Submission to the Productivity Commission

Disability Care and Support Inquiry

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Contents

Who We Are

Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

Corporate Structure

APLA Ltd, trading as the Australian Lawyers Alliance, is a company limited by guarantee with branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a president-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by ten paid staff who are based in Sydney.

Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of individuals, especially the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2008. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for education, exchange of information, development of materials, events and networking. They cover areas such as workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine, Precedent, is essential reading for lawyers and other professionals keen to keep up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.

Introduction

A great need for care for the seriously disabled has been described.[1]

A solution has been proposed: the National Disability Insurance Scheme (NDIS). The nature of the NDIS is not yet well-defined. In its report to government, entitled *The Way Forward: A New Disability Policy Framework for Australia*, the Disability Insurance Group presented many, sometimes contradictory, formulations of who and in what circumstances those people might be covered by such a Scheme.[2]

The Productivity Commission 'has been asked to examine the feasibility, costs and benefits of replacing the current system of disability services with a new national disability care and support scheme' that will achieve a number of broad goals.[3] We assume that, at the same time as conducting that examination, the Productivity Commission will make some suggestions as to the design of such a scheme.

Will the proposed NDIS answer the need?

In our view, the answer depends on two things. First, it depends on whether taxpayers, through their governments, are willing to contribute enough money over time and, second, whether such a scheme is sufficiently well-designed and carried into practice.

The ALA is not able to contribute directly to an answer to the first question, which includes the question, 'How much money is enough?' and which should be answered by disabled people, their carers, economists and politicians.

The ALA does have a contribution to make in relation to the second question.[4] There are a number of possible elements of scheme design and implementation that require careful consideration. We will confine our submission to those issues that we think are both important and about which we have practical knowledge and expertise.

'With the exception of … some disabilities associated with injury or third-party negligence, the current system is based on … 'pay as you go' taxes collected by Australian governments.'[5]

The ALA is mainly concerned with the 'exception'. We are concerned to ensure that the real people with real disabilities and real needs for long-term care who are included in that 'exception' are not severely disadvantaged in the process of implementing a new scheme. In particular, we will give our answer to the question asked in the issues paper: *How should insurance arrangements for catastrophic injury link in with a disability scheme?*[6]

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[1] Disability Investment Group (October 2009) *National Disability Insurance Scheme Final Report* 1-12.

[2] For example:

'A comprehensive NDIS delivering care and support for life to people with severe and profound disability using an individualised and lifelong approach; including reform of state-based insurance

Consideration of Elements of Scheme Design and Implementation

Inequality does not mean inequity.

… first define your terms.

The DIG report and the Issues Paper use the word 'inequity' when the appropriate word is 'inequality'.

For example, in the Issues Paper, when discussing the fact that different people receive different levels of care 'depending on their location or the origin of the disability'[7], it is stated that 'there can be **inequity** of treatment' and 'it [retaining 'current accident insurance arrangements'][8] would not avoid some of the potential … **inequities** of current litigation-based arrangements'.

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schemes for all traumatically injured people.' Covering letter for the report to Bill Shorten from Ian Silk, Chairperson, Disability Insurance Group, pv.

'Who are eligible? People with severe or profound disability…People covered by state/territory-based accident compensation schemes would continue to be covered by those; however, the interaction of these schemes would be further investigated', report, p6.

'The feasibility study should consider: how state and territory accident insurance schemes should interact with the proposed national scheme and move to providing nationally consistent, no-fault insurance for traumatically injured people…' report, p8 and p15.

'A number of state/territory-based insurance schemes currently cover a range of injuries (most significantly traumatic spinal cord injury and brain injury) …To ensure a comprehensive and equitable national approach, the various insurance schemes providing lifetime care and support for traumatically injured Australians should extend to become no-fault and nationally consistent', report, p28.

'In the case of the insurance system, which predominately covers a range of injuries, the most significant of which are traumatic spinal cord injury and brain injury, there are wide differences in coverage and entitlement across jurisdictions and across cause of injury', report, p56.

'In Australia and NZ, the best indicators of potential success of this approach are available through the funded (partially or fully) accident compensation schemes (workers' and motor accident compensation in particular)…as part of this initiative, seek collaboration between the Commonwealth, states and territories to work towards a comprehensive and national approach to providing care and support for people who sustain catastrophic traumatic injury. Such an approach would encourage modification of existing statutes of worker compensation, motor accident compensation, civil (public) liability (extended to general injury) and medical indemnity (extended to treatment injury)', report, p58.

[3] Set out at p3 of the Productivity Commission Issues Paper.

[4] Most of our members are lawyers who act for injured people to obtain money from insurers of people at fault. In cases of serious disability, much of that money is for providing care. Our members represent hundreds of thousands of injured people at any one time.

[5] Issues Paper, p3.

[6] Issues Paper, p30.

[7] Issues Paper, p10.

[8] Issues Paper, p31.

If 'equity' means 'that which is fair and right'[9] and 'equality' means 'the condition of being equal in quantity, amount … etc',[10] the fact that some people receive adequate care and some don't is not, of itself, inequitable. What is inequitable is the fact that not all disabled people receive an adequate level of care, not the fact that some do receive that care. Otherwise, it would be **equitable** if nobody received any care.

While a bit pedantic, this point is important in relation to scheme design. It is not the insurance and/or fault-based schemes that are causing the problem of inadequacy of provision of care; it is the fact that there is not enough care and what care there is, is disorganised.

Are fault-based (tort) schemes inherently bad?

Are they bad for your health?

There is an underlying assumption in much of the literature and rhetoric that the fault-based schemes are bad for the injured person's health. For example, Spearing and Connelly, in their 'systematic meta-review':

'There is a commonly held view that compensation is bad for health. Indeed, systematic reviews that may lead one to accept this thesis have been cited in parliamentary inquiries into compensation law…'[11]

However, the conclusion that their 'study of studies' reaches is:

'There is a common perception that injury compensation has a negative impact on health status among those with verifiable and non-verifiable injuries, and systematic reviews supporting this thesis have been used to influence policy and practice. However, such reviews are of varying quality and present conflicting conclusions…

'Until consistent, high-quality evidence is available, calls to change scheme design or otherwise alter the balance between the cost and availability of injury compensation on the basis that compensation is 'bad for health', should be viewed with caution.'[12]

In addition, a recent study carried out for WorkCover Tasmania Board concluded, as one of its key findings:

'… multivariate data analyses indicated that compensation mode – lump sum or weekly benefits – appeared to have no significant effect on respondents' health, financial, or social outcomes.'[13]

However, as suggested in the Issues Paper, there may be an issue with tort or fault-based schemes, in that 'there may be significant delays in receiving benefits

[9] OED, Third Edition, p627.
[10] OED, Third Edition, p625.
[11] Spearing & Connelly, 'Is compensation 'bad for health'? A systematic meta-review', *Injury, International Journal of the Care of the Injured*, InPress:doi10.1016/j.injury.2009.12.009. p683.
[12] *Ibid*, p689.
[13] Ezzy, Walter & Welch, 'LTBS Workers Compensation Research, Quantative Report for Phase 1', Executive Summary, pv, Key finding 2 (e).

(affecting the prospect for early interventions)',[14] because of the necessity of proving fault. We address this question in our later section on suggestions for scheme design.

Are they bad for your morals?

Never mind our physical health, what about our spiritual condition?

We submit that tort-based schemes are an important part of how our society delivers a measure of fairness and justice to its citizens, as explained by Gaudron and McHugh JJ:

'If the courts of common law do not uphold the rights of individuals by granting effective remedies, they invite anarchy, for nothing breeds social disorder so quickly as the sense of injustice which is apt to be generated by the unlawful invasion of another's …'[15]

Also, more generally:

'Tort law is about compensating those who are wrongfully injured. But even more fundamentally, it is about recognising and righting wrongful conduct by one person or a group of persons that harms others. If tort law becomes incapable of recognising important wrongs, and hence incapable of righting them, victims will be left with a sense of grievance and the public will be left with a feeling that justice is not what it should be.'[16]

It is our submission that we should not embark carelessly on the social experiment of discarding these long-evolving schemes that protect individual rights, for the sake of some vague idea that we would be better off without them.

Would a 'no-fault' scheme necessarily deliver better care for the profoundly or severely disabled?

No-fault schemes have notable champions among legal scholars:

'… there are the radicals. They believe that tort law is about as bad as it could be, whichever way you look at it. As a compensation system it is inefficient and extremely expensive; its efficacy as a regulatory tool is, at best, doubtful; it unfairly discriminates between the sick and the injured on the basis of the cause of their disabilities; and it embodies concepts of wrongdoing that bear little relation to 'moral' ideas of fault. They favour its replacement – in as many areas as possible – by some form of no-fault scheme of support for the disabled. Harold Luntz is the leading Australian radical, although this general approach is common amongst academics who specialise in personal injury law in Australia.'[17]

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[14] Issues Paper, p30.
[15] *Plenty v Dillon* (1991) 171 CLR 635 at 655, per Gaudron and McHugh JJ.
[16] McLachlin J, 'Negligence Law – proving the connection' in Mullany and Linden (eds), *Torts Tomorrow, a Tribute to John Fleming*, LBC Information Services, 1998 at p16.
[17] Peter Cane, 'Reforming tort law in Australia: a personal perspective' (2003) *Melbourne University Law Review*, Vol. 27 2003, 649 at 651.

This commentator, Professor Peter Cane, is entirely correct. That is, many, if not most, academics that specialise in personal injury law routinely condemn tort-based compensation systems and express support for 'some form of no-fault scheme'. The problem is that thinkers apparently have not spent much effort on how such schemes might work outside the ideological laboratory – in the world of human intercourse, where the tort-based systems were conceived, born and raised:

Fault and no-fault compensation systems should not be considered in isolation. Fault systems can be combined with safety regulation and compulsory first-or-third-party insurance systems. So can no-fault systems. From a policy perspective, different combination of insurance/safety regulation should be considered in terms of their ability to provide optimal compensation and safety as well as satisfying societal demands for 'retribution' and 'justice'. But while a considerable amount has been written, we still don't know whether no-fault insurance, taken together with other compensation sources and other incentives to take care, increases overall welfare…At the end of the day, public policy towards accidents should be concerned with empirical evidence about the efficacy of alternate compensation systems incorporating elements of tort, disability insurance and social security. To date this has not been accomplished.'[18]

The New Zealand Scheme

Those who champion the cause of 'no-fault' schemes as an intrinsic good in Australia often refer to the New Zealand scheme. This goes as far back as the beginning of the NZ scheme itself (1974), when the Whitlam government was on the brink of bringing in a national no-fault scheme until its dismissal in late 1975.[19] The original justification for the NZ scheme itself was 'deficiencies in the common law',[20] but:

'The argument against the common law in the 1976 Royal Commission was largely based on principle. There were almost no empirical data in New Zealand on who got what, when, and how from the common law system. Only modest amounts of information were collected by the Royal Commission itself.'[21]

The NZ scheme has not been without its problems.[22] It has never lived up to the high expectations that brought it into being, to the extent that it was described in 1994 by one of its earliest and most loyal advocates, Sir Geoffrey Palmer, as 'now

[18] R Ian McEwin, 'No-fault Compensation Systems' (1999) 3600 at 745.
[19] Harold Luntz questions whether such a scheme would, in reality, have been introduced. Harold Luntz, 'Looking Back at Accident Compensation: an Australian Perspective' (2003) 34 Victoria U. Wellington L. Rev. 279 2003, at 279.
[20] R Ian McEwin, 'No-fault Compensation Systems' (1999) 3600 at 743.
[21] G Palmer, (1979), *Compensation for Incapacity*, Oxford, Oxford University Press, at 26.
[22] For a pithy summary from the point of view of a Canadian observer, see Colleen Flood, 'New Zealand's No-Fault Accident Compensation Scheme: Paradise or Panacea?' (1999?) 8 (3) *Health Law Review* 3.

more in the nature of a mean workers' compensation scheme which covers injuries for 24 hours a day.'[23]

One of the main arguments for the NZ scheme was and is its economic efficiency. This claim has not been borne out. The scheme has suffered from financial inadequacy throughout its existence and has been subject to regular bailouts by government and reduction in benefits to injured people. The current position of the scheme is that estimated liabilities increased between June 2008 and June 2009 from NZ$18.06 billion to NZ$23.785 billion. This dramatic increase was by no means exceptional, liabilities having increased on average by 23 per cent per annum over the three years to 30 June 2009.[24]

The NSW Scheme

Another model that is being pointed to by proponents of a 'no-fault' scheme for care for the catastrophically injured is the NSW Lifetime Care and Support Scheme, which operates in NSW to provide care to those catastrophically injured in motor accidents in NSW. The catastrophically injured person has no choice about whether they receive care under this scheme or under the tort system; the choice is that of the insurer, in that, 'An application by an insurer does not require the consent of the person.'[25] In practice, insurers will always nominate that injured people be covered by the scheme, because it relieves them of their liability to pay for the person's care and treatment as part of a tort claim. This part of the NSW compensation system is, therefore, in practice, a mandatory and exclusive 'no-fault' scheme.

The NSW scheme has been operating for little more than three years and therefore any lessons to be learnt from it should be carefully examined, despite the enthusiasm of some.[26] There is anecdotal evidence that care is now being rationed on purely economic grounds, despite the injunction by the law for the 'Authority … to pay the reasonable expenses incurred … in providing for such of the treatment and care needs of the participant … as are reasonable and necessary in the circumstances.'[27] In the NSW Lifetime Care and Support Authority's annual report for 2008/9, auditors noted that 'there is significant uncertainty regarding outstanding claims liability'. This should cause proponents of any monopolistic and exclusive no-fault scheme to pause.

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[23] Rt Hon Sir G Palmer, 'New Zealand's Accident Compensation Scheme: Twenty Years On' (1994) 44:3 *UTLJ* 223 at 237.
[24] Department of Labour, 'Quality Assurance Review of PricewaterhouseCoopers' June 2009 Valuation of ACC's Outstanding Claims Liabilities (Sept 2009).
[25] Section 8(2) *Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW)
[26] 'Finally, the board is pleased to note that the New South Wales Lifetime Care and Support Scheme is a working model of social insurance that will assist and inform the Productivity Commission in its review of the feasibility of establishing a national disability insurance scheme to ensure that all people with significant disabilities receive the care and support they need to participate in our society.' Nicholas R. Whitlam, Chair, Lifetime Care and Support Authority, in evidence to NSW Parliament's Standing Committee on Law and Justice, on 11 June 2010.
[27] Section 6, *Motor Accidents (Lifetime Care and Support) Act* 2006 *(NSW).*

Who decides what is 'reasonable and necessary'? Will the 'circumstances', (within which the reasonableness and necessity of the treatment or care is decided), include the financial position of the Authority from time to time?

There is a basic natural justice problem under the NSW scheme, in that the Authority decides whether or not the treatment or care is reasonable and necessary. If a participant disagrees with the Authority's decision, it may be reviewed, but only in very limited circumstances and only by a tribunal, the members of which are appointed and paid by the Authority. There is no provision for legal representation for the participant to question these very important decisions.

Any scheme introduced as a result of this inquiry should allow for an appropriate and properly funded way for decisions of the care-funding authority to be tested in a transparent way. This would include, at a minimum, the right to and funding of legal representation and alternate expert opinion for those in need of care.

Finally, there seems to be no overwhelming reason why a scheme such as this should be compulsory; on the contrary, there are good reasons, concerned with human rights and dignity, why catastrophically injured people should be able to opt out and into the tort system if that will get them a better result, from their point of view.

Our suggestion As To How The NDIS Could Work

In Queensland and the ACT, and, to a limited extent, in Tasmania, Victoria, NSW and WA, statutory no-fault workers' compensation schemes co-exist with tort-based schemes. These schemes have been working for a long time; they are adequately funded and they generally deliver adequate results for injured people.[28] In Tasmania, the same can be said for the system of compensation for injuries received in motor vehicle accidents, which is administered by the Tasmanian Motor Accidents Insurance Board.

Our submission is that the insurance tort-based systems should be left in place to co-exist with the proposed NDIS. If someone receives care under the NDIS and subsequently has a successful tort claim, there should be provision for repayment of the cost of care from the damages received under the claim. This would work analogously to the current system, where statutory workers' compensation payments, Medicare payments and Centrelink payments are refunded to the appropriate body from a successful tort claim.

It would also overcome the very real problem of a tort claimant not being able to obtain care until their claim is completed, thus being denied the benefits of early intervention. As the tort schemes are already fully funded, this would save some of the drain on the resources of a NDIS, particularly in the early years.

[28] Appendix 1 is a summary table of the various schemes for compensating injuries around Australia.