# The National Disability Insurance Scheme

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When I received this invitation some months ago I expected my presentation would be a generic one of what a National Disability Insurance Scheme (NDIS) should be doing. Now suddenly things have changed.  The National Disability Insurance Scheme has somehow left the stratosphere of the thing that everyone thinks would be a good idea but is in everyone's too hard basket, to the thing that is a good idea but is still in the very difficult basket. There is now some legislation and at least a framework to discuss how the Scheme will operate, and have a secure funding base.  There is bipartisan support for the concept, with more progress in the last six months than in the previous 10 years towards an acceptance that this is an idea whose time has come.
My presentation will outline what we have been doing for the last 10 years to give an overview and a perspective of why the NDIS has evolved in the way it has. The more detailed analysis of the implications of what is proposed will be considered by the next speaker

Historically financial support for disability has been provided more or less via the civil claims system for injury with other support given in a somewhat haphazard or uncoordinated fashion.  Over the years certain state-based and local schemes, have been funded through state and local governments but by and large for injury the theory has been that the civil claims system, if it finds negligence, provides what is thought to be adequate compensation which will support a person with a disability going forward. However compensation would only be provided if the injury occurred as a result of a breach of duty of care.  Financial settlements or awards would then be underpinned by commercial insurers covering the various main injury types, motor vehicle, workers compensation, medical negligence injury and general personal injury.

Insurers mostly operate as commercial entities but previously medical injury insurance covered via medical defence organisations wasn't subject to the same commercial, prudential and legal requirements as other lines of commercial insurance.

Some might remember that in the Whitlam era there was movement towards a national injury compensation act. A lot of work had been done and in fact legislation had been presented to the Federal Parliament. Unfortunately, this was held up in the Double Dissolution of 1975 and it fell with the government. After that nothing seemed to happen for a while until increasingly state governments became exposed to the problems associated with litigation for insurance through becoming responsible for motor vehicle third party and workers compensation insurance schemes.  As the state governments were increasingly

exposed to high costs in those types of injuries, they moved increasingly towards statutory settlements, decreasing and minimising the interface with the civil litigation system for care costs and in some states introducing a no fault concept to those schemes.

In the medical world increasing costs for medical indemnity insurance led to genuine concerns that certain specialties were at very high risk of not being able to continue to practice. At the same time state governments were also exposed in this area of medical injury through their liabilities for public hospital injuries. Their response was to introduce tort law reforms limiting action for personal injury and costs of care. The Federal Government was also exposed through its Medicare responsibility for private doctors and private health delivery and, with the problems that arose in the early 2000s, the Federal Government saw that something had to be done. It was informative being there at the time and being involved in the discussions with them. Even though they were always too polite to say so, the impression they gave was this is what happens when you let doctors run medical defence organisations. If they could only get the doctors out of the way and let the commercial insurers in, then everything would be fine.

Accordingly the Government made changes to the prudential requirements with which the medical defence organisations had to comply. The immediate result was one of the organisations, and perhaps almost all of them, were probably unfinancial on the basis that the rules regarding funds reserved to fund all liabilities had changed overnight and the timeline to achieve compliance with the new rules was going to be impossible to meet. It looked as though the biggest medical indemnity insurer in Australia was going to collapse and none of the commercial insurers would come to the rescue of doctors who needed indemnity insurance. Ultimately this led to an extraordinary emergency where doctors were saying they would be unable to work the next week because they would not be covered by their Medical Defence Organisation in provisional liquidation and did not know how they were going to be indemnified for potential claims. Not only would most people say it is not professionally responsible to practise without appropriate indemnity insurance but also you would be found guilty of professional misconduct by the Medical Board if you did.

The Howard Government then made a decision. It seemed they now realised they had made a miscalculation and it was they who were now stuck with coming up with a solution, instead of relying on commercial insurers to do so. Accordingly they came up with a smattering of subsidies for insurance premiums for doctors, but their central ethos remained that compensation and disability support for injury would still be determined by the courts through the civil claims system with the costs underwritten by commercial insurers. That was their very strong feeling and I suspect it reflected that of the Prime Minister. The AMA at the time invited the government to consider its long-term care scheme, thinking (probably naively) that long-term care costs were the main problem with medical indemnity insurance affordability. The government steadfastly refused to accept that it should be organising such long-term care and basically wanted it to be business as usual but on a presumed sustainable commercial footing.

It seemed that whatever head of pressure had been forming over a long-term care scheme was now going to dissipate. Those of us who had been involved in this insurance crisis were in one way relieved that the medical profession had been protected from the its problems, but in another way still felt that there was something missing. The new arrangements looked after the doctors but we had not looked after the people living with disability. The AMA continued to lobby for a National Disability Insurance Scheme and increasingly people in the disability sector, and when I say that I don't mean only people working in the industry, I mean people with a disability themselves and their carers, started agitating much more strongly in the political domain for action to address their problems dealing with the series of uncoordinated providers with insufficient overall predictable funding to develop a sustainable disability sector.

Even when the funds were available, from a big payout or elsewhere, there were not a lot of services to buy, because there were so few people in a position to afford to buy those services that there wasn't a viable market to fund the necessary infrastructure (capital and workforce). One of the few things that actually resonated out of the Rudd Government 2020 Summit was the strong feeling there needed to be movement towards a National Disability Insurance Scheme. As a result the Productivity Commission was tasked to undertake a public inquiry and investigate a national long-term disability care and support scheme.

I was one of the independent experts who advised the panel and I was most impressed with was the Productivity Commission process. Without any disrespect to public servants, it seemed to me that the Productivity Commission was giving the intellectual grunt and fearless advice to governments that I suspect the public service is meant to give but increasingly hasn't. In my view the public service has become too politicized tending to protect Ministers rather than challenge them with public policy debate.

The Productivity Commission undertook an exhaustive set of hearings. It received 1,062 submissions. There were 23 public hearings right around Australia in both metropolitan and rural areas. The Productivity Commission released its report in August 2011.

It was quite an experience being involved in the process. My feeling was the demeanour of the Productivity Commissioners initially suggested they really didn't see there was much need to do too much. Once again, like the Howard government before, it was just a matter of the insurers getting their collective houses in order and what was already in place, if made to work properly, would be enough to meet the needs of disabled Australians. However in my view the strength of the submissions especially the personal submissions from people with disability and their families, their stories and the evidence of unintended negative consequences of the way that disability support is delivered in this country turned the Commissioners' attitudes right around. I saw them change from keeping it all at arm's length to really embracing the concept and that this was an opportunity to do something of real and lasting benefit.

It was fascinating to watch people with the intellectual capacity of the Productivity Commissioners when they are inspired and what they can come up with. One of the surprises, was their controversial (for many) recommendation that disability support should be split into two arms, the National Disability Insurance Scheme (NDIS) and the National Injury Insurance Scheme (NIIS). In this way there would hopefully be comprehensive cover for all types of disability; that which occurs through illness and naturally occurring phenomena unrelated to injury and that which occurs through someone being injured by someone else or by accident.

The proposed Commonwealth NDIS would fund long-term high quality care and support for Australians suffering from significant disability acquired through illness. Other important roles, such as providing referrals, quality assurance and best practice were also going to be part of its brief, providing services, mainly in the disability care sector, for people with permanent problems, but also advising on access to health services, public housing, public transport and mainstream education. Employment would remain outside the NDIS but hopefully the NDIS would work as an organisation to coordinate and to let people know what work was available for them.

Apart from direct care about 360,000 Australians currently living with disability would be covered by high level support services from the NDIS. Very importantly the Productivity Commission heard and understood that the concept of self directed management was very important. Certainly, people with disabilities want to spend the support funding that they receive any way they want and they will do it responsibly. In the New Zealand experience,

(and a lot of the deliberations were informed by what happened in the New Zealand Accident Compensation Scheme), it was found if you gave people choices and allowed them to make the decisions about how the funding was used, they tended to actually spend less on themselves than Governments would feel obliged to provide, especially when they had case managers saying “What is it you want? This is what we can do to help.”

The National Injury Insurance Scheme was going to be a federated model; a separate state-based no fault scheme providing lifetime care and support to all people newly affected by catastrophic injury, going forward from the date of inception. We know that about 50 percent of catastrophic injury is currently already covered under motor vehicle injury, and it would be extended to “no fault” eligibility in the states that don't currently have it; criminal and general accidents that occur in the community and home (about 30 percent); medical accidents about 10 percent; and work related accidents (about 10 percent). Coverage would be irrespective of how injury was acquired and would only cover catastrophic injuries occurring after the inception of the scheme.

“Catastrophic injury” was basically defined by the sort of criteria you would expect in the New South Wales Lifetime Care Scheme and the Transport Accident Commission Scheme in Victoria and there are disability criteria to define catastrophic injury. It is fairly clear when motor vehicle, worker place and general injury occurs as something happens such as someone falls, someone gets hit, someone is in a car accident. However in medical treatment injury you need to tease out what is the result of the illness being treated and what is the result of the medical treatment itself. It was proposed the claimant would have their claim reviewed if it wasn't automatically so obviously a treatment injury that it would be accepted by the scheme and that an expert panel would look at what had happened and would make a determination of what was an unexpected outcome of medical treatment, and what was a devastating consequence of the disease itself.

Crucially, pregnancy and birth related injury would not be covered by the NIIS. The reason was it was thought too much time, money and resources are spent in trying to determine causation and liability in birth injury. Accordingly it would be better if it was covered under the NDIS on a “no fault” basis without there being the need to decide causation.

The NIIS, (compared to the 350,000 people that the NDIS would cover from inception), would start covering the estimated 800 people a year who suffer injuries causing severe disabilities. It doesn't cover people who have been injured in the past, unlike the NDIS which covers all people with existing disability. The NIIS is meant to be prospective, so at maturity it would cover about 20,000 Australians, a lot smaller number but with a higher level of care.

The cost of the NIIS was estimated to be about $685 million a year as opposed to that of the NDIS of anything from $11 billion upwards to $21 billion. The additional funding required for the NIIS would come from existing insurance premium income sources and possibly some other levies.

The projected cost of the NIIS, to put it in perspective, would be $31 per year for every Australian to have the security of knowing that if catastrophically injured in their lifetime, there would be what we would hope to be a robust and good scheme to provide them with the support that they needed.

There are existing premium pools including medical indemnity insurance. There is a preexisting source for all of the funding except the public liability insurance pool. You can make doctors insure themselves, you can make everyone who drives a car pay registration fees, and you can make every employer pay workers compensation premiums but you can't

make every householder have compulsory public liability insurance. One proposal was that council rates would be a good source for public liability insurance as councils would have a mechanism to levy it. This seemed a reasonable proposal in that it would cover a lot of those injuries which councils would be liable for in any event.

Why were two schemes proposed? In my view it was because the Commissioners could see that with the COAG agreement on national health reform there would be a “bun fight” between the States and the Commonwealth. A political reality of our federal system is that states are not going to give up, and will jealously guard, their jurisdictional responsibilities. It was thought that because most injury was covered by state-based schemes (and subject to State legislation), it was unlikely that injury cover would ever be ceded to a Commonwealth national disability or national insurance scheme. Further the Productivity Commissioners were very attracted to the notion that injury is, ideally, notionally preventable. Some illness is preventable. With injury and accident if you take steps to minimise the risk you can decrease the downstream effects. Hence an injury insurance scheme paid for by people involved in an insurance model, might maximize the risk minimisation that people apply to decrease the number of injuries, rather than just support it once those injuries occur. In essence the NIIS was separated off from the NDIS because a) the insurance model was attractive to the Productivity Commissioners and b) as an acknowledgement of the political realities.

How did the Productivity Commissioners see the interaction of the NIIS with the civil claims system? They suggested that once a scheme was in place providing as a statutory right support for people with injuries, you could say this replaces the common law right to sue for care costs. The Productivity Commissioners perceived the states would then be able to legislate to remove care costs as a head of damages. Injured persons would still retain their common law rights to sue for pain and suffering, economic loss etc but care costs once provided for through the scheme would no longer be a litigated head of damages. That is what the intention was.

I have attempted to summarise the history of the development of the concept of the National Disability and National Injury Insurance Schemes. The next speaker will talk about where we actually are at this time.