Law Council
OF AUSTRALIA

5 February 2016

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

Dear Director,

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

Thank you for your invitation to the Law Council of Australia to provide a submission to the Communities, Disability Services and Domestic and Family Violence Prevention Committee ("Committee"), in response to this Inquiry.

The Law Council is the national peak body for the legal profession. Further information about the Law Council is at **Attachment A**.

It is noted that, while the title of the Inquiry refers to the "National Injury Insurance Scheme" (NIIS), which the Commonwealth intended to be a federation of state and territory schemes covering all catastrophic injuries arising from accident or misadventure, the Terms of Reference for the Inquiry appear to indicate a focus on motor accident compensation. Accordingly, the Law Council confines this submission to no-fault compensation arrangements for motor vehicle accidents in Queensland.

The Law Council has had the opportunity to read the submission of the Queensland Law Society, a constituent body of the Law Council, and respectfully agrees with its submissions.

The Law Council is pleased to make the following additional remarks for the consideration of the Committee.

**Support for no-fault compensation for catastrophic injuries**

The Law Council is a strong supporter of no-fault compensation arrangements for motor vehicle accident victims who have been catastrophically injured. No-fault care and support arrangements have long been a feature of workers compensation schemes throughout Australia, and more recently motor accident schemes, because of the important social benefits, including protection of those who place themselves and their families' livelihoods at risk when engaging in necessary, productive employment, which has corresponding benefits for their employers and society as a whole.

The use of motor vehicles and public roads gives rise to important considerations. Public roads and the use of private vehicles have both private and public benefits, including with respect to productivity, economic growth and social cohesion.

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639
president@lawcouncil.asn.au

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Road users place themselves and others at risk when driving, which creates a significant cost that must be borne by individuals and their families. Compulsory third-party insurance offers protection for those who are injured by others, through negligence, however the cost of care and support for those without recourse to fault-based compensation can create a terrible burden for individuals and their families. No-fault compensation schemes aim to address the 'gap', for those whose injuries are not covered by existing liability insurance arrangements.

The recent announcement of the National Disability Insurance Scheme (NDIS) offers an important safety net for all people with serious disabilities, regardless of how the disability was acquired. The NDIS will provide fully-funded care and support to all people meeting the eligibility criteria, which will include catastrophic motor vehicle injury victims in all jurisdictions, who are not covered under a comparable State or Territory compensation scheme. Following the announcement of a no-fault motor accident scheme in Western Australia, in June 2015, Queensland is the only jurisdiction yet to announce or establish no-fault compensation for catastrophic motor accident victims.

Under Heads of Agreement entered into with the Commonwealth, Queensland taxpayers will be required to meet the cost of care and support for catastrophic motor accident victims admitted to the NDIS, because of the absence of a comparable no-fault compensation scheme. In theory, therefore, the question of funding care and support for catastrophic motor accident victims is ultimately between socialising the cost through the CTP insurance pool, contributed to by registered vehicle owners; or by all Queensland taxpayers, whether a no-fault scheme is funded from consolidated revenue or through intergovernmental transfers to the Commonwealth.

**Is the NIIS needed?**

The Law Council has consistently maintained that the NIIS is an unfortunate "second-best" option and largely a by-product of pragmatism and political expediency. The creation of parallel schemes creates unnecessary transaction and administration expenses in relation to a national scheme, the essence of which is widely supported and designed to address the same public policy objectives.

Clearly, the most efficient mechanism for providing fully-funded care and support for catastrophically injured people is through the NDIS, the administrative costs of which remain largely fixed and relevant services being largely the same. The primary (and, arguably, the only) reason the NIIS has been proposed is to address the *real politik* of federal-state funding demarcations, enabling access to various insurance funding pools that are already in existence, while not disrupting no fault schemes already in existence.

Maintaining the *status quo* in Queensland is arguably the most efficient mechanism for achieving the same ends. Catastrophically injured motorists may continue to have access to the benefits of the NDIS, subjected to intergovernmental arrangements with the Commonwealth, while the costs can be socialised across all taxpayers, as is the intention under the broader NDIS, without an additional impost on motorists, noting that roads and the use of vehicles delivers considerable public benefits, which are not limited to motor vehicle owners themselves.

If the decision is taken to establish no-fault arrangements in Queensland, as an alternative to the NDIS, the Law Council considers the benefits should mirror those available under the NDIS and should not result in any disadvantage to Queenslanders who benefit under existing arrangements.

**Benefits of common law**

Access to common law remains the fairest means of accident compensation and Queensland continues to have the best performing motor accident scheme in the country, both in terms of benefits to negligently injured parties and CTP premiums for motorists.

As noted above, the Law Council submits that introduction of a no-fault motor accident scheme in Queensland should not result in disadvantage to any person or reduction in entitlements under existing arrangements. Any person whose common law entitlements are removed or diminished will be subject to disadvantage – an unjustified and unfair encroachment on their existing entitlements.

The Law Council strongly agrees with the Queensland Law Society's submission that existing common law entitlements should be retained, while any new no-fault scheme should be an adjunct to the existing, highly successful common law compensation system in Queensland.

If this recommendation were adopted, Queensland would follow a similar approach to that recently adopted in Western Australia, a jurisdiction which similarly enjoys a strong, stable common law system featuring reasonable benefits, low transaction costs and low CTP premiums. The Law Council submits that this model would also be appropriate for adoption in Queensland.

**Paying for the scheme**

As is reflected in the Terms of Reference for the Inquiry, much of the public discussion around the introduction of no-fault often centres on the financial cost of such schemes and the mechanism for funding.

As noted above, the question of funding is often mischaracterised. It is important to start from a position of fact: the actual cost of a fully funded no-fault scheme will be fixed and will increase over time, as new participants enter the scheme and the cost of providing reasonable care and supports invariably increases.

These costs will not be reduced or offset by cutting common law benefits. Cutting benefits to those eligible for common law benefits will simply involve taking entitlements available to negligently injured people and giving them to others. There will be no offsetting benefit for those who lose out – this would be a classic case of 'robbing Peter to pay Paul'.

Typically no-fault motor accident schemes are paid for by a levy on those who take out motor vehicle registration (as in New South Wales and, most recently, announced in Western Australia), or as a direct fiscal outlay from general revenue.

The Queensland Government has already obtained actuarial costings for motor vehicle levies, which have been provided to the Committee. The Law Council notes that the estimates of Options A and B appear to be at odds with actuarial estimates provided for other jurisdictions. For example, the estimated cost of fully-funded care for catastrophically injured road-users in NSW and WA, under a 'hybrid model', is generally substantially less costly to motorists than for a pure no-fault scheme.[1] Regardless, it is noted that, even if a levy in the estimated range were imposed on registered vehicle

[1] See NSW LTCSS website and WA Insurance Commission Report.

owners in Queensland, average CTP costs to Queensland motorists would remain among the most affordable in the country.[2]

However, the Law Council submits that experience in other jurisdictions suggests that systems which retain common law compensation and include a "latch-on" no-fault scheme perform better over the long term, are cheaper for taxpayers and deliver more substantial benefits to the insured.

"Offsetting" costs (or cutting benefits)

One suggestion commonly advanced by insurers and policy makers concerned about public reaction to increases in the cost of registration is that cost increases can be ameliorated by restricting common law benefits.

The Law Council submits that any perceived "reduction" in CTP premiums would be a direct result of devaluing the benefit to insureds. In other words, the no-fault component of the scheme is funded by a transfer of benefits from innocent, wrongfully injured parties, to those who are either negligent or have no one else to blame.

This 'transfer of benefits' can have profound effects, not only on the injured parties, but on the profits of private underwriters of CTP schemes. While motorists are levied for the cost of no-fault cover, the proportion of written premium paid in benefits by CTP insurers reduces dramatically. For example, following the introduction of extensive restrictions on common law entitlements in NSW from 1999, NSW greenslip insurers were enabled to reap profits as high as 25-30 per cent of written premium over the ensuing 12-14 years.[3] This was despite actuarial advice to the NSW Motor Accidents Authority that insurer profits in the range of 4-6 per cent were "reasonable".[4]

**No-fault insurance as an investment**

If no fault arrangements are established for catastrophically injured motorists in Queensland, it should be announced as an investment in care and support for those who presently have little other recourse.

There should be an emphasis on the public benefits of our roads and the corresponding obligation to meet the costs associated with the risks inherent in using public roads.

The Law Council submits that the Queensland Government should resist any temptation to engage in divisive restriction of benefits. As in the recent, well orchestrated and open public discussion around this issue in Western Australia, the focus in Queensland should be on improving the existing system by adding a safety-net, not disrupting the current arrangements which are widely recognised as successful.

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[2] See, for example, http://www.finity.com.au/wp/wp-content/uploads/2014/08/CTP-News-August-2014.pdf#page=3, which indicates Queensland CTP premiums are second-lowest behind Western Australia. After the introduction of the recently announced no-fault scheme in WA, Queensland will enjoy the most affordable premiums (as a percentage of average weekly earnings) in the country.

[3] See, for example, the NSW Upper House 'Twelfth review of the exercise of the functions of the Motor Accidents Authority' (3 July 2014): https://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/9e3791993612e30cca257d0900819a9a/$FILE/MAA%20-%20Final%20Report%20No%2051.pdf

[4] Letter from Greg Taylor, Taylor Fry Consulting Actuaries to Motor Accidents Authority of New South Wales (21 December 2004) Paragraph. 1.2 (p 1-2).

The Law Council would be pleased to expand on any of the remarks in this submission. The Law Council contact person in relation to these issues is Nick Parmeter on [redacted]

Yours sincerely,

[redacted]

**S Stuart Clark AM**
**President**

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