

Sydney, NSW

12 April 2015

Leesa Croke

The Treasury

Langton Crescent, Parkes ACT 2600

Email: niisris@treasury.gov.au

Dear Leesa,

National Injury Insurance Scheme – Workplace Accidents - Consultation Regulation Impact Statement

Thank you for the opportunity to respond to the Consultation RIS.

I am writing to encourage the Commonwealth, State and Territory governments, and specifically those charged with responsibility for rolling out the NIIS, to step back from the current path and reconsider how best to achieve the relevant objectives.

Of the three options set out in the RIS I support option 3 (harmonisation), assuming this would allow the catastrophically injured the choice of participating in a lifetime care and support scheme or receiving lump sum compensation. This will better address many of the problems identified by the Productivity Commission in its report on Disability Care and Support.

My preference, however, would be for governments to halt rolling out the NIIS beyond motor vehicle accidents and instead to encourage private disability insurance as a better way to financially support the NDIS.

I am writing from the perspective of someone who has worked for 25 years in personal injury compensation, from the legal, insurance and financial perspectives and working directly with seriously and catastrophically injured people.

I look forward to the opportunity to elaborate on my comments and recommendations.

Sincerely,


Jane Campbell LLB, BCom, CFP

1. My professional background and qualifications

I am a CFP qualified financial planner and lawyer (admitted in 1993) who has long specialised in injury compensation.

I started my career in 1989 working in claims for a Melbourne-based workers compensation insurer, moved to their legal department, then became an insurance litigator in 1993.

My interest in long term outcomes for the seriously and catastrophically injured led me to study periodic payment systems in the US in 1996 and then work on law reform in Australia (1997 to 2002) to enable the use of annuities to help solve some of the perceived problems with common law lump sum compensation¹.

From 2003 until recently I have worked for one of the two top national providers of financial advice to the seriously disabled.

Over many years I met have met hundreds of clients receiving long term statutory benefits and those receiving lump sum compensation.

I have always worked cooperatively across the spectrum of interest groups – with life and general insurers, plaintiff lawyers, governments, etc. – seeking win/win solutions in the public interest.

2. Defining the problem

The RIS identifies the problem as follows:

- governments need to deliver to the catastrophically injured lifetime care and support which is consistent across jurisdictions
- at the moment although workers compensation schemes are no-fault, some schemes put caps on care and some allow lump sum payments.

Caps on care are noted to be a problem because they might mean that people don't get full lifetime care and support.

Lump sums are noted to be a problem because:

- the money may be insufficient and run out
- people have to cope with longevity risk
- people also have to take on investment risk.

3. Challenging the assumptions

I do not agree that the RIS properly identifies the problem.

3.1.1. The focus on the catastrophically injured

I don't believe that we should focus only on the catastrophically injured. We also need to consider the needs of the seriously and even less seriously injured.

3.1.2. The focus on “care and support”

The focus seems to be entirely on care, but this may not be the primary concern of the catastrophically injured. In my experience the number one concern of those who have become catastrophically injured is **accommodation**.

People in this situation also want to have enough money to cover their needs more broadly than just care.

3.1.3. The requirement for consistency

The RIS seems to assume that fault doesn't matter. I don't think that everyone in the community sees it that way.

There are no doubt a range of societal views on risk and responsibility with no single view prevailing. Some people have strong views on the importance of individual responsibility and others strongly favour theories of interdependence. We need to keep the balance right.

I am concerned that a push for consistency may result in adoption of the lowest common denominator. Surely our federation can accommodate differences in how the states deliver their services.

3.1.4 The assumption that lump sums are a problem

The authors, perhaps following their lead from the Productivity Commission, have pointed to the downsides of lump sums but have not considered their benefits.

It's worth considering how all Australians manage longevity risk and investment risk. Most Australians would consider it their right to take on these risks.

We should investigate how most personal injury compensation recipients currently do manage their lump sums. I can speak on this issue based on my extensive experience (see below).

It would be valuable to analyse whether or not current levels of lump sum compensation are adequate, and if not the reasons for this.

3.1.5 The assumption that the NSW Lifetime Care and Support Scheme is a good solution

The NSW Lifetime Care and Support Scheme (LTCSS) is the model that is held up as the best way forward.

Before rolling it out nationally we should consider the downsides and disadvantages of such a scheme.

I am concerned that the problem has been defined in the RIS as the lack of a NSW-style Lifetime Care and Support Scheme (LTCSS) in all jurisdictions.

This makes it a foregone conclusion that the only viable solution must be the adoption of a NSW-style LTCSS in all jurisdictions.

We need to better understand “the problem” so that we can better analyse the proposed solution and possible alternative solutions.

4. What do the catastrophically injured want?

Before looking at the options it’s worth considering what catastrophically injured people really want. After all, they are the ones, above all others, that the NIIS is designed to help.

Those without legal rights to compensation have no doubt had it tough. If the government is offering an NDIS, with potentially \$34,000 of care supports per year, then they will no doubt want to take this up. If the government is instead offering to cover all lifetime care and support needs estimated at \$70-100,000 per year, then of course this is an even better option.

However, I am not aware of anyone having explored other options with them, such as the government assisting them with their housing needs or delivering income to better cover care expenses.

My point is that something is definitely better than nothing for those who have not had legal rights. However, for those who currently have legal rights they may wish to retain flexibility and choices.

In my experience as a financial adviser specialising in advice to people with very serious or catastrophic injuries, all people have the same basic needs:

- Somewhere suitable and safe to live (shelter)
- Enough money to cover expenses including care (income)
- The ability to set their own priorities (self-determination)

This applies to people receiving compensation as well as those not receiving compensation. People primarily want to be able to live with dignity and choices in a safe environment.

Governments should not be too quick to dismiss what’s important to them.

5. Considering the three RIS options

Directly below I have considered the three options as stated in the RIS.

Note that further below I have suggested some bigger picture options for governments to consider in moving forward with the Productivity Commission recommendations from the Disability Care and Support report.

5.1 Option 1 – the Base Case – No change

This options involves leaving the current workers compensation schemes as they are.

The RIS focuses on perceived problems with lump sums. I therefore think it’s worth making the following points:

5.1.1 Catastrophically injured people want lump sums.

Catastrophically injured people in my experience want the option of a lump sum.

I sometimes wonder if some of the anti-lump sum rhetoric that I often hear comes from jealousy. Those who are not injured seem to think that their neighbour or friend is lucky if they “win” a lump sum compensation payment.

Having met so many of those “lucky” disabled people I can safely say that they would all hand back the money if they could have their health back. They are all too aware that the money will never make up for their loss.

Perhaps the anti-lump sum view comes from our thinking about who deserves what. Maybe we don’t think disabled people deserve this “benefit”. Discrimination against disabled people is a significant problem in Australia, as it is worldwideⁱⁱ.

The media seems to love perpetuating the view that injured people “blow” their lump sums. People who choose to pay off debts and mortgages are attacked as “blowing” the money, even though this may be the right thing to do in certain circumstances.

I think it’s an ugly part of our culture to assume that disabled people make bad choices.

In my long experience:

- Plaintiff lawyers refer all of their catastrophically injured clients for financial advice
- Their clients obtain and take advice
- Advice will take into account all of a person’s circumstances
- Debt repayment is often a priority as debt causes significant stress
- Paying off a mortgage can be vitally important to providing a sense of security
- Preclusion periods mean people can’t “double dip”
- People are aware of their ongoing income and care needs
- People usually convert their lump sum into a flexible income stream
- For those with smaller lump sums they may simply hold their cash in the bank
- For others their solution may involve converting a lump sum into an income stream using a superannuation account based pension.

People tell me they want “choice and control”, as well as safety and flexibility.

People tell me they don’t want to be forced into a long term relationship with a bureaucracy where they must go “cap in hand” asking for the care and support services.

Lump sum compensation can’t make up for someone’s disability, but it can help them regain some sense of dignity.

5.1.2 People want to and can manage their own longevity risk

When I first investigated alternatives to lump sum compensation I came to the conclusion that people should have the *choice* of opting for a tax-free annuity.

I realised the vital importance of choice, but also the importance of solutions to guard against longevity risk.

However after many long years of working in this area I learned that Australians prefer to self-manage longevity risk.

This issue has recently been looked at as part of the Financial System Inquiry. They saw that retirees generally do not buy lifetime annuities. They prefer an account based pension, knowing that they can adjust their level of income as time goes by.

We allow retirees the dignity of taking on and self-managing longevity risk, why not the disabled?

The Financial System Inquiry did not recommend mandating to all Australians that they cannot receive a lump sum. Instead they made recommendations to encourage better market solutions for longevity risk – to give Australians better choices.

If and when new and innovative solutions come to market I have no doubt that the catastrophically injured will look closely at them and perhaps be first in line to sign up.

However in the meantime give the catastrophically injured the same options as other Australians. Let them have the dignity of risk and personal responsibility.

5.1.3 People manage their lump sums sensibly

As mentioned above, plaintiff lawyers refer their clients for financial advice. Injured people (or their carers or trustees, in the case of children and those with brain injuries) get and take advice.

People make sensible choices – invariably carefully working out what initial lump sum expenses they may have and what they need to meet their income needs for life.

In nearly all cases people want to pay off debts and mortgages and then set up account based pensions which will cover their living and care expenses. These are sensible and responsible plans for people who understand the need for the money to last a lifetime.

5.1.4 Discount rates are too high

The RIS mentions the problem of lump sums not being enough and potentially running out. This is indeed a problem and I think the main reason is because the discount rate used to calculate the lump sum is too high.

The discount rate is the rate by which a lump sum might be regarded as capable of growth if safely invested and after making due allowance for future inflation and the effect of taxation. The High Court in 1981 decided in *Todorovic v Waller*ⁱⁱⁱ that the discount rate should be 3%. This was in an era of high interest rates and high inflation.

In most jurisdictions the discount rate is 5%. This assumes that a plaintiff can safely and sustainably achieve very high levels of investment return (much higher returns than was possible in the 1980s) – which, as a financial planner, I can say is not achievable.

The consequence of having a discount rate that is too high is that those with long-term care needs, such as quadriplegics and severe brain-damaged infants, will get between 25 and 30% less than they need to pay for their future care.

A realistic discount rate would be something in the order of 2% to 2.5%. The Motor Accidents Authority in NSW currently assumes a 2% return on its own investments after tax and inflation. The discount rate in the UK for personal injury claims is currently 2.5% and there is pressure to reduce it.

Although the NSW LTCSS Guidelines do not specify what discount rate will be used to calculate the cost of buying into the Scheme, it is understood that a discount rate of 2% will be used (ie, the Authority will assume it makes 2% net return on the buy in figure paid by the participant).

In real terms, this means that people who have received a lump sum payment for their cost of future treatment and care, calculated with a 5% discount rate, will have significantly less than the amount needed to buy into the scheme.

For example, a 20 year old quadriplegic who requires say \$6,000 of care and treatment per week would receive a lump sum of approximately \$6 million for future treatment and care, using the 5% discount rates. If that person then wished to buy into the LTCSS (to receive that same treatment and care) it would cost over \$11 million. The shortfall between the two amounts is dramatic.

The solution to the problem that lump sums that might run out is to lower the discount rate.

5.1.5 NDIS complications can be overcome

A problem suggested with option 1 is that people who receive lump sum compensation could seek to also obtain NDIS services.

I don't believe that this is the situation under the current NDIS rules. However, to the extent it is this problem could be addressed in a number of ways. For example a condition of lump sum compensation could involve giving up the right to claim upon the NDIS forever or for a certain number of years. This could work in a similar way to the Centrelink Preclusion Period.

5.2 Option 2 – Minimum Benchmarks – Mandatory LTCSS

This option involves the adoption of minimum benchmarks and requires the roll out of a lifetime care and support scheme. It is clearly the anticipated solution to the problem described in the RIS.

However, some questions must be asked about the downsides to mandating participation in a lifetime care and support scheme. Some negatives which I have heard about in talking to NSW participants or their lawyers are as follows:

5.2.1 No choice

Despite the Productivity Commission noting that people wanted choice and control, the catastrophically injured in NSW now have no choice about entering the scheme and no control over how the scheme works and what it delivers.

5.2.2 Care only

The LTCSS only pays for "treatment, rehabilitation and care". They will not pay for any capital costs such as a house, car or computer.

If people require capital items they will need to wait until the finalisation of any other claim that they may have. This may delay rehabilitation.

If people have other needs, such as for social outings or outings that might enhance their quality of life, such as an annual trip to the football, this is not covered.

5.2.3 A lifetime of bureaucracy

People don't usually like dealing with bureaucracies. It reinforces their dependency and lack of freedom.

5.2.4 Likely underutilization

People often give up or don't ask for services rather than have to deal with a bureaucracy. It can be too hard to battle bureaucracy. This clearly isn't the best way to help disabled people.

5.2.5 Devaluing family and carers

The Productivity Commission said that one of the problems it was seeking to address was family and carers being devalued.

The NSW LTCSS does not allow family to be paid for providing care. Thus if parents choose to care for their own child rather than have a stranger come into their home they cannot be paid for this service. They become an unpaid subsidiser of the scheme.

The NSW LTCSS also effectively abolished damages for past gratuitous care. This used to be an important recognition of the long hours of unpaid care provided by family. It has now been lost.

5.2.6 Future likely cuts

There is a risk that actuarial estimates are not correct and in the long run benefits will be cut in order for budgets to be met.

The New Zealand experience of long term government support doesn't hold out much hope as benefits there are considered to be low and have been gradually cut over time in response to budget deficits.

5.2.7 Uncertainty of benefits

The Productivity Commission pointed to the problem that people had no confidence about the future in terms of what services will and will not be available.

The NSW LTCS Authority has unfettered power to declare what is "reasonable and necessary". They can declare certain treatments "excluded". When the Authority makes such decisions there can be no review by the Courts.

This effectively means that entitlements can be stripped away at any time.

5.2.8 Uncertainty of rights

As noted above the Productivity Commission was concerned about people being disempowered as well as having no confidence about what services would be available.

The NSW LTCSS does not allow legal fees in relation to medical disputes over eligibility or for disputes about treatment needs.

It is not realistic to expect non-English speaking parents of a brain damaged child to be able to fully understand, let alone draw up submissions in relation to the adequacy of the care plan drawn up by an assessor. No independent advocate has been set up to represent the catastrophically injured in making applications in relation to the scheme.

Governments need to bear in mind the political risks they face when participants in the government schemes that they establish become sufficiently unhappy to speak out publicly.

5.3 Option 3 - Harmonisation

Option 3 seems to be somewhat glossed over. I understand it to mean that the different jurisdictions would harmonise their schemes.

This would mean that:

- they satisfy the objective of the schemes being no fault
- they satisfy the objective of consistency
- however, they don't necessarily have to deliver a lifetime care and support scheme (like the NSW one).

This is the option that I believe has most merit (assuming my understanding of it is correct).

It could mean that each jurisdiction gives people the option of lump sum compensation or entry into a LTCSS.

The important benefits of this approach for injured people are:

- choice and control
- independence and responsibility

In my opinion this approach better solves the problems posed in the Productivity Commission report.

6. My recommendations based on the three RIS options

Assuming consistent no-fault lifetime care and support must be made available to catastrophically injured workers, I recommend:

1. Go with option 3 - Harmonisation
2. All jurisdictions to provide a LTCSS for the catastrophically injured
3. Those with legal rights to claim compensation have the choice to enter the LTCSS or receive lump sum compensation
4. The discount rate to be lowered and caps on care costs to be removed to ensure a fair choice (adequate lump sum compensation)
5. Provisions to ensure that those receiving lump sum compensation can't also receive NDIS benefits (or at least not for the appropriate length of time).
6. Proceed with the Financial System Inquiry recommended changes to enable financial product innovation to allow all Australians to better manage longevity risk.

7. A bigger picture option to consider

I fully support the NDIS and the social welfare benefits that it will deliver to many disabled Australians.

I understand that governments are keen to see the NIIS proceed on the basis that it will relieve some of the burden of the cost of the NDIS.

However, I think that there are problems with proceeding with the NIIS and there are better solutions which would better relieve the cost of the NDIS.

In my submission above I hope to have pointed out:

- The benefits of lump sum compensation for injured people; and
- The problems and disadvantages of mandating a lifetime care and support scheme.

Below I now wish to elaborate on:

- the problems with proceeding with the NIIS
- the benefits of a different way to achieve financial support for the NDIS.

7.1 The problems with proceeding with the NIIS

If the NIIS is defined as mandating no-fault lifetime care and support schemes for all jurisdictions to cover all those suffering catastrophic injury my list of the key problems is as follows:

- People don't want it – they want the NDIS
- Injured people will lose long held rights in return for uncertain benefits
- Injured people will have less choice and freedom
- Overall we will see less compensation available for most people (as schemes cut benefits at the low end to enable no fault catastrophic cover)
- Overall we will see increased premiums (to cover more people)
- State governments will be setting up new bureaucracies
- State governments will be taking on long-tail open-ended liabilities
- State governments will be taking on new political risks (as those bureaucracies become unpopular)
- The Federal Government will need to look after more people (those who will no longer receive compensation)
- Safety standards will be lower when fault doesn't matter
- Moral hazard rises when the risk of liability falls
- Fewer people will take out liability insurance – given higher premiums and less risk of liability
- Less personal responsibility – the government will look after the disabled

7.2 A different way to achieve financial support for the NDIS

The NDIS is there to provide a better safety net for the disabled.

A concern is that some catastrophically injured people have no legal right to compensation and their care needs are quite expensive.

If we assume that the NIIS will care for 30,000 people in total then it's reasonable to assume that 15,000 people would not have legal rights so in the absence of a NIIS they would need to access the NDIS and their needs would be more expensive than the average NDIS participant.

So essentially our problem is the need to provide "extra" funds to the NDIS to cover about 15,000 people.

Given that these people suffered injury in circumstances where no one was to blame, it makes sense that "society" as a whole covers their cost.

It does not seem fair to make their cost a burden on those insurance premium payers who are doing all they can to reduce risk.

We could ease the financial pressure on the NDIS by:

- ensuring more people contribute funding; and
- ensuring fewer people need to access its benefits.

This NDIS would not need to be accessed by nearly as many people if those who could afford it took out adequate levels of personal disability insurance.

Disability insurance includes total and permanent disablement cover, which pays a lump sum, and income protection, which pays an income stream. Trauma insurance also pays out a lump sum if a particular traumatic event occurs, such as a stroke.

There is much that the government could do to encourage personal disability insurance. This has been set out in the Financial Services Council's 2015-16 Federal Budget submission^{iv}.

They state on page 7 of their submission:

"By using incentives and disincentives, the modelling shows that improving the level of private disability coverage could generate net savings over five years to 2019, to the NDIS of \$10.3 billion and to the DSP \$3.4 billion.

"This includes combined savings from both programs of \$3.7 billion for the Commonwealth Government (after accounting for the incentive expenditure \$5.2 billion) and \$4.8 billion for state and territory governments."

They quote Deloitte Access Economics, who concluded:

"From a policy perspective, private disability insurance, supported by a broader base of consumers, would potentially provide a more equitable distribution of the financial burden of disability insurance across people who can afford to pay and need not fall back on the safety net provided by the NDIS. It would also avoid the crowding out of private expenditure among those who can afford to pay, and reduce financial risk to the Australian government (and by extension, taxpayers)."

In my view this approach means we won't have the abovementioned problems associated with the NIIS.

This approach would free up governments to focus on delivering the NDIS.

My simple summary of the impact of the NIIS as currently conceived on the various stakeholders is as follows:

Federal Government	
- More injured people (deprived of State support) will seek Commonwealth support	☒
- The move away from fault towards no fault could reduce safety	☒
State and Territory Governments	
- New opportunity to amend schemes to reduce benefits	☑
- New obligation to build new bureaucracies and take on long-tail liabilities	☒
Existing liability insurance premium payers	
- Likely increased premiums (to now cover no-fault situations)	☒
General insurance companies	
- New opportunity to encourage legislative cuts to benefits	☑
- New opportunity to hand over long-tail liabilities to government	☑
Life insurance companies, trustee companies and superannuation providers	
- Kept out of the conversation about disability solutions	☒
Injured people	
- Reduced benefits for most people (anyone not in the catastrophic category)	☒
- Loss of choice and freedom	☒
- Mandated lifelong engagement with bureaucracy	☒

I would be pleased to elaborate on any aspect of my submission.

Jane Campbell LLB, BCom, CFP

Sydney

12 April 2015

ⁱ See the 2007 “Review of the income tax exemption for structured settlements”

http://archive.treasury.gov.au/documents/1355/PDF/Division_54_Review_Final_Report.pdf

ⁱⁱ “Shut Out: The Experience of People with Disabilities and their Families in Australia” 2009 National Disability Strategy Consultation Report prepared by the National People with Disabilities Carer Council, ISBN: 978-1-921380-54-9, www.dss.gov.au

ⁱⁱⁱ (1981) 150 CLR 402

^{iv} http://www.fsc.org.au/downloads/file/PublicationsFile/FSC2015-16FEDERALBUDGETSUBMISSIONLR_FINAL.pdf