

Date: 8 January 2016

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

BY EMAIL ONLY: CDSDFVPC@parliament.qld.gov.au

Dear sir/madam,

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

Please find **enclosed** my submissions, as an individual, in relation to the committee's current inquiry concerning the National Injury Insurance Scheme.

Thank you for the committee's consideration of my submissions. I am happy to appear at a hearing to assist the committee further. Please do not hesitate to contact me:

Mailing address:

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Yours faithfully,

[REDACTED]
GREG SPINDA
[REDACTED]

**SUBMISSION TO THE QUEENSLAND PARLIAMENT
COMMUNITIES, DISABILITY SERVICES AND DOMESTIC AND FAMILY VIOLENCE
PREVENTION COMMITTEE**

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

Prepared by Greg Spinda, January 2016

Successive Queensland governments must be applauded for their support of the minimum benchmarks for motor vehicle accidents in the National Injury Insurance Scheme (“NIIS”), which is born of the National Disability Insurance Scheme (“NDIS”). Both schemes developed from a 2011 Productivity Commission report.¹ There are, however, concerns related to the costs and impacts of such a scheme, as is evidenced in the experiences of other states.

This committee has a historic task to consider the implementation of the NIIS, a lifetime care and support scheme, which will have far reaching impacts on Queenslanders well into the future. And to do so in a limited time. With this in mind, the challenge for the committee is to ensure the NIIS in Queensland will improve the lives of catastrophically injured road users, ensure the protection of rights of all Queenslanders and do so fairly and sustainably. The committee must recognise that the motor vehicle accidents component of the NIIS is likely, in due course, to be a model for the workers’ compensation component, if the minimum benchmarks are adopted for that component. However, there are substantial challenges in relation to the adoption of minimum benchmarks relating to medical injuries and general accidents, hence these are beyond the scope of my submissions. In particular there are concerning definitional issues outstanding in any minimum benchmarks relating to medical injuries. Further, the NIIS related to general accidents will be a broad sweep, which will involve funding significant infrastructure to support it and will be a massive undertaking with significant risks. My submissions will be confined to the implementation of the minimum benchmarks for motor vehicle accidents.

I am thankful to the committee for considering my submissions. I make these submissions from many years of personal and professional experience. I commenced a Masters of Law (Health Law major) in 2015 and have focused my research to date on the NDIS. I am also a personal injury lawyer. Most importantly, I am a person, one who counts amongst friends 2 seriously injured people. I therefore rely on my research, professional experience and personal reflections in these submissions.

CHOICE AND CONTROL

Choice and control are human concepts. The core role of choice and control for people with disability is to live good, integrated lives, permitting independence which supports the person to reach their best potential.² The Productivity Commission report is replete with the language of choice and control.³ This is a central philosophy of the NDIS and the NIIS. However, there are serious practical issues as to whether or not the scheme models will deliver genuine choice and control within a centrally administered bureaucratic framework.

¹ Cth, Productivity Commission, Disability Care and Support, Report no. 54 (2011) Canberra.

² Erik Leipoldt, *Framing disability through the National Disability Insurance Scheme* (6 June 2011) ABC Ramp Up

³ Productivity Commission, above n. 1 see particularly chapters 1 and 8.

So far, through my research, I hold real fears that this philosophical underpinning is being lost in a top heavy bureaucracy, with an agenda of creating a wholly no-fault scheme. The damage to citizen's rights, risks and costs of such a scheme are demonstrably evident in New Zealand's Accident Compensation scheme and even the NSW Lifetime Care and Support Scheme.

In my research I have found extensive literature, particularly in the UK, which underpins the evolution of their approach to disability care. In fact, much of language and philosophy of the UK experience has made its way into the Productivity Commission report and the Australian political landscape. The NDIS and NIIS have been billed as the most fundamental social policy change since the introduction of Medicare,⁴ a paradigm shift in disability support thinking⁵ and the evolution of a person-centred approach in Australia. The person-centred approach places the person with disability at the centre, by empowering the person to have a voice in the direction of their life, care and support needs. The UK is at least 20 years ahead of Australia in implementing a person-centred disability approach,⁶ and they have not yet ventured into the arena of pure no-fault schemes.

THE HEART OF THE ISSUES

I would respectfully submit that the regulatory framework implementing the NIIS requires the committee to consider:

1. A fair scheme for catastrophically injured people which enables them to exercise choice and control, in pursuit of an independent life, which others take for granted;
2. Maintaining existing rights of all road users; and
3. To do so sustainably.

NIIS: FOR PEOPLE WITH CATASTROPHIC INJURIES

My closest friend suffered a spinal cord injury some years ago in a single vehicle accident. There was no other vehicle at fault. It was a tragic accident on a rainy night. As a result, he was unable to bring a claim for compensation under the CTP scheme. Luckily, his CTP policy did contain an "at-fault driver" cover, but this only allowed \$250,000.00 cover, a paltry sum for someone who is now wheelchair-bound requiring 24 hour care. Existing disability supports are woefully insufficient to meet his needs, thus his mother quit work and is now his carer.

Had the NIIS been around, he would have had a safety-net. Any road user can experience such unfortunate events. The NIIS is sorely needed as a safety-net.

Yet, almost invariably, my clients, who can prove fault and bring a CTP claim, are thankful for not having to deal with insurers and government agencies for their every need over their lifetime. There is nothing more distressing and dehumanising than the loss of choice and control, and the begging "please sir, more".⁷

⁴ Office of the Prime Minister (Cth), *'Locking in a fairer future for Australians with a Disability'* (press release, 1 May 2013).

⁵ Jenny Green and Jane Mears, *'The Implementation of the NDIS: Who Wins, Who Loses?'* (2014) 6(2) *Cosmopolitan Civil Societies: An Interdisciplinary Journal* 25; Productivity Commission, above n 1, 344-346.

⁶ Connie L O'Brien and John O'Brien, *The Origins of Person-Centered Planning, A community of practice perspective* (2000) The Center on Human Policy, Syracuse University <<http://thechp.syr.edu/resources/rsa-publications/>>.

⁷ Erik Leipoldt, above n 2; Michael Bleasdale, *'Please Sir, not more of the same - people with disability in control'* (May 2011) People with Disability Australia Inc. <www.pwd.org.au/documents/pubs/1105-MBleasdale.doc>.

It is therefore essential to allow people the independence of choice in determining whether or not they will pursue a CTP compensation claim for all heads of damage or enter the NIIS. What is important here is that the proposed NIIS for Queensland does not remove the right of catastrophically injured road users from maintaining a claim for compensation for care, support and equipment needs via the existing CTP compensation scheme rather than relying on the NIIS.

Eligible participants should have a choice:

1. To enter the NIIS for all their care, support and equipment needs and maintain a claim for compensation under the CTP scheme for other heads of damages such as economic loss, and pain and suffering; or
2. To solely pursue a claim for compensation under the CTP scheme for all existing heads of damages, including care and support. (I acknowledge some stakeholders may raise concern about such damages being exhausted, however I believe strong safeguards already exist which I deal with later under the heading “A Sustainable NIIS”).

Doing so is nothing more than meeting the minimum expectations we all have as human beings. Moreover, it is fundamental to meeting the core underpinning of the scheme, as per the Productivity Commission report and the promise of successive Commonwealth and State governments of both persuasions.

Western Australia is implementing such a scheme, where eligible participants can decide whether to enter the scheme or pursue their rights to compensation under their CTP scheme. Much the same as Queensland’s CTP scheme, in WA there is a need to prove fault in order to claim compensation. Thus, those who cannot do so, have the NIIS safety-net, yet those who can, may decide the option that suits them best, subject to relevant safeguards.

Queensland’s CTP scheme has been successfully running for almost 13 years. No major changes have had to be made. There has been no ‘insurance crisis’. In fact, not only are most injured road users covered for reasonable and appropriate treatment and receive compensation, but insurance companies are operating extremely profitably. The Queensland scheme works. It just needs to be extended, as envisaged by the NIIS, to provide a safety-net for all catastrophically injured road users by respecting their autonomy.

The NDIS has been set up with such choice and control in mind. As discussed earlier, though, there are very real and significant concerns as to whether the philosophical underpinnings of choice and control can be delivered within the NDIS model. Yet here in Queensland, we have a fantastic opportunity to implement a model of the motor vehicle accident component of the NIIS to allow eligible participants to decide what is best for them.

In fact, under the NDIS, the National Disability Insurance Agency can require a participant in the scheme to commence or maintain a claim for compensation all heads of damage.⁸ The NIIS in Queensland can also be implemented to allow eligible participants to decide what is best for them - entering the scheme or claiming compensation.

Further, the NDIS actually accepts eligible participants even though they may have received, or are in the process of claiming, compensation for personal injuries. The NDIS then allows a mechanism to account for any compensation amounts received, thus avoiding any possible “double-dipping”.

⁸ *National Disability Insurance Scheme Act 2013* (Cth) s.104.

This is much the same as currently happens in Queensland where an injured person receives workers' compensation benefits and later receives a lump sum compensation amount through a CTP or public liability claim, and such benefits are then repaid to the workers' compensation scheme.

This is a sensible approach economically also, as it will reduce the burden on road users' registration payments and the government (out of consolidated revenue should projected expenses be inaccurate) in meeting NIIS needs, where an at-fault party should rightly bear the burden of their actions. It is one of the reasons we have, for many generations, had insurance.

Ensuring that eligible participants in the Queensland NIIS have a choice to enter the scheme or pursue a claim for compensation under the CTP scheme is not only fair, and in accordance with the underlying principles espoused by successive Federal governments and the Productivity Commission, but makes economic sense.

MAINTAINING EXISTING RIGHTS

It is commendable that the Terms of Reference do not include matters of diminution of existing rights. Although, it is a concern that some stakeholders may advocate for such in respect of injured road users who are not eligible for the NIIS.

This has occurred most prominently in NSW, where thresholds have unfairly left many injured road users unable afford treatment and at risk in their careers. We need only look back a very short time in Queensland to see how hollow and destructive the introduction of arbitrary thresholds were on the workers' compensation scheme.

One of the difficulties for Queensland would be the rise in disputes concerning thresholds – i.e. that a system, and possibly a bureaucracy, would have to be established simply to deal with assessments and disputes. This issue has already been canvassed in detail during the short-lived debate around thresholds in the workers' compensation scheme, and those criticisms apply equally to the CTP scheme. I do not intend to rehash all the arguments, aside to say that the administrative burden, personal stress to injured people, cost and delay caused by such a system was (and is) simply unfair.

Of further concern is the limitation of existing rights in compensation claims. As has occurred in SA, NSW and New Zealand, there is a significant risk of a scheme moving from one of non-universal application and inadequacy (pure compensation scheme) to one of sheer incompetence and unfairness (no-fault or close to it). Inaccurate estimates and costs blowouts are an inherent danger in pure no-fault schemes – see New Zealand's Accident Compensation scheme, SA's workers' compensation scheme and more recently the issues in the NDIS launch sites, specifically in SA.

When broad based no-fault schemes enter turbulent financial waters, the policy responses are typically one of more of the following:

1. The government puts their hands in consolidated revenue;
2. Care and support to participants of the scheme are reduced or delayed; and/or
3. If there is an existing common law compensation scheme, the rights of claimants are reduced.

Politically, socially and economically, all of these responses carry significant detriment.

The removal or restriction of existing rights simply shifts the costs and burdens elsewhere. For example, it may lead an injured person, unable to participate in the NIIS, to rely on employer leave requests, Centrelink, Medicare, the public health system, public housing, community organisations (much of which are state government funded) and so on. The burden of an injured person on employers and the economy is well known, in fact the Productivity Commission noted this itself.

The existing Queensland CTP scheme, which allows an injured road user to claim compensation from an at-fault party, underwritten by private insurers, is a system that continues to work well. Actuarial evidence by the Motor Accident Insurance Commission for over a decade clearly illustrates a scheme that is stable, solvent and allows for insurers to maintain healthy profits.

I have acted for many injured road users, whose injuries would be classed as “minor”. However, these people have still endured pain, treatment, medication and time off work. Almost none can afford this, especially if they have no income and a family to support. Many recover sufficiently to return to work eventually, but this is cold comfort when they have already incurred such losses as:

1. Time off work – say 6 weeks at \$1,000 per week - \$6,000
2. If they have no sick leave left and thus use annual leave – use of that leave instead of being able to use it for family vacation. On top of this there is still a loss of income for the remaining weeks.
3. GP attendances – possibly bulk-billed, but possibly leaving some \$200 - \$300 out of pocket
4. Physiotherapy – say 10 sessions at a conservative \$60 per session - \$600
5. Medication – initially strong prescriptions and then Nurofen or Panadol – can amount to \$200 - \$300
6. Fuel for travel to treatment providers
7. Even for “minor” injuries for a few weeks they may be unable to mow the lawn or clean the house there may be a need to pay for such a service – several hundred dollars depending on a number of factors.

None of these items are a windfall. It is not a lottery win. They are real expenses incurred by ordinary people injured through the fault of someone else. So, even a “minor” injury can cause a financial and emotional burden.

It is hard for those who have (fortunately) never suffered from an injury in a vehicle accident to imagine what it is like to cope with the aftermath. Yet, it can happen to any one of us anytime. A “mere” whiplash can cause significant discomfort, the need for treatment, medication and time off work. It may not be lifelong, but if fault can be shown, why should such a person, their employer and possibly the tax payer, bare the cost of someone else’s error.

A SUSTAINABLE NIIS

The average CTP premiums in a few states are approximately⁹:

Financial Year	QLD	NSW	SA	WA
2013-2014	\$333	\$524	\$412	\$265
2014-2015	\$336	\$529	\$476	\$291

⁹ Information gathered from relevant state body websites such as Queensland’s Motor Accident Insurance Commission, NSW Motor Accidents Authority and Insurance Commission of Western Australia.

In Western Australia, where a hybrid scheme is being established (allowing choice of access to NIIS or pursuing a compensation claim), the additional CTP premiums have been estimated at \$99.¹⁰ This would increase CTP premiums to almost \$400, which is still substantially less than in NSW and SA.

During the committee's public hearing, on 2 December 2015, the Under Treasurer estimated the additional cost to Queensland CTP premiums would be approximately \$60.¹¹ This would leave Queensland's CTP premiums still well below NSW and SA, the key states which have played unnecessarily and unfairly with their compensation schemes.

It should be noted that the Under Treasurer gave this estimate based on all eligible participants actually entering the scheme. Of course, with a hybrid scheme, some injured persons may well choose to pursue compensation for all heads of damages (including care and support) instead, thereby reducing the actual cost to the NIIS. It would also allow for the objective of reaching full funding of the scheme.

Beyond the direct costs, it is important to look at how lump sum compensation can also indirectly benefit a hybrid scheme. For NIIS eligible participants, if they are entitled to make the choice to pursue lump sum compensation, they will be able to control the management of their funds.

In my experience, after care and support costs, the largest expense for catastrophically injured people is appropriate housing. In many instances modifications simply cannot be made as the house is wholly unsuitable (e.g. multi-story house, apartment with no lifts etc...). In others, due to circumstances modifications may not be made, e.g. rentals.

The NSW Lifetime Care and Support Scheme will allow for some modifications to existing residences, but does not allow for the purchase of purpose build accommodation, which is what most catastrophically injured people need. This is directly contrary to the philosophical underpinnings of choice and control, so that participant's really have no capacity for independence.

The use of lump sum funds to purchase appropriate accommodation therefore is a critical element of the existing CTP compensation scheme, again for those able to show fault by another. It is also much easier to use private funds to do so, rather than rely on a bureaucracy to manage this. Thus a hybrid scheme may allow reduced administrative burdens and limit NIIS expenses. Still, it will also allow that central element of choice and control.

The use of lump sums must also be managed appropriately to last the injured person's lifetime. Firstly, there are currently strong incentives for prudent management with Centrelink preclusion periods and the recovery and preclusion provisions under the NDIS.¹² Secondly, there are already strong safeguards for funds management by a trustee where an injured person is under a legal disability (e.g. minors or people with significant brain injuries who lack capacity to manage their finances). There is no evidence that these safeguards are not effective, nor that funds are inefficiently managed.

¹⁰ https://www.icwa.wa.gov.au/ctp/ctp_nofault_insurance.shtml

¹¹ (QLD) Communities, Disability Services and Domestic and Family Violence Prevention Committee, *Public Briefing – Inquiry into a Suitable Model for the Implementation of the National Injury Insurance Scheme*, Transcript of proceedings (Wednesday, 2 December 2015).

¹² *National Disability Insurance Scheme Act 2013* (Cth) Chapter 5.

In any case, it would be possible to draft a provision requiring those that choose to claim lump sum compensation, to seek financial advice within a certain period of receiving lump sum compensation. There are already stringent laws around the provision of financial advice, which act as a further safeguard.

CONCLUSION

The implementation of the motor vehicle accident component of the NIIS is commendable. However, the task of this committee and the Queensland Parliament is to implement this component of the NIIS to benefit all Queenslanders fairly and sustainably. For this is an evolution in disability support, for a small number of catastrophically injured participants, which will have far reaching consequences for generations, both socially and economically. Maintenance of existing rights in a stable, affordable and solvent scheme is critical. Modelling suggests that premiums will continue to be affordable even with addition of NIIS onto the Queensland CTP scheme.

The fundamental underpinning of the scheme is the evolution of the person-centred approach to disability; that is giving choice and control to people living with disability. This stated philosophy is best achieved through a hybrid scheme, subject to financial safeguards.

A hybrid scheme, whereby eligible participants in the NIIS can choose to enter the scheme or pursue lump sum compensation for all heads of damage under the existing CTP scheme, will meet this objective.

A hybrid scheme must be designed as an add-on to our existing CTP scheme. It must not take away existing rights to access lump sum compensation under all heads of damages. The Queensland CTP scheme is highly effective, fully funded, allows profitable insurance business, yet at a substantially lower cost in CTP premiums than schemes where compensation rights have been restricted or removed.

A hybrid scheme, bolting on the NIIS to Queensland's CTP scheme, is by all accounts, estimates and comparisons a cost effective scheme. An explanation to voters that this cost improves the lives of the catastrophically injured and also maintains all Queenslanders existing rights, is one which will be considered sensible, fair and acceptable. The former state government agreed to the minimum benchmarks and the current state government has committed to implementing it. The implementation of a CTP scheme with no-fault coverage for the catastrophically injured, without any diminution of existing rights and in the form of a hybrid scheme, is an initiative deserving of bipartisan political support.