants in the scheme. That seems to be consistent with providing increased autonomy for individuals. Overall that could improve the satisfaction levels of injured people.

The Hon. PETER PRIMROSE: If the costs of CTP green slips go up again, is that because we do have a no-faults scheme in New South Wales?

Mr CONCANNON: No, my view is that the no-fault scheme would have potentially increased the cost of the scheme. In my view it was evident from the actuarial reports provided as part of the reform process that the extra administrative costs of fundamentally converting the nature of the scheme were not properly taken into account. That is my real concern about a no-faults scheme, apart from philosophically having an issue with not giving people the right to pursue a common law action. More importantly, from a purely financial point of view, the scheme had the potential to explode. Unlike the Transport Accident Commission and New Zealand we are dealing with a privately underwritten scheme. If the insurers find the cost of the scheme blowing out, there is every chance that they will desert. That would be catastrophic for the functioning of the motor accidents system in New South Wales.

Mr SCOT MacDONALD: On page 2 you discuss section 81(5), which states that a condition of the insurer's licence is an obligation to admit or deny liability within a three-month time frame. You call that a compliance issue. Please tell us about compliance.

Mr CONCANNON: I have been involved over the last two to three months with the Motor Accidents Authority looking at amending the section 81 notices to reflect the Smalley decision. I think they are looking at beefing up that issue to make it a lot easier for an insurer to get section 81 notices right and to provide a consistent framework for them to know the law and get it right. I think it is fair to say that they have been receiving mixed messages from courts as to what should or should not be a section 81 notice.

Mr SCOT MacDONALD: Is there any merit in publishing it, making it more transparent or putting it on a website?

Mr CONCANNON: Publishing section 81 (5)?

Mr SCOT MacDONALD: The level of compliance.

Mr CONCANNON: Absolutely, and I think that is what the Motor Accidents Authority are looking at. One thing they are looking at is dealing with section 81, because they recognise that it is not just a question of amending the claims assessment and handling guidelines. They have to beef up the compliance department as well. Mr Stone mentioned the lawyers' forum. The head compliance officer of the Motor Accidents Authority attended the meeting we had last night, and that reflects a significantly greater interest in pushing these compliance issues. If the Smalley decision had the negative impact it could have, the system could fall down.

Mr SCOT MacDONALD: Could this Committee look at a possible recommendation along the lines of more transparency or putting compliance performance on a website?

Mr CONCANNON: Absolutely.

The Hon. SHAOQUETT MOSELMANE: On page 7 of your submission, "12th Review of the Exercise of the Functions of the Lifetime Care and Support Authority", you applaud the scheme providing for those catastrophically injured in motor accidents, regardless of who was at fault. You go on to say:

> However the Committee is concerned that some recent developments within the Scheme reflect a tendency to err on the side of paternalism over the individual autonomy of participants.

Please elaborate on the recent developments.

Mr CONCANNON: I think those recent developments are outlined in the submissions. One was the amendments to the legislation, the Motor Accidents (Lifetime Care and Support) Act, in the middle of 2012. That was in response to a decision of the Court of Appeal in the matter of *Thiering v. Daly*, which effectively raised the prospect of a claimant not only being able to make a claim for expenses paid by Lifetime Care but also having the right to make a claim at common law against the third-party insurer for gratuitous or unpaid assistance provided by family and relatives. Effectively the Lifetime Care amendments said that what is reasonable and necessary is largely what Lifetime Care says is reasonable and necessary, so avoiding the potential impact of Thiering. That was before Thiering was overturned by the High Court and the whole impetus for the legislative change was pulled out from underneath them.

The other concern is the Lifetime Care and Support Guidelines. To me they are becoming increasingly prescriptive and exclusory. Having said that, I have already mentioned that a pilot scheme is commencing for what is known as direct funding, which effectively is that the carer himself or herself can choose who does their cleaning or personal care, rather than running it through a service provider approved by the Lifetime Care and Support Authority.

That is a positive development. Obviously, there has to be training to enable direct-funding claimants to get properly organised, because you do not want people with significant brain injuries potentially making silly decisions to do with their care or treatment needs. But a large number of those under Lifetime Care are not brain damaged. They are people in wheelchairs, so in most cases quite capable of making their own decisions. In my experience of people for whom I have acted under the Lifetime Care and Support Scheme, they really resent people being pushed upon them, who come into their houses to provide care of either a personal or a domestic nature that could be provided by others with whom they would be more comfortable. The Lifetime Care listing the carer providers they believe is appropriate does not seem to me to fit with the concepts of autonomy and freedom of decision-making. And that, in my experience, is something that the disability community values highly because, through no fault of their own, often they have been pushed into a position where their decision-making processes are already limited.

The Hon. SARAH MITCHELL: I take you back to the issue of reasonable and necessary treatment. In its submission your committee says that there should be an external system of review of what participants think is truly reasonable and necessary for their treatment. Are you aware of instances where participants have received treatment that they think is not necessary or reasonable?

Mr CONCANNON: Yes, absolutely. I had one classic scenario where, in circumstances where she only had a single bed previously, a lady asked for a modified double bed because she now had a partner. There was a denial of the cost of that double bed because, strictly speaking, it did not relate to her needs, it related to the needs of the couple. These are commonsense matters but unless someone external to the organisation is telling them, "That cannot be right, that just does not make sense", it seems to me there is a real prospect for them to become increasingly divorced from reality. I am not saying that it necessarily does at the moment but there is that prospect.

The Hon. SARAH MITCHELL: And if there were to be an external review mechanism set up, how would you envisage that operating and who would you suggest would be a potential organisation—?

Mr CONCANNON: You have to make it accessible because, theoretically, there is an external mechanism—the Supreme Court. But there is a cost associated with that and an adverse cost risk if you lose. So really, it is not an accessible option.

Mr DAVID SHOEBRIDGE: A Supreme Court hearing for a double bed.

Mr CONCANNON: Exactly, you just would not do it. Unless you were dealing with major modifications to a house or something, that just would not happen. But there is the prospect of using Claims Assessment and Resolution Service [CARS] assessors in that role. To some extent they already have a role in dealing with motor accident injuries, although I do not think there has yet been a panel that has actually had to hear one of those but it is an option. I would have thought that one has to provide some access to legal costs to be able to run that sort of case properly. At the same time, we must recognise that to be paying significant amounts for legal costs may not be cost effective in many cases where we are dealing with medical and related expenses. But there are cases that do involve significant costs and I think there should be an allowance in there for those legal costs.

Mr DAVID SHOEBRIDGE: That is not the only aspect of the Lifetime Care and Support scheme where there might actually be issues that the claimants or participants in the scheme have with the Lifetime Care and Support. I thought there were about 700 participants in the scheme at the moment?

Mr CONCANNON: It is closer to 800 now.

Mr DAVID SHOEBRIDGE: And it is growing year by year?

Mr CONCANNON: Yes.

Mr DAVID SHOEBRIDGE: Because there are more entrants coming in than people leaving it, so it is going to be a bigger part of the system going forward. Is that your understanding?

Mr CONCANNON: Yes, I think that you are going to have a tail issue there at some point down the track. I think at the moment the figures suggest that the estimates of the cost of the scheme have been overblown, rather than underblown. It looks okay at the moment but who is to know in 10 or 20 years time, when it becomes a fully mature scheme because we are still only seven or eight years down the track.

Mr DAVID SHOEBRIDGE: Given it is largely administrative, is there a need for something like an Ombudsman with a kind of Ombudsman's power over the Lifetime Care and Support Scheme which would be less litigious but sit there as a kind of watchdog?

Mr CONCANNON: I think the Law Society would support that. It is certainly one alternative anyway.

The Hon. SHAOQUETT MOSELMANE: We have some suggested questions and I will ask this one: What key recommendations would you like the Committee to make to the Motor Accidents Authority and/or the Lifetime Care and Support Authority?

Mr CONCANNON: If there is one on behalf of all lawyers in New South Wales it would be to remove the pre-filing requirements in sections 89A to 89D. It gets mentioned every year, or at least for the last couple of standing committees, and I appreciate that it is a legislative fix but it is a huge issue. I have not mentioned this in our submissions; I think that section 95 has to be amended so that it does not refer to liability but refers to breach of duty of care because that is the real problem, as a result of the Smalley decision. If you amend section 95 to refer to breach of duty of care rather than liability, then you will remove to a great extent that problem with the non-binding nature of CARS' decisions. The costs issue is also something that still causes problems. I was on the 2008 and 2010 working party dealing with costs and it is still here six years later. I am assured that there will be movement this year but that remains to be seen. I would like some urgent movement on that and not just a redoing of the regulation, as has happened to date.

Mr DAVID SHOEBRIDGE: I have a question about late claims. You put in your submission what is, to me, an extraordinary figure, that when insurers contest late claims—these are claims outside the six-month period—they lose 90 per cent of the cases they contest. Can you explain that to the Committee?

Mr CONCANNON: It is probably a little less in the last two years. I think it is down to 83 per cent for the last year that is commented upon in the annual report. I think the real issue is that insurers prefer to err on the side of denying a late claim. It is rare that, in practice, an insurer accepts a late claims dispute, both as to whether it is full and satisfactory. "Full" maybe but "satisfactory" is another issue altogether. Even in cases

where there are very good reasons why a claimant—and I always thought that a good reason would be the fact that they have had Workers Compensation rights that are already available to them that are paying for their loss of weekly compensation and their medical expenses.

Mr DAVID SHOEBRIDGE: So they have not turned their minds to the Motor Accidents Authority?

Mr CONCANNON: They did not even know that there was a motor accident possibility there. They may not even have gone off work until two years down the track. I think the insurers do have to be a bit more realistic about this. I think one of the proposals in the reform process was a good one, that one view would be to extend the six months to 12 months. That will take out a lot of disputes and they are costly disputes because, whilst you are only getting $880 as a claimant for running the dispute, the reality is that it can potentially involve the claimant in a lot more than that because the solicitor has to prepare three or four statutory declarations, obtain medical evidence and obtain clinical notes from doctors. It is a very expensive process. There are also the administrative costs at the Motor Accidents Authority.

CHAIR: You are assuming that, if it is extended to 12 months, applicants are going to get their applications in on time. There will be a drop if we remove these contested situations.

Mr CONCANNON: Yes.

CHAIR: But are we still going to have the same percentage of people putting in their claims late, even if it is 12 months instead of six months? What would you say about that?

Mr CONCANNON: That is largely crystal ball territory, I suppose. I think it would certainly reduce the number of late claims disputes. Certainly, I agree there could be the possibility down the track that it will just move that period of lodging the claim forwards or backwards, whichever way you want to look at it. I think it will certainly reduce the number of late claims disputes but our preferred position would be to remove them completely, to be honest.

Mr SCOT MacDONALD: David asked the question that I was going to ask, that 80 per cent now are coming in the six-month period. Does the other 20 per cent fall in the six to 12 months or drag out forever?

Mr CONCANNON: I have not seen figures on that, I must say.

Mr SCOT MacDONALD: Rather than moving the goalposts, surely there must be a better way of expediting it or making it less combative?

CHAIR: Is the fact that they are extended from six months to 12 months going to make it more difficult for insurers to investigate claims?

Mr CONCANNON: It can, but that really is not an issue that gets taken up at the level of a late claims dispute anyway. You really deal with issues of prejudice only when you are more than three years down the track. A number of cases deal with that. But issues of prejudice do not become relevant until there is an expiry of a limitation period, which, as I stated, is three years. I think that is where the large prejudice generally is suffered by insurers. When you are dealing with that sort of level of delay, I would not have thought six months really.

Mr DAVID SHOEBRIDGE: But when you have systemic failure—and insurers getting it wrong 83 per cent or 90 per cent of the time has got to be systemic failure—is that not when the authorities should be stepping in and fixing up the guidelines, and sitting down and talking with insurers and asking, "Why are you doing this? What do we have to do to direct you to fix up your practice?"

Mr CONCANNON: I agree.

Mr DAVID SHOEBRIDGE: What have you seen the Motor Accidents Authority do in that regard?

Mr CONCANNON: I think it is an issue I recall being discussed. I am not party to discussions between the insurer and the MAA, but I have a feeling that it was being looked at. I do not know concretely what has been done, if anything.

Mr SCOT MacDONALD: I tend to agree with David. Many resources seem to get consumed, from your and the previous witnesses' reading of these late claims. Surely we must be able to make a recommendation for either better compliance or a mediator of some sort?

Mr CONCANNON: I would absolutely support that. I thought that is what I had indicated. Compliance needs to be beefed up on those late claims disputes. I would have thought that there must be certain presumptions in favour of a Claimaint having a full and satisfactory explanation in certain instances. For instance, as I indicated, the workers compensation situation is a classic example. They should be on notice of that right from the start. Why should the insurer not be accepting that? Obviously, there are gross periods of delay that still will have to be litigated, but if you are dealing with a case that is six or seven months down the track, where is the harm, really?

Mr DAVID SHOEBRIDGE: Surely a guideline to the effect that if the claim is within two years and the claimant has been receiving workers compensation benefits for the whole time, unless there are extraordinary circumstances, the insurers should accept that that is a full and satisfactory explanation?

Mr CONCANNON: Absolutely.

Mr DAVID SHOEBRIDGE: Why are we not getting that from the Motor Accidents Authority?

Mr CONCANNON: I do not know the answer to that, I am sorry.

CHAIR: You have raised this issue previously and it has gone nowhere?

Mr CONCANNON: Late claims, yes.

CHAIR: Thank you for attending. Your assistance with our deliberations certainly has been of great value.

Mr CONCANNON: Our pleasure.

(The witness withdrew)

(Short adjournment)

ANDREW STEWART MORRISON SC, Australian Lawyers Alliance, and

JNANA GUMBERT, New South Wales State President, Australian Lawyers Alliance, affirmed and examined:

CHAIR: In what capacity are you appearing today?

Dr MORRISON: I am a Senior Counsel at the Bar. I have been practising in this field since 1976. I am a former director of the Motor Accidents Authority and a former acting District Court judge.

Ms GUMBERT: I am also a barrister.

CHAIR: Would either of you like to make an opening statement?

Ms GUMBERT: Just briefly. The Australian Lawyers Alliance thanks the Committee for inviting us to attend today. The Australian Lawyers Alliance is a national organisation of lawyers primarily involved in representing the rights of injured people. It is estimated that our members represent up to 200,000 people per year. So we believe that we are well placed to assist the Committee in these inquiries. We have been sitting here this morning and heard the evidence given by the NSW Bar Association and the Law Society. The Australian Lawyers Alliance endorses the submissions and the evidence given by those organisations. In relation to the review of the motor accidents scheme, the ALA submits that the scheme in most respects is extremely good and well-functioning. Obviously, some aspects of it can be improved. Our submissions address that and, of course, you have heard more of that from the two other organisations this morning. Overall, this scheme addresses what it is supposed to and provides good compensation for a large amount of people who are injured in motor accidents every year.

Mr Stone on behalf of the Bar Association provided the Committee with a copy of the joint submission made by the Bar Association, the Law Society and the Australian Lawyers Alliance. That submission was provided in response to the legislation that was proposed to be introduced last year. Reference was made to an actuarial report that had been prepared in support of that submission. I have a summary of the actuarial costings here and can provide it to the Committee to accompany that report, if that would be of benefit.

CHAIR: Yes, thank you. That is a summary?

Ms GUMBERT: It is a summary of the costings the actuaries prepared. It is a summary by the actuaries, Deloitte's.

CHAIR: Is there a more full report?

Ms GUMBERT: There is. I can take that on notice and provide a copy of that if it is available.

CHAIR: Thank you. We would appreciate it.

Ms GUMBERT: The only thing I add is that in relation to trying to improve the existing scheme the ALA continues to try to engage constructively with the MAA, with government and other stakeholders to do what it can to try to improve the scheme. I will ask Dr Morrison to continue.

Dr MORRISON: I shall deal briefly with some aspects that perhaps were not covered in particular by Mr Stone. I hope not to repeat what he has skilfully dealt with. I shall deal with an element of comparative costs, the question of complexity of the current scheme, causation, which we dealt with in our submissions to you, the WPI, and just say something briefly about the proposed amendment that was rejected last year. First, regarding comparative costs, it is not just one element of lifetime care that makes our scheme more expensive than other non-comparable schemes. In fact, our scheme has four elements that are free of the issue of liability. In particular, apart from lifetime care there are children, those who are involved in a faultless accident and the ANF element of the scheme about which Mr Stone has spoken. Those elements combined make our scheme appear to be more expensive than States such as Queensland, but would any of us wish to give up those elements? Some older Committee members might remember the outcry when premiums exceeded $300 for third party insurance, now called green slips, in the early 1980s. That would be vastly more than the $550 we are talking about these days. Relatively speaking, premiums have not increased since the early 1980s. After taking inflation into account, they have decreased. That should be compared with premiums in England. I am told that

a third party premium in England is of the order of about £850. They have much more appropriate compensation, but it is vastly more expensive.

CHAIR: Benefits also have been curtailed too?

Dr MORRISON: Very much so. That explains the difference. That is why one needs to compare apples with apples. On complexity of the scheme and its efficiency, some elements desperately need improvement and would reduce its cost, bureaucracy and delays. One is MAS, which remains an enormous source of delay and complexity, particularly the propensity of insurers to keep going back to MAS if they get an answer they do not like. If someone gets over the 10 per cent plus whole of person impairment, I have seen cases in which insurers have gone back five and six times seeking a review on matters with lengthy delays on each occasion. MAS is a real encumbrance.

Section 89A is the requirement that before you can go to a Claims Assessment Resolution Service hearing you have to have a settlement conference but you have to have all of the material which you would have as on hearing before that settlement conference. The consequence is that if the matter settles there you have prepared the case for hearing but you settle it and all of that money is wasted and the poor old claimant recovers only a part of the costs expended. So the claimant goes backwards. An insurance company can afford that cost; the claimant, who is already undercompensated, cannot. You have heard Mr Concannon talk about extension of time. We would express similar views. That is a real problem.

We mention causation in our submissions. It is a real problem. The law says that the test of liability is whether or not the motor accident is a cause of the injury. The tendency is for medical practitioners, because of their training and background, to look for the cause. A person who has a pre-existing back problem which is exacerbated in the accident will find the medical practitioner weighing up which is the greater cause. That is not the test. If the person was functioning before and is not functioning after the motor vehicle accident then the accident is both a cause and in that case the immediate cause of the disability. The propensity of medical practitioners in the Medical Assessment Service [MAS] to apply the wrong test of causation is a significant problem and repeatedly causes claims to be taken to court under the Supreme Court Act for review. But the only power of the court is to send it back to be done again.

Whole person impairment [WPI] is assessed under tables which were expressly never intended for this purpose which create great injustice and which are ultimately quite capricious. The fact of the matter is that two different competent practitioners can come up with results that are widely different depending upon their point of view, their background and their degree of emphasis. That means that ultimately, and particularly in the area at around about the 10 per cent, it is a matter of pure luck whether a person will get over or under the 10 per cent and yet very important consequences flow from that. If the amending legislation had gone through even greater consequences would have flowed. That is of great concern. We have suggested what our views are on the WPI in our submissions.

The last point is the amendment bill. In the prehearing questions on notice addressed to the Motor Accidents Authority [MAA] and their answers the MAA says that the amendment bill would have paid benefits faster and at reduced costs. Well, let us test that for a moment. How could it be faster than the accident notification form [ANF] to put a person onto long-running weekly or fortnightly payments? How could they have made their decision any faster than the decision-making process of the ANF as it presently exists? That does not bear examination. Whatever scheme you bring in, particularly a scheme with such financial consequences for insurers, is likely to be slow and very bureaucratic before it decides to award large sums of money. The staffing required to bring in such a scheme is likely to be extraordinary. We only have to look at what happened to the workers compensation scheme and how extraordinarily bureaucratic that has become to see that is a way we would prefer not to go.

The second aspect that ought to be mentioned in this regard is that in any weekly or fortnightly payment scheme you are providing a positive disincentive for recovery because if the person gets better the money gets cut off. Lump sum payments have, from long experience in this area, a tendency to get people back to work in some form or another. That is a very significant advantage to the current scheme. The only other matter is this: Nothing in the material that was supplied to us deals with a major loss for insurers in the change, and that is the loss of their investment return. At the moment they get something in the order of $1.5 billion a year which they invest and they keep and get the returns on until such time as they pay out the participants in the scheme. That is a very significant source of return for them.

If we go onto a scheme of weekly or fortnightly payments that subsidy to the scheme from the investment of those moneys is loss to the insurers. That is a huge problem. When you add that to the very significant prudential margin which the insurers would have to add particularly in the early stages of a new scheme, the suggestion that such a scheme would be cheaper just does not bear examination. Ms Gumbert might like to comment further on that aspect.

Ms GUMBERT: Yes. I think that there is certainly no guarantee that a new scheme would be cheaper. In fact, there is a lot of concern that the new scheme would end up being more expensive than the current scheme. In addition to the points that Dr Morrison has raised, there is the concern that, as I think was predicted in the report that announced the introduction of the new scheme, propensity to claim would increase from its current rate of somewhere under 50 per cent to up over 100 per cent. The reason it is over 100 per cent is of course because of the risk that no-fault schemes introduce fraudulent claims. That is the experience of other no-fault schemes around the world. So there would be more claims. There was an estimate that there would be 7,000 more claims per year in a no-fault scheme but it could of course be more than that. These are just estimates, and the scheme could blow out considerably. It would be untested.

What we are dealing with at the moment is a scheme that has been tested for many years that we know with fairly good accuracy where the savings would be if we made changes. That is what our actuarial report does. It is able to say based on years of data that if you made certain changes to the scheme it would result in fairly certain savings. In that respect it is a much safer option and more likely to deliver the savings than the proposed new scheme would have.

CHAIR: In your supplementary submission you say:

> The history of the scheme is of clear underestimation of future profits through insurers' over-estimation of future liabilities ... Profit levels for any given year are found in subsequent years to be a gross underestimation ...

I think we are comparing the figure of 8 per cent against the historic average profit of nearly 20 per cent. Then you go on to ask this question:

> The questions to be asked of the MAA must include whether the MAA lacks the power to control prices and excessive profits or whether it has failed in its duty in this respect.

What is your answer to that question that you pose?

Dr MORRISON: Our answer to that question is to say that that is a question which ought to be directed to the Motor Accidents Authority, because it has to be one of those two. We are not in a position to say which it is. They do not seem to complain about lack of regulatory power but that is the only alternative explanation for a failure to use the powers they have. But as to which it is, I think that is a question best directed to them.

CHAIR: Do you have a view?

Dr MORRISON: I do not think we are in a position, particularly given the limited information we get into how they exercise their functions and how they deal with insurers, to give an explanation as to why they have failed to keep premiums to within cooee of the 8 per cent that they aimed in the scheme construction to achieve.

Mr DAVID SHOEBRIDGE: What about comparing the New South Wales statutory powers to the Queensland statutory powers where they seemed to have reined in. Have you looked at the two sets of statutory powers? You may want to take the question on notice, but do you have any view?

Dr MORRISON: The Queensland scheme, as I understand it, simply gives a power to refuse increases. The New South Wales scheme gives a power to monitor rather than specify. As to which approach is desirable, it really depends. But the Queensland scheme has at least kept increases in the last round to $15 compared to a much greater increase. It is a very hard to see on the basis of the insurers' submissions, insofar as we were given access to them, the basis for such a large increase on the last occasion, particularly given the general pick up in the economy and the likelihood that income from investment returns would also pick up.

CHAIR: You talk about excessive profits. What solution would you offer to that?

Mr SCOT MacDONALD: Less profits.

Ms GUMBERT: We made a proposal in the joint submission, which was when profits reach a certain amount—and I think we suggested 12 per cent—the Motor Accidents Authority could have the power then to impose a levy on the super profits that exceed that amount and that would be one way at least of curtailing it and perhaps keeping something there in reserve for when things are not as good.

CHAIR: If the tail end blows out?

Ms GUMBERT: That is right.

The Hon. SHAOQUETT MOSELMANE: With regard to your submission in relation to the Motor Accidents Authority, you mention on pages 13 and 14 insurers denying claims because they have been lodged late. You make the comment that the requirement for claimants to provide full and satisfactory explanation for the delay in lodging claims has become an overwhelming, difficult and time-consuming exercise. The MAA has advised that only a small proportion of late claims are denied by insurers. What are your views about this?

Ms GUMBERT: I have seen the response from the MAA that indicates that something in the order of 14 per cent of claims are lodged late but of those the vast majority are accepted. I have to say that does not accord with my experience so I would like to look into those figures some more and perhaps I can take that on notice to some extent. Certainly my experience is that the vast majority of late claims are rejected, certainly initially rejected. Some of them will then be accepted after statutory declarations are provided. Sometimes it takes multiple goes before that would become accepted by an insurer and then there is still quite a significant amount of late claims that end up proceeding all the way through to an assessment, either at the Claims Assessment and Resolution Service or sometimes in court depending on the liability situation in the claim.

The figures that have been given do not accord with my own experience of the difficulties that claimants are facing but even on those figures I think it was indicated by the MAA that of the 60 or so claims that get referred to assessment or that were referred to an assessment in the last year, only 10 were disallowed. If that is the case and there were so many late claims made obviously in the first place that it then had to go through this process of providing explanations and at the end of the day only 10 were disallowed to be made, is that really worth it? I mean, is that worth the vast cost, time and resources that go into this to knock out 10 claims from the scheme?

Mr DAVID SHOEBRIDGE: Is there also not a philosophical issue in your submission about the fact that someone has paid for the premium to cover that risk and knocking it off on the basis that it is a late claim when the risk has already been paid for—the insurance company has received the money to pay for it—involves a philosophical issue as well as a practical issue?

Ms GUMBERT: That is exactly right and that is the point we make, that this is a claim for which a premium has been collected and why should that claim be capable of being rejected altogether simply because it has been made late and sometimes late by a matter of days or weeks in circumstances where there is absolutely no prejudice and, as has been said before in this hearing, prejudice is not even a relevant matter to be taken into account. Yes, it is grossly unfair. There must be a better way of dealing with it. The fact is that there are already great incentives for people to make claims on time. The reason people do not make claims on time is because they are ignorant of their rights. That is the reason and it is usually because either no-one has told them that they might have the ability to make any claim whatsoever or they are on workers compensation entitlements and they just have not been informed that they might have another set of entitlements. By and large that is the reason why late claims are made and that is not a good reason for refusing someone their rights.

Mr SCOT MacDONALD: Can I talk to you about the discount rate. I think we talked about this a year ago and the Committee commented on it. My fear is that it will be groundhog day and we will have the same issue. I do not think anybody disputes that five years looks high and the difference between five and two or three is a massive difference to the scheme. I am trying to flesh out a recommendation. Instead of just saying, "We think it is too high", can it be linked to an index so that the recommendation to government, instead of being just someone's opinion, would be a six-month or annual review, or a discount rate being used by another industry or another sector—something that we all could possibly live with?

Dr MORRISON: The simplest answer is that this evidence came to a committee on a previous examination of this issue and was the evidence of some actuaries of Cumpston Sarjeant Actuaries and the

comments that you are referring to from the previous report were based upon actuarial evidence that was provided at that time, so that really is the starting point. If you want guidance as to what is a fair thing, the Lifetime Care and Support Authority invests its funds and gets a return.

Mr SCOT MacDONALD: Two or 3 per cent?

Dr MORRISON: Two per cent is what they say is a fair thing. The Lifetime Care and Support Authority approached the legal profession to encourage those who have received a large sum of money to come into the scheme and hand their money over but when they did so they expected to receive—

Mr SCOT MacDONALD: Four or 5 per cent or something?

Dr MORRISON: Well, they expected to receive a far greater sum of money than had been awarded.

Mr SCOT MacDONALD: Because they are using the high discount rate.

Dr MORRISON: Because the 5 per cent discount rate meant that there was insufficient to buy into the scheme and the Lifetime Care and Support Authority, when they were told that no-one would be able to afford to come in at the terms that they were proposing, dropped it like a hot potato. Now it is one thing you might like to ask the Lifetime Care and Support Authority about but the fact that in practice they say that 2 per cent after tax and inflation is their own realistic return means that in practice 5 per cent by comparison leaves those with lump sum compensation very far behind the eight ball. It is not quite as bad as it might be in New South Wales for this reason: the largest amount that usually suffers under the discount rate is future care.

Those on lifetime care do not have to worry about a discount because they get the actual benefit so that the effect of the discount rate really hurts in respect of future income loss. It is not quite as bad as it might be and the lower levels of care, yes, are brought down by the 5 per cent rate and that is where the injustice is but the cost to the scheme between the 5 per cent and the 3 per cent which the High Court decided on as a compromise in 1981 in *Todorovic v Waller*, is one which we can live with and which was the original basis of the scheme and which remains part of the law in New South Wales for those who are injured by either assault or intentional injury in one form or another. The other useful comparison is England, which has 2.5 per cent, and the pressure is on them to—

Mr SCOT MacDONALD: To drop that?

Dr MORRISON: Yes.

Mr SCOT MacDONALD: Can you recommend anything that we can use as a guide to say that the Lifetime Care and Support Authority should use this discount rate rather than just pick a figure?

Mr DAVID SHOEBRIDGE: The difference between, say, the inflation rate and the Commonwealth bank bond rate, is that what you are suggesting?

Mr SCOT MacDONALD: I am thinking of something like that. Surely to remove the conflict or uncertainty is to just seize an index rate?

Dr MORRISON: I do not think there would be anything that is quite as simple or as easy as that. I re-read *Todorovic v Waller* the other day. It brought down its decision at a time of very high inflation. I think returns were running at about 17 per cent at the time, and that was about the time, also, that New South Wales moved motor vehicle cases from 3 per cent to 5 per cent and there was said to be a review when things changed. There has never been a review, of course, but I do not think there is any simplistic measure that you can find. But, in practice, an actuary will tell you that in a reasonably safe investment, and that is what is required, it is not possible over a prolonged period of time to get a 5 per cent return after tax and inflation. Two per cent might be more realistic but 3 per cent was the compromise that, after hearing evidence, the High Court decided upon and it seems reasonable, and no-one has really provided any good argument to the contrary.

Mr DAVID SHOEBRIDGE: I want to ask about the lifetime care. We have heard from Mr Stone and Mr Concannon about the concerns of lack of contestability in respect of what is reasonable and necessary and the general administrative powers of the Lifetime Care and Support Authority. It has been touched on in your

submissions as well. What about some of the concepts that were discussed there, some alternate review mechanism, or potentially an ombudsman to put some balance back into that?

Ms GUMBERT: I will deal firstly with the first point about what is reasonable and necessary, and the way that that changed. As Mr Stone said, that was amended in 2012, and it gave the authority the power to determine for itself what was reasonable and necessary rather than leaving that to be the ultimate determination of a court. It took away a lot of rights that people had until that time, to ensure that if they were aggrieved by the decision of the authority, they could take that to the Supreme Court and get a ruling on whether it was in fact reasonable and necessary.

Mr DAVID SHOEBRIDGE: Mr Stone and Mr Concannon recognised that in the Supreme Court that is often using a sledgehammer to crack a walnut.

Ms GUMBERT: That is exactly right. The Supreme Court review power is incredibly important, but it would be a good idea and a very sensible idea to have something in between, some sort of external review that goes in between the internal review that is conducted by lifetime care and the final stage of getting to a Supreme Court hearing, because it could be done quicker and cheaper by some sort of mid-stage body. At the moment, there are no external appeal options for anyone in the scheme. Even if there were, there are no rights for legal representation, no rights to receive advice for anyone in the scheme so that they would be aware of what they could do in any event. Certainly most participants in the scheme would have no idea that they may have entitlements to go to the Supreme Court for a review of decisions, because most of them do not have access to a lawyer. To answer your question, yes, it would be a good idea to consider some other external review options, perhaps in the nature of some sort of tribunal or the Ombudsman.

The Hon. SHAOQUETT MOSELMANE: In concluding our reports we will have to make various recommendations. I note that in your submission on the Lifetime Care and Support submission you make seven recommendations. Of those seven recommendations, will you narrow down which is the more critical for our purposes?

Ms GUMBERT: If I can just quickly review those recommendations.

The Hon. SHAOQUETT MOSELMANE: That is on page 4.

Ms GUMBERT: There are a few fixes that are quick and easy. The first quick and easy fix is to remove section 89A to 89E. I think the Committee has heard other evidence on that this morning. Those sections were inserted into the Act and can be removed just as easily. They do not serve any constructive purpose. They only create extra work, extra costs and delay. That would be something that could be done quickly and easily and would certainly be a priority.

Mr DAVID SHOEBRIDGE: Will you remind us what section 89A to 89E is?

Ms GUMBERT: I will. I apologise. Section 89A to 89E is procedures that were put in place that must be complied with before you can file an application to the Claims Assessment and Resolution Service. It sounds very sensible. What they are designed to do is to ensure that parties talk to each other and exchange documents, provide particulars and that sort of thing before getting to the stage of going to the Claims Assessment and Resolution Service. The problem is that the way they have been implemented and the time limits that are involved mean that compliance with them is extremely difficult and almost impossible in some cases. In fact, instead of encouraging informal discussions, it tends to discourage it because quite often you will find that a party will be reluctant to call an informal discussion, a section 89A conference, which is the type of compulsory conference you now have to have. Instead, you have pre-section 89A informal conferences. Quite often another difficulty is that because of the time limits involved, the provisions cannot be complied with prior to the expiration of the three-year limitation period. There are cases where complainants are being precluded from being able to apply to the Claims Assessment and Resolution Service within three years of the date of the accident. Despite wishing to do so, they simply cannot get that application on. What that means is that the time is not suspended for them, so if they need to take the case to court, they are out of time. It has a serious consequence, and it is something which is outside their control in many, many circumstances. Apart from being time consuming, costly and so on, it is also extremely prejudicial for some claimants who are affected by it. That is why we say section 89A to 89E should come out.

CHAIR: Do you think this is a major problem?

Ms GUMBERT: It is a major problem because of the serious consequences that flow. There is no doubt it is a very good thing to encourage informal discussion, to encourage the exchange of documents and so on, but it should not be a preclusion from being able to go to the Claims Assessment and Resolution Service. If there are going to be provisions about compulsory conferences and so on, it would be more sensible for that to take place after the application is lodged with the Claims Assessment and Resolution Service, thereby ensuring that time can still be suspended and that people's rights are protected. Then you could say that before you get to an assessment hearing, you have to have a talk. That is the same way that things work in court. You file your court proceedings, but before you get to a court hearing, the court will require you to have mediation, and that works extremely well.

The Hon. SHAOQUETT MOSELMANE: To follow up on those recommendations, in point 7 you say that the Act should be amended to require the consent of the injured person. I would have thought that would be a given. Is that for a specific injury?

Ms GUMBERT: Sorry, that is in relation to lifetime care?

The Hon. SHAOQUETT MOSELMANE: Yes.

Ms GUMBERT: That is in relation to all injuries. This has been the position of the Australian Lawyers Alliance since the Act was introduced. The way the Act operates at the moment is to force an injured person to be included in the Lifetime Care and Support scheme, even if they would prefer to retain their entitlements under the Motor Accidents Compensation Act and to seek a lump sum for their care.

The Hon. SHAOQUETT MOSELMANE: It is illogical to force them.

Ms GUMBERT: It was debated. Perhaps I can take that on notice and provide a more thorough answer.

Dr MORRISON: If I might add something to that. I have seen many quadriplegic cases. Some of them involve people who clearly should not have charge of large sums of money. Also, in that case, the Lifetime Care and Support scheme is an appropriate place for them. On the other hand, I have seen highly intelligent very able people, capable of investing and managing their own money, capable of organising their care and their affairs in a way which suits them and who do not want to spend their time—instead of running a business—debating with the Lifetime Care and Support Authority about their particular medical needs, costs and care arrangements. To have a rule which forces everyone into the Lifetime Care and Support scheme, including people who would rather take the diminished lump sum payment and get on with their lives, on the face of it, seems to be something which is manifestly unjust in those particular cases. It is very different for a brain-damaged person who was intellectually able, who was independent and who has been managing their own affairs at a very high level. They find it quite demeaning for every decision to be made on their behalf for the rest of their lives and that is what we are inflicting on people at the moment.

Mr DAVID SHOEBRIDGE: It goes against the thrust of other reforms such as the National Disability Insurance Scheme, which is very much going the opposite direction and trying to empower those people, where appropriate.

Dr MORRISON: Very much so.

Ms GUMBERT: I will finish the question about important changes to the Motor Accidents Scheme. There are two other very quick easy fixes. We have referred to the first in our submission to section 81, and problems that have arisen as a result of a recent case of Smalley. That has now largely been fixed as a result of recent guideline changes by the authority. However, as Mr Concannon pointed out, section 95 is still an issue to some extent. That section still indicates that a decision of the Claims Assessment and Resolution Service is not binding on an insurer in relation to a decision on liability. It would be a good idea to have a look at that section and try to amend the problem there because at the moment we will have many cases going to the Claims Assessment and Resolution Service for assessment of contributory negligence, for instance. None of those are binding in relation to the insurer. It is something just to look at and give further consideration to since that case of Smalley.

The other thing that is a relatively quick fix and very important is the late claims provisions, which we have already spoken about, given that they take up an inordinate amount of time and expense and, apparently, only 10 per year are getting finally rejected anyway, and also for the reason that it is so grossly disproportionate to deny someone their rights simply for a delay.

CHAIR: What specifically would you put in its place?

Ms GUMBERT: What we had suggested is that the period be extended for which you could lodge a claim and then after that time, if it were determined that a full and satisfactory explanation had not been provided, there could be some sort of a monetary penalty, up to a certain cap. Again it cannot be disproportionate but I think we have suggested something like a 5 per cent penalty on damages up to a set cap. That served the purpose then of ensuring that there is still that incentive to get the claims in early but providing some means to deal with the claims that are made very late without a good explanation, but without taking the rights of people away altogether.

Mr DAVID SHOEBRIDGE: I refer to the proposals that have been spoken about regarding the accident notification form and expanding the accident notification form to perhaps be in the order of $20,000 rather than $5,000. If the accident notification form were expanded it would remove a number of small claims from being within the cost jurisdiction. In part it is against the self-interest of the Australian Lawyers Alliance. What are your thoughts are on the accident notification form and putting forward that model?

Ms GUMBERT: One of the objectives of the Australian Lawyers Alliance is to try to ensure that this scheme runs as efficiently as possible. Our suggestion in relation to increasing the accident notification form cap was to try to improve the efficiency of the scheme. The figures do make it fairly clear that most of the inefficiency is in relation to the smaller claim and certainly it may be that by those claims being processed on a no-fault basis, and without the involvement of lawyers for claims up to $20,000 cap, that may improve the efficiency. That would be a good thing and it is for that reason that we suggested it.

Dr MORRISON: The fact of the matter is that no-one wants to see a situation where legal costs are a disproportionate amount in relation to the ultimate benefit to the claimant. It does not reflect well on the scheme or on lawyers. Our view in the Australian Lawyers Alliance is that it is much better that that money goes directly to the claimants and that you avoid both the bureaucracy and the involvement of lawyers on both sides and the unnecessary delay and costs it imposes. It is a no-brainer.

Mr DAVID SHOEBRIDGE: From a scheme perspective, even if under the current system $20,000 is spent contesting and fighting on both sides of a small claim where there is undoubtedly an injury which might then be successfully defended by the scheme or by the insurer, from a social perspective it would be far better to hand the $20,000 over to the person who was undeniably injured?

Dr MORRISON: Exactly.

Ms GUMBERT: Absolutely, and I should point out that the actuarial costings that we obtained and which we have provided indicate that increasing the accident notification limit would actually be a saving to the scheme. So not only are you saving in having lawyers involved and saving in the fact that the efficiency is better it is an overall saving to the price of premiums.

Mr SCOT MacDONALD: How long has the $5,000 cap been there?

Ms GUMBERT: I think the $5,000 cap was introduced in 2008, replacing a $500 cap.

Mr DAVID SHOEBRIDGE: Effectively it was a new benefit in 2008?

Ms GUMBERT: That is right. It had existed since the inception of the scheme at a $500 limit and it was increased to $5,000, which is certainly more along the lines where it needs to be because the higher the accident notification form limit is, the more claims that can be dealt with conclusively under that limit. I think the $20,000 limit would be an appropriate level because that will ensure that the claims that are quite small can just be processed quickly and easily. But once you start getting into a greater level of injury and complexity you can still ensure that people have access to legal advice.

Mr DAVID SHOEBRIDGE: As it operates in practice it is likely that if you had it set at $20,000, claims that might well be arguably $30,000 or $35,000, when someone goes to get legal advice their lawyer might say, "We could contest this for 12 or 18 months and you might get $25,000 or $30,000 or we could resolve it now for $20,000". It could all be done. It is likely to resolve cases that fall outside the $20,000 figure as well.

Ms GUMBERT: Absolutely. Claims that are within the realm of that $20,000 would likely also be processed more efficiently under that system.

CHAIR: Thank you for coming today. Your evidence and your written submission have been of great value to us.

(The witnesses withdrew)

RUTH ROBINSON, Executive Officer, Physical Disability Council of New South Wales, sworn and examined:

CHAIR: Thank you for coming today. Do you feel that the views of the Lifetime Care and Support scheme participants are well represented? Do you have a view on that?

Ms ROBINSON: Straight out like that? Okey-doke. In some instances, but not in others. If I could say one thing up front, the person who was scheduled to appear today has rung me some hour and a half ago to say that she is in hospital, so I am here. That is fine.

CHAIR: Are you in a position to make an opening statement?

Ms ROBINSON: I am. I am the Executive Officer, which means that I am the person who signed off on the documents that have been prepared. But I also perhaps do not have the same level of in-depth detail around some specifics and I may need to take some questions on notice.

CHAIR: If you are in a position to make an opening statement, the Committee would very much welcome it.

Ms ROBINSON: Okay.

Mr DAVID SHOEBRIDGE: Thank you so much for coming at such short notice.

Ms ROBINSON: And I was at Hornsby. We have placed comment about the Motor Accidents Authority and the Lifetime Care and Support Authority. I would like to highlight one thing that relates to both and three particular things that relate to each. The Physical Disability Council of NSW is referred to as the peak organisation or the major representative organisation of, for and about people with physical disability across the State. That is people of all ages, from babies and small children to older people. One of our three major responsibilities in that kind of organisation is to help inform stakeholders about what some of the issues are for people with disability. I guess it is in that capacity that we have taken the opportunity to provide comment to the Committee.

We are very enthusiastic and supportive of the Government's move towards person-centred support and services for people with disability. That is happening at the moment through the National Disability Insurance Scheme [NDIS], which as we speak is rolling out in its first area in the Newcastle region, and is also represented by the push of the State Government towards Stronger Together 2 in disability services. It is also represented in the way that ageing services are being provided across the State. There is a stronger focus now on people having a greater say in what is happening to them, and that can result in people being able to articulate what it is that they need to live a better quality of life, the best they can. That is providing the focus of those supports and services that are built around them. It is from that point of view that we are very interested in the activities of both the Motor Accidents Authority and the Lifetime Care and Support Authority.

In particular, I would like to highlight three little points. To be able to make good, informed decisions and to feel that you are the centre of something, you need to be able to provide information so that people can make informed decisions. We believe that the Motor Accidents Authority website could be revamped a bit—namely, in a way that has a greater focus and accessibility for people with disability and their families to be able to find pertinent information to them. At the moment there is a strong emphasis on the medical or the service provider through that access, but that is only two parts of the equation. The person who has the disability or the injury is also an important part of that. There are some examples that may be useful to the Committee, in terms of looking at recommendations. The Victorian Transport Accident Commission seems to have nailed down some of those things in relation to search icons—that may or may not be helpful to you.

The Physical Disability Council is also very excited to think that in the recommendations there has been that universal kind of approach, the no-fault kind of stuff. I was very interested in the presentation that came before me. We think that to take the business of recovery and getting back on track in your life and getting back to work—all the sorts of things that were spoken about this morning—the sooner that can happen, the better. And the less adversarial kind of environment that happens in the better. This is in the business of trying to get people up and back there really. We also have some comments that we have made around the outcome measures—how do you know when you have achieved success? We would like to think that there needs to be a

greater focus on the individual outcomes rather than just necessarily the medical ones. Some people may feel that they have achieved a lot if they have achieved this spot, but someone else might be seeing it from that spot—that will not work well on the recording. Again, there needs to be more of a person and individualised focus.

We have also been somewhat concerned about what might happen to people of a particular age. The research that Jordana conducted indicates that women in particular over 50 and up around 80 are an increasing statistic in terms of pedestrian accidents with motor vehicles, yet the National Disability Insurance Scheme is for people under 65. If the National Injury Insurance Scheme [NIIS] is also for people under 65 then some people are potentially going to be missing out on what might provide them with opportunities for recovery and participation in the community. In relation to the Lifetime Care and Support Authority—and I would like the Committee to think about this as the overlying banner for both of them—it is about person-centred support services and information. That is the structure underneath everything that needs to be built. There were three comments we wanted to make there.

Again, one was around the website. It is somewhat geared towards professionals, although in recent times it appears to us that there has been more emphasis placed on providing information to individuals. We applaud that, but we would like to see more than that. Again, with the website stuff I have made reference to for both of the authorities it is always important to remember that not everyone in the world knows how to use a computer or has access to the website. In fact, in our organisation I am always stunned to find, as we move around the State conducting consultations with people with disability, just how many people do not. As a result of that we have to provide a lot of things in paper and use all sorts of alternate ways to get in touch with people. Do not make an assumption that that is the only way it occurs.

There was also a comment about participant participation—a strange double—on the advisory board of the Lifetime Care and Support Authority. Sometimes when you have an individual who is a recipient of a service on an advisory board that can be quite tokenistic in fashion, but we would like to encourage the authority and the Committee to think about that in terms of providing real participation. So an opportunity for individuals to receive training on setting goals and how to reach decisions, perhaps some mentoring, so that they are developing a skillset that is quite invaluable to them as individuals but also participating quite strongly in that very upfront kind of way.

The third comment I want to make about the Lifetime Care and Support Authority is about trying to recommend that any practice of putting a younger person with a disability into a nursing home needs to cease immediately. Way too many people are moving into nursing homes. It is truly inappropriate. It is very difficult for them to move out of those environments. They are not geared up to provide the kind of support in the way that we would like it to happen—in a way that is truly respectful and appropriate for their age and person-centred. Also if you have someone going into that environment with a physical disability and a brain injury combined that might actually have some elements of behaviours of concern, it is very difficult to find staff in those environments with the skillset necessary to be able to support them so that they can learn how to manage themselves better. Thank you.

The Hon. SHAOQUETT MOSELMANE: I wish to ask you a question about your comments about more care and individualised focus. I note that in your submission you call for the Lifetime Care and Support Authority to actively avoid any future admissions of younger disabled people, injured people into aged care.

Ms ROBINSON: And younger in those terms is under 65. When you are talking about—

The Hon. SHAOQUETT MOSELMANE: That is young.

Ms ROBINSON: I am happy about that, let me say. When you are talking about that in general terms within that field they talk about people over 65 and people under 65. But we are finding, and have found for some years, that there are people much younger than that—in their 20s and 30s—in aged care facilities and it is really heartbreaking.

The Hon. SHAOQUETT MOSELMANE: In that regard what is your recommendation? Why are they resisting having facilities for aged recipients and the younger—

Ms ROBINSON: There is a push or an understanding that people with disability should not really be living in congregate care facilities—the institutional kind of environment. Really a nursing home is pretty much

an institutional kind of environment. It is very difficult to make decisions for yourself and have some power and control over your own life if someone else is telling you what to do all the time. The preferred option is to find out how and where the individual wants to live. Some people have had an accident and sustained an injury that results in a disability, but they are keen to go back and live where they lived before, whether that be at home with their spouse and kids, living on their own or living in whatever kind of environment. They need supports built around them to help them manage. In fact, when we go around the country and we ask people what they want more than anything else the answer is the ability to live the life they want to live and live in circumstances where they feel they need to be and can maintain all of those contacts. It is difficult to maintain intimate or even close personal contacts with people who are important to you when you are living in a nursing home.

The Hon. SHAOQUETT MOSELMANE: Out of curiosity, do you communicate directly with the authority with regard to the shortfalls of the website?

Ms ROBINSON: Actually, in the last couple of weeks the Lifetime Care and Support Authority have invited me to meet with them to talk to them about a number of things. I also talk with the Lifetime Care and Support Authority on a regular basis.

The Hon. SHAOQUETT MOSELMANE: You make these recommendations to them?

Ms ROBINSON: We do talk about all sorts of things, yes.

The Hon. PETER PRIMROSE: Can I say how important the Young People in Residential Aged Care Program is. Maybe the Committee could look at that as part of its inquiry and the current Commonwealth and State funding of that program. I am not sure where it is up to. It is an absolutely fantastic program to move people out of nursing homes into their own residential care. In your submission you expressed support for universal cover and a no-fault motor accidents compensation scheme. Which policy direction do you advocate to pay for it, compulsory third party green slip premiums increasing or benefits being cut?

Ms ROBINSON: I will need to take that question on notice and get back to the Committee.

Mr DAVID SHOEBRIDGE: I was going to ask you about reports, anecdotal or otherwise, that you have had about how the lifetime care and support scheme is working in practice. We have had a number of submissions and it is hard to get a grip on it from the annual report. For my part I would adopt those submissions. In your role, and in your members' role providing those services, what feedback have you had?

Ms ROBINSON: It has been fair. It has been okay but not great. It is very much an individual response depending on what the person is hoping to do in terms of their own life and how they want to live their life.

Mr DAVID SHOEBRIDGE: Did you hear some of the discussion with and comments from other witnesses? You were not here the whole time.

Ms ROBINSON: I was here for the previous witness.

Mr DAVID SHOEBRIDGE: Previous witnesses have said that people should be able to opt in or opt out and if people are in a position to manage their own affairs they should be given the opportunity to do that and not be compulsorily put in a lifetime care and support scheme. What do you think of that?

Ms ROBINSON: That was a statement by the previous witness. I heard that comment and it seemed to me to be a fairly sensible comment.

Mr DAVID SHOEBRIDGE: In terms of people who you or your members have engaged with who have had a dispute with the Lifetime Care and Support Authority, how has it been resolved if it has been resolved? Do you want to take that on notice?

Ms ROBINSON: I will take that on notice because I can think of a couple of examples but I need to look at the feedback we have specifically for that.

Mr DAVID SHOEBRIDGE: I would appreciate that.

Ms ROBINSON: Not a problem.

Mr DAVID SHOEBRIDGE: Those answers will be returned before the Lifetime Care and Support Authority appears, is that right?

CHAIR: Yes, I think so.

Mr DAVID SHOEBRIDGE: When are we likely to have the Lifetime Care and Support people here?

CHAIR: The next meeting, which is 17 March?

Ms ROBINSON: That is Monday week, we can get it to the Committee before then.

Mr DAVID SHOEBRIDGE: If you could get it to the Committee before then I would appreciate it?

Ms ROBINSON: Not a problem. Could someone send me an email with the appropriate questions?

The Hon. SHAOQUETT MOSELMANE: I have a question I have asked other witnesses about what are the key recommendations. Part of our role is to report and make various recommendations based on evidence from witnesses. As somebody who is hands-on, as Mr Shoebridge said, what recommendations do you have?

Ms ROBINSON: My recommendation is that the organisation's work is completely informed by the notion of providing individuals with the greatest independence possible in terms of decision-making; a person-centred approach to life. Once you have established that as an underlying philosophy that informs the way you do everything. It informs the way you have conversations with individuals, it informs the way you write letters to individuals, it informs what information is on the website and it informs what supports and services are provided and the way in which they are provided—just as it will with the National Disability Insurance Scheme if it is done well.

CHAIR: Thank you for attending on very short notice and answering our questions.

Ms ROBINSON: Thank you very much.

CHAIR: We are appreciative and thank you for your assistance.

(The witness withdrew)

(Luncheon adjournment)

STELLA ENGEL, Director, Spinal Medicine, The Prince of Wales Hospital, and

FRANCES MONYPENNY, Manager, State Spinal Cord Injury Service, and

CHRISTOPHER CATCHPOLE, Acting Manager, Hunter Brain Injury Service, affirmed and examined:

ADELINE HODGKINSON, Director, Liverpool Brain Injury Rehabilitation Unit and Chair, Brain Injury Rehabilitation Directorate, sworn and examined:

CHAIR: I thank everyone for attending to assist the Committee in the twelfth review of the Motor Accident Authority and the fifth review of the Lifetime Care and Support Authority. Would anybody like to make a brief opening statement?

Ms MONYPENNY: We have presented our issues.

CHAIR: You are entitled to make an opening statement briefly, if you wish.

Dr ENGEL: I attend to represent the State Spinal Cord Injury Service. I wanted to very briefly add that I commend and agree with everything that has been written in the written submissions. I commend the authority particularly for reviewing its statistics for the past five years. In addition to the outcomes the authority is already looking at, these will be used to inform and assist in developing appropriate transitional housing models, both for their clients and possibly by way of the National Disability Insurance Scheme for the rest of our clients and patients.

CHAIR: I will ask the opening question and Mr Scot MacDonald has some questions. What are your observations regarding the performance of the Lifetime Care and Support Scheme? Can you see any areas therefore improvement? One or all of you can answer, if you wish.

Ms MONYPENNY: I work for the Agency for Clinical Innovation. Most of our feedback, which came as part of the NSW Health response, was positive in the sense that Lifetime Care has worked on the recommendations that were relevant to our services in the last review. Our only constructive or additional comment is that they continue to focus on a health promotion/health illness prevention model rather than just when a person who has a spinal cord injury has an illness and they then access services in the community, as we all would. But within this cohort of people with spinal cord injury, they do need a prevention review because their spinal cord injury also affects all their body systems. Over time the small signs become evidence that something may not be quite right. Before it deteriorates too much, they have regular specialist review by the multidisciplinary team. We have recommended this before and we believe that that is happening in cases. I just want to reiterate that.

Dr ENGEL: My only other comment is that from a person who works at the coalface, I think it is very good that they have initiated better communication and regular meetings with prescribers to improve the communication about any difficulties that might arise. They have started to simplify the forms to try to reduce the amount of paperwork. I commend that and I urge that that continue.

CHAIR: That is very good to hear. You have seen a discernible improvement in that area?

Ms MONYPENNY: Yes.

Dr ENGEL: I have seen an improvement but I think that this should continue.

Mr DAVID SHOEBRIDGE: It is nice to hear someone actually talking about a recommendation being implemented. Could you say that again?

The Hon. SHAOQUETT MOSELMANE: That is with Lifetime Care and Support services. Is that right?

Dr ENGEL: Yes.

CHAIR: That is very good.

Mr SCOT MacDONALD: We have had a couple of people and submissions canvass the opt in, opt out possibility. As we move to the National Disability Insurance Scheme, there will be more personal responsibility, I suppose. Could you give us your view on that? Do you think it is a good thing? Is it possible? I am sorry that we do not have the brain injury lady here. Should there be a cooling-off period on that? Do you get pressure from relatives, or do you wake up and think, "I would like to do this", but three months or so down the track it is a little more complicated?

Dr ENGEL: I have been involved in this area for 32 years. I have worked under no cover, I have worked under TransCover, and I have had experience under all sorts of service delivery models. I also remind you that we are dealing with a population of largely young men who have had a catastrophic injury and who frequently have other injuries—and brain injury and spinal cord injury unfortunately is a common companion—but they often will have major psychiatric disabilities and major substance abuse problems. Their care is complex and will involve quite a large amount of money. We were in the business of having a court-allocated settlement, we were talking about 10 or 15 millions of dollars for people. Sadly, I had one patient who went through $5 million in two years and then it was gone. The number of people that ran out of money was quite large.

There is also the choice of what are you going to spend your money on? Are you going to buy a new Xbox or are you going to buy a new wheelchair? The timeliness of intervention is often very crucial in these people, so if you do not have the right wheelchair and the right wheelchair cushion, you will develop pressure areas, which will mean six months to nine months in hospital. So the social costs and not just the personal costs involved are quite large.

Many people would feel very hard done by that they do not have this amount of money to control. I understand that people also feel that they do not have the flexibility of choosing the person next door or someone like that, and that they have to use an agency. I understand their point of view that this is to provide care and that they are given guidance about which wheelchair to have, for example. We need to have a look at some sort of medium grant. If you are going to do an opt-in or opt-out scheme, there would have to be a mechanism for review at regular intervals. If it is all or nothing then I fear we are going to be back where we were before. What happens when the money runs out? We would be back to everyone being on a system without a budget, because the budget has been moved to this funding system.

CHAIR: Arising out of the example you gave of someone who went through $5 million in two years, where did that money go? Did it go on treatment or on bad investments?

Dr ENGEL: Girls, overseas trips and illicit medication. This was a particularly sad case.

CHAIR: How is this person living now?

Dr ENGEL: He committed suicide in the end.

Mr CATCHPOLE: The National Disability Insurance Scheme has a trial site in the Hunter. We are finding that our clients finish their rehabilitation journey and there is still rehabilitation to be had, but the majority of focus is then on things like getting back to leisure activities and life activities. The issue we are finding is that if a person is within the Lifetime Care and Support Scheme, they are ineligible for the National Disability Insurance Scheme. There is potential for people to get to a point where they would prefer to be in the National Disability Insurance Scheme, because that would better support them at the point in their life of getting back to leisure activities and those types of things. From the brain injury point of view, we would like further consideration of the definition of lifetime care. Obviously, we do not want these clients to be disadvantaged if they fall under lifetime care and they cannot access services provided under the National Disability Insurance Scheme.

The Hon. SARAH MITCHELL: Some earlier witnesses—I think from the Law Society—talked about how some people they deal with under the Lifetime Care and Support Scheme get frustrated that the agency determines what is reasonable and necessary for their treatment and that people do not have more autonomy. The Law Society suggested having an external review, perhaps an ombudsman-type person to act on their behalf. Have you heard such concerns from those with whom you deal? Do you think it is a problem?

Dr ENGEL: I think people do get frustrated about what is reasonable and necessary. Some people will have a greater emphasis on some things. It is difficult to know, if you have an unlimited purse—if it is limited then that is fine. Clients get frustrated if there is some latest technology that may or may not be beneficial: Electrical stimulation is a major issue for some people as are some exercise programs. These things are expensive, particularly electrical stimulation for which there is increasing research support. It depends on what you mean by reasonable and necessary. It is a matter of what they spend their money on. If they get X amount of money and they need 35 or 50 hours of care per week, they might choose to do without care in order to buy something—perhaps a new television. That is my concern.

Mr DAVID SHOEBRIDGE: Can those trade-offs happen at the moment, or would the television be considered to fall outside the care?

Dr ENGEL: Correct.

Mr CATCHPOLE: The majority of participants feel they are well supported in terms of what they receive and their levels of care. There is a small percentage who, because they suffered a catastrophic injury, have had their lives changed so much that they feel they cannot do things they were previously able to do and they feel they should be supported to do those things. There are some specific examples, such as respite, which is sometimes provided and sometimes not provided. Another specific example is transportation. They might have an attendant care worker who is funded to do their shopping, but the Lifetime Care and Support Scheme will not pay for the kilometres travelled by that attendant care worker, so the family or the participant has to pay for travel expenses. That seems to be a contentious issue at the moment.

The Hon. PETER PRIMROSE: Please give us some further information about some of the boundary issues that have already been mentioned and that we should be looking at, or take this question on notice if you need to. You are in a unique position to comment on those issues. Given that you come from a regional area, are there any particular issues you think we should be looking at that are unique to the regional areas?

Mr CATCHPOLE: In terms of regional, I think the Lifetime Care and Support Scheme does a pretty good job in providing services across the State, so from a regional point of view there are no huge issues. Obviously, from a geographical point of view, the more rural your area, the fewer available services. Even though someone might be within the scheme, accessing the clinicians or therapists they need will be an issue, but that is the same for anyone within that area and is not unique to lifetime care.

In terms of your first question about the interface between NDIS and Lifetime Care, NDIS has made a clear determination that if you are within the Lifetime Care scheme you will not be eligible for NDIS. So as I said previously, I think that will become an issue for some people as they progress along their continuum. Once they require less rehab, less medical care and need to be supported with more life participation, that is where they probably will feel like they have been disadvantaged, potentially, being in the Lifetime Care scheme because some of those things, like leisure and recreation, are not supported whereas the information we have had from NDIS is that they will be supported under NDIS.

Mr DAVID SHOEBRIDGE: Would not one of the answers then be for NDIS to extend that class of benefits to people in Lifetime Care and Support? Would that not fix that boundary issue?

Mr CATCHPOLE: Potentially.

Mr DAVID SHOEBRIDGE: Is that a policy or statutory determination?

Mr CATCHPOLE: I am not sure.

Mr DAVID SHOEBRIDGE: Would you take that on notice?

Mr CATCHPOLE: Yes.

The Hon. SHAOQUETT MOSELMANE: Returning to Dr Engel's comments, particularly regarding good communication with the Lifetime Care and Support Authority—LTCS—have you raised with it any issues that need to be improved?

Dr ENGEL: I said that since the last review there had been an improvement in the communication. We have had regular meetings. I think that needs to continue and, if possible, improve.

The Hon. SHAOQUETT MOSELMANE: Have you raised any particular issues to which it has not responded and you could make recommendations to us to follow up?

Dr ENGEL: I think basically the issues really are individual patient basis. As with all large organisations, often there can be miscommunications, particularly when you are dealing with differences of opinion, sometimes. The only thing I can say is that I think it is important to look at the person as a whole and if the dispute is over a small item that is delaying discharge, then it is cheaper and the outcome is better to not delay discharge because the cost in hospital is quite excessive if you delay discharge over a small item.

CHAIR: Other witnesses have had the opportunity to make an opening statement if they wanted to. If there is something particular you would like to put on the record or had intended to say, I invite you now to do so, if you would like.

Dr HODGKINSON: Not being aware of what Chris said, because really we are here together to represent the brain injury services, we did think in detail as a network what we would present to this Committee and in the end felt there were a number of issues that we actually could deal directly with Lifetime Care over particular issues and areas that we wanted to further explore, but to do that outside this Committee and work collaboratively with them to resolve them. One of the big issues was how care is defined. Although treatment, rehabilitation and care is in the legislation, there seems to be some flexibility about how to define care and whether in fact care needs to be broadened. Perhaps that goes also to the issue of what is care in terms of perhaps answering the questions you asked about things that might not currently be funded by Lifetime Care but would be funded by NDIS, particularly around leisure—activities currently viewed as outside the scheme. Again, that might be to do with participation as part of care and therefore that would be covered in terms of the transport issues.

Mr DAVID SHOEBRIDGE: Going to the pool for a swim instead of going to the pool for therapy? Getting out of the house and going to the pool is every bit as important to their wellbeing as therapy?

Dr HODGKINSON: Yes. I have had a patient say to me, "I would like to go to the gym but I can't afford it. If I go to the gym I don't need a psychiatrist. They are happy to pay for the psychiatrist to help me deal with my depression when I develop it because I can't go to the gym." So it is something that we feel we probably would be best off working directly with Lifetime Care to try to work together to identify the legislative changes that might be required and how the interpretation of care can be done outside legislation, or within legislation existing.

Mr DAVID SHOEBRIDGE: In circumstances when there is a dispute about what falls inside or outside care or whether a particular treatment or appliance is reasonable and necessary, an example was given earlier of a participant in the scheme who needed a particular orthopaedic bed. She lived with a partner and wanted a double bed and the scheme said it would pay only for a single bed "because it's only for you. We won't pay for a double bed because that's for your partner." The obvious point was, "For goodness sake, they need to sleep with their partner." Ultimately, as the legislation is drafted, the final unappealable determination is made by the Lifetime Care and Support Authority. There is no external body to go to when you are in dispute about the boundaries of what is care or what is reasonable and necessary. How are resolutions of those disputes happening under the current system?

Dr ENGEL: It is time consuming. It involves going backwards and forwards. Sometimes it is difficult.

Mr DAVID SHOEBRIDGE: Whose time is being consumed from the healthcare providers?

Dr ENGEL: Mine.

Mr CATCHPOLE: Clinicians.

Dr ENGEL: Clinician time.

Mr DAVID SHOEBRIDGE: They already have extreme demands on their time.

CHAIR: How would you seek to solve that? What could you recommend to deal with the problem raised by Mr David Shoebridge?

Dr HODGKINSON: It is interesting. I know of instances where they have paid for a double bed. Some of the toing and froing is to look at the clinical reasoning behind your prescription as opposed to a standard prescription or use of equipment. As an organisation, Lifetime Care is fairly bureaucratic. It is difficult to actually present and discuss your case directly with the decision-maker. That decision-maker is behind the level of the coordinators, who are the ones dealing with you directly. So you may present an argument. It goes to the next level. You get back the response, then you present your counterargument. It goes through that person again to the decision-maker and so on.

Mr DAVID SHOEBRIDGE: Whereas all of that probably could have been resolved in a 15-minute face-to-face conversation rather than after a three-week paper war?

Mr CATCHPOLE: Or longer.

Dr HODGKINSON: Or two months. Yes. Sometimes you simply go to the head of the decision-makers and have a resolution at that level. But it tends to be only after you have spent some time toing and froing.

Mr DAVID SHOEBRIDGE: What if there were someone like an ombudsman so that when you had a disagreement, they were empowered to bring the decision-maker, the clinician and the participant together promptly and just allow for the conversation to happen? They would be empowered to have that 15-minute conversation rather than two months of paper warfare.

Ms MONYPENNY: But would it need an ombudsman? Why not look at the processes now to simplify it?

Mr DAVID SHOEBRIDGE: You are more familiar with the processes. I am asking how can we do that so it can happen quickly rather than—

The Hon. PETER PRIMROSE: Wallow.

Dr ENGEL: I would just be concerned if we instituted another level of bureaucracy. That is my concern.

Mr DAVID SHOEBRIDGE: Tell me how it can happen, as you said, from your side of the record?

Dr ENGEL: My major concern about the meetings between the clinicians and the CEO representative from Lifetime Care, is that that was the primary purpose for the resolution and in this sort of case it gives you some sort of access to a senior person from a number of clinicians to discuss and put a clinical case of why a particular prescription was needed. I guess to have a mechanism of direct contact between clinicians and Lifetime Care where these things can be discussed.

Mr DAVID SHOEBRIDGE: Talking to the decision-maker?

Dr ENGEL: Yes. I think it has to be the decision-maker.

The Hon. SARAH MITCHELL: Do you find inconsistencies? Are certain issues resolved quickly and others are not? Do you get different results essentially for the same problem?

Dr HODGKINSON: I think I can say less now. As the scheme matures and Lifetime Care works with its processes, and as we get a little better at meeting their expectations with practice at what is the clinical reasoning, what is the collection of information they want, I think it is getting better.

CHAIR: There always will be grey areas with conflicting views as to whether something is appropriate. It would be very hard to get rid of that.

Mr DAVID SHOEBRIDGE: Bring the people together and resolve it one way or another quickly, rather than this long, drawn-out process.

CHAIR: Yes, that is right.

Mr DAVID SHOEBRIDGE: It must be good also for the claimant if they can know whether they can get specific treatment? Other options or outcomes could be suggested?

CHAIR: What key recommendations would you like this Committee to make to the Motor Accidents Authority or to the Lifetime Care and Support Authority? We have the power to make recommendations, if necessary. Do you have any views on that? What would be your wish list?

Ms MONYPENNY: May I add a comment?

CHAIR: Yes, by all means.

Ms MONYPENNY: One thing we have been talking about is that this is one of the government bodies that deals with people with catastrophic injury. Within its remit, Lifetime Care, it is care that is reasonable and necessary. Complex patients particularly, and I am sure it applies very much for the brain injury, are very complex and difficult to discharge. Some limitations, no matter how well Lifetime Care may support, and it does, and try to progress the preparation for discharge and reintegration into the community, multiple government agencies are involved in trying to support this individual to get into the community. Dr Engel commented about using the data that Lifetime Care is now reviewing to inform development of models of care in relation to transition.

If an individual cannot go home because their house is not ready or they do not have a house, Lifetime Care supports transition accommodation, even though it is not within its remit to pay for the rent. But it is limited as to how much it can do in relation to that. It may be able to broaden its view of how it supports that individual to get back into the community. But there is a greater need from all government agencies to identify that it is very expensive to keep people in hospital. Therefore, how do government agencies and Lifetime Care come together with them to try to work out a way of transitioning them out into the community and into whether it is transitional accommodation or their home, wherever they are going, in a more timely manner? Really, we all are working under the same tax dollar, but Health is having to hold these people in hospital for a very long time. That is the sort of recommendation from my view, I guess. I do not know whether Stella might like to add.

Dr ENGEL: Yes, I support that. The numbers of people are small but they are very expensive. The outcomes—personal costs of individuals—are enormous. It needs a whole-of-government response. The Motor Accidents Authority before the advent of Lifetime Care tried hard to try to get housing and community services and everyone else around the table to try to solve the delays. It was difficult. I can only hope that possibly with the advent of the national insurance scheme and a possibility of delivering a whole-of-person care rather than this bit is delivered by Department of Health, so this is this part of money, and here is the delivered part of Commonwealth, so this is that part of the money, and housing. We spend a lot of time filling out forms and having people throw balls at each other. In the process, a huge amount of money is being wasted that could be used to deliver care rather than sort of fill out forms, make phone calls and beg people to escalate people.

Mr DAVID SHOEBRIDGE: Is transitioning from hospital into inadequate accommodation a significant part?

Dr ENGEL: Yes, absolutely.

Mr DAVID SHOEBRIDGE: Staying in the hospital is costing the hospital system substantial amounts?

Dr ENGEL: I would say that as much as 10 per cent of my bed days are used by people who are waiting for accommodation, care or equipment. When you have a combined spinal cord injury and head injury, it is even more difficult; or if you have someone with a spinal cord injury and schizophrenia or major other psychiatric disorder, which also is very common, it is even more difficult. Not only is it just that it costs the community, wastes the community's money; but also it is very disheartening for people who are just waiting for something to happen.

Mr DAVID SHOEBRIDGE: What about some transition accommodation within the health system? I would imagine you could have facilities that would cost much lower in running and maintaining transitional accommodation within the health system? If you cannot get the other result, this might save you money?

Dr HODGKINSON: Yes. The idea of transition accommodation is one that Lifetime Care has looked at as a need. It becomes difficult because it is not really a housing organisation—an accommodation service. Intergovernmental groups are looking at bringing together housing, accommodation support service, the Public Guardian and health services to look at that. I suppose there are discussions; work is done on it. There has not been anything achieved.

Mr DAVID SHOEBRIDGE: I am not trying to put the burden wholly on Health. It just seems that at the moment there is a lot of finger pointing. I am not saying that in a derogatory sense. You have got budgets set aside for Health, they have got budgets set aside for reasonable and necessary care and this area seems to fall right in the middle.

Dr ENGEL: What it needs is an integrated approach. There are models. In Queensland I understand there is a streamlined, whole-of-government approach to these things. To just keep people in a lower-grade accommodation separate from their families and separate from their communities I do not think is the answer. What we need is a faster transition back to their communities.

Mr DAVID SHOEBRIDGE: Could you take it on notice to provide us with the best example in a jurisdiction. Would that be possible?

Dr ENGEL: We could give you some examples.

Mr SCOT MacDONALD: Dr Hodgkinson, before you came in asked for views on opt in, opt out and whether that has any risks associated with it and if there should be cooling-off periods. Do you have any other comments about opt in, opt out?

Dr HODGKINSON: I think that is more from a legal perspective. In the development of the Lifetime Care and Support Scheme and in looking at how, if people are compensable, how their funds are first of all awarded and then used, it tends not to be in the best interests of the person.

Mr SCOT MacDONALD: To opt out?

Dr HODGKINSON: To opt out. Historically, while spinal injury can often be overcompensated for their disability, brain injury is often an underestimate of their care costs. There is a tendency as well for the family not to use the care available because they have put the lump sum into other areas. My experience of people who are compensated prior to the Lifetime Care and Support Scheme is that it is the rare circumstance where they are adequately compensated and that their compensation lasts sufficiently long. That is my clinical opinion and I do not have legal opinions on that.

CHAIR: I thank you all for being with us and giving us your valuable assistance. It is deeply appreciated and it will certainly be helpful in our deliberations.

(The witnesses withdrew)

MS RASHMI KUMAR, Senior Policy Officer, Council of Social Service of New South Wales, affirmed and examined:

MR MICHAEL HAMPTON, Community Voice Manager, Brain Injury Association of NSW, and

MR GREG KILLEEN, Senior Policy and Advocacy Officer, Spinal Cord Injuries Australia, sworn and examined:

CHAIR: I thank you for being with us today to assist with our inquiry.

The Hon. SHAOQUETT MOSELMANE: At page 3 of the submission from the Council of Social Services of New South Wales you make the following point regarding people with disability as participants on the Lifetime Care and Support Authority [LTCSA] Council:

> NCOSS strongly urges that the recommendation to appoint two participant representatives to the LTCSA Council, as set out in the Second Review Report and supported by the Third Review Report, is immediately actioned.

Your frustration is clear. What do you want to tell us further on that aspect, which may inform our recommendations?

Ms KUMAR: I think it comes from a philosophical viewpoint and a commitment from the Council of Social Services of New South Wales [NCOSS] on behalf of our member organisations to a person-centred approach, which includes the participation of people with disability in decision-making and governance around disability support. It is about involving people with disability in decision-making at each level in their own lives as well as the governance around schemes like the Lifetime Care and Support Scheme.

Mr DAVID SHOEBRIDGE: One issue you address in your submission is complaints handling and you suggest that the complaints handling by the Lifetime Care and Support Authority can sometimes be substandard. You make a proposition about there being some kind of advocate position for complaints handling. Can you give me an example to illustrate that and perhaps flesh out the proposal for an advocate?

Mr KILLEEN: I will be up-front: I did not actually write the original submission put in by NCOSS but I support its content. I have made some notes in regard to the submission. I am not 100 per cent familiar with the current process for people if they want to make a complaint or an appeal and to seek a positive outcome from that.

Mr DAVID SHOEBRIDGE: I probably do not mean complaint as in a formal complaint; I probably mean a disagreement of opinion about what care is appropriate.

Mr KILLEEN: We definitely support the ability for a participant to seek an independent advocate, whether that be a family friend, guardian or an organisation, that provides individual advocacy to support that person in getting a positive outcome.

CHAIR: I should have indicated at the outset that if any of you would like to make a general opening statement you are invited to do so.

Ms KUMAR: I did have some brief introductory comments.

CHAIR: Mr Killeen, I think you also indicated that you had some comments to make?

Mr KILLEEN: I just have some further comments to add to the points in the original submission. That is all.

Ms KUMAR: First of all, thank you for giving us the opportunity to provide feedback to the review. I would like to acknowledge the traditional owners of the land that we are meeting on. I would also like to make a couple of comments about the Assistive Technology Community Alliance of New South Wales of which both the Brain Injury Association and the Spinal Cord Injury Association are members. The Assistive Technology Community Alliance of New South Wales is also known as ATCAN. It is a forum for non-government organisations to discuss and advocate for improvements to the provision of supportive equipment and assistive technology as a basic right of people with disability.

Our general comments to the review really focus on a person-centred approach to support, as I mentioned earlier, and participation of people with disability at all levels of decision-making as well as participation in mainstream life opportunities including education, employment and housing. The feedback to us suggests that this is progressing through the authority but it will need to continue because of the changes that are occurring to support at this level at a Commonwealth level around the National Disability Insurance Scheme and the National Injury Insurance Scheme. I would like to hand over to my colleagues now. I understand they have some introductory comments as well.

Mr HAMPTON: At this stage I want to follow on from the previous people who were giving evidence here, the clinicians. I think the point was made that any complaint solely rests with the decision of the Lifetime Care and Support Authority. There is no ability to go beyond that to have it looked at by an independent body such as the external merits review committee in relation to the National Disability Insurance Scheme. That is possibly something that can be looked at and possibly should be a recommendation of this Committee in relation to the complaints.

Mr DAVID SHOEBRIDGE: How does that external merits review work in the NDIS?

Mr HAMPTON: It is a very new system obviously but the initial approach, I would say, is very similar to the way Housing NSW currently acts, that is, that there is an internal review process, the first peer review—similar to the NDIS, there is a first peer review. Then if that is not resolved to the satisfaction of the people involved there is a second process available to an external merits review tribunal which actually goes to the Administrative Appeals Tribunal, with New South Wales now bringing on board the New South Wales consumer. The Civil and Administrative Tribunal would be the obvious place where that external merits review system would take place, similar to Housing NSW.

Mr DAVID SHOEBRIDGE: Someone else suggested the Claims Assessment and Resolution Service assessors. What are your thoughts about that?

Mr HAMPTON: Yes. I have not had a great deal to do with them so I do not really want to comment on what their process is. Obviously something that is completely independent is better.

The Hon. SHAOQUETT MOSELMANE: My question relates to the Lifetime Care and Support Authority. Are the participants well represented on that authority?

Mr KILLEEN: I am not sure of the make-up of the actual authority but I am assuming that where there was a recommendation in the second and third review recommending that there be participants on that committee. Is that the committee you are referring to?

The Hon. SHAOQUETT MOSELMANE: Yes?

Mr KILLEEN: That would be the recommendation, to have direct participant contribution on that committee, but further to that, in the latest Lifetime Care and Support Authority newsletter there was a quote saying that they were currently now seeking two participants to join a reference group so I am not 100 per cent sure whether the reference group is a separate reference group, something that would be called up by the Lifetime Care and Support Authority or whether it is actually talking about the same thing. That would be something that would be put back to yourselves to seek that from the Lifetime Care and Support Authority, to find out whether that is one and the same or something operating separately.

The Hon. SARAH MITCHELL: In your submission you talk about having to coax some information from therapists with whom you deal within your organisation in relation to the approval process and also a reduction in the waiting time. Are you able to elaborate a little more on that for the Committee?

Mr HAMPTON: Certainly with some of the therapists and service providers that I deal with as an advocate for the Brain Injury Association, particularly for people with catastrophic brain injuries, we are looking at a seven to 10-day approval process where something might happen the night before and they need to do something the next day. We have knocked that system into place and in talking to an occupational therapist just this morning on an unrelated matter, she does some work for the WorkCover Authority as well and she is able to have direct communication with a case manager, who can make the decision that it is appropriate for this to happen straight away. It is a long-term benefit for the scheme itself that it happens then and there and not several days down the track when things may have escalated.

Mr KILLEEN: On a similar line to that, where there is a requirement for an assessment and prescription of assistive technology for the participants, on a side issue, I think it is worthwhile possibly having a look at the fact that you can understand there is a need for participants to be assessed for appropriate equipment and assistive technology prescribed and you want to make sure it is the correct one to meet the participant's goals and there is no abandonment of equipment because that is then just a waste of money.

However, you need to look also at the actual cost of the assessment-prescription process and the actual item that the person is seeking to get, for example, the actual assessment cost for a stock standard item that might be commonly used by people with a disability, such as using a computer. A lot of people with minimum dexterity use what they call a track ball, which is a ball inside a cup when they cannot move the mouse around. They are $100. To get an assessment, a prescription or something like that where the therapist possibly charges $100 an hour, it would seem that the cost benefit to the scheme, while it is in common use by a lot of people with physical disability, would almost be like "Let's cut through the therapy side of it; let's allocate an extra amount of money to the participants" because there is no money provided through the Lifetime Care and Support Authority. It is care for life; there are no damages, but it might be an opportunity for a trial run where participants are actually provided with a nominal fee or amount of $2,000 to $10,000. They have actually got that there and after initially acquiring a disability and a complete new life, they can do a lot of their own research and find things. It is dignity of risk to actually be able to find things that actually suit their needs. It is one of those types of things.

The Hon. PETER PRIMROSE: I know it is early days still but do you think the Lifetime Care and Support Authority is becoming more or less of a silo, more or less bureaucratic? We have spoken about the push that has been adopted by all levels of government through the National Disability Insurance Scheme to have a person-centred approach. That is certainly the bi-partisan policy within New South Wales. Do you think that is reflected in the activities and direction of the authority?

Mr KILLEEN: I am not sure if it is going to be an option or if it is currently in place where participants have been offered individualised funding packages for their care, like with New South Wales policy reform and the transition from the high-needs pool into the attendant care program, which is now called the Community Support Program. People are going to be offered to take those packages of money and manage them themselves. I actually do not know if that is going to be an option for participants through the Lifetime Care and Support Authority but the idea of that is it gives the participants care, flexibility and control over the services they actually receive. Someone might require respite and they need to ring up the Lifetime Care and Support Authority and say, "I need some respite, I need some support. I need this or that," at night but they actually need it for the next day where they could easily have rung the care worker themselves and said, "Can you come and provide that support?" as opposed to applying for it and then waiting for the approval. That is the more person-centred approach.

The Hon. PETER PRIMROSE: That is certainly the position that the Stronger Together 2 policy direction has taken. Do you think that the authority is cognisant of that?

Mr HAMPTON: In fairness to the authority, I have been asked to sit on an advisory committee in relation to a trial of direct funding for attending care services for 15 people to be rolled out between March 2014 and March 2015. The initial documentation was only received yesterday, but in that documentation there is anticipation that other services, apart from the tendered care services, should be self-managed and self-directed in the future, but there were some tax implications in relation to that which need to be overcome. The thought process is definitely there. It may not be quite up to the Stronger Together 2 situation and the roll out of the community support program, which is now in New South Wales. But coming back to the silo effect and that direct question, once again, I have talked directly to some of our members with a disability and some of our members who provide services. They still come back to the fact that there are 60 questions that need to be answered to fill out the assessment form to get a direct service. That is still the same today as it was three years ago. From that side of things, I would say no, that continues.

Mr DAVID SHOEBRIDGE: When you say 60 questions, is it genuinely—

Mr HAMPTON: Genuinely 60 questions.

Mr SCOT MacDONALD: I wish to get some elaboration of the following statement on page 3:

> … supported decision-making processes should be used. NCOSS has received feedback that substitute decision-making may not always produce the best outcomes for the person with disability and in some instances may not even involve them or become an unnecessary default position.

What sort of negative experience are you talking about?

Mr HAMPTON: The experience that I see on an all too regular basis is that possibly provisions under the Guardianship Act, section 4 particularly, and the Trustee and Guardian Act 2009, section 37, but I will need to check that, where consultation is required by the trustee or the guardian with the person whom the order is being made against, or with their family or friends. It does not happen on a regular basis. More with this particular submission, clearly there needs to be situations where it is not an all-or-nothing situation in that some of the smaller day-to-day decisions do not need to be referred to the substitute decision-maker on a constant basis. There should be the ability within the legislation to allow the formal decisions to continue to be made by the person themself and possibly only the major decisions left to the substitute decision-maker, but still with that safeguard of the consultation provided by section 4.

Mr SCOT MacDONALD: On the big ticket items?

Mr HAMPTON: The big ticket items.

Mr SCOT MacDONALD: That could be a recommendation?

Mr HAMPTON: Yes.

The Hon. SHAOQUETT MOSELMANE: I have a question for Ms Kumar. The Council of Social Services of NSW makes mention of independent advocacy. Can you tell us more about that idea and how the Lifetime Care and Support Authority would engage with that idea?

Ms KUMAR: In relation to independent advocacy, I think the authority could engage with advocacy organisations such as the Brain Injury Association of NSW and Spinal Cord Injuries Australia on a more regular basis to work with them on issues that are coming up for their members. They could engage with them to exchange information to resolve issues on a broad basis as well as individually. My colleagues who work as advocates might have more direct comments about that process.

The Hon. SHAOQUETT MOSELMANE: I thought your submission indicated a separate independent advocacy body.

Mr HAMPTON: In relation to that, certainly I am an independent advocate. I am not trying to blame any of my members in any way, shape or form, or service providers in way, shape or form, so I am independent from that point of view. This submission initially was tabled in October last year and the authorities have had an opportunity to engage in this since that time. Certainly they have been quite proactive in seeking out the Brain Injury Association of NSW to have some representation on quite a few of their forward-thinking processes. I am hoping that is the same with Spinal Cord Injuries Australia.

Mr KILLEEN: We do not get too many inquiries. I work in the systemic advocacy and I have colleagues working with individual advocacy. I have not touched base with them in regard to whether they are receiving direct complaints from participants on any specific issue, but I think in general that participants would. Obviously if they are making inquiries or questioning things, if a lot of participants are asking the same questions or possible complaints, they will not all know each other and not all know that they are possibly raising the same issue. A group of individual complaints is a systemic issue, so I do not know what the Lifetime Care and Support Authority does if it is getting various complaints about the same things, whether it tries to resolve them individually or to address them through whatever the complaint system is within the Lifetime Care and Support Authority.

Mr DAVID SHOEBRIDGE: If I or someone I cared about was a participant in the scheme, I would hope that the scheme was proactively putting them into contact with your organisations so that if an issue did arise they would have that independent or assisted advocacy. Does that happen?

Mr KILLEEN: I would have to take that on notice. I will find out and get back to you.

Mr DAVID SHOEBRIDGE: Thank you, Mr Killeen. Mr Hampton?

Mr HAMPTON: The authority does not actively refer directly to an independent advocacy organisation. More often it is the service provider, case managers or the people who are paid by the Lifetime Care and Support Authority who, when they are finishing their role, still see that there is a gap and, out of the goodness of what they do and why they are doing it in the first place, they seek out some independent advocacy to continue the—

Mr DAVID SHOEBRIDGE: Would it not be preferable if there was a systemic provision of information with the authority to saying, "We understand we will not always agree", or "You may want some further advice, here are the advocacy organisations", and proactively informing the participants?

Mr HAMPTON: Certainly.

Ms KUMAR: The authority's website could be improved in relation to the information that it has about advocacy. At the moment it is quite general. It could be more specific with contact details and other information.

Mr DAVID SHOEBRIDGE: Would I find the contact details for Spinal Cord Injuries Australia?

Ms KUMAR: I do not believe they are on the website at the moment.

Mr DAVID SHOEBRIDGE: Have you asked about it being put on?

Mr HAMPTON: I would have to come back to you on that. I imagine we probably would have, but I cannot answer that with a definitive yes or no.

CHAIR: I thank you for coming to give your evidence today. It will certainly help us in our deliberations. I also thank you for the work you do for the people you represent. I know that people like you put a lot of time into these things, and it is not always recognised. I want you to know that we recognise the wonderful and worthwhile work that you do for the community and the people you represent.

Mr KILLEEN: Can I just make one last comment?

CHAIR: Yes.

Mr KILLEEN: The previous speakers were talking about the need for a whole-of-government approach back to this bed block in the spinal unit. It is uneconomical to keep people in the hospital. You often hear in the media that people cannot get a bed in hospital because of the waiting list. It is fact that there are people in the spinal unit, and I assume the brain injury unit, who want to get out but they cannot because there are not appropriate supports, whether it is equipment—and I am not talking only about lifetime care equipment. If they are not compensated through work injury or lifelong care and they have no other form of compensation they are then reliant on government-funded programs. If they need accommodation, equipment, home support, all sorts of support then they cannot get out of hospital to go to available accommodation, or their own home that hasn't been modified, it is all being paid for by the State Government. It is a false economy to keep somebody in hospital at $1,000 a day then if the problem is fixed, which causes the block, then get it over and done with.

Mr DAVID SHOEBRIDGE: Who should have the primary responsibility for resolving that? At the moment the Ministry Health says it is not its job to be providing that and Lifetime Care and Support said it does not fall within reasonable and necessary care. Housing NSW says it does not have any money. If you had to nominate someone as the lead agency to resolve that issue, who would it be?

Mr KILLEEN: I believe the Lifetime Care and Support Authority provides money for transitional accommodation and has the Sargood Centre at Collaroy. It provides a maximum of six months transitional accommodation for people who would not be able to get out of hospital and while they are waiting for things to be done. It is a 14 bed facility when it is first opened up. It is probably expanding on that. However, there might be a need for the Lifetime Care and Support Authority to get some properties, which will go up in value and be an asset, not a loss, and convert them to provide transition accommodation. It could use some of the money to free up the beds and having accessible accommodation to transition people out. It is in the bank, why not put it into property and get people out of hospital so there is not an impost on the Health budget. It is not just about the

money. It is no fun for people who have just acquired an injury who are stuck in hospital and who want to get home and be with their family.

(The witnesses withdrew)

(Short adjournment)

MARY MAINI, General Manager, CTP Insurance Australia Group, Insurance Council of Australia, sworn and examined, and

TONY MOBBS, General Manager, CTP, Allianz, Insurance Council of Australia, affirmed and examined.

CHAIR: In what capacity do you appear before the Committee?

Mr MOBBS: As chair of the Motor Accident Injury Scheme Committee of the Insurance Council of Australia.

Ms MAINI: I appear on behalf of the Insurance Council of Australia.

CHAIR: I think you both may have been here this morning when the Committee heard evidence from the Bar Association, the Law Society of New South Wales and the Australian Lawyers Alliance. The Australian Lawyers Alliance said:

> The history of the scheme is of a clear under-estimation of future profits through the insurer's over-estimation of future liabilities. Profits levels for any given year are found in subsequent years to be a gross under-estimation.

I think they were talking about 8 per cent as opposed to 19 or 20 per cent. Those three bodies understand how the law works. I think they would understand money matters. They would be very competent people. They ask: Why, year in and year out, is there this over-estimation by more than 100 per cent. What is your response to that? That is my first question but you might want to make an opening statement. I do not want to cut corners.

Mr MOBBS: Thank you for the opportunity to give evidence to the Committee. We appear today as representatives of the Motor Accident Injury Schemes Committee of the Insurance Council of Australia [ICA]. The Insurance Council is the representative body of the general insurance industry in Australia, which includes five private sector insurers that underwrite the NSW Motor Accidents Compensation Scheme under several licences. The New South Wales Compulsory Third Party scheme is a vital social support framework for New South Wales motorists and injured people, and the ICA's members provide compensation to those people injured in motor accidents who are not at fault as well as limited compensation for at-fault injured people in certain circumstances. The scheme protects against financial burden of a motorist being personally responsible for compensation payments due to an injured person, which often amount to hundreds of thousands of dollars but can be as high as several million dollars for the most severely injured people.

After listening to this morning's witnesses, there are a few matters we would like to clarify. It was suggested that there is currently no risk taken on by insurers in the New South Wales CTP scheme and that risk needs to be built in. This is certainly not the view taken by APRA, which prescribes the level of prudential capital insurers are required to hold. Mention was made this morning that current prudential margins are too high and this has an impact on profits. Prudential margins relate to the amount of capital insurers are required to hold and they are set by APRA at a level that ensures there is ample capital to pay claims irrespective of future uncertainties. The level of prudential capital we hold has a limited impact on the profits or the premiums we require. It is also not the view of insurers that they do not take on any risk. In setting premiums insurers run the risk that claims frequency will be higher than expected or that superimposed inflation will emerge, and there are many other assumptions which could not be borne out as per our rate filing. In those situations we have to bear the additional costs.

While the table provided by the Bar Association this morning shows insurer profit figures going back to 1999, this does not provide the full picture. During the 1990s insurer profits were considerably lower, and in fact highly unprofitable for a few of those years, to the point that many insurers exited the scheme during that period. Insurance operates in cycles that extend over long periods of time. So to look at a profit figure for a 12-month period out of context does not give a true picture of the scheme. One of the major impacts on profits that has not been addressed is superimposed inflation—that is, any unanticipated increase in claim costs over and above the rate of inflation, such as the identification of new heads of damage or an increase in the proportion of claims receiving compensation for a particular head of damage or above average inflation increases in awards for a particular head of damage.

Superimposed inflation is important to insurers as whatever has driven it has not been accounted for when we set the premiums. So insurers make allowance in their premium pricing for a particular level of superimposed inflation based on past average rates, which has been 3 per cent over the past 20 years as reported

by the scheme actuary Ernst and Young. As the actual rate over the past four years has been closer to zero, insurers have made profits in excess of our forecasts. We can point to several key indicators that show the positive work of the industry. The Insurance Council's members provide an efficient service to almost five million motorists in New South Wales, with more than 14,000 claims having been lodged in the last financial year. Of those 14,000 claims lodged last year, 99.6 per cent were successfully resolved without any complaints—there were only 56 complaints out of those 14,000 claims. In fact, we received more compliments than we received complaints.

Since 2007 the duration of the average claim has decreased from five years to 4.3 years more recently. This has been achieved through the competitive tension between insurers as they strive to improve efficiency and reduce capital consumption. The figure of 4.3 years is less than half the average duration achieved by the Victorian scheme. Claimant experience will improve even more through the program scheme improvements that the Motor Accident Authority [MAA] is currently undertaking with the assistance of insurers. Some of the priorities we are working on with the MAA include the simplification of claim forms, and a range of other things, so that claimants can quickly and easily lodge their claims and have them settled. We are happy to take questions.

CHAIR: Miss Maini, would you like to say something?

Ms MAINI: He said it all.

CHAIR: Thank you for your introduction. Given that the theoretical target was 8 per cent, from 2000 to 2012 it has been up to and usually near 20 per cent, and I know there are variations in inflation and all the rest of it but the percentage level of profit seems to stay static—it does not go down, it just stays high. Every year it is 100 per cent in excess of what the theoretical target is. The Committee has received submissions from three esteemed legal bodies. These are intelligent people who deal with the law and know finance as well. They say there is something wrong. The question that is being increasingly asked, and to put it mildly is increasingly troubling people, is: What is the reason for this? We hear about all of these factors but whatever combination those factors come in it always seems to be the same result—that is, profits up near 20 per cent. How do we explain that?

Mr MOBBS: The first thing is to put it in context—that is, the law societies have provided the results since about 2000. They exclude the 10 years prior to that.

Mr DAVID SHOEBRIDGE: But that is when this scheme started.

CHAIR: That is right.

Mr MOBBS: That is correct but superimposed inflation is prevalent in workers compensation and injury schemes of all sorts where you have a long tail. They all experience superimposed inflation. They will all go through periods of profitability in excess of estimates and they will go through periods of loss making which are obviously unanticipated. But when we are looking at the actuarial assumptions underlying the scheme and within the scheme we certainly look at the results going back past 1999. In fact Ernst and Young in their modelling of superimposed inflation certainly go back to 1990. They do not stop at 1999 as the law societies have done.

CHAIR: I will respond to that. I know there are others who are keen to ask questions. In response to specific assertions and specific statistics given by these three legal bodies you give a generalised response. You give a general answer to a specific situation. I am still having trouble following that myself.

Mr MOBBS: Perhaps I could explain it using other circumstances. Insurance operates on cycles which extend well beyond a 12-month period, such as cyclones, floods and earthquakes. The cycles that these perils operate in extend well beyond any 12-month period.

Mr DAVID SHOEBRIDGE: Compulsory third party insurance would have to be one of the areas of your business that is less exposed to those kinds of cycles because the nature of the product is relatively statistically stable interactions between millions of motorists in New South Wales. It is not the same as flood risk or the like?

Mr MOBBS: We heard this morning of two legal matters which both went to the High Court, Smalley and Theiring —in fact one of them is still ongoing. The Theiring matter in particular is one which, had the High Court found against us, would have cost insurers up to $60 a policy that we did not anticipate.

Mr DAVID SHOEBRIDGE: That has happened before and when something like that has happened you have had very fast legislative response.

Mr MOBBS: Not in all circumstances.

Mr DAVID SHOEBRIDGE: In almost all circumstances there has been fast legislative response. What is the uncertainty in this market that is getting it out of whack?

Mr MOBBS: I will give you another example: Psychological overlay. The absolute figures I am not prepared to talk about but I can talk in general terms. For people with a whiplash injury 10 years ago less than 10 per cent of them claimed any form of psychological injury and when they did succeed they received, I am not certain, but the figure was in the order of $10,000 to $20,000 for that psychological overlay. Over the past eight to nine years that has moved up considerably and now well above 50 per cent of people claim and receive awards for psychological overlay. The amount of money they are receiving is well above $10,000 to $20,000, it is well over $50,000. That is an example where in those underwriting years when we accepted premiums we did not know that in years subsequently the courts would award a much higher rate of psychological overlay and a much greater amount for that as well.

CHAIR: Over these 10 years that has not seemed to have had any negative impact on profit.

Mr MOBBS: There is a range of factors going on. I can talk to some of these but there are more to them. From 2000 to 2008 the claims frequency reduced from approximately four per thousand to two per thousand. At the same time when superimposed inflation was emerging we had concurrently a reduction in frequency. That halving of frequency was also unanticipated. You cannot say that these two things would absolutely occur in unison in the future. The reduction in claims frequency was unanticipated and unexpected. To this day nobody can really explain why it occurred and that is the reason for some of those profits.

CHAIR: Why do you come to a figure of 8 per cent? You are very specific in that figure of 8 per cent. That is able to be worked out but this other figure just seems to remain high. We heard a suggestion this morning from a representative of one of the legal bodies that moneys be set aside. We hear about this end tail and that moneys be set aside to cover that, if indeed it happens, and be used elsewhere if it does not happen.

Mr DAVID SHOEBRIDGE: They put the proposition that there be a levy on super profits over and above a certain threshold, such as 12 per cent, and that money be placed in a public sinking fund to deal with these kinds of eventualities.

CHAIR: Would that not help with the uncertainties that you are finding so there is fairness right across the board?

Mr MOBBS: That matter of scheme design is really one for government to consider. However, the Australian Prudential Regulation Authority [APRA] also considers those issues and APRA also looks at how insurers can mitigate against these types of long-term fluctuations that occur over many years, and we deal with it through capital. That is the current way we are dealing with it. It is open to government to consider alternatives. However, you would have to be aware that in those years when superimposed inflation emerges significantly the costs will be very significant.

CHAIR: I know, and you correctly say it is open to government to do this but I am asking for your response to that suggestion.

Mr MOBBS: I would say that if you look at compulsory third party insurance over the longer term—I am talking specifically about superimposed inflation here—the average over the last 25 years has been 3 per cent and I would expect it to be 3 per cent in the future. In any one year it is likely to be close to nil, in which case insurers will derive more profits than expected—than the 8 per cent—and then there will be years in which it will significantly exceed 3 per cent in which case insurers will make big losses, as they did in the 1990s.

CHAIR: Under a different system.

Mr MOBBS: The superimposed inflation is common to all schemes, all systems and there is no scheme in the world that has managed to get rid of superimposed inflation.

Mr DAVID SHOEBRIDGE: Did you say the average claim is now being resolved in 4.3 years?

Mr MOBBS: That is the average duration of payments.

Mr DAVID SHOEBRIDGE: So the scheme's exposure to superimposed inflation is much less than what you are suggesting?

Mr MOBBS: It is reduced from five years to 4.3 years.

Mr DAVID SHOEBRIDGE: Your risk on average is over four years for this superimposed inflation risk that you are putting on the table?

Mr MOBBS: That is correct.

Mr DAVID SHOEBRIDGE: Surely then if we have 12 years of consistent super profits coming in, the argument that we should be having a long term perspective beyond 12 years—when at most you have a 4.3 year horizon for this kind of risk for superimposed inflation—is a little hard to maintain?

Mr MOBBS: That is because there are two things that have confounded there: There has been superimposed inflation in the scheme in the past 10 years—quite significantly so as well.

Mr DAVID SHOEBRIDGE: It has obviously been priced into your premiums because you have a 19 per cent super profit.

Mr MOBBS: That is incorrect. The reason that profits in excess of expectations were made from 2000 to 2008 is because claim frequency halved.

The Hon. SHAOQUETT MOSELMANE: The submission we received this morning from the NSW Bar Association stated that the average of 19.5 per cent is the projected profits over the life of the scheme to date: How do you say that is incorrect?

Mr MOBBS: The assertion was that it was all due to superimposed inflation whereas there are many assumptions in play at any one time in this scheme. As it turns out in the last 10 years there have been two major things in play: One, claims frequency has reduced substantially, in fact it has halved; and two, there has been superimposed inflation in the scheme. The claims frequency reducing has offset the effect of superimposed inflation other the last 10 years. Nevertheless, superimposed inflation has definitely been present in the scheme.

CHAIR: The end result is the same profit level. There are these different factors, one offsetting the other, but whatever happens in whatever proportions with these competing factors the profit margin stays at remarkably the same level—or am I wrong in saying that?

Mr MOBBS: You are correct in saying that insurers have derived profits in excess of expectations but I am certain that insurers are setting their premium based on the central estimates of each of the assumptions that we make, such as superimposed inflation. That occurs over a substantially longer period than 12 months, from 10 to 20 years or so. Claims frequency halved up to 2008 and there are many other factors. It has started increasing from 2008. Once again, nobody can explain to this date why it is increasing. Nevertheless, that is the uncertainty within which insurers operate.

The Hon. PETER PRIMROSE: Given our conversation and the details we have been presented with of the super profits you have been making, do you expect the cost of green slips to stay stable?

Mr MOBBS: The cost of CTP green slips is set in accordance with a prescribed formula, a prescribed set of guidelines that the MAA promulgates.

The Hon. SHAOQUETT MOSELMANE: Does it take into account the profits?

Mr MOBBS: Indeed it does, and a rate filing that insurers submit is in the order of 100 pages long. It goes into tremendous detail on each and every one of the assumptions that we make, and we are required to provide historical evidence. We compare it with other schemes, we look at our own results, we look at a whole range of factors when we set those. So I cannot tell you next year whether the premiums are going up and down because I do not know what the bond yields will be next year, I do not know what the claims frequency will be next year or the average size or whether there will be a superimposed inflation precedents scheme. These are all things that we will assess over the 12 months and when we set our rate filings in 12 months time we will set the premiums accordingly.

The Hon. PETER PRIMROSE: Most other private sector groups and governments have people who can tell you what they expect their forward estimates to be and all the assumptions that they make. Do you have people like that—auditors? Do you have people such as accountants, people who can read balance sheets and make those predictions?

Mr MOBBS: We certainly do. We have a range of advisers we rely upon. In fact, the premium determination guidelines established by the Motor Accidents Authority set out a range of those things which are mandatory processes we must follow. For instance, each of the insurers has a range of internal actuaries. Actuaries are a specialist profession who look at all of the assumptions as they relate to insurance and they will come up with their estimates. They also rely on, for instance, our forward estimates of a bond yield. Almost all of us rely on Access Economics.

The Hon. PETER PRIMROSE: What do you think the forward estimates will be, the bond yields, next year?

Mr MOBBS: I could refer you to Access Economics and whatever they say will be those assumptions.

The Hon. PETER PRIMROSE: So you can make those assumptions?

Mr MOBBS: On economic? Where they are available.

The Hon. PETER PRIMROSE: How well have they been able to make those judgements compared to what was the case over the last few years?

Mr MOBBS: In respect of the economic assumptions over the last—if you go back from the global financial crisis I do not think anyone predicted that bond yields would halve from 6 per cent to below 3 per cent. That was not an anticipated feature of any analyst report yet it happened. The decline in bond yields that happened a few years after that was also unanticipated, yet it happened. So these are, again, fluctuations that insurers must consider.

CHAIR: But there was one constant: the 19 per cent. The one thing that was constant with these ebbs and flows was 19 per cent.

Mr MOBBS: I do accept that. However, it is incorrect to say that insurers are aiming for a 19 per cent return and we arrange things to get that result. That is incorrect.

The Hon. PETER PRIMROSE: It was just down to luck, was it? Was it luck as opposed to foresight that you achieved that result despite the global financial crisis and all those other issues?

Mr MOBBS: Insurers use a term "fortuitous". "Fortuitous" does not mean fortunate, it means it is an unexpected contingency in the future, and what we would say is that through a range of changes to our assumptions, that has conspired to achieve greater profits over the last 14 years.

The Hon. PETER PRIMROSE: Do you expect to be fortuitous for the next few years?

Mr MOBBS: As I said, "fortuitous" is not a favourable thing; I am saying it is a random function of the future. When we put our rate filings in we are predicting—I cannot speak to the profit margins of an individual insurer but they are disclosed in the MAA's annual report within a range of what they are. Within that range of what insurers file their premiums to be, I would expect that to be our average profits. I can certainly say that the assumptions that we look at prospectively will not occur. Even though we have predicted a superimposed inflation rate of more or less 3 per cent, I can say with some certainty that it will either be

considerably lower than that or it will be considerably higher than that. Superimposed inflation tends to be either benign or extreme.

The Hon. PETER PRIMROSE: I certainly hope that you publish your Melbourne Cup tips in terms of the track record of being fortuitous.

The Hon. SARAH MITCHELL: I would like to discuss the issue of premiums in New South Wales in comparison to other States. Queensland was the example that was discussed earlier this morning—I think you were here for that. In your submission you say that you would be happy to provide specific information in relation to "key metrics to support an accurate comparison of the New South Wales scheme with motor accidents schemes in other jurisdictions such as Queensland and Victoria". Could you talk a little bit more about that and also why there seems to be such a significant increase in New South Wales in comparison to Queensland and if that is correct?

Mr MOBBS: There are two components to that question. The first component is how our premiums compare. I think, as the Bar Association mentioned this morning, the benefits provided in New South Wales differ very substantially from those in Queensland. For example, there is no lifetime care scheme currently operating in Queensland.

Ms MAINI: There are no blameless accidents.

Mr MOBBS: There are no blameless accidents, no ANFs. There is a range of differences in benefits offered now. That is, again, a matter for government as to whether we see that it would worthwhile offering a high level of benefit and, of course, paying an appropriate premium for that additional benefit. I do not think the Insurance Council has a perspective on whether the benefits currently being provided are appropriate or not, but I have not heard any discontent amongst insurers saying that they do not think the benefits are appropriate. What was part B of the question?

The Hon. SARAH MITCHELL: Just why it seems that the premiums in New South Wales have increased so significantly.

Ms MAINI: It really comes down to whilst we have a broader range of benefits that are being provided compared to most other jurisdictions, the only other one that would have the broadest benefit structure—and it is a completely different model—is the Victorian Transport Accident Commission model. But in a privately underwritten scheme New South Wales has got very broad benefits, and that is why the increases have also emerged over time.

The Hon. SARAH MITCHELL: Sort of you get what you pay for, in a sense?

Mr MOBBS: In a sense, that is right.

Mr DAVID SHOEBRIDGE: I would love to go on about profits some more but I get a sense that it is not going to be very productive. There are three areas that there were strong, consistent submissions from the other side of the record—the lawyers—where they said that reform should be relatively consensual and positive; they were about pre-filing statements and the 89 (8) (e) and that being a barrier to getting the matter before CARS. I am wondering whether, from your understanding, those specific statutory requirements are productive from your side of the record.

The other was the proportion of late claims that are contested and unsuccessfully contested—either 90 per cent or 83 per cent unsuccessfully contested—and how that can be resolved as you have said from your side of the record.

CHAIR: Do you agree with that statistic that approximately 90 per cent of late claim disputes are lost by insurers?

Mr MOBBS: I would have to look at that. I do not have that information at hand.

CHAIR: Do you have that, Ms Maini?

Ms MAINI: No, I do not. One of the things I think we need to look at is what is the proportion of late claims that we get across the scheme.

CHAIR: That is a different issue. You might agree to a majority of late claims but I am talking about a different statistic; I am talking about those that you have not accepted that then go to a higher tribunal, and we are told that the insurance company loses 90 per cent of them. The question is raised: If there is such a high rate why do you continue to add expense by opposing these late claims when 90 per cent of them are going to be accepted?

Ms MAINI: I do not know. I have not come across the latest figures, so I would have to take that on notice.

Mr DAVID SHOEBRIDGE: It was 10 out of 60 cases succeeded, according to the Motor Accidents Authority's figures.

Mr MOBBS: There are probably parts of that question we can answer now and parts we can take on notice. I think the part we can answer now is that the law prescribes these cut-off periods. It is the insurers' duty to apply the law. If the law says that we need to decline the claim after a period of time then we decline it. The law then provides a mechanism for the person who has had a claim declined to seek leave to bring the claim late. The fact is that we are applying the law as it stands and the claimant is then entitled to an appeal mechanism; I do not think there is anything scary about that.

CHAIR: The law allows you to accept those late claims.

Mr DAVID SHOEBRIDGE: In fact it says that you have to when there is a full and reasonable explanation given, and nine times out of 10 the tribunal disagrees with what your members are saying. The tribunal says there is a full and reasonable estimation—90 per cent of the time disagreeing with the position taken by the insurance companies. Are you willing to sit down with the Motor Accidents Authority and the lawyers and work out a resolution to this?

Mr MOBBS: The insurers generally, in fact I think almost all of the time, work very collaboratively with the Motor Accidents Authority. When the Motor Accidents Authority has a forum in which the lawyers and the insurers are together we discuss these matters very collaboratively.

Mr DAVID SHOEBRIDGE: What about the pre-filing statements? Those statutory requirements were inserted in 89A to 89E of the Motor Accidents Compensation Act. Unless they are all met, an application cannot be made with the Claims Assessment and Resolution Service. People are running out of time, and you are getting "pre pre-filing conferences". Are you finding that same experience of having "pre pre-filing conferences"?

Ms MAINI: No, the policy design framework for the notices was really to try to ensure that we had all the evidence and all the material presented early so we could actually resolve the matter rather than having the matter go to the Claims Assessment and Resolution Service and then be extended.

Mr DAVID SHOEBRIDGE: But the lawyers are saying that, because every box has to be ticked, it is delaying the resolution of matters—that it is actually a burden and a barrier to quick resolution. What is your view on that?

Ms MAINI: The view that we would have is that if at the end of the day it is actually accelerating the ultimate resolution of the claim then that is not so bad—that is not an unnecessary evil. It is really a case of if is it is actually creating more process and more administrative burden then by all means we would sit down with the relevant associations and work through what would be the ideal with the ultimate aim of trying to shorten the claims' duration because that is what we really want to do.

Mr SCOT MacDONALD: I have four questions. My first one continues on from where the Hon. Sarah Mitchell was going with her questioning about the Queensland experience. Are there any cross-border issues we should be acting on? Are there any opportunities for harmonisation, given that they are very different schemes? Is there anything this Committee should be aware of and acting on to expedite claims? Are there any hiccups there?

Mr MOBBS: Nothing really comes to mind. The Queensland scheme is a very different scheme in many respects. I think it would be difficult to just pick up—and there are probably exceptions to this—elements of the scheme and bring it across to New South Wales. You would have to bring across a greater proportion—

Mr SCOT MacDONALD: I was more thinking of where you have New South Wales registered drivers going interstate and having accidents, or anything along those lines.

Mr MOBBS: They work very well. There are no real problems there.

Mr SCOT MacDONALD: My second question is around motorcycle premiums. I think we have been told that there is some cross-subsidisation going on. Is there any way that we can get some better price signals in there, if you like, without sending the price of motorcycle green slips into the stratosphere?

Mr MOBBS: Motorcycle premiums have been a contentious area of pricing for quite some time. There used to be three levels at which motorcycles were rated—I cannot quite remember the size but it was based on the cubic centimetres of the motorcycle. At that time there was much unhappiness about the cross-subsidies involved so the Motor Accidents Authority introduced five levels for the size of the bike; and that, I understand, has led to an even greater gnashing of teeth amongst the motorcycle-riding community. I am not sure that there is an easy answer to this question other than to say that at some point there has to be some recognition that people injured in a motorcycle accident are very badly injured and they do cost a great deal of money. At some point that has to be paid for—whether you get the motorcyclists to pay that premium for themselves or whether you get other classes of community users to cross-subsidise motorcycle riders. That is a different issue again.

Mr SCOT MacDONALD: I guess in the point I am addressing—and to start with a bit of transparency, I am aware that there is cross-subsidisation—should we have access to what level of cross-subsidisation there is so we can have a debate in the community? I know the motorcycle riders want to pay what the ordinary vehicle users pay. Is that possible? Is it easy to get that sort of information out into the public domain?

Mr MOBBS: That is probably a question better directed to the Motor Accidents Authority. I can say from our perspective though that we are privy to the actuarial analysis underlying how these calculations work. Certainly from my perspective I think that motorcyclists are fairly dealt with in that process. In fact they are dealt with in exactly the same way as all other classes of motor vehicles.

Mr DAVID SHOEBRIDGE: There were some details in the annual report, and from memory far and away the biggest subsidy was in Lifetime Care and Support. I think there was some detail.

Mr SCOT MacDONALD: Nearly half of the long-term care and support was for motorcycle riders. I will move on, quickly. We have had a bit of discussion around the bond yields and that sort of thing. I asked a question of somebody earlier about that discount rate, which is sitting at around 5 per cent, whereas the bond yields are closer to zero. It is probably going to be close to zero for a few more years at least. Do you have any thoughts about how we might have another look at that discount rate and bring it back down to the 2 or 3 per cent mark? Is there an index or something that would be fairer or more contemporary, if you like?

Mr MOBBS: I am not an expert on all elements of this but the part I can talk to is the bond yield rate that insurers use for pricing purposes. It is structured around a duration of in the order of four to five years, which matches our average claims duration. People who are injured in an accident we are setting aside a pool of money for, and that has to last for a considerably longer period of time. So the yield rates that you are using will be different depending on your time frame. I could not speak more specifically than that other than to say that I think the 5 per cent currently is in fact there. The very long-term yield rate—

Mr SCOT MacDONALD: I suppose the counter-argument is that for a few years now we have been in a period of a low inflation rate and a low bond rate, and that seems to have probably another decade or so in front of it. Do you have anything really at this stage to throw back at us on the discount except to say that 5 per cent is probably in the long term a fair thing?

Mr MOBBS: The bond yield rate was above 6 per cent for many years prior to 2008 so at that time it was probably in favour of the claimants rather than against the claimants. At this particular time it might be the other way.

Mr DAVID SHOEBRIDGE: This is meant to be over and above inflation, though; it is not just simply the bond rate. For the actual real growth in capital you cannot just compare it to the bond rate.

Mr MOBBS: Maybe there is more to it.

Mr SCOT MacDONALD: But they are related. They are not one and the same but they are related.

Mr DAVID SHOEBRIDGE: You cannot just compare it to the bond rate. That is just a misunderstanding of how it operates. You have to look at the real rate of return over and above inflation.

Mr MOBBS: That may be so.

Mr SCOT MacDONALD: I come to my final question. Again, there has been discussion of whether or not there is enough competition. Can you talk to us about the level of competition. Are there barriers to entry? Do you think we would be better served by having more players in the market? I take on board your earlier comments that in the 1990s or during the last decade there were certainly more players in there. Would it be sustainable to have more players in there?

Mr MOBBS: The market is currently open. Any insurer is eligible to come into the market at any time. There are barriers to entry. The Australian Prudential Regulation Authority prescribes a very significant amount of capital that is required. Other barriers to entry would be the knowledge that you require to settle a claim.

Ms MAINI: That would not necessarily be a barrier to entry; it is really capital that would be the main one.

Mr MOBBS: And barriers can be overcome I am just saying that generally there are things that insurers would need to do. There is nothing to prevent anyone from entering the market.

Mr SCOT MacDONALD: I will ask a supplementary question. Have you had overseas insurers look at the market?

Mr MOBBS: You would have to speak to the Motor Accidents Authority about that, but they certainly would not be telling an individual insurer about their plans to enter our market.

Ms MAINI: No.

Mr MOBBS: They would properly address that to the Motor Accidents Authority [MAA] and talk about whatever requirements they would need to fulfil.

Ms MAINI: Can I just add one point? When you are talking about the Queensland legislation, was there anything that was copied?

Mr SCOT MacDONALD: I actually was not going down that track. I was talking about the cross-border issues and whether there was any opportunity for more harmonisation.

Ms MAINI: Okay.

The Hon. SARAH MITCHELL: If you want to add something, you should.

Ms MAINI: No. It is just that the section 89 provisions were modelled on Queensland. There are a number of provisions and they are all saying "That worked in Queensland pre-compulsory conferences, and that was the genesis of the reforms in New South Wales."

The Hon. SHAOQUETT MOSELMANE: I want to follow up on those questions about the premiums and comparisons between New South Wales, Victoria and Queensland. Are there any other States that we could use in a comparative analysis in this regard, or for that matter, is there anything from overseas?

Mr MOBBS: There are. The largest schemes in Australia obviously are the Queensland and Victorian schemes. Typically they are the ones that we compare ourselves to for the most part, but there is nothing preventing any other analysis. The South Australian scheme differs in that claims management is underwritten

by the Government, yet the claims are managed by a service provider so that is probably even more different from other schemes. The Australian Capital Territory and Western Australia are probably too small.

Ms MAINI: It is almost the pure common law scheme.

Mr MOBBS: There are elements of comparison there, but it is probably a bit too small to make a useful comparison.

The Hon. SHAOQUETT MOSELMANE: Are there any overseas-State comparisons?

Mr MOBBS: During the reform process there was an element of consideration of overseas schemes, but not in any detail in terms of the pricing. There was certainly some examination of how the process of managing the claims and the benefits being provided, but nothing in terms of how we might compare the premiums.

Ms MAINI: The Government's green paper contained a comparison of all the different States—the premiums and the underwriting framework. We can certainly resubmit that.

Mr MOBBS: That is the Motor Accidents Authority's white paper?

Ms MAINI: Yes, the Motor Accident Authority's white paper.

Mr DAVID SHOEBRIDGE: If you do resubmit that, could you look at the criticisms that were made of those comparisons because they exclude lifetime care and support and those efficiencies and those benefits.

Ms MAINI: Sure.

Mr DAVID SHOEBRIDGE: I was going to ask you about the system using the accident notification form [ANF], which currently is set at $5000 non-indexed. There has been a number of suggestions that if that were increased to something in the order of $20,000, scheme efficiencies would actually pay for that. What are your thoughts on that? Have you had access, or would you like access to the actuarial material that underpins it?

Mr MOBBS: We have not had access to that information, but before we would invest time in considering that we would want to understand whether the Government would be open to considering it, and then we certainly would consider it. In all forms of actuarial analysis in respect of compulsory third party [CTP], there are more that changes than one would first think. The Bar Association's submission—and it might have been in the Law Society submission—was very much restricted to what would happen if we eliminated the legal costs associated with those normal claims. More things would move; there would be behavioural changes by claimants. I am not sure whether that has been modelled, but we can certainly look at that.

Mr DAVID SHOEBRIDGE: What about the concept, though? For small claims to about $20,000, we could get rid of the dispute costs and actually just pay the claim if someone has been genuinely injured.

Mr MOBBS: We are certainly open to that suggestion.

Mr DAVID SHOEBRIDGE: Do you think it is a good general thrust?

Mr MOBBS: Before we could answer that, we would need to do some behavioural modelling on the cost. It is certainly something that we are open to. It probably will not be quite as simple as the law societies have asserted. That is all I am saying.

Mr DAVID SHOEBRIDGE: They have made their assertion with some actuarial modelling supporting it. You are saying you would need to see that?

Mr MOBBS: Certainly.

Ms MAINI: We would also preface that by saying that the current accident notification form has a 50 per cent conversion rate to full claims. Whatever process or scheme we put in place needs to ensure that if it is stopped at $20,000, or whatever the threshold is, that they do not convert to full claims. Otherwise, we have not achieved anything.

Mr MOBBS: That is right.

The Hon. PETER PRIMROSE: Is it the case that about 15 per cent of the premium costs cover insurer claims handling and acquisition costs?

Mr MOBBS: I think it is of that order.

The Hon. PETER PRIMROSE: Can you tell me how much of that would be spent on advertising?

Mr MOBBS: Well, for some of the insurers, it is very little. Essentially, the insurers are lined up either as direct insurers or as intermediated. The direct insurers would incur an advertising cost that undoubtedly would need to be factored into their premium calculation. Intermediated insurers would have very little in the way of advertising costs, but they would have commission payments that they pay to agents who acquire the business on behalf of the insurer.

The Hon. PETER PRIMROSE: Would you support a proposal that said unless the advertising specifically referred to costings and the different prices available for green slips, none of the money of compulsory third party premiums should go towards generating that?

Mr MOBBS: No, I would not support that. The reason I would not support it is that we have to consider both the initial acquisition of the policy and the retention of that business over its subsequent lifetime. Without going into huge detail, insurers would look at compulsory third party specific advertising as being more relevant to the initial acquisition of that insurance policy. Insurers would also seek to maintain a high retention rate of that policy over its lifetime. More general advertising is more relevant to that ongoing renewal of the policy.

The Hon. PETER PRIMROSE: Why should money from green slip premiums be used to pay for general advertising advocating comprehensive insurance?

Mr DAVID SHOEBRIDGE: Because it is a statutory requirement; it is not a matter of choice. That is the point, is it not?

The Hon. PETER PRIMROSE: That is precisely the point. If it mentions a comparison of price involving green slips, I can appreciate that. However, I still do not understand why green slip money should be spent on what amounts to comprehensive advertising that does not mention the cost of green slips.

Mr MOBBS: I work for one of the insurers and I am aware of how my employer does that allocation. I am certainly unaware of how other insurers do that allocation. I would suspect that the amount apportioned from general advertising to compulsory third party advertising is not high in the scheme of things.

The Hon. SHAOQUETT MOSELMANE: Can you provide those figures?

Mr MOBBS: I can get them from my employer. However, my employer is an intermediate insurer. Therefore the amount of advertising money attributed to compulsory third party insurance is miniscule or less.

The Hon. PETER PRIMROSE: Can the Insurance Council provide that information?

Mr MOBBS: That would be a matter for individual insurers to decide.

The Hon. PETER PRIMROSE: If the Committee requested that information from your members through you, would it be provided?

Mr MOBBS: That is not a matter for the Insurance Council; it is a matter for the Motor Accidents Authority to do that sort of investigation.

The Hon. PETER PRIMROSE: They are your members. If this Committee asked you to approach your members they could refuse to provide the information if they wished.

Mr MOBBS: I think it turns to other issues. It would relate to competition matters as to how—

The Hon. PETER PRIMROSE: How much are you spending on advertising?

Mr MOBBS: I think each individual insurer would contend that that is highly private and confidential information. That is something that only a regulator would rightfully ask of the individual insurer.

The Hon. SHAOQUETT MOSELMANE: Do you not think that the people who insure with you have a right to know?

The Hon. PETER PRIMROSE: Public money is required to be spent in relation to green slips. Some of that money may be going into more comprehensive advertising, and you guys are saying you will not provide that information because it is commercial-in-confidence. My dilemma is that this is a requirement for every driver and motorcycle user in New South Wales; we pay for that. It is public money paid by people and going into your coffers.

CHAIR: Do you accept the premise that it is public money going in to advertising?

Mr DAVID SHOEBRIDGE: Private money under public compulsion.

Mr MOBBS: This is information that you could obtain through the Motor Accidents Authority. I do not think that an individual insurer would contribute to the Insurance Council. You could get this information if you wanted it.

Mr DAVID SHOEBRIDGE: In fact, it is something that you would think the Motor Accidents Authority would have had its head around when it agreed to your premiums and actuarial assumptions. You would assume a competent authority would have its head around that.

Mr MOBBS: I can advise you that the rate-filing process does demand provision of this type of information. I am unsure whether it is split quite the way you want it, but it is certainly provided.

CHAIR: On the question of expenses, we were advised by the Law Society that over the underwriting years from 2000 to 2012 insurer expenses amounted to 16 per cent, whereas the legal and investigation expenses were 12 per cent. Are those figures correct?

Mr MOBBS: The 16 per cent would seem to be in the order of being correct. I would note, though, that the insurer expenses have decreased over time. I think more recent figures would give a better picture.

CHAIR: The legal expenses may have decreased as well, but at the moment these figures are 16 per cent and 12 per cent. Some say a major factor in the cost of green slips and this program is the legal costs, whereas they are 12 per cent against 16 per cent for insurers.

Ms MAINI: Can we take your question on notice and provide more detail? Does the legal and investigation expense cover fees contracted out that we have no knowledge of or are not aware of?

CHAIR: Do you have any figures on this? Do insurers have figures for legal and investigation expenses? You would have information on this very important issue, wouldn't you?

Mr MOBBS: There are two components to this. The legislation provides for a regulated set of legal costs, which we are very well aware of. These costs are published, and I think that is the 12 per cent you are referring to. There is another component, the unregulated legal costs. These costs are between the claimant and their own lawyers. These costs are not currently reported or collected by the scheme. Insurers have no awareness of these costs. I am led to understand that under our current legal arrangements we cannot know those costs at this time.

CHAIR: Are you certain that the 12 per cent does not include those legal costs?

Mr MOBBS: What I can say with certainty is that nobody knows the real figure because it is not collected and it is not published. It cannot be known, so if someone mentioned 12 per cent, I presume that is the regulated portion. It would have to exclude the unregulated portion, because it is not collected.

Mr DAVID SHOEBRIDGE: Would you support a reform requiring both sides of the record, if they resolve a case, having resolved it, filing with the Motor Accidents Authority a certificate detailing actual legal costs?

Mr MOBBS: I think the Insurance Council has made almost exactly that submission in the past.

Mr DAVID SHOEBRIDGE: Once a matter has been settled, say for a lump sum of $300,000, there would be a requirement that both sides of the record file a certificate which identifies their actual costs.

Ms MAINI: Yes.

CHAIR: Including advertising expenses. If they are required to give their lists of client expenses, would the same not apply to insurance companies? They would supply details of their advertising expenses.

Mr MOBBS: Insurers currently have to disclose this in great detail. Insurers' legal costs are currently well understood, well known, well recorded, monitored and reported. There is no lack of transparency there.

CHAIR: And publicly available?

Mr MOBBS: And publicly available. The only part that it is not transparent, collected, or reported upon is the unregulated portion of those legal costs and it would be a general proposition that insurers would make all aspects—

CHAIR: I am talking about advertising expenses. Are they publicly available?

Mr MOBBS: They are not currently publicly reported.

CHAIR: That is what I am saying. Following on from what Mr Shoebridge said, if the total legal costs were public, shouldn't advertising costs of the insurance companies be publicly available?

Mr MOBBS: The total costs of insurers are reported. Advertising I do not think is—in fact, I am quite sure it is not—publicly disclosed at this point in time.

CHAIR: Should it be, if lawyers are required to report all of their costs?

Mr MOBBS: That is something the Insurance Council would have to take on notice. I am not sure that there is consensus amongst the members on the answer to that question. I can tell you that that information is currently collected. It is up to the Motor Accidents Authority as to whether they report it.

CHAIR: We have had a good session. Thank you for appearing before us; you have been of great assistance. We will take on board everything that you have put to us and your written submission.

(The witnesses withdrew)

The Committee adjourned at 4.16 p.m.