

**Submission to Education, Tourism, Innovation and Small Business Committee
Workers' Compensation and Rehabilitation (National Injury Insurance Scheme)
Amendment Bill 2016**

We thank the Committee for the invitation to make a submission in relation to the *Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016* (WCR (NIIS) Bill). This submission supplements and builds upon our submissions to the Committee's previous inquiries into the National Injury Insurance Scheme on behalf of the Centre for National Research on Disability and Rehabilitation (CONROD) Griffith,¹ testimony by Dr Ros Harrington before the relevant Committees on 7 March 2016 and 17 February 2016, and our RECOVER Injury Research Centre submission on the *National Injury Insurance Scheme (Queensland) Bill 2015*.²

Key Submissions

1. We welcome the introduction of a NIIS scheme for serious work injuries in Queensland. We believe this is major and important social reform which will improve health outcomes for seriously injured people in Queensland.
2. We strongly support a no-fault lifetime care and support scheme. This is the model that would be consistent with the majority of other schemes across Australia, and meets the draft minimum standards which do not allow for opt-out to lump sum. Client satisfaction with other comprehensive lifetime care and support schemes for serious injury is high.³
3. There is evidence of lump sum dissipation in work injury claims. We do not support provisions allowing 'opt-out' by payment of lump sum compensation.
4. If a hybrid scheme, as proposed by the WCR (NIIS) Bill, is adopted legislation should ensure that as far as is possible, vehicle related and work related serious injuries are treated consistently.
5. If a hybrid scheme is adopted, we welcome the protections aimed at prevention of lump sum dissipation built into the WCR (NIIS) bill. However, we believe there could be further strengthening of these protections.

¹ <https://www.parliament.qld.gov.au/documents/committees/ETISBC/2015/09NIIS2015/submissions/020.pdf>;

² <https://www.parliament.qld.gov.au/documents/committees/ETISBC/2016/NIISQBill2016/submissions/006.pdf>

³ NSW Lifetime Care and Support Scheme Annual Report 2015, <https://www.opengov.nsw.gov.au/publications/15226>, p 4 showed a 82% overall client satisfaction rating.

Evidence of Lump Sum Dissipation in Work Injuries

There is clear evidence that lump sums are prematurely dissipated by some recipients of lump sums. It is incorrect to suggest that there is no or little evidence dissipation occurs. Clearly it does occur, and many stakeholders including those in the community legal sector, the welfare rights sector and the disability sector have reported their concerns in relation to the problem presented to them by clients of their services.⁴ The issue has been acknowledged by a range of previous government reports.⁵ We have previously provided our research (with Dr Genevieve Grant Monash and Professor Prue Vines UNSW) on lump sum dissipation to the committee during its prior NIIS inquiries.⁶ In our study of social security preclusion appeals in the AAT where claimants had dissipated or were in danger of dissipating lump sums, 61% of the claims were work claims. AAT appeals are the ‘tip of the iceberg’. In 2014, Centrelink reported that, in 2013-14 alone there were 692 compensation preclusion appeals dealt with by Centrelink Review Officers (internal review).⁷ The figures provided by Centrelink do not specify how many of these were work claims, however we expect that the proportion would be similar to our study.

There are no existing studies of which we are aware that suggest what proportion of all recipients of lump sums prematurely dissipate. The post settlement experience of claimants is very under-researched. It may be a significant number or a small number. However, even if dissipation occurs in small number of serious injury cases, the risk to claimants and the scheme will be large (eg in the millions of dollars for each dissipation) due to the large quantum of care and support costs inherent in serious injury claims. The right of all recipients to exercise choice and autonomy by receiving a lump sum for future care and support costs, needs to be balanced against the financial risk to the individual, the Queensland government, the Work NIIS scheme

⁴ See for example

<https://www.parliament.qld.gov.au/documents/committees/ETISBC/2016/NIISQBill2016/submissions/008.pdf>
; <http://www.welfarerights.org.au/sites/default/files/news/NWRN%20Research%20Briefing%20-%20IMPs%20and%20CPPs.pdf>.

⁵ See Productivity Commission, *Disability Care and Support* (Report No 54, 2011) vol 2, 807-11.

⁶ Genevieve Grant, Kylie Burns, Rosamund Harrington, Prue Vines, Elizabeth Kendall and Annick Maujean, ‘When Lump Sums Run Out: Disputes at the Borderlines of Tort Law, Injury Compensation and Social Security’ in Kit Barker, Karen Fairweather and Ross Grantham, *Private Law in the 21st Century*, Hart, 2016, forthcoming

⁷ Senate Community Affairs Legislation Committee, Supplementary Budget Estimates, 23-24 October 2014 Answer to Question on Notice (HS 166), 2

(assuming claimant re-entry), and potentially the NDIS (charged back to Queensland)⁸ for each entry after dissipation.

There will no doubt, as suggested by the legal profession, be many lump sum recipients particularly those with adequate financial advice and trustee management, who will not dissipate their lump sum payment. However, great care must be taken not to extrapolate the experiences of individual clients close to the time of settlement, to the experience of the majority of claimants in years following settlement. At this point typically contact with the legal profession has ceased. Our research revealed that the majority of people who appeal their social security preclusion appeals (after the dissipation of funds) were not represented by a lawyer at that time. Seventy percent were self-represented and an additional 7% had non-legal representation. This suggests that while lawyers are heavily involved at the time of personal injury settlement, they are not usually involved when a client has dissipated compensation funds. In addition, where lump sums are managed to avoid dissipation by the reduction in health, care and support services, this may result in poor health outcomes for injured people. It may also result in reliance on ‘free’ care provided typically by female family members with well documented impact on the carer’s mental and physical health, their employment and their long term financial security.⁹

Our research shows many factors which contribute to dissipation of funds are beyond individual control and cannot be remedied by financial advice or by trustee management. These include the impact of excessive discount rates; the costs of irrecoverable funds management fees;¹⁰ divorce or relationship breakdown; deterioration in medical condition; increase in care costs; large deductions of legal fees and other costs from the settlement;¹¹ and the punitive impact of the

⁸ See Heads of Agreement between the Commonwealth and Queensland Governments on the National Disability Insurance Scheme, <https://myplace.ndis.gov.au/ndisstorefront/document/heads-agreement-between-commonwe-1.html>, clause 42.

⁹ <http://www.carersaustralia.com.au/storage/carers-australia-submission-on-economic-security-for-women-in-retirement.pdf>; <https://www.carersvictoria.org.au/facts/impact-of-caring>; AIFS, *The Impact of Caring for Family Members with a Disability in Australia*, <https://aifs.gov.au/publications/nature-and-impact-caring-family-members-di/10-empirical-findings-physical-health-carers>.

¹⁰ For example the impact of irrecoverable funds management costs have recently been highlighted: see <http://www.couriermail.com.au/news/opinion/opinion-little-orphan-annie-needs-states-help-to-reverse-an-injustice/news-story/4700b5ad19fb823d479ddc1e5873dc02>.

¹¹ See discussion in Genevieve Grant, Kylie Burns, Rosamund Harrington, Prue Vines, Elizabeth Kendall and Annick Maujean, ‘When Lump Sums Run Out: Disputes at the Borderlines of Tort Law, Injury Compensation

50% rule adopted by Centrelink pursuant to social security legislation which treats 50% of a lump sum settlement as lost income to calculate preclusion from Centrelink benefits even when it actually relates to lifetime care and support costs. We note that our research revealed cases where funds were dissipated, including loss of houses bought with settlement funds, upon divorce or relationship breakdown. Assets which source from a compensation lump sum (including funds meant for lifetime care and support) are not legally quarantined during property settlement, but enter the joint asset pool for distribution between the parties by their own agreement, or by the Family Court as is just and equitable.¹²

The preliminary results of our current research in progress on the last 5 years of AAT social security preclusion appeals also indicates that purchase of a house with settlement funds including lifetime care costs (often said to be a reason to allow a common law lump sum and give autonomy to a claimant) is a major reason for lump sum dissipation in over half of the cases we are studying. It appears Centrelink and the AAT do not usually consider that it is appropriate for a lump sum recipient to ‘choose’ to expend funds meant for income support and lifetime care and support costs on housing and then return to other publicly funded support systems such as the social security system to seek additional financial support.¹³ The impact of this is that preclusion periods are not generally waived and housing may have to be sold to fund income support and lifetime care and support costs. A similar approach is taken in the NDIS.¹⁴ While purchase of a home with a lump sum representing lifetime care and support funds may seem a sensible financial decision and an appropriate exercise of personal autonomy and choice, it may

and Social Security’ in Kit Barker, Karen Fairweather and Ross Grantham, *Private Law in the 21st Century*, Hart, 2016, forthcoming.

¹² For examples see *Taylor & Taylor* [2016] FamCA 451 (8 June 2016); *Nelson & Ashcroft* [2016] FCCA 1322 (2 June 2016); *Baker & Baker* [2014] FamCA 356 (4 June 2014).

¹³ This is consistent with the relevant Centrelink guidelines on preclusion period, where purchase of assets such as housing with injury compensation is not generally grounds to shorten a preclusion period see Australian Government, *Guide to Social Security Law*, section 4.13.4.10 <http://guides.dss.gov.au/guide-social-security-law/4/13/4/10>.

¹⁴ National Disability Insurance Scheme (Supports for Participants – Accounting for Compensation) Rules 2013 (Cth); National Disability Insurance Scheme Operational Guideline – Compensation – Revise the Plan and Reduce Support – Compensation Received from a Judgement or Settlement; National Disability Insurance Scheme Operational Guideline – Compensation – Recovery of NDIS Amounts – Compensation Received by a Participant from a Judgment or Settlement. See also H Luntz, ‘Compensation Recovery and the National Disability Insurance Scheme’ (2013) 20 *Torts Law Journal* 153.

not be in a claimant's best interest due to the impact of Cth social security legislation and the NDIS legislation.

Consistency with NIIS (Q) Act

We note that there is no current provision in the WCR (NIIS) Bill which would allow buy in to the scheme for those who are seriously injured at work prior to the commencement of the scheme. To allow consistency with the NIIS (Q) scheme for motor vehicle injuries we suggest that the regulations to the NIIS (Q) Act s 13 specify that a person who suffers one of the eligible injuries in a work related accident is also entitled to apply to buy into the NIIS (Q).

We note those who suffer serious injuries at work which are related to serious and wilful misconduct (whether or not at the direction of their employer) will not be eligible for the scheme (Clause 16 amendment to s 130 WCRA, s 232H (2)(b)). While this is compliant with the draft minimum benchmark, we believe it is inconsistent with the NIIS (Q) motor vehicle scheme. For example, the NIIS (Q) scheme does not exclude those injured through driving while committing an illegal activity, as a result of their own drug or alcohol intoxication, through intentionally riding as a passenger with an intoxicated driver, or through grossly negligent driving such as very excessive speed. If clause 16/s 232 H is left in the legislation it creates two classes of injured people within a scheme that will be administered by the same NIIS (Q) agency. Those who are injured at work through serious and wilful misconduct which is not criminal and may not even be grounds for termination may be excluded, while those who have arguably engaged in more morally repugnant behaviour resulting in injury in a motor vehicle will be included. The recent work NIIS scheme introduced in the ACT does not exclude injuries from serious and wilful misconduct.

We note that the proposed s 232X (3) (Court Sanction) and 232Y (Court Order Preventing Election) are similar to s41 (7) and 43(4) of the NIIS (Q) Act. However, we note that 232X and 232 Y add an additional matter for the court to consider in determining whether to sanction an election notice or prevent an election. This is 'the worker's likely legal costs relating to the claim for damages'. We assume this addition is to ensure that a lump sum will not be awarded where legal costs will immediately substantially reduce the value of any lump sum in the hands of the

claimant. We welcome this addition, but suggest for consistency it be added to s 41 and s 43 of the NIIS (Q) Act to extend the same protection to those seriously injured in motor vehicle accidents.

Both the NIIS (Q) Act and the WCR (NIIS) Bill have return to scheme provisions for those who have elected a lump sum and then dissipated it. This is provided for in s 232ZD WCR (NIIS) Bill. There are however differences between the re-entry provisions. In particular s 232ZD seems potentially narrower focussing on whether the amount initially awarded was sufficient to meet necessary treatment and care costs, rather than other possible grounds for dissipation. The provision in s 17 (4) of the NIIS (Q) Act is far less specific resting on circumstances prescribed by regulation and whether there is severe financial hardship (s 22(4)). Again, the conditions for re-entry into the two parallel schemes (both administered by the same Agency) should be same. It will also be important to ensure consistency and the application of the same standards that the determination of re-entry is made by the NIIS (Q) Agency on behalf of the insurer (s 232Z1).

Protections against Dissipation

We welcome the protections in the WCR (NIIS) Bill which seek to protect against the dissipation of lump sums by some claimants. As we outline above it appears the protections in this bill may be stronger than in the NIIS (Q) Act. However, we remain concerned that these protections may not be sufficient to prevent premature dissipation of lump sum payments due to factors beyond the claimant's individual control. We take this view, based on our research, for the following reasons:

- We assume any lump sum payment for future care and support will still be subject to and reduced by the statutory discount rate of 5%. .
- Any lump sum payment for future care costs will be available for the payment of legal fees potentially reducing the amount available for the payment of care and medical costs.¹⁵

¹⁵ QLD Education, Tourism, Innovation and Small Business Committee, *Inquiry into a Suitable Model For the Implementation of the National Injury Insurance Scheme* (Report no 11, 55th Parliament, 2016), www.parliament.qld.gov.au/documents/committees/ETISBC/2015/09NIIS2015/09-rpt-011-21March2016.pdf,

- Unless a claimant is cognitively impaired as a result of an injury, they will need to pay irrecoverable funds management costs for the lump sum, which may contribute to fund dissipation.¹⁶
- Even where a lump sum is well managed and/or where a claimant has a trustee, funds may be reduced as a result of investment failure or poor market conditions such as the global financial crisis.
- The calculation of the lump sum awarded at the time of settlement or judgment for lifetime care and support may prove very inadequate in the long term due to factors such as deterioration in the claimant's medical condition, increase in care and medical costs and increased lifespan.
- The payment of a lump sum to a claimant triggers a preclusion period from Commonwealth social security benefits often for many years in the case of severe injury claimants. Where the funds are paid as part of a lump sum settlement (as opposed to a judgment), the preclusion period is calculated based on what is known as the 50% rule- 50% of the total settlement sum is presumed to be income loss even where the actual amount provided for lost income is much less. This results in claimants being forced to utilise money provided for care costs, as income support
- Lump sums provided for care and support may be spent instead on housing- we discuss the difficulties with this above
- We also have concerns that the ability of the insurer under 232Y to apply to prevent a lump sum being awarded may not be fully effective in practice. There is not a sufficient current evidence base that identifies with any precision the likelihood any particular claimant would or would not dissipate funds. In most cases, in the absence of legal disability, this could only be an intuitive judgment. As we identify above, many of the factors which contribute to dissipation will be risks for any recipient of lump sum damages for care and support.

53 noted that research from the QLD Motor Accident Insurance Commission indicated that up to 48% of claimant compensation can be paid in legal fees and statutory refunds.

¹⁶ See *Gray v Richards* [2014] HCA 40; (2014) 253 CLR 660.

Other Matters

In the event the current hybrid scheme as proposed in the Bill is adopted, we suggest there are further issues which could be considered that may ameliorate further some of the risks of dissipation:

1. A significant reduction in the current discount rate for the lifetime care and support damages portion of the overall settlement.
2. That any lump sum awarded for lifetime care and support costs be quarantined from reduction by legal fees. This could be achieved through an amendment to the Section 347(1) of the Legal Profession Act 2007 to deduct the amount of the lump sum for lifetime treatment and care costs from the overall lump sum prior to application of the 50% costs rule. This would leave legal fees to be capped as a percentage of general damages and economic loss only.
3. The consideration of the appointment of a trustee/funds manager for all lump sums of care and support costs.
4. The consideration of the inclusion of funds management costs for all recipients of lump sums of lifetime care and support costs, not just recipients who are under a legal disability (eg cognitive impairment).
5. The appointment and funding of an appropriately qualified case manager for each recipient of lump sum lifetime care and support costs to provide support in the planning, organisation, co-ordination and expenditure of treatment, care and support services.

As a general matter we also suggest the development of guidelines to supplement the condition eligibility criteria for scheme entry to assist both claimants and medical professionals.

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