Fraser MacLennan-Pike is General Counsel and head of Avant Mutual Group, where he also has responsibility for its advocacy function.

He has held senior legal and commercial roles in Australian Insurance companies since 1999.

He prepared Avant's submissions to the Productivity Commission and Senate Committee in relation to the proposed NDIS/NIIS, and is a member of the Medical Misadventure Advisory Group established by Minister Bill Shorten and chaired by Dr Andrew Pesce.

Thank you very much for the opportunity of speaking tonight. I am very passionate about the NDIS and the NIIS. I am general counsel at Avant and we have done a lot of work on behalf of our members in relation to these schemes. These are my own views I am expressing and I am happy to answer to any of them.

You will find during this presentation that there are more questions than answers in relation to where we are with these disability schemes. I will give you a brief snapshot of where we are, what the launch sites are doing and intended to do, what the full roll out will look like, what the current legislation looks like and, in particular, what are some of the issues arising from the NDIS legislation. There is no NIIS legislation as yet as there has been a focus on the NDIS, but that legislation is now being worked on through Dr Pesce's group.

I will talk briefly about the NIIS funding and how the NDIS is proposed to be funded, aiming to show you the picture is not as rosy as has been painted in the recent weeks since the budget. I will also touch briefly on some of the main medico-legal implications of the NDIS.

Why should we care? Why do we care? We, at this meeting, may be some of the few people who do care, according to recent newspaper articles. One such article "Budget fails to fire up the voters" (AFR 17 May 2013) states the government's signature policies, disability care included, are poorly understood and disability insurance is of little relevance to those who are not directly affected. Further of 1,000 voters polled on budget day, of the 84 percent who nominated health as one of their top five election issues, only 7 percent of them rated national disability as one of their top five health issues. These are people who think health is very important yet can't really find a place in their heart for national disability insurance. In fact, it ranked 13 out of 15 of the health sub-issues presented to them to vote on, beating only indigenous health and other issues as an issue. Medical practitioners and medico-legal lawyers such as us present tonight should and do care.

The launch sites starting up on 1 July 2013 are the Hunter region in New South Wales (including Newcastle); the Barwon area in Victoria (including Geelong); South Australia (children aged 0-14 years) and Tasmania (young adults aged 15-24 years) and that pilot scheme will be phased in over the next two or three years. The headquarters of the NDIS, or DisabilityCare as it is now known will be in the Geelong region. The Ford factory closed down and the NDIS jobs rolled into Geelong, with the support of both the Labor Party and the Coalition. I understand that there are about 450 head office jobs mooted for the corporate office of this infrastructure
in Geelong. Then starting July 2014 we have the launch sites in the Australian Capital Territory and the Barkly region in the Northern Territory (including Tennant Creek). Western Australia is still not a party to the launch sites or to the proposals for the full rollout.

It is anticipated that by the end of the 2015-16 year there will be approximately 26,000 people who will potentially benefit from these launch sites. Twenty six thousand people is a significant size launch site and it is spread geographically. Given these numbers what funds have been committed to those launch sites. The Federal Government has committed $1

billion which has been matched by the States' contributions, that is $2 billion committed over that three year period. This $2 billion divided between 26,000 people equates to $20,000 a person a year. When the costs of infrastructure, new IT systems, employing and housing the 450 people in Geelong et cetera are deducted, that $20,000 a person a year quickly drops. Whilst initially $2 billion sounds a lot of money for those 26,000 people, what will they actually receive from those sites. Further we do not know how valid those sites will prove to be as a good testing ground for the further rollout of the scheme. We have to wait and see, trusting we will get through those launch sites with good things found as we transition through them.

There is no real program for what happens at the end of the three year period nor any real benchmark to achieve. There is no test to determine whether the full rollout should go ahead or not. No-one has thought that far ahead. It is just assumed that there will be a full rollout. At the end of these launch sites there are as yet no criteria as to how to determine whether they were a success or a failure, whether they cost too much or not enough, whether they treated the right people and so on. We can but wait and see.

It is envisaged the full scheme rollout will be a staged one with full rollout by July 2016 in the Australian Capital Territory (assisting 5,000 disabled persons); by July 2018 in New South Wales (150,000) and South Australia (33,000); and by July 2019 in Tasmania (11,000), Victoria (100,000), Queensland (97,000) and the Northern Territory (7,000). The full scheme rollout does not occur until the end of the 2018-2019 year. The sum total of all of the rollouts will mean that 90 percent of the population is covered. As noted above Western Australia has yet to commit to the scheme. It is apparent with a lot of this that the numbers are very flexible even rubbery with no great certainty. The expectation is between 410,000 and 460,000 people will get some direct benefit once the scheme is fully rolled out. What the actual number proves to be is difficult to forecast as there are currently no eligibility criteria for the scheme meaning it is not known who will and who will not covered by it. Further the nature of the supports that people will get from the scheme is not known so we don't know how much it is going to cost. Any figures currently quoted as total funding costs and numbers of people who will be benefiting are unfortunately a "finger in the wind exercise" at this stage.

The National Disability Insurance Scheme Act 2013 in its 227 pages is a high level framework piece of legislation for the administration and governance of the NDIS. It says very little about the functioning of the scheme. It says, for example, there will be an NDIS. It says there will be some administration and some governance. It sets up the offices, the boards and all the infrastructure that is needed to run the launch transition agency. It doesn't then talk about the full rollout but at the moment just talks about the launch transition agency being formed. It has a board, an independent advisory council and, importantly, because a lot of powers rest here, a CEO, David Bowen. David is a well respected man heading up the scheme with a lot of hope resting on his very broad shoulders.

There is not a lot of detail in the act. It does cover a lot of areas and in that sense is comprehensive. However it doesn't drill down very far into the detail leaving it to some rules to provide further guidance. These rules are important because they are legislative instruments that can be changed at the will of the Minister. It is important to bear in mind that it is the very high level framework which is enshrined in legislation and a lot of the detail is very variable underneath. Certainty of support and certainty of deliverables is essential in the long-term care of people with severe disability. The fact that these can come in and out via rules at the whim of a Minister doesn't provide the certainty that those living with a disability would have liked and as the Productivity Commissioners recommended.

There are rules in the legislation but they are short on detail necessitating a further set of guidelines and reliance on how the CEO actually brings this to life, to be able to understand

how the scheme is working. The rules do not provide chapter and verse on what is going to happen over the life of the launch sites and certainly not into the rollout period.

The rules are still draft. They have been out for public consultation but are by no means finalised. In particular there is the rule about how compensation will be dealt with looking at where people who join the scheme may or may not have to contribute any compensation they get from civil awards or from other schemes back to the NDIS to pay for the support they get from it. That is an eagerly awaited rule and that is due out next week.

There will undoubtedly be gaps in what the rules cover and there will be a lot of discretion left to the CEO and the Act does give the CEO a lot of discretion. As yet there is no guidance on how the discretions will be exercised. That will be a question for David Bowen and his team when they get under way.

Is the scheme ready for a 1 July 2013 launch? Absolutely not! Unfortunately whilst we talk about the 1 July launch and we are all very hopeful of the new regime, there is not a lot happening at the moment. It will not be possible to apply to join the scheme on 1 July because there is no application form. Not only is there no form, there is nowhere yet to deliver the form and no-one actually employed to actually receive it or do anything with it. Those essential pieces of infrastructure are being put in place and that is where the initial start-up costs are for the scheme. As yet they are not in place so there cannot be a lot to change on 1 July 2013. It will be a very gradual rollout. It will probably be the same type of rollout as for the Patient Controlled Health Record (PCHR). It will be there and flagged as a great thing but what you can actually do with it on 2 July 2013 is unknown.

Does the NDIS Act legislation reflect what the Productivity Commission recommended? The Productivity Commission did recommend two schemes and there are two schemes. There are arguments for and arguments against but the fact is there will be two schemes when the NIIS is also up and running.

It was also recommended that NIIS be funded by levies on insurance premiums and that is the position. Also cerebral palsy is to be covered by the NDIS and that is critical in the way it will operate. The NIIS is left to cover the catastrophic injuries in the workplace, motor vehicle accidents and the like.

Emphasis on self-directed funding and social inclusion; a streamlined assessment process to identify individual needs and aspirations; and early intervention as a key part of the schemes to reduce community costs are three really important points about which we still don't know the position. Hopefully all three will be included but we still don't know that. Self-directed funding and social inclusion are a vital part of this machinery. It is not just about the money, it is not just about the support, it is about social inclusion, about bringing people with disability into the community. That is critical but until the scheme is up and running it will not be known whether it in fact happens.

There is supposed to be a streamlined assessment process to let people into the scheme very easily so they don't have to go through their lawyers and the courts before they can start to receive what are often very important early interventions. Again, it is not known whether that will happen but it is catered for in the legislation.

What were the Productivity Commission's recommendations that were not acted upon? The Productivity Commission recommended that as much of the key features as possible was enshrined in the legislation to make it as certain as possible and as hard to change as possible, but that has definitely not happened. There is no Office of Inspector-General to oversee the decisions made by the CEO, who now has very broad powers. As the legislation now stands to review a decision of the CEO the first point of appeal is one of his staff, which

isn't particularly helpful, and after that it's the AAT. There is no separate division of the AAT that specialises in disability matters, so appeals are going to prove problematic without a separate office.

The Commission said that the Federal Government should be the sole funder of the NDIS. That is clearly not the case. The Federal Government is not the sole funder and won't be the sole funder of the NDIS by any means. Importantly, and this is where it is crucial that cerebral palsy and birth related incidents and conditions as well have come into the NDIS, the Productivity Commission recommended that the common law rights to sue for future care costs in cerebral palsy cases be extinguished. That hasn't happened and for those who pay medical indemnity premiums I will explain later why that decision has made a big change in the outcomes.

There are a number of discussion points on what are the real issues in the NDIS legislation. Those following are broadly what I believe are the issues. It is still not known what the eligibility criteria are. It is supposed to be a no fault scheme. How can anyone calculate that 410,000 people will be coming in when it is not known whether certain types of visual impairment or autism for example will be included. There is a very long list of eligibility criteria in the Act. However it gives little practical guidance as to who is in and who is out and who will get support from the scheme. This needs to be addressed.

Will the NDIS facilitate early intervention? The legislation could have been better drafted. Those familiar with the New South Wales Lifetime Care Scheme will be aware of the arrangement where you can have an interim participant and then a permanent participant, so that you can come in for two years on no great barrier. Almost anyone with that injury can come into that Lifetime Care Scheme and after two years there is an assessment done of their needs for the future.

Whilst it is possible that the CEO will apply the eligibility criteria to let people into the scheme early when they need to, we will have to wait and see whether this in fact will happen. It is crucial with conditions such as cerebral palsy where that really early intervention is critical in determining the long-term outcomes for both the patient and the community and the cost of their care in the future. Some of these early intervention techniques from the Cerebral Palsy Alliance are crucially done within six months to 12 months of birth. If time is wasted during that period going through doctors' assessments and medical assessments and appeals and trying to work out whether a child is in or out of the scheme, it will be too late.

There is an element of the legislation which gives the CEO the right to compel a participant to sue. This is of concern since some members of the public who have chosen not to sue may wish to become participants in the scheme and can then be directed by the CEO to actually bring and pursue those actions when perhaps they would not have otherwise done so. If they are successful in those actions having taken the financial risk and all the stress and strain of that litigation on the way through, their reward is having to pay the compensation back to the scheme. The situation could still exist where the Keeden Wallers of this world still have to go through a court system with the stress and strain of litigation just to participate fully in the scheme. It is difficult to believe that was what the scheme was intended to do and that's what the Productivity Commission intended it to be like.

It is not clear from the Act at the moment whether doctors will be required to be registered as service providers under the Act. The type of care provided by a GP or a specialist is excluded from cover in the Act, but doctors may be required to do examinations of patients to determine eligibility et cetera. We don't know what the regime will be for that, whether they will be required to register separately with the scheme or whether AHPRA registration will suffice. This needs to be clarified.

One thing that is important in that area is that if doctors do have to register separately, there is a notification requirement there, like a self-management notification, which is if you report to an authorised person, which would include AHPRA, you would have to tell the scheme and the scheme could then remove your rights.

A if not the central crucial issue of the schemes is their funding particularly when the eventual costs are unknown. The Productivity Commission said that it would be about $13 billion, which was the existing $7 billion nationally, plus an additional $6 billion. Obviously a large spend is required but without explanation, the figure is now $22.2 billion. That was the amount stated in the Federal budget with a Federal Government commitment to that of $11.7 billion in 2019-20, about 53 percent of that cost. The rest of that cost is borne by the states. The Productivity Commission recommended it be funded by the Federal Government by the broadest possible tax basis; in fact the states have to fund a lot of this. This contribution from the states may act as a disincentive to the NIIS being introduced. Time will tell. There are no details of course from the states and territories as to how they will fund the $9 billion, but one assumes it is the same way they fund their existing commitments at the moment.

There will be an increase in the Medicare levy of 0.5 per cent from 1 July 2014 to fund the Federal Government contribution to the NDIS only. It does not include the $685 million for the NIIS. About $5 billion to $6 billion a year will come from that levy that is about a quarter of the cost of the scheme. Half of the cost will come from the states and the other quarter, very worryingly, comes from what are called other long-term savings. What these “other long-term savings” are is not specified. They might well include the Federal Government reviewing the existing medical indemnity schemes. The word from the Department of Health is those schemes will be reviewed in 12 to 18 months' time. Those schemes only cost the government around $50 million at the moment, so it will be a drop in the ocean compared with the funding costs. None the less it is reasonable to expect there to be significant pressure on the existing high cost claims scheme and premium support scheme in the next few years.

The funding that was put up in the budget is based on a precarious funding tower illustrated graphically in an excellent DisabilityCare Australia document available on the Treasury web site under the budget. It does not show the cost of DisabilityCare Australia, but only the Federal Government's contribution of $11.7 billion. It is for the State Governments to provide the funds on top of this to meet the $22 billion total cost.

The 0.5 percent Medicare levy will by 2018-19 fund slightly more than half the Federal Government contribution but falls on a business as usual basis to about a half of the contribution by 2022-23. Reforms to retirement incomes is expected to provide about a million dollars annually with no great detail as to how this will be achieved. Private health insurance reforms, that is the changes to the private health insurance rebate that were put through last year has been double counted. There was no real purpose for that sort of means testing of the rebate under social justice, but now it has been saved it will be allocated to the disability scheme. Finally there is absolutely no explanation of what “other long-term savings” will be.

The same DisabilityCare Australia document estimates that in 2019-20 contributions from States and Territories who have agreed to fully roll out DisabilityCare Australia will include New South Wales more than $3.2 billion; Victoria more than $2.5 billion; Queensland more than $2 billion; South Australia around $750 million; Tasmania around $230 million; Australian Capital Territory around $170 million; and Northern Territory around $100 million. Worryingly it also states the Commonwealth, State and Territory governments’ contributions will be reviewed in 2017. As not much will have happened by 2017, how there can be a funding review in 2017 is unknown. What will be done as a review is unknown as is how the

fund will look after that.

To conclude then with the same question raised at the beginning, why should we care? Mention the NDIS and the first question, particularly from obstetricians, is will my premiums go down? Under the Productivity Commission's model there would have been some hope that medical indemnity premiums would have gone down, because those future care costs and the right to sue for them would have been extinguished. Anybody in need of future care would have those needs met through the scheme and not through litigation. However the way the legislation is drafted means this scheme is a safety net scheme, not a front line scheme and it sits behind the common law scheme. This will see people with injuries suing and going through the court system to obtain a lump sum damages payment when in fact the whole idea of this scheme was meant to be they didn't have to go through that process.

Why do medical indemnity premiums stay stable or perhaps even go up under the scheme? It is because of the NIIS funding. If $685 million is about the right cost and medical accident does in fact account for about 11 percent of that, $30 million needs to come from medical indemnity premiums to fund the medical accidents which involve doctors in private practice. Our total industry premium pool is it about $300 million. That equates to a 10 percent levy on premiums to fund the NIIS.

It was hoped that the future care costs component would disappear from the NDIS and that amount would have been about $30 million so there would have been a trade-off of what doctors benefited from by reduction in premiums on the NDIS would then be spent on the NIIS and doctors would be net neutral because those two $30 million figures cancel themselves out. Unfortunately the way the Act has come in, those future care costs do not disappear now, so the premium pool for doctors won't go down by that $30 million, but stay roughly where it is.

Give an actuary any element of uncertainty and an actuary will tell you that you need to keep more capital against the risk. There is now a risk that the CEO will direct people to sue who wouldn't normally have sued. There is also the ability for a CEO or the Federal Government to step into the shoes of a participant and sue on their behalf and one might expect the government with its deep pockets to sue more. There may be an incentive for more legal action funded by government and run by government, which may give rise to a slight increase in medical indemnity premiums.

With the new system would Keeden Waller still have to go to court? There are two sets of cases involving Keeden Waller and his parents, one of which went to the High Court and one which is at the Supreme Court at the moment. My view is that Keeden Waller shouldn't have to go to court and his future care needs should be met by the scheme. As it has eventuated the combination of the attractiveness of a lump sum payment with the fact that the CEO can sue on your behalf and make you go through that process, together with the fact that common law rights haven't been extinguished will make it far more likely that those in his position will need to bring an action and put themselves under the same stress that Keeden and his family have been under for many years. This has been my single biggest disappointment with the scheme.

The scheme was never going to deliver a perfect outcome. There would always still have been litigation to recover for other heads of damage such as past care, gratuitous care and economic loss. The large component of a civil action that results in the payment of $8 million damages is about $5 million or $6 million of future care costs and the stress and strain that comes from that could have disappeared and unfortunately it hasn't. Treasurer Swan said in his budget speech that the NDIS would put an end to the cruel lottery of the common law system. It will not in its current form.

To end with some unanswered questions: What will the launch sites establish? How will they be funded? What data will be collected? What decisions will be made at the end of those launch sites in terms of the full rollout? Where will the remaining funding come from as there seems to be a fairly large gap and importantly what would the Coalition do if it was elected?