
Inquiry into a National Disability Care and Support Scheme

Productivity Commission

20 August 2010

Table of Contents

Introduction.....	3
General comments.....	3
Rationale and objectives	5
Design elements	5
Funding	5
Empowerment.....	6
Eligibility.....	6
Natural ageing.....	8
Comprehensive or narrow coverage?.....	8
No means testing	9
Nature of services.....	9
Needs assessments	9
Service coordination – cost shifting	10
Insurance arrangements and the disability scheme	10
Existing insurance frameworks should be maintained	11
State-based no-fault insurance for catastrophic injury.....	12
Absorb existing state schemes into national framework	13
How much is needed	19
Financing options.....	20
Governance and infrastructure.....	20
Dispute resolution and complaints.....	21
Attachment A: Profile of the Law Council of Australia	22

Introduction

1. The Law Council of Australia is pleased to provide the following submission to the Productivity Commission's Inquiry into a National Disability Care and Support Scheme ("NDCSS") (referred to hereafter as "the PC Inquiry"). The submission responds to the Issues Paper released by the Productivity Commission in May 2010 entitled "National Disability Care and Support" ("the Issues Paper").
2. The Law Council also notes a significant part of the impetus for the PC inquiry was the report of the PriceWaterhouseCoopers ("PWC") Disability Investment Group in October 2009 entitled "National Disability Insurance Scheme" ("the DIG report").
3. The Law Council agrees with the rationales for, and objectives of, a long-term disability care and support scheme and supports the initiative of the Federal Government in commissioning a review of existing arrangements.
4. The Law Council's primary submissions are as follows:
 - (a) The Law Council agrees with the fundamental proposition of the DIG report and Issues Paper that the existing mechanisms for supporting catastrophically injured or severely and profoundly disabled people are inadequate. There is a need to improve services, and the coordination of those services, to ensure comprehensive care is provided to the most disadvantaged in our society.
 - (b) The proposed NDCSS should not overlap or seek to displace existing no-fault compensation schemes operating at the Commonwealth, State or Territory level or existing liability insurance arrangements.
 - (c) Under a NDCSS, people severely or profoundly injured should not be prevented from pursuing their common law rights, or be subject to any disadvantage for electing to take civil action for negligence.
 - (d) A NDCSS should be modelled on existing best-practice schemes currently operating in Australia, such as the Victorian Transport Accident Commission (TAC) scheme.
 - (e) The scheme, at least in the initial stages, should be limited to medical treatment.
5. Action in this area should not be confined to the creation of a new NDCSS. The expansion of schemes such as the Victorian TAC through other jurisdictions could provide an enormous benefit to the severely disabled.
6. It is noted that this submission has been prepared with the assistance of the Law Council's Personal Injuries and Compensation Committee, the Law Institute of Victoria, Law Society of NSW, Bar Association of NSW and Queensland Law Society.

General comments

7. The Law Council is concerned that the objectives of the PC Inquiry should present a balanced view of the costs and benefits of fault and no-fault schemes, as well as the success that existing 'hybrid' schemes have had in Australia.

-
8. A brief review of the literature demonstrates that the primary proponents of no-fault schemes without access to common law are heavily involved in the PC Inquiry, either in an official capacity or as advisers. With the greatest respect, PWC and Bracton Consulting Pty Ltd have been involved in numerous reviews into no-fault schemes in Australia and New Zealand and, in each case, have mounted the strongest arguments possible against allowing negligently injured people access to common law.¹
9. It is considered that pure no-fault arrangements deserve better scrutiny. This submission sets out the alternative view to that put by PWC, that in fact 'hybrid' or 'mixed' schemes have enjoyed greater success in Australia. The cost and wavering performance of pure no-fault schemes should not be overlooked. Pure no-fault WorkCover schemes operating in South Australia and Northern Territory have the highest cost per insured worker and the highest workers compensation premium. Incidence of serious injury under the South Australian and Northern Territory WorkCover schemes are amongst the highest in Australia.² South Australian WorkCover presently has unfunded liabilities approaching \$1 billion (whilst the performance of the privately underwritten NT workers compensation scheme is unknown).
10. Incredibly, the New Zealand Accident Compensation Scheme has liabilities of around \$23.175 billion, which is equivalent to 17.1% of New Zealand's Gross Domestic Product. The deficit has been increasing at a rate of 23% per annum since 2006.³ This prompted the Chair of the ACC to state, in the ACC's 2008/9 Annual Report:
- "The most significant feature of the ACC's situation at the end of 2008-2009 is that its financial position has become unsustainable.
- "the gap between the Corporation's assets and liabilities has grown to the point where the accounts now show a \$13 billion deficit. That deficit grew almost \$5 billion in the last year alone.
- "If this is allowed to continue the Scheme's very existence could be under threat."
11. Comparatively, hybrid schemes in Australia, which provide a mix of statutory benefits and access to common law compensation, have performed very well. Workers Compensation arrangements in Queensland and Victoria have operated in surplus for a number of years, while offering high statutory benefits, reasonable access to common law for more seriously injured workers and low premiums for employers. Similarly, the Victorian TAC is recognised as a strong hybrid scheme which has maintained a strong funding ratio, high statutory and common law benefits and relatively low rates of premium for drivers.

¹ For example, see the reports of PWC, *Accident Compensation Corporation New Zealand: Scheme Review*, March 2008; PWC (Disability Investment Group), *National Disability Insurance Scheme: Final Report*, October 2009; Alan Clayton, *Review of South Australian Workers Compensation System*, December 2007, Bracton Consulting and PWC. The exception is the review by Alan Clayton (Bracton Consulting Pty Ltd) into the Tasmanian Workers Compensation Scheme (September 2007), which recommended that consideration be given to the introduction of a 'narrative test' modelled on the Victorian Accident Compensation Act, to offset the very harsh 30 per cent whole person impairment threshold for access to common law under the Tasmanian *Workers Rehabilitation and Compensation Act 1988*.

² Safe Work Australia, *Comparison of Workers Compensation Arrangements in Australia and New Zealand*, April 2009, Commonwealth of Australia, pages 32-33.

³ Department of Labour 'Quality Assurance Review of PricewaterhouseCoopers' June 2009 Valuation of ACC's Outstanding Claims Liabilities (Sept 2009), page ii.

-
12. Accordingly, the Law Council is very concerned about any proposal to strip away the existing rights of severely disabled people to establish a New Zealand-style national scheme.
 13. The first priority should be to cover the treatment costs of those who fall between the cracks of existing schemes. It is submitted that this would ensure the best use of limited resources, whilst targeting the greatest need.
 14. Expansion of the scheme to cover income support or other assistance inevitably involves a review not just of existing schemes but also of current eligibility for Disability Support Pensions and carers payments. The cost implications of this expansion would need to be carefully considered, due to the proven political sensitivity which often surrounds no-fault schemes.

Rationale and objectives

15. The Law Council considers that the primary basis for a NDCSS must be the provision of comprehensive care and support for people with disabilities and their families. The concept of 'social insurance' has been applied in a broad range of areas, including in relation to workers compensation, motor accidents compensation, Medicare and social security.
16. However, it is important to note that the rationale for a no-fault scheme does not support or require its mandatory and exclusive application at the expense of individual rights. People who suffer an injury are entitled to be afforded options, without suffering prejudice as a result of any election they happen to make (as is the case under the NSW WorkCover scheme). It is not appropriate to prevent someone with a life-long disability from taking legal action against a party who negligently caused their injury or disability (as is the case under the South Australian and Northern Territory WorkCover schemes and Comcare). It is also not appropriate to deprive disabled people of choice, by compulsorily requiring them to enter into a prescriptive scheme for life, where all decision are subject to the approval of the scheme's managing authority (as is the case under the NSW Lifetime Care and Support Scheme (LCSS)).
17. It would constitute the most extraordinary discrimination if those who were severely or profoundly disabled were deprived of their rights because of their severe disability.

Design elements

Funding

18. The most effective means of funding for a new scheme would appear to be through the tax system. Such a scheme could be based on a 'surplus', levied against tax payers in a similar fashion to the Medicare levy surplus, or funded from income tax revenue generally.
19. Most existing 'social insurance' mechanisms derive funding from those ostensibly covered by the scheme. For example, State/Territory compulsory third party insurance schemes are funded through contributions by vehicle owners at registration, workers compensation schemes are generally funded through compulsory employer payments, etc. However, given many of the people the

proposed scheme will be directed at those who are not necessarily injured in this way, it is appropriate that the costs of such a scheme be spread as widely as possible through the taxation system.

20. The Law Council cannot overstate the importance of selecting an appropriate funding model for any new scheme to ensure its longevity and to avoid clients of the scheme being unfairly abandoned should the chosen funding source prove to be unsustainable.
21. The Law Council considers that comprehensive actuarial modelling and costing of a NDCSS should be carried out or commissioned by the Federal Government during the design phase and publicly released, with sufficient time to enable reasonable analysis and scrutiny of the required levels of funding.

Empowerment

22. The Law Council considers that empowerment is about choices and self determination for people with a disability and their families. Disabled people should have a range of choices available to them, including whether to enter the scheme (assuming they are eligible), whether to sue at common law and what their care arrangements will be (including whether they are matched with a particular carer).
23. The Law Council supports the inclusion of individualised funding under the scheme. People with disabilities should have the power to make their own decisions. Only where there is an issue of mental capacity, for example those with severe intellectual disability, should there be a mechanism for carers to have substitute decision-making power. Substitute decision-making by carers should occur under the various guardianship and administration schemes that currently exist. Respect for dignity, and empowerment, of disabled people is consistent with Australia's obligations under the UN Convention on the Rights of Persons with Disabilities.

Eligibility

24. The Law Council considers 'need' is a reasonable basis for eligibility, though it is liable to differing interpretations and, consequently, legal uncertainty. If eligibility is to be limited to, for example, "severely or profoundly" disabled people, there will need to be a fair and subjective basis for assessing 'need', which includes the relative capacity of each individual to live independently or to effectively engage with society. This requires more than a functional assessment of actual activity limitations; rather it requires an holistic assessment of the impact of an injury on the disabled person's life and capacity to function in society without regular support.
25. It is difficult to determine whether "severe or profound" disability should be the criterion for the need for support. The answer depends upon the definition. It may be more appropriate to consider the impact of the disability, rather than the nature of the disability, in determining eligibility under the scheme.
26. A person should not be considered any less eligible for support under the NDCSS simply because they are fortunate enough to have close family or a friend to take care of them. As noted in the Issue Paper, carers may be important beneficiaries of such a scheme, if only due to respite care that might be made available.
27. The Law Council strongly opposes excluding people on the basis that they are, or could be, pursuing a common law claim against a party who caused their injury.

There is scope under some existing statutory schemes to receive immediate care and support, such as under some no fault workers compensation or motor accident schemes; however there are a number of other circumstances where rehabilitation, care and support is left largely to private insurance or Medicare. The Law Council notes that the opportunity to receive immediate care and support, particularly in the early stages following catastrophic injury, is of fundamental importance regardless of fault. People should not be excluded from the opportunity to receive care and support simply because they have chosen, or might at some later stage chose, to pursue their common law rights.

28. Further, it is noted that the cost of any past benefits conferred under the NDCSS upon a person engaged in a common law claim could be reimbursed in the same manner as presently occurs in respect of medical treatment or social security benefits covered by Medicare Australia or Centrelink (to avoid 'double dipping'). This would mean that supporting people who pursue a common law claim would be largely 'cost neutral' under the scheme (besides administrative/clerical expenses associated with managing the case), because medical and other treatment expenses covered by the NDCSS could be reimbursed at the conclusion of the claim.
29. It is considered, however, that anyone covered by an existing statutory scheme in respect of their injuries should be ineligible for the NDCSS. There are a number of well established schemes operating in various jurisdictions, for example in respect of workers compensation and motor accidents compensation, as well as liability insurance arrangements, which should not be disrupted. This would ensure the proposed NDCSS does not overlap with existing frameworks or become unsustainable in terms of size and cost. However, as noted in the DIG report, there are significant gaps in existing insurance frameworks, including for those who suffer injuries as a result of medical negligence, accidents occurring outside the workplace or not involving a motor vehicle, or for those at fault in an accident and without comprehensive medical insurance.
30. Further, the new scheme should not be confined to those who suffer severe disability as a result of an accident, but also disabilities arising from diseases or other causes unrelated to the natural process of ageing.
31. The Law Council recommends that (at least in its initial phase) any new NDCSS be established as a 'safety net' for people falling through those gaps in existing statutory compensation schemes, where medical treatment and rehabilitation are already covered. However, as noted above, insurers do not always accept liability for treatment expenses prior to judgment and therefore those pursuing a common law claim should not be excluded.
32. The Law Council notes that the PC Inquiry should also consider whether any transitional provisions should apply. For example, would the scheme capture all existing cases or transition over a period of time to progressively cover new cases? It is noted that the NSW LCSS was amended in 2009 to permit those whose injuries arose before the commencement of the scheme to 'buy in' to the scheme.
33. As discussed below, the Law Council opposes the application of any financial criteria for eligibility, such as a means test.
34. Further, the Law Council notes that consideration should be given to whether those persons who receive damages settlements should be forever precluded from access to the scheme, or whether a limited preclusion period of the type currently implemented in respect of eligibility for Centrelink benefits should apply.

Natural ageing

35. The Law Council does not object, in-principle, to a proposal to exclude age-related disabilities, which accords with the Law Council's previously stated position that existing support schemes, including the aged care system, should not be disturbed by the proposed NDCSS.
36. However, the Law Council is concerned about proposals to establish an age-based barrier to eligibility. The onset of age-related illnesses and disabilities does not correspond with any particular age. It is further noted that most Australians are now encouraged to work beyond age 65. Indeed, the compulsory retirement age for members of the judiciary is 70 and a significant proportion of the legal profession would be unlikely to cease working or engaging in vocational or voluntary activities until well past that age.
37. Accordingly, the second option on page 19 of the Issues Paper seems to be the most appropriate means of restricting the NDCSS to non-age related disabilities. That is, the scheme should be open to people of all ages, excluding only those with conditions strongly related to the process of ageing. However, there should be room for some form of assessment, particularly where there is evidence that a condition has been caused by, or contributed to, by an accident or event unrelated to ageing.
38. The Law Council understands that there is a similar review currently being conducted by the Productivity Commission into aged care services. It is important that provision for age-related severe disability be addressed by that reference.

Comprehensive or narrow coverage?

39. The Law Council favours a comprehensive model that is limited to areas not already covered by a statutory compensation scheme and which does not limit or abrogate a person's right to pursue common law rights.
40. The Law Council notes that a narrow eligibility test would be difficult to apply and may, in many cases, operate unfairly on people whose disability is "not serious enough".
41. The Law Council notes that the New Zealand Accident Compensation Corporation (ACC) Scheme is identified as an example of an unsustainable scheme due to its broad coverage. However, the Law Council notes that there are many possible causes of the NZ scheme's enormous cost, including that:
 - (a) the ACC scheme provides compensation for injury, including modest lump sums for permanent impairment and other losses, as well as medical expenses;
 - (b) the ACC scheme replaced all other compensation schemes for personal injuries, regardless of fault, age, cause or circumstances;
 - (c) any capacity to access common law damages was removed under the ACC scheme (except in rare circumstances), which also removed any role for private insurers and any capacity for the scheme to recoup expenses through compensation recovery; and
 - (d) anticipated reductions in transaction and legal expenses were replaced substantially by administrative and compliance costs, as well as hidden

transaction costs arising from nationalisation of the incentive-based, private tort system.⁴

42. The Law Council considers that a NDCSS should not be based on, or seek to resemble, the ACC scheme. The NDCSS should not replace any existing accident compensation scheme and should, ideally, be modelled on a best-practice Australian scheme, such as Victoria's TAC scheme or Queensland's WorkCover scheme.
43. Ideally, the scheme should be comprehensive, provide comparable benefits to those available under existing best practice schemes, provide for reasonable access to the courts and other review mechanisms and fill the gaps between existing statutory compensation schemes and liability insurers.
44. The scheme should apply to all people who meet the eligibility requirements for the scheme and who are not eligible under any other scheme, including people with existing disabilities at the time the scheme is commenced.

No means testing

45. The Law Council strongly objects to any form of means or assets test. The NDCSS should be open to anyone who passes the disability threshold.
46. It is considered that, if the scheme is limited to those with a serious disability, however that is defined, there are likely to be minimal savings derived from excluding or requiring additional asset-based contributions from those above a certain income or asset threshold. The Productivity Commission should seek independent actuarial advice to confirm this.
47. Moreover, such a threshold provides an unfair, but politically expedient, means of declaring it is raising money or reducing cost if the scheme comes under financial strain. It is not uncommon for governments to raise egalitarian arguments in favour of 'targeting the most disadvantaged' and forcing wealthy people to pay. However, as with Medicare, those with greater income or assets generally contribute more through the tax system and are less likely to rely on the public health system.

Nature of services

Needs assessments

48. The Law Council cautions against the use of purely objective assessment tools, such as the guidelines for assessment of permanent impairment. Most existing no-fault schemes in Australia use a form of permanent impairment assessment tool combined with thresholds to restrict eligibility for certain benefits or common law, such as the American Medical Association *Guidelines to the Assessment of Permanent Impairment*. However, such mechanisms often fail to take into account the subjective impact of injury or disability and may therefore be inappropriate for assessing actual 'need'.
49. In addition, under some existing schemes, objective functional assessment guidelines have been distorted by thresholds and arbitrary rules, designed simply to

⁴ Howell, Kavanagh & Marriott, 'No-Fault Public Liability Insurance: Evidence from New Zealand', 2002, *Agenda*, Vol. 9, No. 2, page 143.

limit the number of people who can access the scheme. For example, under the NSW WorkCover scheme, the WorkCover Authority has designed a second 'guide' to interpreting the AMA Guidelines, which requires medical assessors to consider physical and psychological injuries separately from each other. Accordingly, while a combined assessment of physical and psychological injuries might take an injured claimant well over the 10 per cent WPI threshold, each must be considered separately against the threshold. There is no scientific basis for this approach – it is simply a crude means of restricting access to common law damages and benefits.

50. This illustrates the manner in which such tools can be used when government underwritten schemes come under financial strain. The Law Council recommends that any form of 'needs assessment' suggested by the Commission enable holistic, subjective and fair assessment of needs, with substantial input from healthcare providers and disability and rehabilitation experts.

Service coordination – cost shifting

51. It is noted that cost shifting under a NDCSS is likely to be inevitable.
52. For example, data obtained by the Law Council from Medicare Australia demonstrates that, following tort law changes adopted in a number of jurisdictions (particularly NSW and Victoria) from 2001-2004, the level of compensation recovery by Medicare decreased in relative proportion to the reduction in common law claims. For example, between 2002 and 2009, Medicare compensation recoveries have fallen from \$25.6 million to \$14.6 million in NSW; and from \$3.4 million to \$2 million in Victoria. The majority of the reduction has been either in relation to workers compensation claims (in relation to which common law access has been substantially restricted in a number of jurisdictions) and public liability. There is no evidence to suggest that there has been a commensurate reduction in the number of accidents or injuries, however independent research commissioned by the Law Council in 2005 demonstrates that the number of common law claims in public liability fell by 60 per cent on average across the country in response to tort law changes since 2001.
53. Accordingly, it is clear that a substantial portion of the cost of medical treatment previously met by the liability insurance industry is now borne by the Commonwealth, through Medicare.
54. Depending on eligibility thresholds and the comprehensiveness of the scheme, cost shifting may occur whenever there is a change to any other scheme in the country. For example, changes to benefits or thresholds under state or territory WorkCover or motor accident schemes may result in the burden shifting to Medicare or the NDCSS.
55. The Law Council has recently requested similar data from Centrelink under the *Freedom of Information Act 1982* (Cth), in relation to recovery of social security benefits paid in lieu of lost income or disability, and may be in a position to provide it to the Productivity Commission at a later point in this inquiry.

Insurance arrangements and the disability scheme

56. As previously noted, the Law Council considers that liability insurance arrangements should not be disrupted by a NDCSS.

-
57. The Law Council therefore recommends the first option suggested in the issues paper, to leave current accident insurance arrangements in place (including litigation based systems), with the NDCSS to cover any gaps in existing frameworks.

Existing insurance frameworks should be maintained

58. The Law Council notes that the stated objective of the national scheme is to provide care and support services in relation to severe or profound disabilities, which may last a life-time or at least require long-term, coordinated care and assistance. There is a strong argument that all people falling into that category should have access to such a publicly funded scheme, regardless of fault.
59. However, it is far less clear that people receiving care and support under the scheme would benefit by being prevented from pursuing their common law rights against someone whose negligence has catastrophically altered their life. There are a number of issues to consider in this regard, including that:
- (a) common law compensation systems perform an important regulatory role, deterring or discouraging negligent behaviour by requiring responsibility and restitution.. For example, studies into the impact of the NZ ACC scheme on regulation of negligent conduct have found:

“...it is far from clear that the no-fault New Zealand accident compensation system provides a superior outcome in relation to medical misadventure than the schemes of any comparable country. Removing incentives is far from costless and most likely results in outcomes that are substantially less equitable.”⁵

This was confirmed recently by the Chair of the ACC in its 2008-9 Annual Report, where he noted:

“New Zealand's rate of injury in the workplace, on the roads and at home continues to be of concern and in many cases is worse than comparable countries such as Australia.”⁶

It is noted that the importance of regulation and monitoring are generally accepted, even by proponents of no-fault schemes. However no mechanism has been found which is as effective as the common law and the market-based incentives which arise from it;

- (b) a common obfuscation with respect to common law rights is that they are somehow incompatible with schemes which compensate victims regardless of fault. In fact, common law and no-fault insurance perform two separate and complementary functions – being the provision of incentives to take reasonable care and the satisfaction of the rational desire for restitution, on the one hand, and the social imperative of ensuring that relief is given to victims of injury, on the other;⁷
- (c) there is little evidence of weaker incentives to rehabilitate in circumstances of severe or catastrophic injuries. There is also no conclusive evidence, of which

⁵ Bronwyn Howell, *Medical Misadventure and Accident Compensation in New Zealand: An Incentives-Based Analysis*, June 2004, New Zealand Institute for the Study of Competition and Regulation Inc., Victoria University, page 23.

⁶ New Zealand Accident Compensation Corporation *Annual Report 2009*, page 5.

⁷ See Wilkinson, B. *The Accident Compensation Scheme: A Case Study in Public Policy Failure*, (2003) 34 VUWLR 313, at p.321.

the Law Council is aware, that severely or profoundly disabled people rehabilitate faster when relying on weekly benefits in perpetuity under a no-fault scheme;

- (d) arguments with respect to the transaction costs involved in common law claims are relatively weak in relation to claims involving severe or catastrophic injuries. Whilst it may be argued that very small common law claims generate transaction costs that are sometimes disproportionate to the size of the claim itself, the costs of long term administration of weekly benefits, as well as appeals, administrative review and compliance, are likely to be significantly greater in any given case involving longer term injuries. This rationale has supported moves in the past to impose permanent impairment “thresholds” to limit smaller claims but allow larger claims. Whilst under some schemes the threshold has been set too high, all schemes continue to allow common law access for the most severely injured or disabled;
- (e) it is the function and business of private liability insurers to indemnify people when certain risks emerge. There appears to be little sense in removing or limiting this function if it is operating effectively, particularly if it enables many severely disabled people the opportunity to regain some independence and quality of life;
- (f) arguments with respect to “double dipping”, where those who receive a common law settlement revert back to the public system once their compensation runs out, are spurious. There exist mechanisms available to ensure lump sum payments can survive for the life of the plaintiff, including trust arrangements and structured settlements;
- (g) arguments that litigation impedes recovery are not supported by any conclusive evidence.⁸ In any event, this argument is largely made in relation to less severe injuries, with the implication that plaintiffs either fail to assist their own recovery or embellish upon their symptoms in order to bolster their common law claim. Whilst the Law Council does not accept the putative basis for this argument, it is noted that the argument does not apply to the most severe or profound disabilities that the proposed scheme is intended to address;
- (h) by maintaining existing insurance frameworks, the cost of any NDCSS could be subsidised due to compensation recovery (as already occurs in relation to expenses incurred by Medicare or Centrelink). This would allow greater scope for a wider range of services to those within the scheme that do not have a claim in negligence; and
- (i) it will be significantly easier and less expensive for the Commonwealth to establish a new stand-alone scheme to fill the gaps in existing cover than to negotiate a national takeover of all existing compensation schemes (effectively establishing a New Zealand-style national scheme).

State-based no-fault insurance for catastrophic injury

60. The most prominent examples of state-based, no-fault insurance for catastrophic injuries are the NSW LCSS; the Victorian TAC scheme; and various Commonwealth, State and Territory workers compensation schemes.

⁸ Spearing, N. And Connelly, L., 2010, 'Is Compensation “Bad for Health”? A Systematic Meta-Review', *Injury*, January.

-
61. In principle, the Law Council supports existing State/Territory schemes for catastrophically injured people. However, there are a number of issues that should be considered, including:
- (a) the desirability of uniformity in benefits, care, funding arrangements, common law access, etc, which would be difficult to achieve under a multitude of separately funded and operated catastrophic injury schemes;
 - (b) the desirability of uniformity in treatment of people with catastrophic injuries, diseases or disabilities, particularly if the proposed NDCSS continues to have coverage;
 - (c) the potential for some disabilities caused by catastrophic injuries to 'fall through the cracks' if there is no coverage for injuries caused in certain circumstances, where the injured party is at fault or there is no negligence involved;
 - (d) funding arrangements for proposed State/Territory no-fault catastrophic injuries schemes, noting that not all jurisdictions may be willing to establish no-fault schemes to avoid politically damaging budgetary impacts;
 - (e) the increased potential for injured persons to 'shop around' for a better scheme, particularly if the State/Territory catastrophic injury scheme is less generous than a Commonwealth NDCSS;
 - (f) the potential for benefits to contract or expand in real terms over time, at different rates, due to funding decisions in various jurisdictions, across a number of different schemes; and
 - (g) whether serious disabilities presently covered by existing Commonwealth no-fault schemes (including Comcare, Seacare, etc) would be absorbed into the NDCSS.
62. The Law Council submits that it may be better to preserve existing state/territory no-fault schemes, but establish a NDCSS to 'insure' those who are not eligible under any other scheme. Such a scheme should preserve common law rights and not exclude those who elect to take action against a negligent party, for the reasons outlined above.

Absorb existing state schemes into national framework

63. The Law Council strongly recommends against establishing a New Zealand style national compensation scheme to replace existing no-fault schemes and insurance arrangements. It is considered that the creation of such a scheme would be the ultimate objective of an attempt to subsume all existing no-fault schemes and other insurance arrangements into a single national scheme.
64. As the PC Inquiry will be well aware, the creation of a New Zealand-style national compensation scheme was attempted by the Whitlam Government, with the introduction of the *National Compensation Bill 1975*. The Senate Legal and Constitutional Affairs Committee, which was tasked with reviewing the Bill, handed down a report which was divided along government and opposition lines. Besides major concerns about the cost of such a scheme, the Senate Committee was also concerned about the vulnerability of such a scheme to Constitutional challenge – a view which was supported by senior Queen's Counsel who proceeded to become

High Court Chief Justices.⁹ The Bill was ultimately withdrawn and amended, then reintroduced late in 1975, but lapsed following the dismissal of the Whitlam Government.

65. It remains unclear whether the Commonwealth could validly 'takeover' existing compensation schemes and it appears highly likely that Constitutional challenge would threaten a national scheme, if it were established. Such a challenge would be disastrous if successful, given the disruption to existing arrangements. Accordingly, a national scheme of the kind proposed by this option would most likely need to be established under bilateral agreements with State and Territory Governments (although the s.122 Territories Power might be used to obviate such negotiations in respect of the ACT and NT). It is considered that such negotiations, to the extent that they would involve referral of powers, may present significant challenges for the Commonwealth.
66. It is noted that the idea of a national scheme is based on the notion that cost efficiencies are gained through amalgamating the administration of no-fault insurance into a single entity. It is further argued that "transaction costs" involved with common law actions are reduced by restricting or legislatively preventing legal action, leaving a larger pool of funds for benefits.
67. In practice, the ACC scheme has demonstrated that the so-called transaction costs associated with court actions are substantially replaced by administrative costs and inefficiencies associated with 'free riders'. For example it was reported that "...the proportion of practitioner visits classified as "accident related" rose from 15% in 1981/82 to 22% in 1989/90. This indicates that either the number of accidents in New Zealand had increased or (more likely) that doctors and patients were seeking to have injuries classified as "accidents" rather than as illness or sickness in order to jump queues in public hospitals and avoid user charges." It was subsequently reported that, following the introduction of an accident declaration form, the number of reported accidents dropped by 570,000 from the 1990 figure.¹⁰
68. It is further noted that, once the cost of the ACC scheme became unsustainable in the 1990s, the response of the government was to drastically cut benefits, rather than increase compulsory contributions or tax-payer funding. The impact of these decisions, whilst financially expedient, can be devastating for the recipients of disability care and support, as well as their primary carers. The 1992 reforms to the ACC scheme:
 - (a) removed lump sum payments for pain and suffering from the scheme whilst maintaining the prohibition against suing at common law, which impacted most harshly against people who were unemployed at the time of injury (e.g. householders, children, including children injured at birth);
 - (b) eliminated fully subsidised general practitioner care – completely if the patient held private health cover and partially if not;
 - (c) restricted compensation for potential earning capacity; and
 - (d) restricted coverage for mental injury, unless resulting from physical injury or the commission of certain crimes.

⁹ Harold Luntz, *Looking Back at Accident Compensation: An Australian Perspective* [2003] VUWLR 16.

¹⁰ Colleen M. Flood, *New Zealand's No-Fault Accident Compensation Scheme: Paradise or Panacea?*, Health Law Review, Vol. 8, No.3, page 4.

-
69. The New Zealand ACC scheme has been further criticised on the basis that it excludes illness and other conditions unrelated to an ‘accident’ (unless it relates to medical misadventure or work).¹¹ Potentially the same criticism will be levelled at a compulsory national disability care and support scheme in Australia on the basis that it might exclude people over a certain age or people with substantial disabilities who are not assessed as meeting the threshold, such as ‘severe or profound disability’.
70. It is also clear that prohibition against common law actions, such as under the ACC scheme, significantly limits regulation of negligent conduct and fails to satisfy society’s ingrained sense that justice must be accorded to those who are negligently injured.
71. The Law Council notes the following in relation to this option:

State schemes functioning effectively

- (a) In the absence of any evidence that the existing no-fault schemes for catastrophic injuries are not functioning effectively, there appears to be little reason, other than consistency, to create a new scheme to replace them. Whilst consistency may be desirable in some respects, the Law Council notes that the benefit of absolute consistency (the feasibility of which is questionable given the different approaches to healthcare across different jurisdictions) must be weighed against the cost. It must also be noted that a scheme directed only at severely or profoundly disabled, or catastrophically injured people, will not achieve consistency for the remaining people who are not eligible to enter the scheme.

Cost

- (b) The cost of this option may be politically unacceptable. The DIG report estimates the annual gross cost of its preferred scheme to be around \$12.5 billion, or 2.22% of GDP.¹² It is assumed that this cost can be partially offset by replacing or reducing reliance on existing Commonwealth disability support schemes and the aged care system, reduced reliance on income support such as the disability support pension and carers payment (by improving rates of recovery and return to work) and promoting better health and social outcomes for disabled or disadvantaged people. With the greatest of respect, these estimates are very difficult to assess given the broad and untested assumptions on which they are based.
- (c) It is also noted that the actual cost involved in such schemes are often significantly underestimated. In 2009, the New Zealand ACC scheme’s total debts amounted to \$23.175 billion¹³ – over 17% of New Zealand’s Gross Domestic Product. This has resulted in proposals for levy increases for New Zealand employers, motorist and tax payers of between 40%-65%.¹⁴ If such additional fees for businesses, motorists and tax payers were translated into premium increases by private insurers, it would be compared with the Australian public liability insurance ‘crisis’ of 2001-02 (which precipitated

¹¹ Talina Drabsch, 2005, *No Fault Compensation*, Briefing Paper No 6/05, NSW Parliamentary Library Research Service, page 41.

¹² *Ibid*, *op cit* 1, page 113.

¹³ *Ibid*, *op cit* 3.

¹⁴ *ACC levy rises intended to boost reserves*, New Zealand Herald, 1 December 2009.

extensive restrictions on the common law rights of injured people in some Australian jurisdictions).

- (d) As a further example, the South Australian workers compensation scheme has restricted access to common law damages since December 1992. As of 2007, it had the highest headline premium rate in the country at 3%, compared with 1.15% in Queensland and 1.45% in Victoria. At the same time, South Australia had unfunded liabilities of \$0.84 billion. However, WorkCover SA has a relatively high level of disputation and is relatively slow in resolving disputes compared with other jurisdictions which allow access to common law.¹⁵ The same applies to the NT workers compensation scheme and Comcare, which are arguably the most administratively expensive schemes in the country. Conversely, the Queensland workers compensation scheme is the cheapest scheme, in terms of premiums, and permits access to common law.
- (e) The creation of such a scheme would most likely require the creation of a new bureaucracy, in the form of a NDCSS "Authority". One of the prime characteristics of bureaucracy is the need for stringent rules (for the purposes of consistent administration). This leads to inflexible decision making and delays in relation to people who have complex care needs. The Law Council is advised that, under the NSW LCSS, there are already delays in meeting the needs of scheme participants as a result of administrative inertia. See, for example, the evidence given to this year's Legislative Council Law and Justice Committee Inquiry by Mr Mark Harris, a participant in that scheme.¹⁶
- (f) In light of the problems highlighted with the management of existing disability support schemes operating at the Federal level, it is reasonable to question the capacity of the Commonwealth to manage a comprehensive NDCSS. This is a particular concern given the size of Australia, relative to other countries which have national no-fault schemes identified as possible models upon which the NDCSS could be based.

Funding

- (g) A common pitfall of no-fault compensation is funding, whether it is through compulsory contributions under an insurance framework (such as compulsory third party insurance or WorkCover) or is wholly government funded through the taxation system (such as the Medicare levy). There is inherent uncertainty of cost under long-tail liability schemes, particularly in relation to severe disability or catastrophic injuries schemes.
- (h) For example, auditors for the NSW Lifetime Care and Support Authority note in the Authority's 2008/9 Annual Report that "there is significant uncertainty regarding outstanding claims liability" (which is in similar terms to the caveat offered in respect of most audits into the financial position of no-fault insurance schemes). In the short life of the NSW LCSS, the liabilities of the scheme, in terms of care, support and administration, have increased from \$41 million in 2006 to around \$358 million in 2009, generating a modest deficit. In the absence of an increase in the number of registered drivers in

¹⁵ Alan Clayton, *Review of the South Australian Workers Compensation System*, December 2007, PWC & Bracton Consulting Services Pty Ltd.

¹⁶ See evidence of Mr M Harris at:

[http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/aae48c4d6b45cff3ca25774a001b5612/\\$FILE/100621%20Uncorrected%20transcript.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/aae48c4d6b45cff3ca25774a001b5612/$FILE/100621%20Uncorrected%20transcript.pdf)

NSW, it appears likely that an increase in compulsory contributions to the LCSS will be necessary to avoid either a deeper deficit or a reduction in the care and support benefits available under the scheme.

- (i) Accordingly, a severe disability care and support scheme will require increased funding for almost every year in which it operates, not to keep pace with consumer price indexation, but also because many severely disabled people may be unlikely to ever exit the scheme in their lifetime, particularly many of those with spinal cord injuries, acquired brain injuries and severely debilitating diseases such as Down's syndrome.
- (j) It would be highly undesirable to establish a single national catastrophic injury or disability scheme to replace well-functioning and fully-funded state/territory schemes, particularly if the funding model requires the partial funding approach now adopted under the New Zealand ACC scheme (which appears to be the preferred approach of the DIG report).

Capacity

- (k) A key consideration with any national scheme is the available supply of carers. The Law Council is advised that, whilst some no-fault schemes have seen the provision of higher levels of paid care to a small segment of the total disability group, there are already reports of shortages of trained and skilled carers. If the NDCSS is going to be serious about providing much higher levels of paid care across the board, then there is going to be a vast increase in the demand for carers. Given the supply of trained and skilled carers is already under strain, serious consideration must be given to how this will be managed if there is any move to nationalise care and support arrangements.
- (l) It is further noted that the available paid care is clearly not being utilised, with many families continuing to provide substantial amounts of care. For example, the DIG report notes that there is "a large volume of unpaid care and support provided by family and other informal carers – an estimated 2.5 million people providing 650,000 full-time equivalent carer positions (implying a replacement value of \$35 billion to \$40 billion per annum)."¹⁷ These families are doing so without any compensation (in compensable cases) for the provision of voluntary domestic services. The Law Council submits that if the estimated costs of such a scheme are to be offset by a reduction in carers' pensions, this is a cause for concern in light of both shortages in the available supply of trained carers and the fact that many carers in the present generation are reaching retirement age.¹⁸

Many will be worse off

- (m) Under present arrangements, catastrophically injured people in most jurisdictions have rights to take action against an insured negligent party. Under a New Zealand-style national no-fault scheme, those people would lose the right to sue for negligence and would be provided only with the modest entitlements available under that scheme (unless unprecedented funding is made available to generously cover all heads of damages, including pain and suffering and past and future economic loss, as well as medical expenses and attendant care). In particular, those people would potentially lose access to

¹⁷ Ibid, DIG report, *op cit* 1, page 1

¹⁸ Ibid, page 2.

the ordinary compensation arrangements for economic loss if, as proposed by the DIG report, those costs were offset largely by the disability pension.

- (n) It may be argued that many will be better off under a no-fault scheme, as presently around 50% of accident victims would have no recourse under common law. However, as noted above, it is clear that common law and no-fault compensation are not mutually-exclusive solutions – they work most effectively as complementary systems, whereby reasonable access to common law for seriously injured/disabled people is complemented by a no-fault scheme to cover medical expenses, attendant care and lost wages (the costs of which may be recouped at the conclusion of a successful common law claim).

Common law access most important for serious injuries

- (o) Contrary to the claim in the DIG report that a common characteristic of reforms with respect to care of people with major injuries has been “elimination or severe restriction in the availability of litigation as a pathway to compensation”,¹⁹ most no fault schemes in Australia are structured to permit access to common law compensation for more severely injured people.²⁰ Restrictions on common law access have largely been targeted at “smaller” claims, through the use of permanent impairment thresholds, or other thresholds designed to allow recourse to the courts only for more significant injuries.
- (p) Any proposal that common law access be restricted for catastrophic injuries is misguided. There can be no logical basis for the suggestion that such restrictions are justified by savings in transaction costs, given (based on estimates provided in the DIG report) only 770 people suffer catastrophic injuries annually. Arguments based on disproportionate transaction costs under the court system are not well founded with respect to severe or catastrophic injuries, because legal fees and court costs account for a much smaller proportion of the overall award.
- (q) Further, as outlined above, there are significant benefits which would be eschewed by the DIG report’s approach, including the important regulatory function served by the common law; the incentive to take reasonable care when driving or to ensure a safe workplace, or reasonably safe venue/activity; the efficiencies of private insurers in the collection of information relevant to the accurate setting of premiums; and the capacity to subsidise the cost of the NDCSS through compensation recovery.
- (r) It is noted that Medicare alone reports compensation recovery in 2008/9 of over \$31.5 million.²¹ This figure has fallen from \$38 million in 2001/2 following tort law changes in 2002. The fall in compensation recoveries indicates a transfer of treatment costs from private or public insurance frameworks to Medicare. The Law Council is unaware of what amounts are recovered annually by Centrelink in social security payments for disability support, but it

¹⁹ Ibid, pages 2-3.

²⁰ For example, the Victorian TAC, the NSW Lifetime Care and Support Scheme and most WorkCover schemes presently operating in Australia.

²¹ This data has been prepared specifically for the Law Council by Medicare, setting out compensation recovery amounts annually since 2000, according to jurisdiction and type of claim. Since the implementation of tort law changes from around 2002, the amount of compensation recovery has fallen significantly, from a peak of \$45 million in 2004.

is expected the amounts recovered may be substantial, particularly in respect of severely, profoundly or catastrophically injured people.²²

- (s) The recommended approach of the DIG report is that its National Disability Insurance Scheme be available only to those whose needs are either “frequent” or “constant” and who are under 65 years of age.²³ Accordingly, those who are severely injured, but who do not require “constant” or “frequent” care, would have access to common law compensation, while those with constant care requirements would be legislatively excluded. Similarly, a person who suffers a catastrophic injury at birth or as a young child will be excluded from taking action. However, a person aged 65 years or over would presumably have access to the courts. The Law Council considers it to be highly anomalous that, whilst most no-fault schemes are established in recognition of the fact that the courts are in fact a very efficient means of compensating serious injury, the DIG report proposes that only the most severely or profoundly injured should be precluded from seeking restitution via common law.

Crippling of insurance arrangements

- (t) As noted in the DIG report, there already exists extensive coverage under private insurance arrangements for injuries suffered outside the workplace and some motor accident schemes. Several jurisdictions have legislated to shield private insurers from smaller common law claims and insurers that offer policies covering personal injuries largely accept that the common law is a reasonable means of determining liability in respect of larger claims. In an environment where private insurance premiums are generally affordable and competitive, it is difficult to justify any attempt to displace those arrangements.
- (u) It is important to note that this is an argument which has carried on throughout the 36-year life of the New Zealand ACC scheme.

Fault continues to be an element of any system

- (v) Most comprehensive no-fault schemes, which cover pain and suffering as well as economic loss, require some assessment of causation, fault or blame when determining the availability or extent of compensation. For example, the New Zealand scheme permits access to common law only for “exemplary damages”, requiring demonstration of excessive negligence or criminality. In addition, to access lump sum payments under the NZ ACC scheme, NSW WorkCover scheme, TAC or any other “no-fault” scheme, it is necessary to demonstrate negligence and causation (and rule out contributory negligence on the part of the injured party).

How much is needed

- 72. As noted above, it is very difficult to assess the DIG Report’s accuracy, in terms of its assessment of the cost of the proposed NDIS, given the number of assumptions on which the net cost is based. \$10.8 billion, offset by \$5.6 billion under existing programs, seems to be a very conservative estimate of the likely cost of a NDIS.

²² The Law Council has sought this data under the *Freedom of Information Act 1982* and is awaiting a response.

²³ *Ibid*, DIG Report, *op cit* 1, page5. The terms “constant” and “frequent” are defined in the DIG report

-
73. Such a figure appears to assume that those injured negligently would not have access to compensation based on their pre-injury earnings, or even a multiple of average weekly earnings (as occurs under some existing no fault schemes). Further, there does not appear to be an allowance for compensation for pain and suffering, which under the common law would be a very substantial part of any given claim involving catastrophic injuries.
 74. It is considered that the NDIS should be based on best practice schemes to ensure fair entitlements. Schemes such as WorkCover (Qld) and TAC (Victoria) are recognised as well-functioning schemes with good outcomes in terms of rehabilitation and low scheme costs and premiums.
 75. The Law Council recommends that further actuarial opinion be sought in relation to a proposal which incorporates generous and realistic entitlements, similar to those available under WorkCover (Queensland) and TAC (Victoria), including access to common law and other benefits.

Financing options

76. The Law Council considers that a problem experienced by many no fault schemes is the tendency to become politicised due to rising scheme costs. As noted in the Issues Paper, schemes which address long-term liabilities are prone to rising costs from year to year because many people continue to rely on the scheme for the long-term.
77. Accordingly, the Law Council submits that a funding method that manages future liabilities is more appropriate for a long-term liability scheme. It is considered that the flexibility associated with 'pay as you go' funding will be less relevant for a long-tail liability scheme addressed at severe disability and catastrophic injury, where there are less likely to be unanticipated cost fluctuations from year to year.
78. Given the lack of any clear group within society which will benefit, it appears reasonable that the cost of such a scheme should be borne by society as a whole, in the same way as Medicare.
79. An additional margin added to Medicare seems a reasonable approach and one with which most Australians would be familiar. It appears to fit logically with other policies intended to encourage use of private health insurance, whereby those who insure privately pay a lesser premium in respect of the public health care system.

Governance and infrastructure

80. The Law Council considers that a federal body could be established to administer a national scheme which would set national standards for service provision to those eligible under the scheme. Such national standards could be informed by the current administration and services provided by best practice schemes, such as the Victorian TAC and Queensland WorkCover schemes.
81. Ideally, the proposed NDCSS would set national standards for treatment and care of those with severe disabilities and catastrophic injuries, including the provision of funding to ensure existing State/Territory schemes improve benefits, governance and standards of care. The NDCSS should also have capacity to report annually on its performance and activities, conduct independent research into the effectiveness

of rehabilitation and treatment programs, etc, in a similar manner to many WorkCover and traffic accident schemes around the country.

82. As noted above, it is considered that the NDCSS should be designed as a safety net for those who are not eligible under any other scheme. A potential downside to such an arrangement is that changes in eligibility under state/territory schemes would result in increased pressure on the NDCSS. For example, there is the potential for some state schemes to limit eligibility to those who are not severely disabled, shifting the cost burden to the Commonwealth (an option which might appear attractive if costs under a State scheme become excessive). It may be necessary for the Commonwealth to enter into bilateral or multilateral agreements with the States to ensure this does not happen.

Dispute resolution and complaints

83. The Law Council submits that a fair and transparent process for resolution of disputes is an essential aspect of any no-fault scheme.
84. The proposed NDCSS should provide for dispute resolution which allows access to administrative review, mediation, appeal and, ultimately, judicial review.
85. The Law Council recommends a process that allows for internal review by the governing 'authority' and then merits review by the Administrative Appeals Tribunal (AAT).
86. By definition, severely disabled applicants would need legal assistance and a scheme which allowed some recovery of legal rights if the applicant obtains a more favourable result in the AAT, similar to the existing approach under the *Safety, Rehabilitation and Compensation Act 1988* (Cth).
87. Decisions of the administering authority should be subject to examination by the Commonwealth Ombudsman.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 57,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.