

20 January 2014

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001
Email: info@alrc.gov.au

Dear Ms Wynn

Australian Law Reform Commission Issues Paper – *Equality, Capacity and Disability in Commonwealth Laws*

The Financial Services Council (FSC) welcomes the opportunity to make this submission in response to the Australian Law Reform Commission's (ALRC) Issues Paper 44 – *Equality, Capacity and Disability in Commonwealth Laws* (IP 44).

The Financial Services Council represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, trustee companies and public trustees. The FSC has over 125 members who are responsible for investing more than \$2.2 trillion on behalf of 11 million Australians.

This submission provides the FSC's response to issues discussed and questions put forward in IP44 which are relevant to the FSC's life insurance, superannuation and public and private trustee Members.

- Section 1 responds to issues raised in relation to insurance;
- Section 2 responds directly to questions put forward in IP44 in relation to the National Disability Insurance Scheme; and
- Section 3 responds to issues raised in relation to superannuation.

We would welcome the opportunity to contribute further to this Inquiry and would be pleased to meet with representatives of the ALRC as appropriate.

Please contact me on (02) 9299 3022 should you wish to discuss any aspect of this submission.

Yours Sincerely



Andrew Bragg
Director of Policy & Global Markets

1. Insurance

There were several issues identified in IP-44 as being of concern in relation to people with a disability and life insurance.

These included:

- the availability of insurance products for people with a disability;
- the operation of the insurance exemption under the *Disability Discrimination Act 1992* (Cth) (DDA); and
- the transparency and accessibility of the actuarial and statistical data upon which insurance underwriting and pricing occurs in relation to people with a disability.¹

The following responds to these issues.

Availability of insurance products

Life insurance products play an important role in the community as they protect the insured and their dependents against the financial risks associated with premature death, permanent and temporary disability, as well as various specified critical medical conditions. Additionally, annuity products designed to meet retirement and other long-range goals also provide the insured with periodic payments after a specified date.

Despite the critical role that life insurance products play in society, research undertaken by Rice Warner Actuaries has highlighted the enduring concern of underinsurance that exists in the Australian community. Based on current median levels of insurance cover, the level of permanent disability underinsurance² in Australia is \$7,912 billion; and the temporary disability³ financial gap is \$589 billion⁴.

In practice, the financial cost of underinsurance is not borne solely by individuals and families. Rather, there is also a substantial cost to government. For example, the Rice Warner research reveals that permanent and temporary disability underinsurance in Australia is estimated to cost the government nearly \$1.5 billion per year⁵. Given the significant level of underinsurance and the resulting social and economic consequences, it is important that life insurance products remain affordable and accessible for the *whole* community and not only to specific cohorts in the population. For this to occur the life insurance industry needs to be economically sustainable. This is achieved through the ability for life insurers to adopt prudent underwriting and risk assessment of applicants.

Individual life insurance in Australia is generally voluntary in nature and is risk-rated during the life insurance application process by way of underwriting. Furthermore, the fact that the majority of policies issued are guaranteed renewable⁶ means that insurers are contractually obliged to renew the insurance policies annually until the specified end of the term for that policy. This obligation occurs notwithstanding any change in the insured's risk profile. As noted in a separate ALRC report⁷, the general duty of disclosure

¹ ALRC Issues Paper 44 at 221 (p. 70).

² Addressed through Total and Permanent Disability (TPD) insurance.

³ Addressed through Income Protection (IP) insurance.

⁴ Underinsurance in Australia Report December 2012, Rice Warner Actuaries

⁵ Ibid

⁶ Policies are issued as guaranteed renewable meaning that the insurer must renew cover up to the end of the term of the policy subject to payment of premium, regardless of any change in the insured's risk profile.

⁷ ALRC Report 96 at para 25.18

requires the applicant to disclose relevant information up to, and not beyond, the moment the contract is entered into. As such, the life insurance application is only rated once and the insurer, in essence, has only one chance to determine the added risks the applicant brings to the insured population.

Evidence-based underwriting takes into account an individual's risk profile to ensure an equitable treatment of all lives insured. To achieve this, the premiums paid by a specific policyholder reflect the relative risk the insured person brings to the insured population compared to the other existing insured lives. As a fundamental principle of voluntary insurance and the insurer's duty to all policyholders, insurers would assess an individual's application for life insurance based on a range of relative-risk criteria. These criteria would include, among other things, the applicant's age, present state of health, past health history, relevant familial medical traits, recreational activities, and various socioeconomic features. Because individuals with certain characteristics carry an added risk relative to others without those adverse characteristics, ignoring those risks would place an unfair financial burden on, and be itself discriminatory against, individuals without those adverse features. Given that life insurance is fundamentally a voluntary and private contract between *all* policyholders and the insurer, if such differentiation were ignored, it could reasonably be perceived as running counter to the fundamental spirit of that arrangement.

In addition to individual risk-rated insurance described above, consumers in Australia are also able to access life and disability insurance through their superannuation. Group insurance offered through superannuation generally does not require an individual to complete comprehensive underwriting in relation to their individual circumstances as it uses a risk rating pooling criteria based on the employees within the group scheme,, unless additional voluntary top-up cover is obtained. As a result, the majority of employed Australians have access to life and disability insurance regardless of their personal circumstances.

Operation of the insurance exemption under DDA

As discussed in the preceding section, the process of risk-stratification is fundamental in ensuring that all policyholders are treated equitably. By the very nature of risk-stratification, an exemption provided in the DDA in relation to the provision of voluntary insurance and superannuation is therefore essential. As such, it is important to ensure that there is regulatory certainty and clarity on the matter.

The current exemptions under the DDA permit insurers to assess risk and make distinctions on the basis of disability. Such exemptions are governed by conditions that strike an appropriate balance between competing interests of those already insured and those seeking insurance. Ultimately it achieves the fundamental purpose of protecting the rights of all Australians. Under the exemptions, there is a requirement that where an insurer makes a distinction on the basis of disability, such decisions are founded on the grounds of reasonable actuarial or statistical data or other relevant factors.

Statistics from the Australian Human Rights Commission highlight the effectiveness of the current exemptions in protecting consumers and supporting the insurance industry. In 2012-13, of the 1,084 complaints received by the Commission in relation to the DDA just 15, or one percent, related to insurance or superannuation.⁸

⁸ Australian Human Rights Commission Annual Report 2012-13

It is also prudent to highlight the issue of ‘anti-selection’. Anti-selection in insurance is an issue whereby there is a tendency for those with higher risks to obtain life insurance than those who do not have those risks. Anti-selection can have an adverse impact on both the insurer and its policyholders (through rising premiums). This is because of a disproportionately higher chance of loss than originally priced for when the insurer sets its insurance rates. Due to the situation where applicants may often have personal information that insurers lack (information asymmetry), the ability through legislation to develop insurance products and to risk profile applicants during the underwriting process is crucial in addressing the inherent imbalance and mitigating the risk for all. As such, the FSC submits that the existing insurance exemption under the DDA is achieving its desired purpose and should be retained in order to avoid undesired social and economic consequences for all Australians.

Transparency and accessibility of actuarial and statistical data

The pricing and underwriting process adopted by life insurers is evidence-based and is guided by a range of data sources. In the formulation of actuarial tables and the underwriting process, the insurers are guided by both publically available and proprietary data. The data assists in calculating the premiums for various risks, and to risk-profile applicants at underwriting. Local data would include, among other things, those from the Australian Government Actuary, the Australian Bureau of Statistics, and the Australian Institute of Health and Welfare. Together with similar international data, the Australian data is then combined with the level of claims experienced by both the reinsurer and insurer in determining the level of risk each insurer is willing to accept.

The level of claims experienced by both the reinsurer and insurer affects underlying claims assumptions made when formulating actuarial tables. It also assists in the statistical predictions of anti-selection depending on the context of how an insurance policy is applied. For example, the anti-selection risk assumptions in a retail (individual) insurance channel may be different from that of a group insurance channel. Competitive economic pressures are also important in the process, and different insurers may target different market segments through its pricing models.

Given the level of under-insurance earlier expressed, and the basic business motivation to increase the sale of life insurance products, where possible, insurers will seek to provide insurance cover for an applicant, including those with higher risk profiles. This is done through a loading of a higher premium that is based on the assessment of risk factors earlier described. Alternatively, in circumstances where the application of an increased premium becomes cost-prohibitive and is deemed economically uncompetitive, other risk measures that are used include mitigation through the application of a specific exclusion of the relevant risk.

As an added observation to this section, matters of reinsurance should also be considered. Despite being a key part of the insurance value chain, consumers are often unaware of the arrangement between insurers and reinsurer. As noted earlier, the reinsurer plays a role in the overall insurance process; not least through the provision of actuarial tables and underwriting guidelines. Reinsurers also play a key role in ensuring that the life industry as a whole has sufficient capital to be sustainable and that risk is diversified.

Each of the six reinsurers actively operating in the Australian market is a subsidiary/local branch of a larger global parent company. In setting reinsurance terms between insurer and reinsurer, for example in the setting of conditions and prices for insurers, combinations of factors are relied upon by the reinsurers. These factors include:

- The rates charged by the insurer;
- Industry experience studies (where available);
- Individual reinsurer experience studies (at portfolio and individual treaty/agreement level);
- Information about the detailed design of the product that is being reinsured in addition to the insurer's relevant experience; and
- Other data (e.g. medical or workplace/population statistical data, overseas data), where the experience information is not sufficient, for example new benefit type - this may be particularly relevant in relation to the potential for further product innovation. This would typically be publicly available information, apart from overseas data supplied from the reinsurer's parent company internal studies.

The terms of the reinsurance agreement determines the conditions upon which the reinsurer would pay the insurer's losses. In turn, these terms influence the level and type of risk that an insurer is willing to accept when assessing a new application.

Conclusion

Given the high level of under-insurance observed in Australia, it is important that life insurance products remain affordable and accessible to as many people as possible. In order for the life insurance industry to remain sustainable for policyholders in the long term, it is necessary to ensure that policies are appropriately priced and insurers are prudent in accepting insurance risks. For example, Section 48 of the *Life Insurance Act 1995* (Cth) requires that insurers consider all policyholders in the statutory fund when making decisions. This is in order to protect *all* policyholders' interests.

In determining insurance risks, evidence-based approaches that involve predictive modelling of data and risk analyses are used. This is necessary for the insurer in order to accurately estimate life expectancy and to risk-stratify applicants. By nature of the complexity of such statistical approaches, it is unlikely that such information would be meaningful to most applicants. Notwithstanding the technical knowledge required in understanding the assessment process, such information is also commercially sensitive and proprietary in nature.

Overall, the FSC forms the view that the present exemptions under the DDA, on balance, assist in safeguarding life insurance affordability for all Australians and in ensuring life insurance business accountability. The current exemptions under the DDA provide a sensible and balanced approach that protects both the insurer and the insured and should be retained.

2. National Disability Insurance Scheme

Question 12: What changes, if any, should be made to the National Disability Insurance Scheme Act 2013 (Cth) and NDIS Rules, or disability services, to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

Affording people with disability the dignity of looking after their own affairs and exercising legal capacity to the best of their ability is to be supported. However, persons who lack full legal capacity can be open to exploitation by others or subject to their own indiscretions.

Where a person with disability lacks the capacity to make legally enforceable decisions for themselves, the law generally permits their rights to be exercised and protected by others who are formally appointed to do so (subject to certain checks and controls). The statutory guardianship regimes that are in place in

all States and Territories are directed toward protecting the interests and legal rights of those persons with a disability who are unable to make their own financial decisions. They are part of a legislative framework aimed at reducing or removing barriers to the fuller exercise of rights of persons with a disability, and to their more active participation in life and their community.

The NDIS provisions should acknowledge and facilitate the role of legally appointed decision-makers, such as financial managers and administrators. The provisions should not ignore an appointed decision-maker or impede their ability to act in the best interests of the person who lacks capacity, at least to the extent that the relevant NDIS matter/issue falls within the decision-maker's realm of responsibility, for example funding for medical equipment, supports or other lifestyle related purchases.

Our concern is that for potential or actual participants in the NDIS who are unable to make financial decisions for themselves the current NDIS regime may:

- undermine the efficacy of State/Territory guardianship orders by failing to recognise and take account of the powers and duties of properly appointed decision-makers;
- set up a parallel, but less effective and less accountable, system of responsibility for decision making that affects people with a disability;
- leave people with a disability more exposed to abuse or neglect due to the inability of a formally appointed decision-maker to oversee transactions and decisions (made either by the NDIS or an inappropriate nominee) that are relevant to the person's interests as a whole; and
- inhibit access to critical and relevant information, by a duly appointed decision-maker, to the financial detriment of the person with a disability.

For example, if the NDIA were to pay funds directly to a participant, without consulting a formally appointed decision-maker, it may have a detrimental affect on the financial position of the participant - the funds may be depleted or inappropriately accessed by others or the participant's other entitlements, such as Centrelink/Department of Veterans' Affairs (DVA) payment or taxation entitlements, may be unnecessarily detrimentally affected.

The FSC made this point in detail in its submission to the Senate Standing Committee on Community Affairs dated 30 January 2013, in response to the NDIS draft Bill. A copy of the submission is attached as **Appendix A**.

NDIS participants who lack the capacity to make financial and other decisions for themselves are different to other NDIS participants. The NDIS Act, Rules and disability services more generally, should expressly acknowledge and recognise, at each relevant juncture, the role and legal responsibilities of:

1. administrators, financial managers and guardians, formally appointed by a court or tribunal under State or Territory legislation; and
2. any decision-maker(s) formally and legally appointed by the person with a disability, at a time when the person did not lack the relevant capacity to make such an appointment, by way of an enduring power of attorney or appointment of an enduring guardian;

The NDIS regime should recognise these formal, legal arrangements in accordance with, and in a manner commensurate with, the scope of the appointed decision- maker's authority as set out in the instrument appointing them.

Question 13: What changes, if any, should be made to the nominee or child's representative provisions under the National Disability Insurance Scheme Act 2013 (Cth) or NDIS Rules to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

See our response to question 12.

Question 14: What changes, if any, should be made to the nominee provisions or appointment processes under the following laws or legal frameworks to ensure they interact effectively:

- a) the National Disability Insurance Scheme Act 2013 (Cth) and NDIS Rules;**
- b) social security legislation; and**
- c) state and territory systems for guardians and administrators?**

Changes should be made to the nominee provisions in the NDIS Act to recognise a formally and legally appointed decision-maker as the default nominee for relevant participants. NDIS amounts should not be paid directly to a participant, or to a person nominated by the participant, unless the legally appointed decision-maker has consented to that arrangement.

In circumstances where an NDIS participant has a formally appointed decision-maker, the NDIS should pay amounts directly to product/service providers after due consultation with the relevant appointed decision-maker.

NDIS participants and their family members should be compelled to disclose all relevant information about a formally appointed decision-maker so as to allow the NDIS regime to appropriately link-in with State and Territory systems for guardianship and administration.

The existing nominee arrangements for Social Security (Centrelink and DVA) already work well with the legislative requirements for guardians and administrators. Harmony between State and Territory Guardianship and Administration laws and Commonwealth laws is highly desirable so as to enhance the effectiveness of disability services on a national level.

3. Superannuation

In relation to Questions 32 and 33, the FSC is not aware of any concerns or reduced recognition before the law experienced by people with disabilities arising from the superannuation exemptions under the Disability Discrimination Act 1992 (Cth) or other legal frameworks. The FSC would, however, welcome the opportunity to respond if any concerns are raised during this stage of consultation.

Appendix A

30 January 2013

Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

National Disability Insurance Scheme Bill 2012

The Financial Services Council (**FSC**) represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, trustee companies and public trustees.

The FSC has over 130 members who are responsible for investing more than \$1.8 trillion on behalf of 11 million Australians.

On 1 March 2012 the FSC welcomed the Trustee Corporations Association (TCA) members as full members of the FSC under the Trustee policy portfolio. The FSC is now the industry representative body of nine out of eleven private licensed trustee companies and all of the eight Public Trustees.

Within the trustee segment of their businesses, trustee companies and public trustee members act as trustee or administrator for more than 36,000 court awarded financial management orders and trusts with assets of around \$4 bn, as well as 25,000 other ongoing trusts with assets of around \$13 bn.

The FSC commends the Government on its decision to introduce a coordinated, national scheme for the provision of support to people with a disability. The scheme has the potential to correct the shortfalls in the current system that is both unfair and socially exclusive.

We urge the Government to ensure that this new scheme and its enabling legislation are given the time and careful consideration required to make it a success; for too long people with a disability in Australia have been subject to a piecemeal approach to their care and support. It is critical that the NDIS legislation is both comprehensive and tailored to the vast range of people that will be covered by the Act.

We provide the following comments on the draft Bill as Attachment 1 to this letter.

Yours sincerely

EVE BROWN

Senior Policy Manager - Trustees

Attachment 1

DEFINITIONS

Trustee company means: a company licensed under chapter 5D of the Corporations Act or a public trustee.

Represented person means: a person who is represented either financially or otherwise, by an official guardian, financial manager/administrator or trustee, and that guardian, financial manager/administrator or trustee was appointed to represent the person by a court or tribunal.

BACKGROUND

Trustee companies and represented persons

Trustee companies can be appointed as the financial manager or trustee of a person by the court, in relation to a compensation award and sometimes also in relation to the person's whole estate. A trustee company may also be appointed as the financial manager of a person by the state guardianship tribunals. If the guardianship tribunal makes a financial management order in relation to a person then that order refers to the person's estate.

All individuals who have had a financial management or trustee order made in relation to them by a court (including court approved settlement orders) have received compensation for an injury. Our former understanding was that the NDIS regime would not apply to cases of catastrophic injury and that the appropriate scheme would be the NIIS. However, the provisions in Chapter 5 of the Bill seem to indicate otherwise. As such, for the purpose of this submission we will assume that the NDIS regime does apply to persons who have a disability as a result of an injury since injury gives rise to compensation.

In relation to financial management appointments made by a guardianship tribunal these may be made in relation to individuals who have suffered an injury that has led to disability, but there is no 'at fault' party and the person suffered the injury in a state where compensation is not available as there isn't a no-fault scheme. Alternatively, appointments by the guardianship tribunal can be made in relation to persons who have a disability that is not a result of an injury. Financial Management appointments made by the guardianship tribunals are usually in relation to a person's whole estate. The person's estate might consist of significant assets or might only consist of an entitlement to regular pension payments.

In every Australian state and territory except Queensland, a financial management appointment can be made by the guardianship tribunal in respect of an adult or a child (albeit that in some states orders in respect of children do not come into effect until the child turns 18). In Queensland these appointments may only be made by the tribunal in relation to an adult.

The state supreme courts have jurisdiction to hear and settle claims for compensation and to make financial management appointments and trustee appointments in respect of the compensation sum and the remaining estate of a child or adult. A trustee company may be appointed as financial manager/administrator or as trustee. The role of a financial manager is generally the same as that of a trustee, though different state Acts apply to the different appointment types.

The appointment type has a bearing on how the assets of the person with a disability are held by the trustee company. For trustee appointments the trustee company holds legal title to the assets on behalf of the person and for financial management appointments the legal title to assets remains vested in the person. With respect to the latter, the financial manager must use other means to protect the assets of the person with a disability, such as lodging caveats over real property assets.

The appointment type also has an influence on how decisions are made in relation to the person. A trustee must make decisions that are in the best interests of the beneficiary. A financial manager applies a slightly different decision making process. Financial managers act as substituted decision maker for the person whose affairs they are responsible for managing. This means they must make decisions that are in the best interests of the person and also make the decision that is as close as possible to the one that would have been made by the represented person if he or she were able to make that decision. In addition, there are degrees of decision-making for represented persons depending upon the level of disability and the independence of the person.

In all cases where a trustee company is appointed as a trustee or financial manager, in relation to a child or an adult, they are charged with the responsibility of making financial decisions and managing the assets of the person subject to the appointment. This is because a court or tribunal has concluded that the person, due to their disability, is not able to manage their own financial affairs.

Compensation awards can arise under different heads of damage. The two key categories of damage are special damages and general damages. The former generally refers to out-of-pocket expenses that have been incurred up to the date of the trial, such as medical expenses and loss of earnings. These damages must be pled and proven at trial and by nature are usually easy to quantify. The latter refers to damages for losses that fall broadly into three sub-categories: loss of futures earnings; cost of future care and pain and suffering (note there are other, less common, categories of general damages).

THE DRAFT BILL

In our view, the draft legislation is fundamentally flawed because it does not recognise in any of its provisions that there are two distinct categories of people with a disability – those who are capable of managing their own financial affairs and those who are not. Generally speaking, children are not legally capable of managing their own financial affairs, whether or not they suffer from a disability.

The draft legislation should identify these two sub groups of persons with a disability and should adjust its provisions accordingly. It would be reckless for the Government to allow scheme payments to be made directly to persons with a disability who are not able to manage their own financial affairs and who have a financial manager or trustee appointed in relation to them. Similarly, it may be inappropriate to pay NDIS amounts to the parent or carer of a person with a disability who has a financial manager or trustee appointed in relation to them.

We agree that where possible the CEO and others involved with the administration of the scheme should seek to engage the person with a disability in decisions around their ongoing care, however, this engagement should not extend to making payments directly to persons who are not capable of managing financial matters.

It is important that those who will administer the NDIS scheme understand that people with a disability are more vulnerable to abuse and undue influence than others. Unfortunately abuse, neglect and undue influence are sometimes inflicted upon people with a disability by family members, friends and care providers.

State and territory guardianship tribunals may also appoint an official guardian for a person with a disability. The guardian is responsible for making personal and lifestyle decisions, though not financial decisions, on behalf of the person with a disability. Where a state or territory guardianship tribunal has formally appointed a guardian in relation to a person with a disability, the guardian should be the first point of call in relation to any of the non-financial requirements under the Act.

SPECIFIC PROVISIONS

Chapter 3, Part 1 – Becoming a participant

In order to become a participant in the NDIS scheme a person with a disability must make a request to join the scheme in the approved form and must meet the access criteria of either the disability requirement or the early intervention requirement.

Given that there is a prescribed form of application to become a participant and that the form requires the provision of certain information and documentation, it should be explicit that these applications may be made on behalf of a person with a disability by an appointed financial manager or trustee.

We note that the disability requirements include a psychiatric condition, provided a person with such a psychiatric condition requires a level of care that is likely to continue for the person's lifetime. There may be difficulties in defining the many and varied psychiatric conditions and making a decision as to the extent of the impairment on the person who suffers from the psychiatric condition. It is not clear whether the scheme will be available to people who suffer from chronic and episodic mental conditions.

Division 2—Preparing participants' plans

This division talks about the preparation of a participant's plan and what must be included, such as a statement of goals and aspirations. This Division fails to recognise that there are many individuals who suffer from moderate to severe disabilities that are not physical in nature. These individuals would not be able to communicate their goals or aspirations and would not be in a position to 'work' with the CEO to develop their plan.

We submit that there should be clear guidelines as to who is the appropriate person to consult with on these matters. For example, in the first instance the CEO should consult with an appointed guardian. Where no formal appointment of a guardian has taken place then the person's next of kin would be the appropriate individual to consult with. It should be noted that there are many instances where a formal guardian has been appointed to an individual and that guardian is not the person's next of kin.

The provision that focuses on the NDIS rules for statement of participant supports is confusing. In summary, the provision states that the method used to assess what supports will be funded by the NDIS, in relation to a person, will take into account (i) lump sum compensation payments that specifically include an amount for the cost of supports (ii) lump sum compensation payments that do not specifically include an amount for the cost of supports and (iii) amounts that a participant or prospective participant did not receive by way of a compensation payment because he or she entered into an agreement to give up his or her right to compensation.

In relation to (i) it is not clear whether this is referring to compensation sums that specifically include an amount for future medical and care costs. The word 'supports' is too general. Also, is point (i) referring only to compensation sums that are awarded after the commencement of the NDIS regime or does it include those awards made before the commencement of the scheme?

In relation to (ii), it is not clear what bearing a lump sum payment that does not include a specific future care component will have on the funding of supports for the participant through the scheme. If a participant has received a compensation amount for pain and suffering or future economic loss then this amount should not have a bearing on funding, unless of course the scheme is means tested generally. Also is point (ii) referring only to compensation sums that are awarded after the commencement of the NDIS regime or does it include those awards made before the commencement of the scheme?

In relation to (iii) it is difficult to understand how the CEO could, in practice, consider amounts that a participant or prospective participant did not receive by way of a compensation payment because he or she entered into an agreement to give up his or her right to compensation. How would the CEO form a view on the compensation that a court might have awarded to a person if the court had had the opportunity to hear the relevant case?

There are many instances where a person or their representative might enter into an agreement to waive their right to compensation. It is our understanding that this provision encompasses all settlement agreements made in relation to a claim for damages for personal injury.

This provision needs careful consideration as it is the first point at which there is reference to participants waiving their rights to compensation. The definition of compensation and what a person is waiving needs to be very carefully articulated. A person can waive their rights to compensation for loss of future earnings but may still be entitled to seek damages in a civil suit to reclaim other costs. Alternatively, a person may waive his/her right to seek compensation under various heads of damage in return for a settlement sum that seeks to compensate the person holistically.

There are many and varied situations that this provision might apply to and it is crucial that full and proper consideration is given to the words of the provision and how it will operate in practice.

Division 3 - Managing the funding for supports under participants' plans

This division looks at who is to manage the funding of supports under the participant's plan. The manager may be the participant themselves; an approved plan management service provider; the agency or a plan management nominee. Again, there is no acknowledgment of persons who have had a financial manager or trustee appointed in relation to them and who are unable to manage their own financial affairs. While the division envisages that a plan management nominee may take this role the division further provides that it is the participant's choice as to whether the participant manages the funding or some other person does so. A participant is also at liberty to remove as nominee a person who was previously appointed by the participant.

People who have had a financial management or trustee appointment made in relation to them are unable to manage their own financial affairs and cannot manage funding amounts from the NDIS scheme. Save for any specific exclusion within the financial management or trustee order, a represented person has no ability in law to give a valid discharge for receipt of funds paid pursuant to an NDIS scheme. In addition, a represented person has no contractual capacity to enter into agreements with care providers associated with the NDIS scheme.

As stated before, people who lack the capacity to manage their own financial affairs are particularly vulnerable to undue influence. A represented person may indicate that they would prefer NDIS amounts to be managed by a family member or friend, however, there is always a risk that another person has attempted to influence the represented person for their own benefit.

We also note that there would be a conflict of interest in allowing a registered plan management provider to manage NDIS amounts on behalf of a participant who receives care and other services from that provider. Also, where a financial manager or trustee is appointed that person or entity steps into the shoes of the represented person. As such, contracts with service providers in respect of a represented person must be entered into by the manager or trustee on behalf of the represented person as that person has no capacity to enter into an agreement themselves. It may not be appropriate for a financial manager or trustee to enter into an agreement with a service provider if the funds to pay for those services are held by someone else and paid directly to the provider by that third party.

Where a trustee company has been appointed as financial manager or trustee in respect of a person with a disability the trustee company owes that person a higher duty of care than what would be owed by a non-professional trustee. This higher fiduciary duty requires the trustee company to act in the best interests of the represented person and a failure to do so is punishable by a range of court sanctions and other penalties. Where there is a financial manager or trustee appointed in relation to a scheme participant then that person or entity is the appropriate person to manage the funding of supports under the participant's plan.

There is no need for the NDIS rules to prescribe criteria to which the CEO is to have regard in considering the risk associated with allowing a participant to manage the funding for their own plan if that participant is a represented person. In these situations, a court or tribunal has already made a legally binding determination that the person lacks capacity and any funding arrangements or service agreements that the represented person enters into are voidable, at the discretion of the financial manager or trustee.

We acknowledge that under part 3 – Registered providers of supports, a person or entity may apply in writing to the CEO to be a registered provider of supports, such as managing the funding for supports under plans. However, we submit that in cases where a financial manager or trustee has been appointed in relation to a person that the financial manager or trustee should automatically be the person or entity responsible for managing the funding for supports. This automatic responsibility could easily be passed to a family member or other person upon the application of the financial manager/trustee, in situations where it would be in the best interests of the represented person to have some other person responsible for funding.

65 Protection of certain documents etc. from production to court etc.

Provision 65 states: A person must not, except for the purposes of this Act, be required: to (a) produce any document in his or her possession because of the performance or exercise of his or her duties, functions or powers under this Act; or (b) to disclose any matter or thing of which he or she had notice because of the performance or exercise of such duties, functions or powers; to a court, tribunal, authority or person that has power to require the production of documents or the answering of questions.

We query the legality of this provision. If an employee or officer of the NDIS Agency has information that is relevant to a matter in dispute that is being considered by a court, we doubt that the court, in its inherent jurisdiction, cannot compel production of that material.

Division 2—Appointment and cancellation or suspension of appointment

Currently, the Bill allows the appointment of a nominee that is a different person to the guardian or financial manager/trustee of a person. As stated above, in our view, this is not appropriate. In addition, it is not clear whether there is a capacity for more than one nominee to be appointed (such as two different correspondence nominees). There may be circumstances where more than one appointment is appropriate.

In the event that a person other than a guardian, financial manager or trustee of a person, is appointed as nominee, the guardian, financial manager or trustee may have no power under the Act to obtain information about the plan. The management plan has a direct impact on the decision making processes of a guardian, financial manager or trustee, and in normal circumstances, government agencies like the NDIS, would be required to provide information upon receipt of evidence of the appointment.

It cannot be assumed that the care plan and/or other relevant information will be made available to the guardian or financial manager by the participant or nominee. Without the ability to obtain this critical

information, a guardian, financial manager or trustee may be forced to make decisions that may not be in the best interests of the person with a disability. For example, without full information about the plan, a financial manager might separately contract for services in relation to the participant that are already covered by the Scheme.

Chapter 5 – Compensation Payments.

This section applies to a participant or prospective participant in the scheme, who might be entitled to compensation for a personal injury, but who has taken no reasonable action to claim the compensation.

It is not clear from this section whether this Chapter would apply to prospective participants who have already received a compensation award for an injury, who have a financial manager or trustee appointed for them, and who might have suffered a second injury that may result in additional care costs. This should be clarified in the legislation.

The Chapter goes on to say that the CEO can give notice to a prospective participant requiring the participant to make such a claim, provided the CEO is satisfied that the participant has a reasonable prospect of success in obtaining the compensation.

We see several problems with this chapter. It is not clear what kind of claim the CEO can compel a participant or prospective participant to make. For example, can the CEO compel a participant to make a claim for special damages for medical and care costs that have been covered by the NDIS scheme up until the date of the trial only or can the CEO also compel the participant to claim general damages under the sub category of cost of future care? We assume the CEO cannot compel the participant to make a claim under any of the other heads of damage such as loss of future earnings or pain and suffering, but we suggest that this is made explicit in the legislation. A power to compel an individual to take legal action is a significant power. The detail around the scope of that power should be absolutely clear.

It is also unclear whether the CEO can compel the participant to claim against a personal life or total and permanent disability (TPD) insurance policy (typically held through superannuation) or whether this power is restricted to claims against the indemnity insurer of an at fault party.

In addition, it is not apparent upon what basis the CEO will decide whether or not there would be a reasonable prospect of a successful claim. Will this decision focus on the likelihood of success in relation to a claim for special damages for reimbursement of medical expenses up until the date of the trial only or will it also focus on general damages for future care costs? If the latter, will a specified amount in the court award for future care costs be paid to the plaintiff/participant or their representative? If so, will the participant or their representative need to use this lump sum payment to repay the NDIS for ongoing care costs provided through the scheme?

It is also not clear whether amounts that have been paid from the NDIS scheme up until the date of the trial, which will be pled and proven as special damages, will be paid to the plaintiff/participant or their representative first for them to repay to the NDIS or whether these amounts will be reimbursed directly to the NDIS through the court process.

We have concerns also with the power generally to compel a participant to bring an action. Where a participant brings an action by his or her next friend or litigation guardian it is that person who bears the risk of losing the action and having an adverse costs order made in relation to them. If the CEO of the NDIS has the power to make a determination as to the likely success of a claim and to compel a participant to bring an action, then in these specific circumstances the CEO should act as the participant's litigation guardian and should bear the risk of an adverse costs order.

It should also be made explicit in the legislation that the NDIS is not entitled to any funds, whether by reimbursement of past NDIS amounts or otherwise, from a participant's award of an amount under the other heads of damage, such as future loss of earnings, loss of enjoyment of life and pain and suffering.

There is no mention of how the scheme will apply to persons who have previously been awarded a compensation sum for future care costs. Some of these individuals will have large sums that are managed by a trustee company. The trustee company will have its own estimates of the ongoing care costs for the person and will have an appropriate investment strategy in place in order to sustain funding of those costs. Will these people be able to participate in the NDIS scheme? If so, given that the scheme appears not to be means tested, does this indicate that the trustee company will no longer be required to plan for and fund any further care costs? If not, we assume the trustee company will carry on with its role of planning for and funding the person's care costs, however it is also unclear what will happen to those persons who received a previous compensation amount and whose compensation sum has been depleted over the years.

Part 3—Recovery from compensation payers and insurers

It is unclear whether the ability to recover compensation from insurers is restricted to those cases where there is a judgement or settlement order. We assume recovery pursuant to personal life/TPD insurance policies, which are typically settled without the need for a court judgement as the amount payable is determined by the terms of the policy, will not be included. It is difficult to assess the impact of the regime without clarity as to whether these types of compensation payments would be included or not. This could be clarified in the definition of compensation.

We make the point that there is scope for the NDIS Bill and Rules to apply a similar approach to assessing disablement and providing support as is currently exercised by life and disability insurers. A significant portion of individuals seeking to become a participant in the NDIS may also be entitled to claim against a personal life/disability insurance policy (note that these kind of personal insurances are commonly incorporated within superannuation). Much of the evidence necessary to assess the individual's eligibility as a participant will be similar to that used by insurance companies to assess claims. There is an opportunity to consider ways of streamlining approvals in both systems, based on the information held, so as to create synergies that would likely improve the experience of the relevant person with a disability.

We also note that it is common for an insurer to reduce the income protection benefits paid for temporary disablement against any income received from other sources, such as periodic Centrelink payments or a lump sum compensation payment. This issue must be considered in relation to the NDIS scheme, especially in regard to compensation payments that may or may not be recoverable by the NDIS.