

28 April 2015

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By email: Niisris@treasury.gov.au

Dear Ms Croke

NIIS – Workplace Accidents Consultation Regulatory Impact Statement (RIS)

Thank you for the opportunity to provide comments to the RIS process on workplace accidents in the National Injury Insurance Scheme (NIIS) and for the short extension in which to provide them.

The Law Council of Australia, the national peak body for the lawyers of Australia, has been a keen and consistent participant throughout the policy formation stages of the NIIS and the National Disability Insurance Scheme (NDIS).

The Law Council does not agree with the premise that lump sum compensation arrangements are inconsistent with the notion of lifetime care and support for injured workers, or that the Draft Minimum Standards require common law or lump sum rights to be removed. Accordingly, the Base Case proposed by the RIS is supported.

Statement of Position

The Law Council has maintained the strong 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 workplace, motor vehicle or other accidents.

Relevant to the RIS, the Law Council stated previously¹:

- all catastrophically injured individuals should receive appropriate quality care and support;
- common law is the most efficient and cost - effective means of determining compensation for injury;
- one scheme is better than two – it would be more effective to simply bring all cases under the NDIS, and allow parties who may have a common law claim to proceed thereby preventing further costs falling to the NDIS;

¹ http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2836_-_Consultation_Regulation_Impact_Statement_-_National_Injury_Insurance_Scheme_-_Motor_Vehicle_Accidents.pdf

- regardless of how any scheme is structured, there should be no disadvantage for any party as a result of introduction of a no -fault scheme now or in the future. That means people should not lose choice, self-determination or their common law entitlements in cross - subsidisation;
- the challenges of providing appropriate quality care and support to catastrophically injured individuals vary between the jurisdictions due to factors including:
 - existing schemes and disability support arrangements;
 - population size and distribution;
 - distances between population and administration centres (geographic challenges);
 - existing infrastructure and availability of a skilled workforce;
 - the existing market and quality of medical and support services;
 - State Government budget positions
 - long term economic capacity of the jurisdiction; and
- a uniform approach to providing appropriate quality care and support based on replicating the system existing in one jurisdiction is at best aspirational and more likely not to be feasible in a federated model due to the challenges outlined above.

The Law Council disagrees that the option of lump sum compensation for care and support for catastrophically injured workers is inconsistent with Minimum Benchmark Standard

The RIS makes the assertion that awards of common law damages or lump sum compensation for catastrophically injured workers are not consistent with the concept of lifetime care and support. It argues that a lump sum for future care needs effectively transfers risks (identified as longevity risk and funds management risk) to the injured individual².

While a lump sum payment does give the injured worker the ability to manage their own care and support needs, the Law Council is strongly of the view that this does not mean that the injured worker does not have provision for their care and support needs. The Law Council disagrees with the premise that the only way a catastrophically injured worker can have their care and support needs provided for is through a centrally-controlled State scheme.

The Draft Minimum Benchmarks proposed in the RIS accommodate common law provision for care and support. Relevantly they state:

“The minimum benchmark is that the NIIS not be required to cover the costs of care and support:

- already funded by common law or statutory compensation; or”³

The proposed Draft Minimum Benchmarks are consistent with position of the Law Council that an injured individual should have choice between a no - fault care scheme or their full common law rights, thereby honouring the principles of the NDIS that promote choice and

² Chapter 5.1

³ RIS, page 24

self – determination. This model is the most equitable to the individual and permits them to pick the approach which will best suit their needs.

The Base Case presented by the RIS proposes that injured workers who have lump sum or common law rights may need to ‘top up’ from the NDIS, where available, to enjoy an appropriate level of cover. The Law Council notes that this is based again on the premise that lump sum provisions do not cater for ongoing needs. This conclusion is not accepted rather, as is acknowledged in the RIS in Chapter 5.1, the worker has choice over the care and support they wish to access.

Additionally, the *National Disability Insurance Scheme Act 2013*, Chapter 5, contains express provisions for recovering costs to the NDIS of care and support provided to any individual with lump sum compensation. This clearly supports the view that the NDIS was intended to sit alongside lump sum compensation arrangements and fulfil the role proposed in the Base Case scenario proposed by the RIS.

Reviewing the Schemes removing the lump sum assumption

If the Law Council's view about Lump Sum and the minimum benchmark is accepted, then this alters the view of compliance of different schemes.

Commonwealth

The Law Council shares Treasury's concerns regarding the cap of a attendant care and agrees that it is too low.

ACT, Victoria, South Australia, Northern Territory, Queensland and Tasmania

These jurisdictions meet the minimum standards

Western Australia

To the extent that the statutory cap on the medical expenses is insufficient for the treatment of a catastrophically injured worker the Western Australian scheme may not meet minimum standards

New South Wales

The New South Wales scheme provides that workers forfeit the right to medical treatment if they elect to pursue common law proceedings. This is inconsistent with the minimum standards.

Given that across schemes most are compliant and the schemes that are non-compliant are relatively few, there seems little point in advancing the Minimum Standard. It is a matter of approaching the relevant governments to request these alterations.

In Support of the Base Case

The history of reaching common provisions in Workers Compensation across jurisdictions is not a happy one.

It is a regrettable reality that the entitlements and benefits for those injured at work in Australia depend on where their accident occurs and who employs them.

For this reason the Law Council has favoured a harmonised approach. We do not agree that setting minimum benchmarks prevents some jurisdictions from offering better benefits.

The RIS further asserts that there is the potential for lump sum payments to ‘run out’ prior to meeting the lifetime needs of the injured worker. The Law Council is unaware of cases of this occurring, but notes that there is no assessment in the RIS of the likelihood or frequency of this risk crystallising. The potential for the risk of lump sum payments ‘running out’ needs to be considered in light of whether it has any actual impact, rather than potential, in order for it to justify removing existing rights as being a necessary and proportionate response.

Further the Base Case minimises the loss of rights and entitlements of workers and the need for jurisdictions to fundamentally re-write their legislation.

We do not accept that injured workers and their families are incapable of managing their own care and finances. This is consistent with the aims of the NDIS itself. We note that the *National Disability Insurance Scheme Act 2013* states:

Section 3 - Objects

- (1) The objects of this Act are to: ...
 - (c) support the independence and social and economic participation of people with disability; and ...
 - (e) enable people with disability to exercise choice and control in the pursuit of their goals and the [planning](#) and delivery of their [supports](#); and

Section 4 - General principles guiding actions under this Act

- (2) People with disability should be supported to participate in and contribute to social and economic life to the extent of their ability. ...
- (4) People with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the [planning](#) and delivery of their [supports](#). ...
- (7) People with disability have the same right as other members of Australian society to pursue any grievance.

The Law Council supports the Base Case proposed in the RIS, noting that a number of the assumptions and arguments presented against this option in the RIS are contestable. The Law Council is firmly of the view that rights of injured individuals should not be removed and that they should be given a choice of lump sum or ongoing care schemes to meet their needs and circumstances.

Yours faithfully



MARTYN HAGAN
SECRETARY-GENERAL