



***Submission to
the Senate Community Affairs Committee's
Concussions and Head Trauma in Sport Inquiry***

***Young People In Nursing Homes National Alliance
February 2023***

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Introduction

The Young People In Nursing Homes Alliance is pleased to make this submission to the Senate Community Affairs Committee's Inquiry into Concussions and Head Trauma in Sport.

The Alliance has campaigned for a National injury Insurance Scheme (NIIS) since 2002 and was pleased to see it recommended in the Productivity Commission's 2011 Report on the need for a national social insurance scheme for Australians living with disability¹.

In that Report, the Productivity Commission recommended the establishment of the NIIS as a companion scheme to the National Disability Insurance Scheme (NDIS). As a critically important companion program to the National Disability Insurance Scheme, the NIIS was conceived as an important part of Australia's health system infrastructure, funding vital hospital and community based rehabilitation as well as developing and maintaining a critical rehabilitation workforce.

In the context of this inquiry, the NIIS should be the focal point for funding the treatment and care of severe head trauma from sporting accidents.

The range of proposals the inquiry will examine around rule changes, concussion management and technology to manage these accidents are all important. But unless a well funded insurance system is implemented to manage recovery and life after a catastrophic injury, these rule changes will count for little.

The absence of a complete no-fault NIIS represents a major gap in the system of care for people with catastrophic injury sustained on the sporting field and in other pursuits of life supports that are not adequately covered by existing insurance options.

A general injury stream of the NIIS that covers catastrophic sporting injuries will provide injury management to the same standard as State/Territory no fault motor vehicle injury schemes now do.

Without such a scheme the management of severe brain and spinal cord injuries incurred from sporting accidents will continue to rely on community fundraising and inadequate community rehabilitation services from State/Territory health systems that can never deliver the quantum needed for the lifetime support severely injured people require.

Catastrophic injuries in Australia

While Australian data on catastrophic injury is not definitive, in its 2011 Inquiry Report into Disability Care and Support, the Productivity Commission reported that there were close to

¹ Productivity Commission; Disability Care and Support Inquiry Report Vol.2, See Chapters 17 and 18

1000 catastrophic injuries in Australia each year. Catastrophic injuries mainly include spinal cord injury, acquired brain injury, amputation and severe burns.

Type of injury	Estimated proportion %
General Injury	31 ²
Motor vehicle	49
Workplace	8
Medical treatment	11

Patchwork of inequity

For people sustaining catastrophic sporting injuries, Australia’s existing insurance system offers little hope or efficacy.

This current patchwork of statutory personal injury schemes that includes motor vehicle and workers compensation schemes; cause specific schemes such as crimes compensation schemes, the NSW Sporting Injury Insurance Scheme and public liability insurance; the common law and the underfunded public healthcare system is inequitable, and results in many injured people missing out on the support they need.

Because it places a premium on the cause of injury rather than the consequences, this hodgepodge of funding and insurance arrangements for catastrophic injury means that Australians who sustain catastrophic brain and spinal cord injuries from sporting activity have worse outcomes than those who sustain equivalent injuries at work or on the road.

In commenting on this poor state of affairs, the Productivity Commission stated that fewer than 50% of people with catastrophic injury have access to insurance. Only some 10% are able to establish liability through public liability schemes for general injuries such as diving accidents where there is no signage, or falls due to unsafe equipment etc.³

Other than via no fault motor vehicle or workers compensation schemes, there is no clear path to access rehabilitation and lifetime care through either the private insurance market or common law for these people.

Further, people sustaining catastrophic injuries who cannot access no-fault schemes are known to have poor outcomes, with some facing years long delays in taking common law action while others are denied access to compensation because they were unable to nominate an at-fault party to sue.

² Based on the experience of the New Zealand Accident Compensation Corporation, that reports the figure for general injury in that scheme is 50% of total injuries, the figure of 31% for general injury is likely to be an underestimate

³ Cited by John Walsh in a briefing to Australian Sporting Peak bodies (unpublished) convened by the Alliance in December 2017.

Relying on common law action is problematic for several reasons. These include high legal and other transaction costs, uncertain financial outcomes and lump sum settlements unlikely to last a lifetime. The significant litigation and time delays that are inherent in these actions further exacerbate poor social and health outcomes for individuals and families alike.

Relying on an underfunded public health system or trying to pursue common law compensation thus brings its own well documented problems that include:

- Time lags of up to 10 years to settle a claim;
- Significant delays in accessing rehabilitation that compromise recovery and regaining capacity;
- Actions that can only be pursued if there is someone 'at fault' to sue;
- Cases often settle for much less than the injured person needs for lifetime care meaning their settlements run out early;
- High legal and transaction costs (up to 40%).

Depending on the extent of injury and other factors, the lifetime cost of care for people with brain and spinal cord injury varies but can be in excess of \$10M-\$15M. This cost includes medical and rehabilitation services, home and vehicle modifications, specialised equipment and personal care.

However, in the absence of the rehabilitation they need and any other support option, too many injured young Australians have ended up in residential aged care homes. For those whose families try to support them at home, parents or spouses commonly need to relinquish paid employment to provide the care and support their loved one needs.

When Prime Minister Julia Gillard announced the NDIS trial sites in 2013, she described the old disability system that the new social insurance scheme for disability was intended to replace as a circumstance where

... you basically get a ticket in what can be a very cruel lottery...where access to services and support depends on your postcode or on the cause of your disability rather than on your need.⁴

More than ten years later, people who acquire a lifelong disability from a catastrophic Injury sustained on the sporting field, through common assault, from a domestic accident or a fall, are subject to the same cruel lottery because we have failed to complete the National Injury Insurance Scheme.

⁴ Lunn, S. "Disability scheme to battle 'cruel lottery' of care", *The Australian*, May 1 2012.

Completing the National Injury Insurance Scheme (NIIS)

In its landmark 2011 *Disability Care and Support Report*,⁵ the Productivity Commission proposed a no fault National Injury Insurance Scheme to fund medical, rehabilitation and disability support services for people sustaining catastrophic injury in any one of four injury streams. These are the motor vehicle, workplace, medical and general injury streams.

In referring to the needs of injured Australians, the Productivity Commission also outlined why a separate sister scheme to the NDIS was needed, saying that an NIIS would:

- Provide cover for the approximately 1000 people eligible for the NIIS's assistance each year
- Cover the necessary health costs associated with catastrophic injuries, such as acute care and rehabilitation services.
- Reduce the cost of the NDIS through a fully funded injury insurance scheme
- Make use of existing expertise and institutions of existing accident compensation schemes
- Use incentives to deter risky behaviour and reduce local risks that can contribute to accidents.

The Productivity Commission also suggested that already established no fault schemes such as the Victorian Transport Accident Commission (TAC) and Tasmania's Motor Accident Insurance Board (MAIB) offered a viable blueprint for the NIIS' design and referenced New Zealand's Accident Compensation Corporation (ACC) as another a successful model for the NIIS.⁶

To build capacity and workforce, the Productivity Commission further recommended that the NIIS precede the introduction of the NDIS.

Rather than the NIIS being a single scheme such as New Zealand's Accident Compensation Commission (ACC), the Productivity Commission recommended a federated system that would initially incorporate state no-fault schemes for motor vehicle and workplace injuries.

In 2014, governments agreed on a set of minimum benchmarks for the NIIS motor vehicle and workers compensation injury streams that underpinned this first stage of the NIIS.⁷ Under these minimum benchmarks, States and Territories agreed to implement no fault

⁵ For a comprehensive explanation of why an NIIS is needed, see Chapter 17 of the Report.

<https://www.pc.gov.au/inquiries/completed/disability-support/report/disability-support-volume2.pdf>.

⁶ The ACC covers all accidents including those arising from motor vehicle, workplace, sporting and domestic accidents, as well as those incurred in public spaces such as beaches, parks or footpaths. See

<https://www.acc.co.nz/>

⁷ See <https://treasury.gov.au/programs-initiatives-consumers-community/niis/agreed-minimum-benchmarks-for-motor-vehicle-accidents>

catastrophic injury cover in their motor vehicle and workers compensation schemes where such coverage did not exist.

The medical and general injury streams were to follow the motor vehicle and workplace injury reforms.

By July 2016, all States and Territories had no fault motor vehicle and workers compensation schemes in place, with Queensland and WA the last states to come on board.

The missing general injury and medical injury streams

Following agreement to implement no-fault catastrophic injury schemes for motor vehicle and workplace injury schemes, initial scoping work was undertaken for the medical injury stream in 2015.

Unfortunately, progress on this work has stalled with the Council of Australian Governments' (COAG) June 2017 decision not to proceed with this stream in the NIIS at that stage. The reasons for this have not been made public.

However, at the June 2017 COAG meeting, it was agreed that treasury officials would scope options for inclusion of the general injury stream, which would include catastrophic injuries from sporting accidents. Consideration of general injury was to occur at the COAG's first 2018 meeting.

Despite this intention and the urgent need for this work to be completed, the general injury stream remains in limbo and incomplete. Despite the Alliance's many requests to Treasury officials for information on progress of this important work, there has been no public update or visible activity since 2017.

As a result, there is no agreement in place for Commonwealth, State or Territory Governments to commit to funding and establishing the general accident or medical injury streams of the NIIS.

Without the inclusion of these injury streams in the NIIS, anyone who acquires a catastrophic injury in these areas will not have access to the community rehabilitation therapies they need to recover from their injury. They will be eligible to obtain disability supports through the NDIS. But the NDIS does not fund rehabilitation.

Without the NIIS and access to comprehensive rehabilitation therapies and the intensive lifetime care and support they require, injured Australians who are forced to rely on the NDIS will be denied the chance to recover from their injuries, maximise their independence and maintain their health and well being.

Without the NIIS, families will suffer significantly reduced income through loss of paid employment; poor health and well being outcomes; and increased rates of family breakdown as the stress of providing intensive care and support takes its toll.

The funding and support available to people suffering catastrophic sporting injuries through existing sporting injury schemes, is completely inadequate to provide the lifetime care and support required.

The NSW Sporting Injuries Committee manages, for example, a number of schemes under NSW's legislative umbrella including one for school children and one for amateur clubs. Under these schemes, severity of impairment is insured for but at token levels of cover. This includes a lifetime maximum of only \$171,000 for significant injuries.⁸

Bicycle organisations and some sporting bodies have different insurance coverage. But none of these are lifetime no fault arrangements. Nor are they benchmarked against lifetime care schemes as the general injury stream of the NIIS is intended to do.

Where there is no compensation or statutory scheme, people and families often resort to crowdfunding and private fundraising. The link to a story about injured footballer, Tai, is an example of the kind of crowdfunding that routinely occurs after these injuries. Yet monies raised through such charitable enterprises barely cover the cost of rehabilitation and care needed in the first few months post injury, let alone sustain the support needed over the life course.

While this fund raising campaign exceeded its goal, the money raised will barely cover part of the first year of support for Tai who was paralysed from the neck down from an injury sustained while playing football.⁹

In responding to another football sporting injury, a more recent community fundraising campaign for injured NSW footballer Nathan Stapleton, again reiterates that despite the presence of abundant community goodwill and people willing to support the injured person and their family financially, the money raised is completely inadequate to fully manage the consequences of his injury for Nathan and his family.¹⁰

It is frustrating to see such effort going into community activation like this, especially as the funds raised will ultimately not meet the needs of the individual.

Why not rely on the NDIS?

The advent of the NDIS and the time and effort committed to establishing this social insurance scheme, has tended to completely over shadow the completion of the NIIS.

⁸ Parliament of NSW, Sporting Injuries Insurance Act 1978 No 141.

⁹ See <https://www.adelaidenow.com.au/news/south-australia/flood-of-gofundme-donations-for-paralysed-south-australian-footballer-tai-martinpage-after-ntfl-neck-injury/news-story/54403fa2ea0a4a107446297892f31798>

¹⁰ See <https://www.gofundme.com/f/nathan-stapletons-spinal-injury-recovery>

Despite the fact that it does not provide rehabilitation services, it has been all too easy to look to the NDIS and rely on its provision of disability supports as the appropriate response for injured Australians.

Often made to justify the delay or abandonment of the complete NIIS, this is a view held by proponents of the common law approach, or by institutions that benefit from the cost shift to the Commonwealth that relying on the NDIS delivers.

But the NDIS cannot be used as a substitute for the NIIS, or as a safety net for people with catastrophic injury for the following reasons.

Cost

The \$22B initially estimated as the annual cost of the NDIS did not include the lifetime support of people with catastrophic injury. This was because the Productivity Commission had located this cost as the responsibility of their proposed NIIS.

Consequently, the failure to deliver a complete NIIS has an enduring and adverse impact on NDIS sustainability.

In its submission to the 2017 Productivity Commission *Review of NDIS Costs*, the NDIA estimated that without the general and medical injury streams of a completed NIIS, the extra cost for the NDIS will be “...about \$23 million in 2018-19, but would increase to about \$226 million in 2025-26 and to about \$1.3 billion in 2040-41.”¹¹

Because the Commonwealth has to assume lifetime funding responsibility for catastrophically injured people through the NDIS as a cost overrun, the NDIA identified the absence of the completed NIIS as a financial sustainability risk for the NDIS.¹²

Medical and rehabilitation services are not covered

The NDIS only funds the disability support costs of living with the disability arising from a catastrophic injury. But responding to a catastrophic injury requires medical and rehabilitation costs to be in place from day one.

As they are not covered by the NDIS, these costs must be met by individuals and families, or by stretched public health systems. This is the reason why injury schemes exist separately from disability schemes – they have the capacity to respond early, integrate medical, rehabilitation and disability services and stay the course.

The key problem with systemic reliance on the NDIS to fund support for people with non-compensable traumatic brain injury or spinal cord injury is that it does not fund rehabilitation. The fact that traumatic brain injury rehabilitation is extremely limited in the

¹¹ Productivity Commission, *Review of NDIS Costs Inquiry Report*, Canberra, 2017: 259.

¹² National Disability Insurance Agency, *Submission to the Productivity Commission Review of NDIS Costs*, April 2017: 113.

public health system means people simply miss out and their recovery is significantly compromised.

The NDIA's refusal to fund rehabilitation was confirmed in an answer to a Question on Notice from the Senate Community Affairs Committee Estimates hearing held on 15 December 2022.

In responding to a question about the NDIA's policy on the provision of community based (non inpatient) rehabilitation services to participants with brain and spinal cord injury, amputation or vision impairment that would otherwise be covered by the NIIS, the NDIA said that

As per the Applied Principles and Tables of Services, the health system is responsible for short-term services and therapies after a recent surgery or medical event – for example rehabilitation and follow-up care. The NDIS may fund maintenance supports related to a person's disability-related impairments that impact functional capacity¹³

In response to a further Question on Notice asking whether the NDIS funded rehabilitation services for this group in any capacity, the NDIA stated that

Rehabilitation is a health system responsibility. The NDIA may fund maintenance supports related to a person's disability-related impairments that impact functional capacity.¹⁴

Funding

Unlike the NDIS, the NIIS has a range of funding sources including premium income. It need not rely on Commonwealth or State budget contributions.

One of the key areas of uncertainty in the further development of the NIIS is how the remaining injury streams will be funded. While the medical injury stream has an existing funding base through medical indemnity insurance premiums, the general injury stream has never been funded before and new funding sources must be identified.

Various funding methods have been canvassed in recent years. These have included combinations of:

- State and territory government funding;
- User pays approaches for sporting injuries;
- Local government rates levies;
- Increased taxes on alcohol or licenced premises;
- An increase in public liability insurance premiums.

¹³ Answer to Question on Notice 261, Community Affairs Legislation Committee, 15 October 2022.

¹⁴ Answer to Question on Notice 262, Community Affairs Legislation Committee, 15 October 2022.

No matter what funding source or combination of sources is favoured to raise a general injury premium, new money must be found.

Age eligibility

Eligibility for the NDIS stops at age 65. There is no age limit for any of the NIIS streams so people sustaining such catastrophic injuries as spinal cord or brain injury after the age of 65, would be covered.

Community awareness

Most Australians presume the rehabilitation and other services needed by those suffering a catastrophic injury are simply part of our health system and are shocked to find – usually when a loved one urgently needs these responses – that this is not the case.

The misapprehension that the NDIS will cover everyone fully has further silenced public calls on government to fully implement the NIIS.

Completing the NIIS

Significant support for completion

A core group of organisations support the completion of the NIIS. These include spinal and brain injury organisations, medical peaks such as the AMA and the Australasian College of Rehabilitation Physicians.

In 2017, the YPINH Alliance convened a meeting of major sporting codes. Representatives from the Australian Football League, the National Rugby League, the Australian Rugby Union, Tennis Australia, Swimming Australia, Cricket Australia and the Jockeys Association attended.

Together with their peak body, the Coalition of Major Professional and Participation Sports (COMPPS), these sporting representatives strongly supported the NIIS covering catastrophic sporting injury through the general injury stream. A number of their members had already been through costly, drawn out common law claims and these members and their associations were highly unsatisfied with the process and the outcomes.

Support for the urgent completion of the NIIS has also come from the Australian Small Business and Family Enterprise Ombudsman, Kate Carnell.

In the final report of her 2020 Insurance Inquiry, Ms Carnell called for the urgent implementation of the NIIS for the benefit of small business, saying ‘Nine years on from the

Productivity Commission Report a NIIS is still under consideration¹⁵ ...to the detriment of Australians and small businesses.’¹⁶

Implementing the general injury stream

Responsibility for completing the NIIS currently sits with Treasury and has traditionally been in the portfolio responsibilities of the Assistant Treasurer.

However, when work on the NIIS has been undertaken previously, it has been the province of the Council for Federal Financial Relations.

Convened by the Social Policy Division of Treasury, a working party on the NIIS has previously existed, its membership including senior officers from jurisdictional treasury departments.

While the Commonwealth has taken a coordinating role in chairing this working party, it has not driven it as a reform program. While there are financial and political hurdles that must be overcome, many accruing at the state and territory level, there are significant benefits in resuming this process as a matter of urgency.

However, Treasury’s lack of stakeholder engagement has contributed significantly to the lack of progress on the NIIS and is not the right portfolio to lead this important work.

The Alliance believes that locating the NIIS in the Government Services portfolio where it will sit in close proximity to the NDIS, is imperative for successful completion of Australia’s national injury insurance scheme.

Conclusion

Despite strong support across the Australian community and particularly by sporting peaks, completing the NIIS has not been included in the government's other disability reform efforts.

The failure of successive governments to pursue the completion of the NIIS is a policy and governance failure, particularly when the same governments raise their alarm over the increasing cost of the NDIS, and the unwillingness of states and territories to provide services for injured people with disability.

The completion of the NIIS will not only fill a critical gap in the treatment and lifetime support of people injured in sporting events and other non-compensable causes.

¹⁵ The ABC (2020), *Catastrophically injured Australians still waiting for national insurance scheme meant to roll out with NDIS*.

¹⁶ <https://www.niba.com.au/2020/12/09/insurance-market-failure-a-national-crisis-asbfeo/>

It will also redraw the funding arrangements for disability services between the levels of government and take significant cost pressure off the NDIS.

Recommendations

Recommendation one

The Inquiry convene a panel discussion with the major Australian Sporting Codes to canvass implementation of the general injury stream of the NIIS to cover those Australians sustaining catastrophic injuries in amateur sport in Australia.

Recommendation two

The Inquiry make a recommendation to the Federal Government to complete the NIIS by first implementing the general injury stream as a matter of urgency; and renewing negotiations with the jurisdictions regarding the medical injury stream.

The Alliance would be happy to present further evidence at a hearing of the inquiry if required.

Further Information

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