Productivity Commission Inquiry into a long term disability care and support scheme

MDA National Submission to the Draft Report

Thank you for the opportunity to provide a submission in response to the Disability Care and Support Draft Report.

Established in 1925, MDA National is one of Australia's leading providers of medical defence and medico-legal advocacy services. With over 25,000 members, it works in close partnership with the medical profession on a wide range of issues which impact on medical practice. In addition to its advocacy and advisory services, MDA National's insurance subsidiary (MDA National Insurance) offers insurance policies to MDA National's members which provide cover for the cost of investigations of professional misconduct and for claims for compensation by third parties. The MDA National insurance policy provides medical practitioners with $20 million of civil liability cover as well as a range of other professional risk covers.

In response to the Information Requests outlined in the Productivity Commission's Draft Report:

Chapter 16

The Commission seeks feedback on an appropriate criterion for determining coverage of medical accidents under the NIIS

If a no-fault scheme is introduced to provide the care and support needs of all people experiencing catastrophic injury, MDA National submits that:

- The definition of "catastrophic" should be consistent with that used within the NDIS and the NIIS.

- There is no available or practical definition for "medical accident" that might assist in delineating cases between the NDIS and the NIIS. In order to do so, it would be necessary to introduce the concepts of blame and causation, which would be contrary to the objectives of a no-fault compensation scheme.

- It is possible that medical errors could potentially contribute to or exacerbate a pre-existing disease, injury or genetic condition or alternatively may have no causal link to an adverse outcome. For example, notwithstanding an uneventful and appropriately managed pregnancy and delivery, a child could later be diagnosed with cerebral palsy. At issue is whether the child's cerebral palsy is classified as a medical accident caused or contributed to by a medical practitioner, or by an underlying condition, or a combination

of both. MDA National does not support a "pseudo" negligence test for "medical accidents" based on some concept of duty of care standards and prefers a true no-fault concept.

- However, even with a broad no-fault definition for "medical accidents", there will still be complex determinations around apportionment and medical causation such as where the clinical outcome/disability is the result of a combination of the underlying disease and also medical treatment factors. To illustrate this point, we refer to a current catastrophic case against one of our obstetrician members:

  > The case involves an infant with severe cerebral palsy as a result of his mother suffering an acute placental abruption during delivery. Our medical experts believe that the placental abruption was not predictable, as the mother appeared healthy and was not showing any symptoms at her antenatal visit the day before the birth. In the absence of any symptoms, arguably this case would meet the criteria for **a pre-existing or underlying condition** rather than a **medical error or accident by our member**. However, if it is found that there was a delay in arrangement of a caesarean section delivery by our member, an argument could be mounted that the cerebral palsy either arose or was contributed to by a medical error or accident by our member.

  As can be seen here, the determination of these boundaries may be problematic in "medical accident" cases, in contrast to the other causes of catastrophic injuries which will be included in the NIIS, such as motor vehicle and other transport injuries, criminal and general injuries. Moreover, if all complications and injuries experienced as a consequence of or during medical treatment are categorised as "medical accidents", this may have significant implications in terms of potential claims for damages under other heads of damage within a claim. For example, automatically classifying cerebral palsy as a "medical accident" irrespective of fault may essentially preclude any argument in relation to causation. In these circumstances, there may be no prospect of successfully mounting a defence even in matters where the medical practitioner's management had not departed from accepted practice. There would need to be clear guidelines considered in any scheme to avoid unintended consequences in relation to other damages claimed.

  It is worth noting that the complexity of the linkage between standard of care and causation was recently illustrated in a Court of Appeal matter involving the defence of a cerebral palsy claim: McLennan v McCallum [2010] WASCA 45 (12 March 2010). The Court found that as it could not be determined when the damage suffered by the child had occurred, causation could not be established on the balance of probabilities. In the circumstances, the entire claim for damages failed.

  MDA National is concerned that a "pseudo" negligence test will implicitly or explicitly apportion fault to a medical practitioner without the rigour of examination of the facts or the opportunity to mount a defence on the facts which tort law provides.

- If it was decided that "medical accident" cases were to be separated out from the broader pool of NDIS cases, the expertise exists within the medical indemnity insurance industry and especially within the cases committee structures of medical indemnity insurers. For example, MDA National has established a cases committee structure comprised of medical experts who consider and advise on issues of standard of care and causation.

The Commission seeks feedback on practical interim funding arrangements for funding catastrophic medical accidents covered under the NIIS

Funding of the NIIS should not be through a levy on medical indemnity premiums for the following reasons:

- An examination of our data indicates that the extension of no-fault cover for care and support could double the number of catastrophic injuries covered (we are able to provide the analysis of our data to the Productivity Commission on a confidential basis). There is a significant amount of uncertainty regarding how many catastrophic medical accidents will be covered by the NIIS and the various assessments which have been undertaken to date though worthy are ultimately unconvincing.

- Legal cost savings for medical indemnity insurers from the no-fault extension will be minimal. Therefore there is little saving from legal payments to pay for the costs associated with the additional people covered for care by the NIIS (estimated as between $1 and $1.41 million per claimant in the Draft Report but in MDA National's view potentially higher than this for medical accidents). MDA National has reviewed the defendant legal costs in our settled catastrophic claims which account for approximately 7% of the total settlement amount (we are able to provide the analysis of our data to the Productivity Commission on a confidential basis).

- Any savings from reduced payouts to those catastrophic injuries currently covered due to the removal of care components will not be immediate ***unless the NIIS is introduced on a claims made basis for medical accidents;*** that is, medical indemnity insurers would need to continue to fund for and buy reinsurance to cover claims which have been incurred but have not yet been reported. Negligence claims for those catastrophically injured can take many years to be brought so the full impact of the NIIS would not be seen for a number of years.

- It is anticipated that savings will mainly arise from reduced reinsurance premiums but as yet there is uncertainty for medical indemnity insurers about how the reinsurance market will view the impact of the NIIS. This is particularly the case if the NIIS is not introduced on a claims made basis consistent with reinsurance arrangements.

- The determination of an appropriate levy to apply to medical indemnity insurers is complex since medical accidents span the public and private sector and within the private sector span doctors, hospitals and other health professionals; it is unlikely that the levy applied to medical indemnity insurers would adequately apportion the cost of medical accidents between the parties that contribute to the event and there is a danger that doctors pay more than their "share" of these accidents.

- There is potential for state based funding to become inequitable and thus encourage "jurisdiction shopping". Therefore, any NIIS levies need to be consistent across all states so as to avoid variation, such as currently exists with stamp duty on insurance policies.

It may be difficult to fund the NIIS through removal of existing subsidy schemes for the following reasons:

- Unless the NIIS is introduced on ***a claims made basis*** there will not be immediate savings to existing medical indemnity insurers and removal of the existing subsidies will have the effect of increasing doctor premiums.

- The existing schemes are funded by the Federal Government while the NIIS will be funded by state and territory jurisdictions.

As a result of the many complexities regarding funding and uncertainties around additional costs and cost savings, MDA National submits the following two options for covering medical accidents to the Productivity Commission:

Option 1: All medical accidents are covered by the NDIS, not the NIIS, for care and support on ***a claims made basis*** with a gradual unwinding of the HCCS in recognition of lower costs for medical indemnity insurers. The rationale for this suggestion is that:

- It removes the potentially complex distinction between which medical injuries go into the NDIS and which ones to the NIIS.

- The Federal Government will be funding the NDIS and the Federal Government will benefit from the unwinding of the HCCS.

- We would not suggest an immediate unwinding of the HCCS as some of the financial benefits will take some time to emerge and will be dependent on the reaction of the reinsurance market to the NDIS.

Option 2: Continue to run the existing common law schemes ***in parallel with the NIIS*** such that the NIIS picks up the cost of the additional claimants from the no-fault extension and funds these costs, and the medical indemnity insurers continue to provide compensation for care under the common law on a full restitution basis for those medical accidents where there is negligence. This is similar in concept to the way many workers' compensation schemes operate with a level of statutory benefits for all injured people regardless of fault and an option to pursue common law restitution for some where there has been negligence. This is the same option as previously submitted by MDA National to the Productivity Commission and we believe continues to have merit as an interim solution to the many complex transitional issues involved with the introduction of the NDIS and NIIS.

Further information

Should you have any questions in relation to this submission contact should be made with:

Ms Kerrie Lalich
Executive Manager, Professional Services
MDA National
Level 5, 69 Christie St
St Leonards NSW 2065