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National Injury Insurance Scheme (Queensland) Bill 2016

Submission No. 008



Headway ABI Australia Submission to Education, Tourism, Innovation and Small Business Committee National Injury Insurance Scheme Bill 2016

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We at Headway ABI Australia (formally Headway Gold Coast Inc.) have reviewed the National Injury Insurance Scheme (Queensland) Bill 2016 in depth and wish to highlight our reservations and concerns relating to various sections and articles within the proposed Bill. In this document, we will endeavor to advise you of our concerns, which affect some 70% of anticipated prospective participants who will suffer an Acquired Brain Injury as a result of a motor vehicle accident. As a core cohort representative body, Headway ABI Australia ask that you please consider our concerns and responses from our direct experience, first- hand knowledge and understanding of the complex issue and circumstances of ABI victims. We are excited for all Queenslanders with the introduction of the NIIS, and hope our input will contribute to and influence the ideal universal accident and injury scheme for this great state.

For the purpose of readability and simplicity we shall raise our concerns on a clause by clause basis.

“Major Concerns with the proposed Legislation”

It is our understanding that the preferred scheme Hybrid B being the underwritten CTP will interact efficiently with the NIIS catastrophic injury schemes, provided that a number of factors are in place.

It is imperative that the catastrophic injury scheme must fully fund all required treatment, support, care and equipment for its participants, irrespective of fault or where fault cannot be attributed.

The NIIS legislative intention to provide any form of access to a lump sum payment for care and support should not be allowed. Where the participant has been identified as sustaining a catastrophic injury from a single vehicle rollover, collision with animals and other participants claims of this nature they should be clearly and specifically identified in the legislation, as not requiring anything other than an NIIS application and assessment process after which the commencement of services and interventions can occur. Care and required services will be provided

under the NIS legislation for as long as the participant requires services and supports. The option of lump sum or compensation by any legal proceedings, which is our understanding was the rational for option B, should be in these circumstances be expressly denied to this participant classification. (It however, should be noted that collision with livestock in all other Australian states can result in proceedings, with the exception of Queensland).

This classification of client must clearly and expressly be advised that no lump sums will be available to them at any time under the NIS legislation, as it is subordinate legislation to the NDIS which is currently changing its legislation to ensure that no lump sums are to be made available.

As these group is specifically excluded from compensation for Economic & General damages therefore any lump sum payment will result in the immediate suspension of Centrelink disability benefits and all other associated Centrelink services under the "Preclusion Period" and depending on the amount of the sum could effectively preclude them from benefits for the rest of their lives. This will result in the individual having to effectively live off their lump sums provided for their care and support for their daily living requirements.

Further, it is absolutely paramount that this legislation is not ambiguous. Legislation which is abundantly clear and unambiguous will enable all parties to understand the eligibility, benefits, scope of services, care, support, equipment and treatment available under the catastrophic injury scheme. Without clear description, the scheme is vulnerable to litigation resulting in spurious claims for items such as gratuitous care or other heads of damages.

It is important to highlight the significant factors which impact individuals, their lives, care needs and lifestyles, on receipt of lump sum compensation such as:

- Lump Sum settlements will ensure Centrelink prescribed period preclusion from benefits will take effect with many, if not all, types of welfare assistance including pensions, child benefits and health care concessions (PBS) forfeited or restricted for many years, in some cases a lifetime. Refer to calculator below:

- <https://www.centrelink.gov.au/RateEstimatorsWeb/publicUserCombinedStart.do?ChosenEstimator=CET>
- Divorce Rates for Catastrophic Injured people are twice the general average.
- Indigenous people in Queensland have cultural financial obligations to tribal elders and family which cannot be avoided and expose lump sum recipients to significant financial loss resulting in insufficient funds for care and support and thus vulnerability to homelessness and poverty.
- Centrelink uses no discretion in their assessment and asset test of lump sum funds which will result in almost all lump sum recipients ineligible to access disability pensions, carer pensions for their spouse or other carers including entitlement to PBS reduced medications and a raft of other benefits.
- Centrelink can provide data identifying the significant proportion of persons who have eroded their lump sum funds within the “preclusion period” and have appealed for reinstatement of benefits. Unfortunately, the success rate to access welfare for this group within Centrelink appeal mechanism is very low.
- It could be determined the primary and long term beneficiaries of a lump sum provision in most cases will be plaintiff and defendant legal services as well public and private trustees who receive significant fees for the management of the participant’s funds which generally exceed the income derived.
- Discount rates applied by the courts on lump sum settlements, legal costs, public trustee and trust management fees as well as access to appropriate accommodation will ensure the catastrophically injured person’s care and support funding is quickly eroded and will rarely be adequate to cover future if not lifetime costs.
- Under the NDIS, Queensland treasury will be required to bear the full cost of the returnees, once their lump sum is eroded and the individual is destitute or in crisis.
- Concern is already being raised under the NDIS concerning lump sums and incorrect or not as purposed utilisation of benefits and compensation funds. “But documents obtained under Freedom of Information laws show the NDIA has suggested a raft of changes to the laws underpinning the program. In a submission to an independent review of the NDIS Act it suggested changes to “ensure the agency has the capacity required to control costs” and “increase the efficiency of the scheme”.
- The act and rules are silent on significant amounts of implementation and operational detail,” the submission said. The NDIA also warned it did not have the power to ensure people who receive compensation spend that money on lifetime care. It said people could instead buy a house and then continue to access the taxpayer-funded NDIS.” <http://www.abc.net.au/news/2016-04-16/ndia-wants-more-power-to-control-costs/7332000>

We draw to the attention of the Committee the 2009 Department of Human Services discussion paper ‘Better Dealings with Government: Innovation in Payments and Information Services’. This discussion paper refers to a recent development in the Australian context regarding policies designated as ‘conditional’ welfare. It identifies as an ‘ongoing challenge’ ensuring that ‘payments are used for the intended purpose’.¹

This committee examined the number of “Proscribed Period” applications for exemption under exceptional circumstances and its findings make very grim reading. The evidence against Lump Sum payments is not

just antidotal, as we see every day, year after year, but factual and hidden burden. Families with the best of intention initially are sometimes overwhelmed by the enormous effort involved in the daily care and support, information, access and coordination of services of a significantly disabled individual which often leads to behaviours of such concern which eventually lead to service provider's having to intervene and seek court orders in respect to financial management of a client funds to ensure that there are sufficient funds available for just their daily needs. Even more alarmingly this occurs to client who are just in receipt of disability pensions, never mind a lump sum amount. Further, we have found many of these requests for intervention are called upon by the client.

Our general manager Julie Williams with 16+ years specializing in ABI and Mental health community service provision and care has provided some illustrations of examples which show the complex circumstances which can adversely affect individuals who have received lump sum compensation payments.

- Male 65: Catastrophic brain injury sustained at 44. Lump sum Compensation received. Relationship breakdown, Client moved out of family home and was left homeless. Crisis resulted in relocating to emergency transitional supported accommodation for many years. Partner's interests and financial assets maintained whilst client care and accommodation remained in limbo for many years. Ultimately moved on to part pension due to inadequate personal funds.
- Male 50: Catastrophic brain injury sustained. Post injury 24/7 supports were established for person by legal representatives to maximise compensation care estimates. On the claim finalizing all 24/7 care and support were ended by family, significant rural property purchased and support was reduced to 8 hours per week.
- Male 18: Catastrophic brain injury- 24/7 supports instigated for high and complex care on discharge to home. On receipt of compensation, family ended 24/7 supports to provide care and support themselves as a result of unexpected significant legal claim costs. Purchase of family property with modifications to sustain son's care from lump sum payment.
- Male 24: Catastrophic brain injury sustained at 18. Devastated parents struggled to manage and coordinate significant legal proceedings for lump sum compensation which lasted 4 years + resulting in their relationship breakdown. Significant burden on family members, often parents, to fight for legal compensation through courts plus manage and coordinate care, support and treatment of their loved one.

We also bring to the Committee's attention to research undertaken in 2002 regarding lump sum payments in the context of Social Security legislation. While the data in the research is not current, its findings are still highly relevant as we believe that it is one of the few studies which examines the relationship between lump sum worker's compensation payments, Social Security preclusion periods and gambling.

The study was conceived following an increase in the number of clients being assisted by the National Welfare Rights Network (NWRN) because they had gambled away their lump sum compensation payments. Due to the operation of Social Security legislation, the recipient of a compensation payment is subject to a Social Security compensation preclusion period. Thus, people can have entirely expended their compensation monies yet not be able to receive Social Security. Too often this results in destitution for individuals and their families. For a copy of the report please contact the NWRN.

Further, in respect to our indigenous community participants who are significantly disabled the situation is dramatically worse, we cite a recent report by Law and Justice Foundation of NSW Final grant report Social security "...For example we are running a number of cases for clients from the Dubbo area living in abject

poverty due to compensation preclusion periods² (sic). More than 50 % of our compensation preclusion period cases from the area are for Aboriginal clients....”

¹National Welfare Rights Network, Submission to Department of Human Services Discussion Paper *Better Dealings with government: Innovation in Payments and Information Services*, 2009. ²A person who receives lump sum compensation may be subject to a period (often many years) during which they cannot receive Centrelink entitlements and are expected to support themselves with their compensation monies. In cases where the person has run out of compensation but is still precluded, the result is absolute poverty. Where special circumstances exist, the preclusion period may be reduced.

Proposed Legislation Review and comments

A Bill for

An Act to provide for a scheme for the treatment, care and support of persons seriously injured in motor accidents, and to amend this Act, the Civil Liability Act 2003 and the Motor Accident Insurance Act 1994 for particular purposes

We seek a definition of “Care and Support” to be included Schedule 1 Dictionary to ensure that a decisive and clear definition is specified.

Chapter 1 Preliminary

Part 3 Interpretation S10

(3) However, subsection (2)(a) does not apply if the treatment, care and support is being provided to a person at a hospital (whether as an inpatient or an outpatient) as part of the services provided by the hospital.

We strongly believe that this section will effectively cause delays to early intervention by service providers and or other parties which could be of significant benefit to the applicant and or their family in this very important time in occurrence of a disability. Clarification of this section is necessary as it actually leaves it open to interpretation that a non-registered provider could provide intervention at this time.

It should be noted that the Community LifeCare & Support Service Alliance proposal currently before the committee for review, would seek to have a representative from the injury cohort, i.e. Vision Australia, attends the hospital to visit with family and scheme participant as early as possible following the event to support, discuss and inform of service options, discharge and care planning, community support services, equipment and support planning, for all. Post Injury, we would work closely with hospital staff and therapists to develop an extensive information, awareness and discharge planning strategy focusing on recovery, functional development and return to community.

Chapter 2 Part 1 Preliminary

12 Persons eligible to participate in scheme

(3) Also, a person is not eligible to participate in the scheme in relation to a serious personal injury if—

(a) before the motor accident resulting in the serious personal injury, the person suffered from another injury or condition; and

(b) the serious personal injury does not permanently increase the extent of any disability experienced by the person before the motor accident.

This section is very ambiguous and need correction and will result in endless litigation with respect to preexisting condition and the amplification of same as a result of a new injury. Can we please recognise that we are dealing with catastrophically injured, not someone with a sore back? We ask that the section be removed in total. Examples of this would be wheelchair bound participants who

currently are employed and actively take part in the community, visually impaired persons, psychologically impaired etc. All currently fit and including in taking part of all aspects of daily life who with the aid of medication of aids have effectively overcome their disability.

Chapter 2 Part 1 Preliminary

(1) A person is a participant in the scheme if the agency accepts the person as a participant in the scheme under—

(a) section 13; or

(b) section 22.

(2) A participant is a lifetime participant if the agency accepts the person as a participant for the rest of the person's life under—

(a) section 22(3); or

(b) section 46(4).14 Participants in scheme

This section needs to clearly articulate that the participant is one as a result of an at fault or non- attributable fault accident and clearly define at this point the differentiation between this classification and possibly attributable fault in excess of 25% participant. Further it should clearly stipulate at this point that no common law actions can be commenced as a result of this acceptance of entry into the scheme.

Chapter 2 Part 1 Preliminary

15 Necessary and reasonable treatments, care and support

Needs

If you were to investigation the biggest complaint against similar schemes in various Australian jurisdiction this section would be almost number one. We should as a matter of simplicity align and define our definition to follow the NDIS one as follows;

Support

4. Reasonable and necessary supports for people with disability should:

- a. Support people with disability to pursue their goals and maximise their independence,*
- b. Support people with disability to live independently and to be included in the community as fully participating citizens, and*
- c. Develop and support the capacity of people with disability to undertake activities that enable them to participate in the mainstream community and in employment.*

See s.4(11) of the NDIS Act

Care

- a. The diagnosis and clinical treatment of impacting health conditions, including ongoing or chronic health conditions, caused or exacerbated by the accident or*
- b. Other activities that aim to improve the health status of participant, including general practitioner services, medical specialist services, dental care, nursing, allied health services (including acute and post-acute services), preventive health, care in public and private hospitals and pharmaceuticals or other universal entitlements, or*
- c. Funding time-limited, goal-oriented services and therapies:*
 - i. Where the predominant purpose is treatment directly related to the person's health status, or*
 - ii. Provided after a recent medical or surgical event, with the aim of improving the person's functional status, including rehabilitation or post-acute care, or*
- d. Palliative care*

Reasonable and Necessary

Defining "reasonable and necessary" has proven an enduring challenge. Determinations of what is necessary care generally turn on the strength of the medical evidence, as encapsulated, for example, in clinical guidelines. Such determinations, however, are rarely straightforward, given the complexity of individual cases. Moreover, the influence of various interest groups has challenge the interpretation of this concept significantly. Determining "reasonableness" has presented even more difficulty. The word implies moderation, suggesting that the resources expended should not be excessive. The issue is not simply whether care is essential, but whether it is advisable given a delicate balance of benefits, risks, and costs. Above all, in making coverage determinations, legislation should be guided by the available clinical evidence. Irrespective of if that evidence is Australian or overseas in origin. With the rate of medical and therapeutically advancement occurring across the globe, it would be ignorant of us not to look at all the clinical data available whilst taking into account the factor of around dignity of risk in the treatment paradigm of the catastrophically disabled. Finally, we must point out that there are precedents of treatment from overseas which have seen 20-year wheel chair bound persons being able to stand and walk after one treatment protocol. Why is it that various authorities concerned with the care and support of the catastrophically disabled cannot see the forest for the trees sometime alarms and surprises us? The longer you are supporting a

person the greater the cost, therefore if interventions can make that person independent and be able to reintegrate into the community, why on earth would you not pursue that avenue with vigor?

This should also extend to what is reasonable and necessary in respect to the care and support of an individual once they are back in to the community or seeking to achieve inclusiveness. Ensure that they have access to the latest research, assessment, therapy and equipment. Any and all technology which including smart housing or vehicle modification and the latest innovative technology relevant to their specific disability which will improve their functional outcome.

Chapter 2 Part 1 Division 2

22 Deciding Applications

(7) A decision under this section must be made within the decision-making period.

We are of the opinion that a decision must be made with 14 working days

Division 4 43 Application to court for order

(1) The agency may apply to the court for an order preventing the participant from being awarded treatment, care and support damages under a final judgment of a court or a binding settlement.

In this an all other relevant sections concerning litigation for the common law relief, it has not been sufficiently spelt out that participants who are "at fault" or where "fault cannot be apportioned" that no common law relief exists. We of course do not wish under any circumstance for this to be confused with persons who are clearly "not at fault" or where the fault can be apportioned to more than 75% against another party, who should be entitled to their full common law rights under legislation. We ask that the committee enact a relevant section where this is clearly spelt out and also ask that no award can be made under any circumstance for Medical, rehabilitation or care and support. Failure to enact this section may result in numerous legal challenges to the legislation, which in many cases present false hope and at worst will be defeatist in the spirit and nature of social legislation which this is purported to be.

Chapter 3 Part 1 Establishment, Function and Powers.

Division 1

60 Agency may agree to perform functions of support entity

(1) The agency may enter into an agreement with a support entity that provides for the agency to perform a function of the entity under a care and support scheme law.

We ask that serious consideration be given to the Community LifeCare & Support Service (CLCS), submission under this committee remit, for consideration in part or whole. Please note the following supportive comments from an eminent specialist in this field who has given his full support to the enterprise.

Adj. Professor Jeffrey Chan, Queensland's first Chief Practitioner Disability and held the inaugural Governor-in- Council appointment as the Director of Forensic Disability dedicated to safeguarding the rights of forensic adults with intellectual or cognitive disability. He was also Victoria's inaugural statutory Senior Practitioner in Disability Services with the responsibility of protecting the rights of people with a disability subject to restrictive interventions and compulsory treatment orders, has communicated his support for our proposal with the following statement:

"Individuals who sustained a catastrophic injury present with a high level of vulnerability and other risks in addition to their injury. As such, safeguarding their rights and that of their families are critical in ensuring service providers are subject to a degree of oversight. Private enterprises are not typically governed by or focused on safeguarding rights as compared to existing community-based support and care services who are subject to human rights standards and accreditation.

As Queensland's proposed NIIS legislation is tasked with, the safeguarding of the safety and well-being of people who sustained catastrophic injury this Community LifeCare & Support Service Alliance initiative is paramount to the legislations successful operation."

Adj. Professor Jeffrey Chan, University of Queensland Adj. Associate Professor, University of Sydney

Your support for our proposed clause that only Public Benevolent Institutions can be considered under this section and article will ensure that

- *The participant receives state of the art care and support*

- *That they will benefit in being exposed to the latest technological innovations in order to achieve best practice functional outcomes*
- *That they will not be exposed to the sometime predatory practices of for profit organisations.*
- *Significantly reduced cost and savings implications on numerous fronts*
- *Knowing that with this support we will be effectively ensuring that many other disabled individuals will also benefit from improved access to services*
- *We are already well established community providers of services to the respective cohorts with significant investment in the Queensland disability community.*

Chapter 3 Part 1 Establishment, Function and Powers.

Division 1 61 Powers

(d) appoint agents and attorneys; and

Please change the word Attorney to solicitors as this wording is incorrect as Attorney is generally only utilised in Australian Executive title or otherwise it is utilised in USA, Canada, South Africa, etc. It is not in common usage for legal representatives in Australia.

Chapter 3 Part 1 Establishment, Function and Powers.

Division 1 65 Advisory committees

We strongly recommend that the act include provision for a committee made up of consumer representatives, as similar to HHNs and PHNs community based organisation.

Part 2 Establishment, Function and Membership.

Division 1 65 Advisory committees

68 Appointment of members

We urge the committee to place into legislation that not less than 4 of the members of the board must be representatives of the respective cohorts which make up the various elements of catastrophically Injured participants. By taking this step the committee can ensure that the best interests of the cohorts is being represented and that this legislation is valid and meetings its obligations as subordinate legislation to the NDIS. We are confident that a board with this makeup would also be up to date with the latest developments occurring in the NDIS and would provide a profound cost saving element to the schemes operations.

Chapter 4 Funding of scheme

Part 2

99 Fixing levy

We propose that the committee consider implement a change to the Bill so that motorists who have incurred more than 7 demerit points pay a proportional higher contribution for their CTP premium for the forthcoming year, should they fail to reduce their demerit to under 7 points in the next 12 months then they will have to again pay a higher premium.

Chapter 4 Funding of scheme

Part 2

101 Recovery from persons in default

It is proposed to the committee that this section be enlarged to encompass companies and or other entities which clearly can be shown to have produced a product or service which results in a motor vehicle accident. It is not sufficient that recovery can only occur against a person when a corporation, company or other entity may have been the underlying cause of the incident. E.g. A motor vehicle manufacture is aware that it has released a defective motor vehicle and it results in a motor vehicle accident in Queensland, prior to a recall being issued.

Chapter 4 Funding of scheme

Part 2**102 Recovery from insurer for interstate vehicles**

(2) The agency may recover, as a debt, from the insurer under the CTP insurance policy the present value of the agency's treatment, care and support liabilities for the participant.

We question the recovery of the debt in present day dollars as the liability of the claim may last 30-50 years? The claimant position may improve or worsen and numerous other costs may incurred. Would it not be better to enter into an agreement that we recover the paid yearly sum plus interest on an annual basis from the liable interstate insurer? C

Division 2 Amendment of Motor Accident**Insurance Act 1994****160 Amendment of s 41 (Insurer must attempt to resolve claim)**

**Section 41(1)(b)—
insert—**

(iii) if the claimant is not a participant in the injury insurance scheme but the insurer considers the claimant may be an eligible person—that the claimant may be an eligible person; and

Can we see this article changed to the Insurer must refer the matter to the Motor Accident Insurance commission to determine whether the claim falls under the auspicious of the NIIS scheme? If he does and the insure objects then the matter should be referred to conciliation for resolution.

Division 2 Amendment of Motor Accident**Insurance Act 1994****161 Amendment of s 42 (Payment of medical expenses etc.)**

(1) Section 42—

insert—

(2A) However, the insurer is not required to make a payment in relation to the claimant's treatment, care and support needs as a result of the injury if—

(a) the claimant is, when the needs arise, a participant in the injury insurance scheme in relation to the injury; or

(b) the needs arise after an amount is paid to the claimant, or a person acting for the claimant, under the National Injury Act, section 44(3)(a) in relation to the injury.

(2B) Subsection (3) applies—

(a) whether or not the treatment, care and support needs are an approved service for the claimant under the National Injury Act; and

(b) whether or not the insurance agency must, under that Act, make a payment in relation to the treatment, care and support needs; and

We ask that the committee consider adding a section which make it compulsory for an insurer to immediately advise the NIIS authority in the even that it takes any action under this section.

**Division 2 Amendment of Motor Accident
Insurance Act 1994**

**162 Amendment of s 51 (Obligation to provide rehabilitation
services)**

Section 51—

insert—

(3A) However, the insurer is not required to make rehabilitation services available to the claimant in relation to the claimant's treatment, care and support needs as a result of the claimant's injury if—

(a) the claimant is, when the needs arise, a participant in the injury insurance scheme in relation to the injury; or

(b) the needs arise after an amount is paid to the claimant, or a person acting for the claimant, under the National Injury Act, section 44(3)(a) in relation to the injury.

(3B) Subsection (3A) applies—

(a) whether or not the treatment, care and support needs are an approved service for the claimant under the National Injury Act; and

(b) whether or not the insurance agency must, under that Act, make a payment in relation to the treatment, care and support needs; and

(c) whether or not the treatment, care and support is provided without charge.

We ask that the committee consider adding a section which make it compulsory for an insurer to immediately advise the NIIS authority in the even that it takes any action under this section.

We thank the committee for considering our submission and are more than pleased to appear before same in order to elucidate on any of the matters raised or any other matter of interest which the committee believe we may be able to assist with concerning the introduction and successful operation of this legislation in practice.

Yours Sincerely

Headway ABI Australia