



Productivity Commission  
Presiding Commissioner Patricia Scott &  
Associate Commissioner John Walsh  
BY EMAIL: [disability-support@pc.gov.au](mailto:disability-support@pc.gov.au)

30 April 2011

Dear Commissioners,

**ALA Submissions in Response to  
Productivity Commission 2011 - *Disability Care and Support*  
Draft Inquiry Report, Canberra**

The Australian Lawyers Alliance (“ALA”) has considered the Draft Report and has attended the public hearings across Australia and in most cases, already provided written responses to the Productivity Commission. The purpose of this paper is to consolidate those submissions and provide a summary of ALA’s views within the one document.

**ABOUT ALA**

ALA is the only national association of lawyers and other professionals dedicated to the protection and promotion of justice, freedom and the rights of the individual. Our members act for real people throughout Australia and particularly the injured. We value a fair, just and democratic society and aim to redress the imbalance between the ample resources available to corporations and their insurers and those available to the public.

ALA’s members are in a unique position to understand the challenges that face the injured and see firsthand the human cost of injury in the workplace and other environments. This includes fighting for the rights of those injured through the fault of others and thereby contributing to a safer world. ALA takes an active role in policy development and commenting on proposed legislation relevant to our aims.

We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. We oppose oppression and discrimination and support democratic systems of government and an independent judiciary. We value immensely the right of the individual to personal autonomy in their lives.

Suite 5, Level 7, 189 Kent Street, Sydney NSW 2000 GPO Box 7052 Sydney NSW 2001  
DX 10126 Sydney Stock Exchange ABN 96 086 880 499

T + 61 2 9258 7700 F + 61 2 9258 7777 E [enquiries@lawyersalliance.com.au](mailto:enquiries@lawyersalliance.com.au) [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au)

## COMMENTS ON THE COMMISSION'S DRAFT REPORT

Essentially the Draft Report proposes:

1. The creation of a National Disability Insurance Scheme (NDIS).
2. The creation of a separate National Injury Insurance Scheme (NIIS).

### The NDIS

ALA supports the further funding of a well documented underfunded disability sector.

A significant level of unmet needs requires correction and the proposed NDIS would provide a vehicle to attempt to achieve this aim.

Whilst there are services in each state, such services operate without cohesion. A coordinated approach is to be welcomed. Increased funding is welcomed but we make the following observations:

- Setting the criteria for eligibility is going to be a difficult task. Disabilities are many and varied. Ensuring applicants are afforded an opportunity to put their case will be essential.
- Some disabilities are not going to be catered for as much as others, if at all. The Draft Report proposes the exclusion of some people because of the *cause* of the disability. This, in fact, creates a two tiered system, which is something the NDIS purports to aim to eliminate. Whilst it may be necessary from an economic perspective, those outside the criteria may not appreciate that. Age related disabilities are to be excluded. Given Australia's ageing population, this will encompass many.
- Decisions made need to be reviewable ultimately by an independent judiciary.
- The right to advocates needs to be enshrined. Those with disabilities are often the most in need of such assistance. The costs of this also need to be factored into any costings.
- There is a real risk AMA Guides will be used in the assessment process. These seem to be the weapon of choice currently of those agencies that seek to downplay levels of disabilities for economic imperatives. Their use is insulting to the injured and fails to appreciate to any real level, the true disabilities of the injured and those with disabilities.
- The Draft Report recommends appeals on points of law only. ALA is vehemently opposed to this. Full appeal rights need to be available to those aggrieved. To do otherwise fails to acknowledge the dignity of those challenging the decision. It is no answer to say that it may generate many disputes. That is a complaint without

any foundation and clearly places economics above procedural fairness and natural justice to those concerned.

- NDIS is not all encompassing and will be selective. Safeguarding the process and ensuring fairness and personal autonomy to the greatest degree must be the paramount considerations at all times.
- The exclusion of large sections of those with mental health disabilities is troubling. This is area that should be included. It is relevant to many and prevalent in the Australian community. Failing to address it here and now should not be an option.

## **The NIIS**

ALA has significant issues regarding the proposed NIIS, which are summarised as follows:

- The setting up of a second authority would appear to be cumbersome and expensive.
- The intention is to cover those catastrophically injured in the near future and to review its application to all compensation schemes in 2020. Whatever form it takes, this category should be within the NDIS system. Abolishing common law and current compensation rights is out of the question from the ALA's viewpoint. The proposed NDIS and compensation schemes need to sit side by side. The catastrophically injured should be part of the proposed NDIS. Those with other rights should be given the option of opting into such a scheme. In many cases, it will be appropriate to so opt. Loss of the autonomy to do so should not be forsaken.

The Lifetime Care and Support Scheme in NSW is an example of such a scheme. The scheme is still in its early stages. Already, concerns have emerged about the lack of a right of representation, the right to challenge decisions and whether the scheme is catering for those in rural and regional areas adequately. The jury is still out on NSW Lifetime Care and Support Scheme.

- Thought needs to be given to ensuring current compensation systems sit alongside the NDIS. This model will operate at a lower cost than a dual NDIS / NIIS system, resulting in more funds being available where they are needed, that is, significantly increasing funding to the disability sector.
- Costings appear preliminary at best. A very real possibility is that the costings are completely inadequate. ALA is making its own enquiries in relation to this issue. Basing costings on the NSW scheme or the disaster that exists in New Zealand is inappropriate. Adequate costing for an NDIS with more tangible aims is where energy should be directed.
- ALA disputes most of the assertions in chapters 15 and 16 of the Draft Report. The common law system has merit on a number of levels. The remarks greatly

devalue the role of personal autonomy for those who suffer injury is just but one concern.

No fault schemes are not the answer. Most are amended after implementation as financial pressures invariably reduce benefit levels to those injured. There is a history of "fault" creeping into existing "no fault" schemes within Australia. One size does not fit all and these no fault schemes do not appreciate this feature.

## **CONCLUDING REMARKS**

ALA strongly supports the needs of those with disabilities in our community and strongly supports the need for a vastly increased investment of funds for the sector.

ALA considers a single scheme (NDIS) is desirable and warranted. The existing entitlement for common law should remain. A person involved in such a claim should be able to access services within the NDIS framework during the course of their litigation and then refund to the NDIA, in a similar manner as currently occurs with Medicare and Centrelink. A dual scheme (NIIS) has great capacity for duplication of administrative processes with the associated cost leakage.

The structure of the scheme must be carefully developed to ensure it captures those with the need and does not exclude on a definition or causation basis.

Appropriate levels of funding must be committed to the scheme. It should not be permitted to bring a "lowest common denominator" approach to the provision of services to those with a disability. There must be sufficient and properly qualified staff available across Australia.

ALA does not support the abolition of a common law entitlement for those whose disability arose in compensable circumstances. It is considered apt that a wrong doer be liable to "correct the wrong" and not the public purse. It is considered inappropriate to force a person to take funding for their needs in a prescribed manner when an alternative may be far more suitable.

ALA considers a single NDIS scheme would be the most suitable and could easily sit beside existing schemes and systems of redress. It would be available for those who currently do not have the right of redress. It would truly be a safety net for those in the greatest need and impose the least impost on the public purse.

Yours faithfully,

**BRIAN HILLIARD**  
**National President**  
**AUSTRALIAN LAWYERS ALLIANCE**