

# **National Injury Insurance Scheme (NIIS)**

## **Background Brief for Safe Work Australia (SWA)**

### **May 2013**

#### **Purpose of brief**

The purpose of this brief is to provide background information about the NIIS to guide SWA's thinking on the development of minimum benchmarks for lifetime care and support for catastrophic injuries caused by workplace accidents.

#### **Productivity Commission (PC) inquiry into Disability Care and Support**

In 2011 the PC found that the current disability support system is underfunded, unfair, fragmented and inefficient. The PC recommended the establishment of two schemes, the National Disability Insurance Scheme (NDIS) and the NIIS.

DisabilityCare Australia, formerly known as the NDIS, is intended to be a national scheme that provides lifetime care and support for all Australians with significant and permanent disability. The NIIS is envisaged as a federated model of separate, state-based, no-fault schemes providing lifetime care and support to people who newly acquire a catastrophic injury from an accident. The intention is that by covering both disabilities and catastrophic injuries, no eligible individual in need of support will fall through the gaps.

#### **PC recommendations on the NIIS**

The PC recommended that the NIIS comprise a system of premium-funded, minimum care and support arrangements that include reasonable and necessary attendant care services, medical hospital treatment and rehabilitation services, home and vehicle modifications, aids and appliances, educational support, vocational and social rehabilitation and domestic assistance.

All causes of catastrophic injury would be covered, including those related to motor vehicle, medical, workplace, and general accidents (including occurring in the home). Coverage would be provided on a no-fault basis and would relate to new catastrophic cases estimated at around 900-1,000 people per year. At maturity, the PC projected the NIIS would cover around 30,000 people.

#### **Development of the NIIS for workplace accidents**

Clause 114 of the Council of Australian Governments Intergovernmental Agreement on NDIS Launch (IGA) provides that all jurisdictions endeavour to agree minimum benchmarks to provide no-fault lifetime care and support for people who are catastrophically injured through workplace accidents, by commencement of the NDIS full scheme.

This is reinforced by the Heads of Agreement between the Commonwealth and NSW for NDIS full scheme in NSW ('the HoA'), which indicates that a NIIS for workplace accidents could be in place as early as July 2016 when NSW commences its transition to NDIS full scheme.

The HoA further provides that NSW arrangements for work cover insurance will be considered to satisfy any minimum standards that would be required for all States and Territories participating in the NDIS, unless amended by agreement through the Standing Council of Federal Financial Relations.

Clause 115 of the IGA notes that the Commonwealth's position is that on commencement of the NDIS full scheme, individual jurisdictions will be responsible for 100 per cent of the cost of participants in the NDIS who are in the NDIS because they are not covered by an existing or new injury insurance scheme that meets the minimum benchmarks for workplace accidents.

This recognises that the manner of implementing the benchmarks may differ from jurisdiction to jurisdiction. For example, some jurisdictions may already have a scheme in place that meets all the benchmarks; other jurisdictions may develop legislation that, when passed, will meet all benchmarks; others may choose to retain limited exclusions which they would then cover by paying 100 per cent of the cost to the NDIS under the approach outlined in the IGA.

Development of the NIIS to date has been undertaken by government officials, mainly from Commonwealth and State and Territory Treasuries. The timeline developed by NIIS Senior Officials is based on the commitments in the IGA and HoA and proposes that minimum benchmarks for workplace accidents be developed by early 2015.

Minister Shorten requested that SWA undertake technical work to develop a set of minimum benchmarks for the provision of lifetime care and support for catastrophic injuries caused by workplace accidents, on a no-fault basis. This work will feed into the NIIS Senior Officials process and will assist this group to develop options for minimum benchmarks for consideration by the Standing Council on Federal Financial Relations, which has governance and decision-making power on this matter.

Areas within each jurisdiction's current workers' compensation schemes where officials may need to consider developing minimum benchmarks include:

- establishing who is covered by the NIIS for workplace accidents
  - the objective should be to ensure no-one suffering a catastrophic workplace accident falls through the cracks because of differences in the coverage of each State and Territory NIIS (e.g. because of the State in which they reside, the location of their employment or their employer, or the interface with the minimum benchmarks developed for motor vehicle injuries). Issues may include:
    - : who constitutes an 'employee' and resultantly who constitutes a 'contractor';
    - : determining what is a workplace accident; and
    - : determining which NIIS applies for an employee of a firm that operates in several jurisdictions.
- alignment of work cover schemes with relevant accident compensation schemes to ensure that there are no gaps or overlap between schemes. Issues may include:

- alignment with motor vehicle accident schemes, such as coverage for journey claims which currently vary across jurisdictions' workers' compensation schemes; and
- coverage for industries which currently have separate workers' compensation schemes, e.g. seafarers and coal mining;
- determining which injuries are covered to ensure there is an objective injury based criteria that correlates with the need for lifetime care and support
  - while spinal cord injury and traumatic brain injury would probably be covered (having regard to the draft minimum benchmarks for motor accident), consideration needs to be given to the coverage of disease such as asbestos (arising out of employment) and to ensuring that individuals receiving long-term weekly compensation benefits who have not suffered a catastrophic injury are not automatically eligible; and
- determining the benefits, through:
  - developing consistency in coverage for lifetime care and support for catastrophic injuries. For instance, Queensland, Western Australia and Tasmania all have capped statutory benefits, which the PC considers may not cover the entire lifetime care and support costs; and
  - determining how the benefits will be provided such as service provision as opposed to a lump sum payment.

For the purpose of developing minimum benchmarks for workplace accidents, we note that schemes are managed or underwritten by governments, private insurers and private or public self-insurers.

Extracts of the PC words on workplace accidents and on implementing a no-fault approach for lifetime care and support for all catastrophic injuries are at [Attachment A](#).

### **Background on the development of the NIIS for motor vehicle accidents**

The development of minimum benchmarks for motor vehicle accidents took place over 12 months from March 2012.

A motor vehicle sub-group of the NIIS Senior Officials, comprised of Commonwealth and State and Territory officials, developed the minimum standards for a federated NIIS for catastrophic injuries arising from motor vehicle accidents, which is modelled closely on the NSW scheme. The benchmarks were first reviewed by NIIS Senior Officials for endorsement, after which they were taken to the Standing Council on Federal Financial Relations. Time constraints meant that State Cabinets did not have the opportunity to fully review the benchmarks before Standing Council.

Subsequently, Minister Shorten wrote to State and Territory governments in early 2013, seeking formal agreement to the minimum benchmarks for motor vehicle accidents. The 19 April 2013 Council of Australian Governments communique notes that NSW and Victoria already meet these benchmarks, that South Australia, Tasmania and the ACT have agreed to the benchmarks, and that Queensland has agreed in-principle. The agreed minimum benchmarks are at [Attachment B](#).

## Attachment A: Extract from PC report

### Extract from PC on workplace accidents

The injury prevention gains from occupational health and safety measures means that catastrophic-level injuries are increasingly a less prevalent feature of workers' compensation schemes, with soft-tissue, muscular skeletal and work-related stress the major types of injury. It is estimated that fewer than 60 cases of catastrophic injury arise from workplace accidents across Australia each year (Walsh et al. 2005).

But the low prevalence of catastrophic workplace injury also means that current workers' compensation schemes are generally not adequately equipped to support the lifelong needs of people with catastrophic injury. Some jurisdictions address this by transferring such cases to their no-fault motor vehicle accident scheme (in effect, catastrophic claims are contracted out to a different scheme, with funding attached). Such an arrangement exists between Victoria's Workcover and the TAC. The Commission proposes that other governments consider adopting this type of arrangement. Importantly, claims would be financed from workcover premiums, maintaining efficient incentives for injury prevention in workplaces and, where possible, vocational rehabilitation.

Some participants raised concerns about the NIIS potentially leading to the dilution or removal of common law rights. For example, WorkCover Tasmania:

... is concerned to ensure that any introduction of a national scheme does not disadvantage the catastrophically injured by reducing or removing entitlements that may currently exist under workers compensation arrangements (sub. DR 972)

The Commission is not proposing that cover of lifetime care and support under the NIIS should reduce entitlements. In fact, the opposite is more likely, to the extent that solicitor-client legal costs (paid from the injured person's damages) reduce the funds available to the injured party and:

... there is often a substantial degree of contributory negligence by the employee that results in damages awarded being reduced. (sub. 600)

In some jurisdictions, including Western Australia, Queensland and Tasmania, adequate funding of catastrophic-level workplace injuries would require legislative change. This is because present arrangements:

- are not sufficiently funded to provide lifetime care and support for those unable to prove the fault of their employer
- provide generally inadequate funding relative to what would otherwise be needed to fund claims in an NIIS setting (mainly due to limitations on statutory benefits, legal costs paid directly from a plaintiff's damages, reductions for contributory negligence and high discount rates).

In particular, under a no-fault approach, the head of damage associated with compensation for future care needs would need to be removed, and additional premium revenue sought to meet the

lifetime care costs of additional no-fault catastrophic claims under the NIS. In the three jurisdictions requiring additional funding:

- it is estimated that approximately double the current allocation of premium revenue (paid as common law lump sum damages) would be necessary to provide no-fault lifetime care and support
- overall, the additional impost would be very modest — estimated in 2005 at around 0.5 per cent of total premiums currently collected (Walsh et al, p. 56).

Acknowledging the inadequacies of Tasmania's present arrangements for dealing with catastrophic workplace injuries, the Tasmanian Government has indicated:

Coverage of catastrophic injury under a national scheme would seem to offer a more equitable outcome for the very few cases of catastrophic injury (around one per year in Tasmania). (sub. 600, p. 6)

A possibility to be investigated for the management of lifetime care and support needs for catastrophic workplace injuries while in Commonwealth employment might be co-ordination through the Department of Veteran's Affairs, since they have established expertise in these matters. Alternatively, care and support needs could be contracted to the relevant NIS scheme in the jurisdiction in which the person resides.

With the availability of comprehensive care and support through the NDIS, it is sensible for governments to move away from lump sum payments for lifetime care and support, thereby managing the potential for 'double dipping' into the NDIS in the not uncommon circumstance that a financial lump sum proves insufficient or is mismanaged (chapter 17).

Under the Commission's proposals, existing workcover schemes would continue to source premium revenue to cover catastrophic workplace injuries and manage non-catastrophic claims. Injury prevention programs would remain unaltered, and existing workcover schemes could continue to be involved in facilitating an early return to work where feasible. The only difference would be that the care and support of catastrophic claims would be provided by the NIS under a contractual arrangement with the relevant workcover scheme.

### **Extract from PC on implementing a no-fault approach for lifetime care and support for all catastrophic injuries**

Under the model proposed by the Commission, scheme management, operation and financing would be jurisdictionally-based. A coordinated federated approach would be critical, however, to ensure that the level of benefits and the standard of care provided by individual schemes were subject to minimum reasonable benchmarks.

State-based schemes should draw on the best arrangements already in place around Australia, and extend their scope so that all catastrophic injuries are insured. This would include motor vehicle accidents, medical treatment, criminal injury and general accidents occurring within the community

or at home. A person could acquire an identical disability from an accident in any of these contexts, and as such, there is a good rationale for equal insurance and access to care and supports.

Existing institutions like the Victorian TAC and NSW Lifetime Care and Support Authority (LTCSA) should expand to include the management of other catastrophic injuries in those jurisdictions. Tasmania and the Northern Territory could also build on their existing no-fault structures for motor vehicle accidents. As a small jurisdiction — with few and unpredictable numbers of catastrophic injuries — the Australian Capital Territory could consider contracting out the management of catastrophic injuries to another serious injury scheme, using premium income as the funding source. Queensland, Western Australia and South Australia would need to either establish a new body to administer their scheme or significantly expand the role and functions of an existing structure, such as the Motor Accidents Insurance Commission in Queensland.

## Attachment B: Minimum benchmarks for motor vehicle accidents

The minimum benchmarks for which the Minister has sought agreement are set out below.

*Who is covered by a NIIS for motor vehicle accidents?*

At a minimum, jurisdictions should have eligibility rules which include people who suffer the following catastrophic traumatic injuries in motor vehicle accidents:

1. Spinal cord injury – based on evidence of a permanent neurological deficit (principally paraplegia and quadriplegia).
2. Traumatic brain injury – based on evidence of a significant brain injury which results in permanent impairments of cognitive, physical and/or psychosocial functions. A defined period of post traumatic amnesia plus a Functional Independence Measure (FIM)<sup>1</sup> at five or less, or two points less than the age appropriate norm (or equivalent where other assessment tools are used), would be required.
3. Multiple amputations of the upper and/or lower extremities or single amputations involving forequarter amputation or shoulder disarticulation, hindquarter amputation, hip disarticulation or “short” transfemoral amputation involving the loss of 65% or more of the length of the femur.
4. Burns – full thickness burns greater than 40 per cent of the total body surface area (or greater than 30 per cent in children under 16 years) or full thickness burns to the hands face or genital area, or inhalation burns causing long term respiratory impairment, plus a FIM score at five or less, or two points less than the age norm (or equivalent where other assessment tools are used); or
5. Permanent traumatic blindness, based on the legal definition of blindness.

*What is the scope of motor vehicle accidents for the first stage of the NIIS?*

Each jurisdiction’s NIIS should cover injuries which arise from accidents which:

- involve at least one registerable vehicle.
- occur on a public road or other locations where registered vehicles are commonly driven including driveways and car parks, and areas adjacent to roads such as nature strips, footpaths and other road related areas.
- are the result of the driving of the vehicle, the vehicle running out of control, action taking to avoid a collision with the vehicle, or a collision with the vehicle while it was stationary, and includes injuries to pedestrians and cyclists injured as a result of such incidents.

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<sup>1</sup> The FIM is a basic indicator of severity of functional limitation that uses a seven point ordinal scale for each of 18 activities of daily living. The scale provides for the classification of individuals by their ability to carry out an activity independently, versus their need for assistance from another person or a device. If help is needed the scale assesses the degree of that need.

Jurisdictions may provide a broader scope if they desire.

For avoidance of doubt the NIIS need not as part of the first stage cover:

- Unregistered vehicles on private property such as farm vehicles.
- Unregisterable vehicles such as motor cross bikes, quad bikes, trikes, off-road or racing vehicles.
- Bicycles.
- Other modes of transport (trains, trams, waterborne craft).
- Injuries arising from organised motor sports.
- Injuries arising from acts of terrorism involving the use of a motor vehicle.

*Which jurisdiction's NIIS should provide cover?*

- At a minimum each jurisdiction's NIIS will cover people who are catastrophically injured in motor vehicle accidents which occur in that jurisdiction. Jurisdictions may, if they wish, provide broader coverage extending beyond their jurisdiction.
- State and territory NIIS schemes will establish arrangements to purchase care and support services from each other when a scheme participant resides in a different jurisdiction to that which assumes funding responsibility.
- A review will be undertaken every 5 years to assess the extent to which state and territory NIIS schemes face differential (net) financial burdens in relation to liability for services provided to non-residents.
- In all cases the jurisdiction assuming financial responsibility should retain the right to seek recovery from the CTP insurer of an interstate registered vehicle.

*Should there be any exclusions?*

The minimum benchmark is that exclusions be limited to persons who:

- have received a common law compensation payment in respect of their care and support needs resulting from the motor vehicle accident;
- have an existing catastrophic injury; and
- are already a participant of the NDIS in respect of the costs of care and support already being provided by the NDIS.

*What are the entitlements?*

A minimum level of entitlement in each jurisdiction's NIIS will include reasonable and necessary needs for eligible persons for the following services to the extent that they arise from the motor vehicle accident:

- medical treatment (including pharmaceutical)



- dental treatment
- rehabilitation
- ambulance transportation
- respite care
- attendant care services
- domestic assistance
- aids and appliances
- artificial members, eyes and teeth
- education and vocational training
- home and transport modification.

Individual jurisdiction's NIS may provide a broader range of services, and may also provide capacity for self-managed funding by participants where appropriate.

Entitlements will only be provided within the Commonwealth of Australia.

Reasonable and necessary supports:

- a) are designed to support the individual to achieve their goals and maximise their independence;
- b) support the individual's capacity to undertake activities of daily living to enable them to participate in the community and/or employment;
- c) are effective, and evidence informed;
- d) are value for money;
- e) reflect community expectations, including what is realistic to expect from the individual, families and carers; and
- f) are best provided through a NIS and are not more appropriately provided through other systems of service delivery and support, including services that are offered by mainstream agencies as a part of its universal service obligation to all citizens.

In determining what is reasonable and necessary the following factors should be considered:

1. Benefit to the participant – to progress or maintain the participant's recovery, management and participation.
2. Appropriateness – services provided are consistent with the participant's current medical or rehabilitation needs, are consistent with current clinical practices and are congruent with other services provided to the participant.

3. Appropriateness of the provider – service providers are qualified, readily accessible and appropriate given the participant’s age, ethnicity and other characteristics.
4. Cost effectiveness of the services – the benefits and expected outcomes outweigh the costs, the cost is comparable to those of other providers, no other services would achieve comparable outcomes and alternatives to purchasing equipment or undertaking modifications have been considered.
5. That the services provided relate to needs arising from the injury sustained in the motor vehicle accident.

*Consistent reporting standards*

That each Scheme agree to collect information in regard to the following items and report under a consistent definitional framework:

1. The number of entrants to each scheme and their characteristics (age/gender/location of service provision – i.e. metro/regional/rural);
2. The classification of injuries of entrants - Spinal injuries (including level of lesion), head injuries (moderate + severe), other severe injuries;
3. The average cost of support of scheme entrants (overall and by the agreed injury classification);
4. The average cost of care in each jurisdiction (to understand variations in the cost of attendant care and monitor trends); and
5. The amount of care per claim overall and by injury classification.

**PREPARED BY THE COMMONWEALTH TREASURY, 2 MAY 2013**