

NDIS Update

Taylor Fry Newsletter / January 2013

"This bill will inscribe in our laws a substantial and enduring reform that will fundamentally change the nature of disability care and support in this nation."

Prime Minister Julia Gillard, introducing the NDIS bill to parliament.

In this month's newsletter we provide an update on the latest issues surrounding the National Disability Insurance Scheme ("NDIS") and identify the key issues relevant to the insurance sector.

On the final day of Parliament for 2012, the PM introduced a bill for the establishment of a NDIS. This is the latest, and strongest, of the Federal government's responses to the Productivity

Commission's recommendations for an overhaul of Australia's disability care and support system. Those familiar with the Productivity Commission's recommendations may find a few surprises in the bill. The most significant of these to the insurance sector is the proposed relationship between existing compensation arrangements and the NDIS.

Newsletter at a glance...

The NDIS and its impact	02
Overview of the NDIS	02
What does it mean for compensation payers and insurers?	03
How can you prepare?	03
Important considerations for Insurers and Accident Compensation schemes	04
The NDIS: in detail	05
How did we get here?	05
Who are the participants of the Scheme?	06
What will be covered?	06
What is the impact on disability service providers?	07
Where are the various state governments at?	07
So, in short...	08
For more details	08
Questions or feedback? Contact us.	08

The NDIS and its impact

Overview of the NDIS

The NDIS will fundamentally change the way in which disability support and services are provided. The structure of disability services in Australia, as envisaged by the NDIS, is a step-change from current practices, particularly in those instances where support and care are coordinated and administered by insurers or accident compensation schemes. At its core, the intention is for funding to be provided directly to participants, who will purchase services and supports in line with a personal plan.

The proposed legislation

The NDIS bill will establish the NDIS Launch Transition Agency ("The Agency"). However, it is expected the ultimate bill will serve as the basis for future legislation establishing an Agency responsible for the ongoing administration of the Scheme. The bill covers many key points, including eligibility requirements, but leaves a lot of detail to future subordinate legislation termed the "NDIS rules".

Shortly following the introduction of the bill, both COAG and the Senate established inquiries to review various aspects of the bill. As such, it is almost certain the final bill, as passed by both houses, will differ in material respects from the draft bill.

One of the most surprising aspects of the bill is that the Agency can compel an individual participant to seek common law compensation in those instances where there may be liability attached to some party. However, the Agency will not cover the legal costs of any such action (although the Agency may not *require* legal action where it would cause undue hardship for the participant). This requirement to seek common law is one of the key concerns of the Senate Inquiry and appears at odds with the Productivity Commission report's negative opinion of the impact of the common law process on severely disabled people and their families.

How it works

The basic process under the NDIS will be:

1. Potential participants apply for access to the Scheme;
2. The Agency determines whether the individual meets the access requirements;
3. If accepted, the participant develops a personal plan, including objectives and the nature of supports required;
4. The Agency determines the reasonable and necessary supports that will be funded by the NDIS. This is intended to take into account any **existing compensation** the individual has received or will receive from other sources;
5. Where possible, the Agency seeks to **recover** the cost of supports from insurers and other compensation providers. **The tone of the bill suggests the intention is to maintain the status quo of liabilities that currently attach to insurers, accident compensation schemes and individuals.**



What does it mean for compensation payers and insurers?

A key question for insurers, re-insurers and accident compensation scheme funds is how their liability estimates will change. In short we expect the cost pressure to be upwards. We come to this conclusion for a number of reasons.

Firstly the demand for support services is expected to increase. Given the move to individual choice, it will take some time to see how the provider networks will change, and how this will influence the cost of services. In addition there is scope for the NDIS rules to include guidance on the cost of supports. Overall, the carer network in particular will need to expand in coming years, putting pressure on costs in the short to medium term, until the supply of carers increases to match demand.

A distinguishing feature of the NDIS legislation when compared to legislation already in place around the NSW Life Time Care and Support Scheme, is that the NDIS will not be removing liability for care and support from the underlying compensation payer or insurer. This is perhaps an unexpected feature of the 2012 bill. Instead the Agency will seek recovery from compensation payers or insurers in respect of support costs. At best, this suggests no change to the overall size of individual claims. The table below outlines the likely impact on schemes and re-insurers.

Responsibilities

The draft legislation outlines a number of responsibilities of the compensation payer or insurer that carry serious penalties for non-compliance. These responsibilities include:

- Providing written notice to the Agency within 7 days of becoming liable or receiving notice that they may be liable for support costs relating to a participant;
- Upon receiving notice(s) from the Agency indicating that they intend to seek recovery relating to the payment for supports, the compensation payer or insurer must not continue to provide supports or payments directly to the claimant that would be expected to be provided under the NDIS.

Entity Type	Impact
Common law scheme	Potential effects on liability will be limited to settlements for past and/or future care. Frequency of court action may increase as potential NDIS participants may be compelled to seek common law compensation.
No Fault scheme	Liability and payments are expected to continue as before. Where an individual is concurrently receiving supports through the NDIS, this may impact the ability to actively manage the claim.
Re-insurer	Since no liability is being removed from insurers, little overall change in the size of the reinsurance market is expected. As there will be upwards pressure on the cost of care, there may be a flow-on effect on reinsurance premiums.

How can you prepare?

The draft bill, as currently worded, does not remove any liability from insurers and schemes but neither does it directly introduce extra liability. However, processes need to be established for notifying the Agency of claimants who may be potential participants of the NDIS and for ensuring that no compensation is paid directly to claimants subsequent to receiving a notice that they have been accepted into the NDIS. Insurers

and accident compensation schemes operating within the pilot sites may be affected as early as June 2013 when the sites are launched.

At this stage, we recommend you review your portfolio for existing claimants that may be eligible for the scheme, particularly if they reside in one of the pilot launch sites.

The NDIS will not remove liability for care and support from the underlying compensation payer or insurer.

Important considerations for Insurers and Accident Compensation schemes

Timing, funding and states included:

The pilot sites kick off from June 2013, with an anticipated start date of 2018 for the full scheme; however to date only NSW, QLD and ACT have signed up. The Scheme involves combined state and Commonwealth funding, and separate deals need to be agreed upon with the remaining states and territories.

Jurisdictional variation: In addition to the possibility that not all states sign up, the draft bill leaves open the possibility of varying levels of coverage across those states that do participate. All this adds up to potential jurisdictional differences that could create administrative headaches for insurers operating across multiple jurisdictions.

Opt-in scheme: A key difference between the NDIS and existing lifetime care schemes, such as the one for motor vehicle injuries in NSW, is that it will operate on an opt-in basis for the participant. An insurer will not be able to require a potential claimant to participate in the NDIS.

Eligibility: The draft bill requires that functional capacity is “substantially” reduced. The definition of “substantially” has been left to the yet-to-be-drafted subordinate NDIS rules.

Influence on care costs: In the short-to-medium term, the NDIS will cause a large strain on the existing carer network. Coupled with the recent Fair Work Australia ruling on equal remuneration for social and community workers, this could see sharply rising costs for attendant care services that is likely to lead to a period of superimposed inflation.

Reduced ability to actively manage serious claims: The draft bill anticipates that all existing liability remains with insurers. This creates considerable uncertainty over the future scope for active claims management for those claimants that are receiving NDIS supports.

Increased frequency of common law action: Receipt of a common law award does not preclude an individual from obtaining NDIS funding at a later date. Coupled with the potential for the Agency

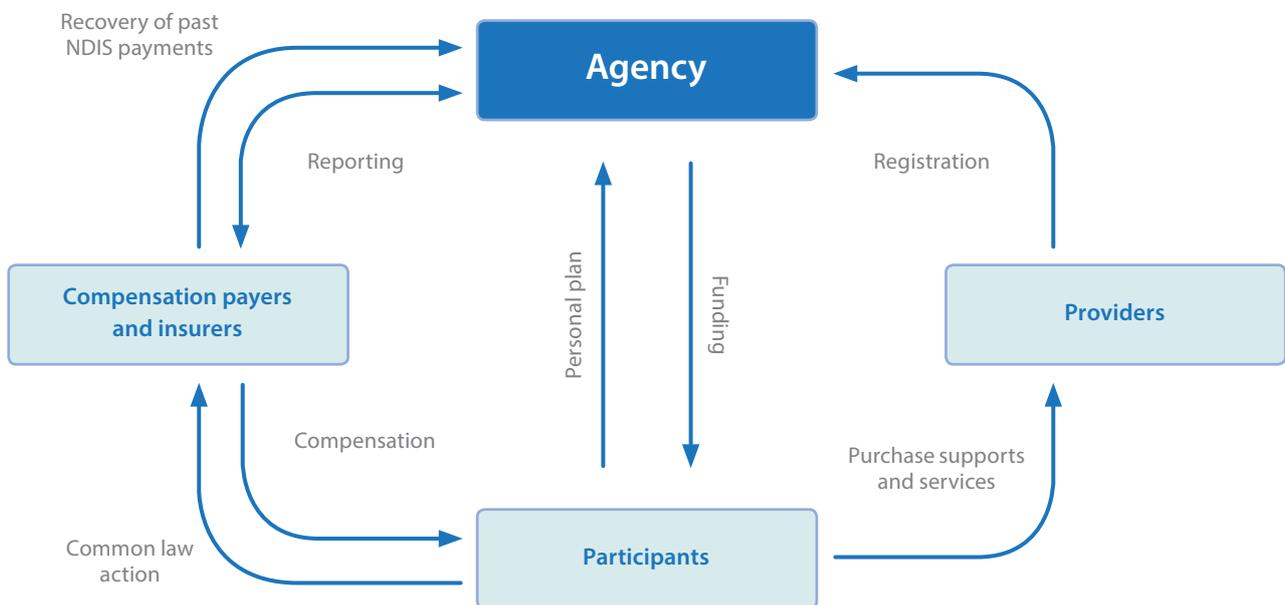
to compel a participant to seek common law compensation, this may lead to an increased frequency of court proceedings.

Frequency of recovery notices: The bill allows the Agency to seek recoveries for past NDIS payments from compensation payers and insurers; however a limit on the number or frequency of notices has not been defined.

Interaction with the National Injury Insurance Scheme (NIIS): The recent announcement of a board for the development of the NIIS suggests it is indeed going ahead. Based on the Productivity Commission report, it may be launched as early as 2015 for motor vehicle accidents with other accident types being included from 2016. Since the NIIS is intended to specifically fund severe and profound disabilities arising from accidents, its introduction will have a direct and material impact on insurers and compensation schemes, who may be expected to contribute substantially to its funding.



The NDIS: in detail



How did we get here?

The draft bill for the establishment of the NDIS is the culmination of many years of discussion, research and concerted lobbying by the disability sector.

Productivity Commission report

The 2011 Productivity Commission report recommended the formation of two complementary schemes:

- *The National Disability Insurance Scheme (NDIS)*. This scheme would provide no-fault funding for the care and support of disabled Australians.

- *The National Injury Insurance Scheme (NIIS)*. This scheme would provide no-fault funding for the lifetime care and support of severely and profoundly disabled Australians, where the disablement is the result of a catastrophic injury. This includes work related injuries, motor injuries, medical injuries and general injuries.

Work on the NIIS continues, although to date it has been much less prominent than the NDIS.

NDIS launch sites

As an initial stage in rolling out a full NDIS, the Productivity Commission report recommended a limited roll out of the Scheme across several pilot sites. After some jostling between the states and Commonwealth, five launch sites were announced in August 2012, with the intention of going live in June 2013. The sites are summarised below.

State	Coverage
NSW	All eligible people in the Hunter region
VIC	All eligible people in the Barwon region
SA	All eligible people across the state aged 0 – 14
TAS	All eligible people across the state aged 15 – 24
ACT	All eligible people across the territory

Who are the participants of the Scheme?

The draft legislation outlines comprehensive NDIS eligibility criteria across three key areas:

- **Age:** Applicant must be under age 65 when access is requested.
- **Residency:** The applicant must be an Australian resident or be the holder of a specified visa and satisfy any other residence requirements as specified by the NDIS rules.
- **Disability:** A person must have substantially reduced functional capacity arising from one or more conditions that are likely to be permanent, affect the person's ability for social and economic participation and result in support needs that are likely to continue for the person's lifetime.

The legislation also establishes the ability to provide early intervention supports to people where these are deemed to be likely to reduce future needs.

The disability criterion is understandably the most complicated. The definition in the draft legislation refers to "substantially reduced functional capacity", without describing what "substantial" is intended to encompass — leaving such details to the subordinate NDIS rules. In short, it is likely to take some time to ascertain clearly who is and isn't eligible.

What will be covered?

One of the overriding principles of the NDIS is *choice*. Individual participants will be able to make choices about the provision of care and will hold the purse strings. Participants or their nominee will have a large amount of freedom both in selecting services and service providers.

The draft NDIS legislation is relatively broad in respect of the types of support and assistance to be covered, in that it simply identifies **reasonable and necessary** supports whereby the Agency is satisfied that the support is appropriate.

The NDIS is not intended to provide income replacement or medical services provided by Medicare. Based on the earlier Productivity Commission report, supports may include:

- Aids and appliances
- Home and vehicle modifications
- Personal and respite care
- Domestic assistance and transport assistance
- Orientation and mobility training
- Supported employment services and specialist transition to work programs
- Local area coordination and development
- Guide dogs and assistance dogs
- Whole of life personal planning services

The legislation however does not allow for funding in respect of legal assistance, which has drawn some criticism. Given the bill enables the Agency to *require* a participant to seek compensation from other parties if they have not already done so, this component of the legislation will be a focus of the Senate inquiry.

How will the NDIS affect existing compensation?

The legislation as it stands does not suggest the NDIS will fund supports or services that are currently funded via other sources. In particular, the funding provided will take into account what is "reasonable" to expect families, carers, informal networks or the community to provide. It also provides scope for the NDIS rules to take into account certain lump sum and compensation payments in determining the amount of NDIS funding.

In essence, the NDIS funding is **not anticipated to replace any existing avenues** for support or compensation. The strongest expression of this is the requirement within the legislation for a person to take "reasonable" actions where they may be entitled to compensation from other parties in respect of a personal injury. Failure to take reasonable action will result in NDIS funding being suspended.

The funding provided will take into account what is "reasonable" to expect families, carers, informal networks or the community to provide.

What is the impact on disability service providers?

Currently, the provision of disability care in most states is block funded, whereby funding is provided directly from the government to providers to deliver support services. Under the NDIS, this will shift towards an individualised funding

model, in line with participants' personal plans. To an extent, this has already been happening in some states, notably WA and QLD; however it will be much more comprehensive under the NDIS.

Providers of supports and services will need to be registered with the Agency, which will establish and enforce suitable registration criteria. NDIS participants will be required to use registered providers.

Where are the various state governments at?

Subsequent to the introduction of the bill, New South Wales and Queensland have signed agreements with the Commonwealth to co-fund a full NDIS roll-out from 2018, with the ACT planning a full roll-out in 2014.

Whilst other states are playing coy at the moment and the Federal opposition's rhetoric is to only support the full roll-out when the budget is back in "strong" surplus, the discussion and debate around the introduction of the NDIS has shifted from a question of "if" to one of "when and in what form?".

State	Position
NSW	<ul style="list-style-type: none"> Participating in initial NDIS roll-out covering the Hunter region. Signed a deal with the Commonwealth for full NDIS from 2018/19 — funding approx. \$3b for each of Commonwealth and NSW.
VIC	<ul style="list-style-type: none"> First stage roll-out in Barwon area from 1 July 2013. Has resisted signing up to the full scheme thus far
QLD	<ul style="list-style-type: none"> Despite early protestations, the QLD government has become the second state to sign up to co-funding the NDIS.
SA	<ul style="list-style-type: none"> Pilot launch of NDIS across SA for three years from July 2013, covering children aged 0-14.
WA	<ul style="list-style-type: none"> Reluctant to sign up to the NDIS. As of November 2012, WA have launched a three-year trial of "My way", which is a reform of disability services to focus on individual needs and plans. As such, it has much in common with the NDIS framework. This is a key item surrounding WA's reluctance to sign on to a full NDIS.
TAS	<ul style="list-style-type: none"> Pilot launch of NDIS to cover eligible adolescents aged 15 to 24. Reluctant to sign up to the full NDIS at this stage.
ACT	<ul style="list-style-type: none"> Pilot launch to cover all of ACT from July 2013. Signed on to full scheme, commencing 2014.
NT	<ul style="list-style-type: none"> Did not apply to be a launch location

Where to from here?

- February 2013**
 Report from COAG inquiry into draft legislation
- 13 March 2013**
 Report from Senate inquiry into draft legislation
- July 2013**
 Launch sites go live
- End 2013**
 Tentative date for roll-out of NIIS for motor vehicle accidents
- July 2014**
 Projected start date for roll out of NDIS in ACT
- 2015**
 Tentative start date for NIIS
- 2018**
 Projected start date for full NDIS

As separate deals need to be agreed with each state, the draft legislation leaves open the possibility of incomplete and varying levels of coverage across the country.

So, in short...

All indications are that the NDIS will be progressively rolled out over the next few years, although coverage may vary across states. The current draft NDIS legislation does not remove any liability from insurers and schemes nor does it directly introduce extra liability; however procedural changes will need to be implemented. As an indirect effect, the rollout of the NDIS could see sharply rising costs for attendant care services that would lead to a period of superimposed inflation.

With a Senate and COAG inquiry ongoing and the NDIS still being designed, we expect there to be a lot of developments in this area over the coming months. We are keeping close tabs on these and will keep you informed of major changes.

For more details

- [Draft bill and explanatory memoranda](#)
- [Regulatory impact statement](#)
- [Senate Inquiry](#)
- [Official NDIS website](#)
- [Every Australian Counts](#)

Questions or feedback? Contact us.



Samantha Fuller

Samantha.Fuller@taylorfry.com.au

(02) 9249 2925 | Sydney



Jonathan Cohen

Jonathan.Cohen@taylorfry.com.au

(02) 9249 2930 | Sydney



Adrian Gould

Adrian.Gould@taylorfry.com.au

(02) 9249 2902 | Sydney

Sydney

Ph: +61 2 9249 2900 | Fax: +61 2 9249 2999

Level 11, 55 Clarence Street
Sydney NSW 2000 Australia

sydooffice@taylorfry.com.au

Melbourne

Ph: +61 3 9658 2333 | Fax: +61 3 9658 2344

Level 6, 52 Collins Street
Melbourne VIC 3000 Australia

melbooffice@taylorfry.com.au



www.taylorfry.com.au

Disclaimer

This newsletter is general in nature and provided for information purposes only. It does not constitute actuarial or investment advice. In certain cases the discussion is based on draft and incomplete information from the Australian Federal and State governments and the Productivity Commission that is subject to change. We recommend that you refer to those organisations for updated information, and discuss your specific circumstances with your appointed actuary, or the Taylor Fry contacts above.