

**MOTOR ACCIDENTS AND LIFETIME CARE AND SUPPORT SCHEMES
LEGISLATION AMENDMENT BILL 2012**

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Bill introduced, and read a first time and ordered to be printed on motion by the Hon. Greg Pearce.

Second Reading

The Hon. GREG PEARCE (Minister for Finance and Services, and Minister for the Illawarra) [11.23 a.m.]: I move:

That this bill be now read a second time.

As members will be aware, the Lifetime Care and Support Authority was established by the Motor Accidents (Lifetime Care and Support) Act 2006. The main purpose of the authority was to establish and operate a scheme to provide all the treatment and care needs of those who have been catastrophically injured in a motor vehicle accident in New South Wales, regardless of fault. Since its inception, participation in the scheme has grown steadily. As at 30 April 2012 there were 638 participants: 564 adults and 74 children. Of the participant children, 66 suffered a dramatic brain injury and the other seven a spinal cord injury. Of the adult participants, 419 suffered a traumatic brain injury, 134 a spinal cord injury, three amputations and two serious burns. The age of the participants spans the entirety of the lifespan of Australians, but it is those between 16 and 20 years who are most strongly represented in the scheme, with 20 per cent of all participants in this range, followed by people between 20 and 25 years—over 12 per cent of participants.

With so many of those who are severely injured on our roads being young, and therefore requiring access to long-term treatment and care, a primary focus for the scheme is to redress the inherent difficulties for courts in adequately predicting and making provision for the costs of ongoing treatment and care needs for young, seriously injured people. In addition, the need to establish the fault of another in order to get such an award had the potential to unfairly disadvantage those who were equally severely injured in a motor vehicle accident but who were unable to establish that another person caused the accident. When the 2006 legislation was introduced then Minister John Watkins, Deputy Premier and Minister for Transport at the time, said:

The bill clarifies that for a participant in the scheme, the CTP insurer dealing with the claim is no longer required to meet any of the person's treatment and care expenses as those expenses are now required to be met solely by the Lifetime Care and Support Scheme.

He said further:

The Motor Accident Compensation Act is also amended to exclude a lifetime participant in the scheme from recovering economic loss damages for any treatment and care needs.

When the Act was introduced, downward adjustments were made to motor vehicle insurance premiums and a levy was imposed on motorists in order to fund the Lifetime Care and Support Scheme. The CTP premium was able to be reduced because insurers believed the legislation ensured that they would not be liable to identify motorists who were at fault in a

motor vehicle accident for the cost of care required by people who were so badly injured in those accidents that they required compensation for the ongoing costs of their constant, changing and lifelong treatment and care needs. The Lifetime Care and Support Scheme levy was calculated to ensure that the Lifetime Care and Support Authority was always in a position to meet all the reasonable expenses of a scheme participant's assessed treatment and care needs.

Unfortunately, a recent decision of Mr Justice Garling in the matter of *Thiering v Daly* [2011] NSWSC 1345 has found it impossible to reconcile the statements of then Minister Watkins with the actual words in the Act and it has fallen to this Government to rectify the problems with the legislation. The questions considered by the court in *Thiering v Daly* were: whether the right of an individual who had been catastrophically injured in a motor vehicle accident, and who becomes a lifetime care participant, to damages for gratuitous care have been completely abolished; and, if not, then who, as between the Lifetime Care and Support Authority and the motor vehicle tortfeasor—in reality, the CTP insurer—is liable for the payment of compensation to services provided to the participants that would otherwise be provided most commonly by family or friends gratuitously.

In considering those questions Justice Garling found that section 130A of the Motor Accidents Compensation Act 1999 does not prevent a lifetime care participant from recovering damages up to the date of settlement or judgement in the common law action for attendant care services that the Lifetime Care and Support Authority had not paid for or accepted an obligation to pay. In his judgement Justice Garling also noted that there is "a significant lacuna in the legislation" because there is no express provision in the Motor Accidents (Lifetime Care and Support) Act that "specifically obliges the Lifetime Care and Support Authority to provide or pay for all of the assessed needs of the participant" and that "it seems assumed ... that the ... Authority will provide for all the assessed needs of a participant".

There are also concerns that the decision in the Thiering case has left open the possibility that in some cases the compulsory third party insurer may be liable in damages for the cost of some of the lifetime care scheme participant's future treatment and care needs. Compulsory third party insurers have calculated their premiums on the assumption that they were no longer liable for any of the treatment and care expenses of participants in the lifetime care scheme. This was a reasonable thing to do, considering the clear intent of the original legislation as clearly expressed by Minister Watkins in his speech introducing the original legislation. The compulsory third party insurer representatives have told me that the decision in Thiering has the potential to place a significant burden on the current level of both premiums and levies collected. It has been suggested to me that premium costs may need to rise substantially in order to accommodate the likely increase in damages payouts if the Thiering decision is allowed to stand.

If this happens motorists will be paying twice for meeting the treatment and care costs of lifetime care scheme participants: once by the payment of an increased compulsory third party insurance premium, and then again by the payment of the levy to fund the Lifetime Care and Support Scheme. To ensure that this does not eventuate, the Government is introducing the Motor Accidents and Lifetime Care and Support Schemes Legislation Amendment Bill 2012. The main purpose of the bill is to ensure that compulsory third party insurers are not exposed to the obligation to pay damages awards for which they have not collected premium and to ensure that all the reasonable and necessary treatment and care

expenses of a participant in the lifetime care scheme, as assessed by the authority, are paid for from the returns on the levy collected from motorists for that specific purpose.

The bill has two key features. First, it clarifies that the Lifetime Care and Support Authority is solely responsible for paying the expenses of all the assessed treatment and care needs of a participant in the Lifetime Care and Support scheme. Secondly, the bill makes it clear that participation in the scheme abolishes a participant's right to claim damages for economic loss or treatment and care needs payable under the Motor Accidents Compensation Act 1999. The amendments to the Motor Accidents (Lifetime Care and Support) Act are set out in schedule 1 to the bill. Schedule 1 [3] updates the definition of "treatment and care needs" and provides for the making of a regulation that will exclude any treatment, care, support or service from the ambit of the Lifetime Care and Support Scheme. If a treatment and care need is excluded by a regulation made pursuant to this provision, then the Lifetime Care and Support Authority cannot be required to make any payment for that treatment and care need.

The key amendments to the Motor Accidents (Lifetime Care and Support) Act are set out in schedule 1 [6], which inserts a new part 2A, headed "Payments under the Scheme". In this part, new section 11A makes it clear that the Lifetime Care and Support Authority is to pay for all of the reasonable expenses incurred by or on behalf of a scheme participant in relation to that person's assessed treatment and care needs. Assessed treatment and care needs are those treatment and care needs that the authority has assessed as being reasonable and necessary in the circumstances and relate to the motor accident injury of the participant. Other forms of treatment and care not assessed as reasonable and necessary and relating to the motor accident injury, or that are excluded treatment and care needs, will not be expenses payable by the authority. As is presently the case, the Lifetime Care and Support Scheme guidelines can make provision for or with respect to determining which treatment and care needs are reasonable and necessary.

New section 11B sets out the circumstances in which the authority will not be required to make a payment. As a direct answer to issues raised in the case of Thiering, new section 11B in the bill states that the authority is not required to make a payment for any treatment, care, support or service that is provided to a participant on a gratuitous basis. In addition, the authority will not be required to make any payment for any treatment, care, support or service that is required to be provided by an approved provider and at the time the service was provided the person was not an approved provider. This will be the case even if the services that were provided formed part of the participant's assessment treatment and care needs. To accommodate cases where there is no approved provider available, new section 11B (2) allows for the making of a payment that is otherwise proscribed by the section if the authority forms the view that special circumstances exist that justify such a payment.

This may be important in cases where scheme participants may live in remote or regional areas and have little or no access to approved providers. New section 11C sets out that attendant care services and other types of treatment, care, support or services that are identified in the guidelines are to be provided only by approved providers. An approved provider will be a person or a class of people approved by the authority in accordance with the guidelines. The transitional provisions in schedule 1 [10] state that the amendments in schedule 1 will apply from the date of introduction of the bill into Parliament to claims made on or after the date of introduction, regardless of whether the claim is made in relation to past or future treatment and care needs. The transitional provisions are expressed to apply even if the motor accident occurred before the date of introduction or the claim relates to a person

who was a participant in the scheme before the date of introduction.

"Claim" is defined to mean a claim under the Motor Accidents Compensation Act 1999 or a claim or request for payment for treatment or care needs made to a licensed insurer or the Lifetime Care and Support Authority. The amendments to the Motor Accidents Compensation Act are set out in schedule 2 to the bill. Schedule 2 [2] replaces the existing section 43A of the Act. The amended provision states that the provisions in chapter 3 of the Motor Accidents Compensation Act that require insurers to pay for certain treatment and care needs do not apply in any respect. This exception applies whether or not the treatment and care needs are assessed treatment and care needs under the Motor Accidents (Lifetime Care and Support) Act and whether or not the Lifetime Care and Support Scheme is required to make any payment with respect to those treatment and care needs. This exception to an insurer's usual obligations under chapter 3 also extends to any excluded treatment and care needs.

In addition, so that it is absolutely clear, proposed new section 43A (2) (c) states that the exception provided for in section 43A (1) applies "whether or not the treatment, care, support or service (provided for in connection with treatment and care needs) is provided on a gratuitous basis". For the purposes of proposed new section 43A, the meaning of "treatment and care needs" is the same in both the Motor Accidents Compensation Act and the Motor Accidents (Lifetime Care and Support) Act. The other key amendment to the Motor Accidents Compensation Act is set out in schedule 2 [7], which inserts new section 141A in place of the existing section 130A. This provision is designed to ensure that no damages can be awarded to lifetime care scheme participants for their treatment and care needs, or any excluded treatment and care needs, as all reasonable and necessary services will be assessed and provided by the Lifetime Care and Support scheme.

Like proposed section 43A, new section 141A is expressed to apply whether or not the treatment and care needs are assessed treatment and care needs pursuant to the Motor Accidents (Lifetime Care and Support) Act, whether or not the Lifetime Care and Support Authority is required to make a payment in respect of the treatment and care needs concerned, and whether or not the treatment, care, support or service is provided on a gratuitous basis. The transitional provisions set out in schedule 2 [9] make it clear that these amendments are to apply to any claim made on or after introduction of the bill into Parliament and regardless of whether any claim is made in relation to past or future treatment and care needs. "Claim" includes claims or requests made in relation to treatment and care needs made to a licensed insurer or the Lifetime Care and Support Authority under the Motor Accidents (Lifetime Care and Support) Act 2006. I commend the bill to the House.

Debate adjourned on motion by the Hon. Adam Searle and set down as an order of the day for a future day.