Law Council
OF AUSTRALIA

Disability Care and Support

Productivity Commission

6 May 2011

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Introduction

1. The Law Council is pleased to provide this submission to the Productivity Commission's Inquiry into Disability Care and Support (**the Inquiry**).

2. This submission has been prepared with contributions from the Law Society of NSW, Law Institute of Victoria, Queensland Law Society and NSW Bar Association, all of which are "constituent bodies" of the Law Council (details of the Law Council's "constituent bodies" is included at **Attachment A**).

3. This submission is made in response to the Productivity Commission's draft report into Disability Care and Support of February 2011 (**the draft Report**). The Law Council has made one previous written submission to this inquiry, dated 20 August 2010 (annexed to this submission at **Attachment B**). The Law Council met with the Productivity Commission in relation to this Inquiry in May 2010 and subsequently appeared at public hearings into this inquiry on 8 April 2011.

4. The Law Council has also read and agrees with the submissions of the Queensland Law Society to this inquiry.

5. The Law Council's submissions in response to the draft Report are summarised, as follows:

   (1) The Law Council strongly supports the proposal to establish a National Disability Insurance Scheme (**NDIS**) to fund and coordinate care and support for Australians with a permanent disability. However, close consideration should be given to:

      (a) definitions in relation to the level of disability that might trigger eligibility for Tiers 2 and 3 of the proposed NDIS; and

      (b) the right of disabled people to coordinate their own care (i.e. opt out of Tier 3) if they make an informed decision to do so.

   (2) The Law Council considers the estimated cost of the scheme must be realistic to ensure its ongoing viability once established.

   (3) The Law Council strongly opposes the Productivity Commission's recommendation that people covered by the NDIS should not have access to ordinary appeal mechanisms or advocacy within the scheme, including access to full merits review and self-funded legal advice and representation.

   (4) The Law Council considers the proposal for a separate NIIS to coordinate State/Territory no-fault schemes for catastrophic injury is unnecessary and should be abandoned. The NDIS should be extended to cover gaps in existing no-fault cover for catastrophic injury.

   (5) The Law Council recommends that the Productivity Commission adopt a more balanced position in relation to common law rights. The current approach, particularly in Chapter 15, is at odds with the tone of the remainder of the draft Report and risks generating unnecessary opposition to the sensible recommendations made elsewhere in the report.

National Disability Insurance Scheme

6. The Law Council supports the proposal by the Productivity Commission for the creation of a NDIS.

7. In particular, the Law Council agrees with the findings of the Productivity Commission that there is an urgent need to provide better care and support for people with disabilities and to provide these to a greater number of our citizens.

8. There is little doubt that the current services and supports are fragmented and inadequate, resulting in poor care, unrealised potential and over-reliance on unpaid family and friends for the provision of essential services and care.

9. The Law Council fundamentally supports the introduction of a national scheme which ensures adequate funding for disability care and support services to those who need it the most, improvement and standardisation of care provided and greater choice and autonomy for those participating in the scheme.

Eligibility

10. The Law Council considers that the use of 3 "tiers" determining eligibility is a reasonable mechanism. The Law Council endorses the recommendation that the scheme should focus on those who are most in need, such as those requiring constant or frequent care and support.

11. Presently, the draft Report recommends that a person should be eligible for Tier 3 if they are Australian residents with a permanent disability (or are expected to require very costly disability supports) and would meet one of the following conditions:

    (a) have significant difficulties with mobility, self-care and/or communication;

    (b) have an intellectual disability; or

    (c) be in an early intervention group.

12. The Law Council notes there are some advantages to having subjective eligibility criteria, including fairness to those seeking entry; and flexibility in decision making, which is important to ensure jurisdictional errors are avoided.

13. However, a significant disadvantage arises in relation to the reliability of costs estimates for the scheme. Clearly, there are many people who will attempt to tailor their history and circumstances to maximize their chances of becoming eligible for coverage under tier 3. This has been the experience of the NZ Accident Compensation Scheme, which has suffered significant unfunded liabilities, in part due to the exclusion of coverage for those whose disabilities did not result from injury.

14. The Law Council acknowledges this may be a difficult issue to resolve in practice, however more clarity may be needed in relation to the conditions of entry. For example, "intellectual disability" (one of the conditions of entry in Recommendation 3.2) would potentially be met by a number of conditions with a very broad range of severity. Persons with mild cerebral palsy or autism may require very few supports. The Law Council notes that this issue appears to be touched upon by some

representative organisations which made submissions to the Inquiry, but is not addressed by the Productivity Commission in its draft recommendations.

15. Further, it is unclear what might constitute an "intellectual disability". By definition, it would exclude psychological conditions such as severe anxiety, depression or agoraphobia, for example.

16. If psychological conditions were included, there is potential for some overlap with existing compensation frameworks and the proposed NIIS, as such conditions may commonly arise from a traumatic event such as an accident or intentional harm. There are many cases involving people who have suffered significant psychological trauma as a result of witnessing an accident, though it is unclear whether existing no-fault schemes would cover such a disability or injury. It is noted that the Productivity Commission should consider the potential for such overlaps in its final report.

17. A further example of potential ambiguity arises in relation to the criteria "significant difficulty" with "mobility", "self-care" and/or "communication". Arguably, one may experience significant difficulty with mobility if they find it uncomfortable or difficult climbing stairs, bending over to pick things up, or walking significant distances (as is a common occurrence for many people who suffer soft-tissue or spinal injuries without neurological impairment), but who are often assessed under 'whole person impairment' thresholds as having suffered 'minor injuries', despite that the effects of those injuries may last for many years.

18. The Law Council recommends more clarity in relation to the eligibility criteria, given the potential for such broad criteria to render the Productivity Commission's cost estimates unreliable.

Freedom to choose

19. The Law Council notes with approval the emphasis of the Productivity Commission on individual choice, including self-directed funding and individually tailored supports.

20. It is noted that the Productivity Commission favours the "reasonable and necessary" criteria adopted by the NSW Lifetime Care and Support Scheme. There is potential for such criteria to operate unfairly against some participants if applied too strictly. If "reasonable and necessary" were adopted as the criteria for determining whether certain aids or treatments should be covered by the scheme, there must be robust review mechanisms, including external merits review, judicial review and accesses to legal advice and assistance, as discussed further below.

Means testing, front end deductibles, co-payments

Means testing

21. The Law Council notes that it seems illogical to apply means testing, front end deductibles or co-payments to participants in a scheme for the most seriously disabled.

22. As recognized by the Productivity Commission, it would not be appropriate to exclude high income earners from the provision of certain services, given the nature of the taxpayer funding model proposed.

Front-end deductibles and co-payments

23. It should also be recognized that the use of services would be largely at the discretion of the National Disability Insurance Authority (**NDIA**), which means a front-end deductible would be just an unnecessary impost on participants, which may discourage the use of important, high-value support services by those lacking in funds, or who have associated health problems such as drug or alcohol addiction. The Law Council queries the necessity of a front-end deductible as a means of limiting costs, given the deductible is likely to be a small fraction of the overall cost of annual care for participants.

24. In relation to co-payments, the Law Council notes the Commission does not favour uniform co-payments to services due to the potential for such a requirement to "discourage the use of high value supports".[1] It is unclear why the Commission does not also apply this rationale to front-end deductibles. The comparison with the 'Medicare safety-net' is not apposite, because Medicare is universal. The proposed scheme will be extended only to those with severe disabilities, most of whom may have very limited capacity to afford an annual deductible and may be more inclined to avoid treatments on this basis. Moreover, if cost pressures arise in relation to care and treatment expenses, in all likelihood the first measure that will be taken to control costs will be to increase the deductible, to discourage use of services and offset scheme costs.

Quotas

25. It is noted that the Commission prefers limiting the availability of certain treatments to a number of episodes appropriate to the person, as supported by clinical evidence. The Law Council cautiously supports this recommendation, but notes any such decisions should be made on the basis of individual clinical assessment, which considers the therapeutic value of the treatment, rather than some clinical "norm".

26. In particular, the Law Council submits there should not be any presumption against approving certain treatments, simply because some arbitrary quota has been reached. Once the clinically recommended number of treatments have been provided, the participant should have the opportunity to request a further assessment to determine the utility of further treatment. The Law Council is advised, anecdotally, that a significant problem under the TAC has been the tendency of claims-officers to arbitrarily cut-off access to certain treatments, such as physiotherapy, regardless of its ongoing utility, purely on the basis that a certain quota has been reached (regardless of whether the existence of that quota was communicated to the claimant).

Dispute resolution

Rights of review

27. The Productivity Commission proposes that participants in the NDIS should be able to seek internal review of decisions by the NDIA. The Commission expresses strong misgivings about allowing access to merits review, preferring removal of merits review altogether, but stops short of such an extreme approach and instead recommends strong limitations on the merits review process.

[1] Productivity Commission, draft report into Disability Care and Support, February 2011, Commonwealth of Australia, page 4.33.

28. The Law Council notes that it is rare to preclude or substantially limit merits review of administrative decisions, particularly by Commonwealth agencies. Full merits review exists in relation to decisions by Comcare, Medicare, the Australian Tax Office, Centrelink, Department of Veterans Affairs, etc. Only a very compelling case could justify the denial of merits review to a particularly vulnerable group, for whom a poor decision may have significant implications for their well being.

29. The Law Council submits that the Productivity Commission should make more reference to the importance of merits review for ensuring that natural justice is enjoyed by participants in the NDIS.

30. The Commission should also consider that, if merits review is limited in accordance with recommendation 7.11, the capacity for independent decision making could be substantially undermined. Recommendation 7.11 may establish a presumption against the applicant, such that they would be required to demonstrate in any given case that granting the entitlement would not adversely impact upon the sustainability of the scheme.

31. The Law Council suggests that a better approach would be to set out in legislation the benefits/services provided by the scheme and the circumstances in which they might be provided.

32. The Law Council strongly recommends that the Commission take note of the following considerations:

Vulnerability

(a) The Law Council submits that intended participants in the NDIS may be highly disadvantaged and vulnerable. Many may be incapable of representing themselves in review processes, much less understand the basis upon which a certain decision has been made.

Record on review

(b) It is clear that a substantial proportion of decisions under existing schemes, which are subject to external merits review, are set aside or varied by the tribunal. For example, in 2009/10, the Administrative Appeals Tribunal reported that of all appeals lodged against decisions by Commonwealth workers compensation providers (Comcare, Seacare, self-insurers, etc) [2]:

(i) 39% (549 of 1406) were set aside either by order of the AAT or by consent;

(ii) 5% (68 of 1406) were varied, either by other of the AAT or by consent; and

(iii) just **30%** of decisions (434 of 1406) were affirmed by the AAT (while most of the remaining applications – around 25% - were withdrawn by the applicant).

(c) These data indicate that participants in the NDIS are likely to be subject to substantial prejudice if denied the right to independent merits review. The Law Council is not aware if corresponding data for other State/Territory tribunals/review authorities is available, however there is no reason to expect

[2] AAT Annual Report 2009/10, page 134

that the outcome would be substantially different under other no-fault schemes.

Legislation should clearly define the scope of the scheme

(d) The Productivity Commission appears to support its argument for denial of merits review by reference to highly exceptional cases, which have explored the boundaries of compensation schemes.

(e) If the concern of the Productivity Commission is really in relation to removing outliers, or the propensity of people to bring speculative claims, this concern would be more effectively overcome by setting out the boundaries within the legislative framework.

(f) It appears that the Commission envisages the NDIS will be flexible in its application of the 'reasonable and necessary' criteria, depending on the needs of the individuals concerned. This is not a strong basis upon which to preclude independent review of decisions upon their merits.

People outside the scheme may enjoy better review rights

(g) As noted above, Comcare and most other no-fault compensation schemes permit people who have suffered serious injury or disability to seek merits review from an independent tribunal or authority, and subsequent judicial review through the courts.

(h) If the Commission's proposal is adopted, people falling outside the NDIS will have better review rights than those within the scheme, which hardly seems equitable.

Natural justice

(i) There is strong likelihood of perceived bias in relation to internal review processes handled solely by the entity that has made the original decision. Such a perception is exacerbated by the lack of any independent merits review process, which would provide a strong incentive for the Authority to ensure its internal review mechanisms are rigorous and designed to withstand independent oversight.

33. The Law Council submits that the Administrative Appeals Tribunal (AAT) is the appropriate body to provide merits review from decisions of the NDIA.

Advocacy

34. The Law Council notes that, apart from the strong and largely unwarranted attack on common law rights for injured people, there is very little discussion in the draft Report concerning advocacy and representation for participants within the scheme.

35. Whilst there is no specific recommendation regarding advocacy in the draft report, the Productivity Commission states (on page 7.40 of the draft Report) that:

> "…as is the case with many dispute resolution processes, this should be undertaken without legal representation for appellants and not be bound by rules of evidence."

36. The Law Council notes that this statement is unsupported by any examples of a well-functioning no-fault compensation scheme which denies access to legal representation. In fact, contrary to this statement, excluding the right to legal representation in dispute resolution processes is not common and is highly prejudicial to complainants/appellants, particularly in circumstances where the right to independent merits review is curtailed. Most existing compensation schemes permit appellants the right to legal representation, as well as external merits review. For example, Comcare allows appellants access to legal counsel at their own expense and retains broad rights of appeal to the AAT. The same is true of most workers compensation schemes around the country. Legal representation is also permitted under the New Zealand ACC.

37. As noted above, participants in Tier 3 of the NDIS and their carers are likely to be particularly vulnerable and, if they are engaged in a dispute about entitlements with the NDIA, will find themselves at a substantial disadvantage next to the relative experience and resources available to case managers. It is simply unacceptable to deny qualified representation to people in a position of such vulnerability.

38. The Law Council submits the Productivity Commission's proposal to deny legal representation within the NDIS is out of step with community standards in comparable jurisdictions; will place NDIS participants at a disadvantage compared to those covered by other schemes; and is completely unsupported by any argument or evidence that it is necessary, fair or appropriate.

39. This unfairness would be exacerbated under the Commission's preferred position that merits review be excluded, or substantially limited.

40. The Law Council strongly recommends that the Productivity Commission reconsider its position in relation to allowing NDIS participants the right to appropriate advocacy within the scheme. The present position, as set out in section 7.8 of the draft report, appears to reflect an ideological fixation on exclusion of legal practitioners, rather than the design of a scheme that will ensure the best interests of severely disabled persons are represented. This may undermine the credibility of the final PC Report and is likely to generate significant opposition, which would be unfortunate given the importance of bi-partisan political support required right across all tiers of government to ensure the NDIS becomes a reality.

Costs of the scheme

41. The Law Council has read and agrees with the submissions of the Queensland Law Society in relation to its concerns about the potential cost of the scheme.

42. The Law Council considers that the greatest risk to the NDIS, if established, will arise from inadequate allocation of Commonwealth funds to support it. The Law Council acknowledges the business of the Productivity Commission and the Disability Investment Group is largely concerned with estimating such expenses. The Law Council's concern arises largely from the experience of comparable schemes, in which the actual costs of care and support appear to be substantially greater than the estimated budgetary allocation proposed for the NDIS.

43. For example, the NSW Lifetime Care and Support Scheme, which covers catastrophically injured road accident victims, has 390 participants and total care and support expenses of $38 million per annum, equating to around $100,000 per person. This excludes the cost of administering the scheme, resolving disputes, etc. The criteria for entry to the scheme includes spinal injury resulting in permanent

neurological impairment, brain injury resulting in permanent mental impairment, burns to over 30% of the body, multiple amputations and permanent blindness.[3]

44. These sorts of disabilities may account for a significant proportion of the participants in the proposed NDIS and it is likely that similar or greater costs could arise in relation to those with permanent, disabling conditions such as cerebral palsy, stroke, autism, dementia, multiple sclerosis, etc.

45. Assuming the Productivity Commission's estimate of 355,000 people who would be potentially eligible for the NDIS is accurate, based on the actual cost of care and treatment under the NSW Lifetime Care and Support Scheme, the Commission's estimate of $12.8 billion appears to be less than a third of what might be required to properly finance the scheme ($35.5 billion at $100,000 per capita). Even if actual cost of care and treatment, on average, were only half that of the Lifetime Care and Support Scheme, the total cost of care and support (excluding administration expenses) would be in the vicinity of $17.75 billion. Assuming administration expenses of 10-15% (as is the case under the New Zealand ACC or Victorian TAC schemes),[4] there might be additional costs of between $2.5 and $5 billion.

46. The Law Council notes there are potentially significant inconsistencies between the risks covered under the proposed NDIS and existing State catastrophic injury schemes. However, the draft Report does not attempt to explain why comparisons with existing catastrophic injury schemes have not been made in the draft Report. There appears to also be substantial uncertainty with respect to the cost estimates outlined in Chapter 14 of the draft Report, as well as inconsistencies between the Commission's estimates and those contained in the 2009 DIG report. For example, the Law Council notes the following:[5]

    (a) The gross annual cost of the proposed NDIS is estimated in table 14.21 as $10.8 billion to $14.2 billion, including 10% for administration. The source tables make no allowance for persons over 65, as these are apparently assumed to elect to receive benefits from the aged care system rather than the NDIS. Page 14.24 notes that the estimates assume pay-as-you-go funding, and are for 2009.

    (b) Care and support accounts for about 91% of the upper gross cost estimate. Care and support assumptions are in tables 14.2, 14.4 and 14.6, and can be simply multiplied to get the cost estimates in table 14.7. The estimate ranges allow for uncertainty in assumed hourly care and support costs (for example, the hourly cost for persons receiving help up to six times a day is assumed in table 14.6 to lie between $36 and $45). The estimate ranges do not allow for uncertainties in the estimated numbers of people in tier 3 (table 14.2), or for the uncertainties in the assumed severity distribution of people in the daily assistance category (table 14.4). It is surprising that no attempt has been made to estimate the distribution of uncertainties in the final cost estimates arising from the uncertainties in each of the components.

[3] LTCS Guidelines part 1. See http://www.lifetimecare.nsw.gov.au/Guidelines_and_Policies_for_Professionals.aspx

[4] The examples of administrative costs under the NZ ACC and Victorian TAC are used due to the Productivity Commission's acknowledgment that the relatively low administration costs of the LTCS scheme is likely to be a result of its immaturity: PC draft Report, ibid, page 15.43.

[5] These comments are based on the advice of Richard Cumpston, retired actuary and former Principal of Cumpston Sarjeant Pty Ltd.

(c) The annual cost of aids and appliances is estimated in table 14.11 as $331 million to $824 million and accounts for 6% of the upper gross cost estimate. Page 14.19 notes that these estimates are significantly higher than the $240 million estimate in the DIG report, but are based on more comprehensive information. They are much higher than the $118 million of state expenditure on aids and appliances in Appendix B of the DIG report.

(d) Page 14.27 comments that:

"The above analysis indicates that the current system is between 50 per cent and 100 per cent under-funded (that is, at the upper-end, expenditure would need to double). These cost estimates are highly uncertain because the data underlying them were not designed to cost a disability scheme".

If the current system for persons with disability under 65 is 50%-100% underfunded, then it seems highly likely that the system for persons over 65 with disability is also seriously underfunded. As the Commission's cost estimates do not allow for any matching improvements to persons over 65, and do not allow for population growth and cost inflation from 2009 to 2011, they are likely to be materially low.

(e) Recommendation 3.5 proposes that people using the NDIS at retirement age would have the choice to continue using the NDIS or transfer to the aged care system. Any incongruity between the NDIS and aged-care system is likely to affect that choice, with cost ramifications for the more attractive scheme. It is unclear if the Productivity Commission's estimates have factored in the possibility that a significant number of NDIS participants may choose to remain in the scheme until they are forced into a nursing home.

47. The very large uncertainties in the cost estimates raise difficult questions about the continuing funding of the proposed NDIS. What happens if the first year of operation shows that the amounts needed are much higher than the central cost estimates? The Law Council queries whether a pilot scheme or schemes could be used to provide more reliable estimates

48. In any event, given the Productivity Commission's acknowledgment that "there will always be a significant degree of uncertainty in the numbers"[6] and the apparent high variation in costs according to different assumptions, evidenced by the discussion in chapter 14, the Law Council considers that the relative cost under comparable schemes should not be overlooked as an indicator of the potential cost of the NDIS.

Relationship with existing schemes

49. The Law Council submits that the NDIS should not seek to replace existing schemes. The Law Council suggests that:

(a) the Productivity Commission should recommend that States and Territories establish no-fault arrangement, where none exist, for those catastrophically or seriously injured in accidents. The Productivity Commission should not seek to prescribe the funding streams that should be established to finance those schemes, other than to suggest potential sources of funding for consideration.

[6] PC draft Report, ibid, page 14.32.

(b) the Productivity Commission should further recommend that the NDIS be extended to fill existing gaps in no-fault arrangements, to ensure all people suffering severe disabilities are covered by a no-fault scheme regardless of how their disability was acquired.

(c) The scheme should not be compulsorily applied. Those who have the capacity to manage their own affairs with assistance should be allowed to opt out of the scheme. In particular, those who receive a common law settlement should be permitted to repay past treatment expenses to the scheme and choose whether to 'buy-in' to the scheme or simply use the NDIS as a referral service, as intended under tier 2 for people with less than catastrophic injuries.

(d) the issue is then how the NDIS might interact with other compensation schemes. Where care and medical treatment is provided by another scheme it would be appropriate for it to be accessed in that scheme rather than the NDIS. In respect of lump sum settlements there are 3 models:

(i) *Health and Other Services (Compensation) Act 1995* (Cth);

(ii) Centrelink; and

(iii) Pay-back and buy-in.

50. The Law Council considers each of these models may offer a reasonable basis for interaction with existing schemes.

National Injury Insurance Scheme (NIIS)

51. The Law Council strongly supports the provision of no-fault care and support for people injured by misadventure. However, the Law Council submits that the case for a separate NIIS is not strong and should be reconsidered.

52. The proposal would result in the creation of 2 separate bureaucracies, which will result in greater administrative costs. If additional administrative costs are to be incurred as a result of an additional government agency, the need for such a body should be carefully considered.

53. Under the Productivity Commission's proposal, the functions of the NIIS would be to set standards and to encourage State and Territory governments to establish uniform no-fault arrangements for people injured regardless of circumstance or location. The provision of uniform, comprehensive, no-fault care and support for people accidentally injured is an important objective.

54. However, a primary concern under this proposal is that it relies on State and Territory governments to establish no-fault arrangements for injury before full coverage is achieved. It seems highly likely there will be reluctance among various governments to establish such frameworks both initially and in the longer term, due to the substantial cost. This concern is supported by the submission of the South Australian Government, which states that it "would be opposed to any additional costs being imposed through CTP premiums".[7] Given the apparent opposition from state governments, which are reluctant to risk higher premiums under existing schemes to fund no-fault arrangements, it seems unlikely that an intergovernmental agreement to fund and operate a NIIS secretariat would be achievable.

[7] PC Disability Support Inquiry, submission no.496.

55. Accordingly, there will be a significant proportion of catastrophically injured people who will not be covered initially and, potentially, indefinitely. This is clearly undesirable and may lead to many of the problems which have beset the New Zealand ACC, as people with catastrophic injuries not covered by a state/territory no-fault scheme seek to have their injuries categorised as disabilities in order to access the NDIS.

56. In relation to the various points made by the Commission in support of a separate NIIS, on page 16.29-16.30, the Law Council notes the following:

    (a) Given the Commission's lengthy deposition on the capacity for risk rating under no-fault arrangements in Chapter 15 of the report, the Law Council does not understand why the Commission considers risk rating to be a particular problem under the NDIS, as opposed to the NIIS. Under the proposed model, the prices (including risk-rated premiums) would continue to be set under the various schemes operating in the states and territories, which means the proposed NIIS would not have a significant role to play in assessing risk, in any event.

    (b) It is unclear how the NIIS would easily be able to capture the separate funding streams under the Commission's proposed model. If private insurers and State/Territory governments hypothetically agreed to generate funding through additional levies and taxation, they would be unlikely to simply agree to transfer funds to the Commonwealth under intergovernmental agreements where the extent of liability has not been determined. A far simpler mechanism, as discussed below, would be either for the Commonwealth to cover anyone not covered by an existing no-fault or hybrid scheme, or to cover all people who are eligible (i.e. catastrophically injured) and seek to recover expenses from insurers and state/territory governments through ordinary compensation recovery processes, as further discussed below.

    (c) Given a federated approach is proposed, it is unclear what role the NIIS might have, which could not be carried out more efficiently by the NDIS. It is indicated at 16.30-16.31 of the draft Report that the NIIS's functions will be purely bureaucratic, without any insurance functions such as collection of premiums and contributions, or pricing risks appropriately. It seems inefficient to propose a second bureaucracy to carry out these functions.

57. The Law Council submits that the proposal for a separate NIIS should be abandoned in favour of complete coverage for all people injured through misadventure under the NDIS, except where covered by an existing no fault scheme. The role of the NDIS should be expanded to include the functions currently proposed for the NIIS. Further, the Commonwealth could seek to ameliorate costs through intergovernmental agreements, which could ensure the transfer of funds from existing schemes to cover the care and treatment of catastrophically injured people under the NDIS.

Damages for future care

58. The Productivity Commission proposes that access to common law damages for future care and treatment be abolished, as such treatment would theoretically be covered by the NIIS.

59. As the Productivity Commission is aware, there exist substantial gaps in no-fault coverage for future care and treatment. The only no-fault motor accident schemes

in existence are in Victoria, Tasmania and Northern Territory and NSW (which covers only catastrophic injuries). There are no medical injury compensation schemes or public liability schemes in existence.

60. The Productivity Commission should acknowledge that convincing all State and Territory governments to establish comprehensive no-fault arrangements for all types of injury will be an extremely challenging undertaking, which is only likely to be achieved in the longer term. In support of this consideration, the Law Council notes there has been significant intransigence in relation to harmonisation of workers compensation and it is already clear there will be reluctance among some jurisdictions to establish such schemes, as evidenced by submissions already made to this inquiry by State and Territory governments.

61. Accordingly, if the Commission's proposal to remove common law compensation for future care and support is implemented, there may be a substantial number of people who are disenfranchised, with no scheme to fall back on.

62. Moreover, as discussed below, it is not necessary to abolish common law compensation for care and support in order to improve certainty and minimize disputes. This can be achieved if the NDIS is set up and geared to provide estimates of the cost of 'buying into' the scheme for the compensating authority, which would substantially assist in resolving disputes around compensation for future care and support.

63. If the Productivity Commission's recommendation to abolish damages for future care is implemented, there will be a number issues to consider, including:

    (a) Will those falling outside the scheme (i.e. those with serious, but non-catastrophic injuries) have access to damages for future care – thus greater freedom in choosing how it is applied – while those within the scheme will not? Does this not create the risk that the scheme will be considered undesirable to those who do not wish to engage in a bureaucratic process every time they need or want particular appliances, aids, treatment or therapy?

    (b) Will those eligible for the scheme, who have a right to sue at common law, retain the right to seek compensation under the common law for things which are excluded under the scheme, or which the authority has refused to provide, on the basis that it was not deemed "reasonable or necessary"?

Compensation recovery

64. Leaving aside the Law Council's reservations concerning the necessity of a separate NIIS, it is unclear why the Productivity Commission has not considered the option of compensation recovery mechanisms to ameliorate a significant proportion of the costs of the scheme. Compensation recovery has worked effectively under most common law, hybrid and no-fault schemes to transfer risk back to private or public insurers, which would otherwise bourn by the tax payer through Medicare or Centrelink.

65. As discussed below, the creation of the NDIS presents an opportunity for future care needs to be actuarially assessed, providing an avenue for independent, authoritative estimates of compensation awards for future care for the purposes of settlement negotiations and court determinations.

66. The Law Council submits that such a mechanism would largely resolve concerns about delays and uncertainty associated with determining the cost of future care

needs, while enabling the scheme to recover such costs through compensation recovery processes.

67. Accordingly, the Law Council does not support abolishing damages for future care and treatment costs and recommends the Commission consider compensation recovery as a means of reducing scheme costs while eliminating delays associated with disputes over the care needs of the plaintiff in the long term. These matters are given further consideration below.

No-fault versus common law

Greater balance needed

68. The Law Council considers the Productivity Commission's treatment of common law lacks appropriate balance; is often misleading and, in some cases, false; fails to offer a reasonable critique of the short-comings of pure no-fault arrangements; and fails to include in its analysis the comparative performance of existing schemes.

69. The discussion in Chapter 15, in particular, is highly polemical and shows very little reliance on views put forward by parties which made submissions to this inquiry. This creates a perception that the Productivity Commission has been long since concluded its position on this issue (as evidenced by previous inquiries by the Productivity Commission[8] and its predecessor, the Industry Commission[9]), which somewhat undermines the analysis.

70. The objective appears ultimately to be the creation of a New Zealand-style ACC. However, unfortunately the chapter does not engage in any form of critical analysis of that scheme, and generally ignores all evidence of the problems that have beset that scheme since its establishment in 1974.

Cost of pure no-fault

71. The Law Council submits that the draft Report shows little indication that the Productivity Commission regards the cost of pure no-fault schemes as a significant problem. For example, whilst conceding that "the financial predicament of the New Zealand scheme…illustrates a potential vulnerability of no-fault systems", the Productivity Commission concludes merely that "the growth in unfunded liabilities affirms the need for a sound governance framework." The Commission does not attempt to explain the alleged weaknesses in the NZ ACC's governance framework, or for that matter the governance problems which, by implication, must have beset every other no-fault scheme which has fallen into financial difficulty.

72. The Commission should give this issue more serious treatment than is presently attempted in the draft report. For schemes that face rising costs associated with treatment and care, significant pressure emerges to either reduce those costs through reductions in benefits and eligibility, or to increase funding to meet liabilities through compulsory contributions or taxation. As mentioned in the Law Council's previous submission (but not referred to in the draft Report), in 2008 the New Zealand ACC announced unfunded liabilities of $23.175 billion. This is roughly equivalent to 17.1 per cent of New Zealand's Gross Domestic Product, a deficit

[8] For example, the Inquiry into National Workers Compensation and OHS Frameworks, No. 27, March 2004.
[9] For example, the Industry Commission, Inquiry into Workers Compensation in Australia, No.36, February 1994.

which would be considered absolutely extraordinary in the Australian context, with obvious political ramifications. In New Zealand, this has led to enormous increases in compulsory contributions to its various injury compensation 'accounts', as well as moves to further limit benefits to injured persons.

73. Similarly, South Australian WorkCover, which does not allow any access to common law, presently has unfunded liabilities of almost $1 billion and charges employers the highest compulsory contributions in the country, at 2.75% of payroll.[10]

74. It is also worth noting that over the period 2004-2008, average workers compensation premiums across most Australian jurisdictions fell by 25%-30%. Over the same period, premiums/compulsory contributions in South Australia and New Zealand remained largely unchanged.[11]

75. The Productivity Commission should acknowledge that a common factor in each of those cases is the lack of access to common law. The NZ ACC and SA WorkCover schemes do not permit any resort to litigation and are some of the worst performing schemes in terms of premiums, cost and benefits to those insured. Conversely, Queensland's WorkCover scheme is very liberal in terms of common law access and has the lowest premiums in the country at just 1.3% of payroll, followed by Victoria with premiums of 1.33%.

Return to work outcomes

76. The Australia and New Zealand Return to Work Survey 2009/10 demonstrates that there was virtually no difference in return to work outcomes among injured workers in Australia and New Zealand.[12] This appears to debunk the Productivity Commission's assertions that no-fault schemes lead to better return to work outcomes, or that common law encourages malingering.

77. Examining the Australian jurisdictions more closely demonstrates that pure no-fault schemes in fact perform worse than comparable hybrid or common law jurisdictions. For example, in 2009/10:

    (a) South Australia had the lowest return to work rate, while Queensland had one of the highest;

    (b) South Australia and Comcare both had the highest proportion of workers on compensation payments[13], while Queensland was among the lowest.

78. Given the comparative performance of the various jurisdictions in terms of return to work outcomes, the Law Council submits that the Productivity Commission's arguments in relation to the supposed deleterious impact of common law systems on health and recovery outcomes are unsustainable. The Law Council recommends that the Commission have greater regard to the actual performance of existing schemes and give less weight to theories and suppositions, which are simply not reflected in reality.

[10] Workplace Relations Ministers Council, Comparative Performance Monitoring Report, 12th edition, December 2010, Commonwealth of Australia, p23. See also WorkCoverSA, media release, 24 March 2011.
[11] Ibid.
[12] Australia and New Zealand Return to Work Monitor 2009/10, *Heads of Workers Compensation Authorities*, August 2010, page i.
[13] Ibid

Benefits of hybrid schemes

79. The Commission's analysis in this area would be improved if placed in its proper context. Presently, there is a broad array of compensation frameworks for injury, varying from statutory no-fault to restricted common law. No jurisdiction allows unfettered access to common law compensation, as there are statutory provisions controlling the size and nature of compensation, including discount rates (as noted by the Commission). There are a number of hybrid schemes operating, which objectively out-perform pure no-fault schemes on almost every level. There are also comprehensive provisions governing case-management in each jurisdiction, in order to address concerns about delays and clarify the issues in dispute well before reaching trial.

80. Given the Commission effectively recommends the establishment of hybrid schemes for catastrophic injury in all jurisdictions, the draft Report would also be improved if hybrid schemes were given more than just tacit acknowledgment. The Law Council suggests that Commission should spend more time analyzing the benefits of schemes which meet care and treatment expenses for all injured people, while permitting those people to lodge a common law claim. Such an approach would certainly go some way toward addressing the polemical approach to common law in the draft Report.

Discount rates and "buying in"

81. Further, the Law Council notes the Commission's comments with respect to discount rates at page 15.16. This is an area of considerable concern, which the Commission might consider addressing by way of a specific recommendation.

82. As noted by the Commission, discount rates are identified as a primary reason for the low uptake of structured settlements, as it is cheaper for insurance companies to pay a lump-sum that has been arbitrarily reduced by an unrealistically high discount rate than to apportion payment of an undiscounted lump-sum over the course of the injury.

83. Discount rates are also a primary inhibiting factor for people wishing to "buy-in" to existing no-fault schemes. For example, the option to 'buy in' to the NSW Life Time Care and Support Scheme was made available in around April 2010, presumably for the benefit of those injured before the scheme commenced. However the Law Council understands that this option has not been taken up because the 5% discount rate applying in NSW generates a large disparity between the lump sum received and the actual cost of buying in.

84. Whilst the Productivity Commission identifies the fact that discount rates are intended to reduce an award for future treatment and care by an amount equivalent to the expected investment return on the sum through "reasonably safe investments", it is clear that discount rates have been used by governments as a simple means of arbitrarily reducing compensation. Clearly, this is a mechanism which most harshly affects the youngest and most catastrophically injured, a result which seems inimical to the stated aims of compensation schemes generally.

85. At present, there is no effective mechanism to set the discount rate nationally, however it is clearly illogical to apply different rates in different jurisdictions or under different schemes. In the UK, the discount rate has been set at 2.5%, which is a more realistic measure of the likely return on reasonably safe investments.

86. An appropriate mechanism for consistent and fairer discount rate-setting in the Australian context might be the Treasury indexed bond rate, which is calculated to include the effects of present inflation and taxation on investment return. In recent years, the indexed bond rate has stood around 2.4%.

87. The Law Council strongly recommends that the Productivity Commission consider the appropriateness of discount rates set in different jurisdictions and recommend that a central mechanism (such as the Treasury indexed bond rate) be used to set discount rates in all jurisdictions at a more realistic level.

88. The Law Council submits that this would have the benefit of enabling people with a common law claim to subsidise the NDIS by contributing compensation awarded under a common law claim for future care and support.

89. Moreover, the estimated cost of buying into the NDIS for eligible persons would be a clear indication to a court and the parties to proceedings as to the appropriate amount to be awarded for future care and treatment, which may largely resolve disputes about quantum. For example, the NDIA might be asked to provide an assessment of the cost for the plaintiff to "buy-in" to the NDIS, which could be provided to the court or compensation authority as an indication of the appropriate amount to apportion for future treatment and care.

90. Such and approach would address the argument that removing common law damages for future care costs in catastrophic injury cases would reduce the scope for disputation, because the appropriate amount would be actuarially determined and recommended by the NDIA.

Some comments misleading

91. The draft Report makes a number of statements which the Law Council considers to be misleading or untrue. For example, the Productivity Commission states that:

    (a) under fault based compensation arrangements, "only a fraction of claims succeed" (page 15.1).

        This statement is unsupported by any evidence and is not reflected in the experience of legal practitioners in this area. Most legal practitioners acting in personal injury matters do so on a speculative, no-win-no-fee basis, which provides a very strong incentive for plaintiff lawyers to ensure each claim brought forward has high prospects of success. Roughly 98% of claims reach negotiated settlement before trial and the Law Council is advised that a high proportion of those claims which proceed to trial result in a decision for the plaintiff. In particular, the vast majority of claims involving catastrophic injury succeed either through settlement or court order.

    (b) Legal practitioners may routinely delay filing claims on behalf of their clients beyond what is necessary to ensure stabilization of the plaintiff's injuries (pages 15.12-15.14).

        It is suggested that delaying medical treatment and filing of claims may be a tactic used by plaintiff lawyers in litigation to control the admission of relevant information and to drive up legal fees.[14] This is, at best, a misleading generalization about the approach of legal practitioners to management of

[14] E.g. draft Report, page 15.12.

common law claims and is not supported by any empirical evidence. The Commission cites opinions in support of this notion, which pre-date many statutory changes placing strict controls around the progress of claims, including time frames for filing an originating process, serving and responding to interrogatories and notices to produce, as well as compulsory case management, settlement conferences and mediation. In addition, cases presented by the Commission to support its assertions are clearly outliers and do not reflect the experience of the vast majority of common law claims.

(c) "People suffering negligent injury from another party often want to punish that party through financial penalties – 'making them pay'", (page 15.35).

The Law Council considers emphasis on punishment and retribution as a contemporary rationale for common law is misguided. As the Commission correctly points out, the existence of insurance has largely removed any retributive effect. There is very little in recent curial discussion to suggest that punishment is an important motivation for common law actions - except perhaps in relation to claims for exemplary damages. However, exemplary damages have been removed in many jurisdictions and would not be awarded under the common law, in any event, where separate criminal proceedings have been commenced or concluded. In *Gray v Motor Accidents Commission* (1998) 196 CLR 1, the High Court confirmed that criminal law is the more appropriate mechanism for punishment, refusing to order exemplary damages against an intentional tortfeasor who had already been convicted and sentenced for causing grievous bodily harm.

Common law claims are more likely to be motivated by a desire for restitution and justice. "Restitutio in integrum" is one of the earliest and most enduring maxims underpinning the common law of torts, which stands generally for the principle that the purpose of damages is "to put the party who has been injured in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation."[15]

The focus, therefore, is on what is required to restore the plaintiff to their pre-accident disposition, rather than what reparations would amount to an appropriate punishment for the defendant. 'Retribution' is largely dealt with by the criminal law through fines or other penalties; contributory negligence findings or exemplary damages awards, which consider the defendant's level of culpability rather than mere negligence; and no fault schemes, which punish parties through reduced compensation for contributory negligence or culpable conduct[16].

It is therefore incorrect to identify 'retribution' as a central justification for common law. Many no-fault systems already deal with the retributive function in the same way as common law. For example, the New Zealand ACC permits common law claims in cases of gross negligence or recklessness on the part of the tortfeasor. Under the NT Motor Accidents Compensation Act, persons found to have been under the influence of alcohol or drugs, to have driven recklessly or to have driven an unregistered vehicle, may be precluded

[15] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25,39, per Lord Blackburn

[16] For example, the NT Motor Accidents Compensation Act, penalises persons found to have been under the influence of alcohol or drugs, to have driven recklessly or to have driven an unregistered vehicle, through reduced statutory benefits for lost income and pain and suffering. Compensation is similarly reduced under the Victorian TAC.

from accessing statutory benefits for lost income and pain and suffering. This is similarly the case under the Victorian TAC.

The Law Council notes that the model ultimately preferred by the Productivity Commission, which would remove access to common law under all heads of damages, would not address the very rational desire of individuals (and society in general) for justice and restitution.

(d) "adversarial processes may hamper and delay effective recovery and health outcomes" (page 15.1).

Given the clear inconsistency among meta-studies of the impacts of litigious processes on health outcomes, demonstrated by the Spearing and Connolly report[17], the Law Council does not consider this conclusion can be supported.

As noted above, return to work outcomes under common law and hybrid schemes are generally better than in schemes which have abolished access to common law compensation. The Productivity Commission's report would be improved if greater regard were had toward the demonstrated performance of existing schemes in Australia and less emphasis placed on the inconclusive findings of academic studies on this topic, none of which apparently consider this issue in the Australian context.

Size of legal fees and costs

92. The Productivity Commission requests in Part 16.4 of the draft Report *"feedback on the benefits and risks of requiring nationally consistent disclosure to an appropriately charged body responsible for monitoring and publicly reporting trends in legal fees and charges paid by plaintiffs in personal injury cases."*

93. The Productivity Commission is most likely aware that there exists stringent regulation of legal fees and costs under legal profession legislation in all States and Territories. Law practices can be required to have their costs audited independently and, if necessary, submit their costs to the Court for examination.

94. Lawyers in all jurisdictions are required to disclose to their clients the basis upon which costs have been calculated and, where reasonably practicable, provide an estimate of the range of costs the client might expect to pay.[18] In personal injury matters, a number of jurisdictions impose an upper limit on costs which can be claimed.[19] The client can apply at any time to have the costs independently assessed and, if there is a finding that the costs are unreasonable or unfair, a determination can be made by the assessor to reduce those costs to a level deemed fair and reasonable. There are also provisions for independent review of an assessor's decision and subsequent appeal against the findings of the review panel.

95. It is further noted that, under draft model nationally uniform legal profession legislation to be adopted in all jurisdictions, the charging of excessive costs will become a matter which attracts disciplinary action against a law practice which charges costs deemed unfair or unreasonable.

[17] Spearing, N. and Connelly, L. 2009, 'Is Compensation "bad for health"? a systematic meta-review', *International Journal of the Care of the Injured*, vol 41 no 7, pp 683-92
[18] For example, see *Legal profession Act 2004* (NSW) section 309.
[19] For example, ibid, part 3.2 div.9.

96. Clients who are concerned about the size of their lawyer's fee can refer the matter to the legal services regulator in their jurisdiction for investigation.

97. As noted previously, the vast majority of personal injury claims are conducted on a no-win, no-fee basis. This means there is often an uplift fee applies in the event of a successful outcome, as the law practice bears all risks associated with costs in the event of an unsuccessful outcome. In any event, legal fees are generally agreed under private contractual agreements.

98. The Law Council agrees with the Commission that pursuing this issue would be an unnecessary distraction from the central aim of this inquiry. It is not required by the terms of reference and focus should remain on the business case and mechanisms for establishing the NDIS. There is already extensive monitoring and regulation of legal costs in all jurisdictions and ample sources for that information to be collated.

99. Having regard to the matters raised in this submission in relation to the Commission's treatment of common law and legal fees, the Law Council suggests that the Commission maintain focus on the NDIS as a means of comprehensively covering the care and support needs for those who need it most.

Conclusion

100. The Law Council thanks the Productivity Commission for the opportunity to contribute to this inquiry and commends the Commission on a number of its positive recommendations, including the creation of a NDIS.

101. The Law Council considers the NDIS would, if implemented, be a significant national achievement. The critical elements of the NDIS will be:

    (a) comprehensive coverage for severely and profoundly disabled people;

    (b) comprehensive coverage of catastrophically injured people who are not covered by any other scheme;

    (c) a right for eligible participants to opt-out of tier 3 of the scheme if they so choose;

    (d) commitment by the Commonwealth to adequately fund the scheme, on the basis of realistic estimates (noting that the greatest threat to the scheme will come from inadequate funding);

    (e) access to fair and transparent review and appeal mechanisms, including merits review, for all scheme participants;

    (f) access to self-funded legal advice and assistance for those who require it (noting that this is consistent with best practice in the vast majority of schemes and is essential for severely disabled people and their carers, who are in a position of significant vulnerability); and

    (g) access to common law compensation for those with a compensable injury, along with mechanisms to enable recovery of compensation for future care and support needs by the NDIS, in order to offset the costs of the scheme.

102. The Law Council also considers a complementary measure would be to lower discount rates for compensation awards and establish a central discount rate setting mechanism, to enable injured people who are excluded from the scheme to buy-in if they wish to.

103. The Law Council would be pleased to expand on any of the matters raised in this submission. The Law Council also commends the Productivity Commission on its work so far and looks forward to receiving the Productivity Commission's final report.

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 56,000 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.

Law Council
OF AUSTRALIA

Inquiry into a National Disability Care and Support Scheme

Productivity Commission

20 August 2010

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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.

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[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.

<u>Absorb existing state schemes into national framework</u>

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] VUWLRev 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 billion[13] – 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

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.