The ALA's take on the NDIS

By Brian Hilliard

Recently, the Productivity Commission released its draft report examining the National Disability Insurance Scheme (NDIS).

You may all be aware that the estimated headline cost is around $11.5 billion per annum for the provision of these types of supports across Australia. Together, the states and the Commonwealth currently spend around $6.3 billion, so this change will require an increase in funding of about $5 billion. In any event, the Commission's recommendation and its costing seem to have gained almost universal support from politicians.

In my view, the NDIS by itself is a good idea and should certainly be looked at seriously. The ALA to date has supported the type of change that has been mooted.

Unfortunately, however, the Productivity Commission has not confined itself to the NDIS. It has recommended yet another scheme called the 'NIIS' – the National Injury Insurance Scheme – which it envisages will be introduced over the next couple of years. Initially it will provide care and support of a more significant character to catastrophically injured Australians, estimated to number about 20,000 at any one time.

The NIIS will be similar in scope to the catastrophic injury support scheme in NSW. However, it will spread initially from motor vehicle accident victims to medical negligence victims, and then to all other injured people in the community. In considering this issue, the Productivity Commission spent a great deal of time considering and expressing its views in relation to the common law system as it applies to all injury compensation, including economic loss and general damages. It came to the conclusion that 'overall, no-fault systems are likely to produce generally superior outcomes compared with fault-based systems'. Reading chapter 15 of its report can leave the reader in no doubt as to where the biases of the Commission now lie. It anticipates a review of the NIIS by 2020, with a view to it encompassing all compensation for injury in Australia. Effectively, it is arguing that the common law system for recovery of damages for personal injuries should be abolished in Australia, or at least that this outcome should be seriously considered. Such a view is clearly of the utmost concern to the Australian Lawyers Alliance, and it is an issue to which we will be devoting much of our resources over the coming months and years. I encourage you all to read the report, provide your feedback to your state committees, and join our campaign to educate both the public and our politicians as to the advantages of maintaining a common law-based personal injuries compensation system.

That is not to say that a no-fault system, or a hybrid system incorporating some aspects of both a no-fault scheme and the common law, should not be considered. Indeed, in my home state of Tasmania we have run a hybrid no-fault and common law system in relation to motor vehicle accidents since 1973, and it is a system that I believe works very well. In effect, anyone who is injured in motor vehicle accidents in Tasmania receives no-fault benefits. They receive income support for up to four years and medical and associated expenses. If they require daily care and support, they receive it for life. There is also open common law, with virtually no restrictions. A common law damages case for a person requiring daily care and support can go to judgment or settlement, with the lifetime care and support component excised and allowed to continue.

The combination of allowing for limited no-fault benefits, with the common law stepping in to operate in the finalisation of most claims (where it is appropriate) appears to work extremely well, and allows the freedom for those people who are injured through the fault of other road-users to access justice and appropriate levels of damages. ■

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