

Disability Care and Support

*A submission of the
Queensland Law Society*

in response to

*the Productivity Commission
Draft Report on Disability Care and Support*

Friday, 29 April 2011

QLS Disability Care and Support Submission

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QLS Position

The QLS is in favour of:

- better care and support for individuals with disability in the community;
- the significant role and responsibility of Governments in providing quality care to all disabled people;
- the right of people with disabilities to make meaningful decisions regarding their ongoing support and care; and
- preservation of all existing rights.

Accordingly, the QLS welcomes the proposals for a National Injury Insurance Scheme (NIIS) and a National Disability Support Scheme (NDIS) provided that these schemes:-

- are affordable and sustainable;
- provide quality care to all disabled persons;
- do not dictate to disabled people and their families; and
- do not diminish existing rights.

The Society supports the concept and objectives of the two schemes proposed by the Commission, but is strongly of the view that the schemes should only be implemented on the basis that all existing common law rights for fault-based claims should be retained, and disabled persons be given the option as to which scheme to access, with no-fault schemes then operating as a “back-stop” to common law claims. This model would clearly have a beneficial impact on the costing of the proposed schemes.

The Society would strongly oppose the establishment in Australia - following the 2020 review of the NDIS, NIIS and common law - of a scheme modelled on the New Zealand Accident Compensation Corporation (ACC).

Executive Summary

National Disability Insurance Scheme

The questions whether the NDIS is in fact an insurance scheme and is of the view that a scheme which uses public funds directly to provide benefits to individuals is in fact social welfare and should be acknowledged as such.

Costs

QLS is concerned that there is much uncertainty in the basis of the Commission's modelling of costs for the NDIS and that should initial inaccuracies lead to underfunding the scheme will prove to be a growing cost burden on future generations. QLS sees the proposed \$1.25 billion administration cost for the scheme to be significant and is concerned that the Commission acknowledges that this is likely to be understated.

Funding Model

QLS is concerned that the appropriate funding model is selected for the NDIS to ensure continued viability and reliability of the scheme. QLS warns of the risks of funding for the NDIS being at the discretion of successive Government's budget priorities. QLS queries why the NDIS is to be funded directly from consolidated revenue but is to be directed managed and reported as if it were a fully funded insurance scheme. QLS notes that in order to bring the New Zealand no-fault injury compensation scheme to commercial prudential levels it would need an immediate injection of NZ\$17.3 billion. QLS is of the view that given the need to provide adequately for expected future liabilities costs of the scheme will be significantly in excess of the Commission's proposed figures.

Learning from the New Zealand experience

QLS is of the view that there is much to be learnt from the continuing financial issues fundamental to the no-fault New Zealand injury compensation scheme, especially if the net result of the proposed 2020 review is to achieve a scheme in Australia modelled on the ACC. QLS expresses concern about any attempt to shift a focused public insurance scheme to becoming an extension of the welfare state as this places the scheme's very existence under threat.

QLS notes that in order to redress the significant financial issues being experienced in the New Zealand no-fault scheme:

- levies on motor vehicles have increased by 75% between 2006 and 2010 (although the ACC had proposed 107% but was rejected by Cabinet);
- levies on all employed New Zealanders have increased by 53% between 2006 and 2010 (although the ACC had proposed 115% but was rejected by Cabinet).

Compulsory Inclusion

QLS considers it essential that the NDIS model provides people with disabilities the right to choose and direct their own care and support. QLS also considers it essential that appropriate review mechanisms are mandated for decisions of the NDIA as well as objective and transparent criteria for assessments. This is especially the case with the high threshold set for a disabled person to access self-directed funding.

Overseas Visitors

QLS considers it essential that the Commission's final report make provision for those who develop a disability while in Australia whether they are an Australian resident or not.

National Injury Insurance Scheme

QLS is in favour of providing catastrophically injured individuals appropriate quality care and support. QLS also considers it essential that existing common law rights are preserved and people are provided with a choice as to their ongoing care and support needs.

Costs

QLS is of the view that the true cost of operating the NIIS will be significantly in excess of the Commission's ballpark estimate of \$685 million. QLS notes that the New South Wales Lifetime Care and Support scheme spends about \$100,000 per scheme participant per year on support. Providing that level of support to a full complement scheme of 20,000 people with catastrophic injuries would cost \$2 billion a year. Costs to Queensland alone could be around \$397 million a year.

QLS notes that the New South Wales Lifetime Care and Support scheme currently expects around \$1 billion of future liabilities for its 390 current scheme participants. Extending that to a full complement NIIS of 20,000 would require \$53 billion to make the NIIS fully funded.

QLS also raises concern the cost estimations appropriately include for higher unit costs of servicing due to the increased demand for services created by the NDIS and NIIS. Unit cost of servicing will also be inflated if the NIIS has upward pressure on medical indemnity insurance premiums which are passed onto consumers.

Learning from the NSW Lifetime Care and Support Scheme

The NSW scheme has too short a history to be instructive (currently in its 4th year), however the scheme currently collects \$361 million in premiums from New South Wales motorists (around \$65 per registered vehicle in 2009 / 2010) and spends \$38 million on care and support expenses.

To collect similar funds in Queensland for a year 3 scheme would require a rough charge of \$79.50 per registered vehicle.

Learning from the Victorian TAC scheme

The TAC scheme has implemented high thresholds for access to common law actions. The scheme is currently 80.6% funded. Its total equity position has declined from a \$337 million deficit in 2008 / 09 to a \$418 million deficit in 2009 / 10.

Compulsory Inclusion

The QLS considers it essential that the NIIS model provides people with catastrophic injuries a right to choose and direct their care and support. QLS objects to all people with catastrophic injuries being compulsorily 'included' in the NIIS and supports choice between common law and support by the scheme. QLS sees automatic 'inclusion' as discriminatory and paternalistic.

Overseas Visitors

QLS proposes that whether foreign visitors can be included within the NIIS should be explicitly addressed.

Thresholds

QLS anticipates disputes will arise around the threshold test of 'catastrophic injury' and is of the view that thresholds bring undesirable results, namely:

- bracket creep;
- distortion of the cut-off based on non-definitive guideline assessments;
- increased rates of disputation; and
- increased operational costs.

Common Law

QLS was disappointed to see the criticism of common law system in the Commission's draft Report and is of the view that it is unfair and unfounded to be measure the success of common law in Queensland by reference to other jurisdictions.

The current workers' compensation and motor vehicle accidents compensation scheme in Queensland are common law based and are fully funded, well run, have nationally low levels of disputation, reach speedy resolution of claims, have low premiums and pay high proportions of premium to claimants. The common law systems of Queensland exceed no-fault schemes in terms of claims frequencies, disputation and funding ratios.

The QLS does not accept the Commission's statements that the common law system is comprised of excessive delays. The average time from notification date to settlement date for motor vehicle accidents claims in Queensland is 19.9 months and the average time from lodgement to settlement of a workers' compensation claim is 11.4 months.

The QLS strongly rejected the Commission's assertions that legal costs are a substantial burden on injury compensation. Legal costs to the workers' compensation scheme amount to 3.1% of expenditure and about 13% of expenditure in motor vehicle accident cases. This must be compared with the 12% of administration costs incurred in the New Zealand scheme. Additionally Queensland is the only jurisdiction to have voluntarily adopted legal cost capping of speculative personal injury actions.

QLS demonstrated that there are not significant benefits in jurisdictions with no-fault schemes as compared with fault based schemes. QLS specifically noted that rates of injury in the workplace, on the road and at home continues to be of concern in New Zealand despite their no-fault arrangements.

QLS noted that the Commonwealth Government receives around \$1 billion of benefit from compensation actions annually through Centrelink compensation provisions and Medicare refunds from settlement funds.

Finally QLS raised significant concern about the clear rationale in Chapter 16 of the draft Report evidencing a desire to implement in Australia an injury scheme modelled on the New Zealand scheme. QLS strongly argued that that model was subject to a number of fundamental flaws which required constant reconstitution of the scheme to progressively move unfunded liabilities forward and juggle debts in perpetuity. While well intentioned the New Zealand scheme is living beyond its means.

National Disability Insurance Scheme

The QLS is supportive of better coordinated, funded and implemented support arrangements for people with disabilities.

The QLS has a number of concerns with the NDIS model proposed by the Commission in its draft Report relating to:

- Costs;
- The funding model;
- Learning from the New Zealand experience;
- Compulsory inclusion; and
- Overseas visitors.

Also the QLS questions whether the NDIS is in fact an insurance scheme. The name of the scheme may contribute little to its overall function, however, the Commission's favoured model of a scheme funded directly by Government from public funds and providing benefits to all (taxpayer or not) is surely an exercise in social welfare. It is a very worthy exercise in social welfare but is surely not an insurance scheme where premiums are paid, aggregated and administered to hedge against the cost of a potential event occurring. The Commission may wish to consider an alternate name for the scheme which more accurately reflects its important social welfare imperative.

Costs

The QLS notes that the Commission has estimated that the annual operating cost of the NDIS would be between \$10.8 billion and \$14.2 billion and would provide services to approximately 358,850 people in the Tier 3 level of funded support and care¹.

It is understood that much of the costing work is based on assumptions and extrapolation of other data sources. This is a necessary part of modelling a new and unprecedented scheme in this country. The Commission accepts that there are 'large differences' between the Burden of Disease data and the 2009 Survey of Disability, Aging and Carers data and admits that it has used the lower values for population size².

The QLS has concern that while a degree of error is unavoidable if the scheme is to be under-funded in its formative years it will prove to be a growing cost burden for future generations. The Commission notes that:

A cost shock might seem to be small at the instant they appear, but a long-term actuarial model can reveal the high cumulative effects on liabilities.³

A small error in estimation can translate into unexpectedly higher costs and over time into a threat to sustainability of the scheme as a whole. The risk of initial under-funding of the scheme is great where costs are deflated initially to make the result more politically palatable.

¹ Productivity Commission draft Report page 14.24

² Productivity Commission draft Report page 14.12

³ Productivity Commission draft Report page 16.4

One significant risk factor in the estimation of scheme costs is the fact that 30% of annual unit costs are said to be children under the age of 14 years. In fact approximately 120,000 of the 360,000 scheme participants are projected to be children in this age range⁴.

This highlights the exposure of the NDIS model to added scheme costs where there is some future change in the underlying approach to care. For example a significant risk to cost estimates occur if fundamental changes were made to-

- the scope of cover (e.g. broadening to cover care for emphysema or terminal cancer); or
- changes to care guidelines to provide an increase level of attendant care; or
- the provision of additional resources for participants.

The generally low age of scheme participants provide it with a significant 'tail' with a high number of participants that would benefit from the change for an extended period of time. It is likely that the corresponding cost estimates and original funding source would not have anticipated such a change and would turn out to be insufficient, in the circumstances. In the 'pay as you go model' an increase in the overall tax levies of costs to Government would be applicable each time there was a variation on the policies regarding care. A failure to do so would ultimately threaten the scheme's viability or willingness of Government to shoulder the burden of costs.

It is also not clear how the likely additional unit cost of servicing due to the increased demand for services was taken into account (which may cause an increase in commercial costs as well as reducing the levels of gratuitous – or family-based care). These effects are likely to increase unit costs of care considerably and need to be a relevant consideration in assessing costs. A similar issue arises with respect to medical costs if the NIIS has any upward effect on medical indemnity insurance premiums which will be passed onto consumers of those services.

A further consideration is the high level of administration costs required in the scheme. The Commission has grossed up its estimates to include a 10% 'loading' for administration costs of NDIS, which on the preferred figure would amount to \$1.25 billion a year. The Commission notes that this would be the ongoing costs rather than the start-up costs noting:

It should be noted that the administration loading of 10 per cent is considered to be the minimum requirement for administration. There will be high start-up costs associated with the scheme, including establishing regional offices of the NDIA, recruiting and training staff (including assessors) and establishing IT systems. There will also be higher initial capital costs associated with building appropriate accommodation. Further analysis of these start-up costs will be included in the final report⁵.

The QLS is concerned that the anticipated administration costs are already a very significant sum and are likely, by the Commission's admission, to be understated.

⁴ Productivity Commission Table 14.2

⁵ Productivity Commission draft Report page 14.24

Funding Model

The importance of choosing the right form of funding model for any scheme is to ensure its sustainability and ongoing reliability for those who need to access it.

The draft Report provides the following recommendations with regard to the NDIS:

DRAFT RECOMMENDATION 12.1

The costs of supporting people with a disability from year to year should be met from claims on general government revenue (a 'pay as you go' scheme):

- *but would be subject to the strong disciplines for certainty of funding specified in draft recommendation 12.2*
- *supplemented by payments to create reserve funds.*

However, the scheme should be managed and reported as if it were a 'fully-funded' scheme in which each year's funding is considered in the context of the scheme's expected future liabilities.

DRAFT RECOMMENDATION 12.2

The Australian Government should direct payments from consolidated revenue into a National Disability Insurance Premium Fund, using an agreed formula entrenched in legislation that:

- *provides stable revenue to meet the independent actuarially-assessed reasonable needs of the NDIS*
- *includes funding for adequate reserves.*

If that preferred option is not adopted, the Australian Government should:

- *legislate for a levy on personal income (the National Disability Insurance Premium), with an increment added to the existing marginal income tax rates, and hypothecated to the full revenue needs of the NDIS*
- *set a tax rate for the premium that takes sufficient account of the pressures of demographic change on the tax base and that creates a sufficient reserve for prudential reasons.*

While concern can be raised at the potential costs of operating the NDIS in the medium and long term, this scheme need not be fully funded if it relies directly upon the consolidated revenue. As such the public underwrites the scheme and it is a matter for the Government of the day to ensure that there are sufficient inflows in to Government coffers to meet the significant outflows that will be required to adequately operate the scheme.

The continued viability of the scheme is not then reliant upon the collection of sufficient premium or levies in order to meet outgoings but is reliant upon the budget of the Government of the day to ensure its sustainability. It may be argued that placing such an expensive and comprehensive scheme to the vagaries of the ongoing budget process is a matter of some risk. This has occurred previously to other schemes directly funded by Government when they have implemented cost containment strategies, such as in rehabilitation and veterans' health. General application schemes such as Medicare or old age pensions may be somewhat insulated from this risk due to their direct applicability to all voting Australians. The NDIS proposed is not a scheme of general application as not all individuals will be eligible for funded support during their lifetimes and may therefore as a result be more likely to be subject to cost containment strategies.

Despite the inherent risks in the NDIS being at the discretion of successive Governments in varying economic circumstances, the direct payment model of funding proposed by the Commission is probably the only realistic funding model which can be proposed.

While the NDIS is proposed to be funded from the consolidated revenue on a pay as you go basis, it is to be directed, managed and reported as if it were fully funded⁶. It is essential that any insurance scheme be fully funded in order to ensure its ongoing viability and sustainability and to provide certainty for those relying upon that scheme that they may reasonably continue to enjoy its support. This is recognised in the draft recommendations of the Commission⁷.

The example of the New Zealand Accident Compensation Corporation is instructive of the difficulties of attempting to ensure the continued reliability and viability of a broad ranging scheme such as the NDIS. In June 2010 the ACC reported an improved result of only having a NZ\$10.3 billion gap between its net assets and outstanding claims liability⁸. Interestingly the 2010 Financial Condition Report for the ACC states⁹:

The Insurance (Prudential Supervision) Act 2010 (IPSA) received Royal assent on 7 September 2010. Under the IPSA, insurance organisations are required to meet a minimum solvency requirement in order to absorb the uncertainty in their insurance business. Although ACC is currently excluded from this requirement, Table 5.2 provides an estimate of the minimum amount of capital ACC would be required to carry as at 30 June 2010 if it were classified as an insurer under the IPSA. **To meet the minimum financial condition requirements under this Act for an entity providing personal injury insurance in New Zealand, ACC would require a capital infusion of \$17.3B.** [emphasis added]

...

Although a government insurance Scheme does not aim to generate investment returns on its capital base to satisfy investor Stakeholders, it does desire to eliminate transferring random fluctuations in its financial condition on to levy payers caused by uncertainty in its business model, especially random fluctuations in asset values due to regular variability that occurs in economic markets. Canadian government worker compensation schemes are required to carry a capital reserve that is explicitly earmarked to absorb random variation in invested assets. Due to the many uncertainties affecting its business, maintaining buffer capital above the estimated value of liabilities is sound capital management best practice for an organisation in the business of insurance.

ACC's current financial condition carries much opportunity for improvement. The poor state of ACC's finances is further highlighted in comparison to minimum capital requirements for general insurance industry participants in New Zealand and capital management best practices applied by scheme peers in other jurisdictions.

ACC's current funding policy is not based on capital management best practice for an organisation in the business of insurance and therefore is inadequate in dealing with the uncertainties present in its business model.

The funding model recommendations in the draft Report propose a model for the NDIS where expenses are funded on a 'pay as you go' basis by Government from general revenue but the scheme is directed as if it were fully funded. This is the same model that is applied in New Zealand to the Non-Earners' Account which covers injuries to people not in the paid workforce and has always been one of the worst performing of the arms of the ACC. In June 2010 that Account had net assets of NZ\$ 1.587 billion and outstanding claims liabilities of NZ\$4.531 billion, contributing about one third of the total net deficit for the entire scheme¹⁰. The ACC's actuary opined that at \$4.168 billion immediate cash injection would be required simply to bring the Account to the level required for general insurance¹¹.

⁶ Productivity Commission Draft Report draft recommendation 12.1

⁷ Productivity Commission Draft Report page 16.26

⁸ ACC Annual Report 2009/ 2010, 'Performance Highlights'

⁹ ACC Financial Condition Report 2010 pages 27 - 28

¹⁰ ACC Annual Report 2009/ 2010, 'Performance Highlights'

¹¹ ACC Financial Condition Report 2010 page 28

If we are to learn from the experience in New Zealand when *'each year's funding is considered in the context of the scheme's expected future liabilities'*¹², provision will need to be made in the Budget each year significantly in excess of the Commission's projected cost figures.

Learning from the New Zealand experience

The Society sees the position of the New Zealand Accident Compensation Commission as a strong indicator of the difficulties in achieving viability and the very significant cost to the community of ongoing care and support schemes. Over the years this scheme has been subject to many severe management measures to correct serious financial problems. The ACC was established in 1974 and significant scheme changes were effected in 1992, 1998, 2001 and more recently in 2010.

The Commission appears to be of the view that the continuing financial issues fundamental to the New Zealand scheme *'does not necessarily demonstrate financial sustainability as specific weakness of no-fault systems'*¹³.

The QLS strongly disagrees with that view. There is much to be learnt from the New Zealand experience, especially in light of the commentary surrounding the 2020 review of the NIS and expansion to all serious injuries, abolishing other common law heads of damage and possible merger with the NDIS, as contemplated in Chapter 16. That result would introduce to Australia a scheme modelled on the ACC.

The QLS has repeatedly expressed concern about issues of sustainability of long-tail no fault 'insurance' schemes funded through levies. The New Zealand Accident Compensation Corporation scheme in particular has demonstrated the risks inherent in underestimating the very significant costs associated with ongoing lifetime care and benefits.

In particular in its 2008 / 2009 Annual Report the New Zealand Accident Compensation Corporation reported disastrous results which prompted the responsible Government Minister to comment in the Annual Report that the model of a long tail no fault scheme as a 'concept is sound but poor policy in recent years has put the scheme at risk. ... **The underlying cause has been a shift from ACC being a public insurance scheme to it becoming an extension of the welfare state.**' (emphasis added).

Also the Minister stated in the 2008 / 2009 Report:

This annual report discloses a financial loss of \$4.8 billion [\$NZ] for the 2008 – 2009 year, amounting to more than \$1,000 for every New Zealander. ... The growth in ACC's liabilities from \$9.4 billion in 2004 – 2005 to \$23.8 billion in 2008 – 2009 is unsustainable.

The ACC Chair stated in the 2008 / 2009 Report:

The most significant feature of the ACC's situation at the end of 2008 – 2009 is that its financial position has become unsustainable. [emphasis added]

The gap between the Corporation's assets and liabilities has grown to the point where the accounts now show a \$13 billion deficit. That deficit grew almost \$5 billion in the last year alone.

If this trend is allowed to continue **the Scheme's very existence could be under threat.** [emphasis added]

¹² Productivity Commission draft Report recommendation 12.1

¹³ Draft Report, page 15.22

Measures were put in place in that year to attempt to redress the ever-increasing debt position and while some improvement has been made the comments of the scheme's Actuary in the 2010 Financial Condition Report are a sombre note of caution for the estimates and basis of the analysis in the draft Report¹⁴:

1. Historical Financial Condition

- (a) Based on data and information through 30 June 2010 a Hindsight Assessment of the adequacy of ACC's historical accrued insurance liabilities and collected insurance premiums demonstrates that:
 - (i) Prior to 30 June 2009, ACC's outstanding claims liabilities reflected in its financial statements did not fully reflect the future cost of injury; in hindsight, they were underestimated. Therefore, in hindsight, the financial condition of the Scheme has proven to be worse than anticipated at the time.
 - (ii) In hindsight, the insurance premiums collected for the fully funded years have demonstrated to be inadequate to fully fund the costs of new injuries that have occurred.
- (b) The main reasons for the inadequate estimates include:
 - (i) Inflationary pressures on the cost of future services had been underestimated. In particular, assumptions of the future cost and cost of uncertainty associated with future medical, elective surgery, and social rehabilitation services had been unrealistically accounted for.
 - (ii) Beginning in 2005 utilisation of the Scheme began to increase. The rate of new injuries/claims rapidly increased, claims from prior years reactivated, and recovery rates began to deteriorate. These patterns of increased utilisation were not immediately responded to and funded for.
 - (iii) The cost of uncertainty associated with personal injury insurance coverage was not adequately included in the estimates of the insurance liabilities until the adoption of the New Zealand equivalent of the International Financial Reporting Standards (NZ IFRS) in 2008 and has never been adequately reflected in the insurance premiums collected.

2. Current Financial Condition

- (a) ACC's current financial condition is best reflected through its net funding position which was a negative \$1.3B as at 30 June 2010. ACC's current financial condition carries much opportunity for improvement.
- ...
- (c) ACC's current funding policy is not based on capital management best practice for an organisation in the business of insurance and therefore is inadequate in dealing with the uncertainties present in its business model.
- ...

Key Risks and Areas of Uncertainty

The following summarises the key risks and areas of uncertainty identified in the report that are present in ACC's business model affecting its financial condition:

1. **Significant Volatility in the Use of the Scheme** - Over the past decade the rate of injury each year has increased significantly and has recently gone through a significant swing. A monopoly insurer would not be expected to experience such volatility in injury rates. Given claims in the Scheme never officially close, there has been similar volatility on the reactivation of prior year claims returning to the Scheme. In addition, recovery rates have lengthened. These are factors ACC has some ability to influence but stabilization of these patterns require the support of other Stakeholders. It would be recommended ACC work with the Government and other key Stakeholders to develop a strategy for stabilising injury rates and recovery rates over the long-term. This would result in more stable levies and funding requirements over the long-term.
2. **Future Cost of Medical and Rehabilitation Services** - Inflationary pressures on the cost of medical services has exceeded the rise in normal inflation for decades due to the cost of improvements in medical technology; an increasing demand for medical services that continues to exceed the supply (labour shortages); and the cost of frequent changes in the administration and regulations of the healthcare system that are transferred on to the user. The future rate of medical inflation is uncertain, as is the future cost of home health care services. These inflation assumptions and the uncertainty associated with them have a significant impact on the adequacy of

¹⁴ ACC Financial Condition Report 2010 pages 1 – 3 available at http://www.acc.co.nz/PRD_EXT_CSMP/idcplg?ldcService=GET_FILE&dID=58673&dDocName=WPC090392&allowInterrupt=1

ACC's financial condition. To the extent these assumptions are underestimated in the projection of future claim cash flows in the insurance liabilities and insurance premiums, future funding would be required.

3. **Economic Conditions** - Both ACC's assets and liabilities are directly impacted by changes in the economy. Assets are heavily influenced by the value of the New Zealand dollar. ACC's liabilities are directly affected by changes in domestic inflation and interest rates. The fact ACC's assets are currently significantly less than its insurance liabilities further extenuates ACC's exposure to this risk.
4. **Quality of Data & Information** - To deliver on its financial objectives ACC needs to fully understand factors affecting its income and use of funds. Improvements in monitoring, analysing, and understanding both internal and external factors affecting its current and future cash flows is required. High levels of data quality and timely updates of information are necessary to ensure strategies align with reality. Transparent and consistent information throughout the organisation and to Stakeholders will ensure consistency in understanding the financial condition at any given point in time and therefore consistent commitment toward balancing and stabilising use and funding.
5. **Political Risk and Stakeholder Commitment** - ACC's financial condition is directly affected by all Stakeholders including the public (individuals and employers), providers (gatekeepers), business and communities, and the Government. Proactive management of Scheme Use through the prevention of unnecessary injuries and responsible use of services in the event of injury is vital to ensure effective and responsible use of funding.

In addition, all Stakeholders must accept the fact that the insurance coverage provided by ACC is "Not Free" and adequate funding is required to ensure the cost and cost of uncertainty associated with the insurance coverage is adequate. It is only through Stakeholder commitment and responsible ownership of the Scheme that ACC's financial condition will reach a healthy state and long-term sustainability be maintained. [emphasis added].

The NZ scheme deals with a number of accounts directed toward a particular insurance purpose. Most relevantly to the NIIS and catastrophic injury is the motor vehicle account, as well as the earners', non-earner's and treatment accounts. It is accepted that the NZ scheme goes beyond the scope envisaged for the NIIS as it pays for rehabilitation and care and also benefits for all injuries, catastrophic or not.

These accounts do, however, provide a very strong indication of what could be expected in the NIIS in terms of volatility of claims liability, premium response and ongoing costs. This is especially the case if there is any under-estimate of number of claims or actual costs of providing services.

Motor Vehicles Account

This account has displayed significant unfunded liabilities and significant increases in premium.

Table 1 – ACC Motor vehicles account

Year	Net levy income	Claims liability
2007	\$590 million	\$3,964 million
2008	\$634 million	\$5,080 million
2009	\$739 million	\$6,845 million
2010	\$869 million	\$7,042 million

The final position in 2010 in the motor accident account was net assets of \$3,387 million and an outstanding claims liability of \$7,042 million.

The growing claims liability has been reflected in levies which come from annual vehicle licensing fee and petrol levy.

Table 2 – ACC Motor vehicles account levies

Year	Levy per motor vehicle (excluding GST)
2006	\$190.00
2007	\$204.78
2008	\$254.63
2009	\$287.00
2010	\$334.00 ¹⁵

This represents a 75% increase in motor vehicle levies between 2006 – 2007 and 2009 – 2010. The ACC had proposed to Cabinet a levy of \$395 which was rejected. This would have amounted to a 107% increase during the period.

Earners', Non-Earner's and Treatment Accounts

A similar picture is painted in the earners' account which deals with non-work related injuries which occur to people in employment and the non-earners' account which is funded directly by Government and covers injuries occurring to those not in employment. The treatment account, which covers costs of injuries arising from treatment, is funded by the earners' and non-earners' accounts. These three accounts represent the closest comparison to the non-motor vehicles and workers' compensation aspects of the NIS.

Table 3 – ACC Earners' Account

Year	Net levy income	Claims liability
2007	\$905 million	\$2,453 million
2008	\$991 million	\$3,483 million
2009	\$1,112 million	\$4,662 million
2010	\$1,381 million	\$4,562 million

Table 4 – ACC Non-Earners' Account

Year	Net levy income	Claims liability
2007	\$719 million	\$2,398 million
2008	\$780 million	\$3,305 million
2009	\$982 million	\$4,245 million
2010	\$1,051 million	\$4,531 million

Table 5 – ACC Treatment Account

Year	Net levy income	Claims liability
2007	\$121 million	\$886 million
2008	\$129 million	\$1,353 million
2009	\$315 million	\$2,167 million
2010	\$319 million	\$2,476 million

¹⁵ ACC recommended to Cabinet a levy of \$395.00 but Cabinet would only approve \$334.00

In the last four years there has been a very significant increase in expected claims liability for all accounts. The earners' and non-earners' accounts have doubled and the treatment account has tripled. This demonstrates the very volatile nature of lifetime care costs, especially with regard to medical and treatment expenses which have increased sharply and significantly. The handling of medical liability in the NIIS has been less than clear, however these figures should demonstrate that both clarity and specificity are required to avoid a prudential calamity.

The levy funding of the non-earners' account is wholly provided by Government on a 'pay-as-you-go' model referable to current expenditure.

The levy funding on all New Zealand earners' has unsurprisingly increased dramatically to attempt to respond to the ballooning nature of the expenses:

Table 6 – ACC Earner's account levies

Year	Levy per NZ earner per \$100 of earnings (excluding GST)
2006	\$1.16
2007	\$1.16
2008	\$1.24
2009	\$1.51
2010	\$1.78 ¹⁶

These figures represent a 53% increase in the levy on all New Zealand earners between 2006 – 2007 and 2009 – 2010. The ACC proposed to Cabinet a levy of \$2.49 in 2009 / 2010 to meet its revenue collection needs. This large increase was not supported by Government. If this had been successful the relative increase during the five years would have been 115% on the 2006 / 2007 rates.

Compulsory Inclusion

The QLS considers it essential that the NDIS model provides people with disabilities the right to choose and direct their own care and support. We see this as one of the strengths of the common law model and wholly support the rights of people to effectively 'cash out'¹⁷ of NDIS control through 'self-directed funding'¹⁸.

Draft recommendation 6.2 provides that the detailed self-directed funding plan must be approved by the National Disability Insurance Agency. The Agency must assess whether the individual and / or their carers have the experience and skill sets to make reasonably informed choices and manage funds¹⁹.

The decisions of the NDIA in making the assessments above appear to be based largely on perceptions and do not appear to be truly independent. It is also highly concerning that there does not appear to be a natural justice mechanism built into the assessments of the NDIA with respect to self-directed funding. There is no proposed review mechanism or right of a disabled person to challenge the decision of the NDIA postulated. This is a serious concern as under the NDIS proposal the NDIA would be a monopoly and while an individual may choose to have services provided by differing providers they can not choose to be truly independent of the NDIA.

¹⁶ ACC recommended to Cabinet a levy of \$2.49 per \$100 of earnings but cabinet would only approve \$1.78

¹⁷ Productivity Commission Draft Report Chapter 6

¹⁸ Productivity Commission Draft Report Chapter 6 commencing at page 6.8

¹⁹ Draft Recommendation 6.7

The QLS considers it essential that appropriate review mechanisms be mandated for decisions of the NDIA and that there are objective and transparent criteria applied to these forms of life-changing decision-making.

Overseas Visitors

The NDIS proposal omits in its entirety overseas visitors who either have or acquire a disability while in Australia. The threshold in recommendation 3.2 requires a Tier 3 party to be an Australian resident before they can access assistance. This may potentially have serious adverse effects on visitors, temporary residents, such as foreign students, workers or others, or refugees during the processing of their asylum claims who come to rely upon the current disability support arrangements.

Perhaps the Commission is proposing that any temporary resident or refugee who acquires a disability should be deported to their country of origin prior to requiring assistance from the NDIS?

The QLS considers it essential that the Commission include in its final report provision for any person who develops a disability in Australia whether an Australian resident or not.

National Injury Insurance Scheme

The QLS is in favour of providing catastrophically injured individuals with appropriate quality care and support. The QLS also strongly supports the preservation of existing common law rights and providing people choice with respect to their ongoing care and support.

The QLS has a number of concerns with the NIIS model proposed by the Commission in its draft Report relating to:

- Costs;
- Learning from the NSW Lifetime Care and Support Scheme;
- Learning from the Vic Transport Accident Commission Scheme;
- Compulsory inclusion;
- Overseas visitors;
- Thresholds; and
- Common law.

Costs

The Draft Report at page 15.6 indicates that average awards for common law damages for catastrophic injury are between \$1 and \$2 million, while it argues that in current lifetime care schemes average costs are projected to between \$1 million and \$1.41 million.

It must be noted that the Draft Report indicates that there were over twenty thousand people in Australia with a 'catastrophic-level' injury and each year this number is increased by between 700 and 800 people²⁰.

The Report opines that net costs of operating an NIIS would be around \$685 million a year²¹, admitting that this is a ball park figure.

The Society is concerned that these figures may not represent the true ongoing costs of a lifetime care and support scheme. We are of the view that a good indication of actual costs can be extrapolated from current operating schemes.

Yearly Care Expenses

The average cost of care expenses actually spent per participant in the NSW Lifetime Care and Support Scheme in the 2009 / 2010 year was \$98,376.92 per person per year.

²⁰ Draft Report page 15.5

²¹ Draft Report page 16.6

Table 7 – NSW Lifetime Care and Support Care Expenses²²

	2010	2009	2008
Persons in the scheme	390	249	85
Care expenses spent	\$38,367,000	\$25,033,000	\$3,983,000
Average care expense per person per year	\$98,376.92	\$100,534.00	\$46,858.82

Using the NSW Lifetime Care and Support Authority figures a rough estimate of the cost of actual services to provide care and support to the existing 20,000 catastrophically injured individuals in this country would be around \$2 billion a year. This is significantly in excess of the projected \$685 million a year referenced in the Draft Report.

The draft Report does not propose to cover all existing catastrophically injured individuals leaving those currently injured to existing support arrangements and the NDIS²³. Therefore the 20,000 person figure represents the full complement of those injured being covered by the scheme at some time in the future.

Expected Liabilities

The NSW Lifetime Care and Support Authority estimates that the future liability of providing care and support for the current 390 scheme participants as at 30 June 2010 was around a \$1 billion.

Table 8 – NSW Lifetime Care and Support Care Liabilities²⁴

\$ in 000	2010	2009	2008
Persons covered by scheme	390	249	85
Liabilities	\$1,036,852,000	\$609,826,000	\$284,447,000
Average projected liability per person	\$2,658,594	\$2,449,100	\$3,346,435

Using the Lifetime Care and Support Authority's 2009 / 2010 figures as a guide the NIIS could expect liabilities for lifetime care of \$53 billion for the 20,000 catastrophically injured Australians who would eventually be included in the NIIS. Yearly accidents would see this liability figure increase by \$2 billion annually.

Costs to Queensland

If we assume an even distribution of accidents in all States²⁵ the cost to Queensland in funding the NIIS for a full complement of around 4045 catastrophically injured individuals would be around \$397 million per year with expected liabilities of around \$10.7 billion, in 2009 / 2010 dollars.

²² Lifetime Care and Support Authority Annual Reports 2007 / 2008, 2008 / 2009 and 2009 / 2010

²³ Draft Report page 16.27

²⁴ Lifetime Care and Support Authority Annual Reports 2007 / 2008, 2008 / 2009 and 2009 / 2010

²⁵ ABS 3101.0 - Australian Demographic Statistics, Sep 2010 see <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0>

Other Issues

Again the QLS is concerned that small errors in estimation at the initial stages may prove to inflate costs to a level where they may affect the viability of the scheme. An example of which is that the 10% per annum rates of superimposed inflation exhibited in some past years in the New Zealand scheme only need to be sustained for a period of four years for annual costs to increase by almost 50%. The analysis above with respect to various accounts in the New Zealand scheme highlights how growing liabilities can only lead to increased premiums.

It is also not clear how the likely additional unit cost of servicing due to the increased demand for services was taken into account in projected costing for the NIIS (which may cause an increase in commercial costs as well as reducing the levels of gratuitous – or family-based care). These effects are likely to increase unit costs of care considerably and need to be a relevant consideration in assessing costs. A similar issue arises with respect to medical costs if the NIIS has any upward effect on medical indemnity insurance premiums which will be passed onto consumers of those services.

Learning from the NSW Lifetime Care and Support Scheme

The Society's view is that the history of this scheme is too short to form any firm conclusion as to its success. It simply has no historical track record to judge its performance to date. It does, however, appear from its most recent figures quoted above that its liabilities are excessive for the number of persons currently in the scheme.

Having regard to the 2009 / 2010 annual report (being the third year of the scheme) it is salient to note that the scheme collected some \$361 million from the motorists of New South Wales. This roughly equates roughly to \$65.00 per vehicle registered in New South Wales as at 30 June 2010²⁶.

Of the funds collected in 2009 / 2010 only \$38 million was used to provide care and support services to the 390 participants in the scheme.

It is estimated that there are about 100 catastrophic injuries in Queensland each year from motor vehicle accidents and in year 3 of a Queensland scheme there could be expected to be 300 participants. If the NSW levies collected by the scheme were to be proportionally collected in Queensland where there were 3,492,000 vehicles registered as at 30 June 2010, then about \$277 million would be required each year, translating to a rough charge of \$79.50 per vehicle.

Learning from the Vic Transport Accident Commission Scheme

The Victorian TAC scheme is often referred to as a model scheme and is a hybrid no fault / common law scheme. However, under the TAC scheme access to common law actions are restricted to those with a 'serious injury' arising from a transport accident and this is in turn defined to mean:

- a permanent impairment of 30% or greater;
- serious long-term impairment or loss of a body function (such as an amputation of a leg or loss of sight);
- permanent serious disfigurement, such as scarring;
- severe long-term mental or severe long-term behavioural disturbance or disorder;
- loss of a foetus.

²⁶ NSW RTA system reports 5,455,312 vehicles registered in NSW as at 30 June 2010

Currently the TAC scheme has a funding ratio of only 80.6% and in the 2009 / 2010 year and had an underwriting loss of \$816 million, which after application of uncertain investment income lead to an \$81 million loss²⁷. In 2008 / 2009 the TAC returned a loss of \$970 million.

The total equity position of the TAC has likewise deteriorated as in the 2008 / 09 year it returned a \$337 million deficit. In 2009 / 2010 the TAC equity position deficit grew to \$418 million²⁸.

The QLS and the Commission has identified the importance of a scheme being fully funded²⁹ to meet its future needs and to be a reliable provider for scheme participants. It is perhaps instructive that common law claims have been severely restricted in the TAC scheme and a great proportion of claims are denied the finality of a common law settlement. It has long been the QLS view that long tail liabilities are problematic in the insurance context.

Compulsory Inclusion

The QLS considers it essential that the NIIS model provides people with catastrophic injuries and their families the right to choose and direct their care and support. The QLS sees choice and self-direction as an important right of an injured person and an important aspect of the flexibility afforded by the common law.

Unfortunately the discussion in Chapter 16 does not specify whether a person who is 'included' in a no-fault scheme will have the right to choose whether or not to be 'included'. There is no equivalent mechanism to the 'self-directed funding' model proposed within the NIIS. From the discussion in the draft Report of abolishing the common law head of damage of care and support for people with catastrophic injuries it seems clear that inclusion within the NIIS will be mandatory and those individuals will be denied their rights.

The QLS considers it essential that catastrophically injured individuals should have a choice to proceed with a common law claim solely or be 'included' within the NIIS for the purposes of care and support. To adopt a position of compulsory inclusion is discriminatory and paternalistic.

Overseas Visitors

As with the NDIS there appears to be no consideration in the draft Report of the status of overseas visitors in the foundation of the NIIS. It may be that presently a visitor from overseas has a common law right to sue for negligence if they are injured in a motor vehicle accident in Queensland for example. It may be that they are entitled to recover compensation from their tortfeasor to permit them to be placed, as far as compensation can, in the position they would have been but for the accident occurring.

The proposal for the NIIS would restrict access to the common law head of damage for support and care, but the draft Report is silent on whether these catastrophically injured individuals would be permitted access to the scheme.

The QLS proposes that whether injured foreign visitors and temporary residents are included within the NIIS should be explicitly addressed in the final report both in terms of coverage and also financial cost.

²⁷ Victorian TAC Annual Report 2009 / 2010 pages 9 and 35

²⁸ Victorian TAC Annual Report 2009 / 2010 pages 36

²⁹ Productivity Commission Draft Report page 16.26

Thresholds

The QLS anticipates that there will be disputes relating to the threshold issue for access to the NIIS, whether an injury is 'catastrophic'. The QLS notes that the Commission has adopted for its purposes the definitions used by the schemes existing in Victoria, New South Wales and New Zealand as an indication of what amounts to an injury which is 'catastrophic'.

As with the imposition of any threshold to a common law system there will be undesirable consequences to the threshold requirement for the NIIS as some parties argue for and others resist being labelled as 'catastrophic'. There are a number of undesirable results associated with the imposition of thresholds:

(1) Bracket creep

Bracket creep is an acknowledged issue associated with the implementation of thresholds and in this context relates to the potential for parties where an assessment of injuries does not qualify them for access to the NIIS to seek to inflate or deflate their assessment to qualify for access to the scheme or for full common law compensation.

The effect of 'bracket creep' is to reduce any potential cost savings to flow from a 'cut off' model of threshold for access to services. It is accepted actuarial experience that savings from the application of a threshold will *always* be lower than past claims experience and patterns would dictate.

(2) Type of thresholds

A 'cut off' model threshold based on assessment guidelines is susceptible to many forms of distortion in its application as:

- assessment guidelines are by their nature not definitive;
- the effects of bracket creep are accentuated; and
- the incentive to dispute assessments is heightened (seeking either inflation or deflation of outcome).

(3) Increased disputation

It can be clearly demonstrated that the implementation of thresholds introduces greater disputation into any scheme as cases at or near the threshold amount will often be disputed. This is especially the case where medical assessments, based on subjective opinions of incapacity, will vary greatly depending on the practitioners involved. Significantly increased costs will flow from enhanced rates of disputation of assessments, as well as from appeals arising from such assessments.

For example, experience from other jurisdictions shows that greater disputation rates flow from schemes where a threshold is applied for access to common law claims or where common law is abolished altogether.

Table 9: *disputation rates by jurisdiction*

	Qld Common Law	SA No Common Law	Comcare No Common Law	NSW Threshold to Common Law	VIC Threshold to Common Law
Disputation rate ³⁰	3.1%	13.6%	12.3%	6.6%	16.6%

³⁰ Workplace Relations Ministers' Council, Comparative Performance Monitoring Report, 11th Edition, accessed at <http://www.deewr.gov.au/WorkplaceRelations/WRMC/Documents/CPM11.pdf>

For the calendar year 2008 the NSW Workers Compensation Commission reports that 42% of its 8,898 referred disputes related to permanent impairment and threshold issues. In addition to these disputes 655 matters were taken directly to their Medical Appeal processes³¹. In total around 4300 disputes in 2008 related to assessments and impairments directly.

In Victoria, the Accident Compensation Conciliation Service reported that in 2008 / 2009 it received 5108 referrals relating to medical issues and 5418 referrals relating to rejection and termination of claims³².

Conversely, in Queensland a significant downward trend is being experienced by the Medical Assessment Tribunals, receiving only 2,475 referrals in 2008 / 2009³³.

Greater levels of disputation in a scheme inevitably lead to increased costs in scheme administration, defeating the original rationale for the imposition of the threshold and frustrating scheme outcomes.

(4) Operational costs

It is accepted that operational costs of a scheme will increase as the result of the application of a threshold as the NIIS would need to:

- implement threshold management strategies to attempt to mitigate the effects of the risks mentioned above;
- resource being engaged in increased levels of disputes; and
- monitor and measure the impact of the changes.

A solution

The QLS is concerned about the imposition of any thresholds to common law systems and calls for the Commission to propose a model for the NIIS where those suffering from catastrophic injuries may elect to enter the scheme or remain solely within the common law system. This would alleviate the worst effects of the imposition of a threshold. Not only would such a proposal empower the disabled individual but would also directly abrogate the undesirable general affects mentioned above as it would be a matter of choice for a participant whether to seek to be a participant in the NIIS.

Common Law

The QLS was disappointed to see the vehement criticism of common law compensation for those who suffer injury in Chapter 15 of the draft Report. It is unfair and unfounded to measure the success of common law in Queensland by using examples from other jurisdictions.

Queensland has a different and a demonstrated more successful approach to common law than any other jurisdiction, certainly the former Queensland Attorney-General summed up the sentiment of the State in the second reading speech to Parliament of some reforms to the workers' compensation system arising from the effects of the global financial crisis:

Sixty written submissions were received in response to the discussion paper from employers, self-insurers, unions, workers, lawyers and health professionals. It was reassuring to note that none of the submissions received

³¹ Workers Compensation Commission Annual Review 2008, pages 20 - 21

³² Accident Compensation Conciliation Service Annual Report 2008 / 2009 page 3

³³ Q-Comp Statistics Report 08 / 09, p47

suggested a change to the fundamental nature of the Queensland scheme—that is, a short tail scheme with access to common law proceedings³⁴.

The Society sees access to common law rights as the foundation of the continuing success of the Queensland workers' compensation and motor vehicle accidents schemes, which are:

- fully funded;
- well run;
- have nationally low levels of disputation;
- reach speedy and early resolution of claims;
- have low premiums;
- pay high proportions of premium directly to claimants;
- cost effective; and
- based on a short tail liability model centred on the right of access to the common law.

The Comparative Performance Monitoring Report 12th edition comparing national workers' compensation system provides that the Queensland workers' compensation leads nationally in:

- ratio of assets to net outstanding liabilities at 146% (20% above the level the New Zealand ACC would require an additional NZ\$ 17.3 billion to reach);
- % of expenditure paid directly to claimants among centrally funded schemes at 66.7% (47.2% in New Zealand);
- disputation rates of only 3.3%; and
- speedy resolution of disputation - 83% of disputes being resolved in 3 months.

Claim frequencies in motor vehicle accidents are strongly reflective of the schemes in which they are administered. A comparison of CTP schemes prepared for the Institute of Actuaries of Australia by Aaron Cutter of Finity Consulting in 2007 and presented at its XIth Accident Compensation Seminar³⁵ stating that:

There is a clear distinction between the Common Law schemes of NSW, Queensland and South Australia and the no fault Government monopolies of New Zealand and Tasmania.³⁶

The paper provides a graph which shows that claim frequencies in Queensland were the lowest of all jurisdictions and dropped from around 4 per 1,000 vehicles in 1996 / 97 to just under 2 per 1,000 vehicles in 2005 / 06. In New Zealand by way of comparison, as the highest level of claim frequency, in 1996 / 97 claims were at 18 per 1,000 vehicles and in 2005 / 06 had dropped to just under 14 per 1,000 vehicles.

The Commission raises a number of concerns with respect to existing common law systems with which the QLS disagrees, including that compensation can be delayed, legal costs are substantial and no-fault schemes promote better outcomes.

³⁴ The Hon Cameron Dick MP, Record of Proceedings of Queensland Parliament, 18 June 2010

³⁵ Available at http://www.finity.com.au/file.php?f=6.c_ACS07_paper_Cutter_Comparison+across+CTP+Scheme.pdf

³⁶ Aaron Cutter, 2007, Comparison Across CTP Schemes in Australasia, page 14

Delays

The QLS does not accept the Commission's statement that in the heavily common law based system in Queensland compensation and support is delayed. In the CTP system in Queensland insurers fund rehabilitation and medical costs from the injury date. This works well in practice in this jurisdiction and does not deny injured parties assistance in a timely manner.

In the Queensland CTP scheme the average claim duration from notification date to settlement date is just 19.9 months³⁷.

In the Queensland Workers' Compensation system the average claim duration from the date of lodgement to finalisation in the 2009 / 2010 year was only 11.4 months. The average time from the date of injury to the lodgement of a common law claim in 2009 / 2010 was only 2.35 years³⁸.

The draft Report uses examples in Chapter 15 of average claim times of 52 months in the TAC scheme to bring a common law claim to its conclusion from the date of accident or 6 years for other accident related claims in Victoria.

It is difficult to support an assertion that there are significant delays in the Queensland common law compensation injury compensation systems. These schemes are efficient and work well.

Legal Costs

The Commission notes that legal costs can be substantial and cites as evidence figures obtained from the Senior Master in Victoria and matters conducted in the United States. Neither of these sources are relevant to the scale of legal costs in Queensland. Estimates of US legal costs are particularly unhelpful as professional rules in that country permit the legal profession to charge without reference to time costing but as a percentage of the final award.

In Queensland the legal costs burden on the compensation schemes is very low.

In the Queensland workers' compensation system legal costs form a minimal element of scheme costs. The Queensland WorkCover Annual Report for 2009 / 2010 provides that for the year legal costs to the scheme in connection with common law claims were 3.1% of expenditure at \$35.8 million³⁹.

In the Queensland Motor Accidents Compensation scheme legal costs comprise on average about 13% of scheme expenditure⁴⁰. The Commission cites figures on page 15.47 of its draft Report for the MAIC as between 15 and 18 percent and has included investigation costs as legal costs. Investigation costs make up about 2.5% of finalised claim costs and would be incurred in any scheme which prudently dissuaded individuals from making fraudulent claims.

It is instructive to note that administration expenses in the New Zealand ACC scheme in the 2009 / 2010 year amounted to NZ\$ 457 million of the NZ\$ 3.818 billion in total claims incurred⁴¹. This amounts to 12% of the total scheme expenditure.

³⁷ MAIC Statistical Information Report to 31 December 2010 at page 15

³⁸ QCOMP Statistics Report 2009 / 2010 at page 41

³⁹ Plaintiff and defendant legal costs to the scheme for common law claims, WorkCover Qld Annual Report 2009 / 2010 page 27

⁴⁰ Motor Accidents Insurance Commission Annual Report 2009 / 2010, details of accident years and finalised claims pages 28 - 29

⁴¹ NZ ACC Annual Report 2009 / 2010 page 47

Queensland is also unique amongst the Australian jurisdictions in implementing legal cost capping for speculative personal injury actions. Section 347 of the *Legal Profession Act 2007* (Qld) provides:

347 Maximum payment for conduct of speculative personal injury claim

- (1) The maximum amount of legal costs (inclusive of GST) that a law practice may charge and recover from a client for work done in relation to a speculative personal injury claim must be worked out under the costs agreement with the client for the claim or this Act but in no case can those legal costs be more than the amount worked out using the formula—

$$[E - (R + D)] \times 0.5$$

where—

E means the amount to which the client is entitled under a judgment or settlement, including an amount the client is entitled to receive for costs under the judgment or settlement.

R means the total amount the client must, under an Act, a law of the Commonwealth or another jurisdiction, or otherwise, refund on receipt of the amount to which the client is entitled under the judgment or settlement.

D means the total amount of disbursements or expenses for which the client is liable if that liability is incurred by or on behalf of the client either by the law practice or on the advice or recommendation of the law practice, in obtaining goods or services (other than legal services from that law practice) for the purpose of investigating or progressing the client's claim, regardless of how or by whom those disbursements or expenses are paid, but does not include interest on the disbursements or expenses.

Examples for D—

- 1 The disbursements or expenses may be paid by the client direct or through a law practice or by a person funding the client for those disbursements or expenses.
 - 2 If a client obtains a loan to fund the payment of disbursements and expenses on the firm's recommendation and pays for medical and expert reports direct to the provider, the expenses fall within D (but the interest payable by the client on those expenses do not).
- (2) If—
- (a) the amount of legal costs that a law practice may charge and recover from a client is more than the amount calculated under subsection (1); and
 - (b) the law practice wishes to charge and recover the amount (the **greater amount**) from the client; the law practice may apply under subsection (3) for approval to charge and recover the greater amount.
- (3) The application must be made in writing to—
- (a) if the law practice is a barrister—the bar association; or
 - (b) otherwise—the law society.
- (4) A relevant regulatory authority may, in writing, approve an application made to it for an amount up to the greater amount.
- (5) This section applies to a barrister only if the barrister has not been retained by another law practice.
- (6) This section applies despite section 319 and division 5.
- (7) Also, this section applies to any request for payment made on or after the day this section commences, whether or not a client agreement was entered into before that date.

This provision is often called the '50 / 50' rule and sets a ceiling on legal costs in 'no win / no fee' personal injury actions. It was originally implemented by the Queensland Law Society in the interests of legal practitioners and claimants and was subsequently moved into legislation.

The Queensland Legal Services Commission in its 2009 / 2010 Annual Report notes that only 222 complaints were received relating to costs in all areas of practice (out of 1259 total complaints). Of these 222 complaints 85 or 38% were summarily dismissed as baseless⁴². It must be kept in mind that these are not figures for personal injury matters but all matters being conducted by Queensland 8,500 solicitors.

⁴² Queensland LSC Annual Report 2009 / 2010 at page 67, Table 29

With respect to workers' compensation, The Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme conducted in 2010 by an independent Victorian consultant did not identify any inappropriate behaviour or systemic abuses with respect to legal costs. The Report stated⁴³:

The profession's supervisory bodies (the Queensland Law Society and the Legal Services Commission), advised the review that they had no evidence of, and had received no complaints about, unprofessional conduct in relation to workers' compensation. As mentioned, the review was not otherwise presented with evidence of any systematic abuses or direct evidence of inappropriate behaviour by legal practitioners.

The comments of the Commission in Chapter 15 with respect to legal costs being excessive and a burden on compensation schemes are not supported with evidence in Queensland. There is no material in this jurisdiction to justify the alteration of existing common law based injury compensation schemes on the basis of excessive legal costs.

Do no fault schemes promote better outcomes?

The Commission considers that no-fault based schemes promote better safety outcomes than fault based schemes.

The QLS is not convinced that this is the case.

The Chair of the New Zealand ACC noted in the 2008 / 2009 Annual Report⁴⁴:

New Zealand's rate of injury in the workplace, on the roads and at home continues to be of concern and in many cases is worse than comparable countries such as Australia. That fact is reflected in the levies ACC has to charge.

Relevantly also is the material contained in the slideshow presentation given to NZ stakeholders on the formation of the ACC's National Serious Injury Service. That presentation provides the following table⁴⁵:

Return to Work	International best practice	New Zealand
Spinal cord injury	80%	18%
Traumatic brain injury	56%	9%

The International Road Safety Comparisons Report 2007⁴⁶ provides an indication of road safety with respect to the number of road deaths per 100,000 people. It states:

- Poland ratio – 14.7
- New Zealand ratio – 10.0
- OECD median – 7.8
- Australian ratio – 7.6

⁴³ Report of Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme, paragraph 140, available at <http://www.deir.qld.gov.au/workplace/resources/pdfs/wc-structural-review-report.pdf>

⁴⁴ NZ ACC Annual Report 2008 / 2009 page 5

⁴⁵ ACC Publication available at

http://www.acc.co.nz/PRD_EXT_CSMP/idcplg?IdcService=GET_FILE&dID=171&dDocName=DIS_CTRB096841&allowInterrupt=1

⁴⁶ International Road Safety Comparisons: The 2007 Report, available at

http://www.infrastructure.gov.au/roads/safety/publications/2009/pdf/rsr_05.pdf

- Tasmania (no fault scheme) – 9.1
- Queensland (fault based scheme) – 8.6

The 2010 ACC Financial Condition Report states⁴⁷:

1 Significant Volatility in the Use of the Scheme - Over the past decade the rate of injury each year has increased significantly and has recently gone through a significant swing. A monopoly insurer would not be expected to experience such volatility in injury rates. Given claims in the Scheme never officially close, there has been similar volatility on the reactivation of prior year claims returning to the Scheme. In addition, recovery rates have lengthened. These are factors ACC has some ability to influence but stabilization of these patterns require the support of other Stakeholders. It would be recommended ACC work with the Government and other key Stakeholders to develop a strategy for stabilising injury rates and recovery rates over the long-term. This would result in more stable levies and funding requirements over the long-term.

Respected New Zealand Academic, Bronwen Lichtenstein⁴⁸, identified the key fundamental flaws in the New Zealand ACC scheme in her 1999 paper *From Principle to Parsimony: A Critical Analysis of New Zealand's No-Fault Accident Compensation Scheme* which remain unaddressed today and continue to undermine the scheme's viability:

The flaws of the 1972 Act were the absolute loss of tort liability, the (related) lack of accident prevention, and the inflexibility to deal with an increasingly complex injury compensation environment⁴⁹

It is clear that there are not significant outcome benefits in jurisdictions with a no-fault scheme as compared with a fault based scheme.

Direct benefit to the Commonwealth of common law actions

The Commonwealth benefits directly at present in two key ways from common law actions for injury compensation:

- structuring of the social security system to encourage people to use private financial resources, such as compensation payments, before accessing the taxpayer-funded assistance and ensuring that people who receive compensation for an injury or illness have those payments considered in the calculation of any social security benefits; and
- repayment of Medicare benefits, nursing home benefits and residential care subsidies paid by the Australian Government when a person receives compensation for an injury or illness by way of judgment or settlement.

In the 2009 / 2010 year the net effect of these two measures appears to have been over \$1 billion of benefit to the Commonwealth nationally.

In terms of social security, the compensation provisions in the *Social Security Act 1991* (Cwth)⁵⁰:

- compel people to claim for compensation where compensation may be payable;
- provide for recovery of past payments of social security from arrears payments of periodic compensation payments and lump sum compensation payments;

⁴⁷ ACC Financial Condition Report 2010 page 3

⁴⁸ Now Assistant Professor in the Department of Criminal Justice at the University of Alabama

⁴⁹ Lichtenstein, *From Principle to Parsimony: A critical analysis of New Zealand's no-fault accident compensation scheme*, Social Justice Research, Vol 12, No 2, 1999 at page 114

⁵⁰ Centrelink Annual Report 2009 / 2010 at page 75

- provide for preclusion periods within which social security payments cannot be paid due to the receipt of lump sum compensation payments; and
- provide for periodic payments, such as weekly workers' compensation payments, to reduce directly, dollar for dollar, the rate of social security payments payable. Any excess is treated as income for partners of compensation recipients.

The Centrelink Annual Report 2009 / 2010 reports that the effect of the compensation provisions of the Act relying upon judgements and settlements for personal injury actions achieved estimated savings to outlays of around \$590 million over the period affected by the relevant compensation payments⁵¹.

If the amount of compensation paid is more than \$5,000 (including costs), the value of the Medicare benefits, nursing home or residential aged care subsidies relating to the compensable injury or illness must be repaid to Medicare under the *Health and Other Services (Compensation) Act 1995*.

In their 2009 / 2010 Annual Report Medicare discloses that \$465 million was paid into the Recovery of Compensation for Health Care and Other Services Special Account administered by Medicare⁵². This account is held to receive monies following a judgement or settlement under the *Health and Other Services Compensation Act 1995*.

Example – Firm A

Firm A examined a sample of 50 of its CTP and workers' compensation claim settlements in March 2011. The firm found that it had remitted \$204,711.93 to the Commonwealth in refunds from these 50 concluded actions. This amounted to 3.3% of settlement funds.

These amounts accruing to the direct benefit of the Commonwealth from private funds would be lost if the right of common law action was removed. The contribution of these amounts is also disproportionately lessened by jurisdictions which implement thresholds or otherwise restrict bringing common law claims. The net effect of access thresholds is both to deny people their rights and also to transfer the burden of costs directly to the Commonwealth without any avenue for recompense.

Clarification needed in the draft Report

The draft Report proposes a system of interaction between the NDIS, the NIIS and existing injury compensation schemes which is summarised in Appendix 1.

There are some areas which require clarification in the final Report regarding the interaction of these schemes, including:

- the Commission should indicate how people with existing catastrophic injuries will be charged for access to the NDIS, while being excluded from the NIIS;
- the Commission should indicate whether it is proposing any change to the common law rights of a person with a pre-commencement catastrophic injury as they will be denied access to the NIIS;
- the Commission should clarify how those with non-catastrophic injuries but with a common law award will be charged by the NDIS for services consumed up to the time of finalisation of their common law claim; and

⁵¹ Centrelink Annual Report 2009 / 2010 at page 75

⁵² Medicare Annual Report 2009 / 2010 at page 180 (Financial Statements page 56)

- the Commission should clarify whether those with a non-catastrophic injury with a common law claim will have continuing access to the NDIS post finalisation of their claim and whether this will be through a 'pay as you go' arrangement or as a single 'buy-in' mechanism.

Our concern with the 2020 review

The Commission proposes in draft recommendation 16.5 that the 2020 review to be the most opportune time to assess whether all common law heads of damage should be removed and whether the NIIS should be merged with the NDIS.

The QLS is particularly concerned with the discussion under heading 16.3 on page 16.35 onwards that considers removing other heads of common law damage beyond support and care.

The QLS has a significant concern with the propositions at page 16.36:

Overall, the Commission sees merit in compensation for pain and suffering being limited to cases where a party suffers serious injury from the gross negligence of others. In particular, if compensation for pain and suffering were provided through the NIIS, it would cover cases where a party suffers serious injury from the gross negligence of others, with:

- payments based on an impairment formula with determination of the amount using an objective assessment tool applied soon after the occurrence of the injury
- a nominal defendant seeking to recover the costs of claims from the at-fault party when their fault was vindicated and where an income source was available.

The Commission similarly sees merit in removing access to sue for lump sum damages for income losses under the common law, with people injured as a result of an at-fault first party instead covered through the NIIS. An administrative process, not the common law, could determine whether or not there was an at-fault first party, and payments should be made periodically and not on a lump sum basis. There are also in principal reasons why NIIS should extend coverage of income loss from injury beyond cases involving an at-fault first party.

It is clear that the rationale behind this view is a desire to implement an injury scheme in Australia similar to the New Zealand ACC. As we have demonstrated in detail throughout this submission there are a number of fundamental flaws in that model which have resulted in the scheme being varied and reconstituted constantly to progressively move ongoing unfunded liabilities forward. It is simply a matter of juggling debts forward in perpetuity. In recent times we have seen staggering increases in premiums to attempt to redress the constant balancing act and also a delaying of full funding targets to buy more time. Overall the model is well intentioned but is living beyond its means. Lessons learnt from the recent global financial crisis are that it is not always possible to pay tomorrow for what is enjoyed today.

Appendix 1 – Interaction between NDIS, NIIS and the Common Law

Catastrophically Injured

Injury pre-dates NIIS

Motor vehicle and medical accidents before end of 2013

Criminal and general accidents before end of 2015

Workplace accidents included at discretion of each State and Territory (Recommendation 16.4)

NDIS	NIIS	Injury Compensation
NDIS provides support (page 16.27 and 16.42) If lump sum compensation is still available NDIS would recover costs of services from compensation (page 16.42)	No access to NIIS (page 16.27)	No change to common law rights Common law rights reviewed in 2020 for catastrophically injured (recommendation 16.5)

Injury post dates NIIS

Motor vehicle and medical accidents after end of 2013

Criminal and general accidents after end of 2015

Workplace accidents included at discretion of each State and Territory (Recommendation 16.4)

NDIS	NIIS	Injury Compensation
NDIS does not provide support (page 16.41)	NIIS provides support from time of injury	Common law rights to sue for long-term care and support should be removed (recommendation 16.1) Other heads of damage for catastrophically injured reviewed in 2020 (recommendation 16.5)

Non-catastrophically Injured

With common law rights

NDIS	NIIS	Injury Compensation
NDIS provides support from time of injury if entry requirements met – see draft recommendation 3.2 below At successful resolution of common law claim, costs of services consumed would be recoverable from damages (page 16.41) No guidance on post-award applicability in draft report	NIIS does not apply Consideration of expanding NIIS to significant accident injuries in 2020 review (recommendation 16.5)	No change to common law rights Expansion of NIIS following review would affect care and support head of damage – uncertain about other heads of damage

Without common law rights

NDIS	NIIS	Injury Compensation
NDIS provides support from time of injury if entry requirements met – see draft recommendation 3.2 below	NIIS does not apply Consideration of expanding NIIS to significant accident injuries in 2020 review (recommendation 16.5)	Not applicable

NDIS entry requirements in Draft Recommendation 3.2:

Individuals receiving individually tailored, funded supports should be Australian residents, have a permanent disability, (or if not a permanent disability, be expected to require very costly disability supports) and would meet one of the following conditions:

- have significant difficulties with mobility, self-care and/or communication
- have an intellectual disability
- be in an early intervention group, comprising:
 - ❖ those for whom there was a reasonable potential for cost-effective early therapeutic interventions (as in autism and acquired brain injury)
 - ❖ those with newly diagnosed degenerative diseases for whom early preparation would enhance their lives (as in multiple sclerosis)
- have large identifiable benefits from support that would otherwise not be realised, and that are not covered by the groups above. Guidelines should be developed to inform the scope of this criterion.