

## **National Disability Insurance Scheme Bill 2012**

### **MDA National Submission**

---

Thank you for the opportunity to provide a submission in relation to the *National Disability Insurance Scheme Bill 2012* (the Bill).

Established in 1925 MDA National is one Australia's leading providers of medical defence and medico-legal advisory services. With over 25,000 members, it works in close partnership with the medical profession on a wide range of issues which impact on medical practice. In addition to its advocacy and advisory services, MDA National's insurance subsidiary (MDA National Insurance) offers insurance policies to MDA National's members which provide cover for the cost of investigations of professional misconduct and for claims for compensation by third parties. MDA National Insurance policy provides medical practitioners with \$20 million of civil liability cover as well as a range of other professional risk covers.

MDA National has significant concerns regarding Chapter 5 of the Bill which deals with compensation payments. MDA National submits that the provisions in Chapter 5 are inconsistent with the public policy intent of a no-fault National Disability Insurance Scheme (NDIS). The provisions are also contrary to the recommendations with respect to medical treatment injury in the Productivity Commission Inquiry Report, *Disability Care and Support* (the Productivity Commission report). The Productivity Commission report recommended that the funding of care and support for cerebral palsy be met through the NDIS and that the common law rights to sue for the long-term care costs of cerebral palsy be extinguished:

*The NDIS should fund all cases of cerebral palsy associated with pregnancy or birth, and that meet the NDIS eligibility criteria. Common law rights to sue for long-term care and support needs for cerebral palsy should be removed, though access to damages for pecuniary and economic loss and general damages would remain, where negligence can be established (Productivity Commission report, Recommendation 18.5, p 914).*

Medical practitioners and their medical indemnity insurers are expected to fund the costs of no-fault catastrophic medical treatment injuries under the National Injury Insurance Scheme (NIIS). It was anticipated in the Productivity Commission report that these additional costs would be offset by reduced medical negligence insurance costs from the NDIS funding all cerebral palsy cases (and removing access to the common law to sue for long-term care and related heads of damage) which would put significant downward pressure on medical indemnity insurance premiums (Productivity Commission report, Appendix L, L.11).

The compensation provisions in Chapter 5 of the Bill mean that the anticipated savings for medical indemnity insurers will not eventuate because not only will patients with cerebral palsy retain the right to sue for long-term care and support, but additionally the CEO may direct a patient to claim. Consequently there will be no reinsurance savings for the medical indemnity insurers following the introduction of the NDIS. Furthermore, the costs of care may increase with the initial introduction of the NDIS due to disability workforce shortages (Productivity Commission report, Chapter 15).

MDA National is concerned about the potential implications of Chapter 5 of the Bill on the medical

indemnity premiums of individual medical practitioner members which will then have to be passed on to their patients and the community. Following the introduction of tort law reform in 2002/2003, the medical indemnity insurance industry has stabilised and the premiums of our medical practitioner members have become more affordable. This has encouraged the provision of medical services, and minimised the withdrawal of services in certain areas of clinical practice, to the benefit of patients and the community.

With respect to the specific provisions in the Bill, MDA National's main concern is in relation to Chapter 5 Sections 104 and 105. Pursuant to s104, the CEO of the NDIS Launch Transition Agency can require a participant or prospective participant in the NDIS to take action to claim or obtain compensation (ss104(1)). Pursuant to s105, a participant or prospective participant who does not take the required action to claim or obtain compensation within a specified period will either have their care plan suspended, or not take effect, until such time as they take the required action (ss105(2)). This is contrary to the philosophy of ensuring early intervention under the NDIS.

Subsection 104(4) states that the CEO must not give a notice requiring a participant or prospective participant to take action to claim or obtain compensation unless the CEO is satisfied that the participant or prospective participant has 'reasonable prospects of success' in claiming or obtaining compensation. As outlined in the Productivity Commission report, decisions about cover of medical treatment injury are not as straightforward as for other sources of injury, since it is difficult to disentangle causality from a range of other factors giving rise to disability (Productivity Commission report, Appendix L, L.1). Any determination with regard to 'reasonable prospects of success' in cases of cerebral palsy will be complex, take time and involve considerable costs. MDA National estimates that the legal costs for prospective claimants in cases of cerebral palsy to investigate whether or not there are 'reasonable prospects of success' in a medical negligence claim may be in the order of \$20,000 - \$50,000. Even in 'no win no fee' cases, the claimant must still pay for disbursements, such as the costs of obtaining medical records, expert medical reports and counsel's fees.

These provisions also mean that participants or prospective participants will be forced to become involved in an adversarial and often protracted claim process, with the concomitant stresses involved in the process. There is also a risk that a participant or prospective participant is denied the opportunity of early intervention unless they comply with the CEO's written notice within the period specified in the notice (ss105(2)). It may take many months or even years to determine if there are 'reasonable prospects of success' in a case involving cerebral palsy, in contrast to motor vehicle accidents. It is also important to note that if a plaintiff is unsuccessful in establishing negligence, then a costs order against the plaintiff will generally be made which may be in excess of several hundred thousand dollars. It is unreasonable to expect a participant or prospective participant to bear these costs at the direction of the CEO and against their wishes.

Subsection 104(6) states that even though a participant or prospective participant has entered into an agreement to give up his or her right to compensation, the CEO may form the opinion that they may be entitled to compensation if the CEO is satisfied that the agreement is void, ineffective or unenforceable. This introduces additional risk and uncertainty for compensation payers and insurers.

The National Disability Insurance Scheme Bill 2012 Explanatory Memorandum states the background to Chapter 5 is that the provision of support and assistance under the NDIS is not intended to replace existing entitlements to compensation for personal injury (p42). MDA National understands the provisions are also designed to ensure there is no 'double compensation' and to assist in the interaction of the NDIS with the proposed introduction of the state based NIIS.

MDA National submits that incentives still exist for patients to claim compensation in cases of cerebral palsy once the NDIS is introduced, including:

- The likelihood that a greater level of care and support will be funded under common law;
- To obtain compensation for other heads of damages under common law, such as non economic loss (general damages/pain and suffering) and economic loss;
- To seek individual accountability and punishment, and facilitate improvements in medical care;
- To obtain lump sum payments, which are generally preferred by claimants.

Under Parts 2 and 3 Chapter 5, the Agency and CEO may recover compensation fixed after NDIS amounts have been paid, or recover from compensation payers and insurers in the event of a successful claim.

MDA National submits that Chapter 5 Sections 104 and 105 of the Bill should be deleted. Retention of Parts 2 and 3 Chapter 5 will ensure that there is no double compensation and that the existing entitlements to compensation in cases of cerebral palsy remain. Participants and prospective participants will be able to access early intervention under the NDIS, while at the same time pursuing a medical negligence claim. If successful, the past care and support costs would be recovered by the NDIS. However, Sections 104 and 105 introduce a new potential claimant in the form of the CEO of the Agency and, for the reasons outlined above, MDA National submits that these Sections should be deleted.

In MDA National's submissions to the Productivity Commission, we highlighted the many complex transitional issues faced by medical indemnity insurers with the introduction of the NDIS and NIIS (MDA National submission to the Productivity Commission, sub. DR937). These represent considerable uncertainty and complexity for medical indemnity insurers, especially in view of the inclusion of cerebral palsy cases in one scheme and other catastrophic medical treatment injuries in the other. One option proposed by MDA National was to include all medical treatment injuries in the NDIS, with a gradual unwinding of the High Cost Claim Scheme. A second option was to continue to run the existing common law schemes in parallel as an interim solution to these issues. The deletion of Chapter 5 Sections 104 and 105, and retention of Parts 2 and 3 Chapter 5 is consistent with this second option.

We thank you for considering our concerns. MDA National looks forward to continuing to work with government and other stakeholders to ensure the policy intent of the NDIS and the NIIS is ultimately met at a reasonable cost to all.

#### **Further information**

Should you have any questions in relation to the submission contact should be made with:

**Dr Sara Bird**  
**Manager, Medico-legal and Advisory Services**  
**MDA National Insurance Pty Ltd**  
Level 5, 69 Christie Street  
St Leonards NSW 2065

Facsimile: 1300 011 235