Response to correspondence regarding options for the design of Queensland's National Injury Insurance Scheme

Thank you for the opportunity to respond to the correspondence from the Under Treasurer regarding the NIIS design.

As our submission indicates, the value in the National Injury Insurance Scheme reform is to deliver no-fault lifetime care and support (LTSS) for people with catastrophic injuries, and to move away from the inefficient and costly fault based model now in place.

On that basis the Alliance favours option A for the design of the reformed Queensland CTP scheme. We do not support the retention of a common law based system for the determination of LTCS benefits for injured people in a reformed CTP scheme reflected in Option B.

As well as being more expensive, it is cumbersome and inefficient to operate 2 separate schemes and to rely on the NDIS to play a role.

Option B also entrenches the contrived distinction between injured people based on the circumstances of their injury. This distinction is at the heart of the inequity of the current scheme that results in drastically different pathways to recovery and support for injured people.

The NIIS reform was driven by the need to fix these access and equity problems and deliver lifetime certainty for injured people. By reiterating circumstance of injury as the definition of access to a reformed scheme, Option B fails to deliver this certainty and merely reinforces the 'lottery' former Prime Minister Gillard spoke of when she launched the NDIS trial sites in 2012

> "…you basically get a ticket in what can be a very cruel lottery…where access to services and support depends on your postcode or on the cause of your disability rather than on your need."[1]

[1] Lunn, Stephen. Disability scheme to battle 'cruel lottery' of care. The Australian, May 1 2012.

Similarly, the Alliance does not support any model that fails to meet the NIIS Minimum Benchmarks.

The modelling that factors in NDIS support for a person whose lump sum settlement is exhausted, further highlights the deficiencies of option B. This 'short funding' of lifetime support is a major failing of lump sum compensation systems.

To go forward with an option that leaves litigation based lump sum compensation as a core process, is counter to the NDIS/NIIS reform that the Queensland Government has signed up to.

The Alliance does not believe that the removal of the discount for contributory negligence for LTCS, proposed as part of option B, is enough to make a common law mechanism appropriate for determining lifetime support. The risks, uncertainty, time delay, stress, costs and convoluted negotiations that are the hallmarks of an adversarial process to determine settlements, are anathema to the focus on recovery and support that injured people and their families need.

We recognise that there are arguments in favour of litigation and lump sum compensation as vehicles for greater choice. But we strongly agree with the Productivity Commission's points about the failings of the this approach to compensation and support:

> Compensation outcomes from litigation typically fall well short of meeting an individual's lifetime needs. This reflects that:
>
> - court outcomes are uncertain and, by far, most people settle out of court
> - the individual's future needs are unpredictable, so that damages awarded at a given time may underestimate or overestimate people's future needs, which on a personal level can mean that sufficient care is not available for the period of time that it is needed
> - compensation is often delayed and, particularly if liability is disputed, access to early treatments and appropriate discharge from hospital to medical and social rehabilitation can be delayed and poorly coordinated
> - assumptions about discount rates play an important role in determining lump sum compensation, especially for payouts intended to last many decades, and while it is generally agreed that rates applied are too high, agreement is lacking about the 'right' discount rate
> - lump sums may not be managed appropriately to meet long term needs, and there are inherent difficulties in managing preclusion periods for access to safety-net services, especially when it may be unrealistic to refuse essential care and support needs.[2]

[2] Productivity Commission, Disability Care and Support Inquiry Report Volume 2, p 789

The Alliance is aware that the recently announced Western Australian no-fault CTP is to contain a provision for scheme participants to cash out their LTCS benefits in a lump sum and leave the scheme if they choose. However there is no public information available about how this would work in practice.

Should this provision to cash out LTCS benefits be operationalised, a very different process of costing, negotiation and settlement of compensation amounts to the current adversarial litigation process would need to be in place.

The new process would be required to ensure that that realistic lump sums for LTCS are not driven primarily by commercial or political imperatives to see the scheme 'settle well', but be based on the best lifetime valuation of the needs of participants. No doubt Queensland, like the Alliance, will be looking closely at the WA approach to this provision, which we expect to be announced in coming months.

The issue of choice in this regard is clearly important, and the Alliance expects that the individualised packaging and self management of funds by scheme participants will be a feature of the Queensland scheme under option A, as it is in the NDIS.

NDIS coverage

The Alliance notes the point made in part 6.4 of the Taylor Fry report about the uncertainty around the coverage of the NDIS. We agree that there is a degree of uncertainty about of the eventual coverage of the NDIS and how the NIIS will interface with the NDIS on a number of levels.

As lifetime care and support schemes, the NDIS and the NIIS are similar in intent in many ways. But they have particular differences when it comes to recovery and rehabilitation responsibilities.

The NDIS has, for example, been designed as a disability support scheme with an overt focus on increasing the social and economic engagement of participants. Participants in the NIIS, however, need to access competent health and rehabilitation services with certainty of funding and delivery.

In many cases, people with brain injury need these services to be delivered over substantial time periods. Slow stream rehabilitation does not routinely exist in the jurisdictions and is not part of the ambit of the NDIS at present.

Option B's reliance on the NDIS as a replacement care system for people whose settlements run out will, in fact, exclude these individuals from essential medical and allied health rehabilitation services that are not fundable under the NDIS. These specialist services are also not generally available in state health systems. This is a very real concern, particularly for people who end up with inadequate settlements that run out before the need for active rehabilitation is fully met.

Disability services cannot be substituted for rehabilitation health services, and attempting to do so structurally as is the case with the NDIS component of option B, can only drive up costs, as participant's independence would be compromised.

Because rehabilitation is such an important feature of the NIIS, the Alliance feels strongly that the certainty required by participants can only be guaranteed under option A. The building of capacity in rehabilitation services in Queensland is an important feature of the introduction of the NIIS, and is something that can benefit the health system, as well as the community in Queensland more broadly.

The Treasury Consultation Regulatory Impact Statement made reference to this problem of rehabilitation services and the NDIS, declaring:

> Another issue with relying on the NDIS is that it does not cover medical and rehabilitation costs immediately resulting from the accident, but rather covers the support costs of living with the catastrophic injury (disability). However, the true cost of an accident includes these medical and rehabilitation costs, therefore individuals will either have to pay these costs themselves, rely on jurisdiction based health systems or not access these early support services to the detriment of their long term outcomes.[3]

The limits of the NDIS in regard to rehabilitation are clearly defined in the *Council of Australian Governments (COAG) Principles to Determine the Responsibilities of the NDIS and Other Service Systems* (revised November 2015).

While active rehabilitation will form a substantial part of the claims of those with catastrophic injuries, the COAG Principles clearly state that the NDIS will not fund active rehabilitation but only cover what are called 'maintenance supports'.

> Health systems are responsible for funding time limited, recovery-oriented services and therapies (rehabilitation) aimed primarily at restoring the person's health and improving the person's functioning after a recent medical or surgical treatment intervention. This includes where treatment and rehabilitation is required episodically.
>
> The NDIS will be responsible for supports required due to the impact of a person's impairment/s on their functional capacity and their ability to undertake activities of daily living. This includes "maintenance" supports delivered or supervised by clinically trained or qualified health professionals (where the person has reached a point of stability in regard to functional capacity, prior to hospital discharge (or equivalent for other healthcare settings) and integrally linked to the care and support a person requires to live in the community and participate in education and employment. [4]

---

[3] PwC, National Injury Insurance Scheme Consultation Regulatory Impact Statement, April 2014, p8. See http://www.parliament.qld.gov.au/documents/committees/CDSDFVPC/2015/09NIIS2015/09-Cor-22Jan2016.pdf

[4] Council of Australian Governments; Principles to determine the responsibilities of the NDIS and other service systems, revised 27 November 2015, Canberra. See: https://www.coag.gov.au/node/497

Our submission to the Inquiry highlights the need to design the NIIS scheme in Queensland so that the new scheme can incorporate other injury types (particularly medical and general injury) that will be progressively brought into the no-fault NIIS. Option B will not enable this important design capacity to be enacted as quickly as option A, or at the scale required to deliver a comprehensive NIIS in Queensland by 2019.

It is also important to note that the Queensland Government has signed up to the NIIS minimum benchmarks for motor vehicle accidents and is participating in a national NIIS Working Group to fully implement the NIIS as a federated model of no-fault schemes.

This commitment is to be applauded, as is the government's work to develop the no fault motor vehicle scheme as the first step to the NIIS in Queensland.

Moving to full implementation of the NIIS by including workplace, medical and general catastrophic injuries remains a complex and politically risky undertaking, but ultimately achievable. Adopting Option B would signal a departure from a full no-fault NIIS before first base has even been reached, and appears to be inconsistent with the Queensland Government's stated policy commitments in this area.