
I Expanding the scope of the NIIS

I.1 Introduction and background

The Commission has recommended a coherent national arrangement for no-fault cover of the long-term care and support needs of people experiencing catastrophic injuries (recommendation 18.1). This would replace common law arrangements for this head of damage and for this class of injuries.

In chapter 18, the Commission made further observations about the appropriate scope of the NIIS versus current common law arrangements for non-catastrophic injuries, economic losses, and pain and suffering. In that chapter, the Commission indicated that, *over the long run*:

- it considers there is a persuasive case for a no-fault insurance system to cover the care and rehabilitation costs of significant but non-catastrophic injuries’
- there may be significant gains from extending no-fault insurance arrangements to the other heads of damage. For example, this could involve compensation for pain and suffering being limited to cases where a party suffers serious injury from the gross negligence of others, and removing access to sue for lump sum damages for income losses under the common law.

This report does *not* make any recommendations on these matters. Rather, the Commission has recommended that the advantages and disadvantages of such additional changes be thoroughly evaluated as part of an independent review of the NIIS proposed for 2020 (recommendation 18.7).

Delayed consideration of any changes in this area is prudent because:

- the most urgent change is coverage on a no-fault basis of people’s care and support needs for catastrophic injuries
- the shift to the proposed NIIS is a significant one — with new agencies, agreements between jurisdictions, the arrangement of new funding sources and coverage of a much wider group of people. The rapid expansion of the NIIS to cover the even larger populations with significant, rather than catastrophic

injuries, and coverage of the other heads of damage would involve much more extensive change, much greater costs and many practical obstacles

- the introduction of the a no-fault scheme for long-term care and support for catastrophic injuries may address many of the concerns about incentives for early rehabilitation under common law arrangements
- as shown in responses to the Ipp review, there is a wide diversity of views on the desirability and form of changes to litigation arrangements.¹ Given its wider scope, this inquiry cannot address all the complexities associated with changes to common law arrangements for compensation of personal injury. Accordingly, extending the NIIS (beyond no-fault arrangements for care and support) would desirably be tested in a much more focused inquiry, hence the proposed 2020 review.

In addition to this major focus, this appendix considers two other matters.

- As discussed briefly in chapter 17, the choice of discount rates for determining lump sum payments under common law arrangements can significantly affect the capacity of people to meet their future care and support needs.
- This appendix provides some miscellaneous detail on the nature and visibility of legal costs, as supporting material to chapters 17 and 18 (section I.5).

It should be emphasised that the proposal to review the ‘other heads of damage’ in chapter 18, and the evidence and arguments underpinning judgments in this appendix, only relate to personal injuries stemming from most kinds of accidents. *They explicitly exclude personal injuries covered by workers compensation arrangements, and common law arrangements for seeking redress for product failures (product liability).*

I.2 Borderline cases of catastrophic injury

Chapter 18 proposed that, at least until the 2020 review, a two-staged assessment of a person’s participation in the NIIS take place. This would distinguish between a participant’s interim (say up to two years post accident) and long-term participation in the NIIS and, hence:

- limits the potential for adverse consequences from any classification errors in determining a catastrophic injury, especially for suspected moderate to severe brain injury, where the extent of injury and scope for recovery is initially uncertain

¹ Peter Cane outlines the diversity of views (2003, ‘Reforming Tort Law in Australia: a personal perspective’, *Melbourne University Law Review*, vol. 27, no. 3)

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- enables cost-effective early interventions that reduce the long-term costs of injury management and duration of recovery
 - aligns with the approach either explicitly or implicitly adopted in existing no-fault motor accident schemes, including the NSW LTCSA and the Victorian TAC,

In comparison to the continuing care costs of permanent scheme participants with catastrophic injuries, providing interim access to services and supports for cases at the margin need not be costly, if managed appropriately. In particular, given the expectation of more significant recovery and more rapid changes in service and support needs over time, it is important that:

- expectations of a client's recovery are established early to avoid a dependency on services beyond that which would be expected for the apparent level of injury. Even the labelling of services can be important to condition expectations of short-term versus long-term reliance
- any non-injury related impacts on a client's recovery and rehabilitation are identified early and responded to appropriately. Objective monitoring of recovery and comparison with 'normal' or 'expected' progress can help in this respect, especially given the database that accident schemes readily accumulate. It is often found that ageing, an underlying health condition or social disadvantage can impede or delay recovery, which may require coordination across agencies of government and agreement about cost sharing
- discharge protocols are established to ensure a smooth transition to home or another appropriate living environment. Best-practice would include medical, social and vocational rehabilitation of injury-related needs.

Estimates from the NSW LTCS scheme show:

- for each scheme participant that becomes a 'lifetime participant' (following a final determination after 2 years), another person with a traumatic brain injury may be borderline and, hence, would be suited to, at least, interim entry. But even if all borderline cases (approximately 90 cases) were eligible beyond two years, it is reasonable to expect that scheme costs would increase by less than 10 per cent
- around 100 cases per year would involve less serious TBI cases, and would be at the outer borderline (at most, accessing the scheme on an interim basis). Yet, even if the whole of this group were to enter the scheme for life, costs of the scheme would only increase by a further 10 per cent.

This reflects the significant differences in care and support needs (and costs) for different level injuries, including how care and support needs can change dramatically over time depending on the extent of recovery and adjustment.

The Commission's estimates of costs for the NDIS tell a similar story. As outlined in chapter 16, a broadening of NDIS coverage to include people with relatively lower care and support needs increases the number of people in the scheme by nearly 30 per cent, but only increases the overall cost by 4 per cent.²

In sum, the costs of including borderline cases are unlikely to significantly raise the costs of a scheme's liabilities; principally because care needs are lower and likely to decrease overtime (with needs tailing off as the extent of recovery and adjustment to the injury improves).

Over the long haul, should there be an extension of the NIIS to cover significant injuries?

Chapter 18 proposed that there is a persuasive case for a no-fault insurance system to cover the care and rehabilitation costs of significant but non-catastrophic injuries. This builds on the case presented above for 'borderline cases', but additionally reflects that:

- the appropriate duration of rehabilitation therapies, care and support would prevent delayed or partial recovery, reducing the risk of further injury, or exacerbation of the original injury
- the potential for savings in future liabilities and social welfare costs by providing timely short-term support for relatively minor injuries. In the absence of such support, people's social and economic participation rates would often fall, which can become difficult and costly to reverse.

That said, the NIIS would not cover non-serious accidental injuries, and health care costs would generally be excluded. This separation of functions recognises the appropriate roles of the health system and the NIIS. An exception would be specific injuries where the coordination of acute care, and potentially the creation of specialist facilities, would reduce the future liabilities of the insurer. Similarly, because existing workcover schemes offer no-fault care and support for all non-catastrophic injuries, the NIIS should not expand to cover these.

² In practice, the increase in cost is likely to be higher as such claims would have a relatively higher administrative cost component associated with them. Even still, the cost impact would still be minor.

1.3 Other heads of damage

People suffering a significant injury will often face reduced earnings while they are away from work, and some will never work again, or only be able to work in a lower paid job. Moreover, injury often involves pain and suffering.

The current situation is that most claims for pain and suffering are made either through the common law or, in no-fault schemes, through statutory lump sums based on whole person impairment. In addition, taxpayer-funded schemes for compensation of victims of crime include some (capped) payments for pain and suffering.

On the income side, current Australian arrangements are more complex and sometimes overlapping:

- At the minimum, the Australian Government provides social welfare, such as sickness benefits and the Disability Support Pension — and these are available regardless of the source of the disability (but subject to means tests). In effect, safety net arrangements represent a basic no-fault system of compensation for income loss.
- People can purchase voluntary private income protection insurance, which provides cover on a mostly non-fault basis.
- Injured people who are able to identify an at-fault first party may use the common law.
- Victoria and Tasmania include some compensation through their statutory motor vehicle accident schemes for income losses on a no-fault basis, but do not extinguish the right of people to make common law claims. In most jurisdictions this is also the arrangement that exists under workers' compensation schemes.

New Zealand's ACC goes further and provides payments for income loss through the scheme alone, extinguishing the right for common law claims in this area.

No single approach, or combination of them is perfect. Nevertheless, past Commission work (2004) and other studies and authors point to significant drawbacks of the common law as a desirable compensation mechanism for pain and suffering and income loss.³

- It can discourage early and effective rehabilitation.

³ Luntz 2002 and 2007; Atiyah 1997; Negligence Review Panel 2002 (Ipp Report); Cane 2006 and 2007; Woodhouse 1967 and 1974; NSW Parliamentary Inquiry into Personal Injury Compensation Law 2005; Niemeyer 2004; Di Mauro 2002; Kontorovich 2001; Ison 1994.

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- It involves considerable frictional costs and long delay through the litigation process (chapter 17).
 - Lumps sums may not be sufficient to meet people's future income needs and can involve double-dipping through the social security system.
 - People unable to identify an at-fault party have no coverage (other than through private insurance or the safety net).
 - The negligent party does not usually fund payments for compensation under the common law. Rather the payments are funded by mandatory (or effectively) mandatory insurance. Given this, the effects of the common law on incentives for care are blunted.

This is why the Commission sees merit in re-considering the future scope and place of the common law for compensation arising from personal injury. However, the issues are very complex and contested.⁴ Moreover, it needs to be recognised that common law arrangements have some benefits too — the 'fault' principle often aligns with community expectations of justice, legal 'rights' are perceived as less vulnerable to political control, damages can take into account individual needs and circumstances, lump sums can encourage independence and do not affect work incentives once the case resolves. For these reasons, and in certain contexts, common law arrangements for compensating injured parties have considerable public support. For instance, there appears to be strong public support for compensation of people who are the innocent victims of highly negligent or criminal behaviour.

The review in 2020 should consider common law arrangements in relation to their impacts on the NIIS. One important aspect of this will be to gauge the extent to which the ability of people to make common law claims for pain and suffering and economic loss frustrate the goals of the NIIS to maximise incentives for early rehabilitation and the greatest possible social participation.

1.4 The application of a discount rate

Under common law arrangements, courts typically award compensation as a one-off lump sum. This includes damages for the costs of care over a person's life, economic losses, and pain and suffering. Courts apply a 'discount' rate to the stream of expected future costs to account for the financial returns from receiving money in advance of the time when many expenses are actually incurred. If awards were not

⁴ Wagner 2006; Howell 2004; Lytton, Rabin and Schuck 2010; Spearing and Connely 2010; sub. 392; sub. 375; sub. 409; sub. 305.

discounted, the real investment earnings on a plaintiff's lump sum would represent a windfall to the injured person, but an excess cost for premium payers.

The actual discount rates applied to a court-awarded lump sum are statutorily defined rather than empirically based, and vary according to the relevant state or territory and insurance arrangement in place (table I.1). Accordingly, there can be differences between the rates predicted from market circumstances and those stipulated in law.

Table I.1 Statutory discount rates
Before and after reforms to civil liability insurance laws in each jurisdiction

<i>Jurisdiction</i>	<i>Professional and public liability under civil liability laws</i>		<i>Workers' compensation</i>	<i>Transport accidents</i>
	<i>before</i>	<i>after</i>		
New South Wales	3	5	5	5
Victoria	3	5	6	6
Queensland	3	5	5	5
Western Australia	6	6	6	6
South Australia	3	5	n.a	5
Tasmania	7	5	3	5
Australian Capital Territory	3	3	3	3 ^a
Northern Territory	5	5	n.a	6

n.a not applicable ^a A rate of 5 per cent is under consideration by parliament, as proposed in the Road Transport (Third Party Insurance) Amendment Bill 2011.

Source: Australian Government (2004, p. 93); Cumpston Sarjeant (2008); Plover and Sarjeant (2010, p. 3).

Those differences have implications for the value of lump sum payments (table I.2). In particular, for lump sums intended to provide benefits running into the future, using a statutory rate in excess of the economic rate, means that funds will not be sufficient to provide those benefits.

This is of particular concern when the lump sums are required to meet the future care and support needs of people experiencing enduring serious and catastrophic injuries. For example, using the same benefit stream and 4 percentage point gap, as described above, the lump sum required to meet 35 years of care needs would be short by more than 40 per cent of the amount actually required. Indeed, people would run out of funds half way through the 35 year period. As observed by the Lord Chancellor, Irvine of Lairg:

... it is in the context of larger awards, intended to cover longer periods, that there is the greatest risk of serious discrepancies between the level of compensation and the actual losses incurred if the discount rate set is not appropriate, I have had this type of award particularly in mind when considering the level at which the discount rate should be set. (27 July 2001)

One of the advantages and rationales for no-fault lifetime care and support schemes for catastrophic injury is that this issue does not affect them because people's lifetime care and support needs are met from scheme finances as those costs arise. The investment risks are borne by the scheme itself. Accordingly, the Commission's proposal to introduce no-fault lifetime care and support for all catastrophic injuries (recommendation 18.1) means that much of the heat will be taken out of the issue of discount rate gaps.

Table I.2 An illustration of the impacts of discount rates^a

<i>Court discount rate (%)</i>	<i>Lump sum(\$)</i>	<i>Difference to amount if true discount rate=3%</i>	<i>Percentage variation from the optimal amount</i>	<i>Full years of benefits provided</i>
	\$	\$	%	years
35 year period				
3	1 645 914	0	0.0	35
4	1 413 441	-232 473	-14.1	28
5	1 226 189	-419 725	-25.5	24
6	1 074 021	-571 893	-34.7	20
7	949 275	-696 639	-42.3	18
2 year period				
3	118 008	0	0	2
4	116 347	-1 661	-1.4	1
5	114 728	-3 280	-2.8	1
6	113 148	-4 860	-4.1	1
7	111 607	-6 401	-5.4	1

^a The estimates are based on the assumption that an injured person gets care and support of 30 hours a week at \$40 per hour, with prices rising by 3.5 per cent per year to keep up with inflation of 2 per cent and real wage growth of 1.5 per cent. The actual, rather than court-determined, nominal discount rate (or the risk-free investment rate) is assumed to be 3 per cent per annum. It is assumed the person lives for 35 years after the initial award of compensation. It is then possible to calculate the court-determined lump sum that, at the court-approved discount rate is able to finance the stream of future benefits (to meet care and support needs or income requirements). These are shown as the column 'Lump sum'. The world and the court are different things, and what the court suggests is the future real risk-free investment return and the actual return can often be very different amounts. If the true real return was 3 per cent per annum, the lump sum is equal to \$1.6 million (the 'optimal' amount used to calculate the variations shown in columns three and four). Accordingly, it is possible to calculate the gap between the awarded lump sum and the true amount needed to finance future needs. If court set high discount rates, the lump sums are too small. The corollary is that for high court-determined discount rates, people get fewer years of benefits than if lower ones are used. The years shown are the number of full years funded by the lump sum.

Source: Productivity Commission calculations.

I.5 Consumer issues and legal costs

There are potential imbalances in the negotiating power of consumers of personal injury legal services. In particular, injured plaintiffs usually use personal injury legal services only once in their life, which contrasts with the insurer (defendant),

who repeatedly consumes these services and usually maintains in-house expertise. There are also significant information asymmetries between a client and their legal representation in most legal matters, but especially for plaintiffs in personal injury cases.

Lawyers' commitments to a professional code of conduct provide one source of assurance to consumers. However, apart from that, consumers have relatively little capacity for informed decision-making in the system because legal services can be complex, the methods of charging can be even more complex than the services themselves, and the visibility of fees and charges can be low (hence dampening competitive efficiencies).

Recognising these information imbalances, various consumer protections for the disclosure of legal fees and charges have been imposed, especially in litigated personal injury matters. Legislated requirements mainly attempt to increase transparency by requiring early disclosure about legal charges to reduce later disagreements. The requirements aim to mitigate information asymmetries between lawyers and clients, and may include details about their intended delivery of services, fees and the basis for billing (whether on a lump sum or hourly rate basis or according to another method), the frequency of communication between the lawyer and client, complaint handling options, and other terms of their retainers. Requirements for legal practitioners to disclose information to their clients varies across jurisdictions, and some jurisdictions and statutory schemes specifically require adherence to scale or fixed cost models of charging.

Existing statutory requirements for disclosure and access to independent legal cost assessment in the event of a dispute are likely to have assisted some consumers of legal services. But these measures have probably not empowered consumers more generally. This raises the issue of whether the requirements are sufficient to ensure full accountability of, and discipline on, the practices and charges adopted by many plaintiff lawyers.

It is difficult to quantify the effects of low transparency, but it is likely that they tend to inflate prices for legal services:

- Insufficient disclosure could lead to instances of excessive charging. Currently, an injured party would only discover instances of this nature if they referred the matter to a cost assessor (who can assess the reasonableness of charges).
- Negotiation by informed parties tends to lower legal fees — indicative of bargaining power associated with knowledge. For example, the Victorian Senior Master's Office negotiates solicitor-client costs to achieve sizable savings for their client beneficiaries in most instances. Estimates show a 15.5 per saving on

legal costs is achieved on average, which is likely to reflect the extensive experience of the Senior Master's Office in dealing with plaintiff lawyers on behalf of their trustees and a detailed understanding of what constitutes reasonable fees and charges.

Regulation and disclosure of uplift fees

A particular concern about disclosure and methods of charging relates to uplift fees. These are success-based fees paid to the lawyer as contractually agreed between a lawyer and their client at the outset of a case. In particular, to the extent that party-party legal costs are subject to review, or calculated according to a fixed costs model, there may be a tendency to increase charges through less transparent avenues, such as increasing the proportion of solicitor-client costs covered in a no-win, no-fee cost agreement and reliance on uplift.

Maximum uplift fees are regulated in several Australian jurisdictions, and sometimes not allowed at all (for example, Western Australia).⁵ Uplift fees tend to be associated with no-win, no-fee agreements and have replaced legal aid arrangements in personal injury matters. In this way, they have increased access to litigation for injured clients and, in return, represent a premium for the legal practitioner taking on a risk and help to reinforce incentives to secure a win.

If it were possible to accurately assess the probability of losing at the outset of a case, uplift fees would increase with that probability. However, most personal injury litigation is settled out of court, with the probability of success usually factored into the Offer of Compromise that is accepted by the injured party. This means there is no clear dichotomy between success and failure, just matters of degree. Based on the information the Commission has been able to access:

- about 70 per cent of settled cases attract an uplift fee. An uplift fee is rarely waived because a strong outcome was not achieved for the client
- overall, around 28 per cent of all solicitor-client fees are accounted for by uplift fees (this figure includes the 30 per cent of cases where no uplift is applied, so in individual instances where an uplift is applied, it would represent an even higher proportion of solicitor-client fees taken from the injured party's award)

The proposed Council of Australian Governments draft Legal Profession National Laws (2010), seek to limit uplift fees to an amount no greater than 25 per cent of the

⁵ Report by the Institute of Actuaries of Australia, compiled by Trowbridge consulting and Deloitte Touche Tohmatsu, 2002, to the Insurance Issues Working Group of Heads of Treasuries. Public Liability Insurance, Practical proposals for reform.

legal costs (excluding disbursements) otherwise payable, and prohibit contingency fees calculated with respect to a percentage of the amount of any award or settlement (s.4.3.13; s.4.3.14). Contingency fees are of particular concern as they represent a cost to the client that is unrelated to the value of legal services actually provided, and the point at which a lawyer maximises their profits does not necessarily coincide with the legal effort likely to bring about an optimal settlement for the plaintiff (Dal Pont 2001, p.397).

The broad issue of appropriate transparency — how much and to what it relates — remains unresolved for the Commission. This recognises that while disclosure can be beneficial in overcoming information gaps for consumers, they also can involve compliance costs and sometimes unintended impacts (as noted in the Commission’s 2008 report into consumer policy). The Commission sought feedback on this issue in the draft report. Participants generally supported the proposal to increase transparency of legal fees and charges, and chapter 18 provides a suggested method for this to occur.