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Inquiry into Disability Care and Support
Productivity Commission
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Dear Commissioners

KPMG - COMMENTS ON THE PRODUCTIVITY COMMISSION DRAFT REPORT INTO DISABILITY CARE AND SUPPORT

KPMG commends the Productivity Commission on its Disability Care and Support draft report dated 28 February 2011 (the "draft report"). We note the Commission has taken a balanced approach to the proposed National Disability Insurance Scheme (NDIS) and the National Injury Insurance Scheme (NIIS). We believe the Commission has given due consideration to submissions and provided rationale and justification for its recommendations. The schemes, as put forward in the report, contain a number of positive features that will be beneficial to people with a disability and their carers.

In particular we note the following in respect of the Commission's proposals:

- Page 14.15 of the draft report acknowledges in its analysis of the costing of the scheme that the viability of the scheme relies on the continuation of unpaid care. Page 17 of the Overview notes that needs assessment for Tier 3 will consider 'what reasonably and willingly could be provided by unpaid family carers and the community'. Understanding the interaction of this reliance on the continuation of unpaid support with the need to offer respite and other supports to those carers currently providing care at unsustainable levels, will be a challenge for the scheme.
- Due to the current disjointed and fragmented disability systems that cross many jurisdictions, there is a dire lack of consistent, accurate and comprehensive data on almost all aspects of disability, and disability care and support in particular. Lack of data impedes informed decision making on the efficient use of resources and funding. We therefore support the Commission's recommendation for the implementation of extensive data systems that are consistent across jurisdictions as

well as across different parts of the disability system. We see this as a priority issue.

The draft report is comprehensive and attempts to address the large number of complex issues that the introduction of a universal social insurance disability scheme will introduce. We are supportive of the direction of the recommendations, and we do not propose to comment on all aspects of the draft report. However we wish to bring to your attention a number of additional implications or considerations beyond those highlighted in the draft report. We note that in most cases these are areas where we believe the final report should provide greater detail or additional clarity, rather than a need for a change in the proposal.

We summarise some key issues below, and expand on these and a number of additional points in APPENDIX A – NDIS Eligibility and Benefits, Appendix B – NDIS Funding, Costing and Workforce Capacity and Appendix C – NDIS specific issues.

- Tier 2 is not explored in detail in the draft report. Whilst we appreciate that much of the detail will be determined during implementation, it is difficult to assess the practicality of this option from the draft report. We have set out questions regarding the process and logistics of Tier 2 in Appendix A, which we believe could be addressed at a high level by the Commission in the final report. In addition, we observe that the restriction of Tier 3 to a relatively small subset of the total number of people with a disability implies that current sources of government and other funding will continue to be required indefinitely to provide support for the majority of people with disabilities (i.e. Tier 2). This is not acknowledged clearly in the draft report.
- The Terms of Reference stated that the Commission should examine options that focus investment on early intervention and the ability to access funding for early intervention was a common theme in almost all submissions. Chapter 11 of the draft report suggests that while some early intervention will be provided within the NDIS for some specific disabilities, there will also be intervention that sits outside the scope of Tier 3. Whilst Chapter 11 also sets out considerable discussion regarding the importance of early intervention and how an evidence base might be accumulated, it does not clarify whether early intervention is intended to apply to Tier 2 participants. Early intervention will affect (and perhaps limit) Tier 2 participants transitioning into Tier 3 as their disability progresses. This will have a direct impact on costs. Whether or not sufficient early intervention is being provided outside of Tier 3, may well impact the sustainability of the NDIS.
- While costings for the NDIS contain inherent uncertainty, we note in particular that there is a reliance on unpaid carers continuing their current role (albeit possibly with greater respite). There is also uncertainty regarding the paid carer workforce, with respect to both the supply of workers and pressures on wages, and therefore scheme costs. These issues are discussed further in Appendices A and B of this

submission. We recommend specific scenarios be included with respect to these uncertainties, regarding the potential impact on scheme costs, in Chapter 14 of the report.

- We observe that the NIIS will overlap with a broad range of existing compensation schemes already in place. Considerable discussion will be required during implementation to agree on definitions of catastrophic injury and baseline levels of care and support as these will define the crossover points between the NIIS and existing compensation schemes and the NDIS. We discuss certain issues with respect to the NIIS in Appendix C of this submission.

Once again, we wish to commend the Commission for its work to date and for tackling this very complex problem.

Yours sincerely

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APPENDIX A – NDIS ELIGIBILITY AND BENEFITS

A.1 NDIA - Adding another box

Page 7.21 of the draft report puts forward the NDIA as being a replacement of significant functions ‘rather than merely adding to, or attempting to coordinate them’. While we agree this would be the case from the perspective of a person eligible for Tier 3, it should be acknowledged that for a person with a disability not eligible for Tier 3, or for a person who is eligible for an existing accident compensation scheme, that the NDIA, NDIS and NIIS may well be seen as “another box” or layer. Indeed, the role of the NDIA for Tier 2 participants is to act as a referral service, which implies some attempt to coordinate the existing “maze”.

Page 17.1 of the draft report notes that “existing state and territory disability services will have to remain as they are for a while and, even after the introduction of the new arrangements, coexist for some time.” It is not clear from these statements whether it is acknowledged that existing disability services will actually be required indefinitely (although presumably with some reduction of costs) for people who are not eligible for Tier 3.

Given the draft report proposes a number of additional schemes without a complete replacement of any existing agency it would be prudent for the Commission to carefully consider how additional administration for Tier 2 and other participants might be avoided, and what is the ongoing role of state and territory disability support.

There is also an ongoing role for other service providers (e.g. Non-Government Organisations) which we have discussed further in Appendix B.

A.2 Tier 2

We note the Commission has provided substantial detail on Tiers 1 and 3. However, we would recommend providing further information on how Tier 2 will operate given that potentially 4 million people might access and be reliant on the accurate and timely services of this Tier (as per section 3.4 of the report). Potential questions or implications raised in respect of Tier 2 include:

- What is the process that a person eligible for Tier 2 would have to go through? For example, would a person with a newly acquired disability or degenerative condition prior to retirement be required to “register” himself or herself or would this person’s doctor or hospital be responsible for registering him or her? It would be useful to provide a flow chart or diagram of how a newly disabled person entering Tier 2

might go through the NDIS/NIIS system. This chart could also include the process of how those who apply for Tier 3, but are unsuccessful for individualised funding, would be co-ordinated through Tier 2.

- As a scheme ‘for all Australians’, we note that access to direct early intervention will be one of the first benefits that most newly disabled people might seek. The submissions were quite clear that the current system does not adequately address this for most disabilities, and particularly for moderate disabilities that haven’t reached eligibility for Tier 3. This is discussed further in section A.2, below.
- We note that the Commission states that the State and Territory disability frameworks will continue to exist temporarily for a period after the introduction of the scheme. We query this statement, as it appears that for Tier 2 this source of funding and support will continue to be required indefinitely.
- In order to provide an effective referral or information service for Tier 2 (and potentially other Tiers), presumably the NDIA would need to have a comprehensive database encompassing both funding sources for disability support (through the various mainstream services) as well as service providers and disability support groups. Potentially this represents a considerable logistical exercise, requiring those third parties to register their information with the NDIA. It is unclear from the draft report if the scale of this has been anticipated.
- Additionally, as Tier 2 will relate to a multitude of mainstream services it may be necessary to reduce the red tape associated with this Tier. For example, Tier 2 will provide a person with information and referrals but not a case worker to help with decision making.
- When providing further information on Tier 2 we also note the Memoranda of Understanding with health, mental health, palliative and aged care. We recommend that the Commission provide further clarification as to whether these are memoranda with the NDIS and each mainstream provider, or whether there will also be Memoranda of Understanding between the mainstream providers themselves. Cost shifting and red tape was a concern in many submissions and for the significant number of persons who will be ineligible for Tier 3, there does not appear to be any change under the proposed NDIS.

A.3 Early intervention

The Terms of Reference stated that the Commission should examine options that focus investment on early intervention and the ability to access funding for early intervention was a common theme in almost all submissions.

Section 11.5 of the draft report acknowledges many early interventions that “reduce the risk of disability” (e.g. education and prevention interventions) would continue to be under the control of agencies outside the NDIS (p 11.24) and “it is likely to be impractical for the NDIS to fund or coordinate many of these interventions” (p 11.25).

While the chapter also sets out considerable discussion regarding the importance of early intervention and how an evidence base might be accumulated, it does not make clear the interactions between early intervention and Tier 2 participants. The draft report does not explore how (and when) the recipients of early intervention might be identified and it is therefore not clear how the estimated 80,000 people would access their funding entitlement to early intervention. It is not clear if the NDIS is intended to directly assist people with a moderate disability to access early intervention to prevent a longer term more serious disability.

Early intervention will affect (and perhaps limit) Tier 2 participants transitioning into Tier 3 as their disability progresses. This will have a direct impact on costs. Whether or not sufficient early intervention is being provided outside of Tier 3 may well impact the sustainability of the NDIS.

We recommend the Commission expand on whom the NDIS early intervention programs are intended to assist.

A.4 Boundaries between Tiers and Schemes

The proposed framework sets the scene for a number of boundaries and cut off points. These boundaries will have implications for who and what benefits are included in each scheme, impacting the containment of costs. There is also the potential that people with a disability who are close to the borderline between two sources of funding may have a preference for one over the other, and additional costs may be incurred where a dispute arises over an initial decision. During the implementation of the schemes, careful consideration will need to be given to ‘boundary issues’. We set out some examples below:

- The potential for transition between Tier 2 and Tier 3 is unclear, in terms of whether Tier 3 eligibility is for life or can be temporary or periodic (perhaps implying transition between Tier 2 and Tier 3 might occur at various times). Also, the transition to Tier 3 that might occur for a person initially in Tier 2 is unclear, with respect to re-assessment for Tier 3 eligibility.
- Page 16.42 notes that “The NDIS would also provide benefits to people with injuries arising from accidents prior to the start date of the NDIS...If such compensation is still available, the NDIS would recover from the lump sum...” There are a number of complexities around the interaction of the NDIS with such schemes, for example:

- This might create a disincentive to be prudent with the compensation received (i.e. exhausting the funds more quickly), if it is perceived that participation in the NDIS will come at a cost of some portion of the lump sum if any remains. Or the need for prudence may be perceived to diminish where the NDIS acts as a 'safety net' for these people. This may have implications for the cost of the NDIS scheme.
 - Where some proportion of a lump sum relates to heads of damage that are not included in the NDIS (e.g. loss of earnings), it could be argued it is not appropriate for the NDIS to recover from these amounts. Lump sums awarded are often not 'allocated' and certainly the amounts include significant reductions for discounting, vicissitudes, contributory negligence, "negotiation compromises" and legal fees, that would make recovery by the NIIS/NDIS complicated. The interaction between this and the general philosophy of 'no assets testing' should be considered.
 - Noting that eligibility for Tier 3 of the NDIS and the proposed NIIS may not be aligned, these issues may persist beyond the transitional stage where people with disabilities acquired through accident have fallen outside of the NIIS, but are subsequently eligible for the NDIS.
- It is unclear what will occur where a newly acquired disability is not clearly the result of an accident, but may have been. Pages 16.18 and 16.19 acknowledge this issue for birth cases. For these and any other examples where eligibility is unclear, we recommend that where the delay to resolving eligibility is substantial, that interim arrangements be established.
 - The creation of NIIS schemes in each state will create a "cross over" point between a no-fault periodic benefit scheme (the NIIS) and a fault based common law scheme. Therefore, the allocation of an injured person to one scheme or the other will affect how their benefits are delivered, and a preference for one form or another may drive some challenge of the eligibility decision. These preferences may include a desire for common law over periodic benefits (or vice versa) or even a preference to deal with one scheme, rather than the hybrid NIIS-existing scheme implied for catastrophic disabilities.
 - The NDIS is not intended to include a number of mainstream services (eg education, employment, transport), and yet the draft report suggests that it might include specialist programs within each of these. Co-ordination with agencies offering these mainstream services will therefore be required.
 - We note that cooperation and collaboration between the NDIS and other mainstream and existing disability services may offer the best way to meet the needs of persons with a disability. However, we note the difficulty involved with

coordinating many different departments and organisations. It is also a valid point that many “mainstream” services are provided by State governments. A further complication arises given that the exact boundaries between the roles of mainstream services and specialist disability services is often unclear.

- Duplication of effort or the potential for people with a disability to fall through the cracks is also something that needs to be considered with respect to the boundaries between the new schemes and existing schemes or services.

The implementation of the NDIS and NIIS will require careful consideration of how these boundary issues might be resolved, as well as a high degree of coordination and cooperation between the different state schemes and mainstream services in each state.

A.5 ‘Means test’ in Tier 3

Tier 3 also supports people whose needs “would otherwise not be reasonably met without NDIS-funded services (3d)” (page 13). Although the draft report only refers to needs taking into account what is “reasonably and willingly” provided by unpaid family carers, it is unclear if there may be an implicit means test through an assessment of unmet need (e.g. if a well resourced family is able to provide for the needs of a family member with a disability, does this mean they do not have unmet needs?). We request greater clarity regarding the needs assessments and the interaction with means and assets, noting that there are two assessments that may come into play, i.e. the means and assets of the carer and/or the means and assets of the person with a disability.

A.6 Continued reliance on ‘unpaid family carers’ and Carer payments

Page 14.15 of the draft report acknowledges in its analysis of the costing of the scheme that the viability of the scheme relies on the continuation of unpaid care. Page 17 notes that needs assessment for Tier 3 will consider ‘what reasonably and willingly could be provided by unpaid family carers and the community’. Understanding the interaction of this reliance on the continuation of unpaid support with the need to offer respite and other supports to those carers currently providing care at unsustainable levels will be a challenge for the scheme. We recommend that scenarios with respect to the participation of unpaid carers, and the impact on scheme costs, be included in chapter 14 of the report.

With regards to the Commission’s request for feedback “about whether Carer Payment, Carer Supplement, Carer Allowance, Mobility Allowance, and the Child Disability Assistance Payment should fall within the scope of the NDIS” we note that these payments are received by a substantial number of people who would fall into Tier 2 of the NDIS, and these people are not expected to receive direct funding from the NDIS.

This will need to be taken into account in any decision regarding its inclusion or exclusion from the scheme.

Any Carer allowances are payments to the carer (not the person with a disability), and because the NDIS will continue to rely on the unpaid services of those carers, it is not clear whether the individualised NDIS funding would make payments to unpaid carers directly. Therefore, it is unclear whether there is scope for double-dipping. Whilst it might make sense for these services to fall within the scope of the NDIS, it does not seem feasible given the Tiered structure. Presumably, these payments could be taken into account in the needs assessment for those eligible for Tier 3.

APPENDIX B – NDIS FUNDING, COSTING AND WORKFORCE CAPACITY

B.1 Costing and forward projections

We note in chapter 14 that the cost is estimated on data from 2009. However, what is the projected cost for the next 5 years during implementation? We recommend the Commission provide further information on whether there is a cost projection, and if so, how it allows for cost inflation, increases in utilisation or behaviour changes. Also, given that Australia's population is ageing (and people with a disability are living longer too) and the pool of unpaid carers is shrinking, we ask whether the Commission expects the cost for NDIS as a percentage of consolidated revenue to increase.

We also note the reference to a need for a risk margin in the draft report on page 14.24. We recommend that the final report clarify the basis of any risk margin, as well as provide clarity as to why a risk margin is required given the potential to make up a shortfall in future funding provided.

The international comparisons on page 14.5 show that the Australian cost relative to GDP appears low. It is not clear whether this is an indicator that Australia intends to offer a narrower range of support to people with disabilities, or whether there is a like for like comparison suggesting that the estimates are underprovided.

B.2 Administration costs

Even though administration costs are expected to be low, as stated on page 15.43, arguably the administrative costs associated with Tier 2 could be significant. We recommend the Commission explore this issue in greater detail, as it is not clear whether the co-ordination required for the NDIS in the context of the significant numbers of agencies, providers and support organisations was considered in selecting the administration costs loading.

Consideration will also be required to avoid inefficiencies of assessment where support is provided both within and without the NDIS. For example, dual layers of assessment for the NDIS and disability income support eligibility.

B.3 Scheme costing and offsets

Section 14.5 of the draft report sets out a number of offsets to the gross costs of the NDIS scheme. While we acknowledge that the offsets were estimates subject to a number of uncertainties, it was unclear whether the offset amounts were purely in respect of expenditure on people eligible for Tier 3.

The States will still need to provide funding for disabilities, since the majority of people with a disability will not be eligible for Tier 3 NDIS support. Part of Recommendation 12.3 was that "state and territory governments should offset the Australia-wide fiscal implication of the transfer of responsibility by either (a) reducing state and territory taxes by the amount of own-state revenue they used to provide to disability or (b) transferring that revenue to the Australia Government." Additionally, page 12.42 states "For example, a state or territory government could remove taxes on insurance, remove stamp duties on motor vehicles or a significantly stamp duties on conveyancing."

We put forward that this strategy is highly uncertain as it relies on agreement between the Federal Government and the States. We recommend that the Commission clarify whether the disability funding that will still be required for Tier 2 participants was considered in the costing.

B.4 Funding impacts on service providers

Some disability service providers are NGOs which rely heavily, or completely, on donations. As noted already, most of these organisations will need to continue to provide their services to people accessing Tier 2, and the draft report recognises that people in Tier 3 could choose to access support from NGOs with their individual funding.

The draft report is not clear whether the Commission has investigated the possible reduction in "propensity to donate" if there is a National scheme in place purporting to provide universal disability coverage. Lower donations mean additional revenue for government (lower tax deductions) but less revenue for those NGOs who rely on donations.

We anticipate that a number of NGOs providing valuable services and support for people with all levels of disability will be very uncertain about how the new system will affect their viability, and uncertain as to how much financial support would be directed to them from the individual choices made by Tier 3 participants.

B.5 Workforce and wage growth

Although the draft report refers to a move away from block funding, the report does not set out clearly the Commission's intentions with respect to future wages in the sector. Increases are considered to be inevitable in the course of implementing the NDIS, but no target level of growth has been articulated.

We note that the key tool in improving working conditions appears to be the variable pricing of shifts as stated on page 13.21, with reference made to negotiations of price between the consumer and service provider. At the same time, page 13.18 refers to the role of the NDIA in regulating prices in order to ensure sustainability. It is unclear to what extent the NDIS will allow participants input into the use of more or less costly shifts, when assessing their needs.

The structure of pricing service contracts will need to be researched and sensitivity tested to optimise the use of available funds. A full cost-benefit analysis should be an early, key output of the research and data collection function.

APPENDIX C – NIIS SPECIFIC ISSUES

C.1 Legal and process costs under common law

The Commission notes on page 34 that the common law system can involve costly processes when suing for compensation. Although the Commission states that the NIIS would avoid many of the deficiencies of a common law compensation system, it is observed that a carve out of the cost of care benefits may leave some of these costly common law processes still in place, particularly where the contention relates to eligibility for compensation rather than the degree of compensation (e.g. in relation to cost of care). This creates uncertainty with respect to the expected level of offset of introducing a no-fault catastrophic scheme.

C.2 Workers' compensation

Page 35 of the draft report notes that "existing Workcover schemes would stay in place". However, page 15.26 states in respect of workers compensation that "...in some jurisdictions, care and support costs are not adequately provided for catastrophic injuries..." and on page 16.20 it is suggested that such jurisdictions will require legislative change. It is unclear to us why workers' compensation injuries were not included in the proposed scope of the NIIS, and we recommend this be further clarified.

The impact of any changes derived from the introduction of NIIS on self-insurers will also need to be considered given the prevalence of workers' compensation self insurance in Australia. This relates to inclusion or exclusion in the scheme, or the flow on impacts of legislative changes.

C.3 Product liability

Page 16.38 notes that common law will still be relevant to product liability and the draft report does not otherwise suggest this source of injury would be included. We recommend the Commission clarify its position with respect to this source of injury.

C.4 No fault catastrophic injury for medical accidents

Chapter 16 (pages 16.10 to 16.19) of the draft report sets out discussion regarding provision of no-fault cover to catastrophic injuries arising from medical accidents. We observe a number of complex issues relating to such coverage for medical indemnity compared with other sources of injury:

- The definition of 'no-fault' injury will need to be clearly defined. While we appreciate that some submissions may have supported a move away from negligence as a trigger for compensation, a clear definition of what will and will not be included is needed. The draft report sets out on page 16.10 that it is expected that an eligible

injury would be an unexpected or unusual outcome of medical treatment, that it would exclude some injuries from discretionary medical procedures (e.g. cosmetic procedures) and exclude injury connected to an underlying genetic factor or health condition. We note that the Commission may need to consider:

- What is an unusual or unexpected outcome? Would a known small probability of an outcome from medical treatment qualify as unusual or unexpected? For example, if there is a 0.01% chance that a patient will have an adverse reaction to a drug, even though this may be considered rare, could such an incident still be considered 'expected' since 1 in 10,000 people is expected to have this reaction? Hence, should the outcome be entirely unforeseen based on medical outcomes observed from that procedure? If it is to be based on a probability, what should that level be?
- How will injuries arising from underlying genetic or health conditions be identified? If these factors were merely a contributor, with a partial contribution from the medical treatment, would they still be covered?
- We also query the Commission's view that the discretionary nature of a procedure is relevant when using a no-fault system. Is the exclusion of certain procedures based on discretionary consumption consistent with the inclusion of injuries from other sources (e.g. general accidents)? There has been no suggestion in the draft report that a general accident or motor accident based on discretionary action would be excluded. For example, sporting injuries or injuries arising from joyriding in vehicles would not appear to be excluded, yet each of these is a discretionary activity.
- The draft report acknowledges on pages 16.12 to 16.16 the interactions between the introduction of NIIS and existing medical indemnity subsidies. While the draft report requests feedback on the best mix of funding, we observe that more detailed granular analysis would be required to understand how these might interact, and how premiums (and more particularly, the proportion of premiums paid by government and practitioners) would be affected.
- We further observe that as the draft report suggests that each State would have discretion to apply levies as was felt appropriate, that medical indemnity insurers may also face differing levy structures by state, that will add complexity to their operations.

C.5 General Accidents

Page 16.27 of the draft report proposes that general accidents be partially pre-funded rather than fully funded, but all other injury sources be fully funded. We recommend the Commission clarify why this funding difference is appropriate relative to other injury sources.

C.6 Administration

The introduction of the NIIS may result in repetition of administration, particularly as participants in the schemes will in many cases also be covered under existing state or territory based compensation schemes. The implementation of the NIIS will require additional consideration of mechanisms to avoid inefficiency through such repetition.