

Productivity Commission Inquiry into a National Disability Support Scheme

“Treat disability related to injury the same as other disabilities”

Second Submission

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Executive Summary

1. The NDIS should provide entitlement based benefits for all people with disabilities who need support
2. The NDIS should provide support for people with disabilities related to injury on the same basis as for other people with disabilities
3. The NDIS should be funded by both the Commonwealth and the States, with each sector at least maintaining its current financing effort, including their existing own funding for injury compensation systems
4. All injured people should be entitled to Medicare benefits
5. Each State and Territory should provide a no fault income replacement system for road injuries and work injuries
6. Fault based injury compensation systems should be abolished at the commencement of the NDIS

Introduction

The draft report Disability Care and Support contains an exciting vision of improved disability support for all people with disabilities, with provision as an entitlement to every Australian based on their need for support. This vision is strongly supported. It is quite unacceptable in a prosperous and fair society, as exists in Australia in 2011, that social security and universal health insurance provide a wide set of entitlement benefits, but that people with support needs due to disability have heavily rationed benefits, and that families bear the load of support in many cases, often with no or totally inadequate assistance.

The Commission's report is a once in a generation opportunity to correct long standing injustices to people with disability and the injured, and to remove the inefficient and inequitable support and compensation systems that have grown up piecemeal over a century or more. The Commission is urged to build on its draft proposals and so provide a base for governments to grasp the opportunity provided for the complete reform that is necessary.

Joint Commonwealth-State funding

Recommendations 12.2 and 12.3 are not supported. Financing the National Disability Insurance Scheme should be a joint Commonwealth-State exercise (State/Territory is implied by the term 'State' throughout this submission).

The current structure of the Commission's proposals requires Commonwealth funding alone for the NDIS. States would have a decrease in their financial requirements, and the Commission recommends changes in State taxes as a consequence. However State contributions to the injury scheme (NIIS) are proposed.

Leaving aside the practicalities of this major recasting of Commonwealth-State financial arrangements and State tax structures, the result is a complete separation of the NDIS and the NIIS. This leads to undesirable consequences.

First, the eligibility thresholds for the two schemes are quite different. Eligibility should be based on need for support (see submission by Ros Madden and colleagues) without regard to the health condition giving rise to the need for support. But for the NIIS, a catastrophic injury is required. This would generally be a more stringent threshold, and is not based on need for support but the type of injury (the draft report states that 'catastrophic injuries mainly comprise major acquired brain injuries, spinal cord injuries, burns and multiple amputations'). Many people with a need for support would be excluded from the NIIS, and left to cope with the existing disjointed and inadequate insurance systems across the country, or alternatively seek assistance through the NDIS.

A **design principle** for new disability support arrangements (both NDIS and NIIS) must be that the source of disability should not be the matter determining eligibility or support provided. Need for support should be the criterion.

Second, the limited coverage of the NIIS produces the most undesirable outcome that existing systems need to be left in place for those who have suffered a non-catastrophic injury and who have a need for support. Chapter 15 of the draft report comprehensively demonstrates the inadequacy and waste involved in those existing injury compensation systems that are based on fault. A priority of the new arrangements must be to ensure that these systems are supplanted as the source of disability support for injured Australians.

Third, the financing task for the Commonwealth is higher than it needs to be. States currently provide significant own source revenue for disability support services, as well as earning or mandating significant premiums for injury compensation

schemes. All the existing revenue sources should continue to be tapped for the new disability support arrangements (including for disabilities arising from injury), especially savings available from the elimination of fault based compensation systems.

Injury Compensation reform: Recommendations 16.1 to 16.5

Chapter 15 explores in some detail the overwhelming flaws of the common law system for accident compensation: the lottery nature, the inadequate compensation, the high legal costs, the disincentives to rehabilitation, and the removal through insurance of any direct safety incentive.

These findings mirror those of numerous earlier studies in Australia, from the 1974 Woodhouse Report onwards, and in other countries.

The conclusion is that there is an undeniable need for reform of injury compensation systems based on fault.

However there is no systematic analysis of the strengths of the reformed systems in Australia, notably the Victorian transport accident system.

The reform proposed is limited to catastrophic injury, a NSW innovation. While valuable in its context in NSW, a better model would be the Victorian transport accidents system, altered so as to mesh as completely as possible with the NDIS.

This would allow a complete abolition of common law actions in fields covered by the injury scheme.

Mesh injury compensation and the NDIS

In light of the condemnation of fault based compensation arrangements, Chapter 16 argues for no fault compensation for catastrophic injuries. The chapter argues that “No fault insurance for catastrophic injury would mean that common law actions associated with lifetime care and support would be extinguished” (P16.4). This is highly desirable. But the immediate goal must be to abolish **all** common law actions for care and support (regardless of whether they result from catastrophic injury or not), by providing such care and support through a no fault system.

This further supports the argument for the NIIS threshold to be identical to that for the NDIS, a need for support.

A common threshold would also remove the potential for seeking to prove an injury to qualify for a more generous injury scheme.

Provide Medicare benefits for all injured people

The existing prohibition for injury compensation recipients to access MBS and PBS benefits and public hospitals as a public patient should be removed.

This reform would mean that Medicare becomes a truly universal health insurance system, and would eliminate the doubt, worry and expense that surround the existing exclusion of compensable injuries from Medicare.

Importantly, another leg of the common law system would be removed if medical and hospital benefits were covered through the universal health insurance system.

States will lose a source of revenue for their public hospital systems and the Commonwealth will need to provide additional Medicare benefits. But substantial administration costs relating to payment of health benefits within existing compensation systems would be saved.

Additional net cost to the Commonwealth and States should be included as part of the overall funding package. Additional Commonwealth expenditure could be offset by a reduction in MBS benefits if, as recommended below, medical indemnity claims are abolished at the commencement of the NDIS, thereby removing the need for doctors to purchase medical indemnity insurance.

This reform should be introduced at the same time as the NDIS,

No fault coverage for income replacement for road and work injury

Once disability support services for all those who need support are funded through the NDIS and all injured people have access to Medicare, there remains the issue of income replacement.

There is no national scheme that can be used as a base for an income replacement system. Social security provides a safety net but its reliance on income and assets tests means that it cannot be used as a base for a supplementary income replacement scheme.

The no fault State compensation systems however do provide a well tested model for income replacement. The Victorian transport scheme is suggested as the model to follow. The Victorian scheme provides:

- 80% of lost income for 18 months
- Benefits for lost earning capacity for a further 18 months from the date of injury, and continuing until the earlier of normal retirement age or age 65 for people

with impairment of more than 50%. However these benefits cease if a common law settlement for pecuniary loss is reached.

These Victorian no fault benefits provide a good base for a national no fault approach to income loss for road injury. (It is noted that Victoria uses an impairment threshold for access to income replacement after 3 years, and the NDIS contains no mention of impairment. It is probably inevitable that an income replacement system will not be consistent with the NDIS as the purposes of the two systems are different.)

The road based income replacement system could be extended to other transport injuries (rail, bus and tram) which are all largely State based or regulated responsibilities. Funding required would form part of the overall Commonwealth-State financial negotiation.

Workers compensation systems already include a system for dealing with lost income. A similar approach for work and road injuries would be desirable but not an essential condition for a national move away from common law systems to a no fault basis for income replacement.

Income replacement benefits for road and work injuries would remain a State and Territory responsibility. A national approach would be desirable, but is not essential, provided all jurisdictions adopt a no fault approach instead of a fault based system. Each jurisdiction should introduce such a set of benefits at the commencement of the NDIS.

Funding for no fault income replacement should continue to come from existing State based sources.

Abolish fault based compensation systems

Once all people with road (and other transport) and work injury have access to the NDIS for disability support, to Medicare for health benefits and to no fault income replacement benefits, there would be no case to retain an additional fault based compensation system. Such systems should be abolished at the commencement of the NDIS

Fault based compensation for other injuries should also be abolished at the commencement of the NDIS. NDIS benefits and Medicare benefits would be available for these injuries. The lack of an income replacement system (other than social security) needs to be considered against the expense and systemic problems caused by fault based systems, which are very well described in Chapter 15 of the draft report.

In particular, the strong interest of the entire community in improving quality and safety in health services should predominate to ensure the abolition of common law actions for income replacement following medical injury. Anyone injured through a health process would have full access to the NDIS, to Medicare and, as for all Australians, to income replacement benefits for lost income. It is vitally important that there be full examination of the root causes of medical errors, rather than have the strong incentive for defensive reactions by all involved which are the inevitable result of the existing system of common law actions for compensation.

If a compelling need is seen for an income replacement system for medical injuries, then a no fault system should be introduced having regard to the New Zealand experience.

Removal of fault based compensation for medical injuries would enable the existing substantial Commonwealth subsidies for medical indemnity insurance and State expenditure on medical indemnity claims to be transferred to the NDIS.

Ensuring State capacity to pay

State financial burdens to support the NDIS and expanded health benefits as well as changes in State taxation arrangements would be included in the remit of the Commonwealth Grants Commission in conducting its regular reviews of State capacities to provide a standard level of State services given a standard effort to raise State taxes.

Funding the scheme

There is no justification for seeking full funding of the injury compensation system, regardless of the level of integration with the broader NDIS. The scheme is a government scheme, so there is no possibility of default on benefits.

A fully funded injury scheme precludes any assistance from that scheme for people with disabilities which result from injuries which occurred prior to scheme commencement. In contrast, the NDIS would cover other people with disabilities regardless of the date of onset of the disability or when their need for support first arose. The draft report states that "People who acquired a catastrophic injury in the past would continue to be supported by the existing disability and health system and the NDIS" (P16.27). Such an outcome for the injured would be an inequitable and probably unsustainable position.

However, having some reserves gives stability to the scheme, so strict pay as you go is also not necessary, An approach which broadly maintains current contributions to injury schemes as funding for the new system would avoid chance windfalls to some

contributors, and provide a source of funds to assist people injured before commencement who have been excluded from compensation as well as assisting pay for the broader coverage. Because of the long term nature of many benefits, some build up of reserves is likely.

Further reviews

Recommendations for further reviews, as recommended several times in Chapter 16, should be avoided as far as possible. Problems that have been clearly identified should be addressed through a unified reform, which may be phased. Inevitably reform fatigue will develop after the NDIS is in place, and the likelihood of further changes of significance in the short or medium term is unlikely.

More comprehensive reform along the lines proposed here will eliminate at least some of the suggested review issues, eg, non-road transport injuries and medical indemnity premium issues.