

# *Treatment, care and support guidelines*

Submission to the National Injury Insurance  
Scheme Agency, Queensland

**1 September 2023**



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## Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

The ALA office is located on the land of the Gadigal people of the Eora Nation.

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au)

## Introduction

1. The ALA welcomes the opportunity to have input on the full set of the draft *Treatment, care and support guidelines* ('draft TCS Guidelines') released by the National Injury Insurance Scheme Agency, Queensland ('NIISQ Agency').
2. Many members of the ALA have extensive experience of long-tail schemes in other Australian jurisdictions, including schemes broadly analogous to the National Injury Insurance Scheme, Queensland ('NIISQ') scheme. ALA members have worked closely with the NIISQ scheme from its inception.
3. It is our view that long-tail schemes, generally:
  - a. Adopt a paternalistic approach to determining what is, or is not, to be funded by the scheme.
  - b. Seek to promulgate regulations, guidelines and other instruments which are asserted to be interpretive aids, that are:
    - Excessively prescriptive;
    - Conceived on in ways which are either clearly inconsistent with their enabling legislation or likely to be found by a Court to be so;
    - Designed to create an impression, especially for participants who are unrepresented by lawyers, that they have the force of law;
    - Plainly intended, if not expressed that way, to limit the payments made to participants and providers; and
    - Seen by internal staff at the agencies as being the template or rigid formula upon which decisions on funding are to be made.
  - c. Seek to quarantine key decision-making, and the information upon which those decisions are based, to staff employed by the scheme, rather than relying primarily upon independent experts such as external case managers. This internal decision-making suffers from a fundamental and irreconcilable conflict of interest: schemes have fiscal limitations, and cultural pressures from leadership are commonly directed to constraining costs.

- d. Espouse principles such as “empowerment” and participants’ “choice and control” but behave in ways which severely restrict participants’ choice of entitlements, and closely control the treatment, care, and support matrix.
  - e. Adopt a secretive approach to decision-making and rarely provide full transparency of the material upon which decisions are based, in a timely way or at all.
  - f. Take a defensive approach to participants who use lawyers to pursue improved outcomes.
4. Every person who is now, or will become a participant in the NIISQ scheme, has a unique set of needs. Typically, those needs will change and evolve throughout the NIISQ participants’ lives. To seek to adopt ‘cookie-cutter’ approaches, whether the terms of the draft TCS guidelines offend or are in tension with *National Injury Insurance Scheme (Queensland) Act 2016* (Qld) (‘the Act’) and *National Injury Insurance Scheme (Queensland) Regulation 2016* (Qld) (‘the Regulations’), or not, is a serious mistake.
- a. We note the section on page 12 about the limitations of the guidelines and that they are not to be applied inflexibly. However, the very prescriptiveness of the document makes that risk certain to manifest. The necessity and reasonableness of any form of treatment care and support will always be contextual. We regard the prescriptiveness as likely to foster more disputes between participants and NIISQ and greater distress amongst our members’ clients.
5. In addition, we consider that the length (139 pages) and content of the current draft TCS guidelines will be unhelpful to our members’ clients and their families.
- a. We note further that the NSW iCare guidelines are 132 pages long with remarkably similar content. Our members’ experience of the NSW scheme is of one which often treats participants terribly (on which there has been media attention), continues to be badly run, and suffers from all the flaws detailed in paragraph 3 subsections a. to f. of this submission (above). The NSW scheme; legislatively, behaviourally, and culturally, is one to be eschewed in Queensland, in our view.
  - b. In contrast, the Queensland CTP scheme:
    - i. Has a simple touchstone in section 51 of the *Motor Accident Insurance Act 1994* (Qld) for determining insurers’ rehabilitation obligations;

- ii. Is well-run; and
  - iii. Has developed excellent jurisprudence on rehabilitation obligations in the context of an overall very low disputation rate on rehabilitation issues.
- c. The jurisprudence on section 51 has evolved, not coincidentally, without lengthy and prescriptive guidelines. The current (2021) Motor Accident Insurance Commission (MAIC) guidelines are, at 17 pages, a fraction of the 139-page tome which is the current NISQ draft TCS Guidelines. The MAIC guidelines are commendably short on prescriptiveness and long on principles and common-sense. Most insurers in the Queensland CTP scheme have generally taken a sensible approach to their rehabilitation obligations, with the jurisprudence guiding their consideration of more complex matters. Compromise on complex matters is common and usually aided by expert reports commissioned by our member firms.

6. **The ALA's submission responds to the draft TCS Guidelines, especially in relation to:**

- a. **Treatment, care and support guideline 1: Necessary and reasonable guideline;**
- b. **Treatment, care and support guideline 2: Medical and pharmaceutical treatment;**
- c. **Treatment, care and support guideline 3: Dental treatment;**
- d. **Treatment, care and support guideline 4: Rehabilitation;**
- e. **Treatment, care and support guideline 6: Attendant care and support services;**
- f. **Treatment, care and support guideline 7: Assistive technology and consumables;**
- g. **Treatment, care and support guideline 8: Orthoses and prostheses;**
- h. **Treatment, care and support guideline 9: Vocational rehabilitation support and education support;**
- i. **Treatment, care and support guideline 10: Home modifications; and**
- j. **Manufacturer warranties.**

7. Accordingly, the balance of our submission does not include comment on every guideline and the individual detail in the draft TCS Guidelines. The absence of commentary on a particular guideline should not be misunderstood as the ALA accepting the appropriateness of any such guideline. To the contrary, we submit that a wholesale re-think is required.

## Treatment, care and support guideline 1: Necessary and reasonable guideline

8. This section of the ALA's submission will address the guideline which explains how the NISQ Agency assesses whether proposed treatment, care and support are 'necessary and reasonable'.

### Treatment, care and support needs

9. The ALA notes an example of a support that may related to a treatment, care and support need, namely "a taxi fare or rideshare charge where the participant is required to travel for a medical or allied health appointment for their accepted injury".<sup>2</sup>
10. The ALA submits that this is a helpful example and, additionally, we propose that the following should also be included as a second example to provide further guidance for those accessing the TCS Guidelines:

The need for the NISQ Agency to pay for rental costs whilst modifications were being made to a participant's home to meet their injury needs.<sup>3</sup>

### Deciding whether treatment, care and support is necessary and reasonable

11. In relation to guidance as to where the need results from an injury, condition or disability that has no connection to the motor accident,<sup>4</sup> the ALA notes:
  - a. External case managers will play a crucial role in identifying and costing NISQ participants' needs, including through identifying availability of providers and the costs thereof; and

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<sup>2</sup> National Injury Insurance Scheme Agency, Queensland, *Treatment, care and support guidelines* (Draft Guidelines, July 2023) 7.

<sup>3</sup> See, eg, *National Injury Insurance Agency, Queensland v Croton and AAI Limited*, unreported, SCQ 29 September 2022.

<sup>4</sup> National Injury Insurance Scheme Agency, Queensland, *Treatment, care and support guidelines* (Draft Guidelines, July 2023) 8.

- b. This could become problematic in some cases if there are boundary issues between NIISQ and other schemes (such as the National Disability Insurance Scheme or the Department of Veterans' Affairs), or if there is medical disagreement as to what treatment, care and support need may be related to a pre-existing condition and what is needed because of the accepted injury.
12. With respect to where the need results from an injury, condition or disability that has no connection to the motor accident:<sup>5</sup>
- a. The policy in practice since the inception of the NIISQ legislation has been for NIISQ to provide treatment, care and support for all accident-related injuries and conditions, including medically-demonstrated aggravations of pre-existing conditions. Those conditions commonly include injuries other than the injury which has given rise to the participant's eligibility in the NIISQ scheme.
  - b. For example, it is very common for people who sustain qualifying brain injuries in motor vehicle incidents to also sustain in the same incident a range of orthopaedic injuries.
  - c. The phrase "do not result from their **accepted** injury and treatment" (emphasis added) and the suggestion that such injuries ought to be covered by public health systems, private health insurance, and other statutory insurers (such as the National Disability Insurance Scheme) requires clarification.
  - d. The ALA believes that the current practice to include all injuries sustained in the subject incident, including but not limited to the injury meeting the criteria contained within the NIISQ Regulations, is the correct approach.
13. Regarding what factors would indicate to the NIISQ Agency that treatment, care and support is cost effective, the ALA notes the following criterion: "that the cost of the treatment, care and support does not exceed the average cost of providing that support in Queensland".<sup>6</sup>
- a. The ALA submits that this involves additional wording not found in the Act and the Regulations.

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<sup>5</sup> Ibid.

<sup>6</sup> Ibid 12.

- b. The Regulations state that the NISQ Agency must have regard to “whether the cost of the treatment, care or support exceeds an amount prescribed for the treatment, care or support under section 37(5)(a) of the Act”.<sup>7</sup>
- c. The Act defers to the Regulations to prescribe that amount;<sup>8</sup> although, presently, the Regulations do not prescribe any amount.
- d. ‘Average cost’ is an unwise criterion as it fails to realise the market reality of significant costs differences, according to Queensland’s vast geography. Rural, regional and remote participants accessing treatment, care and support services through NISQ will almost invariably face differing costs for at least some of those services than those NISQ participants in the Brisbane metropolitan area. Applying a ‘cookie-cutter’, average criterion is certain to lead to an increase in disputation, and the need for NISQ participants to justify different market rates in non-metropolitan areas.
- e. The ALA thus recommends that the above criterion in the draft TCG Guidelines is removed to avoid inconsistency with the Act and the Regulations, as well as general confusion for those engaging with the NISQ.

## Guiding Principles

- 14. The ALA submits that the core Guiding Principles need to also include “Best, evidence-based clinical practice”.
- 15. Best clinical practice will be determined by suitably qualified and experienced experts, including occupational therapists. Whilst the section which follows in the draft TCS Guidelines does refer to a clinical framework, the ALA submits that best clinical practice ought to be explicit as a Guiding Principle.

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<sup>7</sup> *National Injury Insurance Scheme (Queensland) Regulation 2016* (Qld) s 20(2)(e).

<sup>8</sup> *National injury Insurance Scheme (Queensland) Act 2016* (Qld) s 37(5)(a).

## Guideline limitations and participant review rights

16. The ALA notes the following from the TCS Guidelines:<sup>9</sup>

The treatment, care and support guidelines are the NISQ Agency's interpretation of the implementation of the *National Injury Insurance Scheme (Queensland) Act 2016* and *National Injury Insurance Scheme (Queensland) Regulation 2016*, and are intended to guide decision-making on necessary and reasonable treatment, care and support. The treatment, care and support guidelines are designed to improve the quality and consistency of NISQ Agency decisions while promoting transparency and public trust in the NISQ.

The treatment, care and support guidelines are a set of policies created by the NISQ Agency, and they are not law. While substantial efforts have been made to ensure consistency with; the NISQ statutory framework, other applicable legislation (including the *Human Rights Act 2019*), and court rulings, in circumstances where there is a conflict or inconsistency, the legislation or court ruling (where facts are the same or substantially similar) will have preference over the treatment, care and support guidelines. The treatment, care and support guidelines will be updated over time.

17. The ALA appreciates that this articulates that priority will be afforded to the Act, the Regulations and judicial decisions, where any inconsistencies within the TCS Guidelines arise.

18. However, whilst emphasising the need for a re-think as stated earlier in our submission, the ALA submits that every effort must be made to ensure the TCS Guidelines are consistent with the Act, the Regulations and current case law. This will avoid unnecessary errors and thus ease the burden of NISQ participants relying on activating their review rights. As a result, the costs and time associated with those reviews will be saved.

### Review rights for particular decisions

19. The ALA contends that it should be included in this section, which outlines review rights for a person who disagrees with a decision made by the NISQ Agency,<sup>10</sup> that some matters may also be subject to judicial review by the Courts.

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<sup>9</sup> National Injury Insurance Scheme Agency, Queensland, *Treatment, care and support guidelines* (Draft Guidelines, July 2023) 13.

<sup>10</sup> *Ibid* 14.

## Information exchange with participants and their legal representatives

20. Despite the NISQ scheme commencing in 2016, the NISQ Agency has so far failed to develop a protocol for the prompt exchange of all file information on the NIS Agency's file to participants, their families and, in particular, their legal representatives.
21. ALA members have reported difficulties in eliciting full file information from the NISQ Agency in a timely way and/or at all. Our members report an Agency attitude of providing information only if and when the Agency chooses to.
22. We accept that there might be an extremely limited class of documents from the NISQ Agency's file which cannot be shared, such as material which may prejudice a fraud investigation. However, the ALA contends that the guiding principle should be full and timely exchange of **all** file information.
23. Our recommendation is for a simple protocol for access to that material to be developed. For example, WorkCover Queensland has a simple process for the administrative release of claimant files. This measure is overdue and would be simple to implement.

## Treatment, care and support guideline 2: Medical and pharmaceutical treatment

24. This section of the ALA's submission will address the guideline which discusses identifying NISQ participant's needs for medical treatment and pharmaceuticals, and funding thereof.

## Assessment of needs for medical treatment and pharmaceuticals

25. The ALA notes the following in the draft TCS Guidelines:<sup>11</sup>

In assessing a participant's needs for medical treatment and pharmaceuticals, the NISQ Agency will ordinarily require information from a medical practitioner, **allied health provider**, registered nurse or clinical nurse/nurse practitioner to assist the NISQ Agency to decide whether it is necessary and reasonable.

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<sup>11</sup> Ibid 20.

26. The ALA contends that “including an external case manager” should be added after “allied health provider”.
27. Further, in relation to information required by the NISQ Agency to assess needs, the words “or assessed” should be added in the final paragraph on page 20 of the draft TCS Guidelines after “an allied health provider who has treated...”.

## **Assisted fertility treatment**

28. The draft TCS Guidelines explicitly state that assisted fertility treatment will only be funded “[i]f a participant’s fertility has been affected by their accepted injury”.<sup>12</sup>
29. The ALA urges the NISQ Agency to consider the following two examples:
  - a. Example 1: A person with a spinal cord injury, who is rendered infertile as a consequence. It seems clear that the guideline would not preclude payment for assisted fertility treatment in that example.
  - b. Example 2: A male participant is accepted as a participant due to an acquired brain injury and becomes a lifetime participant in the scheme. There is medical evidence that the participant in the subject motor vehicle incident sustained a range of other significant injuries, including testicular damage, rendering them unable to produce viable sperm.
30. The ALA submits that there is no sound rationale for excluding fertility treatment for such a participant, provided that the medical nexus between the subject motor vehicle incident and infertility can be demonstrated.
31. Further, the ALA seeks clarification on the following:
  - a. “Whether the treatment is safe and effective based on independent, high quality evidence.”: As this is giving consideration to fund assisted infertility treatment, what does the NISQ Agency mean by “effective” and how does the NISQ Agency define

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<sup>12</sup> Ibid 23.

“high quality evidence”? Are they referring to someone over and above an expert in fertility?

- b. “The anticipated outcome and success rate of the assisted fertility treatment.”: How does the NISQ Agency define success rate? Is the does the NISQ Agency suggesting that it will not fund anything with less than a 50 per cent success rate?

### **Treatment, care and support guideline 3: Dental treatment**

32. This section of the ALA’s submission will address the guideline which outlines how the NISQ Agency assesses a participant’s needs for dental treatment, and funding thereof.

33. The ALA notes the following:<sup>13</sup>

The NISQ Agency will generally require any information provided by a dental practitioner who treated the participant while they were in hospital following the incident which caused the participant’s accepted injury, including dental practitioners working at public or private hospitals.

34. The ALA notes that dental injuries are not always addressed or treated in the hospital.

35. The reference to being in hospital should be removed from draft TCS guidelines. For the purpose of the NISQ Agency assessing dental treatment, a treating dental practitioner can provide a report.

### **Treatment, care and support guideline 4: Rehabilitation**

36. This section of the ALA’s submission will address the guideline which outlines how the NISQ Agency assesses a participant’s needs for rehabilitation supports, and funding thereof.

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<sup>13</sup> Ibid 29.

## Definition of “rehabilitation supports”

37. The ALA contends that the definition of “rehabilitation supports”<sup>14</sup> needs to be broadened to include items that do not have to be provided by a rehabilitation provider. As per *Croton*,<sup>15</sup> interim rental costs were considered ‘for, or relating to’ rehabilitation.
38. Therefore, “rehabilitation supports” in the TCS Guidelines need to be much more broad, as per *Croton*:<sup>16</sup>

Considering the Macquarie Dictionary definition of rehabilitation and objects of NIISQ and the MAIA, there is no reason why rehabilitation should have a different meaning in NIISQ. In any case, rehabilitation seeks to restore a person, as far as reasonably possible, to their former level of functioning in the community. Nothing could be more directly related to the issue of enhancement of community access than provision of suitable housing during the period of time Croton’s property is being modified.

## Supporting a participant who needs rehabilitation supports

39. The ALA notes the following in the draft TCS Guidelines:<sup>17</sup> “Rehabilitation is the restoration of a participant’s level of functioning to their pre-injury state, to the greatest extent possible, and is achieved through a range of treatments and services performed by rehabilitation providers”.
40. The ALA submits that rehabilitation does not technically have to be “performed by rehabilitation providers” and, therefore, this provision should be amended to reflect that.

## Assessment of needs for rehabilitation supports

41. This section of the draft TCS Guidelines does not mention an important class of people: case managers. For many of our members’ clients with complex needs, the appointment of an external case manager is an important step in the comprehensive evaluation of the NIISQ participant’s treatment, care and support needs.

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<sup>14</sup> Ibid 34.

<sup>15</sup> *National Injury Insurance Agency, Queensland v Croton and AAI Limited*, unreported, SCQ 29 September 2022.

<sup>16</sup> Ibid.

<sup>17</sup> National Injury Insurance Scheme Agency, Queensland, *Treatment, care and support guidelines* (Draft Guidelines, July 2023) 35.

42. When the NIISQ scheme was first conceived, it was the expectation of most stakeholders, including the ALA, that the NIISQ Agency would operate in a way analogous to the MAIC, that it would be a regulator of the scheme but not a case manager (by whatever title, such as “support coordinator”). That is, it was the expectation of most stakeholders that in discharging the NIISQ Agency’s regulatory role, it would ensure that the treatment, care and support services typically coordinated by an external case manager were in accordance with the legislation, but the NIISQ Agency would not act as a case manager for participants. The rationales for that expectation include the irrevocable conflict of interest issue referred to in the introduction to our submission, and that the MAIC has been a very effective regulator of Queensland’s CTP Scheme, while studiously avoiding service delivery and leaving rehabilitation issues to be coordinated as between licenced insurers, on the one hand, and claimants and their lawyers and case managers, on the other.
43. In the period of time after the Board and CEO were replaced with the current leadership of the NIISQ Agency, it remained the ALA’s expectation that NIISQ would return to its proper role solely as a regulator. This has not occurred, and we detect no likelihood of this occurring. Instead, we perceive that it is the NIISQ Agency’s intention to continue to act as case managers, as well as the regulator of the Scheme.
44. The NIISQ Agency continuing to engage in case management (whatever nomenclature is used to describe the practice) is also in breach of its own legislation. This, in the ALA’s submission, is a very serious matter.
- a. In *Taylor v The National Injury Insurance Agency Queensland*,<sup>18</sup> [2020] QSC 132, the Queensland Supreme Court found that the NIISQ Agency improperly exercised power conferred by the Act, by appointing itself as case manager. The *Taylor* decision was appealed by the NIISQ to the Queensland Court of Appeal. The appeal was dismissed. It remains uncontested that to act as case manager, the NIISQ Agency is exceeding its legislative remit.
  - b. Some pragmatism has occurred whereby the NIISQ Agency accepts our members’ requests to appoint external case managers. Whilst that is a welcome practical measure, in our view it ought to be regarded as temporary and transitional whilst the NIISQ Agency designs a model which is consistent with its legislative remit. The ALA would welcome further discussions about how to design and implement such a model.

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<sup>18</sup> [2020] QSC 132.

## Access to public sector health services

45. The ALA accepts that NISQ participants will have received some treatment and care from the public system preceding becoming a participant in the NISQ scheme, and some participants will also be eligible to receive some forms of treatment, care and support from the public sector after their NISQ participant status is confirmed.
46. However, if this section of the draft TCS Guidelines is intended to foreshadow NISQ adopting a policy that NISQ participants must first attempt to access public sector forms of treatment, care and support before their treatment, care and support needs will be considered by NISQ, the ALA would strongly disagree that that is an appropriate policy because:
- a. the legislation does not state or imply that such a policy would be justified;
  - b. the intergovernmental bilateral agreements which preceded the inception of the NISQ Scheme contain no such suggestion – to the contrary, those agreements affirmed an expectation that the NISQ Agency would be the ‘first port of call’ for treatment, care and support; and
  - c. the problems with many aspects of the public health system throughout Australia are notorious, quality of care is variable, availability is mixed (worse in rural, regional and remote areas) and delays and waiting lists sometimes of years are a common feature, and not just in Queensland.

## Specific types of rehabilitation supports funded under the NISQ

### Exercise physiology, exercise programs and gym memberships

47. The ALA is puzzled at the apparent distinction between maintaining function and rehabilitation in the gym memberships and exercise programs criteria.<sup>19</sup>
48. The ALA contends that maintaining existing function (which might otherwise, as a result of an injury, deteriorate) is integral to quality rehabilitation.

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<sup>19</sup> National Injury Insurance Scheme Agency, Queensland, *Treatment, care and support guidelines* (Draft Guidelines, July 2023) 39.

## Support coordination

49. The ALA has mentioned earlier this submission NIISQ’s adoption of the phrase “support coordination” for what has been well-understood in the medical sector and the rehabilitation sector for decades as case management. We are pleased that the NIISQ Agency will continue to fund case management.
50. However, the Guidelines describe case management as a “time limited” service.<sup>20</sup> This reference should be removed. Rehabilitation and case management, to be in the participant’s best interests, must never be ‘set and forget’.
51. Whilst it is almost always the case that case management will be most intensive whilst preparing for hospital discharge, and in the months and sometimes first two years post-hospital discharge, effective case management is about ensuring, as far as possible, that crises do not develop. A crisis is much more likely to develop where an agency takes a reactive approach to a participant’s needs, rather than having effective monitoring mechanisms in place through a case management matrix.
52. NIISQ participants’ circumstances always evolve. Adjustments, sometimes major and sometimes less so, are needed in response to changes in NIISQ participants’ circumstances. Good case managers will often foresee changes in circumstances and have effective plans developed to meet those changes in circumstances. Any formulaic approach to how often case management services are needed, and over what period of time, will never be suitable for the myriad complexities across a portfolio of matters and the complexities within each individual matter.

## **Limitations on support for rehabilitation supports**

53. The ALA has observed earlier in our submission that during the life of the NIISQ scheme, there has not been any dispute to the proposition that a pre-existing condition made worse – and therefore needing treatment, care and support, or a greater level of treatment, care and support – would be funded by the NIISQ scheme. If the NIISQ Agency takes a different view now, then we urge the NIISQ Agency to share the legislative and other rationales for this view.

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<sup>20</sup> Ibid 43.

54. Further, the ALA offers the following two significant points of clarification in relation to this section, which we contend must be amended accordingly:

- a. Neither the Act nor the Regulations say that the NISQ will not fund anything funded by Medicare; and
- b. That the Federal Government and the Queensland Government have agreed that the NISQ must first pay for rehabilitation services support before the National Disability Insurance Scheme will contribute.<sup>21</sup>

## **Treatment, care and support guideline 6: Attendant care and support services**

55. This section of the ALA's submission will address the guideline providing details on how the NISQ Agency assesses a participant's needs for attendant care and support services, and funding thereof.

### **Definitions**

56. The ALA submits that the second element in the definition for an 'NISQ approved ACSN adviser' ("has experience in providing professional advice on attendant care and support services for people with complex support needs") should not be necessary if NISQ has already properly assessed that adviser when approving them "to provide advice about the participant's treatment, care and support needs for attendant care and support services".<sup>22</sup> Suitably qualified case managers invariably have that requisite experience.

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<sup>21</sup> Bilateral Agreement between the Commonwealth of Australia and Queensland on the National Disability Insurance Scheme (9 July 2019) 16 at [20] <<https://federation.gov.au/about/agreements/bilateral-agreement-between-commonwealth-australia-and-queensland-national>>; see also: The Treasury, Australian Government, Agreed minimum benchmarks for motor vehicle accidents (Web Page) <<https://treasury.gov.au/programs-initiatives-consumers-community/niis/agreed-minimum-benchmarks-for-motor-vehicle-accidents>>.

<sup>22</sup> National Injury Insurance Scheme Agency, Queensland, *Treatment, care and support guidelines* (Draft Guidelines, July 2023) 54.

## Funding care and support provided by family members or friends of a participant

57. The ALA notes the following from the draft TCS Guidelines:<sup>23</sup>

Excluded treatment, care and support includes support provided gratuitously (without charge) by a participant’s family member or friend.

While the NIISQ Agency recognises the importance of support provided by family members and friends to a participant, the NIISQ Agency does not fund family members to provide attendant care and support services.

58. The decision in *Walters v Roche* (*‘Walters’*) confirmed that gratuitous care is excluded treatment, care and support but that the Agency still has a discretion to fund it.<sup>24</sup> As such, the NIISQ Agency cannot in all circumstances state it will not fund gratuitous care. Further, we note such decisions by the NIISQ Agency is subject to judicial review.

59. In making that decision, the Judge in *Walters* stated that there are factors relevant to the consideration of whether such a discretion ought to be exercised. This includes: cultural or religious issues, language, and accessibility of services (especially in remote areas).

60. As such, the ALA recommends that this section of the draft TCS Guidelines should state instead “...the NIISQ Agency does not *generally* fund...” and then state some factors that may be taken into account in the NIISQ Agency’s discretionary decision-making. Alternatively and preferably, consistent with our ‘less is more’ counsel, do not particularise any factors, as those will be for consideration on the merits of individual matters.

## Home and garden maintenance services

61. The ALA notes that guidance on funding for home and garden maintenance services includes the following:<sup>25</sup> “Lawn mowing, light pruning and rubbish removal is limited to work ordinarily required for an average residence, and excludes excessive, or high frequency maintenance work.”

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<sup>23</sup> Ibid 59.

<sup>24</sup> *Walters v Roche* [2020] QSC 319 at [57].

<sup>25</sup> National Injury Insurance Scheme Agency, Queensland, *Treatment, care and support guidelines* (Draft Guidelines, July 2023) 62.

62. The ALA contends that these are highly subjective considerations, which warrant clarification and further guidance. For example, what exactly is “excessive, or high frequency maintenance work” and who determines whether such service is “excessive, or high frequency maintenance work”? The preferable course is to delete that guideline and simply deal with such issues on the factual context in each individual case.

### **Specific matters which the NIISQ Agency will consider when deciding respite services**

63. The draft TCS Guidelines detail that the NIISQ Agency “will consider specific risk factors for different groups of carers...”,<sup>26</sup> although there is no further guidance as to what those risk factors are, to which groups of carers it applies, who determines those risk factors and groups, how is it applied, or any research upon which this is based.

64. This section then proceeds to refer to “higher levels of carer social isolation”, “higher levels of carer psychological distress” and “high levels of carer financial stress”.<sup>27</sup> It is unclear what the higher levels are compared to or what is a high level. These are subjective and need to be considered not as isolated factors but cumulative, given carers experience multiple and cumulating stressors. Therefore, use of the words “high” or “higher level” is inapt.

65. The ALA contends that clarification and guidance must be provided in relation to both of the above matters.

### **Carer’s circumstances are relevant to determining level of funded respite services**

66. The ALA notes the following in the draft TCS Guidelines:<sup>28</sup> “Overall, the total period of respite services funded under the NIISQ is less than 30 days per year...”. We contend that this is an arbitrary determination and is not justified.

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<sup>26</sup> Ibid 64.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

67. More appropriate and fair wording for this section of the draft TCS Guidelines, the ALA contends, would be: “The NISQ considers a reasonable amount of respite services to be funded annually is 30 days, subject to the circumstances of the participant and their family.”

### **Aged care and services provided in residential aged care: Younger people in residential aged care**

68. ALA members are aware of some young NISQ participants being in residential aged care. In our view, the commitment to the general principle that younger people are not suited to and ought to be moved out of aged care environments, needs to include an explicit recognition that non-aged care accommodation options will usually be more expensive than aged care. Young people ought only to be in residential aged care as a last resort and as a short-term, temporary transitional measure whilst other more suitable accommodation is identified and approved.

### **Requirements for reimbursement of transport expenses**

69. The draft TCS Guidelines detail that reimbursement for travel expenses should be “consistent with the WorkCover Queensland rate”.<sup>29</sup>

- a. The ALA submits that this is inappropriate for a scheme relating to motor vehicle accidents.
- b. Whilst the rate itself is per the Australian Taxation Office rate, it also imports other considerations which may well lead to NISQ participants paying additional costs out-of-pocket – for example, tolls, attendances less than 20km or less than 150km per week. WorkCover Queensland rates for payment/reimbursement of various expenses have been extensively criticised by stakeholders, including the ALA. WorkCover Queensland rates have rarely represented market rates for any of the services therein. The inadequate rates for many of the services provided for in the WorkCover table are a recipe for disputation with and distress for participants. Any reference to NISQ adopting any table of costs – whether it be WorkCover Queensland or the NDIS – ought, in the ALA’s view, to be entirely removed from the draft TCS Guidelines.

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<sup>29</sup> Ibid 70.

- c. Instead, the touchstone should be reasonable market rates, which of course will vary according to a number of factors, including geography. This is a particularly important issue for current and future NIISQ participants in rural, regional and remote areas, where the availability and cost of services varies significantly.

70. In relation to airfares, the draft TCS Guidelines state that “the NIISQ Agency may pay the return airfare at the level supported by a suitably qualified medical professional”.<sup>30</sup>

- a. The ALA contends clarification is required for this provision: What or who is “a suitably qualified medical professional”, and how is this determined? How is the view of a medical professional relevant to air travel and its associated costs, other than to confirm whether or not it is safe for the NIISQ participant to travel by air? Further, allied health experts will usually be just as qualified as medical doctors to comment on capacity to travel, including by air.

### **Support related to general transport**

71. The ALA is confident that the Agency would also recognise that for some participants with complex needs, transport to facilitate community access does involve considerable expense.

### **Limitations on support for attendant care and support services: Assistance for everyday tasks**

72. The ALA contends that further clarification is required regarding the criteria for funding assistance for everyday tasks, namely what exactly “community expectations” are.<sup>31</sup> Since this is not a factor for consideration under the Act or the Regulations, who determines “community expectations” and how is that determined?

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid 72.

## **Attendant care and support services that are generally not funded by the NISQ Agency**

73. The ALA provides the following comments regarding costs generally not considered necessary and reasonable treatment, care and support:<sup>32</sup>

- a. “holiday and general activity costs while a participant is away from home”: There should be a stipulation that any additional costs incurred because of the NISQ participant’s injury will be considered for funding (for example, disability-friendly accommodation; large unit/holiday house to accommodate carers and/or necessary equipment).
- b. “extensive or excessive landscaping for larger properties, including rural properties, which is beyond work required to ensure safe and convenient access to a participant’s house, and outdoor family/recreational areas”: We submit that this is inappropriate, as a NISQ participant should be able to access the remainder of their property. More importantly, for rural or regional areas, there is the risk of fire danger and such properties need to be maintained in better condition to minimise fire risks. Whilst such costs may be considered ordinary expenses of any such property, the imperative for someone with a serious personal injury is higher, because often they will lack insight or mobility to flee in advance from fire danger.
- c. Certain skilled services will not be funded, the examples provided in the draft TCS Guidelines being carpentry, painting, electrical, plumbing and roofing.
  - i. What if the NISQ participant holds the relevant qualifications in such trades and would have otherwise attended to such repairs/works themselves?
- d. “general accommodation costs”: It would appear from the draft TCS Guidelines that accommodation costs other than those for participants in residential aged care, is a type of care of support that the NISQ Agency views as not being covered by the NISQ scheme. This is curious, in view of the import of the aforementioned Supreme Court of Queensland decision in the matter of Adam Croton. Other than the brief comments at paragraphs 86 to 93 (below), this submission does not comment further on the guideline in respect of accommodation and home modification issues because, in our view, those issues will need to be the subject of further litigation and

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<sup>32</sup> As per Ibid 73.

jurisprudential clarification. The complexities of the interrelationships between the NIISQ legislation, the MAI Act and the NDIS (particularly the SDA component), together with the intent shown by the draft guidelines; make this area ripe for further judicial direction.

## **Treatment, care and support guideline 7: Assistive technology and consumables**

74. This section of the ALA's submission will address the guideline detailing how the NIISQ Agency assesses a participant's needs for assistive technology and consumables, and funding thereof.

### **Assistive technology and consumables generally not funded by the NIISQ Agency**

75. The ALA contends that clarification is required regarding the following criterion in relation to what the NIISQ Agency will not fund:<sup>33</sup>

replacement of an ordinary personal or household item, which would be owned and replaced by the participant or their household. This applies even if the ordinary personal or household item was initially funded under the NIISQ. Following the initial purchase, the NIISQ expects the general household or personal item will be replaced by the participant.

76. If the NIISQ Agency has provided funding for that "ordinary personal or household item", then that means it was accepted as a reasonable and necessary treatment, care and support. Therefore, the ALA submits that replacement or repair ought to be funded by the NIISQ Agency.

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<sup>33</sup> Ibid 83.

## Treatment, care and support guideline 8: Orthoses and prostheses

77. This section of the ALA's submission will address the guideline detailing how the NIISSQ Agency assesses a participant's needs for orthoses and/or prostheses, and funding thereof.

### Assessment of needs for orthoses/prostheses

#### Information required by NIISSQ Agency to assess a participant's need for orthoses/prostheses

78. The ALA notes the following in the draft TCS Guidelines:<sup>34</sup> "For prostheses, the NIISSQ Agency will generally require information provided through a rehabilitation program in a public hospital, as well as information provided by a Queensland Health Amputee Clinic."

- a. ALA members report that any amputee will have a stay at one of the major amputee clinics. However, there are only limited clinics in Queensland.<sup>35</sup> This poses a barrier particularly for someone who lives in a regional, rural or remote part of Queensland.
- b. As such, the ALA submits the NIISSQ Agency should consider offering alternative ways for acquiring the necessary information, such as applying discretion to accept information from a local prosthetist. That is, limiting entitlement to only funding recommendations provided by or through the public system is unreasonable. Any recommendation from a suitably qualified expert should be considered on its merits.

#### Access to public sector health services

79. The ALA submits that it ought to be clarified in the draft TCS Guidelines that, even though programs and services are available through the public healthcare system,<sup>36</sup> NIISSQ participants still have choice of provider and may still, for their own reasons, prefer a private physio/prosthetist.

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<sup>34</sup> Ibid 90.

<sup>35</sup> As listed: Queensland Health, Queensland Government, *Amputee Clinics* (Web Page, 1 August 2023) <<https://www.health.qld.gov.au/mass/prescribe/artificial-limbs/qals-groups#AmputeeClinics>>.

<sup>36</sup> See more: National Injury Insurance Scheme Agency, Queensland, *Treatment, care and support guidelines* (Draft Guidelines, July 2023) 90.

## **Treatment, care and support guideline 9: Vocational rehabilitation support and education support**

80. This section of the ALA’s submission will address the guideline detailing how the NIISSQ Agency assesses a participant’s needs for vocational rehabilitation supports and education supports, and funding thereof.

### **Vocational rehabilitation support and education support must be necessary and reasonable**

81. The ALA notes the following in the assessment criteria concerning vocational rehabilitation supports and education supports:<sup>37</sup> “whether providing the support aligns with recommended practices, and other industry best practices, for the rehabilitation of persons with similar injuries”.

- a. The ALA submits that it is unclear what “recommended practices” are and how those practices would differ from “industry best practices”. These terms should be defined and clarified in the TCS Guidelines.
- b. This will make the NIISSQ Agency’s decision-making opaque, which is contrary to the interests of NIISSQ participants and their advocates, as well as contrary to the public’s expectations of fairness and accountability in schemes like the NIISSQ.

### **Assessment of needs for vocational rehabilitation supports and education supports: Information required by the NIISSQ Agency to assess needs**

82. The ALA notes that the information required by the NIISSQ Agency includes:<sup>38</sup>

- the participant’s capacity to engage in vocational rehabilitation support and education support
- whether the participant’s medical and rehabilitation team are supportive of their vocational and education goals
- ...
- identifiable labour market opportunities on completion of training

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<sup>37</sup> Ibid 97.

<sup>38</sup> Ibid 98.

83. When taking into account the first requirement in the above list around capacity to engage in the support and opportunities in the labour market, there ought to be no reason why a medical or rehabilitation team member's support is then needed for the NISQ participant's goal (as per the second requirement in the above list). If a NISQ participant has the willingness and capacity to engage in the support and there are feasible outcomes, this further requirement is an unreasonable impost on freedom of choice and independence.
84. Relatedly, we submit that the third requirement in the above list unfairly imports the subjective views of others into a NISQ participant's personal goals.

### **Vocational rehabilitation supports and education supports that are generally not funded by NISQ Agency**

85. The NISQ Agency has stated in these draft TCS Guidelines that it will not fund "fees for excursions or school camps".<sup>39</sup>
- a. The ALA submits that this requires clarification in the final iteration of the TCS Guidelines, given that ALA members report that fees or costs arising as a result of the accepted injury and which are above and beyond the standard fee that any student is required to pay, will be a treatment, care and support that the NISQ Agency will cover.
  - b. We take the view that schools regard participation in external school events such as excursions and camps, as a necessary and beneficial element of a quality education. There is no sound reason in our view to deprive a participant of the additional costs (such as specialised transport, or a carer accompanying) associated with such activities. For example, if a participant with a spinal cord injury attending a school had a fee for a day-long excursion of \$250; but needed a carer to accompany them and specialised transport at an aggregate additional cost of \$2,000; it would be unreasonable not to fund that additional cost.

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<sup>39</sup> Ibid 101.

## Treatment, care and support guideline 10: Home modifications

86. This section of the ALA’s submission will address the guideline outlines how the NISQ Agency assesses a participant’s needs for home modifications for their residence, and funding thereof.

### Modifications to a residence owned by the participant or their family member

87. The ALA notes that the NISQ Agency has included the requirement:<sup>40</sup> “For major home modifications, the NISQ Agency generally expects that the participant will remain living at that residence for a minimum of five years.”

- a. We submit that no justification can be found for this temporal requirement in the Act, the Regulations or in judicial determinations regarding NISQ supports and funding.
- b. The NISQ Agency should provide justification for and guidance on this requirement, or remove this requirement from the draft TCS Guidelines.

88. The NISQ Agency may also require the NISQ participant or owner to enter into a deed, such that if modifications objectively increase the value of the property and the property is sold, then the NISQ Agency may limit the funding for modifications to a new home by the amount directly attributable to the value added by the modifications of the home that was sold.

- a. The ALA affirms that this is consistent with the principles espoused in *Aldridge v Allianz*.<sup>41</sup>
- b. However, the example provided in the draft TCS Guidelines reveals that a NISQ participant could technically be left out-of-pocket and having to self-fund modification costs to a new home. This could create risk in a rising home market, whereby, despite an increased value on the former home, the new home costs more too.
- c. The ALA is concerned that this is a significant risk for NISQ participants to accept, although we note the interests of NISQ participants and the NISQ Agency must be considered and balanced, where possible. Further, if the practical effects of Deeds or

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<sup>40</sup> Ibid 111.

<sup>41</sup> *Aldridge v Allianz Australia Insurance Ltd* [2009] QSC 257.

other legal arrangements may be to deflect some accommodation funding responsibility to CTP insurers, participants, participants' families, and/or the NDIS; those would be issues for judicial consideration, as our view is that that would likely not have been the intention of the NIISQ legislation.

## **When a participant relocates to another residence**

89. The ALA notes that, in relation to the funding of home modifications over the course of a NIISQ participant's lifetime, the NIISQ Agency will consider whether the level of support reflects "community expectations".<sup>42</sup>

- a. We contend that further clarification is required regarding what exactly "community expectations" are. Since this is not a factor for consideration under the Act or the Regulations, who determines "community expectations" and how is that determined?

## **Specific home modifications: Room temperature control equipment**

90. It would appear from the draft TCS Guidelines that the NIISQ Agency intends to adopt a policy of:<sup>43</sup>

- a. Paying for air conditioning without question for spinal cord injuries at or above T6; and
- b. For injuries other than the above, requiring medical specialist to certify and inability to regulate body temperature, which will not resolve or cause significant secondary care complications, and only with that certification would it then pay for that air conditioning.

91. The ALA submits that this is unreasonable. Air conditioning is provided in all Queensland schools, in most commercial premises (including those of the NIISQ Agency), in public

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<sup>42</sup> National Injury Insurance Scheme Agency, Queensland, *Treatment, care and support guidelines* (Draft Guidelines, July 2023) 112.

<sup>43</sup> *Ibid* 114.

buildings, and in a majority of Queensland homes. The reasonableness of air conditioning should be contextual to each individual case, and in particular if NISQ participants who had been living in a household supported by air condition prior to their qualifying injury and are now no longer able to reside in that household, the comforts of air conditioning afforded to the majority of Queensland's population ought to be available to participants and funded by the NISQ Agency. This issue will become more important as the effects of climate change are felt more acutely.

### **Home modifications that are generally not funded by NISQ Agency**

92. The ALA notes that the NISQ agency will not fund “costs related to fittings, fixtures or materials which are above a standard grade”, according to the draft TCS Guidelines.<sup>44</sup>
93. The ALA cannot see where the Act or Regulations prescribe that the costs of the modifications or costs related to fittings, fixtures or material are limited to standard grade. The ALA is seeking clarification on the legislative or other rationale for this provision.

### **Manufacturer warranties**

94. Generally throughout the draft TCS Guidelines, the NISQ Agency will require NISQ participants to pursue repair and replacement.<sup>45</sup>
95. The ALA submits that this is something the NISQ Agency or a provider/case manager should pursue on behalf of the NISQ participant. NIS participants are experiencing the effects of serious personal injury, which should be the primary consideration when allocating responsibilities to NISQ participants.

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<sup>44</sup> Ibid 118.

<sup>45</sup> Ibid 83, 93.

## Conclusion

96. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the full set of the draft *Treatment, care and support guidelines*. We reiterate that the ALA considers that a fundamental re-think of the TCS Guidelines is warranted for the reasons stated in our submission.

97. The ALA is available to provide further assistance to the National Injury Insurance Scheme Agency, Queensland on the issues raised in this submission.



**Sarah Grace**

**President, Queensland Branch Committee**

**Australian Lawyers Alliance**