

18 December 2015

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

Dear Sir / Madam

INQUIRY INTO A SUITABLE MODEL FOR THE IMPLEMENTATION OF THE NATIONAL INJURY INSURANCE SCHEME

Thank you for providing the Anti-Discrimination Commission (ADCQ) with the opportunity to make a submission to the Inquiry into a suitable model for the implementation of the National Injury Insurance Scheme (NIIS) for motor vehicle accidents.

The ADCQ has the function of promoting the understanding, acceptance, and public discussion of human rights in Queensland. This submission relates to the models for implementing the NIIS.

Productivity Commission report on Disability Care and Support

The ADCQ notes that the concept of a National Injury Insurance Scheme was recommended by the Productivity Commission in a 2011 report on its inquiry into a National Disability Long-term Care and Support Scheme.¹ The Productivity Commission report contained the following relevant recommendations:

Recommendation 18.1

State and territory governments should create insurance schemes that would provide fully-funded care and support for all catastrophic injuries on a no-fault basis, and that would collectively constitute a National Injury Insurance Scheme (NIIS).

¹ Australian Government, Productivity Commission, *Disability Care and Support*, Report no. 54, (2011).

The NIIS would include all medical treatment, rehabilitation, home and vehicle modifications and care costs, and cover catastrophic injuries from motor vehicle, medical (excluding cases of cerebral palsy associated with pregnancy or birth, which would be covered by the NDIS), criminal and general accidents. Common law rights to sue for long-term care and support should be removed, though access to damages for pecuniary and economic loss, and general damages would remain.

State and territory governments should develop a national framework in which the separate schemes under the NIIS would operate.

Recommendation 18.2

State and territory governments should fund catastrophic injury schemes from a variety of sources including:

- compulsory third party premiums for motor vehicle accidents
- a small surcharge on passenger tickets of all rail transport regulated under the new rail safety national laws
- a modest levy on domestically registered passenger carrying vessels regulated under the Australian Maritime Safety Authority (as the proposed new safety regulator for all commercial shipping in Australian waters by 2013). A small levy on existing state-based registration for privately owned 'pleasure' vessels
- a small increase in municipal rates for catastrophic injuries arising for victims of crime and from other general accidents (excluding catastrophic medical accidents)
- contributions from the insurance (including self-insurance) arrangements of hospitals and the medical indemnity premiums of physicians for medical treatment accidents:
 - If the removal of the insurance costs associated with the lifetime care and support of cerebral palsy cases does not sufficiently outweigh the additional costs associated with the inclusion of no-fault catastrophic injuries, then any premium increases should be gradually phased in. State and territory governments should fund any gap between premium income and catastrophic medical injury claims.
 - Regardless, the Australian Government subsidy schemes should continue to safeguard the affordability of medical indemnity cover.

State and territory governments should fund NIIS claims directly to the extent that they choose not to fund catastrophic general accidents on a no-fault basis through local council rates.

The Australian Government should fund any catastrophic aviation accidents, until specific sources of funding related to accident risks are established.

Recommendation 18.3

The NIIS should be structured as a federation of separate state-based catastrophic injury schemes, which would include:

- consistent eligibility criteria and assessment tools, and a minimum benchmarked level of support
- consistent scheme reporting, including actuarial valuations and other benchmarks of scheme performance
- shared data, cooperative trials and research studies
- elimination of any unwarranted variations in existing no-fault schemes
- a national reinsurance arrangement to pool coverage of high risks among the separate schemes.

State and territory governments should create a small full-time secretariat to further the objectives outlined above. The NIIS and the NDIA should work closely together.

Recommendation 18.4

State and territory governments should consider transferring the care and support of catastrophic workplace claims to the NIIS through a contractual arrangement with their respective workers' compensation schemes, drawing on the successful experiences of Victoria's Worksafe arrangements with the Transport Accident Commission.

Recommendation 18.6

The initial priority for the NIIS should be the creation of no-fault motor accident insurance schemes, which should provide services and support for catastrophic injuries arising from motor vehicle accidents in all jurisdictions by 2013. Other forms of catastrophic injury should be covered by at least 2015, with funding commencing by 2014 to establish a funding pool prior to any claims.

Recommendation 18.7

An independent review in 2020 should examine the advantages and disadvantages of:

- widening coverage to replace other heads of damage for personal injury compensation, including for pecuniary and economic loss, and general damages
- widening coverage to the care and support needs of non-catastrophic, but still significant, accidental injuries, except where:
 - the only care needed can be provided by the health sector
 - the injuries arose in workplaces covered by existing workplace insurance arrangements
- the expert panel for medical treatment injury, evaluating the timeliness of its decisions, its independence and cost-effectiveness
- merging the NIIS and the NDIS.

Models for implementing the NIIS

The models mentioned in the terms of reference for this inquiry include:

a. A no fault lifetime care scheme

The Productivity Commission's recommendation was that:

The NIIS would include all medical treatment, rehabilitation, home and vehicle modifications and care costs, and cover catastrophic injuries from motor vehicle, medical (excluding cases of cerebral palsy associated with pregnancy or birth, which would be covered by the NDIS), criminal and general accidents. Common law rights to sue for long-term care and support should be removed, though access to damages for pecuniary and economic loss, and general damages would remain.²

The ADCQ understands that under this option, no lump sum payment for reasonable and necessary care and support would be available; instead, regular payments would be made for these services. Such a model would be very similar to the existing Transport Accident Commission scheme that has operated within the Victorian jurisdiction since 1987. Under the Transport Accident Commission 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 Transport Accident Commission.

b. A hybrid common law and no fault care and support arrangement

This type of scheme has been recommended by the Queensland Law Society and the Law Council of Australia in their May 2014 joint submission in response to the Consultation Regulation Impact Statement on the *National Injury Insurance Scheme: Motor Vehicle Accidents*, which was prepared in collaboration with the Law Institute of Victoria.³

These three entities are 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 Law Institute of Victoria suggests 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.⁴

² Ibid 88.

³ Queensland Law Society and Law Council of Australia, Submission to Commonwealth Treasury in response to the Consultation Regulation Impact Statement on *the National Injury Insurance Scheme: Motor Vehicle Accidents*, May 2014.

⁴ Law Institute Victoria, Submission to Commonwealth Treasury, *National Injury Insurance Scheme: Motor Vehicle Accidents* — Consultation Regulation Impact Statement, 2 June 2014.

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Accidents covered by the scheme

The ADCQ notes that, at this stage, the scheme referred to in the terms of reference is only in relation to catastrophic injuries from motor vehicle accidents.

The Productivity Commission contemplated that, ultimately, a scheme offering lifetime care and support should be available to all persons who suffer catastrophic injury regardless of fault, and, regardless of how the injury occurred.

The ADCQ submits the scheme should be designed so that it has the capacity to, ultimately, cover persons who have been catastrophically injured through medical (excluding cases of cerebral palsy associated with pregnancy or birth, which would be covered by the NDIS), criminal, and general accidents occurring in the home or community. Accidents occurring on trains, boats, aircraft, and other forms of transport should be covered, and the scheme should also be designed to include persons aged over 65 years, who suffer a catastrophic injury.

The ADCQ also suggests the government give consideration to the merit of ultimately transferring the care and support of catastrophic workplace claims to the NIIS through a contractual arrangement with Queensland's workers' compensation scheme, drawing on the successful experiences of Victoria's Worksafe arrangements with the Transport Accident Commission.

Preferred Model for the scheme.

The *Convention on the Rights of Persons with Disabilities* incorporates the 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'.

For this reason, the ADCQ submits that the scheme should be a hybrid common law and no fault care and support arrangement, and that existing common law rights to sue for long-term care and support should not be removed.

The ADCQ agrees with the Law Institute of Victoria's contention that:

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.⁵

⁵ Ibid 5.

The Law Institute of Victoria argues 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) if a claimant is successful in obtaining common law damages.

The ADCQ understands that, under the no fault component of a hybrid scheme, reasonable and necessary care and support may be made available through regular payments for these services. It appears this is a common process under the Victorian Transport Accident Commission scheme. However, it is preferable that, wherever possible, clients should retain the ability to direct their own care. The Law Institute of Victoria has observed that:

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.⁶

The ADCQ submits that, wherever possible, the implementation of individual funding agreements should be the desired mode of service delivery for the no fault component of a hybrid scheme.

The ADCQ thanks the Committee for the opportunity to make this submission.

Yours sincerely



KEVIN COCKS AM
Anti-Discrimination Commissioner

⁶ Law Institute Victoria, Submission to Commonwealth Treasury, *National Injury Insurance Scheme: Motor Vehicle Accidents* — Consultation Regulation Impact Statement, 2 June 2014, 5.