

24 December 2015

Research Director
Communities, Disability Services and Domestic and
Family Violence Prevention Committee
Parliament House
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BRISBANE QLD 4000

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Dear Director

Inquiry into a suitable model for the implementation of the National Injury Insurance Scheme

Background

On 11 November 2015, the Inquiry into a suitable model for the implementation of the National Injury Insurance Scheme (NIIS) was referred to the Communities, Disability Services and Domestic and Family Violence Prevention Committee. On 2 December 2015 a public briefing was held in the Parliamentary Annexe in relation to the Inquiry.

Terms of Reference

That the Communities, Disability Services and Domestic and Family Violence Prevention Committee inquire into and report, by 7 March 2016, on:

1. The most suitable model for implementing the National Injury Insurance Scheme (NIIS) for 1 July 2016 as entered into by Queensland in a Heads of Agreement with the Commonwealth in May 2013 with options including:-
 - a. a no-fault lifetime care scheme; or
 - b. a hybrid common law and no-fault care and support arrangement.

2. In undertaking its inquiry, the Committee should consider:

How the government can sustainably and affordably meet the NIIS minimum benchmarks for motor vehicle accidents:

- a. Affordability for Queensland taxpayers and motorists;
- b. The long term nature of liabilities in a NIIS; and
- c. The desire to target full funding of long term liabilities in accordance with actuarial advice.

3. In undertaking its inquiry, the Committee should:
 - a. Seek public submissions; and
 - b. Consult with key stakeholders and peak representative bodies from the health and disability care sectors, the insurance sector and the legal profession.

Submission

Queensland Law Society appreciates the opportunity to comment on this important issue, and supports the introduction of a "no fault" insurance scheme for persons catastrophically injured in motor vehicle accidents. However, it is imperative that this scheme is implemented in such a way as to ensure that the varying needs of claimants are addressed in a fair, just and workable way to protect existing rights and promote choice and independence for injured persons.

Preferred Model

It is the Society's firm view that NIIS should operate in addition to the current common-law scheme; whilst the need for a "safety net" for those without a common law claim is acute, the implementation of the NIIS should not come at the expense of, or in the alternative to, common law rights.

In view of this, the Society supports the implementation of a hybrid common law and no fault care and support arrangement. The Society notes that the maintaining of access to common law rights has the following advantages:

1. Lump Sum Payments

Common Law claimants receive lump sum payments, which allow them a choice in care providers and treatment options, as well as providing certainty of claim and a degree of closure.

Maintaining a claimant's choice of carer, facilities, rehabilitation plan and similar necessities is, in the Society's view, paramount. Central to the recovery of catastrophically injured persons is the reintroduction of some element of day-to-day independence if at all possible. If claimants are to be tied to the decisions of government administrators, such independence is unlikely to arise.

In addition, it is possible – indeed, likely – that future governments will seek to run the scheme as leanly as possible to minimise politically unpopular increases in the financial burden carried by members of the public in supporting the scheme (most likely require car registration payments).

History shows that governments generally achieve savings by centralising services, limiting the pool of providers, capping entitlements and – in this case – falling back on an overloaded public health system. It is inevitable that this will result in sub-optimal care being provided to claimants, and also require them to relocate to service hubs in larger metropolitan areas which in many cases will be significant distances from vital support networks such as family and friends.

In worst-case scenarios, it is possible that claimants will be institutionalised, and often in facilities not designed for their care (as currently occurs with disabled youths and young adults whose parents can no longer care for them, being placed in nursing homes.)

In addition, the removal of freedom of choice from critically injured persons whose injuries have resulted in a disability would be in contravention of the United Nations Convention on the Rights of Persons with Disabilities. That convention specifically recognises the importance of ensuring that disabled people maintain autonomy and independence, which includes the freedom to make their own choices¹. It is clear that choices in relation to such significant issues as where a disabled person is cared for and who does the caring are covered by the Convention.

2. Administrative Burden-Claim Management

The ongoing management of a lifetime support and care scheme will carry an administrative burden. At the Public Briefing to the Committee, the Treasury representatives briefing the Committee advised that the structure of the scheme was not certain, but would likely start as a Statutory Body within the Insurance Commission and evolve into a discrete body; there is evident and significant administrative associated with this course of action.

Maintaining common law as an option for eligible catastrophically injured claimants may assist in keeping the numbers of the people assisted by the NIIS scheme smaller and therefore require less administration as well as reduced levels of prudential reserve. This would, in turn, result in downward pressure on additional funds requiring collection through registrations.

This is a particular case in relation to claimants who have an acquired brain injury and lack the capacity to make their own financial decisions. This adds an extra administrative burden to the cost of managing the claim. In addition, in such circumstances, it is vitally important that guardians of such persons are allowed a choice in this regard, especially as the Public Trustee charges higher registration fees for people cared for in the community as opposed to those cared for in nursing homes. If common law rights are removed, it is highly likely that claimants with acquired brain injuries will be institutionalised as a cost savings measure – an outcome which the Society strenuously opposes.

3. Administrative burden – review of decisions

Although not specified in the terms of reference, nor addressed at all in the public briefing, it is inevitable that the operation of a no fault care and support arrangement, with government administrators making decisions in relation to the care and housing of catastrophically injured persons, will add to the number of administrative reviews dealt with by the legal system.

¹ See *United Nations Convention on the Rights of Persons with Disabilities* preamble (n) and Article 3 (a)

Currently, administrative reviews of government decisions in Queensland are largely heard by the Queensland Civil and Administrative Tribunal (QCAT). It is uncontroversial to note that QCAT customers already experience significant delays in having matters heard, and then in delivery of the decision; those delays are compounded by the fact that there is no right to legal representation in QCAT².

If it were the case that all claims by catastrophically injured persons, regardless of fault, were funnelled into the NIIS, the resultant increase in applications for review of decisions in QCAT would be devastating. The cost to government of absorbing those reviews can be conservatively estimated in the millions of dollars³.

Funding

Neither the call for submissions nor the public briefing provided detail in relation to the funding calculations for the NIIS. In addition, no proposed funding models have been suggested. It is difficult for the Society to advise on an appropriate funding model or comment on the issues raised in item two of the terms of reference in the absence of any financial detail. The Society notes that at the Public Briefing the Treasury representatives committed to providing further actuarial and financial detail to the Committee; the Society suggests that it would be beneficial to the Committee to allow stakeholders access to that data when available as it will allow stakeholders to make more precise recommendations.

Funding Options

At the public briefing of the Committee on 10 December 2015, a number of funding options were considered, but the only detail provided (which was in any event limited in scope) concerned the option of funding the NIIS via an increase in car registration. It is clear that this method is the most likely funding option, and given that the Society has not been provided with any detailed costings of any other proposal, it is not possible to comment on alternative models.

Wayne Cannon, State Actuary, Queensland Treasury, provided some details in relation to the funding calculations. Mr Cannon advised that the estimated cost of the NIIS in 2016/17 (based on 130 persons being catastrophically injured during the year) would be \$348 million. Treasury officials advised that there were 4 million motor vehicles in Queensland, over a wide range of vehicle classes, and that based on these figures and Treasury's estimate of any increase to the annual registration payment would need to be \$60. The Society's submission is based on those figures, but it should be noted that the Society has seen no actuarial detail on which detailed analysis could be made.

Thresholds

The Society strenuously objects to the imposition of any threshold above which injuries incurred must impair a person before they can access either scheme. The Society's position is the same as it was in relation to the recently removed threshold on workers compensation claims.

² This issue is covered in detail in QLS' submission to the QCAT review, which can be provided to the Committee on request

³ Based on QCAT's recurrent expenditure of \$20.36 million as per 2014/2015 Annual Report

Although the imposition of thresholds often appeals as a cost management tool it inevitably disenfranchises injured persons who suffer significant economic loss following apparently minor injuries.

Indeed, when introducing the bill which removed the 5% threshold on workers compensation claims, Treasurer Curtis Pitt referred to a real-life example of the 36-year-old plumber, who tore the meniscus in his left knee and badly injured his calf muscle in a workplace accident. The injuries were assessed a total of 3% permanent impairment, but this left the plumber with an inability to stand for long periods, which cost him his job. Those injuries would have been just as career-ending if sustained in a motor vehicle accident, and the Society's submission is that it is clear that the imposition of a threshold of any kind is not justified.

Risks

1. Common Law Claimants returning to scheme

Although anecdotal evidence indicates that incidences are at best rare, the risk exists that a common-law claimant will expend any payment unwisely, and need to ultimately enter the NIIS. This is highly unlikely, as common-law claimants are advised by legal professionals who provide bespoke services, and their own medical experts and financial advisers. This ensures that they obtain sufficient money for care throughout their life and that the money is expended on the advice of appropriately qualified professionals.

In any event, it is the Society's position that the rights of catastrophically injured persons to choose their own carers and health professionals, and to be able to be cared for in their own communities rather than institutionalised in a central location, should override the risk to the scheme. In addition, the funding of the scheme could clearly be calculated to accommodate a small percentage of common-law claimants needing to return to the scheme. Given how rare this is in practice, this should not add significantly to the cost of the scheme. Anecdotal feedback from the Society's members indicates that rather than being invested unwisely, money paid under common-law claims is largely well utilised and many clients increase their investments over time.

In fact, consideration of other schemes reveals that schemes which remove common law rights invariably encounter financial difficulty. For example, the New Zealand Accident Compensation Commission, in 2008, announced unfunded liabilities of \$23.175 billion. This has been addressed through enormous increases in compulsory contributions as well as limits being placed on the benefits available to injured persons.

The South Australia WorkCover scheme is instructive in this regard. Initially implemented as a scheme which eliminated common law rights, South Australian WorkCover quickly became financially unviable with unfunded liabilities almost \$1 billion and the highest compulsory contributions in the country as at 2010. The scheme was subsequently revised and common law rights reintroduced, and the scheme has experienced a significant turnaround in financial health – in 2015 it had improved to have a funding ratio of 114% and \$370 million in net assets.

It is the Society's submission that in order to avoid similar problems, the NIIS must be implemented in a way which preserves common law rights so that the scheme can be complemented by common law claims.

2. *Contributory Negligence*

The question of contributory negligence poses some challenges for a scheme which preserves common law rights. The Society submits that the question of contributory negligence can be covered as follows:

- The "care and support" head of damage could be exempt from any reduction relating to contributory negligence in circumstances where a claimant pursues a common-law claim. This is consistent with the no fault nature of the scheme whilst preserving a claimant's right to choose;
- Prior to making a common law claim, potential claimants will have the option of seeking legal advice as to the best course of action, in circumstance where contributory negligence may be an issue.

3. *Experiences in other jurisdictions*

Victorian experience

The Victorian *Transport Accident Act* has been in existence since 1 January 1987 and is an example of a hybrid scheme, incorporating some "no fault" benefits including hospital, medical, rehabilitation and disability services, and a common-law scheme for general damages and pecuniary loss only. Claimants entitled to bring a common-law claim are prohibited from seeking damages for future expenses in the common law claim.

This forces the claimant – regardless of the nature of the injuries – to seek payment of all hospital, medical, relocation and disability services from the scheme on an ongoing basis.

The practical effect of this system is that a claimant can only obtain services within the legislative definitions, regardless of the value of the service to the claimant. The claimant is also forced into a lifelong dependency on the scheme and must continually justify the need for a particular service. This is often inhibitive of rehabilitation strategies.

Decisions made under the scheme in relation to a claimant's interests are reviewable, but (as foreshadowed above) this generally leads to lengthy delays. In Queensland, such decisions would be reviewed in QCAT which averages 42 weeks from application to hearing⁴; such delays would be detrimental to the physical and mental well-being of claimants.

Further, in the Victorian scheme, the entitlement amount approved for a given service is not based on the actual cost of that service in the market. This means that claimants must fund the gap between their entitlement and the actual cost of a particular service (or simply miss out on the service).

In addition, the service a claimant requires may be unavailable in the claimant's locality, particularly in regional and rural environments. Given the number of Queenslanders who are domiciled in rural and regional areas, this issue would be loom even larger for Queensland claimants under a Victorian-style system.

⁴ QCAT Annual Report 2014/2015

In short, the Victorian scheme realises all of the risks identified above by the Society in relation to the need to maintain access to common law rights. In its curtailing of common law rights and its removal of freedom of choice from claimants, the Victorian scheme is a cautionary tale, a perfect example of what not to do.

Transparency of Costs

The Society is aware that there is an ill-founded belief amongst the public – and some politicians and public servants – that lump sum payments can be rendered inadequate by the portion devoted to the cost of lawyers. This is not the case, and in fact Queensland is the only jurisdiction with a rule which specifically prevents this occurring. This rule is referred to as the 50/50 rule and is widely misunderstood as meaning that a solicitor can claim 50% of the lump-sum payout; it is this misunderstanding that leads to the fear that lump sum payments may not be sufficient for the lifetime care of a critically injured person.

In fact, the 50/50 rule (put in place by sections 345 – 347 of the *Legal Profession Act 2007*) operates to limit the amount of costs chargeable by a solicitor in relation to a claim. In short compass, the rule states that once all refunds (Medicare, etc.) are deducted from a lump-sum claim, and all disbursements – for example, barrister's fees – are paid out, the solicitor's costs can be no more than 50% of the remaining amount of money. The effect of this is that if after all legitimate deductions are made, a sum of \$100,000 is left to a claimant, and a solicitor has done \$80,000 worth of work, that solicitor can receive a maximum of \$50,000.

Given that Queensland solicitors are already subject to this regime (which applies only to speculative work) being subject to greater transparency on costs issues is not something that will cause alarm for QLS members. The Society notes that in some jurisdictions (for example, New York) costs agreements are filed on the court record. It may be that the government could look to the experiences of such jurisdictions to determine the most effective way to achieve costs transparency, but – subject to the form costs transparency might take – the Society supports this in principle.

Conclusion

The Society supports the National Injury Insurance Scheme being implemented in Queensland, but takes the strong view that at its heart the scheme must hold the physical and mental well-being of claimants paramount. It is imperative that the scheme ensure the greatest chance of rehabilitation and the highest possible care for critically injured persons, for the duration of their lives.

The Society submits that the only model which keeps the interests of the critically injured person as the number one priority is a model which preserves the common law rights and allows claimants to opt in or out of the no fault scheme.

Preserving common law rights maintains a claimant's right to choose the type of care they receive, the healthcare professionals who provide the care and the circumstances in which that care is provided. Preserving common law rights also quarantines claimants, as far as is possible, from the decisions future governments may make in relation to the scope of care provided by the scheme, and its funding.

People who are critically injured in motor vehicle accidents lose many of the amenities of life, which has an effect on both the mental and physical well-being of that person. Post-accident, much of what happens to a critically injured person will be beyond their control; it is vital to their dignity and mental health that they have as much control over their lives as possible in the circumstances.

Maintaining common law rights – and thereby their right to choose treatments, carers, living arrangements and the like – is the key to ensuring that critically injured persons recover as fully as possible, and with dignity intact; to eliminate common law rights and take away what little control critically injured persons have over their lives is unjustifiable in a first world economy.

Again, the Society appreciates being consulted on this important issue. Should you wish to discuss these matters further, please do not hesitate to contact me or Shane Budden, the Society's Senior Policy Advisor, on 3842 5889 or via email at s.budden@qls.com.au

Yours faithfully



Michael Fitzgerald
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