

## **Thalidomide Survivors and the National Disability Insurance Scheme**

**Richard Madden, Centre for Disability Research and Policy, University of Sydney**

### **Background**

Thalidomide survivors are under age 65. Therefore they are eligible to participate in the National Disability Insurance Scheme (NDIS). However the NDIS has specific provisions relating to compensation for injuries. The separate arrangements for injured people under the NDIS, and, in particular, the 2014 compensation settlement for thalidomide survivors, could complicate and jeopardise their entitlements under the NDIS.

### **Issues**

The NDIS was designed as a universal scheme. That is, it aims to provide all Australians with necessary and reasonable supports in relation to a disability arising from an impairment.

But there is one class of people with a disability for whom NDIS entitlement is not straightforward, or not available at all. These are people whose disabilities arise from injuries for which compensation can be obtained elsewhere. The NDIS is in fact partnered by a dual system known as the National Injury Insurance Scheme (NIIS). Injuries arising from work and many road accidents have long been covered by State/Territory based compensation systems. But other injuries may be compensable under a variety of insurance arrangements, including public liability and medical indemnity.

Chapter 5 of the NDIS Act provides that a person may be required to take action that is 'reasonable to enable the person to claim or obtain the compensation' (NDIS Act, clause 104(2)). An NDIS plan is suspended until the action is taken (clause 105(2)). However, the NDIS may not apply this suspension but take action in the name of the participant to obtain the compensation

These exclusions from NDIS supports were introduced so that existing revenue measures supporting injury compensation systems would continue in place, preventing an additional financial load for the NDIS. But the compensation systems have major flaws which have been well documented over many years. These arguments were comprehensively brought together in Chapter 17 of the 2011 Productivity Commission report (Disability Care and Support) which recommended the establishment of the NDIS. However the Commission proposed that a National Injury Insurance Scheme be established alongside the NDIS which would, in essence, continue the existing compensation arrangements. The Commission recommended these separate arrangements be reviewed in 2020 (Recommendation 18.7).

Once the NDIS was in place, moves have been taken to introduce consistent no fault compensation for 'catastrophic' road injuries. But separate State/Territory based systems persist. There has been no reform of public liability and medical indemnity insurance, based on common law negligence actions.

Thalidomide survivors have the right to be NDIS participants, and can benefit greatly from the flexible range of supports that can be provided. But it is important that all necessary actions be taken to ensure that the compensation provisions of the NDIS Act do not block or limit their access to the full range of NDIS supports.

In particular, there should be no argument that the \$89 million compensation to thalidomide survivors awarded in 2014 (Sydney Morning Herald, 7 July 2014) should reduce or offset NDIS entitlements. That compensation came some 50 years after the birth of the affected people. The NDIS has commenced since that award.

### **Recommendation**

1. Thalidomide survivors should be encouraged and facilitated to become NDIS participants, with support plans reflecting their individual needs
2. The National Disability Insurance Agency should take whatever steps are needed to ensure there is no effort to reduce or offset NDIS entitlements
3. There should be a clear decision by the NDIA not to seek any offset to NDIS support from the 2014 compensation decision.
4. The Committee should recommend that the foreshadowed review of the separate arrangements for people with a disability arising from injury take place in 2020 as proposed by the Productivity Commission.