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16 August 2010

Attention: John Walsh
Level 2 / 15 Moore Street
CANBERRA CITY ACT 2600

Dear Mr Walsh,

Re: Productivity Commission Inquiry into the proposed National Disability Insurance Scheme

We enclose a submission to the above inquiry on behalf of the national law firms, Maurice Blackburn and Slater & Gordon.

You will note that Attachment C to the submission is not attached and we confirm it will be emailed to you tomorrow.

If you have any questions or require any further information or documents, please let us know.

Yours faithfully

John Berrill
Principal
MAURICE BLACKBURN
Accredited Specialist Personal Injury Law

LAW INSTITUTE OF VICTORIA ACCREDITED SPECIALIST

Encl

PRODUCTIVITY COMMISSION INQUIRY INTO DISABILITY CARE AND SUPPORT

SUBMISSION

MAURICE BLACKBURN
SLATER & GORDON

[16 August 2010]

SUBMISSION TO THE PRODUCTIVITY COMMISSION INQUIRY INTO DISABILITY CARE AND SUPPORT

Executive Summary

We welcome the opportunity to provide a submission to the Productivity Commission in relation to its *Inquiry into Disability Care and Support* (the "**Inquiry**").

For over 150 years, Maurice Blackburn and Slater & Gordon have represented hundreds of thousands of people living with disability. We currently provide advice and advocacy to over 20,000 people living with disability per annum and are well placed to inform the Productivity Commission as to the services that are available to and the needs of people with profound or severe disability.

We recognise that there is a clear need to improve the nature and level of disability care and support across Australia. Further, we understand that the scale of this task is both substantial and growing.

The Commonwealth Government has rightly placed great emphasis on the need to ensure that these growing disability care and support needs will be met, and to this end has already moved to improve the quality of services across Australia.

However, while additional resources have been provided, we believe that there is still room for substantive improvement in both the nature and level of services for disability care and support – now and into the future. Amongst the problems that still need to be addressed are:

- the variability in, and in some cases the lack of, access to disability care and support;
- the variability in the quality of care and support available in different parts of Australia;
- the need to ensure that there are clear incentives across Australia to minimize the incidence of injuries and accidents that increase demand for care and support;
- the removal of overlaps and inefficiencies in the delivery of disability care and support through better coordinated service provision across governments at all levels; and
- the provision of greater control and input by individuals receiving care and support.

In addressing these problems, the task is to ensure that any action taken by the Commonwealth to improve the level and quality of disability care and support services is done in a manner which is efficient, effective, equitable and accountable. To achieve such outcomes, we believe that any action to improve the level of disability care and support should have regard to the following aspects of reform:

- ***A leadership and coordinating role for the Commonwealth Government***

  Given the scale and nature of the problems to be addressed, it is critical that the Commonwealth Government plays a leadership and coordinating role in the future delivery of disability care and support services.

  To this end, we see the Commonwealth Government as having an overarching role to play in setting the standards that should apply with respect to disability care and support, ensuring adherence to those standards and providing funding to assist in meeting those standards.

  We suggest the creation of a "National Disability Authority" which would perform this function.

However, this does not mean that the Commonwealth Government should necessarily be responsible for the service provision itself – as it is often geographically remote from those requiring support and care and lacks experience in direct service provision.

- ***A flexible and tailored policy approach***

  We believe that national standards should be set in terms of the level and quality of service provision. However flexibility should exist in how services are developed, delivered and funded. This is necessary because the circumstances in which the need for disability care and support services arise differ from one person to the next. It is important to ensure not simply the appropriate levels of care, but also that the necessary incentives are in place to minimise harmful behaviour which may otherwise increase the demand for disability care and support services.

  A simplistic approach that seeks to apply a one-size fits all approach to the task of improving disability care and support in Australia risks becoming bureaucratic, unwieldy and unresponsive to specific community needs. As such, any proposed scheme with respect to severe and profound disability that may be considered has to be developed having regard to, and be able to work alongside, existing compensation systems that are often integrated into broader policy approaches to provide holistic outcomes.

- ***Integration of policies across the whole of government (e.g. health system; aged care; etc)***

  To maximise the efficiency with which disability care and support can be delivered, it is critical that related policy approaches are coordinated across the whole of government. This is particular important having regard to:

  - the nature of disability care and support services and their relationship to other areas of government service provision, including health and aged care; and
  - the scope of the Terms of Reference for this Inquiry, which relate only to those with a "severe and profound disability", and also not to those who face disability as a consequence of ageing.

- ***No diminution of existing standards***

  In considering any changes to long term care and support, a fundamental tenet of reform should be that there is no diminution in the existing standards of care, support or compensation that are currently available to any disabled person in any jurisdiction.

  For example compensation for motor vehicle or workplace accidents in Victoria are generally better than in other jurisdictions. The Comparative Performance Monitoring report released by the Workplace Relations Ministers' Council in August 2008 illustrates the disparity in outcomes in relation to worker's compensation schemes across Australia.) There is a case for "levelling up" the quality of schemes and the Commonwealth Government would need to take a leadership role in this.

  Given the current levels of disability care and support services, there is nothing equitable about reducing the levels of entitlements that are currently being provided under any existing arrangements so as to improve average levels of care and support. We strongly believe that the task is to lift all standards to an appropriate minimum level, not equalise them to an inadequate one.

- ***No restriction or removal of existing common law rights***

We are equally strong in our view that any proposed changes to disability care and support services should not involve any restriction or removal of existing rights to access compensation through the common law.

One of the major benefits associated with the common law for persons injured as a result of negligence is that every successful action results in a personalised compensation arrangement that reflects the nature of the individual's needs and enables them to chose the manner in which their care and support is provided.

Equally important, to restrict or remove existing common law rights would remove incentives for good behaviour and risk increasing the cost of disability care and services.

- ***Targeted funding arrangements***

  In determining what should be the appropriate funding arrangements for disability care and support services, we support targeted funding arrangements. More specifically, we submit that regard and consideration should be given to a variety of factors, including:

  – that funding arrangements (and the nature and scope of any Commonwealth action) should recognise that in relation to various existing schemes, funding arrangements incorporate a specific risk component to encourage positive behaviour. The fact that such risk-weighted funding arrangements will not be appropriate for all causes of severe and profound disability means that there is a need for a mix of schemes, some with such funding arrangements. The corollary is that existing schemes such as those relating to motor vehicle and work accidents should not be incorporated into a more general support scheme; and

  – in circumstances where there are no risk-related factors to consider in developing funding mechanisms – for example, in relation to severe and profound disability that are not the result of negligence – funding requirements should be imposed in accordance with general community standards. This funding could be achieved either through a greater allocation from consolidated revenue or through a hypothecated levy.

- ***Community awareness and education***

  In developing any new approach to the delivery of disability care and support, it is important that reform be accompanied by a well resourced and continuous education campaign that is designed to build community acceptance and understanding of people living with disability.

  Education, information and awareness are essential to building community understanding and demystifying disability. They help break down barriers to rehabilitation and facilitate reintegration into the workforce.

In addition to these general matters, to assist the Inquiry our submission also addresses three of the specific areas highlighted in the Issues Paper in further detail:

- who should be eligible;
- who has the power; and
- what services are needed and how they should be delivered.

In considering these issues, we have structured and confined our responses having regard to the Terms of Reference of the Inquiry, including that the Inquiry is with respect to providing "*long-term essential care and support for eligible people with severe or profound disability*", and that it is" ... *intended to cover people with disability not acquired as part of the natural process of ageing*".

The Terms of Reference do not extend to all injuries or illnesses or to those with mild or moderate disabilities and do not extend to, for example, the provision of income support.

SUBMISSION TO THE PRODUCTIVITY COMMISSION INQUIRY INTO DISABILITY CARE AND SUPPORT

1. Introduction

This submission has been prepared by Maurice Blackburn and Slater & Gordon.

We are consumer law firms with a wealth of experience supporting and advocating for people living with disability. Between us we have 150 years of experience representing hundreds of thousands of people living with disability. They are ordinary Australians who have experienced extraordinary hardship because of disabilities arising from accidents, illnesses or birth in both compensable and non compensable circumstances. We have observed their suffering and the suffering of their families who suddenly have their lives changed forever by the birth of a child with a disability, an accident, diagnosis of an illness or a medical procedure gone wrong. We have been educated by each of our clients and possess a deep and detailed understanding of their needs and concerns. We believe we are in a unique position to comment on disability policy in this country, and have done so on behalf of people with disability throughout our histories.

We seek to continuously improve the quality of our support for clients living with disability. Each firm has also developed innovative practices to assist clients beyond the core service of supporting legal recourse. For example, Slater & Gordon employs social workers to assist clients navigate their changed worlds and assists families with a disabled dependant in specialised estate planning, including the establishment of testamentary and disability trusts. At Maurice Blackburn there is a dedicated social justice practice that takes on matters seeking to further a public good, correct a perceived injustice or address a matter of broad community concern, including for people with disability. The practice has 3 full time lawyers working pro bono.

We have obtained millions of dollars in compensation for people whose disabilities are 'compensable' – that is, there is an action that can be taken at common law or the injury or illness is subject to a statutory compensation scheme. These funds provide disability care and support that enable our clients, if not to restore their lives, at least to live with dignity and fulfilment. However for others there is no compensation available and they depend on fragmented and often inadequate services funded by the public sector or charitable organisations whose budgets are stretched to the limit. We want to see this changed. We want every Australian living with disability to do so with dignity and fulfilment realising their full potential. We think this is a basic human right and it is of serious concern that this is not the experience of many people living with disability in our community today.

We welcome the opportunity to provide a submission to the Productivity Commission in relation to the inquiry which has been established to assess the costs, cost effectiveness, benefits and feasibility of an approach which:

- provides long term essential care and support for eligible people with severe or profound disability, on an entitlement basis and taking into account the desired outcomes for each person over a lifetime;
- is intended to cover people with disability not acquired as part of the natural process of ageing;
- calculates and manages the costs of long-term care and support for people with severe and profound disability;
- replaces the existing funding system for the eligible population;
- ensures a range of support options is available, including individualised approaches;

- includes a coordinated package of care services which could include accommodation support, aids and equipment, respite, transport and a range of community participation and day programs available for a person's lifetime;
- assists people with disability to make decisions about their support; and
- provides support for people to participate in employment where possible.

Having regard to the Terms of Reference, it is clear that this Inquiry offers a welcome opportunity for the Productivity Commission to examine some of the key issues relating to the provision of disability care and support services across Australia, so as to assist the Commonwealth Government in its decision making processes. In particular, it provides a clear focus with respect to the steps that can be constructively taken to enhance long term care and support for Australians with severe and profound disability.

To assist in this process, the purpose of this submission is to twofold:

- to set out aspects of potential reform which we believe should be considered when developing the Commonwealth's role with respect to disability care and support for people with severe and profound disability (Section 2); and
- to provide comment with respect to some of specific issues and questions that have been set out in the Productivity Commission's *Disability Care and Support: Issues Paper* dated May 2010 (the "**Issues Paper**") and the *Disability Care and Support: The Key Questions* dated May 17, 2010 (the "**Key Questions Paper**") (Section 3).

We would welcome the opportunity to discuss further the matters that are set out in the submission below. We also look forward to the opportunity to provide further input into this Inquiry following the release of the Productivity Commission's Draft Report.

2. Disability Care And Support – Elements Of A National Approach

In preparing this submission, we recognise that there is a clear need to improve the nature and level of disability care and support across Australia. Further, we understand that the scale of this task is both substantial and growing. This is amply demonstrated in the Report of the Disability Investment Group (2009:11-12) which details, inter alia, that:

- in 2003, about 1 in 12 children aged up to 14 years had a disability (8.3% of all children), and half of these had a severe or profound limitation;
- the number of people aged 0-64 years with severe or profound core activity limitations is projected to have grown substantially between 2006 and 2010. The Australian Institute of Health and Welfare estimates an increase of 4.8% to 752,100 people;
- with an ageing population, over the next 40 years a steady increase in the number of people with severe or profound disability is projected – growing from 1.4 million to 2.9 million; and
- this growth in disability will place increasing strains on carers, primarily women, who are likely to be in the poorest two-fifths of households.

The Commonwealth Government has rightly placed great emphasis on the need to ensure that these growing disability care and support needs will be met and to this end it has already moved to improve the quality of services across Australia.

In particular, through the Council of Australian Governments ("**COAG**"), the Commonwealth – together with the states and territories – has agreed to a new *National Disability Agreement* ("**NDA**") to improve and expand services for people with disability, their families and carers. Under the NDA, which came into effect on 1 January 2009, the Commonwealth will provide more than $5 billion in funding over five years to the states and territories for specialist disability services. The NDA means that in 2013 the Commonwealth Government's contribution will exceed $1.2 billion, compared to $620 million in 2007.

Furthermore the **NDA** outlines the commitment of the Commonwealth and state and territory Governments to work together on the establishment of a National Disability Strategy and the Prime Minister's recent release of the draft along with election pledges in relation to early intervention and other enhancements to funding augers well for the future.

While these additional resources are clearly beneficial, we believe that there is still room for substantive improvement in both the nature and level of services for disability care and support – now and into the future. Amongst the problems that still need to be addressed are:

- the variability in, and in some cases the lack of, access to disability care and support;
- the variability in the quality of care and support available in different parts of Australia;
- the need to ensure that there are clear incentives across Australia to minimize the incidence of injuries and accidents that increase demand for care and support;
- the removal of overlaps and inefficiencies in the delivery of disability care and support through better coordinated service provision across governments at all levels; and
- the provision of greater control and input to individuals receiving care and support.

We expect that addressing these issues will involve considerable public expenditure and that resources are unlikely to be available to resolve every issue immediately. Again, the scale of the task is well illustrated in the Report of the Disability Investment Group (2009). However, it must be recognised that unless there is change in the way in which we as a community meet existing and future disability care and support needs, those additional costs will not go away – rather they will be borne largely by those who require care and by the family and friends who care for them.

Issues in developing the Commonwealth's role in disability care and support

The task then is to ensure that any action taken by the Commonwealth to improve the level and quality of disability care and support services is done in a manner which is efficient, effective, equitable and accountable.

To achieve such outcomes, we believe that any action to improve the level of disability care and support should have regard to the following aspects of reform:

- ***A leadership and coordinating role for the Commonwealth Government***

  Given the scale and nature of the problems to be addressed, it is critical that the Commonwealth Government plays a leadership and coordinating role in the future delivery of disability care and support.

  At present, governments at all levels are involved in the delivery of disability care and support. Given the importance of ensuring that provision of services occurs locally and in a manner that is responsive to individual's needs, this can be expected to continue. The challenge is to ensure that overlapping responsibilities are reduced and that where possible service provision is streamlined across Commonwealth, state and local governments.

  To this end, we see the Commonwealth Government as having an overarching role to play in setting the standards that should apply with respect to disability care and support services, ensuring adherence to those standards and providing funding to assist in meeting those standards.

We suggest the creation of a National Disability Authority which would perform the above function.

However, this does not mean that the Commonwealth Government should necessarily be responsible for the service provision itself – as it is often geographically remote from those requiring support and care and lacks experience in direct service provision.

- ***A flexible and tailored policy approach***

  In taking a leadership role, it is important for the Commonwealth to recognise the need for, and to maintain, flexibility in the manner in which disability care and support services are developed and delivered.

  In particular, any system of disability care and support should recognise that:

  - where the causes of disability are subject to human behaviour, it is important to maintain incentives for good behaviour that will lower the risk of injury and hence reduce the human and financial costs associated with severe and profound disability;
  - compensation schemes providing support for severe and profound disability often form part of integrated policy responses which contain mutually reinforcing components and incentives – for example, in Victoria the compensation arrangements operating with respect to motor vehicle accidents form part of a suite of initiatives – some funded through insurance premiums – including safety advertising and road network improvements, as well as strict road safety rules relating to matters such as drink and drug driving, and speeding;
  - in whichever area that they may operate – be it government or private sector – monopolistic structures carry with them inherent risks of becoming overly bureaucratic, unwieldy and unresponsive to consumer or client needs. This risk is potentially exacerbated with respect to government service provision at the Commonwealth level, because it is often geographically remote and lacking hands-on experience in direct service delivery. Yet the care and support services required by many people living with severe or profound disability are complex and specialised eg for people with spastic quadriplegia. Given the complexities associated with service provision in an area as intricate as disability care and support, any arguments that may be made with respect to economies of scale and the potential for reductions in administrative burdens need to be rigorously tested against the countervailing potential for diseconomies of scale and scope, and the risk that opportunities to encourage innovation will be lost;
  - the risks associated with a monopolistic policy approach to service provision are further exacerbated in this instance because they potentially go against the thrust of reform in service delivery in this area, which is for greater individual power over decision making with respect to care and support. It is important that this reform process not be placed at risk; and
  - by their nature, monopolistic approaches to the provision of government services risk crowding out competitive private sector involvement – for example, with respect to medical negligence – which in the first instance can be assumed to have developed in accordance with community preferences.

  In summary, while we believe that national standards should be set in terms of the level and quality of service provision, flexibility should exist in how services are developed, delivered and funded. This is necessary because the circumstances in which the need for disability care and support arise differ from one person to the next and it is important to ensure not simply the appropriate levels of care, but also that the necessary incentives are in place to minimise harmful behaviour which may otherwise increase the demand for disability care and support services.

A simplistic approach that seeks to apply a one-size-fits-all approach to the task of improving disability care and support in Australia risks becoming bureaucratic, unwieldy and unresponsive to specific community needs. As such, any proposed scheme with respect to severe and profound disability that may be considered has to be developed having regard to, and be able to work alongside, existing compensation systems that are often integrated into broader policy approaches to provide holistic outcomes.

- ***Integration of policies across the whole of government (e.g. health system; aged care; etc)***

  To maximise the efficiency with which disability care and support can be delivered, it is critical that related policy approaches are coordinated across the whole of government. This is particularly important having regard to:

  - the nature of disability care and support services and their relationship to other areas of government service provision, including health and aged care; and
  - the scope of the Terms of Reference for this Inquiry, which relate only to those with a "severe and profound disability", and also not to those who face disability as a consequence of ageing.

  Under the recent reforms to the health system, the Commonwealth Government is taking additional responsibility for the funding of health services, has moved to improve and unify standards for care, and is introducing greater accountability and transparency. However, it has not taken direct responsibility for service provision and indeed has sought to devolve greater responsibility to the local level.

  Ensuring that the suite of policies focusing on related areas such as disability care and support, health and aged care are coordinated across the whole of government is most likely to reduce overlapping responsibilities and inefficiency, and hence maximise the available resources that can be used to improve service delivery.

  It is recognised that services need to interact to create a virtuous cycle, and integration (within any scheme and between a scheme and other government services) is a high priority e.g. access to training influences access to employment which has a positive impact on psychosocial and physical health, location of residential accommodation and available transport influence access to employment and community involvement, personal care services integrated with residential accommodation allow the maximum degree of independence which is associated with feeling empowered which in turn impacts the ability to engage with the community and so on.

- ***No diminution of existing standards***

  In considering any changes to long term care and support, a fundamental tenet of reform should be that there is no diminution in the existing standards of care, support or compensation that are currently available to any disabled person in any jurisdiction.

  This includes services available under the various state and territory compensation schemes and care packages administered through various state and territory authorities.

  Given the current levels of disability care and support, there is nothing equitable about reducing the levels of entitlements that are currently being provided under any existing arrangements so as to improve average levels of care and support.

There are some schemes operating in Australia which we believe provide adequate and desirable levels of care and support. We also recognise that there are a number that do not. Where there are schemes that are working now – they should be left to operate unhindered. Where there are schemes that are operating less effectively – the challenge should be to improve them, not replace them. The task must be to lift the standard of care and support across Australia, not simply redistribute existing resources more broadly.

To dismantle existing schemes would be an enormously complex and expensive task. These schemes have developed and evolved, in some cases over decades, and provide care and support services to hundreds of thousands of people with disability of varying degrees of severity and need.

Naturally, the challenge of developing a national approach to disability care and support services that achieves a truly equitable outcome is a difficult one.

As the Issues Paper highlights, this is in part because under existing arrangements there is considerable variability in the level of disability care and support that is available to individuals with disability. This variability arises as a result of differences in the cause of individuals' disability, and also because of the different states or territories in which those individuals live. For example, compensation for motor vehicle accidents in Victoria are generally better than in other jurisdictions. Similarly, those who suffer injuries other than in a motor vehicle or at work will receive different levels of care and support from one jurisdiction to the next. Again, it is generally recognised that Victoria has the best care and support packages.

As the Issues Paper also recognises, under any proposed scheme for long term care and support that applies to those with "severe and profound" disability, there will be people with quite similar needs who fall on different sides of the eligibility criteria and hence receive different levels of care and support.

The challenges of structuring any long-term arrangement in these circumstances are not simple ones. However, we strongly believe that the task is to lift all standards to an appropriate level, not to equalise them to an inadequate level.

Any changes to disability care and support must not result in any reduction in the levels of care and support that are currently provided or are accessible under any existing scheme.

For example, the NZ no fault scheme, which was introduced in the 1970's to provide care and support services and income support benefits for those injured in accidents and replaced existing compensation schemes and common law rights, has had significant financial difficulties with large and growing unfunded liabilities and has progressively narrowed the eligibility criteria and reduced benefits.[1]

We recognise that applying such a principle will mean that there is a cost to be borne by community. However, we believe that this is an issue which the community needs to address and a commitment which needs to be made.

- ***No restriction or removal of existing rights***

  We are equally strong in our view that any proposed changes to disability care and support should not involve any restriction or removal of existing rights to access compensation through the common law.

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[1] See Commentary on the Accident Compensation Corporation (NZ) in Access Economics submission to the NDIS "Towards a national disability care model" (August 2010)

One of the major benefits associated with the common law for persons injured as a result of negligence is that every successful action results in a personalised compensation arrangement that reflects the nature of the individual's needs and enables them to chose the manner in which their care and support is provided.

A lump sum monetary award or settlement gives the disabled person choices to make decisions as to their own support and care services and to access rehabilitation and employment services where appropriate.[2]

The common law is based upon principles of "human responsibility and corrective justice"[3] and is a means by which the community can register disapproval of blameworthy behaviour and shift costs from a wronged disabled person to the perpetrator.

Although some compulsory insurance or government funds spread losses to groups of employers, motorists or to taxpayers, others penalise members or insureds with adverse claims experience through premium increases. Other negligent parties bear the cost risks of adverse common law awards themselves.

The above, together with a real risk of adverse publicity and judicial criticism, act as powerful incentives for behaviour modification. The last thing a director of a company or a negligent individual would wish for is to be cross-examined in the witness box by the victim's representative and their behaviour (or product) subject to criticism in full view of the public.

Examples include:

- the complete overhaul in the design, layout and safety features of childrens playgrounds due to a high number of litigated cases in the mid to late 1990's which has resulted in a dramatic decrease in the number of families seeking advice in relation to such injuries;
- the introduction of warnings signs in dangerous diving spots following public liability actions against councils for spinal injuries;
- patients being informed by doctors of all material risks of medical procedure following the landmark High Court decision in a medical negligence case of Rogers v Whitaker[4];
- major improvements to safety in shopping centres, shops and stairwells because of litigation from "slip and trip" injuries in the 1990s;
- major safety and security upgrades at public events such as music festivals and night clubs following litigation in the 1990s and 2000s.

Although government regulation can provide a means to control some risky behaviour, such as occupational health and safety laws, the number of prosecutions can never match the number of common law actions which highlight particular negligent behaviour. Total reliance upon government regulation would be problematic, would depend on the resources allocated, would dilute the disincentives for risky behaviour and would likely lead to an increase in the incidence of accidents causing disabilities. Surely, the optimum approach would be for both government regulation and the common law to operate in tandem to promote risk minimisation.

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[2] See, for example, attached case studies of common law settlements for some people with serious disabilities. (Attachment A)

[3] PS Atiyah & P Cane "Atiyah's Accident Compensation and the Law", Fourth Edition, Weidenfeld & Nicholson, London, 1987 page 56

[4] Rogers v Whitaker (1992) 175 CLR 479

Common law actions are often criticised for being too slow, too costly and involving a power imbalance between a disabled person and a well resourced defendant or it's insurer.

Dispute resolution in common law actions for damages varies from state to state but whilst it is certainly true that civil courts were slow at resolving cases in the past, there have been substantial improvements in the last five to ten years. This is because most states have adopted pre-issuing protocols, mediation and aggressive case management by the courts procedures that have substantially reduced the time taken to have common law personal injuries actions resolved and damages for disability care and support paid[5].

Transaction costs also vary from state to state but, again, the trend to early resolution and away from costly trials has reduced costs such as legal fees, witness expenses, expert medical fees and court fees.

The power imbalance between the parties has also been ameliorated because of the introduction of 'no win/no fee' representation and litigation funding.

It is often said that delays in litigation and receiving benefits can affect the prospects of early intervention in the treatment of disabilities and vocational rehabilitation. No fault schemes, it is argued, are best placed to deal with the immediate needs of disabled persons and in a non-adversarial climate.

Whilst this may be true where common law actions are particularly contentious and drawn out, common law rights usually co-exist with no fault entitlements to care and support services pending the outcome of the common law action under statutory workers' compensation or motor vehicle schemes or under Centrelink or state-specific rehabilitation, care and support packages or programs. Many of these contain incentives or sanctions for participation in rehabilitation programs which militate against the commonly-held view that common law claims encourage exaggeration of disability and incapacity to maximise payments. Furthermore, with respect to people with severe and profound disability, the nature and extent of the disability is not usually an issue which gives rise to disputes between parties.

As Ken Purse said in assessing common law in workers' compensation Australia, "the consequences of all this is that the potential conflict between rehabilitation and common law is considerably less than is often supposed"[6].

In summary, the setting of national standards should not restrict or remove any existing rights of individuals to claim for loss and support where their circumstances are as a result of the negligent actions of another person. To do so would remove incentives for good behaviour which would risk increasing the cost of disability care and support services. It would also take away the personalised compensation arrangements and choices that the Common Law provides for some people with disability and shift costs from negligent parties to their victims or the tax payer.

- ***Targeted funding arrangements***

  In determining what should be the appropriate funding arrangements for disability care and support services, we support targeted funding arrangements. More specifically, we submit that regard and consideration should be given to a variety of factors, including:

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[5] See attached a summary of some of the timeframes for resolution of civil matters of various state courts. (Attachment B).

[6] Ken Purse "Common Law and Workers' Compensation in Australia" (2000) 13 Australian Journal of Labour Law page 16

- that funding arrangements (and the nature and scope of any Commonwealth action) should recognise that in relation to various existing schemes, funding arrangements incorporate a specific risk component to encourage positive behaviour. For example, under state-based workers' compensation schemes, premiums are risk weighted to encourage employers to take action to reduce the incidence of injury. The fact that such risk-weighted funding arrangements will not be appropriate for all causes of severe and profound disability means that there is a need for a mix of schemes, some with such funding arrangements. The corollary is that existing schemes such as those relating to motor vehicle and work accidents should not be incorporated into a more general support scheme;
- in circumstances where there are no risk-related factors to consider in developing funding mechanisms – for example, in relation to severe and profound disability that are not the result of negligence – funding requirements should be imposed in accordance with general community standards. This funding could be achieved either through a greater allocation from consolidated revenue or through a hypothecated levy, both of which encompass progressive, rather than regressive taxation.
- in determining whether to impose any new funding requirements on the community, it would be appropriate to assess the intergenerational equity of moving from a pay-as-you-go funding system to an insurance scheme, having regard also to the extent to which any such a change may or may not impact on overall economic performance;
- more broadly, it would also be appropriate to assess the economic impact of any funding arrangements having regard to the fact that while moneys raised for an insurance scheme will be available to be invested for future disability care and support, those same moneys will not be available to be invested or spent by those individuals from whom it was raised. This may impact on future growth and hence future government revenues. With respect to future government revenues, it is also noted that hypothecation of a revenue source can be expected to reduce the overall budget flexibility, though a benefit will be that it will provide greater certainty with respect to meeting the longer terms disability care and support needs which may not always qualify as priority government expenditure;
- in determining the efficacy of any new funding arrangements, there will be a need for a clear and transparent assessment of all administrative costs associated with any insurance type models, including for example investment management fees with respect to any long-term funds; and
- where opportunities exist to claim back moneys where individuals receive compensation for disability care and support services, these should be taken. This will ensure that available resources are allocated according to need, rather than allowing particular individuals to "double dip".

- ***Community awareness and education***

  In developing any new approach to the delivery of disability care and support, it is important that reform be accompanied by a well resourced and continuous education campaign that is designed to build community acceptance and understanding of people living with disability.

Ongoing improvement in the lives of people living with disability depends upon organic innovation to constantly reshape the physical and social environment. People and places must adapt and be sensitive to the ever changing needs of people living with disability and this is not likely to happen if disabled people are 'invisible' or misunderstood. A top-down approach which seeks to direct that change cannot hope to respond to the myriad needs of the community – but with better understanding, the community can chose to do so.

Education, information and awareness are essential to building that community understanding and demystifying disability. This helps to break down barriers to rehabilitation and facilitates reintegration into the workforce.

3. Issues Paper – specific matters

The Issues Paper set out information on a range of issues relating to a future proposed scheme for the delivery of disability care and support for people with severe and profound disability and set out a series of questions upon which it sought comment.

In this section of our submission, we address three of the areas highlighted in the Issues Paper and where relevant provide additional comments. In particular, this section sets out our views in respect of any proposed scheme in relation to:

- who should be eligible;
- who has the power; and
- what services are needed and how they should be delivered.

In structuring our submission on these issues, we recognize that the Scope of the Review under the Terms of Reference is with respect to providing "*long-term essential care and support for eligible people with severe or profound disability*". As such, our submission has been confined to issues of eligibility with respect to that group of people and not with respect to all people with disability, or with respect to, for example, income support.

Further, we have also structured and confined our submission more generally having regard to the other relevant parameters of the Inquiry as outlined by the Terms of Reference, including that any proposed scheme is:

- " ... *intended to cover people with disability not acquired as part of the natural process of ageing*";

that with respect to design issues, consideration is required to be given to:

- *" ... the implications for the health and aged care systems;*
- *... where appropriate, the interaction with:*
  - *national and state-based traumatic injury schemes, with particular consideration of the implications for existing compensation arrangements*
  - *medical indemnity insurance schemes";*

and that with respect to the cost and financing of any proposed scheme, consideration is required to be given to:

- *"... options for private contributions including copayments, fees or contributions to enhance services."*

3.1. Who should be eligible?

The Terms of Reference for the Inquiry provide that in relation to any proposed scheme, the Productivity Commission is to consider "*eligibility criteria for the scheme, including appropriate age limits, assessment and review processes*".

In it's *Issues Paper*, the Productivity Commission has highlighted a number of specific questions that it seeks to address (see Box 1). In its Key Questions paper, the Productivity Commission further specifies that the key questions with respect to eligibility are:

- *Who should be in the new scheme and how could they be practically and reliably identified?*
- *Which groups are most in need of additional support and help?*
- *What could be done about reducing unfairness, so that people with similar levels of need get similar levels of support?*

Submission

Having regard to the Terms of Reference, this submission will seek to address a number of these and related questions under two headings:

1. How should "severe or profound" disability be defined for the purposes of any proposed scheme?; and

2. To what extent, if any, should limits be placed on the inclusion to any proposed scheme of persons or groups of people who do suffer from "severe or profound" disability?

In considering these questions, it is important to note that the application of any eligibility criteria will encompass a cut off point (or points) around which the individuals are within and outside any proposed scheme who will have only relatively minor differences in their conditions. This is an issue faced by people on a daily basis where they have been excluded from access to compensation – both under statutory no-fault insurance schemes or as a result of restraints on access to common law rights or from state based care and support packages. Having regard to the Terms of Reference for this Inquiry, we recognise that this is an inherently difficult issue for the Productivity Commission to address, but one which it is required to do in developing any proposed scheme for those with severe and profound disability.

Box 1 Issues Paper questions – eligibility

Is need the appropriate basis for eligibility?

What groups have the highest needs or have been most disadvantaged by current arrangements?

How does need overlap with core activity limitations or other criteria for identifying the severity of disability?

Is 'severe or profound' disability an appropriate criterion for the need for support?

To what extent should other facets of a person's life: their location, access to services, family circumstances and any disadvantages affect eligibility?

How should carers' needs be factored into eligibility?

What other factors might be used as a basis for eligibility?

How do you ensure that eligibility processes are consistent, fair and transparent?

How should the scheme address disability associated with natural ageing, and why?

What implications would the resulting eligibility criteria have for people outside the system?

What are the implications of adopting more or less generous eligibility criteria on fairness, adequacy of services, costs and incentives, and how could these be addressed?

Should the scheme apply to new cases of disability or to all people with existing disabilities?

To what extent should eligibility include people experiencing short-term disability (7 to 12 months) compared with people whose disability (and associated needs) is expected to last for many years?

How often should eligibility be re-assessed?

Should means or asset tests affect eligibility for the scheme, the amount or type of services funded by the scheme, and the size of any copayments? If tests were appropriate, what income or asset thresholds might apply?

What would be the impacts of means testing?

3.1.1. How should "severe and profound" disability be defined for the purposes of any proposed scheme?

Whilst the terms "disability", "severe", and "profound" are not defined in the Terms of Reference, it is apparent from them that any proposed scheme is intended to cover those disabilities at the more extreme end of the spectrum – where the needs are greatest.

As the *Issues Paper* points out, the *United Nations Convention on the Rights of People with Disabilities* defined disability as "long term" physical and/or mental impairments which hinder "full and effective participation in society on an equal basis with others"[7] whilst the Australian Bureau of Statistics defines "*profound*" in terms of an inability to do a core human activity without help and "*severe*" as sometimes requiring help with a core activity.[8]

The language used indicates that a disability must be long term and perhaps permanent and require long term treatment or care. The measure of the disability is not the nature of the injury or sickness per se but the effect it has on the extent of disability and the consequent treatment and care.

Accordingly, it is our view that it is not appropriate to include (or exclude) any particular injuries or sicknesses within (or from) the scope of any proposed scheme. Given that the impetus for the Inquiry was the gaps in and the inadequacy of treatment and care available, only a case-by-case assessment could ensure that those who need long term care and support qualify for any proposed scheme.

This functional approach reduces the risk of depriving people of particular care and support based on a particular diagnosis. For example a person with a severe physical disability may be in a better position to safely live alone with appropriate appliances than someone with a moderate intellectual disability who cannot safely cook for themselves.

That said, it is acknowledged that there would be some injuries or illnesses which, when diagnosed, would inevitably qualify as severe or profound disability and therefore should be fast-tracked without having to go through the usual assessment process e.g. severe intellectual disabilities or major strokes.

It would be very important to clearly define what severe and profound disability is to ensure certainty and the financial viability of any proposed scheme.

Given that the level of disability of someone with a severe or profound disability can fluctuate over time, the assessment of eligibility will have to be an on-going process. Further, a person who may not be eligible at one point in time, may become severely or profoundly disabled at a later date.

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[7] Issues Paper, p. 7.
[8] Issues Paper, p. 7.

This would undoubtedly create difficulties in assessing whether applicants had the requisite level of disability at any particular point in time and there will inevitably be winners and losers. However, absent a universal scheme covering all injuries or illnesses regardless of severity, the integrity of any proposed scheme mandates clearly defined parameters and a rigorous assessment process.

However, the process must include rights of appeal and an option to re-apply given that the level of disability can vary over time.

3.1.2. To what extent, if any, should limits be placed on the inclusion to any proposed scheme of persons who suffer from a "severe or profound" disability?

The Terms of Reference specify that any proposed scheme is not to include severe or profound disability that is part of the natural ageing process. They also contemplate the exclusion or limitation of other persons or groups who may otherwise come within the ambit of a proposed scheme including:

- people over a certain age;
- people who otherwise have income or assets to meet some or all of their own expenses;
- those who may have entitlements to benefits under existing insurance schemes; and
- those who may have certain litigation or common law entitlements.

3.1.2.1. Age Limits

Given that any proposed scheme is required to exclude a disability that is acquired as part of the natural ageing process, it may at first appear to be sensible to impose an age limit on eligibility which would be consistent with injuries/illnesses which are usually associated with the natural ageing process, such as Alzheimer's disease, dementia, osteoporosis and various vascular diseases.

However, the clinical aetiology of such conditions shows that they can afflict people at an early age and as such are not necessarily part of the "natural" ageing process. For example, dementia can be caused by environmental factors such as excessive alcohol consumption and can afflict people in their 30s, 40s or 50s.

Accordingly, whilst it may be administratively efficient or easier for any proposed scheme to assess a person for eligibility based upon a particular clinical diagnosis of a health problem or their age, the reality will be that some people with particular injuries or illnesses that are usually associated with the natural ageing process should be eligible, as should some elderly people who have suffered, for example, trauma injuries.

More broadly, where age is used as a criterion for inclusion in (or exclusion from) any proposed scheme, there will undoubtedly be pressure for policies with respect to both disability care and support and aged care to be integrated and aligned.

If an age limit was to be struck, a good reference may be that commonly used in travel insurance policies for the assessment of eligibility for unlimited medical and like expenses, namely 75 years of age ie an age beyond which an insured's need for medical and like services would be unlikely to have been as a result of an injury/illness acquired while overseas.

It would be possible to establish a set of indicators of severe or profound disability covered or excluded by any proposed scheme, including age, particular types of injuries or illnesses and minimum periods of time for the need for care and support services, as detailed above. However, we submit that eligibility for any proposed scheme cannot be assessed for an applicant on anything other than a case-by-case basis without inevitably resulting in circumstances where people with disabilities will be wrongly and unfairly excluded.

3.1.2.2. Means Testing

The Issues Paper raises the question as to whether eligibility for any proposed scheme should be means-tested.

Whilst means testing may seem attractive to increase the funds available for those of limited means, the cost of disability care and support services for those with severe or profound disability would be very substantial, particularly in the longer term. Accordingly, it may be that very few people could afford the cost of such services and therefore means testing may be of limited utility, particularly since there would be a cost to administer means testing.

An intermediate position could be to require some user-pays contributions for services over and above a generous cap. However, again, the administrative costs in assessment and collection may outweigh any funds which may potentially be collected.

3.1.2.3. Interaction with existing insurance schemes

The Terms of Reference require the Productivity Commission to consider the interaction between any proposed scheme and national and state-based traumatic injuries schemes and medical indemnity insurance schemes.

Consequently, the Issues Paper has also raised specific questions as to the interaction between the existing schemes and the common law on the one hand and any proposed scheme on the other hand with respect to people suffering with a ‘catastrophic injury’.

The phrase ‘catastrophic injury’ is described in the Issues Paper as ‘mostly involving serious brain and spinal cord injuries’.

Whilst the phrase “traumatic injury scheme” is not defined, it presumably refers to national and state-based statutory schemes which have no fault benefits for care and support services such as all state and national workers compensation schemes and state and territory motor vehicle injury statutory schemes. These schemes provide no fault care and support benefits for injured or disabled persons[9].

Given the nature and reach of these existing schemes, it is submitted that people with entitlements to no fault disability care and support services under state or national workers compensation and motor vehicle injuries schemes and other statutory schemes providing long term care and support must be excluded from any proposed national scheme. These arrangements already provide targeted care and support. Many of these schemes function well, and they should be allowed to continue to do so without unnecessary and harmful disruption. This issue is addressed in further detail in section 3.3.2 below.

3.1.2.4. Interaction with litigation (common law)

Medical indemnity insurance indemnifies health professionals against common law claims for damages in negligence, including for disability care and support services, past and future.

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[9] See attached a matrix which sets out the benefits payable under all of the workers compensation and motor vehicle statutory schemes. (Attachment C)

Accordingly, by raising the question of the interaction between any proposed scheme and existing medical indemnity insurance, the Terms of Reference are linking or comparing the cover for care and support services under a proposed scheme with damages claimable at common law for medical negligence with respect to disability care and support services, past and future.

Similarly, the Issues Paper is linking or comparing the cover for care and support services under any proposed scheme with damages for such services claimable at common law for those who suffer catastrophic brain or spinal injuries.

Some, but not all, people with severe or profound disability or catastrophic injury may have the right to sue in negligence (whether for medical negligence, public liability, product liability or otherwise) whilst, some people whose level of disability is less than severe or profound may still have the right to sue a negligent party and be compensated for disability care and support services for the past and future.

Accordingly, the integration of any proposed scheme and the common law is problematic because of the disconnect between those who may be eligible under each for disability care and support services.

However, for some people with severe or profound disability from medical accidents or catastrophic injuries there may be limited no-fault benefits for care and support services to access pending receipt of common law damages for such benefits. Accordingly, an appropriate interaction may be to allow a person with a severe or profound disability or a catastrophic injury to access the proposed scheme but with a strict statutory obligation to notify the scheme of any common law award or settlement and to refund monies received from any common law damages award or settlement which relates to the cost of care and support services already provided. A future preclusion period for access to the scheme should also be put in place with respect to the extent to which such damages represented future care and support services.

The above process replicates the existing model for the refund to and preclusion of Centrelink income support payments and would avoid "double dipping".

Box 2 Issues Paper questions – scope for individual decision-making

How can people with disability and their carers have more decision-making-power in a national disability scheme? How would the success or failure of new approaches be tested?

What should be the decision-making powers of governments and service providers?

What have been the experiences overseas and in Australia with individualised funding, including their impacts on outcomes and costs? What lessons do these experiences provide for adopting this approach as an element in a national disability scheme?

Should individualised funding include the capacity to save some of the annual payment for future purchases of services or borrow from future payments to pay for current services?

How should the national disability scheme support people's decision-making under individualised funding, taking account of the spectrum of disability — both in terms of the nature and severity of disability? Should all people be able to access individualised funding, and if not, what guidelines would be appropriate?

What are the risks of individualised funding and how can they be managed? What guidelines would be appropriate? How would any accountability measures be designed so as not to be burdensome for those using and overseeing the funding?

Should people be able to treat funding as ordinary income and do what they like with it? Should primary carers or other family members be able to pay themselves for providing care?

How would individualised funding work in rural and remote areas where service availability is poorer?

Who would be responsible for monitoring individualised funding?

What would be the impacts of individualised funding on service providers and do these impacts matter?

Are there ways other than individualised funding that empower people with disabilities and their families?

3.2. Who has the power?

The Issues Paper sets out a number of questions in relation to who should be responsible for determining how disability care and support is to be provided.

In section 7 of the Issue Paper, these questions relate to the scope for individual decision-making in relation to the nature of disability care and support (see Box 2). Separately, in section 8, the Issues Paper considers questions in relation to how people's needs should be assessed (see Box 3). These issues are refined in the Key Questions Paper, in which the Productivity Commission asks:

- *How could people with disabilities or their carers have more power to make their own decisions (and how could they appeal against decisions by others that they think are wrong)?*
- *How should the amount of financial support and service entitlements of people be decided (and by whom)?*

Submission

Having regard to the matters raised in both the Issues Paper and the Key Questions Paper, under any proposed scheme there appears to be two key types of decisions that will need to be made:

- whether a particular applicant meets the eligibility criteria of suffering from a severe or profound disability for entry to any proposed scheme; and

- what care and support services should be allocated to a disabled person, including who should be their care providers.

We would submit that at least with respect to the allocation of support services and providers, the person with the disability should have as much control over the decision making as possible.

One of the greatest failings of no fault and government disability care and support schemes is the frustration experienced by users in navigating case management which all too often involves a lack of consistency in decision making, a lack of personalised attention, constant changes in case managers, delays, never ending paper trails and demands for justification for even minor expenditure or services.

Many people with severe or profound disability will not be able to advocate for themselves, and family and friends will usually not have the time or energy to do so on their behalf over an extended period.

Funding should be allocated to people with disability in packages so that they don't have to continually seek approval for specific services and they should have primary control as to how the money is spent and on which providers. It would, of course, be necessary to have guidelines in place to ensure that monies are appropriately used for the person's care and support and that providers are either accredited or reviewed to ensure quality control and to prevent gouging.

Finally, under any proposed scheme it would be important to decentralise decision making and case management to avoid depersonalisation and disempowerment of users and their carers. There should be regional and rural offices with outreach case workers who would have direct and personal relationships with the disabled persons and their carers. This is consistent with a number of existing arrangements, where service delivery occurs at the local level.

Box 3 Issues Paper questions – how people's needs should be assessed

How should the long-term care and support needs of individuals be assessed?

What are the appropriate features of assessment tools?

Should assessment gauge both eligibility and the extent of need in the one set of instruments, or should the assessments be distinct?

Should a nationally consistent tool be used (and what process would be used to achieve consistency quickly)?

What are the risks associated with different approaches and how can these be minimized?

Who should use assessment tools (GPs, specialist disability staff, specialists)? Who should employ or engage the assessors?

How would the accuracy of assessments and the performance of assessors be gauged?

On what basis should beneficiaries be reassessed? How should assessment processes take account of changes in life circumstances?

How would data from assessment be used? (for example, should it be available to a range of service providers?)

To ensure quality decision making both as to eligibility and the services to be provided, the following minimum standards should be put in place:

- decision making processes must be transparent and accord with defined and published criteria;
- decisions must be made within defined short time frames, subject to extensions only in exceptional circumstances;
- applicants and users must be provided with written and meaningful reasons for decisions;
- there must be robust internal and independent external rights of review; and
- disabled persons should have a right to representation given that many will not have the capacity to advocate for themselves.

3.3. What services are needed and how they should be delivered?

The Terms of Reference noted a significant "level of unmet demand" for disability services which was likely to be exacerbated by demographic change and an anticipated decline in "informal care".

In respect of the services that are needed and how they should be delivered, in the Issues Paper, the Productivity Commission has highlighted a number of general questions (see Box 4). Further, the Issues Paper seeks responses with respect to service coordination and linkages with mainstream services (see Box 5) and how should insurance arrangements for catastrophic injury link in with any proposed scheme (see Box 6).

The Productivity Commission broadly summarises and prioritises these questions in the Key Questions Paper as:

- *What kinds of services particularly need to be increased or created?*
- *How could the ways in which services are delivered — including their coordination, costs, timeliness and innovation — be improved?*
- *Are there ways of intervening early to get improved outcomes over people's lifetimes? How would this be done?*
- *How could a new scheme encourage the full participation by people with disability and their carers in the community and work?*
- *How can a new system ensure that any good aspects of current approaches are preserved?*
- *What should be done in rural and remote areas where it is harder to get services?*
- *How could a new system get rid of wasteful paper burdens, overlapping assessments (the 'run around') and duplication in the system?*

Submission

Having regard to the nature of the questions that have been raised in the Issues Paper, this submission focuses on two core areas:

- what services are needed; and
- how should insurance arrangements for catastrophic injury link in with a disability scheme.

Box 4 Issues Paper questions – what services are needed

Are there any services not provided now that should be part of a national disability scheme?

What are the most important services, their costs, their likely demand and who would be the predominant users?

How should service providers be monitored and regulated with respect to quality, outcomes and cost effectiveness?

How would services be structured to increase the likelihood of participation in work and the community?

Should all services be free or should there be scope for co-payments? To which services and/or people might a co-payment be applied? How would the size of copayments be determined?

What should be the relative roles of specialist compared with mainstream services?

What needs should not be met (for example, needs that would have existed in the absence of a disability)?

To what extent, if any, should people be able to cash-out the benefits from a basic service/appliance/aid (for example, a wheelchair that met assessed need) and use it as a part payment in purchasing a premium service (a more advanced wheelchair)?

How are service needs likely to change over time and how should that be accounted for in designing a long-term care system?

What are the challenges for delivering expanded services in remote and rural Australia, including for specific communities, such as Indigenous Australians, whose needs may vary?

How could innovation be encouraged?

3.3.1. What services are needed?

All states and territories provide general care and support packages including respite care, home and accommodation, aids and equipment, transportation, and rehabilitation and retraining packages whilst some states, such as Victoria, provide individualised support packages which are tailored to the needs of individuals with disabilities.

However, the eligibility criteria and the size and scope of such support services are fractured, in many cases underfunded and vary widely between the states and territories.

Rehabilitation and retraining services are also available nationally through Centrelink and at the local council level whilst many not-for-profit community and disability support groups offer some care and support services to their constituents.

Finally, as has previously been noted, national, state and territory statutory compensation schemes provide extensive care and support services for people living with disability.

There are undoubtedly gaps in the level, quality and delivery of care and support services for people living with disability. We represent many people who have limited access to care and support services whether because of limited funding, remote isolation, unavailability of service providers or because the disabled people lack the physical or mental capacity to access services and don't have the necessary carer or advocacy network to assist. For others the problem is delays in the provision of services, particularly in dealing with the funders of such services, whether they be government or no fault compensation schemes.

It is important, in our submission, that the gaps and services need to be closed by expanding the resources and support for those in need without reducing the existing services available. Accordingly, there should be a "levelling up", not a "levelling down" of disability care and support services and any proposed scheme provides a unique opportunity to achieve this outcome for people with severe or profound disability.

As was previously stated at page 10, to dismantle the existing schemes and packages would be enormously complex and would in some cases, likely lead to a reduction in services, which, we submit, is most undesirable.

Continual developments in medical treatments, rehabilitation and care mean that the types of services to be provided by any proposed scheme cannot be prescribed. However, relevant care and support services may include:

- Long term rehabilitation;
- Transport;
- Accommodation;
- Attendant care services;
- Respite care;
- Social support;
- Aids and appliances;
- Prostheses;
- Home, transport, workplace and educational facility modifications;
- Education and vocational training;
- Employment services;
- Early intervention and exercise programs.

Access to any particular services needs to be flexible and an appropriate test would be a general reasonable and necessary test in the circumstances of the applicant to be decided on a case by case basis, taking into account the particular needs of the person with the severe or profound disability.

Box 5 Issues Paper questions – service coordination

What are the obstacles to a cohesive package of disability services, where do the problems most arise, and how can they be fixed? What processes might be needed to fix them?

What role would mainstream services play in any national disability scheme (such as coordination and facilitating access)?

How do you prevent cost shifting between services inside and outside of the scheme?

Where services remain outside a long-term care and support scheme, how can service delivery be best coordinated?

Should income support and disability service provision be coordinated as part of a package, and if so, who would do that and how? What conflicts or synergies could arise between a national disability scheme and income support?

How could the capacity for people to move between services — both intra and interstate — be made easier?

3.3.2. How should insurance arrangements for catastrophic injury link in with a disability scheme?

Generally speaking, the state, territory and national workers compensation schemes provide no fault care and support services for workers with work-related injuries and illnesses regardless of the severity of the injuries or illnesses, subject to a reasonableness test. Some have caps and time limitations on some benefits. All schemes cover severe and profound disability and catastrophic injuries but importantly all extend cover for care and support services well beyond these limited groups to all work-related injuries and illnesses.

Some state and territory motor vehicle injuries schemes also provide no fault long term care and support benefits to those injured in transport accidents without being limited to those with severe or profound disability or catastrophic injuries. Some, such as the Victorian Transport Accident Commission scheme, cover all motor vehicle injuries and are subject only to a reasonableness test whilst others are subject to fault restrictions or caps.

The workers compensation schemes and some of the motor vehicle injuries schemes also provide no fault benefits for loss of income and impairment lump sums and, for the most part, preserve the right to sue a negligent employer or driver of a motor vehicle for damages, although some have restrictions or thresholds for common law claims. These benefits are inextricably linked to the provision of care and support services which promote recovery from injuries, rehabilitation and return to work thereby mitigating the size and incidence of loss of income, impairment and common law claims. For example, workers will be required to seek and follow reasonable medical advice and treatment and undertake rehabilitation and retraining programs to be eligible for loss of income benefits and often as a prerequisite for any common law actions.

Given that the above schemes provide disability care and support services to a much wider range of disabled people and are not limited to those with severe or profound disability or catastrophic injuries, it would not be appropriate to try to integrate those schemes with any proposed scheme which, by its Terms of Reference, is limited in those people with disability it would cover. To do so would deprive many, many people with disability of care and support services necessary to deal with their injuries or illnesses which could in turn lead to a higher incidence of such disabilities becoming severe or profound. It would also sever the direct link between such services and the other benefits provided by the schemes as detailed above which would in turn have an adverse impact on the number and size of loss of income, impairment or common law claims.

Further, integration of such schemes would add layers of administrative assessments by requiring people who were already covered by state or national compensation schemes to either apply or be assessed for eligibility to any proposed scheme and, potentially at least, repeat this assessment process on an ongoing basis as to whether they remained severely or profoundly disabled (a test that they would not have to meet in the other scheme). Such assessments would be unnecessary given the disabled people were already covered for disability care and support services elsewhere and would only cause inconvenience and stress.

In essence, for those areas which are covered by existing compensation schemes, the arrangements are either performing well or are capable of being improved in a relative straightforward manner. Any move to extend the coverage of any proposed scheme for severe and profound disability to incorporate people who are already able to access disability care and support under these schemes would be a disruptive and retrograde step that would inevitably create uncertainty and tension, and as a consequence potentially cause harm to some of the most vulnerable in our community.

Box 6 Issues Paper questions – integration with existing insurance schemes

How should disability associated with catastrophic injuries be addressed?

What are the benefits and costs of alternative approaches, including any effects on service provision for those covered by existing systems?

How would any coherent Australia-wide approach be achieved given that catastrophic insurance is a state and territory matter? How would a national disability scheme be structured if jurisdictions followed different approaches to accident insurance?

Are there lessons from existing injury insurance systems in Australia and New Zealand for a national disability scheme — regardless of whether those systems are incorporated into a national scheme?

What rights should remain, if any, for common law actions if no-fault arrangements were introduced?

If governments introduced broader no-fault catastrophic injury schemes, what would be the appropriate premium income sources?

If catastrophic injury is bundled with the national disability scheme, how would this be achieved without disrupting existing coherent systems for providing care to people experiencing catastrophic injury?

6. Summary

Our firms strongly support improved funding and services for people living with disability led and coordinated at a national level. We suggest that those for whom the system provides least should be the first priority. These are people living with disability who are not able to make a claim at common law or avail themselves of a statutory compensation scheme. The next priority is to level up the state and territory statutory schemes so that those whose source of disability does qualify them to access theses schemes are in receipt of a similar level of high quality care and support. These schemes should remain in place and serve the needs of those already covered by them. Those who are entitled to make a common law claim should be able to continue to do so.

We urge eligibility on the basis of assessed need rather than any prescribed list of injuries or illnesses and the provision of care packages that allow the maximum degree of choice and control on the part of the people living with disability and their carers/advocates. Innovation will likely be demand driven and a flourishing marketplace subject to appropriate professional and regulatory constraints is to be preferred to centralised public sector provision.

A national framework that includes funding, standard setting, monitoring, benchmarking, harmonisation of schemes and an information/education service would be a tremendous improvement on the current system that is under-resourced, fragmented and provides quite different outcomes from state to state and as between accident and congenitally acquired disability.

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Attachment A

Case Study 1

The Facts

Mrs W's labour was slow to progress and medical staff decided to assist her labour with a drug, Syntocinon. However medical staff failed to maintain continuous CTG monitoring whilst that Syntocinon infusion was in place and allowed the labour and Syntocinon infusion to continue for an extended period in which J was distressed and deprived of oxygen.

As a result of this failure to adhere to accepted standards of foetal monitoring and to initiate prompt intervention in the labour, J sustained brain damage and now suffers from cerebral palsy.

J's medical negligence claim was successfully resolved at mediation. The multi-million dollar settlement received will allow J's parents to meet the lifetime costs of providing for her special needs.

The Plaintiff's Perspective

"The proposed National Disability Scheme raises huge concerns for me.

My granddaughter, J, is severely disabled as a direct result of hospital staff's failures. J was born extremely stressed and suffered serious brain damage as a result. She cannot speak, use her arms effectively or walk. She is fed through a tube in her tummy as she cannot chew or swallow food. J cannot communicate; she will never dance, never marry or have children. She will require 24 hour care for the rest of her life.

This is a tragedy that J's mother and I have to live with.

On top of this, we deal with enormous practical burdens on a daily basis such as coordinating all of the therapists, services, aids and equipment that J needs.

It gives us comfort to know that because of our common law settlement we have funds safely invested with the Senior Masters' Office which will allow us to take care of J well into the future. We have one body that we go to when we need money for her care and this is a relief in the maze of administrative tasks that form part of your life if you have a disabled child.

If we had to repeatedly claim and prove J's need for services through a bureaucratic process this would just add extra stress to our lives.

With the extended care and therapy (costing in excess of $100,000 a year) that J now receives because of her compensation payout, she may one day be able to speak via a computer and possibly even reduce her daily seizures. This gives us great hope.

There can be no doubt that more funding is required to care for the disabled but the government could never afford to put in place a system capable of giving J all of the care she needs to reach her full potential. Through common law we can.

It also worries me that the introduction of no fault legislation would remove the hospitals' need for accountability. The hospital system is stressed to the point of coming apart. I believe government needs to fix our hospital system and relieve the pressures that result in staff & procedural errors and the need to sue for compensation, rather than simply take away the right to sue when these errors occur."

Case Study 2

Nathan was admitted to hospital when one month old and given the wrong fluid and drugs in an intravenous line, causing severe brain damage. The hospital admitted its negligence. He is now eight years old. Three years after the event, he settled his claim for $5 million dollars. The funds are protected and managed by the Supreme Court of Victoria. Immediately following the settlement, the family were able to purchase specialised equipment, attendant care and secure suitable housing for the family.

The family say it would be wrong if they were unable to access lump sum compensation and is was appropriate that the hospital should pay. They consider real accountability came from the compensation claim. They can now plan for his future and ensure his financial security.

Case Study 3

While riding on a designated bike path on his way home from work a man in his early 50's was involved in a terrible accident. He entered into a sweeping bend and collided with an oncoming cyclist exiting a long dark underpass. The impact caused him to be thrown from his bicycle and he collided with an adjacent retaining wall. The force of the impact caused him to suffer catastrophic spinal injuries leaving him with complete quadriplegia. Poor maintenance and control of the vegetation at the sides of the path created a "blind corner" which precipitated the accident and this has now been rectified so that the chance of further accidents has been minimized.

The injured person sued the local council at common law and a resolution of his claim has resulted in a very substantial payment of compensation that has enabled him to commit to the construction of a new purpose-built dwelling that will make it easier for his carers to manage his daily needs in the bathroom, the toilet and the bedroom and provide facilities and spaces for him to spend his long days at home more comfortably and enjoyably than was previously the case.

His compensation funds were placed under management with highly regarded professionals so as to provide for him and his needs for the duration of his life. He has expressed great relief at being able to receive a substantial compensation payment that permits him to exercise control over his life at a time when his needs are very significant so that he can request and receive care and equipment that he needs rather than the limited benefits that the public system has been able to provide. This alone gives him a great sense of personal dignity when he is in a physical state that allows little room for personal dignity or modesty. Now he does not have to hold his hand out for what limited benefits might be available to people in his position but can decide what he needs and make decisions that he has control over.

His wife, who was his dedicated and long-suffering carer in the period following his accident due to their inability to personally fund the cost of professional carers, has been able to resume her life as his wife and partner and this has returned their relationship to a position of equality with care provided in a spirit of love and compassion rather than dire need and hard necessity. He is able to engage carers for virtually all his care needs and is even able to finally plan for a well deserved holiday with his wife, complete with professional help alongside them. Something that able bodied persons take for granted has been denied them for some years and is now being planned with excitement and enthusiasm.

When asked to describe the importance of a proper payment of compensation for a person in his position he said simply: "it gives me the freedom finally, to do things that I want to do"

Case Study 4

A single mother of two children resided in rented accommodation in an outer suburb of Melbourne. Heating for the property was by way of a wall mounted heater. The woman noticed that the heater was defective in that unless it was operated at maximum temperature the pilot light would go out thus requiring a manual re-lighting each time the thermostat control setting activated. Reports of this defect were made to the relevant parties but nothing was done to rectify the problem. Eventually the defect resulted in the unit catching fire which spread quickly to the timber framed house. The woman who was asleep at the time was overcome by smoke and rescued by neighbours, but not before she had suffered very severe burns injuries to her body, arms and particularly her hands that were left scarred and deformed with the loss of numerous fingers.

Until the common law settlement the woman was dependent on the public health system and the support of family and friends to provide for the basic needs of herself and her family.

A common law action resulted in a significant compensation payment that enabled the woman to achieve financial independence and that permitted her to engage care and assistance to perform simple day-to-day domestic tasks which she struggled to do without the full use of her hands and arms.

She describes a future that is not burdened by financial worries and was able to purchase her own home, which had been her immediate goal up until her future was shattered by the house fire, and provide some security and stability for her children once again.

Attachment B

Clearance rates of Australian State Courts		
State	**Court**	**Clearance rates**
Tasmania	Supreme Court	66% of civil matters resolved within the 2009 reporting period
	Magistrates' Court	99% of all civil matters resolved in the 2009 reporting period
Queensland	District Court	95% of all civil matters resolved within 24 months of commencement
	Supreme Court	99.26% Supreme Court matters resolved within 12 months of commencement 96.33% Court of Appeal matters resolved within 12 months of commencement
New South Wales	Local Court	90% civil matters resolved within 6 months of commencement in the period 2006-2009
Western Australia	Supreme Court	70% civil matters resolved within 18 months of commencement
	District Court	63% of all civil matters resolved within 12 months of commencement
South Australia	Supreme Court	72% of all matters resolved within 12 months of commencement
Victoria	Magistrate's Court	80% of Defended Civil Claims resolved within 6 months of commencement 46 154 claims actioned in 2009 with a 98.3% clearance rate
	Supreme Court	85% of civil matters resolved in the 2009 reporting period
	County Court	98.9% of all civil matters resolved in the 2009 reporting period