

Submission to the Senate Standing Committee on Community Affairs

National Disability Insurance Scheme Bill 2012

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Submitted by Andrew Grech,
Managing Director, Slater & Gordon Lawyers
485 La Trobe Street
Melbourne, Victoria
Phone: (03) 9602 6888
[Redacted]
Facsimile: 9600 0290

Slater &
Gordon
Lawyers

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1. Introduction

Slater & Gordon strongly supports the Federal Government's initiative to introduce a National Disability Insurance Scheme (NDIS). The NDIS is the culmination of a significant campaign by people with disability, their carers and advocates to gain recognition of the chronic under resourcing of disability supports and services for people who have significant disability. The NDIS will support many thousands of people in their desire to live a fulfilling life and recognises the right of every citizen to pursue that desire.

In preparing this submission, we have consulted with clients who have suffered catastrophic injuries resulting in significant disability to ensure that this submission is grounded by their experiences. Our perspective is also informed by the practice of personal injuries compensation law in all Australian jurisdictions. Our practice includes personal injury class actions like the case conducted on behalf of Australians with significant disabilities against manufacturers and distributors of the thalidomide drug.

This submission in general supports the scheme framework outlined by the National Disability Insurance Bill 2012 (the Bill) and provides comments and suggestions to improve the Bill in ways that will ensure that the scheme is fair and workable for participants and sustainable in the long term.

We note subordinate Legislation and the operating guidelines for the NDIS launch Transition Agency are still under development, and that this work will complete the detail necessary to make the framework in the Bill operational. We believe that when available, key details relating to 'eligibility' and the 'reasonable and necessary supports' that will be provided by the NDIS, should be included the Legislation.

2. Summary of this submission

A summary of the issues covered in this submission are as follows:

2.1 Dispute resolution

Provisions relating to merits review, including internal review followed by a right of appeal to the Administrative Appeals Tribunal (AAT), are strongly supported.

Steps will need to be taken to ensure that internal review processes put in place are independent, fair and as far as possible utilise best practice in disability access and alternative dispute resolution. These will assist to ensure that processes are no cost to participants and no net cost to the scheme.

Further work will need to be done to ensure that both internal review processes and the new AAT jurisdiction are user friendly and accessible to people with disability. We believe that the Agency and the AAT should establish a disability access advisory group to oversee the introduction of new dispute resolution processes and the AAT jurisdiction.

2.2 Key definitions

The definitions of 'eligibility' and 'reasonable and necessary services and supports' should provide as much clarity for participants as possible at the commencement of the scheme. Noting that inclusions in the definition of 'reasonable and necessary services and supports' will be developed further through Rules that will guide administration of the scheme, this submission refers to an overview of the elements that should be included.

2.3 Inclusion of 'catastrophic injuries'

Given the uncertainty in relation to the establishment of the National Injury Insurance Scheme, we believe that it is critical at least whilst an NIIS is not in existence, that it be made clear that the eligibility criteria in the Bill and the subsequent NDIS do not exclude people with 'catastrophic injuries'. This is most important particularly if a catastrophically injured person does not have access to a compensation scheme. Further, given the inclusive framework provided by the NDIS Bill, we contend that a stand alone NIIS may ultimately not be needed.

2.4 Compensation

The framework in Chapter 5 of the Bill relating to compensation is in general supported because it is intended to ensure the sustainability of the scheme and to ensure that private and public insurers and tortfeasor corporations will continue to meet their responsibilities, rather than transferring costs and liabilities for compensation to taxpayers.

Australian compensation schemes and the common law provide a range of additional rights to recover damages such as past and future economic loss, pain and suffering and medical expenses that go beyond the scope of the NDIS.

It is reasonable to expect that NDIS participants who have statutory or common law entitlements will wish to claim and receive these entitlements in the same way that they would be likely to if the NDIS did not exist.

There are difficulties which may arise from some of these provisions. We take this opportunity to make recommendations which we believe would alleviate those difficulties.

We recommend that the Agency be given the power in certain circumstances to subrogate the rights of a participant to make a claim for compensation by including in the Bill powers to recover compensation similar to those that exist in other statutory insurance schemes.

2.5 No participant should be worse off

Existing compensation arrangements and common law rights should be safeguarded to serve the long term sustainability of the scheme. This will also ensure that participants are not worse off because of a loss of rights including access to compensation for past and future loss of earnings, pain and suffering and medical benefits that the NDIS does not provide, and was never intended to.

The common law also plays an important role in injury prevention and alleviating pressures on the public health and social security system. It provides access to justice for people who have been seriously injured as a consequence of the serious wrongdoing of another.

2.6 Privacy

Clarity is required regarding whether the Privacy Act 1988 (Cth) will cover the NDIS. We contend that this Act should apply and that the Commonwealth Privacy Commissioner should have the jurisdiction to deal with complaints.

2.7 Legal professional privilege

The aims and requirements of the scheme may mean that the Agency requests a participant to provide information about legal advice they have received in relation to a claim for compensation. The right of participants to maintain the confidentiality of communications with their legal advisor must be protected. If the advice or elements of it are to be provided to the Agency by the participant, the Legislation should make clear that this would not constitute a waiver of the participant's right to claim legal professional privilege in respect of those confidential communications.

2.8 General contentions

Slater & Gordon strongly supports the introduction of the NDIS and the framework for the scheme provided by this Bill. The comments below relate to matters that will improve the workability and safeguard the sustainability of the scheme in the context of the goal of providing 'reasonable and necessary services and supports' with choice and control for people with disability.

Recommendations are also provided to assist in ensuring that there are no unintended consequences resulting from the introduction of the scheme and that people with disability who currently have rights to compensation, services and supports are not unexpectedly worse off.

The sustainability of the scheme requires stakeholders, particularly statutory and private insurers and negligent corporations to maintain existing compensation arrangements.

As stated in the Bill's Explanatory Memorandum, the scheme will 'take an insurance approach that shares the costs of disability supports and services across the community'.¹ Therefore it is critical that existing insurers, entities, and corporations are prevented by State Governments from withdrawing or eroding compensation arrangements or taking away existing rights with a view to shifting responsibility towards the new tax payer funded NDIS.

2.9 Slater & Gordon

Slater & Gordon is Australia's largest consumer law firm with lawyers operating from over 70 locations across all Australian States and Territories, except the Northern Territory.

We consider assisting the Government of the day to make the NDIS successful and sustainable to be an integral part of the firm's commitment to social responsibility.

Slater & Gordon predominantly practices in the area of personal injuries and employs accredited personal injuries specialists in all jurisdictions. Preliminary legal advice in relation to the viability of claims is generally given on a no fee basis,ⁱⁱ and cases that are taken on are conducted on a 'no win, no fee' basis. This means that unless exceptional circumstances exist (e.g. the claimant has been fraudulent), our client is only responsible for the legal fees incurred on her/his behalf if the claim is successful.

We have a history of running class and group actions on behalf of people who have been injured and suffered loss as a consequence of the actions of major corporations, institutions and organisations. All our personal injury class actions have been litigated on a 'no win no fee' basis. Most recently the firm has partnered with Gordon Legal to conduct the ground breaking case in relation to victims of the drug thalidomide.

2.10 Summary of recommendations

Recommendation 1: 'objects and principles'

The intention of the NDIS is to improve the lives of people with disability. No one should be worse off, or lose rights under other programs, compensation schemes or laws as a consequence of the introduction of the NDIS. Accordingly we recommend an additional principle for inclusion in the Objects and Principles Section in Chapter 1, part 2 as follows;

'People with disability and the broader community have a right to expect that Australians will not lose existing rights and entitlements to services and supports available under pre-existing insurance arrangements and State and Federal compensation laws as a consequence of or following the introduction of the NDIS'.

Recommendation 2: 'reasonable and necessary services and supports'

The Legislation should make clear that the Agency is required to apply the guiding principles set out in the Bill when determining if a support is 'reasonable and necessary'.

The Agency should, as far as possible, have primary regard to the evidence and information provided by the participant or their treating health practitioner regarding the benefit of a proposed support.

Recommendation 3: review of decisions

The Bill includes a sound framework for internal and external review of Agency decisions. We believe that the review and dispute resolution sections of the Bill could be further improved by explicitly requiring independent, accessible and straightforward processes. An Advisory Body of people with disability and their advocates should be established to advise the Agency and the AAT on how to achieve these aims.

We also recommend that the following processes be implemented;

Internal Review processes

- Internal review processes should be independent from original decision makers, and reviewers should have powers to make further inquiries and to mediate outcomes;
- Agency reviewers, or at least the Senior Reviewer, should be appointed by the Minister or the Attorney-General;
- Officers of the Agency should be given a short turn around opportunity to review their decision after being notified of a participant's grievance and participants be given reasonable opportunities to provide further information to the Agency; and
- Time frames for the completion of reviews should be included in the Bill.

AAT processes

- The new jurisdiction of the AAT should adopt a best practice approach to access for people with disability and to alternative dispute resolution to ensure the jurisdiction is straightforward and no or low cost for participants; and
- A further 'reviewable decision should be included in Clause 99 to make clear that a participant has a right of review if substantially dissatisfied with supports proposed under a Support Plan.

Recommendation 4: compensation payments

Clauses related to recovery of NDIS payments from compensation are necessary to the sustainability of the scheme and to ensure that statutory and private insurers and corporations do not cost shift their liabilities to the tax payer funded NDIS.

We believe that the compensation payments provisions could be improved. A participant may not wish to make a common law claim and their reasons and wishes should be respected and taken into account.

We recommend the following additional Subclauses be considered for incorporation into the Bill. In relation to the CEO's powers in Subclause 104(2), if retained in its current form, we recommend that;

1. Subclause 104(3) should specifically require the CEO to consider the health and well-being of the participant as an impact before deciding whether to issue a Notice pursuant to Subclauses 104(2). This may in part be what is intended by Subclause 104(3)(f) but it is not clear; and
2. The CEO should be required to consider whether in all of the circumstances related to a particular participant it would be preferable for the participant to subrogate their right to pursue compensation to the Agency.

The Bill should be amended to give the Agency powers of subrogation and general powers to pursue compensation and contributions from relevant agencies or third parties, similar to the powers of the TAC or Comcare.

Recommendation 5: reimbursement of compensation

In general we support the provisions for reimbursement of past NDIS payments, however we believe that subclause 35(4) is overly broad with respect to payments made after compensation, and may create uncertainty for participants. Accordingly we recommend that the Agency be required as a matter of course to provide a notification to a participant prior to resolution of their common law claim (preferably 6 weeks prior to a settlement conference or Court ordered mediation) of the following;

- a) The payments made by the Agency to date for otherwise compensable supports, services or treatment with the amount the Agency wishes to recoup clearly identified; and
- b) The recoupment from compensation the Agency estimates that it will seek for NDIS services and supports provided in the future.

Recommendation 6: privacy and security of health information

We recommend that the jurisdiction of the Privacy Commissioner and applicability of the *Privacy Act 1988 (Cth)* be clarified.

Recommendation 7: legal professional privilege

We recommend that if advice or elements of a participant's legal advice are provided to the Agency by the participant, the Legislation should make clear that this would not constitute a waiver of the participant's right to claim legal professional privilege in respect of the confidential communications.

3. Objects and principles - chapter 1, part 2

Slater & Gordon supports the 'Objects and Principles' clauses set out in the Bill. Additionally, we believe it is necessary to introduce a concept consistent with the Federal Government's intention of advancing the well-being and quality of life of Australians with disability.

3.1 **Protecting existing entitlements**

We would wish to see the addition of a positive statement in the objectives to underline that no person with rights to services, supports or compensation under existing private or public insurance arrangements should have their rights or entitlements reduced as a direct or indirect consequence of the introduction of the NDIS, or in the alternate no person should be 'worse off'. We suggest the inclusion of words into *Clause 4 'General principles guiding actions under this Act'* in paragraph 3.2 below.

3.2 **Additional principle**

'People with disability and the broader community have a right to expect that Australians will not lose existing rights and entitlements to services and supports available under pre-existing insurance arrangements and State and Federal compensation laws as a consequence of or following the introduction of the NDIS'

We contend that this is a necessary addition because some stakeholders, may seek to have State Governments change laws to reduce or abolish their obligations to provide compensation. We contend that if this were to occur, choice and autonomy for people with existing rights would be diminished and some people would be worse off in future.

The public and preventative benefits of the common law would be eroded (as has happened in New Zealand) and the cost of injuries would be diverted to taxpayers. The latter will erode the financial viability of the NDIS over time to no net benefit to people with disability or the Australian taxpayer.

4. 'Reasonable and necessary services and supports, including early intervention' - chapter 1, Part 2

We note that section 35(1) of the Bill anticipates that the Rules of the scheme will prescribe criteria for assessing what supports fall within the definition of 'reasonable and necessary' under the scheme.

We submit that the definition of 'reasonable and necessary' and the manner in which it is applied is crucial to participants of the scheme, and that certainty around what supports will and will not be provided is desirable.

4.1 **No participant should be worse off**

We anticipate that the criteria established by the Rules will comply with the scheme's overarching principle to benefit individual participants and will ensure that no individual participant is worse off than they would be under existing arrangements.

4.2 **Guiding principles**

In light of the general principles of the Legislation, and the specific principles outlined in Subclause 34, both of which we commend, we anticipate that what is deemed to be 'reasonable and necessary' will also include consideration regarding whether the support or service:

- assists a participant to participate in economic and social life (Subclause 14);
- encourages or assists with a participant's engagement in the community (Subclause 5(b)); and
- should be approved in order to allow the interpretation of a participant's rights to accord with the Convention on the Rights of Persons with Disabilities (Subclause 3).

4.3 Judicial consideration of ‘reasonable and necessary’

Judicial consideration of the terms ‘reasonable and necessary’ and like notions has been undertaken in numerous jurisdictions. In determining whether support is reasonable under other insurance schemes it has been determined that;

- consideration should be given to the necessity of the support;ⁱⁱⁱ
- it should not be a requirement for a support to be urgent to be considered necessary;^{iv}
- there should be some long term benefit from the provision of the support;^v
- a support which produces no long term improvement in function or capacity, but does produce short term benefit and prevents further deterioration of the participant’s condition should be considered reasonable;^{vi}
- a support should be shown to increase a particular capacity or maintain that capacity or slow the rate of deterioration of that capacity;^{vii} and
- a support may be considered necessary if it provides a ‘real benefit’ to a person even if that benefit is only short term pain relief, where such pain relief maintains a particular functional capacity – for example to continue to work.^{viii}

Judicial consideration of ‘reasonable and necessary support’ falls short of the guiding principles of the Legislation. Accordingly, the Rules under development pursuant to the guiding principles and objectives in the Legislation will be a critical detail of the scheme.

4.4 Determining ‘reasonable and necessary support’

The Rules must allow supports that are consistent with the guiding principles and objectives that are set out in the Legislation. The Rules should be drafted in a manner which requires the Agency to apply the principles in the Legislation.

In seeking to apply those principles, the Agency should, wherever possible, have regard to:

- the participant's own experience or belief as to the benefit that they may obtain from the support; and/or
- the opinion of the participant's nominee, carer and treating health providers as to the benefit provided to the participant by the support.

This is because the people who are best placed to inform the Agency are the participant, their nominee or carer, and the health providers who support them on a regular basis.

5. Appeal provisions – chapter 4, Part 6

We agree with the 'reviewable decisions' listed in Clause 99 and suggest one addition. We also agree with the proposal for a first stage 'internal review' by the Agency prior to AAT jurisdiction becoming available.

Both internal and AAT review processes put in place should be straightforward, timely and easy for people with disability to access at no or low cost. We recommend that a best practice approach to alternative dispute resolution and disability access be adopted and that this should be reflected in the Legislation. In respect of both alternative dispute resolution and disability access we believe that the NDIS should look to existing best practice in other jurisdictions for guidance.

5.1 **NDIS Agency internal review process**

We make the following suggestions about 'internal review' processes that we contend would further the objective of dispute resolution in a fair and timely way, and as far as possible avoid the need for recourse to the AAT.

- It is in the interests of the scheme that Agency staff responsible for making decisions are well trained and supported to make highly quality first instance decisions. Officers should also be given a short turn around opportunity to consult senior officers to obtain a second opinion and to re-consider their decision once they are notified that a person is aggrieved.
- Time limits should be introduced in relation to the making of decisions and conducting reviews. Subclauses 100(2) and 100(6) should be strengthened to ensure that a failure to conduct a review within a specified time frame may result in the matter being escalated to the AAT.
- The internal review process should at all times be at arms length from original decision makers. A positive statement should be added to Subclause 100 to strengthen the requirements for arms length review.

- Reviewers should be independently appointed by the Minister and/or the Attorney-General rather than the bureaucracy. Provision for this should be added to the Minister's powers at Clause 121. Reviewers should be experienced in alternative dispute resolution and processes that are accessible for people with disability. Reports to the Minister should set out the number of complaints/reviews requested, numbers successfully resolved and the time taken to achieve resolution to enable the quality of processes to be assessed at the end of the first year of operation. Subclause 100 should incorporate these provisions for the appointment, experience and conduct of reviewers in order to give confidence to a person who may be affected by a decision made by the Agency.
- On receipt of a decision, a participant should be afforded the option of providing additional information to the decision maker within a time frame in order to avoid the need for the escalation to review of the decision. This option should be proactively offered by the Agency. This should be added to Subclause 100(1) to facilitate the capacity of the Agency to review its decisions quickly where new information is provided.

The explanatory memorandum indicates that Clause 6 recognises that people may want or need assistance to access the scheme and meet obligations under the Act. The Agency will assist in a variety of ways but will not fund legal assistance for review of decisions under the Act.^{ix} We acknowledge the Government's intention to avoid the cost of disputation and agree that it is not desirable for resources of the Agency to be diverted towards disagreements over access to services and supports. We submit that a participant should have assistance if they require it.

Every effort will need to be made by the Agency to ensure the high quality of its decisions in order to minimise the need for participants or potential participants to seek review.

5.2 Additional 'reviewable decision'

For clarity we would add a further 'reviewable decision' to Clause 99 to make clear that a participant has a right of review if substantially dissatisfied with supports proposed or provided under a support plan.

5.3 An advisory body to ensure accessibility

As a matter of priority both the Agency and the AAT should establish an advisory group predominantly comprised of people with disability and their advocates to represent potential users of the complaints and review arrangements. This will be critical to ensuring the arrangements meet the needs of people with disability and their carers; and

- are accessible, straightforward and easy to understand;
- provide as much assistance as possible for people seeking a review; and
- come at low or no net cost.

5.4 External review processes

The AAT should also incorporate best practice in alternate dispute resolution and disability access when establishing its procedures.

We believe that the practices of the AAT would need to be substantially adapted in order to be in a position to hear matters for participants with disability in accordance with the principles which have been outlined above. We recognise that the AAT currently has some systems in place in order to allow the parties to resolve disputes without the need to attend a hearing.

We believe that further improvements to current practice could be made to ensure that the appeals process is more accessible for self represented participants with disabilities, and to better allow the Tribunal to actively assist, using methods of Alternative Dispute Resolution to ensure that matters are resolved as quickly and easily as possible.

6. Compensation arrangements – chapter 5

Compensation arrangements set out in this Bill are necessary to the sustainability of the scheme. The protection and exercise of existing rights to compensation will help to ensure that funds payable and resources provided under current Australian compensation laws are not borne by the NDIS. A diversion of those costs to the NDIS may impact its financial viability, capacity to deliver on its objectives and capacity to deliver support and benefits to participants.

When conferring powers upon the Agency CEO to direct a participant to make a claim, a distinction could be made between claims for statutory or 'no-fault' entitlements, and common law claims. The relevance of this distinction is elaborated below.

We support the proposition that the CEO of the Agency should have the power to direct a person to claim no-fault statutory benefits, if they are available. A no fault claim for statutory entitlements after an accident would in ordinary circumstances not have a potential for adverse consequences on a participant.

The intention of the proposed CEO's power to require a person to make a common law claim is to support the sustainability of the scheme. The provisions could be improved to further allay concerns for participants who do not wish to make a common law claim. We recommend that prior to considering the use of this power, the CEO should;

- Consider the impact of giving notice to a participant to take common law action on the health and well-being of the participant. This could be included as an overriding consideration for the CEO in Subclause 104(3). This would build on a consideration established by Subclause 104(3)(f).

We also suggest that the CEO be provided with powers of 'subrogation' and to recover compensation similar to those in statutory schemes like TAC or Comcare.

We understand that these powers are rarely used in other schemes but, could be added to the Legislation so that the CEO has the capacity to consider as an alternative, having the participant 'subrogate' their right to make a claim to the Agency (or to subrogate the right to challenge a refusal by a statutory insurer to provide no-fault benefits).

We believe that it would be unlikely or rare that the CEO would encounter circumstances that could warrant the exercise of the power provided by Subclause 104(2).

6.1 Alternative proposal

We believe that the Subclause 104(4) could be amended to allow the CEO the power to:

(a) Direct a participant to lodge a claim with an appropriate insurer with respect to a statutory or "no fault" entitlement. The NDIS is designed to ensure that people who do not have access to disability supports gain access. The scheme should not bare the cost of supports for people who are or will be provided for under an existing scheme of insurance.

(b) Provide an additional consideration for the CEO when considering whether or not to require a participant claim compensation for common law damages. While a person may be advised that they should claim compensation for common law damages, a small number of participants may have difficulty pursuing a claim. The health and well-being of a participant should be an overriding consideration for the CEO.

(c) In addition, the CEO should be provided with an option of 'subrogating' a participant's right to pursue a claim. The Agency could be provided with powers to subrogate the right to claim compensation, and to take up the claim where a participant has genuine reasons for not proceeding with a viable claim for compensation.

6.2 Subrogation of claims and related powers

The scheme could include additional appropriate ways for the Agency to recover compensation in circumstances where a person would be negatively impacted and has sound reasons for not wishing to pursue a claim.

The Objects and Principles in the Bill at Subclause 3(2)(b) confirm that the scheme adopts an 'insurance-based approach'. Accordingly, it is reasonable to consider the inclusion of subrogation powers available to most statutory insurance schemes, including the Transport Accident Commission (TAC) and Comcare.

The Bill could include a subrogation clause allowing the Agency the right of subrogation in relation to common law claims if;

- it would be detrimental to the health and well-being of a participant for the participant to be engaged in a claim;
- the participant is unable to pursue the claim because they lack the capacity to manage their legal and financial affairs, and do not have a nominee capable of acting as the participant's litigation guardian; or
- a person has reasons that the CEO considers justified.

We recognise that there are practical matters to consider with respect to subrogation of a right to bring a claim for compensation. However, the proposal for powers for a statutory insurance body to subrogation is not new.

6.3 Subrogation powers in other schemes

For instance, the Transport Accident Act 1986 (Vic) allows for the Transport Accident Commission (TAC) to take over the conduct of a matter where proceedings:

- have not been instituted;
- have been instituted and then discontinued; or
- have not been properly conducted.

In such circumstances, the proceedings remain in the name of the injured person, and the TAC has the authority to settle the claim by judgement or agreement.

The TAC has the power to compel a person to sign settlement documents to give effect to the agreement, and, if a person refuses to sign, the TAC may seek an order from the court or Tribunal to sign in place of the person.

The TAC is liable to pay for the cost of the proceedings, except for costs unreasonably incurred by the injured person.

Similar provisions exist under the Comcare scheme. The Safety Rehabilitation and Compensation Act 1988 allows for all compensation and incidental legal costs paid by Comcare to be recovered by Comcare, and for Comcare to take over a common law claim.

Where this occurs, Comcare is liable for the costs incurred in the claim, however the injured person must comply with reasonable requests relating to the conduct of the matter, otherwise their claim/benefits may be suspended (save for their medical benefits). After recovery amounts and costs have been refunded to Comcare, the balance is payable to the injured person.

It is noted that in practice these powers are rarely utilised.

For the Committee's reference we have annexed the relevant provisions of the Transport Accident Act 1986 (Vic) and the Safety Rehabilitation and Compensation Act 1988 (Cth).

Further consultations may be required between the Agency, disability advocates, the legal profession and other stakeholders to ensure that any outstanding practical issues regarding subrogation are addressed, and to ensure that the provisions are properly understood, are not costly for the Agency, and are not onerous for people with disability.

6.4 Reimbursement from compensation

We believe that Part 2 of the Legislation regarding reimbursement of previously paid benefits from compensation represents a sensible approach, and has been shown by Medicare, which obtains reimbursement from compensation amounts, to be workable. Further, we agree that Clause 116 allowing the CEO the discretion to waive the requirement to refund past payments is important. The provision that refundable amounts must not outweigh the damages payable (after refunding to Centrelink and Medicare) are crucial to avoid a participant being forced to pay for scheme benefits from their own pocket.

However with respect to the circumstances in which compensation may be recovered for future treatment, we believe Subclause 35(4) is overly broad, and creates uncertainty regarding how compensation may be taken into account. There is no valid reason for the provisions relating to recovery of past benefits to sit apart from the calculation of future medical benefits.

An appropriate resolution to the issue of recovery of compensation would be for the Legislation to be amended at Clauses 109 and 111 to allow the Agency to provide a notification to the participant.

We recommend that the Agency as a matter of course be required to provide a notification to a participant prior to resolution of their common law claim (preferably 6 weeks prior to a settlement conference or Court ordered mediation) of the following;

- c) The payments made by the Agency to date for otherwise compensable supports, services or treatment with the amount the Agency wishes to recoup clearly identified; and
- d) The recoupment from compensation the Agency estimates that it will seek for future NDIS services and supports.

The Agency would then be in a position to recover past payments made as set out in the Bill, and future benefits after taking into account its estimate, and the settlement amount received.

7. Other considerations

7.1 Privacy and security of health information

Given the breadth and volume of personal information that will be collected by the Agency, there should be confirmation that the Privacy Act 1988 (Cth) will cover the NDIS. This would provide an unambiguous regime of protection in relation to the collection, use and storage of participant information. This is particularly important if the day to day operation of the scheme will require the Agency to transfer information and/or documents to other agencies. The Bill currently includes a number of offences relating to breaches of Privacy (Clauses 61 and 64) but does not provide a complaints procedure. The Bill would benefit from making clear where complaints should be directed and/or that the jurisdiction of the Privacy Commissioner (Commonwealth) applies.

In any event there must be a clear obligation upon the Agency to inform participants about how their personal information could be used and how it will be stored.

7.2 Legal professional privilege

In relation to the compensation section of the Bill, there may be occasions where a participant provides the Agency with confidential communications with their lawyer regarding their claim. Providing these communications may assist in informing the CEO of the prospects of success of a participant's claim.

Where the Agency obtains a copy of those communications, or information for the purpose of recovering payments from compensation, the confidentiality of those communications needs to be protected.

Lawyers have a primary duty to their clients, including maintaining confidentiality.

The right to maintain legal professional privilege must be viewed in the context of the broader aims of the scheme. The Agency is better able to protect the scheme from financial strain if it is in a position to understand the effect of legal advice provided to participants about their prospects of a successful claim. Without this ability, there is a significant risk that private insurance obligations and costs will be transferred to the scheme, risking its long term viability.

We believe that strong privacy provisions regarding the handling of participant's information, discussed above, will be important in mollifying concerns regarding even the limited release of communications with a lawyer to the Agency.

The Bill should make clear that the participant providing confidential communications with their lawyer to the Agency does not constitute a waiver of legal professional privilege over those communications for any other purpose.

Similarly, copies of legal advice or other confidential communications provided by participants to the Agency should be exempt from release under Freedom of Information laws.

8. Conclusion

We again take this opportunity to commend the Federal Government for its initiative in introducing a Bill to create the NDIS. We look forward to making further contributions to assist in the formulation of the scheme, in order to ensure that Australians with disability receive appropriate levels of care, services, and support.

This submission has been prepared by experienced Slater & Gordon personal injury compensation lawyers, Nicholas Mann and Julie Clayton.

Andrew Grech

Managing Director,

Slater & Gordon, Lawyers

Endnote

- i Explanatory Memorandum, page 1.
- ii Where a claim for compensation was successfully pursued, costs are inclusive of the time taken to provide the initial advice.
- iii *Russell v TAC [2004] VSC 442*
- iv *Russell v TAC [2004] VSC 442*
- v *Russell v TAC [2004] VSC 442*
- vi *Higgins v Weissman & Ors [2010] VSC 294*
- vii *Lukeis v Victims of Crime Assistance Tribunal [2006] VCAT 2473* Deputy President Coghlan citing Harper in the unreported case of *Berger & Ors V Physiotherapist Registration Board of Victoria (Unreported 1997 VicSC 14 April 1997)*.
- viii *Theodoulis v TAC[2005] VCAT 872*
- ix Explanatory Memorandum, page 2.



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SAFETY, REHABILITATION AND COMPENSATION ACT 1988 - SECT 50

Common law claims against third parties

(1) Where:

(a) an amount of compensation under this Act:

(i) is paid to an employee in respect of an injury to the employee or in respect of the loss of, or damage to, property used by the employee; or

(ii) is paid for the benefit of a dependant of a deceased employee in respect of an injury that resulted in the death of the employee;

(b) the injury, loss, damage or death occurred in circumstances that appear to create a legal liability in a person to pay damages in respect of the injury, loss, damage or death; and

(c) a claim against the person for the purpose of recovering such damages has not been made by the employee or by or for the benefit of the dependant, or, having been made, has not been prosecuted;

Comcare may make a claim or a fresh claim against the person in the name of the employee or dependant for the recovery of damages in respect of the injury, loss, damage or death or may take over the conduct of the existing claim, as the case requires.

(2) If Comcare takes over the conduct of a claim, it becomes liable to pay all costs of and incidental to that claim that would otherwise be payable by the person who originally made the claim other than costs unreasonably incurred by that person.

(3) If Comcare makes, or takes over the conduct of, a claim under this section, Comcare may:

(a) take whatever steps are appropriate to bring the claim to a conclusion; and

(b) if the claim is before a court--settle the proceedings either with or without obtaining judgment; and

(c) if the claim is before a court and judgment has been obtained in favour of the plaintiff--take such steps as are necessary to enforce the judgment.

(4) The employee or dependant must sign any document relevant to a claim made or taken over by Comcare under this section (including the settlement of the claim or of any proceedings arising out of the claim), being a document that Comcare requires the employee or dependant to sign.

(4A) If the employee or dependant fails to sign a document in accordance with a requirement under subsection (4):

(a) if the claim is not before a court or tribunal at the time of the failure--the Federal Court of Australia, on the application of Comcare, may direct that the document be signed on the employee or dependant's behalf by a person appointed by Comcare; and

(b) otherwise--the court or tribunal in which proceedings relating to the claim are being heard, on the application of Comcare, may so direct.

(4B) If Comcare proposes to make an application under subsection (4A):

(a) Comcare must notify the employee or dependant concerned of the fact that it is proposing to so apply;
and

(b) the employee or dependant concerned has a right of representation in the hearing of that application.

(5) If Comcare makes or takes over the conduct of a claim under this section:

(a) the employee or dependant must comply with any reasonable requirement of Comcare for the purposes of the claim; and

(b) if the employee or dependant fails to comply with such a requirement, the right of the employee or dependant to compensation under this Act in respect of the injury, loss, damage or death to which the claim relates is suspended until such time as the employee or dependant complies with the requirement.

(5A) However, paragraph (5)(b) does not operate to suspend the employee's right to compensation for the cost of medical treatment that is payable under section 16.

(6) Where a right to compensation is suspended under subsection (5), compensation is not payable in respect of the period of the suspension.

(7) Any damages obtained as a result of a claim made or taken over by Comcare under this section (including damages payable as a result of the settlement of such a claim) must be paid to Comcare and Comcare must deduct from the amount of those damages:

(a) an amount equal to the total of all amounts of compensation paid to, or for the benefit of, the employee or dependant under this Act in respect of the injury, loss, damage or death to which the claim relates; and

(b) the amount of any costs incidental to the claim paid by Comcare.

Comcare must pay the balance (if any) to the employee or dependant.

(8) Where Comcare pays an amount to an employee or dependant under subsection (7), the employee or dependant is not entitled to receive any further amounts of compensation under this Act in respect of the injury, loss, damage or death to which the proceedings related until the amount of compensation that would, but for this subsection, have been payable to the employee or dependant in respect of that injury, loss, damage or death equals the amount paid by Comcare to the employee or dependant under subsection (7).

(9) In this section:

"person" does not include the Commonwealth, a Commonwealth authority, a licensed corporation or an employee.



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Transport Accident Act 1986 - SECT 107

Commission may take proceedings

107. Commission may take proceedings

(1) If-

- (a) the Commission has paid an amount under this Act in respect of an injury or death; and
- (b) a person (other than the Commission) who appears to be liable or who it appears would have been liable, but for section 93, to pay damages or an amount by way of indemnity in respect of the injury or death is not entitled to be indemnified against that liability under an indemnity to which section 94 applies; and
- (c) proceedings against that person for the purpose of recovering such damages or amount have not been instituted or have been instituted but have been discontinued or have not been properly prosecuted-

the Commission may take over the conduct of the proceedings.

(2) The Commission is liable to pay all costs of or incidental to proceedings referred to in subsection (1), being costs payable by the plaintiff in those proceedings but not including costs unreasonably incurred by the plaintiff.

(3) If, in accordance with this section, the Commission takes over the conduct of proceedings that have been instituted in the name of a person-

- (a) the Commission may-
 - (i) settle the proceedings either with or without obtaining judgment in the proceedings; and
 - (ii) if a judgment is obtained in the proceedings in favour of the plaintiff-take such steps as are necessary to enforce the judgment; and
- (b) that person shall sign any document relevant to the proceedings, including the settlement of the proceedings, that the Commission requires the person to sign and, if the person fails to sign any such document, the court or tribunal in which the proceedings are being taken may direct that that document be signed on behalf of the person by another person appointed by the Commission for that purpose.

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