National Injury Insurance Scheme: Motor Vehicle Accidents - Consultation Regulation Impact Statement

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Introduction

The Law Institute of Victoria ('LIV') welcomes the opportunity to respond to the National Injury Insurance Scheme ("NIIS"): Motor Vehicle Accidents, Consultation Regulation Impact Statement ('RIS').

The focus of the RIS is to identify options for Queensland and Western Australia to provide lifetime care and support for all newly acquired catastrophic injuries due to motor vehicle accidents.

The options proposed in the RIS involve a catastrophically injured person receiving lifetime care and support through State and Territory based no fault schemes set up with minimum benchmarks regarding the provision of these services (ie the NIIS framework). Most jurisdictions already meet or are making significant progress towards meeting these benchmarks. Under the NIIS proposal, it is proposed a catastrophically injured person, who is injured as a result of the negligence or fault of another party, will lose their right to claim past and future lifetime medical, rehabilitation, care and support expenses at common law.

The LIV is well placed to provide commentary on the RIS given the implementation of the *Transport Accident* Act (1986) (the "TA Act"), which established the Transport Accident Commission ('TAC') scheme within the Victorian jurisdiction since 1987. Under the TAC scheme, an injured claimant is unable to pursue past and future medical and related expenses in a common law claim for damages but rather, is required to claim these expenses on an ongoing basis through the TAC.

The focus of the LIV's response will be on important considerations that the RIS has failed to address in its analysis of no fault schemes, including some illustrative case examples that have arisen in the TAC context.

The benefits and advantages of common law rights and the importance to individuals and families have already been well covered by the Law Council of Australia in its response to the Productivity Commission Draft Report on Disability Care and Support. It is not intended to revisit these issues in detail here save to say that the LIV's view is that as matters of fairness and scheme sustainability, no fault benefits should not come at the cost of common law rights of all citizens.

A no fault scheme should not erode common law rights

A no fault scheme is important for people who sustain catastrophic injuries, in a motor vehicle accident in non-compensable circumstances, ie where there is no fault or negligence on the part of another party to enable the bringing of a common law claim.

The LIV submits that a no fault system should not be at the expense of abolishing an individual's common law rights. There should be no disadvantage to any injured individual as a result of the introduction of any no fault scheme.

Contrary to what is proposed in the RIS, the ability to pursue a common law claim for past and future medical, rehabilitation, care and support should remain available and exist in parallel with any no fault scheme. The potential for "double dipping" is easily prevented through means of the operation of the refund and preclusion periods incorporated into the *National Disability Insurance Scheme Act 2013 (Cth)* ('the NDIS Act') if a claimant is successful in obtaining common law damages.

Indeed, the retention of common law rights is critical to the financial sustainability of the National Disability Insurance Scheme (NDIS) because catastrophically injured claimants who are able to recover damages either do not access benefits through the NDIS or if they do, the "pay back" requirements mean that the cost of supporting these claimants is ultimately borne by the insurer rather than the NDIS.

Difference in Legislative Objectives - NDIS and TAC

The objects of the NDIS Act include giving effect to the Convention on the Rights of Persons with Disabilities. This incorporates principles of individual autonomy, freedom to make one's own choices, and independence of persons. The objects of the NDIS Act also include to "*support the independence and social and economic participation of people with disability*" and "*enable people with disability to exercise choice and control in the pursuit of their goals and planning and delivery of their supports*".

The LIV submits that a fundamental flaw in the practical application of a no fault scheme is that it does not necessarily enable individuals to self-determine or self-direct their future care and support needs in the same manner as they would if they had received common law damages. For example, the TA Act does not share the above objectives incorporated into the NDIS Act. Anecdotal reports suggest that a practical reality of the TAC scheme is that in many cases there is a limitation on the ability to achieve independence and self-determination for injured claimants. To inform the discussion, it would be helpful if the TAC provided detailed information about individual funding agreements entered into pursuant to Sections 61A to 61D of the TA Act.

The LIV submits that the analysis in the RIS ignores how the fundamental principles of the NDIS scheme of autonomy, self-determination and independence will be protected and fostered with the introduction of the NIIS. There are numerous case examples, many of which result in costly disputation with the TAC.

Case example

A claimant sustained catastrophic injuries, including a spinal cord injury resulting in C6/C7 quadriplegia, when the driver of a vehicle failed to give way at a give-way sign, causing a high impact collision with her vehicle. At the time of the accident the claimant resided on a farm (140 acres) in Cowwar, Victoria. Her property was isolated, with her nearest neighbour approximately 800 metres away, and the terrain was uneven and grassy, making it difficult to negotiate in a wheel chair. The property was also in a bushfire area and if a bushfire occurred it would be extremely difficult for the claimant to leave the house and property, especially in a timely fashion. At the time of the accident the claimant worked as a veterinary nurse in a clinic in Maffra, a town over 30 kilometres away.

In order to maximise her independence and mobility, the claimant wished to relocate to Maffra where she could independently access her workplace, medical and community services, shops, and be closer to her social support network of family and friends. The claimant believed that the move was particularly important for her to maintain her employment.

The TAC denied the claimant's claim for relocation costs on the basis that her original house in Cowwar was capable of modification and that it was her choice to move to Maffra.

The TAC's decision was overturned after a hearing at the Victorian Civil and Administrative Tribunal ('VCAT') in which it was decided that a 'home' is not just the actual dwelling but also the surrounding geographical area, and it was dangerous for the claimant to remain living in Cowwar due to the bushfire risk, the difficulty in obtaining timely access to medical and ambulance services and the psychological impact of living a restricted and isolated lifestyle.

Limits on self-directed care

Eroding the right of a catastrophically injured individual to claim future care needs through a lump sum common law claim puts them at a disadvantage, especially with respect to their autonomy and independence. A lump sum amount for future care needs provides an injured individual the freedom of choice and autonomy in how to utilise and disperse funds to best meet their needs and enhance their quality of life. This fosters independence and self-determination of care in a manner which is not available if that individual is subject to the bureaucracy of a no fault scheme.

The operation of the TAC scheme in practice must be considered for its impact on clients and their ability to direct their own care.

In a significant number of cases, an injured claimant is wholly reliant on the decision of a bureaucrat regarding each and every aspect of their treatment and care needs. The TA Act allows for the implementation of individual funding agreements to be put in place which provides some autonomy for individuals, however anecdotal reports suggest that the utilisation of these agreements in practice is low.

In a significant number of cases, individuals must submit and justify each request for treatment and services whilst also satisfying the TAC's internal processes and requirements. This includes requests for straight forward, cyclical and obvious treatments and supports.

For example, *a claimant with a catastrophic spinal injury must seek permission each time s/he wishes to repair or replace a wheelchair.*

For example, *a claimant with an amputation must have a prosthetic treatment request form completed and approved each time he/she requires a major repair or alteration to their existing prosthesis or a new prosthesis.*

Each request is subject to scrutiny and review by the TAC. In making a decision the TAC is informed by internal policy as well as the information provided by a claimant. Disputes regarding TAC decisions are common, costly and can lead to delay in benefit delivery to injured claimants.

The LIV submits that the financial and emotional costs to individuals dependent on a state administered bureaucracy for their lifetime care and support is not adequately considered by the RIS.

Case example

The claimant was 5 years old when he was involved in a motor vehicle accident where he sustained severe head injuries resulting in marked cognitive and learning difficulties. As a result, he required special schooling at Narunga Special School.

When the claimant was 15 years old a request was made to the TAC for a replacement computer, monitor and printer. The TAC only agreed to fund 50% of this cost ($1,240) on the basis it would also be used by the claimant for leisure and not just school work.

The TAC's decision was overturned after a hearing at VCAT where evidence was adduced demonstrating the benefit the computer would provide the claimant, including educational and rehabilitative benefits such assisting him with drawing, constructing montages and composing letters.

The cost of disputes in a no fault scheme

A benefit of awarding compensation in a lump sum at common law is that there is finality in the claim and in the associated costs.

The LIV submits that the RIS fails to acknowledge or detail the ongoing costs of managing disputes in a no fault scheme, particularly given claimants are subject to the scheme for all their future treatment and care needs. The LIV suggests that Treasury obtain further data and factor these costs into its analysis.

In 2005, protocols were introduced between the TAC and legal stakeholders allowing for successful alternative dispute resolution without the need to issue proceedings at VCAT. The TAC Annual Report 2013 (page 13), indicates that in the 2012/13 financial year 974 applications for review of a TAC decision were lodged under the dispute resolution protocols. If one assumes that half of these applications resolved successfully in that financial year at an average cost of $5,000, this equates to in excess of $2,400,000. Further, in the 2012/13 financial year 817 merit review applications were lodged at VCAT, which usually incur higher average costs than the matters that resolve under the protocols.

The LIV rejects the proposition that a person be denied the ability to appeal or challenge a bureaucratic decision. This outcome would be unacceptable and would deny a person natural justice. The LIV raises the issue of disputation costs to illustrate that the RIS's analysis regarding the benefits and costs associated with the introduction and ongoing management of a no fault scheme is superficial.

Other concerns regarding no fault schemes

The LIV would also like to raise the following concerns that claimants may experience in a no fault scheme:

- A claimant is only able to access treatment or services that are allowed within the legislative framework of the scheme. This means that certain treatment, services or supports are simply not covered by the scheme even though they may be of significant benefit to an injured claimant. This also means that the treatment and services available under the scheme are subject to legislative change at any point in time, which is at odds with the RIS's desired outcome of certainty.

- There may be reluctance from service providers to engage with the bureaucracy and treat or service its clients. Some service providers often find the bureaucratic process to be so demanding as to make it unappealing to undertake treatment, care or support of a TAC claimant. Some professional health services providers complain it is demeaning and insulting to be required to justify their professional opinions to a claims officer. In addition, some service providers choose not to undertake TAC work due to, at times, burdensome administrative and reporting requirements.

- The amount paid by the TAC for the provision of various and numerous health services may not reflect the market rate for such services. In the TAC context there is often a 'gap' between what a service provider charges and what the TAC is prepared to pay for the service. This cost falls on the individual claimant if they wish to continue with that service provider or that type of treatment.

- A bureaucracy can be slow in its decision making about what treatment will be provided to a claimant, possibly due to poorly trained claims staff and/or inadequate systems.

- Claims management and staff can also change over the course of a person's claim. The history and knowledge of a claimant's circumstances and the expertise that follows can be lost with a change in staff/claims management. A change in personnel can also be difficult and disheartening for injured claimants with anecdotal evidence suggesting that many feel at the mercy of the person making the decision.

- Other things that can increase delays include that the TAC may require an injured claimant to attend medico-legal examinations for TAC to determine whether a particular treatment or service should be funded. This can add many months to the decision making time frame.

Other issues regarding the RIS

The LIV also wishes to highlight the following issues in relation to the RIS:

1. **RIS asserts that mismanagement of lump sum compensation is an issue:**

The RIS details that mismanagement of a lump sum may be a risk but does not present evidence of this being a significant problem in practice.

The RIS does not acknowledge the protections in place within the legal system to combat the mismanagement of funds. For example, in the Victorian context if a person is under a legal disability (eg. a severe acquired brain injury) a legal practitioner must seek court approval of a common law settlement. The compensation is then deposited into the Funds in Court of the Supreme Court of Victoria where it is managed and administered. If a legal practitioner fails to discharge this obligation, legal and professional ramifications apply.

The Supreme Court of Victoria 2012-13 Annual Report (pages 44 and 45) confirms that in the 2012-13 financial year over $100 million was paid into the court fund with 748 new accounts opened. This illustrates that Funds in Court is a well-established mechanism that serves to protect recipients of compensation to ensure it is utilised in their best interests and not mismanaged. Further information is available on the Supreme Court of Victoria website www.supremecourt.vic.gov.au and in particular the Funds in Court Information Guide.

2. **No need for two schemes:**

The LIV submits that two schemes (NDIS and NIIS) are not required, and that the NDIS has the capacity to provide appropriate care and support to the catastrophically injured. To set up two schemes would be inefficient and costly, and in the LIV's view cannot be justified on an economies of scale rationale.

In the LIV's view, the RIS fails to justify the significant expense associated with the establishment and ongoing management of State and Territory based bureaucracies of the NIIS.

The LIV submits that an analysis of investing the potential NIIS set up and administration costs into the NDIS, and what this would mean in terms of improved benefit delivery to people with a disability and catastrophic injury, should be made.

3. **Financial viability of no fault schemes:**

The concern expressed in the RIS for the potential for the mismanagement of funds does not address the ramifications for the catastrophically injured and the community as a whole should there be mismanagement of the funds of a NIIS - type scheme. Poor financial performance of a broad based no fault scheme leaves all at risk in the future provision of care and support. It is submitted that the New Zealand Accident Compensation Corporation is an example of poor financial management with a reduction in benefits accessible over time.

Conclusion

The LIV suggests that there are key factors that have not been addressed in the RIS regarding the management of lifetime care and support for people who sustain catastrophic injuries in motor vehicle accidents. This not only includes additional financial and administrative costs, but also costs associated with an individual losing independence and the ability to self-direct their care.

The Productivity Commission concluded that adequacy of care should be defined by certainty, timeliness and quality of access, and that no fault schemes best provide for this. It is submitted that the issues and examples raised above highlight that no fault schemes do not necessarily deliver this objective.