



8 January 2016

Research Director
Communities, Disability Services and Domestic and Family Violence Prevention Committee
Parliament House
George Street
Brisbane Qld 4000

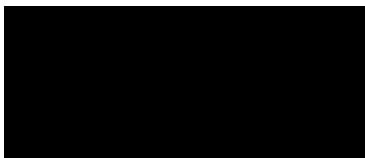
Dear Research Director,

RE: Inquiry into a suitable model for the implementation of the National injury insurance scheme

Please accept Queensland Advocacy Incorporated's submission in relation to the Communities, Disability Services and Domestic and Family Violence Prevention Committee inquiry into '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 no-fault lifetime care scheme; or
- a hybrid common law and no-fault care and support arrangement.'

Yours sincerely,



Michelle O'Flynn

Terms of reference

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:
 - a. How the government can sustainably and affordably meet the NIIS minimum benchmarks for motor vehicle accidents;
 - b. Affordability for Queensland taxpayers and motorists;
 - c. The long term nature of liabilities in a NIIS; and
 - d. The desire to target full funding of long term liabilities in accordance with actuarial advice.

About QAI

Queensland Advocacy Incorporated (QAI) is an independent community-based advocacy organisation. Since 1987 QAI has campaigned for the rights of vulnerable people with disability in Queensland. We believe that human beings are equally important, unique and of intrinsic value. Historically, people with disability have been devalued and marginalised in what Newell and Goggin have called a 'social apartheid'.¹ Those systemic failings continue when government persists in funding group homes and other forms of congregate care, when our guardianship and administration systems use substitute decision-making, and when we continue to imprison people with intellectual disability at five times the rate of the general population. As an organisation we seek to bring about a common vision where all human beings are equally valued.

Key Recommendations

- QAI supports the adoption of a hybrid scheme that provides minimum standards of health care, rehabilitation and long term care and support but which still allows injured people to seek common law remedies that meet or exceed those standards.

A hybrid scheme does not deny injured parties an opportunity to win lump sum awards. Such payments provide the ultimate in self-direction.

¹ G Goggin and CJS Newell, 2003. *Disability in Australia: Exposing a Social Apartheid*. Australia: University of New South Wales (UNSW) Press.

A 'no-fault' scheme that prohibits injured parties from pursuing common law remedies would also eliminate the moral hazards essential to ensure that the parties in control of risk are also the ones who will endeavour to minimise it.

- There must be no barriers to interim supports while claims are being settled. Rehabilitation, in particular, must be timely. Nor should there be any barrier to income and other financial supports from Centrelink, and the State may need to negotiate with the Commonwealth to ensure this. Should the injured party choose to (and successfully) pursue a common law claim the cost of support already provided could be factored into the award. We would not support mandatory repayment given that uncertain outcome of such claims.

- Were government to implement an exclusively 'no-fault' scheme, QAI recommends that such a scheme includes a review mechanism that
 - maintains practically enforceable rights
 - is fully funded
 - is easy to access, and
 - is transparent.

Introduction

Injury is the leading cause of mortality,² morbidity and permanent disability in Australia, diminishing the quality of life of injured people and their families.³ About half of people injured catastrophically will have access to some form of insurance, usually compulsory third party motor vehicle cover.⁴ The other half must rely on generally inadequate taxpayer-funded health and disability services- in most cases, for the rest of their lives.

Each week about three Queenslanders sustain life-changing, catastrophic injuries as a result of a road traffic crash, and about 70 of those people are not eligible to claim against compulsory third party (CTP) insurance for the care and support they need. The state's current scheme does not provide cover for injured people who are at fault or cases where there is no negligent party.

QAI has advised and/or is aware of a number of people who have spent years in poorly funded slow-stream rehabilitation, unable to leave because there is no accommodation available and no support for them even if accommodation was forthcoming.

Whatever option Queensland decides, in QAI's view it must provide timely and robust support to those injured on the roads or in any other arena. It should also give injured people the option to pursue a common law remedy, should they choose to do so. A lump sum payout offers the injured party the greatest degree of control over their care and support.

It is our view that any scheme should be framed according to principles informed by human rights. Accordingly, we propose the following '**Guiding Principles for an Injury Insurance Scheme**':

1. **The interests of injured parties must be paramount** - The scheme must hold the physical and mental well-being of claimants paramount. It is imperative that the scheme ensures the greatest chance of rehabilitation, the highest possible care, and meets the support needs for critically injured persons, for the duration of their lives.
2. **Self-determination** - The ability to make choices about care and support is critical to recovery and rehabilitation. The ideal scheme should seek to support individuals to become socially and financially self-sufficient.
3. **Equity** - Benefits are available to all who are injured, regardless of fault. Benefits are defined by realistic timeframes and dollar amounts, reducing ambiguity, inconsistency, disputes, litigation and volatility, and guaranteeing the scheme's affordability and financial viability.
4. **Sustainability** - The scheme should be self-sustaining and must operate with sound pricing and capital management practices so that liabilities remain fully funded.

² Injury is a leading cause of death in all age categories, and the leading cause of death among young people aged 12–24 years, accounting for more deaths than all other causes of death combined.

³ According to the ABS disability survey in 2003, 15.2% (600,300) of people with a disability reported that the cause of their main health condition was accident or injury (ABS 2004).

⁴ Productivity Commission. 2011 *Disability Care and Support* No 54, p 789.

5. **Dispute resolution** - All participants of the scheme, particularly claimants, have access to low cost, timely, independent and objective review.⁵

'No-Fault' Systems

Both 'no fault' *and* common law systems have proven flaws. 'No fault' systems -

- reduce people's freedom to seek common law remedies, denying them flexibility, freedom of choice, and a sense of closure;
- can be inefficient in determining and delivering payments to negligently injured parties, and expensive to administer;
- often lack remedies for injured parties when scheme decision making is slow and/or poor in quality;
- do not discourage risky behaviour or incentivise reasonable care; and
- encourage dependency by
 - 'drip feeding' compensation, and
 - consequently disincentives recovery or rehabilitation .

'No-fault' systems also have many positives. They -

- are more likely to distribute compensation more fairly;
- have more stable costs;
- are more likely to provide financial support for treatment and rehabilitation in the early stages of recovery; and
- provide coverage when there is no party at fault.

Common law

Common law systems also have widely acknowledged limitations, particularly in terms of equity of outcomes.⁶

- The outcomes for injured people vary depending on their ability to establish fault. In about half of personal injuries there is no party 'at fault';

⁵ Some of these principles are taken from Suncorp's submission to the Consultation Regulation Impact Statement- National Injury Insurance Scheme: Motor Vehicle Accidents. 2014.
<http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2014/National%20Injury%20Insurance%20Scheme%20Motor%20Vehicle%20Accidents/Submissions/PDF/Suncorp.ashx>

⁶ See, for example, Productivity Commission. 2011 *Disability Care and Support* No 54, p789 – 793.

- Parties unable to establish fault must rely on residual health and welfare and their own resources.
- 'Once and for all' lump sum payments may not accurately reflect an injured party's full rehabilitation and support needs. For example, it is not uncommon for injured people to develop secondary physical or psychological conditions as a result of their injury. Long periods out of work and inactivity, for example, can trigger depression and other medical conditions.
- Critically, the common law on its own is insufficient to meet the needs of the approximately 50% of injured parties who cannot demonstrate negligence and who therefore must rely on their own resources, family and government provision of health and welfare. Timeliness of payments is difficult.

The great virtue of common law remedies is that they provide certainty, closure and control. Wisely invested, an appropriate lump sum provides an injured party with the means to take control of their rehabilitation and support needs.

It is QAI's recommendation that a Queensland scheme should not take away people's common law right to a lump sum compensation payment if their injuries are caused by another party. Following injury stabilisation and entitlement confirmation, an injured party who can establish fault should be offered a choice to either continue to receive their care and support entitlements paid on an 'as you go' basis from the scheme or choose to exercise a right to settle by lump-sum payment, self-managing their treatment, rehabilitation, care and support from that point. An advantage of offering choice to those people who can establish fault is that the right to lump-sum compensation is not taken away but is complemented by the choice to continue to receive care and support entitlements on a 'pay as you go' basis. This choice provides independence and financial security for the claimant together with freedom and flexibility in their future life choices.

An alternative hybrid arrangement that QAI favours is one where injured parties can obtain the benefits of 'no-fault' insurance for long-term care costs, which are not always predictable at the time of common law settlement, but allows injured parties to pursue other types of claims such as for income loss or compensation for pain and suffering through the common law where an at-fault first party is involved.

Conclusion

How we respond to injuries now will affect the likelihood of similar injuries in the future. Neither a pure common law nor 'no-fault' scheme is satisfactory on its own. Neither guarantees both equity *and* choice and control. QAI supports a hybrid scheme that delivers both.

A scheme that takes away 'fault' and associated costs may create conditions where those at fault have less incentive to prevent further injuries. The Queensland scheme should retain the desired 'deterrent' effect to reduce the incidence of injury and ensure an equitable allocation of costs to those parties with the highest risk.

In QAI's view, then, government must preserve common law rights. Historically, people with disabilities have been denied self-determination with respect to provisions for their health, housing, income and support needs. Few people with disability have ever been in a position to make choices about where and with whom they live, how and from whom they receive supports or health care, or how their money is spent.

Having a choice about those things is just as important as the amounts of money available or the quality of services and their provision. A lump sum payout is the ultimate in self-direction, ensuring that people have a choice about how they will fund and manage their ongoing care and support needs.

This may not happen if Queensland extinguishes the right of catastrophically injured people to recover damages for care and assistance and forces them to rely solely on a 'no-fault' scheme for the provision of those services. However, people who are injured through the fault of others should not be required to give up choice and flexibility and have the extent of their care determined by a government scheme. QAI does not support the maintenance of common law rights at the expense of benefits provided by 'no-fault' systems, such as bottom line equity of coverage, and predictable and coordinated lifetime care and support. A hybrid scheme will provide the best results.

.....