Avant Mutual Group Limited

Submissions to the Community Affairs Legislation Committee Inquiry into the National Disability Insurance Scheme Bill (Draft Bill)

1. About Avant

Avant Mutual Group Limited ("Avant") is Australia's leading medical defence organisation and one of Australia's leading mutuals, offering a range of insurance products and expert legal advice and assistance to over 60,000 medical and allied health practitioners and students in Australia. Our insurance products include medical indemnity insurance for individuals, practices and private hospitals and private health insurance, which is offered through our subsidiary The Doctors' Health Fund Pty Limited.

We also provide extensive risk advisory and education services to our members, as well as access to medico-legal assistance via our Medico Legal Advisory Service. We have offices throughout Australia, providing personalised support and rapid response to urgent medico-legal issues.

We have been involved in the design of the proposed national disability insurance schemes, providing input and formal submissions to the Productivity Commission on medical indemnity and other issues prior to the publication of its Report into Disability Care and Support in July 2011. We have attended a meeting of the NDIS Taskforce to discuss issues specific to medical indemnity arising from the Draft Bill and we are also represented on the NIIS Medical Misadventure Advisory Group, which is currently working on the design of the medical accident provisions of the proposed NIIS.

We welcome this opportunity to provide our submission to the Senate Community Affairs Legislation Committee's Inquiry into the draft Bill. Our comments are borne of a desire to strongly represent the interests of our members, while ensuring that the Draft Bill reflects good public policy (as we believe our members would judge it).

We would be happy to give further information to the Committee upon request and to attend any Committee hearing.

2. Executive Summary[1]

[1] References in this submission to:

- A "participant" include a potential participant and refers to a participant in the NDIS (and the NIIS where the context requires) ; and
- A "section" are to a section of the Draft Bill
- A "State" include a State or Territory of Australia

2.1 *Summary of our submissions*

Our submissions, which are set out in more detail in sections 3 and 4 below, can be summarised as follows:

- **In principle support** - We welcome and support the introduction of a Federal Government disability insurance scheme to enhance the quality of life and increase economic and social participation for those living with disability, provided that the scheme does not place any undue financial or other burden on our members. We are on the public record as providing our support.

- **Scheme design** We have a once in a lifetime opportunity to establish a "best of breed" scheme which makes a meaningful difference in the lives of those living with disability, but in our view the current design of the NDIS as set out in the Draft Bill misses a number of opportunities to achieve this.

  We urge Federal and State Governments to change the design of the scheme as referred to in this submission before the pilot schemes are launched on 1 July 2013, so that we start with the best chance of the scheme achieving its important objectives.

  We believe that the objectives of the scheme are not best served by the proposed introduction of dual schemes (the NDIS and NIIS) due to the complexities which arise from having more than one scheme, and that the above objectives would be best served by an NDIS only. Notwithstanding this, we understand that it is the position of Federal and State Governments that both an NDIS and NIIS should be established.

  If this is the case, then we strongly suggest that medical accident injuries be covered by the NDIS and not the NIIS, for the reasons referred to in this submission.

  If medical accident injuries are to be covered by the NIIS, then when we talk of those suffering from cerebral palsy being eligible for the NDIS and not the NIIS, we should include those suffering from all pregnancy and birth-related neurological impairment, as cerebral palsy has been used as a "shorthand" definition, rather than try to define the range of injuries where it can be difficult to distinguish accidental, genetic and other causes.

- **Putting medical accident injuries into context**

  While there have been a series of arguments put forward by the Productivity Commission and others to justify dual schemes and putting medical accident injuries into the NIIS, in our view there are more compelling contrary arguments.

- "CEO" means the CEO of the Agency
- "Agency" means the proposed National Disability Insurance Scheme Launch Transition Agency
- "Cerebral palsy" includes all pregnancy and birth-related neurological impairment

To get a sense of the practicalities of dual schemes, we need to put the number of people who are likely to suffer catastrophic injuries from medical accidents into context.

The NIIS Medical Misadventure Working Group is currently working to find the detailed data needed to estimate the likely numbers of people who will suffer catastrophic medical accident injuries each year, and the likely cost of providing future care for them. While work on this continues, the best estimate at the moment is that less than 100 people would become eligible for the NIIS each year as a consequence of a catastrophic medical accident.

We suggest that there is little justification for amending up to eight sets of State laws (to remove common law rights to sue for future care costs) or changing each State's existing motor accident compensation scheme rules and administrative procedures to accommodate such a small number of people, especially when they would likely be eligible for support under the NDIS in any event.

The costs of bringing medical accidents under existing State-based motor accident schemes would not be insignificant, as they are not all on a "no-fault" basis and none of them is currently resourced to deal with long-tail medical indemnity claims, which are very different in nature (and often in complexity) from CTP (or for that matter workers' compensation) claims.

On the other hand, the NDIS will already exist and will have processes specifically designed to deal with those suffering from cerebral palsy and these will be appropriate to cover those suffering from other catastrophic injuries arising from medical accidents.

There are also likely to be delays caused by COAG obtaining agreement for consistent scheme design across the States and the challenges associated with harmonising State laws and scheme rules. For these reasons, we suggest that medical accident injuries should not go into the NIIS.

The number of people who will need lifetime care and support under the NDIS (ie those with cerebral palsy and other birth-related neurological injuries) is also expected to be very low, and it would make sense to derive any "economies of scale" from a single scheme with a single set of processes catering for, say 200 new entrants per year, than establish nine separate schemes, which will duplicate processes, add cost and add complexity, meaning that the cost per person benefitting under the NDIS and NIIS would be very high relative to one national scheme.

For these reasons, if the decision to establish an NIIS and an NDIS is not changed, we strongly suggest that medical accident injuries be covered by the NDIS and not the NIIS, leaving the NIIS to cover motor accidents, workplace accidents and general accidents and avoiding the costs of "converting" each State-based motor accident compensation scheme to deal with medical accidents. The costs and complexities arising from having a national NDIS and eight State-based schemes dealing with medical accident are, in our view, simply not justified.

- **Incomplete design** – We note that draft Rules under which the NDIS will operate (which will have a significant impact on its design and implementation) have not yet been published. We also note that one of the key design features of the NDIS will be the way in which it interacts with the State-based schemes which will form the NIIS. There is still no clear indication of when the NIIS may be implemented, when its key features will be determined or how it will be funded.

  It is not possible to comment definitively on the Draft Bill until the Rules have been published and the design of the NIIS has been more substantially progressed. The timing of the Committee's Enquiry is therefore unfortunate as the Committee will not have access to the fully-informed views of those impacted by the Draft Bill, and the introduction of the NDIS before there is any certainty about the introduction of the NIIS gives rise to greater uncertainty (and hence risk) for all concerned.

  While we acknowledge the need for flexibility in the applicable legislation, in particular as the scheme goes through its pilot period and we learn from it being applied in practice, too much of the design of the scheme is left to the Rules and this will lead to uncertainty for participants, carers, support providers and the community.

  We should be mindful of rushing the design of the NDIS for political expedience, or "borrowing" the provisions of other existing schemes which may not be appropriate in the context of supporting those living with disability.

- **"Front Line" scheme or "Safety Net"?** – In our view, several design aspects of the NDIS as set out in the Draft Bill position it more as a "safety net" than a "front-line" scheme, which does not best serve the interests of those living with disability, who would benefit from greater certainty up front that they will receive support and/or funding under the scheme.

  We suggest that the NDIS should be easier to access by those who need it than offered under the Draft Bill, in particular where early intervention may lead to better medical and community outcomes.

  Amending the Draft Bill to allow participants to obtain supports on an "interim" basis for a period of 2 years as in the NSW Lifetime Care and Support Scheme would be a welcome feature, giving participants greater comfort that their early intervention needs will be met and that important treatment can begin straight away.

  In regard to early intervention, we note that there can be particular complexities in diagnosing cerebral palsy and other pregnancy and birth-related neurological impairment at an early stage and assessing the early intervention needs of infants and young children suffering from them. Often it is critical to mitigating the severity of future conditions to start physiotherapy and other treatment as soon as possible and sometimes before there is a definitive medical diagnosis. Certain neurological pathways can be re-trained at a very early age, but the opportunity to do so may be lost if the re-training is not done straight away. We suggest that the Draft Bill (sections 24 and 25), specifically provides for "at risk" infants and young children to be given access to early intervention support before

medical diagnosis is given definitively and for any Rules covering these sections to take account of the particular needs of such persons.

- **Red tape** – We believe that the proposed processes of the NDIS are unnecessarily bureaucratic and that this will result in less of taxpayers' money finding its way to where it is needed most, as well as undue challenges and time delays for participants in accessing the support and/or funding they require.

  In an environment where the Federal Government is seeking to reduce the impact of regulation and in the context of a desire to support those living with disability, this is unfortunate. While there is a need for strong governance to protect the community, we believe that the minimum of hurdles should be put in the way of those who need support and/or funding from the NDIS.

- **CEO's powers and review of decisions** – The CEO's powers are very broad and there are as yet no guidelines (or insufficient guidelines) for his decision-making in relation to some key decisions, which causes concern as to how such decisions will be made. Decisions made by the CEO may be reviewed by another member of his department (section 100) and not referred to an independent "Inspector General" as recommended by the Productivity Commission. Instead, if a participant in the scheme wishes to challenge the decision outside of the Department, he/she must go to the Administrative Appeals Tribunal (section 103).

  It is not clear whether a specialist unit would be established within the AAT to deal with such contested decisions, as recommended by the Productivity Commission as a fall back in the event that the office of "Inspector General" was not established. Such decisions could be complex, for example a challenge to a decision by the CEO that a participant has "reasonable prospects of success" in claiming compensation from a third party (section 104).

  Supports and funding should continue to be available to participants while such reviews are taking place to ensure that the withdrawal of supports does not deter a participant from requesting a review.

- **Pursuing claims for compensation from third parties** – The Draft Bill provides that the CEO can require a participant to seek to recover compensation from a third party where in his view there are "reasonable prospects of success" (section 104). A participant's receipt of support and/or funding under the scheme is suspended if he/she does not take the action required. This could put a participant in the unenviable position of having to take on costly litigation (potentially over several years) before being able to access support under the NDIS.

  If the participant is successful in his/her claim, the compensation will likely be deducted from the funding they receive under the scheme or recovered by the Agency under sections 106-116, so there is no upside for the participant taking the litigation risk. On the other hand, if their claim is unsuccessful, they would almost certainly have to pay the defendant's and their own legal costs, which may be substantial. Those seeking support under the NDIS may well be the least able to take on either the financial risk of claiming unsuccessfully, or the emotional stress of conducting litigation.

We believe that this reflects poor public policy and that instead participants should receive funding and/or support under the NDIS from the outset, especially if early intervention would be advantageous, and then be required to subrogate their rights to claim compensation from a third party to the Commonwealth, which could then take its own decision about whether to pursue the claim. This is consistent with the NDIS being an insurance scheme, as insurers typically pay claims, then use their subrogated rights to recover from third parties where they think this is appropriate.

It may be considered counter-intuitive for a medical indemnity organisation to argue in favour of effectively replacing an individual plaintiff (in particular one suffering from, or living with, disability) with a government plaintiff (which has much "deeper pockets"), but we submit that this price is worth paying to avoid participants being placed in an unenviable financial or emotional position at a time when they need the support of the NDIS and the community.

Despite some very high level principles being included in the Draft Bill, it is not clear just how the CEO would make his decision that a claim does or does not have "reasonable prospects of success". In our experience, this can be an extremely difficult decision, requiring multiple experts' and lawyers' opinions often at significant cost. It could take a number of years before a participant has his or her condition sufficiently clearly diagnosed to enable a properly informed decision to sue to be made. As the consequences of the decision are potentially highly significant for the participant and the Commonwealth, this is a decision which would need to be made very carefully, yet as quickly as possible to give certainty to the participant and enable them to access support under the NDIS, especially where early intervention might lead to better outcomes. This risk would be obviated under a subrogation model as suggested above, as the participant would not be prejudiced pending any action being taken.

Additionally, doctors who are sued in order to recover compensation may be prejudiced if a decision is made by the CEO that there are "reasonable prospects of success", as this may encourage participants to sue where they had no previous intention of doing so and/or put disciplinary bodies on suspicion (if not effectively imposing an "obligation" on them) to pursue a doctor on the basis he or she may not have delivered medical care to the required standard..

- **Common law rights to sue for future care costs** – The Draft Bill does not follow the Productivity Commission's recommendation that "*common law rights to sue for long-term care and support needs for cerebral palsy should be removed*" (Recommendation 18.5). This is also consistent with the Productivity Commission's comment in relation to the NIIS that "*common law actions for damages associated with lifetime care and support would be extinguished*" on the premise that "*the goal of a no-fault scheme is to provide high quality care and supports making redundant the uncertain and costly process of accessing any additional supports through the common law."*

  It seems counter-productive to this objective that the NDIS specifically introduces provisions requiring participants to take legal action at the direction of the CEO.

In this regard, we note and support the arguments put forward by the Productivity Commission highlighting the advantages of no-fault compensation schemes over negligence-based medical negligence regimes in providing for future care needs (as endorsed in a recent article by David Weisbrot and Kerry Breen,[2]). These include:

- greater predictability of outcomes;
- equality of support provided (no "winners and losers" as litigation implies);
- greater administrative efficiency; and
- better incentives and deterrents to reduce risk.

We suggest that the provision of future care is better addressed by the NDIS than under the common law and that there should be no role for the common law in the context of future care needs. We agree that common law rights to sue under other common law heads of damage could be retained so that those suffering these types of loss can still recover at common law.

If it is the intention that the NDIS and NIIS should operate consistently and that the States will establish the NIIS in accordance with this recommendation by the Productivity Commission, then common law rights to sue for all future care costs which are covered by the NDIS (including cerebral palsy and other pregnancy and birth related neurological impairment) should be extinguished. If not, there will be a significant inconsistency between the NDIS and NIIS which is likely to lead to unwanted "forum shopping" between the two schemes, and there would be potential inequalities between those who sue successfully and receive a lump sum payment covering private health care and rehabilitation costs and those who do not sue successfully and are left to rely on the NDIS for supports via the public health service.

We acknowledge the challenge of extinguishing State-based legal rights for the purposes of a Federal Government scheme, but it is necessary in our view to take on this challenge in order to ensure fair and equitable treatment of participants in each of the schemes. It puts everyone on a level playing field in terms of outcomes (ie avoids some participants receiving significant lump sum compensation amounts while others receive no compensation, which is one of the key objectives of the schemes. It is also needed to ensure that there is no "double recovery" of costs through the common law and the NDIS and/or NIIS.

If this is not achievable, a much less effective alternative might be to amend the Draft Bill to prohibit the CEO from exercising his powers under section 104 to require a participant to take action to recover compensation from a third party in all cerebral palsy and other pregnancy and birth-related neurological impairment cases, or at least to recover compensation for future care costs which are covered by the scheme. This, however, would still leave potential inequalities for those who sue successfully and receive a lump sum payment covering private health care and rehabilitation costs compared with those who do not sue successfully and are left to rely on the NDIS for supports via the public health service

[2] "A no-fault compensation system for medical injury is long overdue" – Med J Aust 2012 197(5) 296-298

We agree, based on our extensive previous experience in handling such cases, with the Productivity Commission's assessment that the annual future care costs of those suffering from cerebral palsy is likely to be between $60-100m (around 1% of the Federal Government's estimated overall cost of the NDIS) and this is not an excessive cost in the context of the billions of dollars which will be spent establishing and maintaining the NDIS.

Rather than put participants with cerebral palsy through expensive and stressful litigation (which the NDIS was intended to avoid), we suggest that the community is best served if the taxpayer-funded NDIS simply absorbs these costs and removes the spectre of litigation for future care costs from all concerned.

If a participant does happen to recover compensation for future care costs from a third party (for example where the participant had commenced common law proceedings prior to the launch of the NDIS), this would likely result in an adjustment to the funding and/or supports they receive under the NDIS or recovery by the Agency of any compensation received under sections 106-116.

- **Funding and impact on medical indemnity premiums** – We have consistently stated that we support the introduction of a Federal Government disability insurance scheme, provided that the scheme does not place any undue financial or other burden on our members (including through the compulsory medical indemnity premiums that they pay).

  Impact of uncertainty

  As the funding arrangements for the NDIS and the NIIS are not yet known, it is not possible to determine what the impact on our members will be, and our support of the NDIS is conditional on the funding arrangements for both schemes being made known.

  We understand that the Federal Government plans to announce its funding proposals for the NDIS in its forthcoming budget, however, this will not give us certainty unless the NIIS funding arrangements are also announced prior to the proposed launch of the NDIS on 1 July 2013. Additionally, as medical indemnity premiums are set actuarially, trying to predict the level they need to be at to cover claims that may arise in the future, we will be unable to price our premiums appropriately for our renewals on 1 July 2013 if the funding arrangements for the NDIS and design of the NIIS are not known by 31 March 2013.

  As a result of this uncertainty, we would expect medical indemnity premiums to rise (all other things being equal) until the funding arrangements for the NDIS are clear and all key NIIS design features and funding arrangements are known. We therefore urge Commonwealth and State Governments to address these issues as a matter of urgency.

  If the Productivity Commission's recommendation that common law rights to sue for future care costs be extinguished is followed in relation to the NDIS and/or NIIS, it is likely that medical indemnity premiums would fall over time (to reflect the fact that a proportion of insurers' potential liability would be taken up by the NDIS and subsequently the NIIS).

Our concerns at the current lack of detail in relation to funding are increased by the potential for States to collect higher premiums than actuarially-justified, especially in the light of the uncertainties arising from the NIIS in its early years pending the actual usage (and costs) of the NIIS becoming known. We note "the predilection of Australian governments to award themselves dividends from the insurance providers they own"[3], and the fact that there is evidence that Commonwealth and State Governments have historically in effect turned premiums for such schemes into taxes on those paying what turn out with hindsight to be inflated premiums.

Impact if common law rights to sue are not extinguished in respect of the NDIS but are extinguished under NIIS

The Productivity Commission estimated[4] that medical indemnity insurance costs could be reduced by between $60-100 million per year if the costs of future care and related heads of damage for cerebral palsy alone were met exclusively by the NDIS. In theory this amount would be available to fund support under the NIIS for catastrophic medical accident injuries on a "no-fault" basis, as doctors should not receive such a "windfall gain" and should be willing to exchange lower medical indemnity premiums for State-based levies.

If, as per the Draft Bill, such common law rights are not extinguished, medical indemnity premiums would certainly not fall by that $60-100m and would in all probability rise to reflect the uncertainties associated with the new scheme. These costs would either be absorbed by those practitioners or effectively passed on to those receiving care from them in the form of increased medical fees. In turn, this might be expected to put upward pressure on amounts paid by Medicare under the MBS and also amounts paid by the Federal Government under the existing High Cost Claims Scheme and Premium Support Scheme.

In relation to the NIIS, the Productivity Commission recommended that funding for medical treatment accidents on a "no-fault" basis under the NIIS should include contributions from medical indemnity premiums, but only on the basis that "*if the removal of the insurance costs associated with the lifetime care and support of cerebral palsy cases* [under the NDIS] *does not sufficiently outweigh the additional costs associated with the inclusion of no fault catastrophic injuries* [under the NIIS], *then any premium increases* [associated with the NIIS] *should be modest and could gradually be phased in. State and Territory governments should fund any gap between premium income and catastrophic medical injury claims*".

If such savings are not made, doctors would not be able to contribute this amount without suffering an increased financial burden and the only amount theoretically available from doctors to fund support under the NIIS for catastrophic medical accident injuries would be the much smaller amount by which their premiums decreased from having common law rights to sue for future care costs for claims under the NIIS extinguished.

[3] "Disability, injury insurance schemes need scrutiny" – Andrew Baker, 28 August 2012

[4] p889 of its July 2011 report

Given the small number of people likely to be eligible for the NIIS, this amount would not be enough to fund the expected costs of introducing cover for catastrophic medical accident injuries on a "no-fault" basis and the States would need to find alternative sources of funding.

We acknowledge that doctors should not receive a "windfall gain" from the transfer of future care costs into the NDIS and we anticipated (as did the Productivity Commission) that the "quid pro quo" for such transfer would be a levy on medical indemnity premiums to help fund the "no-fault" element of claims for catastrophic injuries covered by the NIIS (even though in theory the imposition of a levy on medical treatment accidents which could not have been avoided by the exercise of reasonable care would be inequitable on doctors).

Without the quid pro quo, as is the case under the Draft Bill, we anticipate that doctors would be significantly worse off under the NDIS (both in their capacity as doctors due to the uncertainties surrounding the new scheme and the consequent rise in medical indemnity premiums, and as tax paying members of the community due to the increased tax burden or reduction in other services required to fund the NDIS) and potentially significantly worse off in relation to the NIIS, depending on the amount of any levy imposed on medical indemnity premiums.

Impact if common law rights to sue are not extinguished in respect of NDIS and NIIS

If, for any reason, common law rights to sue for future care costs for medical accident injuries covered by the NIIS are not extinguished once the NIIS is launched, we would not be in a position to support any contribution from doctors to the funding of medical treatment accidents on a "no-fault" basis under the NIIS, as this would undoubtedly increase the already significant financial burden on them and there would be no offsetting decrease in medical indemnity premiums to reflect the transfer of future care costs to one of the schemes.

- **High Cost Claims Scheme and Premium Support Scheme** – We note that the Productivity Commission recommended that "*regardless [*of any increase in medical indemnity premiums caused by the NIIS*], the Australian Government subsidy schemes would continue to safeguard the affordability of medical indemnity cover.*"

  We agree with this recommendation and suggest that it be formally enshrined in the legislation, to the effect that the High Cost Claim Scheme and Premium Support Scheme should not be amended (other than the future changes to the Premium Support Scheme which have already been announced) until at least 2020 when the impacts of the NDIS (and depending on the timing of its establishment, the NIIS) can be fully assessed. This would give doctors at least some level of certainty that their premiums would remain affordable, despite any (as yet unknown) increases to their premiums caused by the introduction of the NDIS and NIIS.

  Additionally, the interaction of the NDIS (and ultimately the NIIS) with the HCCS and PSS and any transfer of funding between the various schemes needs to be

better understood once the funding arrangements are published to ensure that no arbitrage opportunities or perverse incentives are unintentionally created.

- **Provision of services by doctors** – The Draft Bill requires that providers of supports to participants must be registered and that all registered providers must comply with governance, compliance, business practice, audit and accounting requirements which have not yet been made available in the form of draft Rules. We are not sure whether these obligations will apply to doctors, as there is no detailed definition of "supports", but if they do apply, we are concerned that the legislation does not impose any further unnecessary compliance or other burdens on doctors.

  In addition, the operational aspects of the scheme as they apply to medical examinations and assessments performed at the request of the Agency need careful consideration to ensure that there is no unnecessary additional administrative burden on healthcare practitioners as a result of the scheme. We note that some of the timeframes in the Draft Bill for assessments to be prepared are very tight and this may make it difficult for participants and potential participants to schedule appointments for assessments within the stated timeframes.

- **Privacy, confidentiality and privilege** – While we acknowledge the need for good governance to protect the community's interests in relation to the operation of the NDIS and that this will require the flow of relevant information, the provisions of the Draft Bill relating to the compulsory disclosure by third parties (including doctors) of documents and information are very broad.

  We are concerned to ensure that appropriate Rules are introduced to minimise the additional administrative burdens on our members and compensate them for the costs they incur, as our experience has been that information requests under government schemes can often require significant documentation to be retrieved and copied, with insufficient cost reimbursement.

  In addition, we suggest that the Draft Bill should be amended to make it clearer:

  - how sections 58-68 interact with the *Freedom of Information Act 1982 (Cth)* and therefore what "protected information" and other information collected in relation to the operation of the NDIS can be obtained via the FOI process; and
  - that third parties can provide "protected information" and other information collected in relation to the operation of the NDIS to their insurers and legal advisers as necessary to protect their interests.

2.2 Our recommendations

Recommendation 1

The NDIS should be the only long term care scheme providing funding and supports to persons living with disability. As the NDIS will now precede the NIIS in time (which was not initially anticipated), there is no advantage in establishing an NIIS and the existence of dual schemes will give rise to significant complexity and duplicated costs.

If the NIIS is to be established, those suffering catastrophic medical accident injuries should receive funding and support under the NDIS and not the NIIS, to avoid significant and unnecessary duplication of cost, complexity and uncertainty.

If this is not the outcome, then to avoid definitional issues leading to unfairness those suffering from all pregnancy and birth-related neurological impairment should be eligible for funding and support under the NDIS, and not just those suffering from cerebral palsy.

Recommendation 2

The Draft Bill should be expanded to include many of the provisions expected to be included in the draft NDIS Rules, so as to provide more legislative certainty for all concerned. As recommended by the Productivity Commission, future changes to key elements of the NDIS should only be made after the usual processes of community and Parliamentary scrutiny have been followed.

We encourage the NDIS Task Force to publish drafts of all Rules as soon as practicable so that the true impact of the scheme can be assessed and all concerned can start to prepare for the launch of the NDIS from 1 July 2013.

Recommendation 3

The Draft Bill should be amended so that the NDIS operates more as a "front-line" scheme and less as a "safety net", giving greater support to participants up front, in particular where early intervention is advantageous.

Amending the Draft Bill to allow participants to obtain supports on an "interim" basis for a period of 2 years as in the NSW Lifetime Care and Support Scheme would be a welcome feature, giving participants greater comfort that their early intervention needs will be met and that important treatment can begin straight away.

Eligibility and early intervention criteria in the Draft Bill should specifically take into account infants and young children who are "at risk" of cerebral palsy and other pregnancy and birth related neurological impairment in advance of a definitive medical opinion being given in order to enable them to receive immediate therapy and other treatment which may significantly improve their medical outcomes.

Recommendation 4

The Draft Bill should be amended to reduce the administrative requirements on participants and service providers to ensure that the NDIS is not overly-bureaucratic,

allows participants to participate with greater ease up front and allows service providers to provide necessary supports under the scheme in an efficient manner. As much of the NDIS budget as possible should go to participants and not be set aside to support government agencies and unnecessary processes.

Recommendation 5

Appropriate checks and balances in the exercise of the broad range of powers given to the CEO should be introduced to ensure that they are exercised in an appropriate and effective manner. These should be introduced in the legislation itself, and not by Rules.

Recommendation 6

As recommended by the Productivity Commission, an independent "Inspector General" or similar person should be appointed to review all key decisions taken by the CEO, rather than have them reviewed in the first instance (as set out in the Draft Bill) by the CEO's delegate and ultimately by the AAT. If this is not possible, then a specialist unit should be established within the AAT to review such decisions.

Supports and funding should continue to be available to participants while such reviews are taking place to ensure that the withdrawal of supports does not deter a participant from requesting a review.

Recommendation 7

Participants should not be required by the CEO to take action to recover damages where the CEO determines there are reasonable prospects of success in obtaining compensation from a third party. Instead, participants' rights to sue third parties for future care costs which can be provided under the scheme should be subrogated to the Agency, which can then take action to seek to recover compensation, as is the case under the Military Rehabilitation and Compensation Act 2004 (Cth).

Recommendation 8

As recommended by the Productivity Commission, common law rights to sue for future care costs which can be covered by the NDIS (or the NIIS, once it has been established) should be extinguished and participation in the NDIS should be "compulsory" in the sense that participants may only look to the NDIS to provide future care supports which it provides.

If this is not the case, the Draft Bill should be amended to prohibit the CEO from exercising his powers under section 104 to require a participant to take action to recover compensation from a third party in all cerebral palsy and other pregnancy and pregnancy and birth-related neurological impairment cases, or at least the future care costs which are covered by the scheme. Rather than put such participants through expensive and stressful litigation (which the NDIS was intended to avoid), the NDIS should simply absorb these costs.

Recommendation 9

Details of the proposed funding arrangements for the NDIS and, if possible, the NIIS, should be announced as soon as practicable (and prior to the Draft Bill and draft Rules being finalised) so that the full impact of the schemes on the community is known before

any vote is taken on the Draft Bill. Our in principle support for the NDIS and NIIS is given on the premise that the schemes do not place any undue financial or other burden on our members.

Recommendation 10

As recommended by the Productivity Commission, the existing Commonwealth medical indemnity schemes (principally the High Cost Claim Scheme and Premium Support Scheme) should remain in place with a commitment not to alter any of their key provisions in order to safeguard the affordability of medical indemnity cover.

Recommendation 11

The provisions of the Draft Bill and draft Rules relating to the provision of supports by service providers should ensure that they can be provided efficiently and with the minimum of bureaucracy and additional cost.

Recommendation 12

The provisions of the Draft Bill and draft Rules relating to the performance of assessments and medical examinations should ensure that they can be done efficiently, with the minimum of bureaucracy and additional cost, and deliver a fair fee to service providers.

Recommendation 13

Appropriate Rules should be introduced to minimise the additional administrative burdens on third parties who are required to provide information in relation to the NDIS and compensate them reasonably for the costs they incur.

Recommendation 14

The Draft Bill should be amended to make it clearer:

- *how sections 58-68 interact with the Freedom of Information Act 1982 (Cth) and therefore what "protected information" and other information collected in relation to the operation of the NDIS can be obtained via the FOI process; and*
- *that third parties can provide "protected information" and other information collected in relation to the operation of the NDIS to their insurers and legal advisers as necessary to protect their interests.*

Recommendation 15

Specific amendments to the Draft Bill should be made to reflect the above recommendations, as summarised in Appendix 1 to this submission.

3 Detailed submissions

3.1 In principle support, but questions as to scheme design

3.2.1 In principle support

We welcome and support the introduction of a Federal Government disability insurance scheme to enhance the quality of life and increase economic and social participation for those living with disability, provided that the scheme does not place any undue financial or other burden on our members.

We have a once in a lifetime opportunity to establish a "best of breed" scheme which makes a meaningful difference in the lives of those living with disability, but the current design of the NDIS as set out in the Draft Bill misses a number of opportunities to achieve this. We urge Federal and State Governments to change the design of the schemes as referred to in this submission before the pilot schemes are launched on 1 July 2013, so that we start with the best chance of the scheme achieving its important objectives.

However, we believe that these objectives are not best served by the proposed introduction of dual schemes (the NDIS and NIIS) due to the complexities which arise from having more than one scheme, and that the above objectives would be best served by an NDIS only.

3.2.2 Scheme design and medical accident injuries in context

The Productivity Commission in its report envisaged that the NIIS would be faster to establish than the NDIS and the relative ease of, and speed to, launch of the NIIS were among the key reasons for its proposed establishment. Now that the NDIS is to precede the NIIS (and there is no firm commitment as to when the NIIS may be established), we question the need to proceed with two schemes, when it was essentially acknowledged by the Productivity Commission that the ideal position would be a single, federally-funded scheme.

While there have been a series of arguments put forward by the Productivity Commission and others to justify dual schemes and putting medical accident injuries into the NIIS, we disagree.

Notwithstanding this, we understand that it is the position of Federal and State Governments that both an NDIS and NIIS should be established, and the remainder of our submission is made on the basis that dual schemes are intended.

If this is the case, then we strongly suggest that medical accident injuries be covered by the NDIS and not the NIIS, for the reasons referred to in this submission.

If medical accident injuries are to be covered by the NIIS, then when we talk of those suffering from cerebral palsy being eligible for the NDIS and not the NIIS, we should include those suffering from all pregnancy and birth-related neurological impairment, as we have used cerebral palsy as a "shorthand" definition rather than try to define the range of injuries where it can be difficult to distinguish accidental, genetic and other causes.

To get a sense of the practicalities of dual schemes, we need to put the number of people who are likely to suffer catastrophic injuries from medical accidents into context.

The NIIS Medical Misadventure Working Group is currently working to find the detailed data needed to estimate the likely numbers of people who will suffer catastrophic medical accident injuries each year, and the likely cost of providing future care for them. While work on this continues, the best estimate at the moment is that less than 100 people would become eligible for the NIIS each year.

We suggest that there is little justification for amending up to 8 sets of State laws (to remove common law rights to sue for future care costs) or changing each State's motor accident compensation scheme rules and administrative procedures to accommodate such a small number of people, especially when they would likely be eligible for support under the NDIS in any event.

The costs of bringing medical accidents under existing State-based motor accident schemes would not be insignificant, as they are not all on a "no-fault" basis and none of them is currently resourced to deal with long-tail medical indemnity claims, which are very different in nature (and often in complexity) from CTP (or for that matter workers' compensation) claims.

On the other hand, the NDIS will already exist and will have processes specifically designed to deal with those suffering from cerebral palsy and these will be appropriate to cover those suffering from other catastrophic injuries arising from medical accidents.

Add to this the likely delays caused by COAG obtaining agreement for consistent scheme design across the States and the challenges associated with harmonising State laws and scheme rules, and we suggest that medical accident injuries should not go into an NIIS.

The number of people who will need lifetime care and support under the NDIS (ie those with cerebral palsy and other birth-related neurological injuries) is also expected to be very low, and it would make sense to derive any "economies of scale" from a single scheme with a single set of processes catering for, say 200 people per year, than establish nine separate schemes, which will duplicate processes, add cost and add complexity, meaning that the cost per person benefitting under the NDIS and NIIS would be very high relative to one national scheme.

For these reasons, if the decision to establish an NIIS and an NDIS is not reversed, we strongly suggest that medical accident injuries be covered by the NDIS and not the NIIS, leaving the NIIS to cover motor accidents, workplace accidents and general accidents and avoiding the costs of "converting" each State-based motor accident compensation scheme to deal with medical accidents.

The costs and complexities arising from having a national NDIS and 8 State-based schemes dealing with medical accident are simply not justified.

3.2.3 Potential complexities arising from dual schemes

We note the following complexities that may arise if an NDIS and NIIS are established:

a) The establishment of dual schemes will require the cooperation of Federal and State governments on a number of key scheme design and funding issues, which may complicate and delay the final design of the NDIS and the establishment of the NIIS;

b) We question what incentive there is for the States to establish an NIIS once the NDIS has been established (unless the NDIS specifically excludes the provision of supports following catastrophic injury, which the Draft Bill does not do);

c) Dual schemes will lead to a continuing duplication of infrastructure and operational costs and continuing difficulties such as the potential for "forum shopping" and "postcode lotteries" (where if there are differences in the quality or availability of funding or supports under the NDIS versus the NIIS or the different State based schemes within the NIIS, participants may be incentivised to try to bring themselves under one scheme rather than another. For example, a participant may be incentivised to argue that they do not have cerebral palsy if the funding or supports available under the NIIS for catastrophic pregnancy or birth related impairment are better under their State's NIIS scheme);

d) While the Productivity Commission's report refers to the existing States' accident compensation schemes as being well-placed to provide extended cover quickly and efficiently, we question whether in fact this is the case for medical accidents as they can be of a very different nature from motor or workplace accidents. This concern is magnified given that a number of States have no scheme today to seek to leverage from. Issues as mentioned above such as transitional arrangements, eligibility criteria and the time taken to determine the full financial and other impacts of the Schemes all bring into question whether the existing State-based schemes, to the extent that they exist, are in fact the right place to cover medical accidents;

e) There may also be a high level of "sunk cost" into the NIIS if it subsequently merges with the NDIS following the proposed review of the Schemes in 2020, as recommended by the Productivity Commission be the case;

f) Having two schemes sitting side-by-side may confuse and frustrate participants, especially if the outcomes of participants in the individual schemes are different or unfair, whether intentionally or otherwise;

g) The existence of separate schemes may lead to "forum shopping" within the State based schemes of the NIIS and between the NDIS and the NIIS and patients might well be expected to gravitate to the scheme offering, or being perceived to offer, better quality services and/or support. This may be the case in particular during the early years of the NIIS if States which do not currently have "no fault" accident compensation schemes take longer than those States which do to adjust to the new regime. Some States may not have, or may not develop as quickly, the same level of expertise or experience in dealing with the catastrophically injured or readily available systems and services to provide the appropriate level of support. Some say this is the case today in dealing with the various existing State accident compensation schemes;

h) Geographical issues may arise as a result of having different schemes within the NIIS alongside the NDIS. It is not clear how "boundary disputes" between the State schemes within the NIIS will be resolved, for example whether qualification for a particular scheme might be determined by the patient's place of residence,

the place in which the relevant medical accident occurred or by reference to other criteria;

i) As a matter of principle the establishment of State-based schemes within the NIIS appears at odds with the recent establishment of a national registration regime for medical and other health practitioners which is attempting to eliminate State-based differences and make it easier for practitioners to practice throughout Australia. Different rules for different State-based schemes within the NIIS and potentially different insurance responses in different States may add a new level of complexity meaning that the benefits of national registration might be diluted; and

j) While these differences may to some extent be mitigated by the existence of a National Secretariat for the NIIS, which should homogenise the individual schemes to a large extent, this will not lead to the schemes operating identically and in any event any equalising initiatives will take time to establish and become fully-effective. This will undoubtedly give rise to arbitrage opportunities which may not become apparent until after the Schemes are implemented. This may also be the case where there is uncertainty or overlap as to whether persons qualify for the NIIS or the NDIS or if the services and/or support provided under the respective schemes are of a different standard.

3.3 **Incomplete scheme design**

3.2.1 Heavy reliance on Rules

We note that draft Rules under which the NDIS will operate (which will have a significant impact on its design and implementation) have not yet been published.

In many key respects, the Draft Bill merely provides a framework within which Rules may be introduced. For example, sections 13-16 of the Draft Bill are the key enabling provisions, which provide that the NDIA may provide supports and funding to scheme participants and information in relation to the scheme. There is no further explanation of how these things may be done, other than in section 17 which simply states that "The National Disability Insurance Scheme rules may prescribe matters for and in relation to this chapter." This is not a fair or effective way of drafting legislation.

While we acknowledge the need for the legislation to be drafted quickly to enable an early start for the scheme, to be flexible and to evolve over time as the pilot schemes progress, the lack of legislative certainty arising from the heavy reliance on Rules will cause difficulties for those living with disability, the Agency and its staff, service providers and others who interact with the NDIS.

Many will need to take crucial decisions in their personal and professional lives based on the legislation and without fear that the rules of the game may unilaterally change.

It is therefore not possible to comment definitively on the Draft Bill until the Rules are published. We understand that the draft Rules will be published for consultation at various stages prior to the commencement of the scheme on 1 July and we look forward to having an opportunity to review them in the context of the Draft Bill.

3.2.2 Failure to adopt the Productivity Commission Recommendation

As Rules will cover key features of the NDIS and are legislative instruments which can be amended, withdrawn or supplemented with the approval of the relevant Minister, we note that the use of Rules rather than legislation is contrary to the Productivity Commission's recommendation that "*future changes to the key features of the scheme should be undertaken only by explicit changes to the Act itself, be subject to the usual processes of community and Parliamentary scrutiny, and require consultation with all state and territory governments*." (Recommendation 9.6).

3.2.3 Interaction between the NDIS and NIIS

We also note (for the reasons specified in section 1.2 of this submission above) that one of the key design features of the NDIS will be the way in which it interacts with the State-based schemes which form the NIIS. There is still no clear indication of when the NIIS may be implemented, when its key features will be determined, how it will be funded or how it will interact with the NDIS.

It is therefore not possible to comment definitively on this aspect of the Draft Bill until the design of the NIIS has been more substantially progressed and it becomes clearer how the two schemes will interact to avoid the above issues.

The timing of the Committee's Enquiry is unfortunate as the Committee will not have access to the fully-informed views of those impacted by the Draft Bill, and the introduction of the NDIS before there is any certainty about the introduction of the NIIS gives rise to greater uncertainty (and hence risk) for all concerned.

3.2.4 *Best design for the NDIS*

As a community, we have a once in a lifetime opportunity to design a "best of breed" scheme for the enduring benefit of those living with disability and the broader community and we should be mindful of rushing it for political expedience, or incorporating into the Draft Bill provisions of other existing schemes which may not be appropriate in the context of supporting those living with disability.

For example, we understand that the compensation recovery provisions in the Draft Bill (sections 104-116) have been incorporated based largely on equivalent provisions in the *Social Security Act 1991 (Cth).* However, we question whether they are appropriate in the context of a national disability scheme (see section 3.6 of this submission below).

3.3 "Front Line" scheme or "Safety Net"?

In our view, the Draft Bill makes accessing supports and funding under the NDIS unduly difficult and this runs counter to the overriding objective of making the same available to those living with disability.

Several design aspects of the NDIS as set out in the Draft Bill position it more as a "safety net" than a "front-line" scheme, which does not best serve the interests of those living with disability, who would benefit from greater certainty up front that they will receive support and/or funding under the scheme when they need it.

In order to best serve the interests of those living with disability, the scheme should be easier to get into at the outset, less bureaucratic (see section 3.4 of this submission below) and should concern itself less with what other schemes or third parties can do to support those living with disability and more with providing immediate support to those members of our community who need it most, when they need it most.

An example of this is where potential participants may be required by the CEO of the NDIS to pursue a claim for compensation from a third party (at the participant's own cost and risk) and, if they do not, funding and support is denied to them under the scheme. The NDIS thereby essentially "sits behind" other state or territory schemes and the common law, rather than standing "up front" as the only port of call a potential participant needs to make to ensure that they receive the support they and their families have effectively paid for in funding the scheme.

The NDIS is designed as an insurance scheme and in our view should respond like an insurance scheme, whereby the community is certain that the "premiums" it effectively pays to fund the NDIS will ensure that cover is available when needed, not when other avenues have been exhausted or only after the Agency has sought to shift the cost of support elsewhere. This is particularly the case in any context where early intervention would achieve better health and community outcomes.

The community will be paying for the scheme and they are entitled to receive the benefits they have paid for. In our view, the community does not want a "Clayton's" scheme, it wants a real scheme which supports those living with disability without question once basic eligibility criteria have been satisfied.

In this regard, the Committee may wish to consider a particular design feature of the NSW Motor Accidents Lifetime Care and Support Scheme (established under the *Motor Accidents (Lifetime Care and Support) Act 2006 (NSW*)), which provides for applicants to be accepted as either lifetime or interim participants. Interim participants can only participate on this basis for up to 2 years (or up to the age of 5 if they are under 3 years old), by which time their ongoing participation on a lifetime basis must be reassessed. There may be benefits in introducing participation in the NDIS on an interim basis, in order to ensure that initial support is available when needed, in particular in cases where early intervention is essential.

In regard to early intervention, we note that there can be particular complexities in diagnosing cerebral palsy and other pregnancy and birth-related neurological impairment at an early stage and assessing the early intervention needs of infants and young children suffering from them. Often it is critical to mitigating the severity of future conditions to start physiotherapy and other treatment as soon as possible and sometimes before there is a definitive medical diagnosis. Certain neurological pathways can be re-trained at a very early age, but the opportunity to do so is lost if the re-training is not done straight away.

We suggest that the Draft Bill (sections 24 and 25), specifically provides for "at risk" infants and young children to be given access to early intervention support before medical diagnosis is given definitively and for any Rules covering these sections to take account of the particular needs of such persons.

3.4 **Red tape**

We believe that some of the proposed processes of the NDIS are unnecessarily bureaucratic and that this will result in less of taxpayers' money finding its way to those who need it most, as well as presenting undue challenges and delays for participants in accessing the support and/or funding they require.

In our view, the scheme should be much easier to participate in and those who need its support should not find themselves engaged in onerous and overly-bureaucratic processes before they can avail themselves of this support.

Some examples include:

a) The need for a participant to replace their existing plan with an entirely new plan if they wish to amend it, involving the participant repeating the whole new plan approval process (Sections 47-50). It is not clear why a plan cannot simply be amended, rather than a whole new plan prepared;
b) The CEO's entitlement to make multiple requests for participants to undergo assessments and/or medical examinations before deciding whether to allow them to join the scheme (section 26), what the participant's supports should be (section 36) or to subsequently amend their plan (section 50). These processes could be streamlined and the presumption should be that a potential participant is entitled to join the scheme (where relevant on an interim basis as suggested above) after one round of assessments/examinations unless the CEO reasonably determines that a potential participant does not meet the eligibility criteria; and
c) Under section 26, a participant is deemed to have withdrawn their application to join the scheme if they do not provide information or reports to the CEO within 28 days of the CEO's request. This may be impractical, given that such information/reports include medical examinations and other assessments, which might take considerably longer than 28 days to organise and complete. If a 28 day deadline is missed, the onus is on the potential participant to prove to the CEO that it was reasonable not to have complied. We suggest that that the obligations on the potential participant do not need to be as onerous and the sanctions for non-compliance do not need to be as severe.

There are other examples in the Draft Bill where processes could be streamlined so as to reduce the administrative burden on potential participants and the Agency, for the benefit of the community.

In an environment where the Federal Government has stated its intention to reduce the impact of regulation and in the context of supporting those living with disability, the inclusion of such bureaucratic provisions in the Draft Bill is unfortunate.

While we acknowledge that there is a need for strong governance to protect the community, this should not come at the cost of adding complexity and process to those who need support, and we believe that the minimum of hurdles should be put in the way of those who need support and/or funding from the NDIS.

3.5 **CEO's powers and review of decisions**

3.5.1 *Breadth of CEO's powers*

The CEO's powers are ostensibly very broad under the Draft Bill and we must wait for the Rules to be published to enable us to determine whether these will operate to introduce appropriate checks and balances on the exercise of his powers.

Under the Draft Bill, the CEO has the power to do all things necessary and convenient in connection with the performance of his duties, and these specifically include the power to:

a) decide whether a person meets the access criteria, and require a person to undergo and assessment or examination and to provide a report for the purpose of deciding whether a prospective participant meets the access requirements;

b) approve a statement of participant supports for a participant (including the reasonable and necessary supports that will be funded);

c) revoke a person's status as a participant;

d) obtain information from participants, prospective participants and other persons to ensure the integrity of the scheme;

e) disclose protected information if the CEO certifies it is in the public interest to disclose it;

f) approve registered providers of supports;

g) determine whether a person responsible for a child is not appropriate to do things on behalf of the child under the Act and if so to determine who is appropriate;

h) determine whether a child is capable of making decisions for himself or herself; and

i) require a person to take action to obtain compensation.

This is a very broad set of powers, and, while we acknowledge that governance structures will be introduced to ensure oversight of the CEO's decision-making powers, it is of concern that such broad powers are vested in one person and that, at least at the moment, there is little guidance on how he will make such key decisions. We are also concerned that any meaningful guidance will be given by Rules rather than by legislation, meaning that any checks and balances are subject to amendment without appropriate Parliamentary and community scrutiny.

3.5.2 Guidance in relation to exercise of CEO's decision-making authority

There are as yet no meaningful guidelines for the CEO's decision-making in relation to some key decisions, which causes concern as to how such decisions will be made and will give rise to further uncertainty in the way in which the scheme will operate.

While Rules may be subsequently prepared providing such guidelines, it is not currently clear from the Draft Bill how the CEO will make key decisions such as those stated in section 3.5.1 of this submission above, and in particular:

a) whether there are "*reasonable prospects of success*" of a participant recovering compensation from a third party (section 104). There are only very high level guidelines in section 104(3) to assist the CEO in determining whether it is reasonable

for him to require a participant to take action, and they are at such a high level as to give no meaningful guidance and do not specifically address the question of what might constitute "reasonable prospects of success". In our experience, considerable medical and legal evidence, time and cost may be required to make this determination, in particular in a cerebral palsy case involving an infant or young child. In any event, "success" is not defined – does this mean the prospects of recovering $1 in compensation (net of legal costs for all sides), an amount of compensation which might otherwise justify taking the litigation risk or the right amount of compensation?

b) whether under section 25 the provision of early intervention supports is "*likely to reduce the person's future needs for supports in relation to disability*" or to "*mitigate, alleviate or prevent the deterioration of the functional capacity of the person to undertake communication, social interaction, learning, mobility, self-care or self-management*."

These are complex decisions, and we look forward to being able to assess more completely the design of the scheme in these crucial areas once the Rules are prepared.

3.5.3 *Review of CEO's decisions*

Under section 100(5)(c), certain decisions made by the CEO may be reviewed by "*a person to whom the CEO's powers and function under this section are delegated.*" While it is not yet clear who this person might be and what checks and balances might be introduced to ensure that a fair review process is established, it is implicit from the Draft Bill that this person would be subordinate to the CEO. In our view, this would be entirely inappropriate and would not ensure a fair review.

Section 100(6) which sets out the reviewer's authority only requires the reviewer to make a decision "as soon as reasonably practicable" and does not impose any time limit, nor does it provide any guidance as to how the review should be undertaken. More is needed here to impose actual, and realistic, time limits and to give certainty as to how the review will be undertaken, as it is only the reviewer's decision (and not the CEO's initial decision) which may be referred to the AAT under section 103.

We note in this regard the recommendation of the Productivity Commission that an independent "Inspector General" should be appointed to review such decisions.

We also note that it is not clear whether a specialist unit would be established within the AAT to deal with such contested decisions, as recommended by the Productivity Commission as a fall back in the event that the office of "Inspector General" was not established. Such decisions could be complex, for example a challenge to a decision by the CEO that a participant has "reasonable prospects of success" in claiming compensation from a third party, and we suggest that specialist expertise would need to be developed within the AAT to deal with such matters.

Supports and funding should continue to be available to participants while such reviews are taking place to ensure that the withdrawal of supports does not deter a participant from requesting a review.

3.6 **Pursuing claims for compensation from third parties**

3.6.1 Requiring a potential participant to seek compensation

The Draft Bill provides that the CEO can require a participant to seek to recover compensation from a third party where in his view there are "reasonable prospects of success". The principal objection we have to this is that a potential participant's receipt of support and/or funding under the scheme is suspended if he/she does not take the action required by the CEO. This could put a participant in the unenviable position of having to take on costly litigation (potentially over several years) before being able to access support under the NDIS.

The outcomes of litigation are uncertain, and the scheme, which should be designed to remove uncertainty, appears to reintroduce it. We do not believe that this reflects the intentions of the Productivity Commission in its recommendations to establish the scheme.

If the participant is successful in its claim, the compensation will almost certainly be deducted from the funding they receive under the scheme, so there is no "upside" for the participant in return for taking the litigation risk. On the other hand, if their claim is unsuccessful, they would almost certainly have to pay the defendant's, any other parties' and their own legal costs, which may be substantial. Those seeking support under the NDIS may well be the least able to take on either the financial risk or the emotional stress of conducting litigation.

It is difficult to see how a scheme that forces a participant to exhaust their existing entitlements to compensation before accessing or continuing to access the scheme is fair, or how it would work in practice. The health benefits of early and ongoing access to care and support resources may also be reduced by this aspect of the scheme thereby denying potential participants one of its stated benefits.

3.6.2 What action might be required?

Critical to the operation of the compensation provisions is what "required action" the potential participant might be required to take. "Required action" is not defined in the Draft Bill but it could mean anything from:

a) lodging a claim form, to
b) obtaining legal advice, to
c) commencing formal legal proceedings, to
d) litigating a matter to settlement or judgment, or to
e) exhausting all appeal rights.

The litigation process is complex in common law personal injury matters alleging medical negligence. Liability may not be determined until some years after a claim has been made or proceedings have been commenced. Cerebral palsy claims for example are notoriously difficult both in terms of liability, causation and quantum, and apportionment issues, between doctors and hospitals, add another level of complexity. The extent of a child's condition and their prognosis may not be known for several years after birth, causing great delay in determining the likely outcome of litigation or settlement negotiations.

What might seem like reasonable action to the CEO may, in the context of this complex litigation process, in fact put the potential participant at great financial and emotional risk, where they may be unable to deal with it.

3.6.3 Determining "reasonable prospects of success"

The Agency's decision to require a participant to take action to obtain compensation depends on the CEO being satisfied that the potential participant has "reasonable prospects of success" in obtaining compensation.

The notion of "reasonable prospects of success" appears in many areas of the law, and is, for example, the test to be overcome before commencing proceedings in several jurisdictions around Australia. It is not clear how the CEO will determine whether a potential participant's legal action has "reasonable prospects of success" or indeed what success might be.

In many cases whether a participant's claim has reasonable prospects of success will be based on an established approach of obtaining expert opinion on the elements of the claim. In the context of medical negligence proceedings, this would ordinarily require legal advice as well as expert opinion on the issues of breach of duty, causation and possibly also damage.

We would like to understand better what process may be adopted for making this determination. We understand that in the context of the design of the NIIS, the formation of an expert panel is being considered for the purposes of determining eligibility for that scheme, in the hope that an expert panel might be able to more quickly and efficiently determine whether the eligibility criteria are met. As determination of such issues can be complex, there is a need to balance the desire to make quick and efficient determinations for the benefit of all potential participants with the need to make accurate and fair determinations. If there is any sense that decisions being made are not accurate or fair, then there is a risk that there will be significant numbers of decisions appealed to the AAT (which similarly may not be the optimal forum to make an ultimate determination of these matters, depending on its internal expertise).

Additionally, it might be considered inappropriate that the CEO should himself determine this question without some form of independent oversight, lest there be any perceived or actual conflict of interest arising from the fact that the CEO can effectively determine that costs are shifted from the NDIS to another scheme or to a third party under the common law.

Further, as the costs of unsuccessful proceedings would be borne by the potential participant as the Draft Bill stands, there is little risk to the CEO of an adverse outcome and thus little incentive for it to ensure the rigour of its decision-making process in this regard. Although the decision to give notice to require a person to take reasonable action to claim or obtain compensation is a reviewable decision under section 99, the costs of an action seeking judicial review of such a decision must be borne by the participant, (and section 6(2) specifically states that the Agency is not permitted to fund legal assistance for participants or potential participants in relation to a review of decisions made under the legislation).

Third parties (including doctors) who are sued by potential participants in order to recover compensation may be prejudiced if a decision is made by the CEO that there are "reasonable prospects of success", as this may encourage participants to sue where they have had no previous intention of doing so and/or put disciplinary bodies on suspicion that a doctor's conduct may require investigation or effectively require them to investigate, where this might otherwise not have been the case.

3.6.4 "*Postcode lottery"*

The design of the provisions requiring potential participants to take action to obtain compensation may also cause an undesirable "postcode lottery" (the very type of consequence that the scheme was intended to avoid) where either the differences in common law or availability of other support or compensation schemes (including the NIIS, once established) might determine whether the CEO decides that there are reasonable prospects of success of compensation being obtained other than under the NDIS.

The common law and, importantly, the application of the common law, differs from State to State. Accident compensation schemes also differ from State to State, including importantly whether they are "fault-based" or "no-fault" schemes. There will undoubtedly be different "prospects of success" in recovering compensation depending upon the State in which a participant lives.

For example, a potential participant as a result of a car accident in a State where there is not a "no fault" CTP scheme may pass more easily into the NDIS than a person living in a State with such a scheme, depending on the circumstances of a car accident. This might act as a disincentive for States to adopt a "no fault" accident compensation scheme, leaving the Federal Government to fund the necessary supports via the NDIS (and not via the NIIS).

The potentially different outcomes are potentially unfair as between potential participants with the same conditions or injuries or potential participants whose conditions or injuries were caused by different events, with those having no reasonable prospects of recovering compensation elsewhere accessing the NDIS more easily than those who do.

Even if the NIIS is established, we understand that it may well be established as a "loose federation" of State-based schemes due to the likelihood that not all States will adopt identical schemes, and the very difference in their design and/or implementation will mean that the potential for a "postcode lottery" exists. This may well lead to forum shopping and increased eligibility disputes, in the form of challenges to the AAT or its State equivalents.

In our earlier submissions on the NDIS and NIIS, we warned of such "forum shopping" or "postcode lottery" risks associated with multiple disability schemes and their interrelationship with the national scheme, and we suggest that these are inevitable if the Draft bill is enacted in its current form.

3.6.5 Legal costs and costs orders

It is not clear what would happen in terms of costs orders if a participant were required to take required action by the CEO but was ultimately unsuccessful in

obtaining any compensation. An unsuccessful party in a litigated matter will almost certainly be the subject of a costs order against them, leaving them taking the risk of paying their own and other parties' legal costs. In a complicated medical negligence matter, costs orders can be hundreds of thousands of dollars. Would the participant be entitled to claim the costs from the Agency? If not, the participant would be in a significantly worse financial position as a result of having been forced to commence proceedings with no recourse.

What if the potential participant simply could not find the funds to take the action required by the CEO?

3.6.6 Review of a decision to require a participant to take reasonable action

A participant who is issued with a notice to take action is able to apply for a review of that decision under section 99(o) firstly by a reviewer with delegated authority from the CEO (see section 3.5.3 of this submission above) and ultimately by the AAT. Any application for review would be at the participant's own cost (as a consequence of section 6(2)), and the review process (which has no time limits on it in the Draft Bill) could significantly extend the time during which a participant is unable to access funding and/or supports, due to suspension of their plan.

3.6.7 A better approach

We believe that the arguments in this section of our submission demonstrate that the wording of sections 104-116 Chapter 5 of the Draft Bill represents poor public policy and that instead participants should be entitled to receive funding and/or support under the NDIS from the outset, especially if early intervention would be advantageous. The participant should then be required by the legislation to subrogate their rights to claim compensation from a third party to the Commonwealth, leaving it to take its own decision about whether to pursue the claim and recover compensation on its own account.

This is consistent with the NDIS being an insurance scheme, where insurers typically pay claims, then use their subrogated rights to recover from third parties where they think this is appropriate.

There is precedent for this approach in State legislation in the *Transport Accident Act 1986* (Vic) and the *Motor Accidents (Liabilities and Compensation Act 1973* (Tas), as well as in federal legislation in sections 390-403 of the *Military Rehabilitation and Compensation Act 2004 (Cth),* and we believe strongly that this approach would avoid or better address the concerns raised in this section of our submission and better serve the interests of those living with disability than the approach taken in the Draft Bill.

In our view, this is more consistent with the NDIS being a "front-line" scheme than a "safety net" which only provides support once other avenues have been exhausted and more consistent with a key design feature of the NDIS to make early intervention supports available to participants who need them.

It may be considered counter-intuitive for a medical indemnity organisation to argue in favour of effectively replacing an individual plaintiff (in particular one living with,

disability, who may be impecunious and already living with great stress, making it more likely that they will settle for lower compensation amounts) with a government plaintiff (which has much "deeper pockets" and is better able to represent itself in litigious matters). However, we submit that this is preferable to participants being placed in an unenviable financial and/or emotional position at a time when they need the support of the NDIS.

As an additional design feature, the Draft Bill could be amended to permit the use of assessments and examinations prepared for the purposes of the NDIS in any litigation, thereby reducing potential legal costs and duplication where such assessments would be used for both the scheme and any litigation.

3.6.8 Federal Government to underwrite the participant's costs?

An alternative amendment to the Draft Bill might be to retain the ability of the CEO to require a participant to take reasonable action, but to include an indemnity from the Federal Government for the costs incurred by a participant in doing so.

While this would require fewer changes to the Draft Bill and might reduce the financial risks for participants, we suggest that this would be a less optimal solution than the subrogation mechanism referred to in section 3.6.7 of this submission above, for the following reasons:

a) The participant would still be required to conduct the action (find and instruct lawyers etc), which would be more efficiently done by the Federal Government, given its experience in handling legal matters and significant internal legal resources;
b) As the person benefiting from any compensation received, the Federal Government is best-placed to make decisions about the conduct of any litigation;
c) As a "model litigant", the Federal Government should be best-place to ensure that any litigation conducted is efficient and this should ensure that out of the Agency's overall budget, more funding finds its way into the hands of those who need support under the scheme than into lawyers' hands;
d) As the provider of a costs indemnity, the Federal Government would likely want significant influence over, and information about, the conduct of any litigation and the involvement of two sets of lawyers would almost certainly increase the overall costs incurred; and
e) A subrogation model would likely be far less stressful for a participant than a costs indemnity model.

3.7 Common law rights to sue for future care costs

3.7.1 *NDIS/NIIS better suited than common law to deal with future care needs*

The Draft Bill does not follow the Productivity Commission's important recommendation that "*common law rights to sue for long-term care and support needs for cerebral palsy should be removed*" (Recommendation 18.5), and is inconsistent with the Productivity Commission's comment in relation to the NIIS that "*common law actions for damages associated with lifetime care and support would be extinguished*" on the premise that "*the goal of a no-fault scheme is to provide high quality care and supports making redundant the uncertain and costly process of accessing any additional supports through the common law."*

It seems counter-productive to this objective that the NDIS specifically introduces provisions requiring participants to take legal action at the direction of the CEO.

The assumption that common law rights to sue for future care costs covered by the NDIS and NIIS would be extinguished, as recommended by the Productivity Commission, is one of the key bases on which we felt able to support the NDIS and NIIS, as it is crucial to the likely financial outcomes for our members, and in particular the willingness of our members to support the imposition of State-based levies on medical indemnity premiums to fund the "no fault" element of medical accident claims under the NIIS (see section 3.8 of this submission below).

In this regard, we also generally support the arguments put forward by the Productivity Commission (and as endorsed in a recent article by David Weisbrot and Kerry Breen, highlighting the advantages of no-fault compensation schemes over negligence-based medical negligence regimes[5]) in providing for future care needs. These include:

- greater predictability of outcomes;
- equality of support provided (no "winners and losers" as litigation implies);
- greater administrative efficiency; and
- better incentives and deterrents to reduce risk.

We suggest that the provision of future care is better addressed by the NDIS than under the common law and that there should be no role for the common law in the context of future care needs. We agree that common law rights to sue under other common law heads of damage could be retained so that those suffering these types of loss can still recover.

To our knowledge, no explanation has been provided as to why this recommendation has not been followed in the Draft Bill, but we apprehend that a factor in this decision may have been the perceived complexity of seeking amendments to legislation in each State to effect this. This is one of the unfortunate consequences of having dual schemes and it is made more of an issue by the fact that the NDIS will now precede the NIIS in time, rather than follow it. However, this challenge will need to be taken on for the launch of the NIIS and we suggest that it should be taken on prior to the launch of the NDIS in order to ensure the fair and equitable treatment of participants in each of the schemes. It is also needed to ensure that there is no "double recovery" of costs through the common law and the NDIS/NIIS.

3.7.2 The need for consistency

If it is the intention that the NDIS and NIIS should operate consistently and that the States will establish the NIIS in accordance with this recommendation by the Productivity Commission, then common law rights to sue for all future care costs which are covered by the NDIS (including cerebral palsy and pregnancy and birth related neurological impairment) should be extinguished. If not, there will be a significant inconsistency between the NDIS and NIIS (if it is implemented in a manner which is consistent with the Productivity Commission's recommendations) which may again lead to unwanted "forum shopping" between the schemes, or an

[5] "A no-fault compensation system for medical injury is long overdue" – Med J Aust 2012 197(5) 296-298

additional "postcode lottery" if some States amend their legislation to extinguish common law rights and others do not.

In our view (as expressed in our submissions to the Productivity Commission):

a) participation in the NDIS and NIIS should be compulsory in the sense that there should be no other source of compensation for future care needs (be it litigation or other government schemes). It is in our view essential for the management of insurable risk that the interaction of the Schemes with civil litigation is unambiguous and stable over time. By eliminating the future care head of damage from civil litigation we would expect major civil claims litigation to be resolved more quickly, less expensively and with less stress for those involved. Notably, speedy resolution will deliver more immediate support to those who need it, rather than waiting until their claim for compensation is finally resolved which in our experience can take up to twenty five years from the date of the incident; and

b) all future care costs should be fully included in the Schemes, and the right to pursue compensation through civil litigation for other damages should remain. A scheme that provides immediate and ongoing support, as opposed to lump sum compensation payments, is more likely to focus on the immediate medical, social and personal needs of participants. This is particularly so given the considerable uncertainty involved in determining future care costs during consideration of heads of damage.

3.7.3 Legal issues can be addressed

We acknowledge that extinguishment of such rights would cause some legal issues, but suggest that these should be addressed in the interests of achieving fair and equitable outcomes for all concerned.

Likely legal issues to be addressed include whether future care costs are to be unbundled from court proceedings which have already been issued. While less equitable than unbundling them in some agreed way, it may be more expedient to extinguish them only from claims commenced after the launch of the NDIS (or NIIS as the case may be), leaving those with claims already on foot the ability to choose to proceed with them or seek support from the NDIS.

Some practical answers to any transitional issues may be found in the transitional arrangements for existing State-based accident compensation schemes, such as the NSW Lifetime Care & Support Scheme, which applies to children under 16 injured in an accident on or after 1 October 2006 and to adults injured in an accident on or after 1 October 2007. The transitional arrangements for this scheme include allowing people injured as a result of an accident before these dates to "buy-in" to the scheme. This is designed to allow into the scheme people who had already received compensation but wished to have their care needs met through the scheme rather than buy it privately with their compensation.

3.7.4 An alternative solution?

If the extinguishment of common law rights to sue for future care costs which are covered by the NDIS is not achievable, we suggest that the Draft Bill be amended to prohibit the CEO from exercising his powers under section 104 to require a participant to take action to recover compensation from a third party in all cerebral

palsy and other pregnancy and birth-related neurological impairment cases, or at least compensation for future care costs which are covered by the scheme.

We agree, based on our extensive previous experience in handling such cases, with the Productivity Commission's assessment that the annual future care costs of those suffering from cerebral palsy is likely to be between $60-100m (around 1% of the Federal Government's estimated overall cost of the NDIS) and this is not an excessive cost in the context of the billions of dollars which will be spent establishing and maintaining the NDIS.

Rather than put participants with cerebral palsy through expensive and stressful litigation (which the NDIS was intended to avoid), we suggest that the community is best served if the taxpayer-funded NDIS simply absorbs these costs and removes the spectre of litigation for future care costs from all concerned.

If a participant does happen to recover compensation for future care costs from a third party (for example where the participant had commenced common law proceedings prior to the launch of the NDIS), this could result in an adjustment to the funding and/or supports they receive under the NDIS, as is currently contemplated by the Draft Bill.

3.8 **Funding and impact on medical indemnity premiums**

We have consistently stated our support for the introduction of a Federal Government disability insurance scheme, on the basis that the the scheme does not place any undue financial or other burden on our members.

3.8.1 Impact of uncertainty

As the funding arrangements for the NDIS and the NIIS are not yet known, it is not possible to determine what the impact on our members will be, and our support of the NDIS is conditional on the funding arrangements for both schemes being made known.

We understand that the Federal Government plans to announce its funding proposals for the NDIS in its forthcoming budget, however, this will not give us certainty unless the NIIS funding arrangements are also announced prior to the proposed launch of the NDIS on 1 July 2013. Additionally, as medical indemnity premiums are set actuarially, trying to predict the level they need to be at to cover claims that may arise in the future, we will be unable to price our premiums appropriately for our renewals on 1 July 2013 if the funding arrangements for the NDIS and design of the NIIS are not known by April 2013.

As a result of this uncertainty, we would expect medical indemnity premiums to rise (all other things being equal) until the funding of the scheme is clear and all key NIIS design features and funding arrangements are known. We therefore urge Commonwealth and State Governments to address these issues as a matter of urgency.

If the Productivity Commission's recommendation that common law rights to sue for future care costs be extinguished is followed in relation to the NDIS and/or NIIS, it is likely that medical indemnity premiums would fall over time (to reflect the fact that a

proportion of insurers' potential liability would be taken up by the NDIS and subsequently the NIIS).

Our concerns at the current lack of detail in relation to funding are increased by the potential for States to collect higher premiums than actuarially-justified, especially in the light of the uncertainties arising from the NIIS in its early years pending the actual usage (and costs) of the NIIS becoming known. We note "the predilection of Australian governments to award themselves dividends from the insurance providers they own"[6], and the fact that there is evidence that Commonwealth and State Governments have historically in effect turned premiums for such schemes into taxes on those paying what turn out to be inflated premiums.

3.8.2 Impact if common law rights to sue are not extinguished in respect of the NDIS but are extinguished under NIIS

The Productivity Commission estimated[7] that medical indemnity insurance costs could be reduced by between $60-100 million per year if the costs of future care and related heads of damage for cerebral palsy alone were met exclusively by the NDIS. In theory this amount would be available to fund support under the NIIS for catastrophic medical accident injuries on a "no-fault" basis, as doctors should not receive such a "windfall gain" and should be willing to exchange lower medical indemnity premiums for State-based levies.

If, as per the Draft Bill, such common law rights are not extinguished, medical indemnity premiums would certainly not fall by that $60-100m and would in all probability rise to reflect the uncertainties associated with the new scheme. These costs would either be absorbed by those practitioners or effectively passed on to those receiving care from them in the form of increased medical fees. In turn, this might be expected to put upward pressure on amounts paid by Medicare under the MBS and also amounts paid by the Federal Government under the existing High Cost Claims Scheme and Premium Support Scheme.

In relation to the NIIS, the Productivity Commission recommended that funding for medical treatment accidents on a "no-fault" basis under the NIIS should include contributions from medical indemnity premiums, but only on the basis that "*if the removal of the insurance costs associated with the lifetime care and support of cerebral palsy cases* [under the NDIS] *does not sufficiently outweigh the additional costs associated with the inclusion of no fault catastrophic injuries* [under the NIIS], *then any premium increases* [associated with the NIIS] *should be modest and could gradually be phased in. State and Territory governments should fund any gap between premium income and catastrophic medical injury claims*".

If such savings are not made, doctors would not be able to contribute this amount without suffering an increased financial burden and the only amount theoretically available from doctors to fund support under the NIIS for catastrophic medical accident injuries would be the much smaller amount by which their premiums decreased from having common law rights to sue for future care costs for claims under the NIIS extinguished.

[6] "Disability, injury insurance schemes need scrutiny" – Andrew Baker, 28 August 2012

[7] p889 of its July 2011 report

Given the small number of people likely to be eligible for the NIIS, this amount would not be anywhere near enough to fund the expected costs of introducing cover for catastrophic medical accident injuries on a "no-fault" basis and the States would need to find alternative sources of funding.

We acknowledge that doctors should not receive a "windfall gain" from the transfer of future care costs into the NDIS and we anticipated (as did the Productivity Commission) that the "quid pro quo" for such transfer would be a levy on medical indemnity premiums to help fund the "no-fault" element of claims for catastrophic injuries covered by the NIIS (even though in theory the imposition of a levy on medical treatment accidents which could not have been avoided by the exercise of reasonable care would be inequitable on doctors).

Without the quid pro quo, as is the case under the Draft Bill, we anticipate that doctors would be significantly worse off under the NDIS (both in their capacity as doctors due to the uncertainties surrounding the new scheme and the consequent rise in medical indemnity premiums, and as tax paying members of the community due to the increased tax burden or reduction in other services required to fund the NDIS) and potentially significantly worse off in relation to the NIIS, depending on the amount of any levy imposed on medical indemnity premiums.

3.8.3 Impact if common law rights to sue are not extinguished in respect of NDIS and NIIS

If, for any reason, common law rights to sue for future care costs for medical accident injuries covered by the NIIS are not extinguished once the NIIS is launched, we would not be in a position to support any contribution from doctors to the funding of medical treatment accidents on a "no-fault" basis under the NIIS, as this would undoubtedly increase the already significant financial burden on them and there would be no offsetting decrease in medical indemnity premiums to reflect the transfer of future care costs to one of the schemes.

3.9 **High Cost Claims Scheme and Premium Support Scheme**

We note that the Productivity Commission recommended that "*regardless [*of any increase in medical indemnity premiums caused by the NIIS*], the Australian Government subsidy schemes would continue to safeguard the affordability of medical indemnity cover.*"

We agree with this recommendation and suggest that this recommendation be formally enshrined in the Draft Bill, to the effect that the High Cost Claim Scheme and Premium Support Scheme not be amended in any way (other than the future changes to the Premium Support Scheme which have already been announced) until at least 2020 when the impacts of the NDIS (and depending on the timing of its establishment, the NIIS) can be fully assessed. This would give doctors at least some level of certainty that their premiums would remain affordable, despite any (as yet unknown) increases to their premiums caused by the introduction of the NDIS and NIIS.

The interaction of the NDIS (and ultimately the NIIS) with the HCCS and PSS and any proposed or implicit transfer of funding between the various federal and State government scheme needs to be better understood once the funding arrangements

for the NDIS and NIIS are determined to ensure that no arbitrage opportunities or perverse incentives are created for governments, medical indemnity insurers or their members.

3.9 **Provision of services by doctors**

3.10.1 Registration of providers of "supports"

The Draft Bill requires that providers of supports to participants must be registered and that all registered providers must comply with governance, compliance, business practice, audit and accounting requirements which have not yet been made available in the form of draft Rules.

We are not sure whether these obligations will apply to doctors, as there is no detailed definition of "supports", but if they do apply, we are concerned that the legislation does not impose any further unnecessary compliance or administration burdens on them which could increase costs passed on to patients or distract doctors from providing care.

3.9.2 Assessments and medical examinations

In addition, the operational aspects of the scheme as they apply to medical examinations and assessments performed at the request of the Agency need careful consideration to ensure that there is no unnecessary additional administrative burden on healthcare practitioners as a result of the scheme. The Draft Bill understandably contemplates a process whereby healthcare practitioners are approached to undertake assessments and provide medical reports "in the approved form" to the Agency so that it can:

a) determine whether a prospective participant meets the access requirements;
b) determine whether to approve a statement of participant supports for a participant (including the reasonable and necessary supports that will be funded); or
c) review a participant's plan.

We note that some of the timeframes in the Draft Bill for assessments to be prepared are very tight (28 days in some cases) and this may make it difficult for participants and potential participants to schedule appointments for assessments within the stated timeframes.

3.10.3 Draft Rules need to be published

Avant appreciates that the operational provisions relating to these aspects of the scheme are likely to be included in the NDIS rules, and we would appreciate the opportunity to review the draft rules to ensure that the relevant provisions do not add to the administrative burden currently experienced by medical practitioners.

3.10.4 Red Tape generally

We note in this regard that in 2011 the Australian Medical Association conducted a "Red Tape Survey" in an effort to learn more about the impact of administrative matters in general practice, particularly in relation to completing forms for government departments (eg Centrelink and the Department of Veterans Affairs) and

third parties. According to the survey the red tape burden on GPs was 4.62 hours a week (Halving GP red tape would free up more than 7 million new GP consultations a year"[8]).

We suggest that every effort is made in practice and in designing forms etc for the scheme to streamline the administrative processes which need to be completed.

3.10.5 Practical issues with assessments and examinations

Each year, we receive via our Medico-Legal Advisory Service numerous queries from our members relating to assessments that they perform on patients at the request of third parties under accident compensation schemes across the country, particularly concerning payment for examinations and reports.

In our experience, payment for medical assessments performed at the request of accident compensation insurers can be a significant issue for our members. Payments are often capped under the applicable rules, and do not adequately reflect the commercial value of the services provided and our members have experienced long delays in obtaining payments, with no entitlement to interest.

The Draft Bill does not specifically state who is pay for the costs of an assessment under the legislation (compared, for example, with section 328 of the *Military Rehabilitation and Compensation Act 2004* (Cth), which expressly states that the Commonwealth is to pay for the cost of an examination ordered for the purpose of assessing a claim under that Act).

We suggest that the Draft Bill should expressly state that assessments and examinations performed at the request of the CEO be funded by the NDIS. The fees for the assessments and examinations should adequately reflect the commercial value of the services provided. The fees should be paid within a specified time, with interest to accrue for payments outstanding beyond the specified time.

3.11 **Privacy, confidentiality and privilege** –

3.11.1 Protection of participants' and doctors' interests

While we acknowledge the need for good governance to protect the community's interests in relation to the operation of the NDIS, we are concerned to ensure that the provisions of the Draft Bill relating to the compulsory disclosure by doctors of a broad range of information/documentation which may be relevant to a participant in the NDIS do not impose significant additional administrative burdens on them or require them to disclose information which may be detrimental to the participant's or the doctors' interests.

We are concerned to ensure that our members are not the subject of "fishing expeditions" by the Agency, leading to them having to produce copies of numerous documents at significant cost to them in terms of photocopying and time. Our experience has been that information requests can often require significant documentation to be retrieved and copied.

3.11.2 Freedom of Information and "protected information"

[8]AMA publication 21 November 2011

We suggest that the Draft Bill should be amended to make it clearer:

- how sections 58-68 interact with the *Freedom of Information Act 1982 (Cth)* and therefore what "protected information" and other information collected in relation to the operation of the NDIS can be obtained via the FOI process; and
- that third parties can provide "protected information" and other information collected in relation to the operation of the NDIS to their insurers and legal advisers as necessary to protect their interests.

4 Specific comments on the provisions of the Draft Bill

We have set out in **Appendix 1** to this submission our comments on specific sections of the Draft Bill including our suggestions as to how sections might be better drafted to achieve the objectives of the scheme. Some of the proposed amendments relate to matters covered elsewhere in this submission, while others are suggested in addition to those matters.

As mentioned above, it is difficult to comment definitively on whether the Draft Bill achieves its stated objectives without the benefit of seeing the Rules which will give flesh to the NDIS' legislative bones and the key design features of the NIIS, and we may need to change our view on any particular matter once these are made known.

Authorised by:

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Appendix 1

Comments on specific provisions in the Draft Bill

Section of Draft Bill	Proposed amendment to Draft Bill	Rationale
9	Include more detailed definition of "supports" to clarify which supports (and hence which service providers) are covered by the Act	
13-17	Include more detailed provisions as to how the Agency may do the things contemplated by sections 13-16 in the Act itself, rather than in the Rules referred to in section 17	More legislative certainty is required in these key "empowering" provisions and all of the detail should not be left to the Rules, but should be enshrined in the legislation
23(1)(c)	The Act, not the Rules, should specify all residence requirements for eligibility	
24 and 25	Specifically include in the eligibility and early intervention criteria "at risk" infants and young children prior to them receiving a formal medical opinion that they have cerebral palsy of a pregnancy or birth related neurological impairment	Some early interventions for sufferers of these conditions can be vital and the opportunity to benefit from them may be lost if there is delay in receiving a medical opinion. We understand that there are valid and effective diagnostic tools available for this purpose
24	Add participation on an "interim" basis for 2 years	As per the NSW Lifetime Care and Support Scheme, in order to ensure that there are as few impediments as possible to early intervention
25(b) and (c)	A person should meet the early intervention requirements if the CEO determines if the CEO is satisfied that the early intervention "is or may be likely to" have the effects stated in these sections	If there is any doubt as to whether early intervention will have beneficial outcomes, we should err on the side of allowing a participant to receive it

26(2)(b)	The time limit for undergoing assessments and medical examinations should be longer than 28 days	It may well take significantly longer for participants to be assessed or examined, particularly where specific expertise is required to conduct the same and in geographic areas where there are insufficient registered service providers
26(3)	A participant should not be deemed to have withdrawn their access request if they do not comply with a rigid time limit for undergoing an assessment or examination	This is unfair on participants, who may not be able to control the time it takes to undergo assessments or examinations
30	The ability of the CEO to immediately withdraw support under the scheme may leave a participant in an unenviable position and there should be a requirement that reasonable notice is given before a participant's access to the scheme is terminated. There should also be a provision ensuring that supports and funding are provided to participants for such time as they are appealing the CEO's decision (and a reviewer's decision under section 103)	Unilateral and immediate denial of access to funding or supports may have a significantly adverse impact on participants
33(4)	There should be a time limit placed on the CEO to determine whether or not to approve a statement of participant supports, rather than requiring the CEO to use reasonable endeavours to do so as soon as reasonably practicable.	
34	The requirement that the CEO be satisfied that all of the criteria in this section are satisfied before determining that supports are "reasonable and necessary" is onerous and the subjective or high level nature of some of the criteria may operate to unfairly deny supports to participants Section 34(f) should be deleted, as the scheme should stand "up front" rather than as a safety net behind, other schemes. It is not appropriate that section 34(g) allow Rules to specify excluded supports. This should be done within the Act itself (and the same applies to section 35(1).	
37(2)	This section should be deleted	A participant's plan should be capable of

		being amended, rather than a whole new plan being required
40(2)	The "grace period" for absence from the country before support is suspended should be extended to at least 3 months, to reflect longer periods of absence for holidays or specialist treatment overseas	It is ironic that the Chair of the Board can excuse a Director's absence for up to 3 months under section 131(4) without notifying the Minister, yet a participant can only leave the country for up to 6 weeks before support is suspended
46(1)	Participants should only be required to spend money substantially in accordance with their plan, rather than absolutely in accordance with it,	To allow for minor "unders and overs" in spending on what could be a wide variety of items
51(1)	A participant should only be obliged to inform the CEO if their circumstances change materially, and not if there is only a minor change	The requirement to notify every change is onerous and will lead to the Agency receiving many immaterial notifications
53(1) and 55(1)	The CEO should only be permitted to require the provision of information and documentation from participants or third parties where it may be material	
57	It should not be an offence not to comply with a requirement of the CEO under section 55. Instead, this should be a civil penalty provision.	
58 to 68	Third parties should be able to recover reasonable expenses for providing documentation and other information for the purposes of the Act and Rules should be prepared to ensure the relevance of all requests made. It should be made clear: • how sections 58-68 interact with the *Freedom of Information Act 1982 (Cth)* and therefore what "protected information" and other information collected in relation to the operation of the NDIS can be obtained via the FOI process; and • that third parties can provide "protected information" and other information collected in relation to the operation of the NDIS to their insurers and legal advisers as necessary to protect	

	their interests.	
73(2)(b)	Delete this section	The ability to introduce Rules as to how service providers run their business is inappropriate and overly-bureaucratic and should not be determined by government
100(5)(c)	The reviewer should not be subordinate to the CEO and should be independent of the Agency	As per the Productivity Commission's recommendation
100(6)	Time limits should be set for the review by the initial reviewer and included in this section	Guidelines are also needed as to how the initial reviewer will make its decisions
100(7)	Amend this section to provide that a participant's existing funding and supports should remain on foot pending any review by the initial reviewer (and by the AAT under section 103)	It is unfair to participants that the CEO's decisions can be implemented while a review is pending
104-116	Replace these sections with provisions more akin to the sections 390-403 of the *Military Rehabilitation and Compensation Act 2004 (Cth*) or *Transport Accident Act 1986 (Vic)*	See section 3.6 of this submission for further details