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# National Injury Insurance Scheme: Motor Vehicle Accidents

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## Commonwealth Treasury

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## Introduction

1. The Law Council of Australia (Law Council) and the Queensland Law Society (QLS) are pleased to make the following joint submission in response to the Consultation Regulation Impact Statement (RIS) on the *National Injury Insurance Scheme: Motor Vehicle Accidents*.
2. The Law Council is the national peak body for the Australian legal profession, representing around 60,000 lawyers through the law societies and bar associations of the states and territories, plus the Large Law Firm Group Ltd (collectively referred to as the “constituent bodies” of the Law Council). The QLS is the peak body for the Queensland legal profession and a constituent body of the Law Council.
3. This submission has been prepared by the QLS, in collaboration with the Law Council and the Law Institute of Victoria (LIV) (‘the Submitters’). The submission has been informed by expert members of the Submitters’ various working groups and committees.
4. The Submitters are strongly of the view that the common law rights of catastrophically injured people should be preserved in the process of establishing any no-fault arrangements for those injured in motor vehicle accidents. The RIS contains a range of material which is polemical in nature and wholly unsupported by reference to any evidence.
5. It is important to note that the ‘model’ catastrophic motor accident scheme, the NSW Lifetime Care and Support Scheme, was established without stripping away common law rights to catastrophically injured motorists. The notion that common law and no-fault injury schemes cannot co-exist is ideological rather than factual and has infected the analysis of this issue from the commencement of the Productivity Commission Inquiry into Disability Care and Support, through to the subsequent implementation phase for the National Disability Insurance Scheme.
6. The Submitters call for more balanced consideration of this issue, that takes into account evidence in support of the retention of common law remedies as an adjunct to a no fault insurance scheme. We commend this submission to the Treasury.

## Statement of Position

7. The Submitters are of the view that:
  - all catastrophically injured individuals should receive appropriate quality care and support;
  - common law is the most efficient and cost-effective means of determining compensation for injury;
  - one scheme is better than two – it would be more effective to simply bring all cases under the NDIS, and allow parties who may have a common law claim to proceed thereby preventing further costs falling to the NDIS;

- regardless of how any scheme is structured, there should be no disadvantage for any party as a result of introduction of a no-fault scheme now or in the future. That means people should not lose choice, self-determination or their common law entitlements in cross-subsidisation;
- the challenges of providing appropriate quality care and support to catastrophically injured individuals vary between the jurisdictions due to factors including:
  - existing schemes and disability support arrangements;
  - population size and distribution;
  - distances between population and administration centres (geographic challenges);
  - existing infrastructure and availability of a skilled workforce;
  - the existing market and quality of medical and support services;
  - State Government budget positions;
  - long term economic capacity of the jurisdiction; and
- a uniform approach to providing appropriate quality care and support based on replicating the system existing in one jurisdiction is at best aspirational and more likely not to be feasible in a federated model due to the challenges outlined above.

8. On the basis of the above, the Submitters:

- support the Base Case presented in the RIS to permit each jurisdiction to approach their respective challenges locally;
- reject Option 1 as requiring each jurisdiction, in effect, to move toward replicating the NSW LTCS, despite costs and the local challenges faced in those jurisdictions, based on benchmarks which are vague and have not been the subject of proper community consultation;
- support Option 2 to the extent that it permits each jurisdiction to approach their respective challenges locally, in the context of the general operation of the NDIS;
- categorically reject any jurisdiction removing common law rights for those injured in motor vehicle accidents or the introduction or increasing of common law access thresholds to defray increased costs to CTP premiums required to join the National Injury Insurance Scheme (NIIS);
- call for specific consideration in affected jurisdictions of the challenges, changes, impacts and possible solutions available. The broad and high-level analysis of the RIS is insufficiently sophisticated and lacks the detail that would permit jurisdictions to make informed decisions about the likely long term impacts of any of the options presented in a local context; and
- call for consideration of an approach which gives the injured individual the choice between a no-fault care scheme or their full common law rights,

thereby honouring the principles of the NDIS that promote choice and self-determination.

## Background

9. The options presented in the RIS must be viewed in the context of the arrangements which have been agreed by the various jurisdictions and the Commonwealth with respect to the NIIS.
10. The 7 December 2012 Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch<sup>1</sup> was signed by all States and Territories . It provides at paragraphs 112 – 115:

### **Part 11 - Relationship to National Injury Insurance Scheme**

#### Launch

112. All States endeavour to agree minimum benchmarks to provide no-fault lifetime care and support for people who are catastrophically injured in motor vehicle accidents prior to the commencement of the NDIS launch.
113. If a host jurisdiction is unable to implement minimum benchmarks prior to or during launch, that host jurisdiction will be responsible for 100 per cent of the cost of participants in the NDIS who are in the NDIS because they are not covered by an existing or new injury insurance scheme that meets the minimum motor vehicle benchmarks.
  - a. During launch, NDIS supports will be provided to people in launch sites who would otherwise have been supported by a National Injury Insurance Scheme (NIIS) if the NIIS had been established for those catastrophically injured through workplace accidents, medical accidents, and criminal and general accidents (occurring in the home or community).

#### Full scheme

114. All jurisdictions endeavour to agree minimum benchmarks to provide no-fault lifetime care and support for people who are catastrophically injured through workplace accidents, medical accidents, and criminal and general accidents (occurring in the home or community) by commencement of the NDIS full scheme.
  115. Noting that a new Agreement will be agreed with all jurisdictions for the NDIS full scheme, the Commonwealth's position is that on commencement of the NDIS full scheme individual jurisdictions will be responsible for 100 per cent of the cost of participants in the NDIS who are in the NDIS because they are not covered by an existing or new injury insurance scheme that meets the minimum benchmarks for motor vehicle accidents, workplace accidents, medical accidents, and criminal and general accidents (occurring in the home or community).
11. This Launch Agreement is subject to the finalisation of subsequent agreements for the adoption of the Full Scheme into various jurisdictions. Despite the apparent commonality of initial intent at the Launch stage, the heads of agreement for the full scheme of the NDIS with the jurisdictions have taken on differing approaches and differing levels of commitment to a single way of implementing the NIIS.

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<sup>1</sup> see <http://www.ndis.gov.au/document/180>

12. The first full scheme related agreement was entered into between the Commonwealth and the New South Wales Government. Relevantly the Heads of Agreement between the Commonwealth and NSW Governments on the National Disability Insurance Scheme (agreed 6 December 2012), provides at paragraphs 38, 40 – 41<sup>2</sup>:
- 37. NSW provides no-fault lifetime care and support to people who are catastrophically injured in a motor vehicle accident in NSW, and indemnifies the owner and driver of a NSW registered vehicle against liability for an accident causing death or injury caused by their vehicle anywhere in Australia. ...
  - 39. Such arrangements can, in practice, reflect a subsidy to other States and Territories which do not provide equivalent support and insurance cover for their residents or visitors.
  - 40. The NSW arrangements for motor vehicles, work cover insurance will be considered to satisfy any minimum standards that would be required for all States and Territories participating in the NDIS, unless amended by agreement through the Standing Council on Federal Financial Relations.
  - 41. When the full scheme commences, jurisdictions without equivalent schemes will be responsible for 100% of the costs of their citizens and visitors who enter the NDIS due to disability caused by relevant accidents within their jurisdiction.
13. The second full scheme related agreement was struck with South Australia. The Heads of Agreement between the Commonwealth and the South Australian Governments on the National Disability Insurance Scheme (agreed 18 April 2013), states at paragraphs 35 to 37 and at 42<sup>3</sup>:
- 35. South Australia will provide no-fault lifetime care and support to people who are catastrophically injured in a motor vehicle accident in South Australia, and indemnifies the owner and driver of a South Australia registered vehicle against liability for an accident causing death or injury caused by their vehicle anywhere in Australia.
  - 36. South Australia agrees to implement nationally-consistent minimum benchmarks to provide no-fault lifetime care and support for people who are catastrophically injured in motor vehicle accidents by 1 July 2013 in South Australia. If nationally-consistent minimum benchmarks are not implemented in South Australia by 1 July 2013, clause 42 will apply.
  - 37. South Australia's proposed reforms to compulsory third party insurance for motor vehicles, are expected to satisfy the minimum standards that would be required for all States and Territories participating in the NDIS, unless amended by agreement through the Standing Council on Federal Financial Relations. ...
  - 42. South Australia will be responsible for 100 per cent of the cost (both administration and care and support) of participants in the NDIS who are in the NDIS because they are not covered by an injury insurance scheme in South Australia that meets the nationally-consistent minimum benchmarks for catastrophic injuries from motor vehicle accidents, workplace accidents, medical treatment injury and general accidents (including criminal injury) by the dates specified above.

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<sup>2</sup> See <http://www.ndis.gov.au/document/184>

<sup>3</sup> See <http://www.ndis.gov.au/document/194>

14. The third entrant into the agreements was the Australian Capital Territory. The Heads of Agreement between the Commonwealth and the Australian Capital Territory Governments on the National Disability Insurance Scheme (agreed 19 April 2013), relevantly states at paragraphs 39 and 41<sup>4</sup>:
39. The ACT has agreed to implement nationally-consistent minimum benchmarks to provide no fault lifetime care and support for people who are catastrophically injured in motor vehicle accidents before the commencement of the ACT launch in July 2014. From 1 July 2014, the ACT will be responsible for 100 per cent of the cost of NDIS participants who are in the NDIS because they are not covered by an injury insurance scheme that meets the minimum motor vehicle benchmarks.
41. The NSW lifetime care and support arrangements for motor vehicle accidents and work cover insurance will be considered to satisfy any minimum standards that would be required for all States and Territories participating in the NDIS, unless amended by agreement through SCFFR.
15. The fourth entrant was Tasmania. The Heads of Agreement between the Commonwealth and Tasmanian Governments on the National Disability Insurance Scheme (agreed 2 May 2013) provides at paragraphs 36 -38<sup>5</sup>:
36. Tasmania provides no fault lifetime care and support to people who are injured in a registered motor vehicle accident in Tasmania, and indemnifies the owners and drivers of Tasmanian registered vehicles against liability for an accident causing death or injury caused by their vehicle anywhere in Australia.
37. The lifetime care and support provided to people with disability by the Motor Accidents Insurance Board will reduce the cost of operating the NDIS in Tasmania.
38. If the arrangements in Tasmania for the lifetime care and support for relevant people injured in motor vehicle accidents are assessed as not meeting the agreed minimum benchmarks by 1 July 2013, for these persons who enter the NDIS the Tasmanian Government will be responsible for 100 per cent of the NDIS-related costs of these persons.
16. The Government of Victoria signed on 4 May 2013. Its Heads of Agreement between the Commonwealth and the Victorian Governments on the National Disability Insurance Scheme, provides at paragraph 38<sup>6</sup>:
38. Victorian arrangements for people injured in motor vehicle accidents or work place accidents are agreed by the parties to satisfy the nationally-consistent minimum benchmarks to provide no-fault lifetime care and support for people who are catastrophically injured in motor vehicle accidents or work place accidents in Victoria, unless the minimum standards are amended by agreement through the SCFFR.
17. The Heads of Agreement between the Commonwealth and Queensland Governments on the National Disability Insurance Scheme (agreed 8 May 2013), provides at paragraph 40<sup>7</sup>:
40. Queensland agrees in principle with the National Injury Insurance Scheme (NIIS) minimum national benchmarks that have been developed through the SCFFR for the

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<sup>4</sup> See <http://www.ndis.gov.au/document/200>

<sup>5</sup> See <http://www.ndis.gov.au/document/198>

<sup>6</sup> See <http://www.ndis.gov.au/document/189>

<sup>7</sup> Available at <http://www.ndis.gov.au/sites/default/files/documents/Queensland-and-Federal-Government-Heads-of-Agreement-for-the-NDIS.pdf>

provision of no-fault lifetime care and support for people who are catastrophically injured in motor vehicle accidents and agrees to undertake work to determine the feasibility of extending its CTP scheme to meet the NIIS minimum benchmarks for motor vehicle accidents. From 1 July 2016, Queensland will be responsible for 100 per cent of the costs of NDIS participants who are in the NDIS because they are not covered by an injury insurance scheme that meets the minimum motor vehicle benchmarks.

18. The Heads of Agreement between the Commonwealth and the Northern Territory Governments on the National Disability Insurance Scheme (agreed 11 May 2013), provides at paragraphs 38 – 39<sup>8</sup>:
  38. The Northern Territory already provides defined no-fault lifetime care and support to people who are catastrophically injured in a motor vehicle accident in the Northern Territory, and indemnifies the owner and driver of a Northern Territory registered vehicle against liability for an accident causing death or injury caused by their vehicle anywhere in Australia.
  39. The Northern Territory agrees to implement nationally-consistent minimum benchmarks to provide no fault lifetime care and support for people who are catastrophically injured in motor vehicle accidents before the commencement of the Northern Territory launch in July 2014. From 1 July 2014, the Northern Territory will be responsible for 100 per cent of the cost of NDIS participants who are in the NDIS because they are not covered by an injury insurance scheme that meets the minimum motor vehicle benchmarks.
19. Western Australia has not agreed to the full scheme and has only recently (as of 31 March 2014) agreed to a limited two year NDIS trial in the Perth Hills<sup>9</sup>.
20. It is noted that none of the agreements require the abolition of common law rights as argued by the RIS or the Productivity Commission report.

## General Concerns with the RIS

### Focus on limited policy options, not regulatory impact

21. The Submitters note that no regulatory options or details for such options are provided in the RIS. Rather, the paper puts forward two broad policy options with very similar results and dismisses other options from consideration.
22. The RIS is less than effective as a consultation tool in the absence of relevant details, consideration of a suite of differing approaches and transparent disclosure of base information and assumptions.

### Lack of relevant details and consideration

23. The Submitters have found responding to the RIS challenging as the paper provided by PwC gives limited options and does not provide any detail regarding:
  - a) the regulations or legislation that jurisdictions or the Commonwealth proposes to change

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<sup>8</sup> See <http://www.ndis.gov.au/document/202>

<sup>9</sup> See <http://www.ndis.gov.au/document/791>



- b) the establishment costs and ongoing costs associated with both options, but particularly with establishing new NIS schemes, and
  - c) how those costs should be met.
24. With respect to jurisdictions such as Queensland and Western Australia, the changes proposed in the Options are both costly and seek to compel significant reforms to long operating successful injury compensation schemes. The RIS provides very little detail on the potential impact of those changes, beyond merely stating possible costs and does not in any way deal with how the challenges of vast distance, disparate populations and available skilled workforce can be overcome. These will be very significant challenges in those jurisdictions which will be affected by a number of local factors. Those complexities must be considered before any sensible decision on a federated model can be reached.
25. The Submitters are concerned about the models of costing used in Table 1 (Page 19) “Cost Estimate to Provide Lifetime care and Support to Individuals catastrophically injured in motor vehicle accidents (additional to existing jurisdiction based schemes)” and Table 4 (Page 25) “Cost estimates to provide lifetime care and support to people catastrophically injured in motor vehicle accidents (additional to existing jurisdiction based schemes) –”. Both tables purport to assess the financial impact on different jurisdictions of the implementation of lifetime care and support. However, both are modelled using a 7% discount rate.
26. This is a discount rate above any currently used in Australia. An exaggerated discount rate will underestimate the quantum of the cost estimate. This will not accurately reflect the actual cost but will simply understate the cost.
27. The RIS refers to the effect of discount rates in a critique of the common law as being an appropriate means of providing for the future needs of catastrophically injured people (page 7). However, by applying a discount rate that is above any currently in use, the RIS is both misrepresenting and understating the actual expected additional costs to be borne within the various jurisdictions.
28. There is little information in the RIS that can form the basis of a genuine cost benefit analysis of the options, as the jurisdiction specific analysis of the implementation of the options is omitted.
29. The RIS further makes selective reference to submissions from the jurisdictions themselves which contain actuarial analysis and other information. It appears these submissions are not available to submitters and again, frustrates independent analysis and informed consideration of the costs and benefits of any particular proposed option, except at the highest level.

### **Reiterating critical assertions about common law**

30. The RIS reiterates broad critical assertions made in the Productivity Commission Report of the common law and its costs. Like the Productivity Commission Report the RIS does not attempt to:
- quantify the costs of common law on any legal economic basis, or

- quantify and compare the bureaucratic and administrative costs associated with the Options presented in the context of the challenges facing the jurisdictions involved in service delivery.
31. The RIS does not have regard to disputes (and the cost of disputes) that arise in no-fault schemes when scheme decision making is slow and/or poor in quality. The establishment and ongoing operation of a TAC or NSW LTCS has costs which have not been quantified but must be considered in making an informed decision on additional regulation.
32. While the RIS perpetuates broad criticism of the common law:
- no other common law country has followed the path adopted in New Zealand when it abolished the common law for personal injuries in the mid 1970's;
  - policy trends and problems are emerging in jurisdictions that restrict access to common law benefits, which contradict the assumptions of the RIS that no-fault arrangements are superior to the common law.

For example:

- in recent months in both the Commonwealth and South Australian workers' compensation jurisdictions, policy makers have sought to re-introduce the notion of fault into those schemes. For example, in the case of the Commonwealth, a Bill has been introduced into Federal Parliament that seeks to exclude injured workers from 'no-fault' benefits if they are alleged by their employer to have voluntarily agreed to a work activity carrying an 'abnormal risk of injury'.
- In the case of South Australia, the Government has committed to the re-introduction of common law, partly as response to ongoing viability issues caused by the no-fault arrangements introduced 10 years ago. When announcing the reintroduction of common law to the South Australian WorkCover scheme Premier Jay Weatherill said<sup>10</sup>:

*"For many workers, WorkCover has failed to return them to work as quickly as originally planned, which in turn has driven up costs for employers.*

...

*...As a package, the changes will give workers greater control over their lives and greater certainty and savings for business."*

- These sentiments were supported by the policy statement accompanying the announcement, which said of the rationale for the reintroduction of common law to the South Australian scheme<sup>11</sup>:

*"Common law will be re-introduced to the South Australian system. This recognises that a variety of compensation approaches is often useful in a community, in order to suit different needs. A benefit dependency*

<sup>10</sup> Government of South Australia media release, 24 January 2014, see [http://www.premier.sa.gov.au/images/news\\_releases/14\\_01Jan/workcover.pdf](http://www.premier.sa.gov.au/images/news_releases/14_01Jan/workcover.pdf)

<sup>11</sup> A new recovery and return to work system for South Australians: A workers' compensation policy statement, page 5, see <http://saplan.org.au/documents/p-doc-v15-with-images-print-no-crops.pdf>

*cycle may be avoided where a worker receives a common law settlement, and can then take responsibility for the ongoing management of their injury and control of their life.”*

- As noted in the Law Council’s submission to the Productivity Commission’s Inquiry into Disability Care and Support:

*“...in 2008 the New Zealand ACC announced unfunded liabilities of \$23.175 billion. This is roughly equivalent to 17.1 per cent of New Zealand’s Gross Domestic Product, a deficit which would be considered absolutely extraordinary in the Australian context, with obvious political ramifications. In New Zealand, this has led to enormous increases in compulsory contributions to its various injury compensation ‘accounts’, as well as moves to further limit benefits to injured persons.”*

33. Further, the RIS does not fairly represent the operation of existing common law schemes with respect to injuries occurring from motor vehicle accidents. The existing schemes have developed some sophistication in dealing with these issues and as such are both efficient and effective in the way they deal with injured claimants. It is worthwhile to note that liability is usually determined at an early stage and payment for medical expenses and care start shortly after notification, sometimes even when no admission of liability is made.
34. Common law schemes do not necessarily mean that claims are subject to lengthy periods of litigation:
- in Queensland and the ACT there is provision for the early determination of liability and court proceedings cannot be commenced until an exhaustive process of negotiations including a compulsory conference and mandatory final offers are exchanged;
  - in NSW claims in most cases are diverted to the Motor Accident Compensation Authority, a statutory body, and resolved by a mixture of negotiation and assessment without recourse to Court;
  - in South Australian the vast majority of matters resolve prior to court proceedings being issued. The Court Rules require that offers be put by the parties before proceedings are issued with cost sanctions for non-compliance;
  - in Western Australia most matters resolve by way of negotiation with the monopoly insurer although there are no court or legislative requirements to do so; and
  - in hybrid jurisdictions, Tasmania and Victoria, the vast majority of cases are determined by agreement and without recourse to court proceedings. In Victoria, the TAC protocols have been operating effectively for almost 10 years to reduce delays and minimize the cost of disputes. Without the common law there is no benchmark for what is fair and equitable compensation of injured individuals. Abolition of aspects of the common law for catastrophically injured individuals or any more widespread abolition of common law actions denies both rights and also an important independent reference point for assessing whether a person has been fairly treated.

- Support provided by no-fault administrative schemes for care and support will be restricted when scheme administrators are of the view that restrictions are needed.
- No-fault administrative schemes often lead to unfair outcomes for individuals and costly review processes, as evidenced by the rate of decisions overturned by administrative review bodies.<sup>12</sup>
- Maintaining common law rights as an alternative to no-fault schemes empowers injured individuals and also permits fair outcome comparisons to be made.

## One-sided cost assessment

35. The RIS does not quantify the costs associated with removal of common law deterrence, or quantify and compare the bureaucratic and administrative costs associated with the options presented in the jurisdictions where 'at fault' schemes currently exist.
36. The RIS should consider the cost of bureaucracy to administer payments to a claimant over a 30 year period, accounting for the cost of probable disputes occurring every two years.
37. A review of the New South Wales Lifetime Care Scheme Annual Report for 2012/13 shows the significant administrative costs of lifetime care:
- Yearly administrative personnel and operating expenses were \$13.24 million<sup>13</sup>
  - Yearly participants' care and support expenses were \$64.85 million<sup>14</sup>
  - Yearly taxes, fees and fines collected were \$470.26 million<sup>15</sup>
  - Yearly operating surplus after expenses and future provisions \$377.41M<sup>16</sup>
  - Total scheme liabilities as at end of 2012/13 were \$2.08 billion<sup>17</sup>
  - 796 participants in the scheme<sup>18</sup>.
38. These figures demonstrate that the administrative costs of the scheme in the 2012/13 were 20 per cent of the funds spent on care and support services to catastrophically injured individuals. In fact more money was spent in 2012/13 on actuarial fees, financial assets management fees, service partnership agreement fees, consultants and contractors (\$5.041 million) than on home modifications (\$3.715 million), equipment (\$4.424 million) or medical expenses (\$4.742 million).<sup>19</sup>

<sup>12</sup> For example, in 2012-13, 33% of Comcare/Seacare/self-insurance decisions were set aside either by order of the AAT or by consent; 4% were varied; and just 38% of decisions were affirmed by the AAT or by consent: AAT Annual Report 2012/13, page 193.

<sup>13</sup> LTCS Annual Report 2012/13, page 34

<sup>14</sup> LTCS Annual Report 2012/13, page 35

<sup>15</sup> LTCS Annual Report 2012/13, page 25

<sup>16</sup> LTCS Annual Report 2012/13, page 25

<sup>17</sup> LTCS Annual Report 2012/13, page 26

<sup>18</sup> LTCS Annual Report 2012/13, page 11

<sup>19</sup> LTCS Annual Report 2012/13, pages 34-35

Any consideration of the issues contained in the RIS should have regard to the high administrative costs associated with the preferred option, both short and long term.

39. Page 5 of the RIS provides that “Compensation outcomes from litigation typically fall well short of meeting an individual’s lifetime needs” and that “lumps sums may not be managed appropriately”. In fact for the vast majority personal injury claimants the common law allows their loss to be properly quantified and compensated (within Government imposed caps) and provides them with the dignity of an opportunity to re-build their life free of ongoing decisions about their care, support and accommodation by statutory or private insurance companies.
40. The RIS should also, but does not, have regard to the cost to individuals when benefits are denied or the cost of disputes that arise in no-fault schemes when decision-making processes are slow or often result in poor outcomes. Except in occasional instances, no-fault schemes like the NSW LTCSS and TAC do not practice the principles of choice or self-directed care.
41. Catastrophically injured people are subjected to decisions by claims and other administrative officers regarding the type and location of their accommodation and choices about the care and support they can receive.

### **Diminished access to justice**

42. The Law Council also notes that there is no consideration given in the RIS to the impact of no-fault arrangements on access to justice.
43. Access to justice is a significant problem for claimants under no fault compensation schemes. Most existing no-fault injury compensation schemes provide restricted categories of compensation. Most compensation is paid by way of funding of rehabilitation or other services, a weekly or other periodic payment for loss of earning capacity, and a lump sum payment for permanent impairment.
44. Decisions about compensation entitlements are not made independently but by the people administering the compensation scheme. Review of those decisions is often difficult due to a combination of lack of information about a claimant’s rights, a poor understanding of how compensations schemes are administered, and complex and often multi-layered review processes. Often, a claimant will not have an entitlement to recover legal costs incurred in reviewing a decision until the matter reaches a Tribunal. Claimants are therefore at a significant disadvantage to the administrator of the scheme in any contest of rights.
45. Because most compensation entitlements are periodic, any dispute as to the availability or quantum of a benefit is likely to translate to a missed entitlement valued in the hundreds of dollars or perhaps in the low thousands. While an adjustment of compensation entitlements of a few hundred dollars per week or fortnight can have a significant financial or social impact on a claimant’s quality of life, it does not translate to a significant monetary remedy.
46. One benefit of common law claims is that compensation is paid on a once and for all basis. Usually, a claimant can secure legal assistance to pursue their entitlements

by funding their legal costs from the judgment or settlement without impacting significantly on the amount recovered. Various mechanisms to prevent the erosion of claimants' entitlements by a substantial legal costs burden already exist.

47. Where compensation is not paid on a once and for all basis, a claimant is often left with no means whatsoever to fund legal representation to protect or pursue their proper entitlements to compensation. As a consequence, many claimants are forced to pursue their rights without any assistance at all. Many claimants may not be receiving their proper entitlements because they simply do not understand their entitlements and cannot afford access to legal representation or advice. Further, as noted above, the rate at which decisions in relation to entitlements are overturned by administrative review bodies clearly demonstrates there is a significant likelihood of injustice occurring under no-fault administrative schemes.<sup>20</sup>

## Option 1

48. Option 1 represents a federated model of insurance schemes that would provide fully-funded care and support for all catastrophic injuries on a no-fault basis, collectively constituting a NIIS. In 2013, the Commonwealth Treasury coordinated the jurisdictions to agree on benchmarks for the NIIS (we note that the Commonwealth's workers' compensation scheme Comcare, does not meet these benchmarks).
49. The costs of implementing Option 1 vary between jurisdictions depending on the focus of the existing scheme and the outcome it was intended to produce. The Heads of Agreement cited earlier indicate that the jurisdictions have divergent views on how to approach the NIIS and this accordingly lends support to the view that the Option 1 is not the consensus position.
50. Option 1 also does not consider that the challenges of providing appropriate quality care and support to catastrophically injured individuals vary between the jurisdictions due to factors including:
  - a. existing schemes and disability support arrangements
  - b. population size and distribution
  - c. distances between population and administration centres
  - d. existing infrastructure
  - e. the existing market and state of medical and support services
  - f. economic capacity
  - g. State Government budget positions.
51. These factors unite to indicate that the uniform approach to providing appropriate quality care and support based on replicating the system existing in one jurisdiction is not feasible.

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<sup>20</sup> Ibid, *op cit* 12.



## The Victorian experience

52. Victorian Heads of Agreement with the Commonwealth deems that the TAC scheme meets the requirements for the NIIS and accordingly there is purported to be no cost impost on that jurisdiction in meeting Option 1 in the RIS and providing superior results to the common law.
53. The Victorian *Transport Accident Act* has been in existence since 1 January 1987. It is 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. Injured motorists entitled to bring a common law claim are legislatively prohibited from seeking damages for future medical and like expenses in the common law claim.
54. An injured person, regardless of whether the injuries are catastrophic or otherwise, is therefore required to seek payment of all hospital, medical, rehabilitation and disability services from the TAC on an ongoing basis.
55. In theory, this appears to provide certainty, however, in practice the result is often different:
  - The person is restricted to the obtaining of such medical and like services which are within the legislative definitions. Simply, if the requested service is outside the legislative definition, it cannot be funded - regardless of its value to the injured person.
  - There is no ability to recognise the person’s subjective needs. There is no discretion available.
  - An injured person is forced into a culture of having to perpetually justify the need for the requested medical or like assistance.
  - The injured person is forced into continuing a life-long relationship with the TAC. The person is unable to completely move on with their life. It is not uncommon for this to be frequent complaint of the injured.
  - The injured person may be forced to seek review of decisions made by the TAC claims officer. If the TAC makes a decision adverse to the person's interests a claimant must either initiate an informal dispute process or initiate court proceedings at the Victorian Civil and Administrative Tribunal. Both avenues of dispute can cause delay and many Claimants experience significant stress and anxiety managing a dispute with the TAC. Claimants with catastrophic injuries in particular will face many disputes with the TAC concerning their care needs over their life time.
  - Entitlements are always subject to legislative amendment. Therefore, there is no guarantee of certainty for the satisfaction of future needs.
  - Payments made to service providers often do not reflect the costs charged in the market place. While an injured person may have a legislative entitlement to a particular service, the reality may be that no service provider is willing to undertake the provision of the service for the rate being paid by the TAC. The injured person has no option but to either self-fund the cost gap or miss out.

- A lack of quality service providers frequently results in the injured person being unable to receive the required service. This is a frequent problem in regional and rural environments.
  - Bureaucratic requirements result in medical and like service providers refusing to provide treatment and services to TAC claimants. Health professionals become fed up with dealing with the TAC regime and simply refuse to treat TAC claimants. This has resulted in a shrinking pool of available health professionals and a situation where the injured person may not be receiving required services from the most appropriate provider.
  - The TAC can compel an injured person (pursuant to the Transport Accident Act) to attend independent medico-legal examinations to assess their treatment and rehabilitation needs. This can cause significant delay in providing funding for the medical expenses that the injured person requires. If the Claimant refuses to attend the medical examination, the TAC can deny funding of treatment.
  - An injured person has one year from the date of the decision to dispute any decision made by the TAC concerning medical and like expenses. If the injured person is unaware of their review rights and the time limitation, they can simply lose entitlement to certain benefits that should otherwise be provided due to time lapsing.
  - The interests of the TAC are not the same as those of the injured person
56. According to the RIS this represents best practice and the desired outcome for ongoing care arrangements for individuals catastrophically injured in motor vehicle accidents. However, the experience shows that many of the elements of a common law based approach to these issues criticised in the RIS (and the in the original Productivity Commission Report) manifest in no-fault schemes in other ways.
57. One of the key points of difference is the (somewhat paternalistic) approach in no-fault schemes of dictating care and services compared to the freedom provided by common law awards. For example, if an injured individual finds relief in massage sessions they can choose to spend their resources on this treatment from a common law award. If however, massage is not a provided service in a lifetime care scheme it cannot be provided, regardless of the therapeutic value of the treatment. This is an anomalous and inequitable result.

## **The Queensland Experience**

58. The current Queensland arrangements for those with catastrophic injuries occurring in a motor vehicle accident depend on the issue of fault. However this is often misunderstood in the Queensland context. Where an individual injured is partially at fault they can make a claim for assistance. The only occasions where a claim cannot be made are:
- the injured person was entirely at fault, or
  - no-one was at fault.



59. Where a claim can be made, if the insurer has accepted liability or agreed to fund rehabilitation without admitting liability, the insurer pays rehabilitation expenses that are reasonable and appropriate which relate to the injuries from the accident. This is managed progressively through the claim process and does not require a claim to be finalised before rehabilitation is undertaken.
60. Treatment of Queensland CTP claimants at public hospitals or by emergency services in Queensland is covered by the Hospital and Emergency Services levy which is included in the CTP insurance premium.
61. A settlement amount will include provision for the cost of care and support services, subject to statutory thresholds.
62. In practice practitioners report that the licensed insurers are proactive and address treatment and rehabilitation issues from a very early stage in the life of a claim, leaving to the settlement phase the final reconciliation of the compensation amount.
63. All licensed CTP insurers also provide some level of additional cover for at fault drivers. For example, Suncorp provides at no extra cost:
  - Up to \$2 million in benefits for specific serious injuries to eligible at-fault drivers, if the vehicle is also comprehensively insured with Suncorp Insurance.
  - Up to \$1 million in benefits for specific serious injuries to eligible at-fault drivers, where the vehicle is not comprehensively insured with Suncorp Insurance.
  - Access to a lump sum payment of \$5,000 which may help pay for upfront costs like medical and rehabilitation expenses.
64. Allianz and QBE provide at no extra cost up to \$1 million in benefits for specific serious injuries to eligible at-fault drivers.
65. RACQ provides at no extra cost up to \$250,000 in benefits for specific serious injuries to eligible at-fault drivers
66. While this does not cover the field, the existing Queensland scheme is not, as described in the RIS, limited to only those who can prove fault against a currently solvent party. It is also not the practice of insurers to sit on their hands when providing care and support to injured individuals.
67. Queensland also faces some significant challenges in providing a centralised expensive scheme particularly due to:
  - population size and disparate population distribution (with over a million people located outside the South East Corner)
  - distances between population and administration centres (the distance from Brisbane to Cairns being the same as to Melbourne)
  - the existing market and state of medical and support services, especially in remote and regional centres
  - State Government budget position and debt levels.

68. The challenge faced in Queensland is how best to bridge the gap between those already covered in the existing scheme and any greater coverage in the NDIS. On this basis, Option 1 is a costly structural change to a well-functioning, affordable scheme which has potentially limited additional application and coverage. Presently Option 1 does not appear to be the most effective or efficient application of public resources or premium funds in the Queensland context.

## The Base Case and Option 2

69. The Submitters support each jurisdiction being given the option to choose between the base case scenario or Option 2. This approach permits each jurisdiction to approach their respective challenges locally, in the context of the general operation of the NDIS. As stated above there are significant local challenges facing affected jurisdictions, particularly Queensland and Western Australia, with schemes based around fault elements that need to be properly considered in light of detailed local analysis.
70. The RIS does not provide the level of detail or sophisticated analysis required for informed decisions to be made and accordingly the support of the Submitters is conditional on further local consultation being conducted.
71. Having said that the Submitters believe it is not justified or equitable to:
- remove common law rights for those injured in motor vehicle accidents, or
  - introduce or increase common law access thresholds, thereby reducing compensation for many injured people to subsidize Government underfunding of health and disability support services.

## Common Law Approach

72. The Submitters query why a hybrid common law approach was not considered in the RIS, where no fault schemes exist alongside common law rights and may be accessed at the election of the injured individual.
73. The RIS purports to consider only how a no-fault scheme must replace common law and how in the view of the authors the no-fault approach is superior to the common law based schemes. This approach ignores the most enabling and empowering model for injured individuals which is a dual approach where a catastrophically injured individual, who has rights to bring action at common law can choose to either:
- forgo their common law right for care damages and enter a no-fault scheme, or
  - bring a complete common law action and provide for their own care needs from their compensation funds as they go.
74. This model is the most equitable to the individual and permits the injured individual to pick the approach which will best suit their needs.

75. A further advantage is that it will obviate the likely problem of increased disputes in common law jurisdictions where injured individuals or insurers argue whether an individual meets the definition of catastrophic injury so as to either include or exclude them from the common law care head of damage. For example, in a matter where the injuries sustained by an individual may meet the definition of 'catastrophic' it is in the interest of the insurer to argue that the individual does not have access to the common law head of damage for care as they must seek care through the no-fault scheme. Alternatively, where an individual's injuries may meet the threshold level, the injured individual may wish to argue that they should not be characterised as 'catastrophically injured' so as to retain their full common law rights and be enabled to decide their own care requirements.
76. A scheme where the power is given to the injured individual is a better scheme than one than where those decisions are made for them, firstly by the mandating of entering a care scheme and secondly by the administrators of the care scheme as to how the care will be provided and by whom.
77. Retaining proper access to common law also has the additional benefit of not encouraging risky behaviour in motorists as has been evidenced in New Zealand over time with the blanket coverage of their no-fault scheme. International road traffic death figures indicate that New Zealand has more road deaths than Australia by population or number of registered vehicles. New Zealand's death rate per registered vehicle for the reported 2009 year exceeded the OECD average and exceeded all other reporting nations, including Australia.<sup>21</sup>

## Conclusion

78. The Submitters recommend that the RIS be redrafted, taking a more balanced approach to the benefits of the common law.
79. It should be recognised that the common law can and does operate effectively alongside many successful no-fault compensation schemes.
80. Pure no-fault schemes are, in fact, an extreme rarity. Most schemes adopt some element of fault, either as a means of determining certain statutory benefits, or (more commonly) as a means of restricting entitlements, as is currently being attempted in respect of the Comcare scheme.<sup>22</sup>
81. The common law is an important financial 'safety valve' for many no-fault schemes, enabling those schemes to limit their long-tail liabilities through settlement. This is achieved most efficiently and fairly through the civil litigation process.

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<sup>21</sup> See ABS Publication - 1301.0 - Year Book Australia, 2012, figure 24.33, available at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~International%20comparisons~191>. See also Te Ara, the Government encyclopaedia of New Zealand, which clearly makes the point about ongoing risky behaviour causing traffic accidents: See <http://www.teara.govt.nz/en/road-accidents/page-2>

<sup>22</sup> Note the *Safety, Rehabilitation and Compensation Amendment Bill 2014*, currently the subject of an Inquiry by the Senate Employment and Education Committee.

82. The Submitters consider that different States should be left to determine their approach to the mechanism for compensating and caring for individuals who have been involved in a motor vehicle accident. Ideally, all such people should have access to consistent care and support, through the NDIS or under a comparable State no-fault scheme. Where such schemes are established in the future, it is recommended that rights of participants to pursue their entitlements against a negligent party who caused their injuries be retained. In jurisdictions that have already moved to limit such entitlements, it is recommended that those restrictions be lifted to ensure motorists enjoy equal rights with other jurisdictions and to reinforce the ongoing viability of those schemes.
83. The Submitters would be pleased to elaborate on any of the matters outlined in this submission, and thank the Treasury for accepting this late submission.

## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the 17 Constituent Bodies and 6 elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.