

PARLIAMENT OF NEW SOUTH WALES  
LEGISLATIVE COUNCIL

**STANDING COMMITTEE ON LAW & JUSTICE**

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REPORT ON THE INQUIRY INTO THE

**- MOTOR ACCIDENTS SCHEME -  
(COMPULSORY THIRD PARTY INSURANCE)**

**SECOND INTERIM REPORT**

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ORDERED TO BE PRINTED 15 DECEMBER 1997  
ACCORDING TO RESOLUTION OF THE HOUSE

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# Terms of Reference

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- 1 That the Standing Committee on Law & Justice inquire into and report on the Motor Accidents Scheme and compulsory third party insurance, and in particular:
  - (a) examine and report on the role of insurers participating in the scheme;
  - (b) examine the accountability and oversight mechanisms of insurers and the Motor Accidents Authority under the scheme; and
  - (c) examine the concerns of insurees, levels of claims and compensation as well as legal fees and other such matters as the Committee finds appropriate.
- 2 That the Committee obtain such expert advice as may be necessary to assist the Committee with its inquiry.
- 3 That the Government provides such resources as the Committee feels is necessary to undertake the inquiry.
- 4 That the Committee give a progress report within twelve months of the date that the House adopts this resolution.<sup>1</sup>

# Committee Membership

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**THE HON BRYAN VAUGHAN, MLC, AUSTRALIAN LABOR PARTY**  
**CHAIRMAN**

**THE HON HELEN SHAM-HO, MLC, LIBERAL PARTY**  
**DEPUTY CHAIRPERSON**

**THE HON JANICE BURNSWOODS, MLC, AUSTRALIAN LABOR PARTY**

**REVEREND THE HON FRED NILE, MLC, CALL TO AUSTRALIA GROUP**

**THE HON PETER PRIMROSE, MLC, AUSTRALIAN LABOR PARTY**

**THE HON JOHN RYAN, MLC, LIBERAL PARTY**

**THE HON JANELLE SAFFIN, MLC, AUSTRALIAN LABOR PARTY**

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*Only the Report on the Study Tour of September 1997 has been reproduced on the Internet. It can be found on the Law and Justice Home Page next to the entry point for this report. For a copy of any or all of the remaining appendices, please contact the Secretariat on Telephone: (02) 9230 3311, or Fax: (02) 9230 3371, or Email: [law.justice@parliament.nsw.gov.au](mailto:law.justice@parliament.nsw.gov.au)*

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# Chairman's Foreword

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The Standing Committee on Law and Justice began its inquiry into the Motor Accidents Scheme (Compulsory Third Party insurance) in April 1996. In December 1996 the Committee produced an *Interim Report* which set out the Committee's concluded views on the role of insurers in the scheme and accountability and oversight mechanisms. The *Interim Report* also identified three outstanding issues, upon which the Committee would seek to encourage further discussion and consultation during 1997. The three outstanding issues were:

Long Term Care;  
Medical Evidence; and  
Legal Costs.

Throughout 1997 significant research has been conducted into each of these issues. Although this research is ongoing, there is now sufficient information available for the Committee to form concluded views on all but one of the outstanding issues.

If there is one particular theme running through this report it is *appropriate compensation for the most seriously injured motor accident victims*. The Committee is of the view that there are two principal means by which the compensation available to the most seriously injured motor accident victims can be made more appropriate. This report therefore expresses the Committee's unequivocal support for:

the use of structured settlements in appropriate cases; and  
the development of a no fault long term care scheme.

Together with the rest of the Committee, I have become a passionate supporter of the use of structured settlements. Of course, lump sum payments will continue to be the most appropriate form of compensation payment for the overwhelming majority of accident victims who suffer relatively minor injuries. However, structured settlements must be made available as an option for those whose injuries mean a total loss of income earning capacity and dependence on compensation payments to meet medical and care costs. In order for this to happen, the taxation treatment of periodic payments under a structured settlement needs to be clarified. The Committee therefore recommends that the NSW Government adopts the submission for tax reform to facilitate structured settlements which has been prepared by the Motor Accidents Authority.

Structured settlements are only part of the answer, though. As the Motor Accidents Authority's research has shown, less than 50% of the most seriously injured motor accident victims receive any form of compensation under the Motor Accidents Scheme. In order to ensure that the long term care needs of this group are addressed the Committee has recommended the development of a no fault long term care scheme. The development of such a scheme will impose an additional cost upon Green Slips. However, the Committee is convinced that this extra cost can be offset, at least in part, from savings that will accrue from

other reforms to the scheme. For instance, the Committee's recommendations for reform in the area of medical evidence should lead not only to greater objectivity in medical evidence but also to consequent cost savings to the scheme.

The only issue now outstanding in the Committee's inquiry is legal costs. Once the results of the Justice Research Centre's study of legal costs in the scheme are available the Committee will be using these results as the basis for further consultation and consideration of reform proposals. The Committee intends to report upon legal costs in the *Final Report* upon this inquiry during 1998.

On behalf of the Committee I would like to thank all those individuals and organisations who have been of assistance to the Committee during 1997. I would also like to acknowledge the excellent work that has been done by many individuals and organisations over the last twelve months.

The Motor Accidents Authority and its General Manager, Mr Dallas Booth, have shown real leadership and vision. Together with the Ageing and Disability Department, NRMA Insurance and other representatives on the Long Term Care Working Party, the MAA has commissioned ground breaking work in relation to long term care by consultants Ms Vivien Tippett, Mr John Walsh and Mr Geoff Atkins. The MAA's consultant on structured settlements, Ms Jane Ferguson, has designed what appears to be a practical and realistic model for structured settlements in Australia and has prepared a comprehensive submission for tax reform to facilitate structured settlements. All of this work, on both long term care and structured settlements, has a significance beyond NSW. This work will be of interest not only to other jurisdictions within Australia but also overseas. I would also like to acknowledge the important work that has been conducted by NRMA Insurance in relation to medical evidence.

On behalf of the Committee I would like to thank the staff of the Committee Secretariat for their work in the preparation of this report and for their assistance during the course of this inquiry. The Committee Director, Mr David Blunt, drafted this report. The Committee's Senior Project Officer, Ms Vicki Mullen, wrote the report on the study tour which is reproduced in Appendix One. Ms Mullen also organised the Legal Costs seminar referred to in Chapter Five. The presentation and formatting of the report was handled by the Committee Officer, Ms Phillipa Gately.

Finally, I would like to thank my fellow members of the Standing Committee on Law and Justice for the considered and constructive manner in which they have continued to approach this inquiry during the past twelve months. Once again, the Committee has operated in a non-partisan manner and has produced a report in which each of the recommendations has the unanimous support of all members of the Committee.

**Hon Bryan Vaughan MLC**  
**Chairman**

# Summary of Recommendations

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## Chapter Two - Structured Settlements

Recommendation 1: The Committee recommends the use of structured settlements in appropriate personal injuries compensation cases.

Recommendation 2: The Committee recommends that the NSW Government adopts the submission for tax reform to facilitate structured settlements which has been prepared by the Motor Accidents Authority.

## Chapter Three - Long Term Care

Recommendation 3: The Committee recommends the development of a no fault long term care scheme.

Recommendation 4: The Committee therefore recommends that the Motor Accidents Authority, the Ageing and Disability Department, and their working party, continue the development of detailed proposals (which the Committee has been told will be completed by April 1998) for the introduction of a no fault long term care scheme, including a range of options for funding and administrative arrangements for such a scheme.

Recommendation 5: The Committee recommends that the Motor Accidents Authority prepare for public release a document setting out options for achieving savings within the current CTP scheme (together with the final detailed proposal for the introduction of a no fault long term care scheme).

## Chapter Four - Medical Evidence

Recommendation 6: The Committee recommends that the prototype computerised standard report format for medical reports be further refined through a pilot program.

Recommendation 7: The Committee recommends that the relevant medical colleges develop standard examination protocols for all key injuries or conditions that arise in CTP matters, based upon prevailing, contemporary scientific evidence.

Recommendation 8: The Committee recommends the use of video-conferencing in CTP matters as a way of involving leading medical specialists in the provision of evidence and therefore recommends that the Attorney General ensure that the Supreme and District Courts have sufficient resources to ensure that the necessary technology is put in place as soon as possible.

Recommendation 9: The Committee recommends that the Motor Accidents Authority conduct a detailed examination of the possible application in NSW of the Designated Assessment Centre (DAC) system which operates in Ontario.

Recommendation 10: The Committee recommends the use of evidence based medicine in CTP matters.

## Chapter Five - Legal Costs

The Committee has not made any recommendations about the issue of legal costs in the CTP scheme. The Committee is awaiting the results of the Justice Research Centre's study of legal costs in the CTP scheme. Once this study is completed (which the Committee has been advised should be by February 1998) the Committee will be using the results of the study as the basis for further consultation and detailed consideration of legal costs in the CTP scheme.

## Chapter Six - Other Issues

### Infants Claims

Recommendation 11: The Committee recommends that, should the proposed no fault long term care scheme not be adopted, there be a presumption of liability in infants claims.

### Section 45

Recommendation 12: The Committee recommends that, in view of the Court of Appeals decision in *Stubbs v NRMA*, the Motor Accidents Authority give urgent consideration to the development of means by which disputes about what constitutes reasonable and necessary services or payments under section 37 or 45 of the *Motor Accidents Act 1988* may be quickly and finally resolved.

# Chapter One

## Introduction

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### 1.1 Background

1.1.1 In December 1996 the Standing Committee on Law and Justice (the Committee) tabled its *Interim Report* on its inquiry into the Motor Accidents Scheme (the inquiry).<sup>2</sup> The report contained the Committee's concluded views in relation to the terms of reference the Committee received from the Legislative Council in December 1995, concerning the role of insurers participating in the scheme and accountability and oversight mechanisms. The report also contained the Committee's views on a range of other issues, including non-economic loss, infants claims and structured settlements. The report also identified three key issues requiring further work:

- long term care;
- medical evidence; and
- legal costs.

The *Interim Report* indicated the Committee's initial views and pointed to relevant research that was to be carried out by other bodies during early 1997. The Committee indicated an intention to encourage further discussion and consultation on these issues with a view to reporting conclusively on these matters in a *Final Report* in mid 1997.

### 1.2 Conduct of this inquiry during 1997

1.2.1 As a first step in pursuing the three outstanding issues from the Committee's *Interim Report* the Committee convened a number of round table meetings involving key stakeholders. On 3 February a round table meeting was held in relation to long term care. On 6 February the Committee convened a round table meeting in relation to legal costs and medical evidence. A further round table meeting was convened on 1 April. That meeting dealt with both long term care and legal costs. The participants in these round table meetings are listed in Appendix 4.

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<sup>2</sup> Standing Committee on Law & Justice, *Report on the Inquiry into the Motor Accidents Scheme (Compulsory Third Party insurance) Interim Report*, Report No. 3, December 1996 (hereafter *Interim Report*).

- 1.2.2 On 5 May the Committee held a public seminar on Legal Costs in the Motor Accidents Scheme. A range of invited speakers made presentations followed by a round table discussion. A list of seminar participants is included at Appendix 4. The Committee tabled the seminar proceedings, together with extensive background prepared by the Committee Secretariat, in a report to Parliament, in June 1997.<sup>3</sup>
- 1.2.3 At the round table meeting on 1 April the Chairman announced that the Committee had decided to accept supplementary submissions. Specifically, he indicated that the Committee was interested in submissions which either responded to the recommendations contained in the *Interim Report* or provided the Committee with further evidence in relation to the outstanding issues. The Committee wrote to all those who had made submissions during 1996 to advise them that supplementary submissions would be accepted. The Committee received 26 supplementary submissions. Nine of these submissions were concerned with the issue of legal costs. The remaining 17 submissions addressed a range of issues. The authors of those supplementary submissions are listed in Appendix 5.
- 1.2.4 On 3 July the Committee Chairman was the keynote speaker at a seminar organised by the Australian Insurance Law Association, entitled *Green Slips Overhaul: Has it Worked?* The Chairman's paper was entitled "Public Confidence as the Key to Sustainability: An Overview of the Proceedings of the Inquiry into the Motor Accidents Scheme". A number of speakers responded to the Chairman's paper, from the perspectives of plaintiff lawyers, defendant lawyers and the insurance industry. Reference is made within this report to a number of the points made by speakers at that seminar.
- 1.2.5 On 13 August the NRMA convened a symposium entitled *Whiplash - the Impacts & Implications*. The Chairman delivered a brief paper entitled "Whiplash - A Parliamentary Perspective", which dealt with the subject of medical evidence. Reference is made within this report to a number of points made by speakers at that symposium.
- 1.2.6 In August and September a delegation consisting of the Committee Chairman, Rev Nile and the Senior Project Officer undertook a three week study tour to the United States, Canada and the United Kingdom, to investigate the use of structured settlements in relation to motor accidents compensation matters. The

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<sup>3</sup> Standing Committee on Law & Justice, *Proceedings of the Seminar on the Motor Accidents Scheme (Legal Costs)*, Report No. 5, June 1997 (hereafter *Legal Costs Seminar*).

issue of legal costs was also examined, particularly in the United Kingdom. The Deputy Chair was also able to attend meetings held by the delegation in Canada. A report on the study tour is included as Appendix 1.

- 1.2.7 Upon the return of the delegation a meeting was convened with the General Manager of the Motor Accidents Authority (MAA) and the MAA's consultant in relation to structured settlements, to discuss progress with structured settlements and ways in which the Committee may be able to assist in relation to this issue. As a result of this meeting, on 13 November the Committee Chairman arranged a briefing on developments in relation to structured settlements for selected senior members of the legal profession. The Committee then discussed possible mechanisms for educating the legal profession about the benefits and possible use of structured settlements with the senior members of the profession in attendance.
- 1.2.8 On 26 September the Committee held a formal hearing at which evidence was taken from a number of people involved in work being co-ordinated by the MAA and the Ageing and Disability Department (ADD) in relation to long term care. This hearing placed on the public record the results to date of the extensive work that has taken place on this subject during 1997. A list of those who gave evidence is included in Appendix 4.

### **1.3 Nature of this report**

- 1.3.1 As highlighted above, it was the Committee's intention to table a *Final Report* on the Motor Accidents Scheme by the middle of 1997. By April this year it was clear to the Committee that it would not be possible to meet that time frame and the Committee resolved to aim to complete this inquiry and table a *Final Report* before the end of 1997. Once again, however, it became evident some months ago that it would not be possible for the Committee to finalise this inquiry until well into 1998. The main reason is the fact that the Committee is still awaiting the completion of important research in relation to one of the outstanding issues, legal costs.
- 1.3.2 Chapter Two of this report deals with structured settlements. Significant work has taken place in respect of structured settlements during 1997 and, the delegation that conducted the study tour during August and September collected a wealth of material on the operation of structured settlements in the United States, Canada and the United Kingdom. Chapter Two contains the Committee's concluded views on this important subject.

- 1.3.3 Chapter Three deals with long term care. Significant and ground breaking research has been completed this year, and the Committee has now expressed its firm support for the development of a no fault long term care scheme. However, the Motor Accidents Authority has made it clear that considerable work is required before a range of possible detailed reform options will be ready to be put to the Government and placed on the public record for detailed discussion. At this stage it is thought that this work may be completed by April 1998. The Committee therefore expects to comment on the various detailed options for the introduction of a no fault long term care scheme in its Final Report in 1998.
- 1.3.4 Chapter Four is concerned with medical evidence. There has also been some useful research and real progress made during 1997 in relation to options to address the problems in the area of medical evidence that were summarised in the Committee's *Interim Report* of December 1996. Chapter Four contains the Committee's concluded views on the key reform options in this area. However, the Committee has highlighted a further reform option in relation to medical evidence, namely the Designated Assessment Centre (DAC) system which operates in Ontario, and the Committee will follow up the Motor Accidents Authority's consideration of this proposal during 1998.
- 1.3.5 Chapter Five deals with legal costs. The Committee understands that there have been a number of reasons for delay in the completion of the Justice Research Centre's study of legal costs in the Motor Accidents Scheme. It is now expected that the study will be completed and the research findings published in February 1998. The Committee will be relying upon and using this data in the detailed consideration of reform options in relation to legal costs during the first half of 1998.
- 1.3.6 Chapter Six deals with two issues. There is a brief discussion of Infants Claims, a subject which received considerable attention in the Committee's *Interim Report* of December 1996. There is also a discussion of section 45 of the *Motor Accidents Act 1988*, which has been the subject of decisions of the Supreme Court of NSW and the NSW Court of Appeal since the Committee's *Interim Report* was tabled.
- 1.3.7 It has proved impossible for the Committee to complete its inquiry into the Motor Accidents Scheme and table a *Final Report* before the end of 1997 dealing with **all** of the outstanding issues. However, the Committee felt that it was important that the Legislative Council, all stakeholders and interested observers (including those who have contributed to the Committee's inquiry to date), be informed of the Committee's views in relation to a number of important issues and kept up to date with the progress that has been made in relation to challenging issues during the past year. Furthermore, the Committee has wanted to be accountable for the steps that it has taken during the course of this inquiry

during 1997. Therefore, the Committee has determined to table a *Second Report* setting out the Committee's concluded views on a number of issues and summarising the progress that has been made during 1997.

# Chapter Two

## Structured Settlements

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### 2.1 Background

2.1.1 Chapter 10 of the Committee's *Interim Report* of December 1996 dealt with structured settlements. The chapter began with the following definition of a structured settlement.

A structured settlement is a technique which enables a personal injuries plaintiff, who would otherwise recover a substantial lump sum in damages, to receive instead sums of money payable by regular instalments guaranteed for life or for a fixed term.<sup>4</sup>

2.1.2 The chapter then discussed the existing barriers to the use of structured settlements in Australia. The most important barrier identified was the uncertainty of the taxation treatment of structured settlements. Under the common law distinction between income and capital, periodic payments are usually characterised as income and treated as taxable, regardless of the source of the payments. There is therefore concern that a compensation payment paid in the form of a structured settlement would lose its capital status and be taxable. In the light of this uncertainty it is not surprising that plaintiffs and their legal representatives have been unwilling to embrace the concept of a structured settlement.

2.1.3 The chapter in the *Interim Report* then briefly summarised the evidence received as to the advantages and disadvantages of structured settlements. The advantages of structured settlements for the small number of very seriously injured motor accident victims (and other persons who receive compensation payments for very serious personal injuries) include: a cash flow guaranteed for life; transfer of the risk involved in investing a large sum of money to a life insurance company; and indexing, that is linking to inflation. The structured settlement can be flexible, involving both a lump sum component and periodic payments. Structured settlements also make it more likely that compensation payments will be spent on the purposes for which they were intended, such as medical and care needs. This must lead to significant savings to government. Structured settlements can also result in savings to defendants and their insurers as structured settlements can cost up to 15 % less than the alternative lump sum compensation. The advantages of structured settlements have been presented in the Parliament recently by the Committee Chairman, in a speech which is reproduced in Appendix 1. The only possible disadvantage of structured settlements identified by the Committee in its *Interim Report* was the possibility of a lack of flexibility after a structured

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D Colenbrander, "Tax Implications of Introducing the UK Structured Settlements Model into Australia", *Discussion Paper*, 26 October 1996, p 1.

settlement has been put in place. However, it is the Committee's view there is more than adequate flexibility when a structured settlement is negotiated. Plaintiffs can build flexibility into their structured settlement by including a lump sum payment as part of the structure, and also by including lump sum payments in the structured settlement. The Committee is of the view that while lump sum payments will continue to be the most appropriate form of compensation payment for most accident victims who suffer relatively minor injuries, structured settlements should be available for those whose injuries mean a total loss of income earning capacity and dependence on compensation payments to meet medical and care costs.

- 2.1.4 The chapter in the *Interim Report* then noted that the MAA was preparing a case to present to the Federal Government in support of the non-taxable status of structured settlements. The Committee expressed its strong support for this work and recommended that,

as a matter of some urgency, the NSW Government, clearly states its support to the Commonwealth Government for the non-taxable status of structured settlements as a compensation mechanism, for the benefit of the long term financial independence and stability of compensable motor accident victims, and as a means of reducing the reliance of NSW motor accident victims on Commonwealth funded social security programs (otherwise known as 'double dipping').<sup>5</sup>

## **2.2 Progress during 1997**

- 2.2.1 Much activity has been taking place in relation to structured settlements during 1997. In February the MAA engaged a consultant, Ms Jane Ferguson, to: analyse international structured settlement models; research the Australian legal, tax and social contexts; design a model for structured settlements for Australia; prepare a comprehensive proposal document for submission to government; liaise with lobbyists and consultants engaged by the MAA; and answer queries and provide general information and advice about structured settlements to government and business.
- 2.2.2 In June 1997 the MAA published a consultative document entitled *Structured Settlements for Accident Victims: A proposal by the Motor Accidents Authority*. The consultative document briefly set out the need for structured settlements and the potential benefits to all stakeholders from their use.

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<sup>5</sup>

*Interim Report*, p 152.

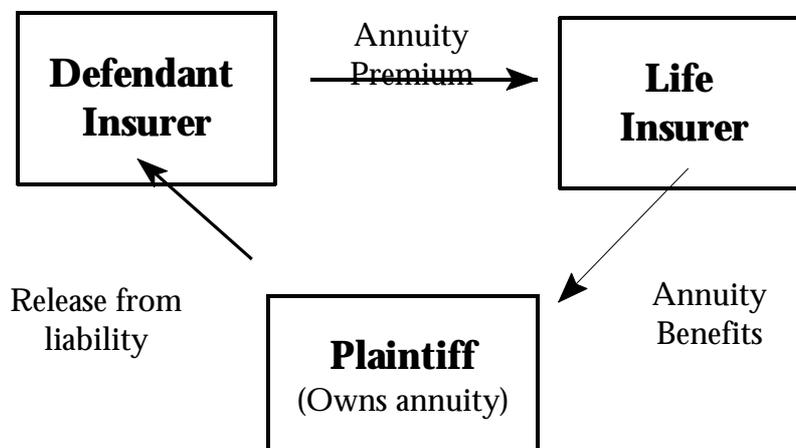
The document then set out the MAA's preferred model for the operation of structured settlements:

- The model applies to the situation where a plaintiff (victim) makes a claim against a defendant for damages resulting from serious personal injury.
- The plaintiff's damages will include fairly large future care and lost earning capacity components.
- The plaintiff and the defendant's insurer will negotiate a structured settlement based on the plaintiff (victim's) individual needs and preferences.
- The structured settlement will include an up front lump sum and periodic payment.
- The defendant insurer will pay the up front lump sum to the plaintiff.
- It will also purchase for the plaintiff (from a Life Insurer) an annuity.
- The annuity will be owned by the plaintiff (victim). It will be non-assignable and non-transferable.
- The defendant insurer will be released from liability.
- The plaintiff will receive ongoing periodic annuity payments direct from the Life Insurer.
- An amendment to the Tax Act will confirm that the periodic payments are tax-free in the plaintiff's hands.
- The amendment of the Tax Act will enable the plaintiff to make a tax-neutral choice between accepting compensation in the form of a lump sum only or a structured settlement. It will not include any penalties to influence claimants against lump sums.<sup>6</sup>

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<sup>6</sup>

MAA, *Structured Settlements for Accident Victims*, July 1997, p 11.

**Diagram of the MAA model**

The MAA's consultative document also briefly set out the nature of the amendment to the Tax Act which would be sought from the Commonwealth Government in order to clarify the taxation treatment of structured settlements. The amendment would confirm that those compensation payments that would be characterised as capital if paid in the form of a lump sum should retain their capital characterisation if paid in the form of periodic payments.

- The proposed amendment to the Tax Act will not disrupt the existing tax system, but rather will clarify the law in the specific context of structured settlements...
- The important point to keep in mind is that the proposed amendment does not seek to give a capital characterisation to a receipt which would otherwise be income. It simply clarifies the fact that the capital characterisation of a compensation payment is retained when that payment is paid over time rather than in the form of a lump sum.<sup>7</sup>

2.2.3 The MAA's consultative document was circulated to 45 interest groups spanning consumer organisations, the legal profession, the insurance industry and others. The document received a very positive response, particularly because it is proposed that structured settlements be a voluntary option.

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<sup>7</sup>

Ibid, pp 15-16.

- 2.2.4 The MAA has since engaged Mr John Walsh, of Coopers & Lybrand actuarial services to complete a review of the financial implications of the proposal. The MAA has indicated that Mr Walsh has identified a net benefit to the Commonwealth Government of more than \$200m per year from the use of structured settlements as proposed by the MAA.

### **2.3 Overseas study tour**

- 2.3.1 In August and September a delegation consisting of the Committee Chairman, Rev Nile and the Senior Project Officer undertook a three week study tour to the United States, Canada and the United Kingdom, to investigate the use of structured settlements in relation to motor accident compensation matters. The issue of legal costs was also examined, particularly in the United Kingdom. The Deputy Chair was also able to attend meetings held by the delegation in Canada. A report on the study tour is included as Appendix 1. The report contains an outline of each meeting and the issues arising from them.
- 2.3.2 The delegation was particularly attracted to the simplicity of the structured settlements model which operates in the United Kingdom. In the United Kingdom, payments under a structured settlement have been treated as tax free pursuant to a ruling from the Inland Revenue Service in 1987. In 1995 the tax free status of payments under a structured settlement were confirmed through amendments to the *Income and Corporation Taxes Act*. The main elements of the United Kingdom structured settlements model are reflected in the MAA's proposed model. The defendant insurer purchases an annuity for the claimant, thereby discharging its liability to the claimant. The annuity is owned by the claimant and the annuity provider pays the periodic payments directly to the claimant. The annuity is non-assignable and non-transferable. The claimant receives the periodic payments under the annuity tax free.
- 2.3.3 The main impression from the United States part of the study tour was the fact that structured settlements are a "win-win" situation for all stakeholders in the personal injuries compensation field, and that all stakeholders have now come to accept and utilise structured settlements. The delegation was told that early "plaintiff lawyer resistance" to voluntary structured settlements had been eroded as the financial benefits of structured settlements had become evident. The delegation was told that structured settlements had become increasingly popular in relation to matters where minors or adolescents were the claimants. Over the years that structured settlements have been in operation in the United States their

flexibility has become evident, particularly the capacity for a significant up-front lump sum to be built into the structure.

- 2.3.4 The delegation was surprised by the size of the structured settlements industry in the United States. The industry now has over \$40 billion in assets under management in relation to structured settlements. There are now between 250,000 and 300,000 structured settlements in place and 22 life insurance companies providing annuities for use in structured settlements.
- 2.3.5 A number of industry representatives and lawyers with whom the delegation met in the United States made reference to the need to ensure the security of periodic payments in the event that a life insurance company is merged or becomes insolvent. It should be noted that the United States insurance industry is not regulated by any Federal industry regulator and the level of State prudential supervision is significantly less than that which exists in Australia. Plaintiffs and their lawyers tend to be guided by industry ratings when considering the security of life insurers. In Canada it is generally accepted that a life insurance company wishing to offer structured settlements must have \$15 billion in asset backing and an AA+ credit rating.
- 2.3.6 Attention was also drawn to the growth of a “grey market” in structured settlements in the United States whereby brokers offer to purchase structured settlements for a lump sum. Plaintiffs effectively commute their periodic payments into a lump sum. This market is relatively small as few plaintiffs wish to give up their tax-free flow of payments. But in some situations it may be necessary for some plaintiffs to commute to lump sum. This “grey market” does not exist in Canada. In Canada structured settlement payments are non-commutable.
- 2.3.7 The delegation was told that there has recently been a successful suit against a plaintiff lawyer in Ontario for not bringing the option of a structured settlement to the attention of a plaintiff.
- 2.3.8 There are now approximately 600 structured settlements under management in the United Kingdom. They range in size from less than £100,000 to more than £ 2 million. Structured settlements are now being used in relation to between 25 - 60% of catastrophic compensable injuries. The delegation was told that in a typical structured settlement approximately 40% of a compensation amount would take the form of a lump sum with 60% going towards a structured settlement. The delegation was told that structured settlements have the strong support of the legal profession, particularly in relation to catastrophic claims, and that the legal profession has been just as involved in the development of structured settlements as the insurance industry.

2.3.9 Upon the return of the delegation a meeting was held with the General Manager of the MAA, Mr Dallas Booth, and Ms Jane Ferguson, to discuss progress in relation to the structured settlements issue. The delegation was able to provide a wealth of valuable research material, particularly in relation to the operation of structured settlements in the United Kingdom. The delegation was pleased to note that the MAA's preferred structured settlements model most closely approximates the United Kingdom model.

## 2.4 Next steps

2.4.1 The MAA has now finalised its formal submission for the amendment of the Tax Act to clarify the non-taxable status of personal injury compensation payments paid as periodic payments. The MAA's submission will shortly be considered by the NSW Government. It may ultimately become a submission from the NSW Government to the Commonwealth Government.

### **Recommendation 1:**

**The Committee recommends the use of structured settlements in appropriate personal injuries compensation cases.**

### **Recommendation 2:**

**The Committee recommends that the NSW Government adopts the submission for tax reform to facilitate structured settlements which has been prepared by the Motor Accidents Authority.**

# Chapter Three

## Long Term Care

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### 3.1 Background

3.1.1 Chapter Nine of the Committee's *Interim Report* of December 1996 dealt with long term care. The chapter began with an outline of the nature of the long term care needs of seriously injured motor accident victims, and an outline of the problems which exist in relation to long term care. These problems include the lack of appropriate services, particularly for persons with a severe brain injury, and the inequities between compensable and non-compensable persons in their capacity to access the limited services which do exist. The chapter summarised the views about long term care contained in submissions received by the Committee and described long term care in other jurisdictions such as Tasmania.

3.1.2 The Committee's *Interim Report* went on to outline an emerging proposal which had the support of the consumer associations representing seriously catastrophically injured motor accident victims, together with the NSW Government's disability funder, the Ageing and Disability Department (ADD). This proposal was closely based upon the Tasmanian future care program and had the following key features:

- a no-fault long term care scheme, fully funded;
- funded by a dedicated levy on motorists as part of CTP premiums going into a pooled fund;
- pooled fund to be partitioned from consolidated revenue withdrawals and invested;
- pooled fund to be administered by independent statutory authority with significant consumer representation;
- assessment of eligibility for benefits to be made by a tribunal or independent assessors with a right of appeal;
- emphasis upon a case management approach and community support programs;
- accreditation of service providers; and
- development of a long term care database.<sup>8</sup>

3.1.3 The Committee's *Interim Report* referred to data showing that approximately 250 persons are catastrophically injured in motor accidents in NSW each year and that

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<sup>8</sup> *Interim Report*, pp 138-139.

currently less than 50% of them receive any form of compensation. The Committee highlighted the intention of the MAA to further develop the proposed model and prepare a detailed costing for it. The Committee drew attention to a number of matters that would need to be carefully considered in relation to the development of such a proposal. These included the possible effect of long term care support upon an injured person's eligibility for Social Security or other Commonwealth benefits, and possible arrangements for the administration of a pooled fund and long term care scheme. (In relation to possible administrative arrangements the Committee drew attention to a submission from the Office of the Protective Commissioner which suggested that the Office of the Protective Commissioner may be able to play a useful role.) The Committee expressed support for the MAA's proposed work on this issue and an intention to use the results of the MAA's proposed work as the basis for further consultation and the development of definitive conclusions on this issue.

The Committee recommends that the Motor Accidents Authority complete its work developing and costing a model for the provision of long term care on a no-fault basis by the end of April 1997. This model should be based upon the proposal that has emerged from consumer associations, the Ageing and Disability Department, and others during the Committee's inquiry, and should draw upon the experience of the Tasmanian future care program...

The Committee recommends that the results of the Motor Accidents Authority's work developing and costing the proposed no-fault long term care proposal, form the basis of further consultation and discussion prior to the development of definitive recommendations for inclusion in the Committee's Final Report in mid-1997.<sup>9</sup>

## 3.2 Response to the *Interim Report*

3.2.1 As outlined in paragraph 1.2.3 above, the Committee received 26 supplementary submissions. Seven of these submissions dealt primarily with the recommendations contained in the *Interim Report* concerning long term care. Unsurprisingly, the three consumer associations representing catastrophically injured motor accident victims all expressed strong support for the development of a no-fault long term care scheme.<sup>10</sup> Mr John Walsh, whose original submission had contained the key features of the emerging proposal given support in the Committee's *Interim Report*, was also very supportive of the Committee's

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<sup>9</sup> Ibid, pp 143-144.

<sup>10</sup> *Supplementary Submissions* Volume One, September 1997, per Brain Injury Association (BIA), The Australian Quadriplegic Association (AQA), Paraquad.

recommendations in this area. Mr Martin McCurrich, the former General Manager of the MAA, also made a brief submission in support of the emerging proposal but emphasising the need for the proposal to be limited in its coverage to persons with serious brain injuries and quadriplegia in order to constrain costs.<sup>11</sup>

- 3.2.2 On the other hand, the supplementary submission received from the Insurance Council of Australia raised a number of concerns about the emerging proposal referred to in the Committee's *Interim Report*. The Insurance Council expressed concern about the difficulty of developing objective criteria to assess a person's eligibility for assistance, the potential cost of the proposed scheme, and the effect that such a scheme could have on the dynamics of the Motor Accidents Scheme as a whole.

The criteria for identifying persons with serious injuries must be established in a manner that emphasises objectivity and allows the industry to predict, with a high degree of certainty the group in this category...

A fundamental issue arising from mixing different types of scheme structures, that is fault and no-fault, within a single scheme or providing that one group of claimants is entitled to a particular type of damage and another group is not, is to ensure that does not of itself create a major problem with the scheme and fundamentally upset its dynamics and operation...

At the heart of any proposal is the cost in premium terms and insurers do not believe that anything has been presented to the Committee which would indicate, in sufficiently clear and unambiguous terms, that the cost is in the range of being affordable as that concept is currently viewed by the community. The insurers remain committed to a fault based common law approach. Insurers believe that unless a clear objective gateway can be established (such as age in respect of infants claims) these proposals for long term care for all motor accident victims who are seriously injured, will be fraught with danger.<sup>12</sup>

- 3.2.3 Perhaps the most useful of the supplementary submissions addressing the recommendations contained in the *Interim Report* concerning long term care was that received from the Brain Injury Rehabilitation Unit (BIRU) of the Liverpool Health Service. The BIRU drew attention to inequities in the services available to persons with a traumatic brain injury (TBI) on the basis of their compensability, and strongly endorsed the proposed no-fault long term care scheme.

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<sup>11</sup> Ibid, per Mr John Walsh, Mr Martin McCurrich.

<sup>12</sup> Ibid, per Insurance Council of Australia (ICA).

Existing benefits available from Commonwealth and State governments are highly inadequate for people with “catastrophic injuries” who are non-compensable. The maximum number of home support hours that can be organised through Community Options and other HACC programs rarely exceeds 3-4 hours per day. In contrast, people with [successful] claims can fund 16-24 hours care per day where necessary. There is a marked gap in the levels of support it is possible to access between people who are compensable and people who are non-compensable, and it is unrealistic for the ICA to suggest that current support available through government programs is adequate...

The BIRU strongly supports the idea of a no-fault scheme for long term care. In most cases there is a level of equality of services at the inpatient level but even at the point of discharge the differences between the options available to someone who is compensable compared to someone who is non-compensable become readily apparent. A no-fault scheme for long term care would have the advantages of addressing the equity issues and disparities currently so readily apparent, and also bring relief to many families who have born a disproportionate burden in supporting a relative with a TBI.<sup>13</sup>

- 3.2.4 The BIRU made a number of specific recommendations concerning the development of the proposed long term care scheme. It suggested that the term “catastrophic” should be dropped and replaced with the term “severe disability”.

The term “catastrophic” has no clinical validity. It should be dropped and a term like “severe disability” used in its place. Severe disability is measurable on the Glasgow Outcome Scale, which is a properly validated scale. In addition, it must be harrowing for families of a person with a TBI to be told that their relative has a “catastrophic injury”, not to mention the person with a TBI themselves.<sup>14</sup>

- 3.2.5 The BIRU expressed doubt about the prospects for developing a single instrument to identify and measure “catastrophic injury”. For this reason the determination of the needs of a person with “catastrophic injuries” should take place in a “clinical process”. It was suggested that an expert panel should do this.

Given the fact that there is no one instrument likely to be able to assess a “catastrophic injury” due to heterogeneity of outcome, it is recommended that an expert panel be established that would be able to assess findings from assessment tools with clinical data to reach determination about an individual’s level of need. As people’s situations do change over time such a panel could also exercise a review

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<sup>13</sup>

Ibid, per Brain Injury Rehabilitation Unit, Liverpool Health Service (hereafter BIRU).

<sup>14</sup>

Ibid.

function. Such a panel should comprise people with experience (ie not neurologists or neurosurgeons) in long term care issues.<sup>15</sup>

3.2.6 Furthermore, the BIRU suggested that, although any cut-off point for entry into the proposed no-fault long term care scheme would be necessarily “arbitrary”, such a cut-off point was essential to the scheme. The BIRU suggested a cut-off point as where “a person’s needs exceed current levels of service provision available in the community, which is normally 3-4 hours per day”.<sup>16</sup>

3.2.7 The BIRU also addressed the suggestion, referred to in the Committee’s *Interim Report*, that consideration be given to a submission from the Office of the Protective Commissioner (OPC) to the effect that the OPC could administer the proposed no-fault long term care scheme. The BIRU rejected a role for the OPC on a number of grounds, generally based upon the current structure, operations and skills base of the OPC.<sup>17</sup>

3.2.8 In relation to the issue of the administrative arrangements for the proposed no-fault long term care scheme, comments about this subject were also included in the submission received from the Australian Quadriplegic Association (AQA). AQA expressed a strong preference for the establishment of a special division within the Motor Accidents Authority, overseen by a board with significant consumer representation, to administer the proposed scheme. Like the BIRU, AQA expressed strong reservations about the suggestion that the OPC could play a role in administering the proposed scheme.

People with severe physical disabilities such as quadriplegia and paraplegia are, in the main, quite able to make decisions for themselves and feel strongly that they should not be brought “under the wing” of bodies which have been set up to deal predominantly with people who are unable, for whatever reason, to make their own decisions. They do not relate to such terms as “protection” and “Protective Commissioner”.<sup>18</sup>

### 3.3 Round table meetings

3.3.1 On 3 February 1997 the Committee convened the first of a series of three round table meetings involving key stakeholders. These round table meetings were designed to monitor progress on the action being taken on the outstanding issues

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> *Supplementary Submission* Volume One, per AQA.

in the inquiry and to ensure that all relevant interest groups continued to be informed of the work being done. The participants in these round table meetings are listed in Appendix 4. The meeting on 3 February was specifically concerned with long term care. In opening the meeting the Chairman made it clear that the Committee was determined to see that the work that had gone into the development of the emerging proposal given support in the *Interim Report* was not allowed to go to waste.

The Committee is determined that the hard work that has taken place in relation to these issues [including long term care], to which you have all contributed, is not wasted. Put another way, the Committee is determined that the *Interim Report* is not allowed to gather dust and that something is done about the reforms we are discussing.<sup>19</sup>

- 3.3.2 The round table meeting on 3 February included an outline of the development of the emerging proposal given support in the *Interim Report*, discussion of the concept of a no-fault long term care scheme, discussion of the possible cost of such a scheme and discussion of the appropriate “cut off point” for entry into the scheme. Representatives from each of the major interest groups, including consumer associations representing those with “catastrophic” injuries, and representatives of the key government agencies with an interest in the issue contributed to the discussion. The General Manager of the MAA, Mr Dallas Booth, outlined the MAA’s proposed approach to this issue, including the establishment of a working party and the proposal to give priority to the development of a system to identify the support needs of persons with a “catastrophic” injury.
- 3.3.3 The Committee convened a further round table meeting on the subject of long term care on 1 April. Representatives of the MAA and ADD briefed the meeting on the work of the working party established by the MAA. Specifically, the meeting was briefed on the consultancy specifications which had been finalised for the joint MAA/ADD project to develop a system of classifying people with serious injuries based on their support needs. There was some discussion, particularly from the perspective of the Insurance Council, about the merits of categorising people on the basis of need as distinct from their medical condition. The meeting was also told that, at the completion of this part of the project, the MAA would then engage an actuary to prepare a detailed costing of the cost of care for people who fall within each level of the classification system. Some concern was expressed at the meeting about the time frame for the completion of the MAA/ADD consultancy projects and there was a suggestion that the emerging proposal had become lost in the detail and needed to be “re-energised”

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<sup>19</sup>

*Transcript*, Round Table meeting on Long Term Care, 3 February 1997, p 1.

### 3.4 Take note debate

3.4.1 In April and May 1997 the Committee's *Interim Report* was the subject of a take note debate in the Legislative Council. A number of the members of the Committee spoke during the debate. The Deputy Chair of the Committee addressed the emerging long term care proposal in considerable detail. Both the Chairman and Deputy Chair sought to send a strong signal to the insurance industry, to the effect that the Committee would be very disappointed if the industry did not see fit to involve itself in reforms to improve the support services available to all "catastrophically" injured motor accident victims. For instance, the Deputy Chair said that,

At the most recent round table meeting convened by the Committee on this subject, a representative of the Insurance Council suggested that it was somehow inappropriate that the long Term Care Working Party was taking steps to have the research I have just outlined undertaken as "this process is making some assumptions as to where the system will go, which I think are matters for serious debate". I would suggest that the Committee has in fact adjudicated on this debate by expressing strong in principle support for a no-fault approach to long term care in the *Interim Report*...

In conclusion, I would also like to echo the comments of the Chairman in relation to the need for the insurance industry to engage itself more positively in the long term care issue. As the Chairman said, the Committee has adopted a scrupulously objective approach to this entire inquiry. No doubt, the insurance industry will have some concerns about some of the findings and recommendations in the *Interim Report*. However, I think any objective reader from the insurance industry will recognise that the industry has come out of this inquiry quite well. The Committee has clearly stated that it sees a useful ongoing role for private insurers in the scheme. Section 79A, which was the most controversial of the amendments to the Motor Accidents Act in 1995, will remain in place. The Committee is continuing to examine the issues of Medical Evidence and Legal Costs with a view to ensure greater stability in the scheme and minimising cost pressures. In this context I think it is not asking too much of the insurance industry to expect that they co-operate with the investigation of a no-fault approach to the issue of long term care. I would be very disappointed if the insurance industry does not see fit to support reforms in this important area.<sup>20</sup>

### 3.5 Australian Insurance Law Association seminar

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<sup>20</sup> NSW *Parliamentary Debates (Hansard) (NSWPD)* (LC), 14 May 1997, per Hon Helen Sham-Ho MLC.

3.5.1 On 3 July the Committee Chairman was the keynote speaker at the Australian Insurance Law Association seminar entitled *Green Slips Overhaul*. The Chairman's paper was entitled "Public Confidence as the Key to Sustainability" and pursued the theme that, for it to have a sustainable future, the current CTP scheme must maintain public confidence. The Chairman spoke about the long term care issue in the context of the need to ensure that the scheme continues to be fair and equitable. In this regard, he referred to the data that was presented to the Committee during 1996 to the effect that less than 50% of "catastrophically" injured motor accidents are covered by the scheme, in that less 50% of such persons receive compensation under the scheme. The Chairman concluded,

To retain public confidence the scheme must be fair and equitable. Above all, the needs of the most seriously injured, indeed the most "catastrophically" injured, motor accident victims must be addressed. It is the view of the Committee that a scheme in which less than 50% of the most seriously injured motor accident victims receive compensation is not sustainable.<sup>21</sup>

3.5.2 A number of speakers at the Australian Insurance Law Association seminar provided a commentary on the Chairman's paper. Mr Neville King, of N W King Consulting Pty Ltd, gave a commentary on behalf of the insurance industry. In relation to the Chairman's comments about the long term care issue, Mr King said that the Committee's proposal had merit and was a "sensible approach to a very difficult problem". However, he then raised a number of issues that the insurance industry would have to address in relation to the proposal.

In principle the proposals on long term care offer a sensible approach to a very difficult problem. The implications for the [insurance] industry are numerous, in particular the following matters need to be considered:

- The unpredictability of the numbers of potential claimants on these benefits. Much will obviously depend on the definitions. Unless definition is right, substantially more claimants than anticipated will undoubtedly be able to lay claim to these benefits. The description "catastrophic" and "severe" seem to be used interchangeably in some writings on the subject which increases the concerns I have in respect of what injuries it is intended would be covered.
- How is the interest of the administrators of the fund in containing costs to be maintained? Such a scheme cannot remain affordable if the administrator's interest in its performance is largely in telling the

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<sup>21</sup>

Hon B H Vaughan MLC, "Public Confidence as the Key to Sustainability" Paper presented to the Australian Insurance Law Association seminar *Green Slips Overhaul*, 3 July 1997, p 17.

industry what levy it must collect for the next year. The cost blow-out could be rapid and the industry, as the collector of the levy, will undoubtedly catch the flack.

- How is cross-funding out of this scheme into services for non motor accident victims to be controlled? One imagines many, if not most, facilities will be shared between accident and non-accident victims. There is bound to be a temptation for requiring the motor accidents scheme to pay more than its fair share, particularly if it appears to be performing well in the early stages.
- Is it possible to effectively quarantine these funds to protect them from short-term government needs in other areas?
- The industry would have to ensure that the collection of the levy in a given year is the end of its liability for those costs. It could not afford to link itself to any on-going liability for something it could not control. Insurers must be able to depart from this business if they wish without on-going liabilities to any government fund. In short the government would have to become the insurer for this part of the scheme.
- Cost shifting issues between the Commonwealth and the scheme will need to be carefully considered. There is little advantage to the community, the State Government or the industry if the end result of a pooling arrangement merely shifts costs previously borne by the Commonwealth onto scheme funding.
- There will be reinsurance issues to be determined by the industry.

As mentioned this proposal has merit but the industry would need to think through very carefully the above issues which it brings with it. There are numerous opportunities which have been raised by the previous speakers. Many of them will be difficult to achieve but in the mid-term most offer the prospect of a better more stable scheme in the future.<sup>22</sup>

### **3.6 Results of the MAA's work during 1997**

3.6.1 On 26 September 1997 the Committee conducted a public hearing at which evidence was taken from a number of persons who had been intimately involved

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<sup>22</sup>

Mr Neville King, "Commentary on Papers Presented by Dallas Booth and the Hon B H Vaughan MLC", Paper presented to Australian Insurance Law Association seminar, *Green Slips Overhaul*, 3 July 1997, pp 6-7.

in the MAA's work during 1997 to further develop the emerging long term care proposal given support in the Committee's *Interim Report*.

- 3.6.2 The General Manager of the MAA, Mr Dallas Booth, tabled a document which provides an overview of the MAA's work on long term care during 1997. The document is reproduced in Appendix 2. Mr Booth emphasised that the MAA's work was still "in a developmental stage" and had not yet been considered by the Government. Mr Booth highlighted the level of support and co-operation which the MAA had received from other agencies of Government in this work, including NSW Health, the Brain Injury Rehabilitation Units, the trauma registries at the major trauma hospitals and the Transport Accidents Commission of Victoria. Importantly, Mr Booth spelt out the definition of long term care services upon which the MAA was basing its work.

Services that aim to provide assistance to people with disabilities for everyday tasks that they would normally be doing for themselves. They enable an individual to live independently and exercise basic rights about choice of lifestyles, free of institutional constraints.<sup>23</sup>

Mr Booth then briefly outlined the nature of the MAA's work on this issue, in terms of:

- the development of an assessment and classification model;
- costing of the proposed long term care model;
- development of funding and financial options for a long term care program; and
- development of a service delivery model.

Mr Booth made it clear that most work to date had focussed on the first two issues, and that work in relation to the later two issues was still at a very preliminary stage.

- 3.6.3 The Committee received evidence from Ms Vivien Tippett, of Brian Elton and Associates, who acted as the consultant to the MAA in the development of a system to classify people with serious injuries and assess their care needs. Ms Tippett presented the Committee with "a simplified version of what is becoming

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<sup>23</sup>

*Evidence*, 26/9/96, p 6.

quite a complex mechanism for classification”.<sup>24</sup> Ms Tippett explained that the classification model involved a “summative assessment” of a number of variables in a weighted fashion. Ms Tippett tabled a document which set out the variables which form part of the classification system. This document is reproduced in Appendix 2. The variables were divided into primary indicators of the severity of injury and individual variables. The primary indicators of severity include:

- Glasgow Coma Scale, and length of Post-Traumatic Amnesia, in relation to a Traumatic Brain Injury (TBI);
- Locus of Lesion in relation to Spinal Cord Injury (SCI); and
- Co-morbid TBI and SCI.

The individual variables include:

- age at injury
- time since injury
- presence or absence of a partner / living companion / care;
- level of physical dependence (mobility);
- level of functional dependence (activities of daily living);
- cognition / memory / planning;
- presence of challenging behaviour as a result of the injury; and
- access to services.

Ms Tippett stated that all the variables included in the model are “measurable”, “quantifiable” and “in the main are consistently well gathered already”.<sup>25</sup>

3.6.4 Ms Tippett explained that the classification model was designed to assess needs at a number of points, including at the point of discharge, two years after injury when the injury and its effects had plateaued, at five years after injury, and after that as a person elected to have a fresh assessment. Ms Tippett outlined the work that was currently under way to validate the model, both against a group of individuals who will be injured over the next six to twelve months and also against a group of individuals who had been injured some time before.

3.6.5 The Committee received evidence from Mr John Walsh of Coopers & Lybrand Actuarial Services, who acted as a consultant to the MAA in the costing of the

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<sup>24</sup> Ibid, p 13.

<sup>25</sup> Ibid.

provision of long term care to seriously injured persons. Mr Walsh provided the Committee with a detailed description of his research methodology and findings. Mr Walsh's slides are reproduced in Appendix 2. Mr Walsh outlined the range of consultations which he conducted during his research and the range of data sources within NSW Health to which he had access. Mr Walsh went on to outline the conclusions which he was able to reach in relation to the incidence of motor vehicle accidents resulting in long term care needs. These figures are reproduced in the table set out below.

**INCIDENCE RATES: MVA RESULTING IN LONG TERM CARE [PER YEAR]**

DISABLING CONDITION	ASSUMED INCIDENCE (SURVIVORS)
Brain Injury	220 (excludes same day discharges, but has a loading for children)
Spinal Cord Injury	40
Major orthopaedic	10
<b>ALL</b>	<b>270</b>

Mr Walsh then discussed the findings of his research in relation to the demographics of those motor accident victims with long term care needs in terms of age, sex, locality, ethnic distribution and life expectancy.

- 3.6.6 Having outlined his findings in relation to the numbers of motor accident victims with long term care needs and the demographics of this group, Mr Walsh went on to outline the methodology by which he was able to calculate the level of care required by this group. Mr Walsh then presented a series of graphs showing the intensity of care required for adults and children with a TBI and persons generally with a SCI. Mr Walsh then presented a summary of the cost of care required. Mr Walsh presented this information in three tables. The first of these tables set out the cost of care required by all those who would be eligible for care under the proposed no fault long term scheme. The second table set out the cost of long term care under the current scheme. The third table set out the net cost of the proposed no fault long term care scheme.

**SUMMARY OF COSTING MODEL - PROPOSED NO FAULT SCHEME**

[PER YEAR]

	NUMBER	ANNUAL COST (\$M)	UNIT COST	\$PER POLICY
<b>By Severity</b>				
<b>Very severe</b>	30	80.7	2.7	24
<b>Severe</b>	47	96.9	2.1	28
<b>Moderate</b>	55	55.4	1.0	16

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	NUMBER	ANNUAL COST (\$M)	UNIT COST	\$PER POLICY
Mild	147	29.4	0.2	9
All	278	262.4	0.9	77

	NUMBER	ANNUAL COST (\$M)	UNIT COST	\$PER POLICY
<b>By Diagnosis</b>				
Brain Injury	220	198.1	0.9	58
SCI	40	47.1	1.2	14
Other	18	17.2	0.9	5
<b>All</b>	<b>278</b>	<b>262.4</b>	<b>0.9</b>	<b>77</b>

Notes: Adjusted model, with higher costs for children, expenses and "other"

**SUMMARY OF COSTING MODEL - CURRENT SCHEME COSTS [PER YEAR]**

	NUMBER	ANNUAL COST (\$M)	UNIT COST (\$M)	\$PER POLICY	"COMPENSIBILITY"
<b>By Severity</b>					
Very Severe					
Severe					Work still underway in assessing severity analysis
Moderate					
Mild					
<b>All</b>	<b>112</b>	<b>134.6</b>	<b>1.2</b>	<b>40</b>	<b>40%</b>
<b>By Diagnosis</b>					
Brain Injury	61	85.1	1.4	25	28%
Spinal	34	39.3	1.2	12	85%
Other	17	10.1	0.6	3	93%
<b>All</b>	<b>112</b>	<b>134.6</b>	<b>1.2</b>	<b>40</b>	<b>40%</b>

**NET COST OF NEW SCHEME [PER YEAR]**

	NUMBER	ANNUAL COST (\$M)	UNIT COST (\$M)	\$ PER POLICY
<b>New Scheme</b>	278	262.4	0.9	77
<b>Current Scheme</b>	112	134.6	1.2	40

Net result	166	127.9		37
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The bottom line of these figures and of Mr Walsh's analysis was that the cost of care under the proposed no fault long term care scheme would be approximately \$260 million per annum, or \$77 per CTP policy or Green Slip. As the cost of long term care under the current CTP scheme was approximately \$135 million per annum, or \$40 per Green Slip, the net cost of the introduction of the proposed no fault long term care scheme would be approximately \$128 million, or \$37 per Green Slip.

### 3.7 Next Steps

- 3.7.1 The Committee received evidence from Mr Geoff Atkins, of Trowbridge Consulting, who had conducted a peer review of Mr Walsh's costing work. (As a result of Mr Atkins peer review a number of changes had already been incorporated into Mr Walsh's costing, outlined above.) Mr Atkins spoke favourably about the nature of Mr Walsh's analysis, describing it as "comprehensive, well thought out, excellent, groundbreaking". However, Mr Atkins drew attention to a number of assumptions relied upon by Mr Walsh and other concerns about the problems involved in estimating the cost of such a proposal. These concerns related to matters including: tax treatment of funds within the proposed scheme; the relationship between the proposed no fault long term care scheme and the existing CTP scheme; and short term medical costs. Mr Atkins also suggested that it would be useful if the cost savings that would accrue to the State and Commonwealth Governments from the introduction of the proposed scheme could be quantified.<sup>26</sup>
- 3.7.2 In relation to Mr Atkins suggestion that there could be some significant savings to the State and Commonwealth Governments as a result of the introduction of a no fault long term care scheme, the General Manager of the MAA, Mr Dallas Booth, said that he was uncertain of the extent of any possible savings. Mr Booth said that it was his feeling that the proposal would have the effect of meeting currently unmet needs and creating new services.

From my own very personal point of view, and I do stress that, a very personal view at the moment, I am not sure of the extent to which there will be real savings under current programs. The reason why I say that is because one thing this work has done has been to identify the real lack of

<sup>26</sup>

Ibid, p 32.

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services out there now for non-compensable people and the extent to which those people are relying on their families and their friends and voluntary community support, so there is no doubt that that is the case.

I think governments generally do recognise that there is unmet need out there and that it is a question of the governments' capacity to fill the full need. I think governments are aware of a large degree of unmet need. One of the benefits of a project of this nature, I suppose, is to try and go some way towards addressing that unmet need in a rational and co-ordinated manner. I am not sure personally of the extent to which there will be savings but clearly to the extent to which savings might be available that is an issue that government can look at in terms of providing the top-up funds towards the additional expenses which will be incurred. When some of the costings are clearer and when some of the further work is done that is clearly something which the government is going to have to consider.<sup>27</sup>

3.7.3 Mr Booth was also asked if, in view of the conclusion of Mr Walsh's costing that the proposed no fault long term care scheme would cost an additional \$37 per Green Slip, he had any ideas of any areas of the CTP scheme in which there was potential for savings to be achieved. Mr Booth responded by saying that there were limited opportunities for the achievement of savings from efficiencies and that any significant savings would have to come from changes to benefits available under the scheme.

At the end of the day I think any compensation scheme could always achieve efficiency improvements, there is always the capacity for efficiency gains somewhere in the system, but my view is that efficiency gains will only ever get you savings in the order of \$5, if you are lucky \$10, per policy and you will not achieve efficiency savings of \$40 per policy just in terms of improving the operation of the system. This therefore means that if the government was so minded it would have to look at heads of damage and benefits under the scheme. Really if you wanted to start doing that all of the heads of damage and the benefit structure would have to be on the table and away you go.

The current scheme has had a philosophy all the way along, and still has the philosophy of meeting economic losses in compensable cases, and limiting non-economic loss. So that out-of-pocket expenses are all paid under the current scheme for those who are compensable. Savings are achieved in the non-economic loss area of pain and suffering for minor injuries. That has always been the philosophy of the scheme.

In order to answer the question, you can have further savings on non-economic losses, and limit even further the level of damages provided in that area, or you can start limiting benefits for economic losses. By virtue of the fact that they are economic losses, if you are going to start limiting payments in those areas you are inevitably going to probably increase hardship rather than reduce it. All of the options are there and are available, but the issues are difficult.<sup>28</sup>

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<sup>27</sup>

Ibid, pp 36-37.

<sup>28</sup>

Ibid, p 56.

3.7.4 A number of Committee members asked Mr Booth about the relationship between structured settlements and the proposed no fault long term care scheme. Mr Booth answered that whilst structured settlements would be an important part of the solution to the problems in the area of long term care, there would probably still remain a need for other funding arrangements in addition to structured settlements.

MR BOOTH: In the area of long-term care, what we are talking about is some people who would be very capable of going about their day to day lives with that guaranteed flow of funds - and I think many of the spinal cord injured people would be in that category - but I suspect that the bulk of the people in the long-term care program would not have the capacity to manage their own financial and other affairs and would require a degree of ongoing case management or oversight either through the sort of services currently provided by the protective office or elsewhere, so from that point of view I think certainly structured settlements are part of the answer, but I think they are only part of the answer and there may well be the need for other funding arrangements as well. The other problem is that structured settlements are also ideal where you have a reasonably clear estimate of future need, whereas if you have a very unclear estimate of future need and a real possibility of a person's situation changing dramatically but you just do not know how or do not know when, that sort of person would probably be better served by some sort of pooled fund arrangement rather than a structured settlement. I think at the end of the day whatever program we finally develop will have to be able to cope with those different circumstances.

COMMITTEE: What occurred to me was to link the structured settlement with case management for a brain injured person. That would be part of the package.

MR BOOTH: I think there are real benefits for the use of structured settlements and if you can link it with case management, or as other parts of the package, I think there can be real benefits.

COMMITTEE: But the settlement itself, it would almost be compulsory that case management is part of the structured settlement, it is all part of it.

MR BOOTH: That is one of the issues that we need to address and ultimately the government will have to think about whether you actually abolish future care as a head of common law damage, which is what happened in Tasmania. In Tasmania you do not get damages for future care, you are obliged to use the future care framework which they have in place. The government there clearly decided effectively to make the future care program a mandatory program. The New South Wales Government will have to address that issue as well.<sup>29</sup>

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Ibid, pp 41-43.

3.7.5 The Committee received evidence from two senior officers of the Ageing and Disability Department, Ms Gillian McFee and Ms Sharyn Campbell. Ms McFee and Ms Campbell described the involvement of the Ageing and Disability Department (ADD) in the work on long term care. They emphasised the current lack of services for persons with long term care needs and the fact the proposed no fault long term care scheme would meet currently unmet needs. They also emphasised the need for the work that had been done to date to be further progressed before a final proposed scheme, or options for reform, could be presented to Government early in 1998.

We believe that there is more work to be done on this project. It is highly complex and it is important to be accurate in terms of our findings. That is important for you as a Committee and it is obviously important for Government as well in considering the recommendations. The further work that needs to be done is in validating the findings of the classification instruments that Vivienne has developed; verifying the costs and, finally, if possible, verifying the classification, looking at ways in which we can link that with costs of support or costs of long-term care now. We would estimate that a final proposal would probably be completed around about April next year.<sup>30</sup>

3.7.6 The Committee also received evidence from senior staff of NRMA Insurance about the NRMA's involvement in the work on long term care. NRMA Insurance had been represented on the MAA's working party basically as a representative of the insurance industry. Mr Thomas Higgins, Business Planning Manager CTP Insurance, gave a brief presentation which summarised the dynamics of change in relation to long term care, and the NRMA's approach to the issue. The slides used by Mr Higgins are reproduced in Appendix 2. The drivers and restrainers in relation to possible changes in the management of long term care in the CTP scheme were summarised as:

#### **Drivers**

- perception of inequity between care available to seriously injured who can access the CTP scheme and those who cannot;
- perception that professional fees/profits (ie legal, medical and insurance) deflect funds from LTC;
- mismanagement of lump sum settlements and double dipping;
- recommendations from Law and Justice Committee; and

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<sup>30</sup>

Ibid, p 47.

- pressure on public purse to provide LTC for ageing population and non-compensable injury.

### Restrainers

- increased cost of LTC management;
- perception that no-fault LTC could lead to push for no fault scheme;
- uncertainty and potential for scheme instability (ie entry threshold and acceptable levels of care);
- inability to confidently point to a model that successfully provides quality LTC and contains costs; and
- differing agendas and low trust between stakeholders.

3.7.7 In relation to the restrainers, or areas of concern to NRMA Insurance, Mr Higgins elaborated on concerns that the proposed no fault long term care scheme could lead to pressure for further changes to the CTP scheme or have unpredictable affects upon the remainder of the scheme.

The thin end of the wedge argument: the idea that somehow if we introduce a no fault component of the scheme to deal with long-term care in fact will ultimately lead to the demise of the scheme, by leaning towards a no fault scheme, and those involved in the insurance industry, the legal profession have concerns in this area and perhaps one of the reasons why they have not joined the party wholeheartedly.

Uncertainty and potential for scheme instability; we are not sure what the implications will be, what the ripple effect will be throughout the larger scheme. As a result perhaps say for example removing long-term care as a head of damage, we just do not know. What we do know is in the past if we tweaked one part of the scheme it can have impact somewhere where we did not really realise it would happen and it is something to be very mindful of. It is already an unstable environment, introducing a further instability is something that makes some players a little bit nervous.<sup>31</sup>

The Committee asked the General Manager CTP, NRMA Insurance, Mr Doug Pearce, about the effect that the proposed no fault long term care scheme would have upon the CTP market available to the insurance industry.

It depends. I can only speak for myself, or for the NRMA, and it is as simple as this. If we, as the insurance industry, can provide an insurance solution to the funding of this, then quite the opposite; it is an expansion of the business and if we wear the risk then we will expect to be remunerated for

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Ibid, p 76.

that. If, however, it is the removal of that compensation or a large chunk of the compensation from the existing scheme then clearly it is a reduction in that scheme; the sort of numbers that John Walsh is looking at, it is not a big reduction. But the issue becomes one of the stability of the scheme that is left and how the new scheme interacts with it...<sup>32</sup>

- 3.7.8 As the MAA's work progresses the major contribution of NRMA Insurance is to be the development of a range of funding options, including possible insurance products, for the proposed no fault long term care scheme. Mr Higgins briefly outlined some of the issues to be considered by NRMA Insurance in this regard.

How would such a component of the scheme be funded? I am not going to go into detail, but the most obvious ones and the ones we target most often are perhaps some sort of levy on the existing CTP premium or on registration or a possible fuel levy. The larger the sum becomes, the more the problems become, but again wearing the hat of the devil's advocate we would have to be convinced of the benefits of going in this direction, the additional burden that motorists are going to carry, and that is something we are dealing with at the moment.

Full or partial Government funding: If it is such a good idea then there is good reason for the Government to perhaps redirect some funding currently going into the social security system into whatever this long-term care pool might be, so that is an option too. I am sure the Law Society and the legal profession will be up in arms about this, but something that has been suggested by the beneficiary groups is that other heads of damages could be further restricted and that funding could be diverted into some sort of long-term care component. Of course, an insurance product has appeal. Optional is unlikely to work, it is very hard to sell, people do not opt for it. If it is compulsory we have to ask the question: Is it any different from an additional CTP levy or registration levy, and, from our point of view in terms of do we underwrite it, are we restricted in the same way as we are currently restricted with the CTP product? These are the sorts of funding issues that we are considering.<sup>33</sup>

**Recommendation 3:**

**The Committee recommends the development of a no fault long term care scheme.**

**Recommendation 4:**

<sup>32</sup> Ibid, pp 82-83.

<sup>33</sup> Ibid, p 79.

**The Committee therefore recommends that the Motor Accidents Authority, the Ageing and Disability Department, and their working party, continue the development of detailed proposals (which the Committee has been told will be completed by April 1998) for the introduction of a no fault long term care scheme, including a range of options for funding and administrative arrangements for such a scheme.**

**Recommendation 5:**

**The Committee recommends that the Motor Accidents Authority prepare for public release a document setting out options for achieving savings within the current CTP scheme (together with the final detailed proposal for the introduction of a no fault long term care scheme).**

# Chapter Four

## Medical Evidence

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### 4.1 Background

4.1.1 The Committee's *Interim Report* of December 1996 included a brief chapter on Medical Evidence. The chapter discussed problems in the area of medical evidence, quoting the Attorney General's concerns about the extraordinary differences in medical reports about the same person, and Lord Woolf's comments about expert witnesses acting as "hired guns" and "second tier advocates". The chapter outlined the establishment of a task force by NRMA Insurance to consider the issue of medical evidence and develop mechanisms to introduce greater objectivity in the assessment of damages for non-economic loss. The chapter concluded by commending NRMA Insurance on the establishment of this task force and indicating that the results of the work of this task force would be used as the basis for further consultation and the development of recommendations covering issues such as:

- standard form medical reports;
- the use of impairment assessment guidelines;
- involvement of leading specialists (particularly through the use of video-conferencing);
- reliance upon treating doctors/teams; and
- the cost of medical reports.<sup>34</sup>

### 4.2 Standard form reports and treatment protocols

4.2.1 On 6 February 1997 the Committee convened to discuss progress in relation to the issues of medical evidence and legal costs. Senior staff of NRMA Insurance provided a briefing on the ongoing work of their task force on medical evidence. The General Manager CTP, Mr Doug Pearce, said that the work of the task force was focussing on the development of standard report formats and examination protocols, concentrating initially on whiplash and lower back injuries, together with promotion of the use of video

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<sup>34</sup> *Interim Report*, p 180.

conferencing in the courts. Amongst those present at the meeting were Professor Nikolai Bogduk, of the Newcastle Bone and Joint Institute, and Professor Hugh Dickson. Professor Bogduk and Professor Dickson each asked a number of questions about the work of the NRMA's task force and there was some lively discussion, particularly in relation to the mechanisms and timetable for the development of treatment protocols. The issue of medical evidence was briefly discussed at a further round table meeting on 1 April 1997. Mr Pearce informed the Committee that considerable progress had been made in the development of a computerised standard report format for medical reports. He also indicated that the NRMA was planning to hold a conference later in the year at which the results of the work of its task force on medical evidence would be publicly released.

- 4.2.2 At the Australian Insurance Law Association seminar entitled *Green Slips Overhaul* on 3 July 1997, Mr Victor Kelly, Senior Partner with Abbott Tout Solicitors, spoke about the strategy on which the work of the NRMA's task force was based. Mr Kelly emphasised that the strategy was based upon improving the quality and objectivity of medical evidence so that the authority of such evidence is restored and medical experts will continue to have a key role in the CTP scheme. He added that standard form medical reports would enable biased medical reports to be more easily identified.

The overall strategy should be to improve the quality of medical-legal evidence to the point where the courts again recognise the dominant role which expert medical evidence has to play in compensation cases. Restoration of the authority of medico-legal evidence as the corner stone of compensation schemes seems to me to be the primary strategy which should be adopted by claimants, insurers and governments...

One process which would assist that outcome is that all medico-legal reports should be produced in a standard format, so that the judiciary and assessors at every level of the claims process can sensibly compare reports and identify biased reports.<sup>35</sup>

- 4.2.3 Mr Kelly also spoke about the need for any standard form medical reports to be based upon information gleaned from the use of similar procedures by those carrying out medical examinations. He referred to the American Medical Association Guides for the Evaluation of Impairment (AMA Guides) and the guidelines published by the National Health and Medical Research Council (NHMRC) for the development of similar guides in Australia, and made specific reference to the Guidelines for the Management of Back

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<sup>35</sup> "Medico-Legal Issues - Stabilising the Scheme", AILA seminar, *Green Slips Overhaul*, 3 July 1997, pp 2, 5.

Injured Employees published by the South Australian WorkCover Corporation. Mr Kelly said that, in view of the sensitivity of the medical profession to the concept of managed care, it was essential for any medical examination protocols to be developed by the medical profession.

- 4.2.4 On 13 August 1997 the NRMA convened a symposium entitled *Whiplash - the Impacts and Implications*. Ms Shayne O'Reilly, Planning & Development Manager CTP, with NRMA Insurance, made a presentation entitled "Towards Greater Objectivity". Ms O'Reilly's presentation included a demonstration of the computerised standard form medical report which had been developed by the NRMA's task force. On 26 September 1997 Ms O'Reilly gave a similar demonstration to the Committee. Ms O'Reilly explained the reasons for using a computerised report format.

When we have been looking at how to do this we have decided that we favour the development of a computerised system for the distribution and maintenance of examination standards and for the standard reporting to be in graphical format for those examination results and we envisage the usage of electronic mail or Internet for the transfer of information. We see a number of advantages from a computerised format. Firstly, with a point and click format for injury definition, we achieve consistency and accuracy. It also offers easy access to accurate and valuable data and reports; it offers an efficient and easy method to distribute information and the standards and then to deliver the outcomes of examinations and, from what we understand, the medical profession is generally computer literate these days.<sup>36</sup>

- 4.2.5 The prototype model demonstrated by Ms O'Reilly related to the examination of a lumbar spine injury. She explained that a number of orthopaedic specialists had provided the NRMA with advice as to the "objective measurements" of a lumbar spine injury, and these measurements had been developed into examination protocols which formed the basis of the information included in the report format. In this regard, Ms O'Reilly noted that standard medical examination protocols were an equally important part of the reform process.

The standardisation of medical examinations will involve the carrying out of certain tests which are specified for the particular medical condition with a prescription for the way that those tests must be carried out and that this testing and the tests that are carried out will be developed on an evidence based medicine basis. The standard format reports will then reflect the standards for medical examinations.<sup>37</sup>

Ms O'Reilly noted that the College of Clinical Neuropsychologists had recently endorsed a set of guidelines for the conduct of examinations of a neuropsychological condition for use in medico-legal reports. A similar concept would apply in relation to the development of both examination protocols and standard report formats for whiplash.

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<sup>36</sup> *Evidence*, 26/9/97, p 66.

<sup>37</sup> *Ibid.*

### 4.3 Video-conferencing

- 4.3.1 The Committee's *interim Report* of December 1996 discussed the potential of the introduction of video-conferencing technology as a means of enabling leading medical specialists to make themselves available to give evidence without the consequent disruption to their practices. In his address to the AILA seminar entitled *Green Slips overhaul* in July 1997, Mr Kelly spoke about the ready availability of video-conferencing equipment at major hospitals and the advantages that its use would have in CTP matters.

The acquisition of reasonably adequate facilities for each of the Supreme and District Court complexes, and portable equipment for use on circuit, is not going to cost an arm and a leg, if I might be permitted a personal injury metaphor. The medical profession is accustomed to the use of video-conferencing for a number of purposes including, in outlying centres, for instance, directions of operations. There is a significant number of video-conferencing sites located throughout the State, including at major hospitals, which could be used to organise the courts' taking experts' medical evidence from busy doctors, at sites and at times which could be arranged to suit the doctors' timetables. Such additional convenience should result in more involvement by the leaders of the medical profession.<sup>38</sup>

- 4.3.2 On 26 September 1997 the Business Planning Manager CTP with NRMA insurance, Mr Thomas Higgins, provided a brief up date on developments in relation to the introduction of video-conferencing in CTP matters. Mr Higgins indicated that the NRMA had received positive feedback from members of the judiciary following a demonstration of the latest video-conferencing technology and said that the only impediment to the introduction of such technology into the NSW courts was the quality of the ISDN lines into the courts.

A number of months ago, probably three or four months ago, we provided a demonstration to a number of District Court judges, a video conferencing demonstration, at the Hilton Hotel. We crossed live to British Columbia and also to the children's hospital in Westmead. It was an opportunity for the judges to ask questions specific to the use of video conferencing in medico-legal type situations and we gained some considerable support for the adoption or at least continued pursuit of the introduction of video conferencing into courts. We have since acquired video conferencing technology ourselves so that we have first-hand experience of the equipment and we hope to meet with representatives from the District Court some time during next month to discuss how the technology might be introduced.

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"Medico-legal issues - Stabilising the Scheme", *Green Slips Overhaul*, 3/7/97, p 12.

We have a problem in that the level of technology currently available on the District Court circuit is not up to scratch. I am specifically talking of the ISDN lines that are required for video conferencing to take place. They do not currently exist. However, I do understand that a number are currently being hooked up. How we manage that process and how we encourage the introduction of more technology is something that we are working with right now, but it is certainly an obstacle that we will have to overcome.<sup>39</sup>

#### 4.4 Designated Assessment Centres

- 4.4.1 The keynote speaker at the NRMA symposium on *Whiplash - the impact and implications* on 13 August 1997 was Dr Murray Allen, who spoke about "Whiplash Management in British Columbia". Dr Allen's main points were the need for early rehabilitation and return to normal activities (as opposed to rest) and the fact that much money and resources was wasted on uncertain or ineffective treatments. During his presentation, Dr Allen mentioned the system of Designated Assessment Centres in operation in Ontario. As a result of Dr Allen's reference to the DAC system arrangements were made for the delegation which undertook the study tour examining structured settlements to receive a detailed briefing about the operation of the DAC system from the Ontario Insurance Commission in Toronto.
- 4.4.2 The Designated Assessment Centre (DAC) system is designed to provide a mechanism for the provision of an objective third party opinion where an insurer and a claimant are in dispute about the nature of a claimant's injuries and entitlement to a benefit. The DACs are located within the existing health care and hospital system. Briefing notes and brochures about the DAC system are reproduced in Appendix 3.
- 4.4.3 The DAC system was discussed with a number of witnesses who appeared before the Committee at its hearing on 26 September 1997. The General Manager of the Motor Accidents Authority, Mr Dallas Booth, had also reviewed the DAC system upon a visit to Toronto earlier in the year. Mr Booth had a generally positive impression of the operations of the DAC system. Both Mr Booth and Ms Gillian McFee, of the Ageing and Disability Department, drew some comparisons between the DAC system and the aged care assessment teams that operate in Australia.

Mr BOOTH: I obtained some information regarding what are called designated assessment centres which have been established in the province

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<sup>39</sup>

*Evidence*, 26/9/97, p 74.

of Ontario in Canada and I have some limited information obtained from the Ontario Insurance Commission during a recent study tour.

Ms McFEE: I was just going to say that one of the great success stories I think in Australia's aged care system has actually been the aged care assessment teams, which are a pivotal part of the aged care system and which are used to assess the support needs of older people and people with disabilities for residential care, so indeed we have a model in this country, even though it has not been used in that medico-legal way.

COMMITTEE: In the compulsory third party area.

Ms McFEE: Yes, and the other comment that I would make, and I make this as someone with more background in aged care than disability, is that it seems to me that one of the great omissions in the disability services system is that we actually do not have something that can do that sort of independent diagnosis and assessment so that we can meet people's needs. Again I think it is important to make some of these parallels between some of the policy and planning tools that we are talking about that need to be put in place for this cohort of people in this scheme with the wider system.

Mr BOOTH: I would agree with all of that. My understanding is that the designated assessment centres were established in the province of Ontario, they ran as a pilot project for a period of eighteen months to two years and were regarded by the government of the province as being so successful that the centres were essentially entrenched and supported by legislation which was passed by the Parliament of Ontario last year. I have a limited understanding of aged care assessment teams, but I think there is the parallel in that the idea was not to create or establish new centres, the idea was to recognise that there are already centres with very high levels of expertise in the relevant areas and it is actually designation of an existing centre as an assessment centre for personal injury purposes. My understanding - and I stand to be corrected - is that that is how it happens for aged care as well. It is not a question of creating something new, it is recognising that in the community there are a range of existing centres of expertise which can be utilised.<sup>40</sup>

The Committee also asked NRMA representatives whether or not they had considered the DAC system in their work on medical evidence. Ms O'Reilly indicated that the NRMA would be prepared to consider the DAC system.

COMMITTEE: When we visited Ontario they said that they had also now set up assessment centres. Would that be another development that would be able to do these assessments?

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*Evidence*, 26/9/97, pp 52-53.

Ms O'REILLY: We have not carried that idea through, but it is certainly something that we looked at earlier. At this stage we have not done sufficient work to say whether we concur with that or not. I think it has some difficulty, but some advantages, so we would like to look at that.<sup>41</sup>

## 4.5 Evidence based medicine

4.5.1 At the NRMA's symposium entitled *Whiplash - its impact and implications*, held on 3 August 1997, many speakers referred to the term "evidence based medicine". However, there appeared to be little agreement as to the meaning of this term.

4.5.2 One of the medical experts in attendance at the round table meeting convened by the Committee on 6 February 1997 was Professor Nikolai Bogduk, Director of the Newcastle Bone and Joint Institute. At that meeting Professor Bogduk emphasised the need for the use of evidence based medicine in preference to reliance upon so called expert medical opinion. On 4 July 1997 the Committee attended upon Professor Bogduk in Newcastle and received a half day briefing about "evidence based medicine" and the work of the Newcastle Bone and Joint Institute.

4.5.3 Following the NRMA's *Whiplash* symposium, Professor Bogduk provided the Committee with a submission entitled "Evidence Based Medicine and the Law". In the submission Professor Bogduk defines evidence based medicine as

the practice of medicine using diagnostic procedures with proven reliability and validity, and treatments with proven efficacy.<sup>42</sup>

4.5.4 Professor Bogduk's submission discusses the means by which reliability and validity are measured in scientific medicine, and the reasons for pursuing and promulgating evidence based medicine. Professor Bogduk set out what he sees as the intellectual, moral and economic reasons for promulgating evidence based medicine.

The *intellectual* reason is that if Medicine is to be regarded as scientifically based, and not a mystical craft, its components must themselves be scientific. The *moral* reason is that patients should not be subjected to diagnostic procedures that are not reliable or not valid, or to treatments that lack efficacy. To use knowingly procedures that lack reliability, validity or efficacy is tantamount to fraud, for the patient is agreeing to submit to these

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<sup>41</sup>

Ibid, pp 71-72.

<sup>42</sup>

*Supplementary Submissions*, Professor Nikolai Bogduk, p .

procedures trusting that the doctor knows what they are doing, yet the doctor knows that what they are doing does not work. The *economic* reason is that societies can no longer afford to reward doctors for performing practices that do not work; someone pays the bill for every doctor's time and efforts, but that someone is entitled to demand that doctors use that which is known to work. Altruistic trials of therapy, or "give it a go" may be philosophically appealing when there are no proven options in medical management of a problem, but become a waste of resources when proven options are available.

The moral and economic imperatives of Evidence-Based Medicine should appear laudable as axioms. However, for the imperatives to be satisfied for a particular diagnostic test or therapeutic procedure, data is required on its reliability, validity and efficacy. To this end, a research industry has developed to determine these data for selected procedures and practices.

- 4.5.5 Unlike others who used the term evidence based medicine at the NRMA's *Whiplash* symposium, Professor Bogduk clearly distinguishes evidence based medicine from so called expert medical opinion. Professor Bogduk suggests that much of the so called expert medical opinion relied upon by the courts in CTP matters has little scientific basis.

These problems bring into relief the conflict in Court between Evidence-Based Medicine and the evidence of supposed experts. The cardinal issue is whether the evidence of an expert is based on a scientific knowledge of the evidence-base of Medicine or simply on what the expert personally believes is correct, or wants to be correct in the interests of his or her reputation or intention in court.

While so long as a field, such as Third Party Compensation, lacked medical authorities in a scientific sense, anything that an appointed expert might say was liable to be trusted by the Court. Thus, myths and hearsay were promulgated in the past as authoritative statements. If the Court had no scientific knowledge or a knowledge of how to evaluate scientific data, it deferred to trusting in these myths.

However, medical research has caught up with the myths that have sustained the Courts. Research has addressed the reliability and validity of procedures used to assess plaintiffs, and the diagnoses and predictions resulting from these assessments. The news is not good. That in which the Courts have trusted, that which the past experts have said, proves scientifically to be false or unreliable.<sup>43</sup>

- 4.5.6 Professor Bogduk outlines his own experience as a "scientific witness" in CTP matters. Professor Bogduk states that "what the courts get is not

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<sup>43</sup>

Ibid, p 4.

scientific evidence but pre-ordained opinion". He also draws attention to the fact that when scientific evidence is tendered the result is often an attempt by defendants to seek to discredit the witness rather than any real attempt to grapple with the scientific facts of the case.

The tragedy of medicolegal proceedings is that they disintegrate into intellectual absurdity. In the absence of scientific evidence, or in the absence of scientific testimony, Courts rely on (assumed) expert opinion. Yet it is common knowledge that lawyers can recruit medical opinions to suit their purpose. One can always find three or more doctors that state that there is something wrong with the patient. One can equally find three or more doctors (often the same ones) who will deny that there is anything wrong with the patient. This experience alone testifies that the entire process lacks reliability, as defined scientifically. After all, the same six or more doctors saw the same patient, yet disagreed.

The reason for this tragedy is that the Courts are required to adjudicate and defer to medical information for that purpose. However, the Courts are demanding information and conclusions that cannot be tendered scientifically by the so-called experts involved. What the Courts get is not scientific evidence but pre-ordained opinion designed to suit the purpose of the Courts, the purpose of the plaintiff or the purpose of the defendant.

When scientific evidence exists about a particular problem it is usually not available to the plaintiff. Plaintiff lawyers are not aware of developments in the field, and scientifically grounded experts are few and far between. Thus, a case may be tried without the benefit of otherwise available evidence.

When that scientific evidence is available, legal costs escalate, particularly when the scientific evidence defies or refutes the opinions of witnesses for the defendant. Defendants do not wish the evidence to prevail, for that may mean that they lose the case. It is their preference to have the opinions of their own witnesses to prevail. Consequently, instead of acceding to scientific evidence, defendants elect to challenge that evidence, not in a scientific forum, but in Court. That consumes the time of the Court.

Interestingly, the propriety and scientific standard of opinions offered by defendant witnesses is infrequently challenged. There seems to be a decorum that "doctor's standing should not be challenged". Yet, the same privilege seems not to apply to witnesses bearing new scientific evidence that challenges the defendant. As a scientific witness I have never had the scientific merit of new studies challenged in Court, but have regularly been assaulted with claims of having fabricated data, having sponsored conspiracy amongst patients, accused of having had my work discredited; one of my students, a specialist Rheumatologist, was once even accused of not being registered to practise medicine. These actions indicate to me that defendant barristers are not interested in the scientific facts of a case, but are entitled, if not encouraged, to use any device to discredit, or unsettle, the scientific witness socially and personally, so that the new evidence shall not prevail, leaving the opinion evidence as the more senior.<sup>44</sup>

4.5.7 Professor Bogduk concludes by stating that a decision has to be made whether the courts will continue to rely upon so called expert medical evidence or move to only receive evidence based medicine. Professor Bogduk points to the US Federal Courts which have recently stipulated that only contemporary scientific evidence will be admitted.

The Courts need to decide whether they will continue to indulge the medieval practice of respecting the opinion of any expert, that whatever the witness says is reliable, valid and admissible, or that somehow the Courts will enquire about the reliability and validity of so-called evidence, and respect that which is emerging as the scientific basis of evidence in this field.

The Federal courts of the USA have moved in this direction. They no longer admit evidence based on experience or opinion. They require that whatever evidence is heard must be consonant with prevailing, contemporary scientific evidence. Only that evidence is admitted.

For NSW to resolve in this same manner would immediately cut costs. Opinionated medicolegal reports would be inadmissible, and therefore of no value. They would not be required; they would not be requested; they would not be paid for.

Given that there is a medical evidence-base, and given that most opinions tendered in medicolegal reports do not reflect this evidence-base, the Courts need to decide whether in all conscience they can continue to admit unreliable and invalid evidence, for to do so is to admit that the Courts function on the basis of disproven mythology. If opinionated experts are disavowed, they will not be called to Court. This saves time, and it saves fees.

A perceived threat is that if "professional" witnesses are disavowed, there will be no-one left to appear in Court; that only "scientists" can be witnesses. This is a fallacy. What Evidence-Based Medicine demands is not that every doctor, every witness, be a scientist, but that whatever evidence is given is evidence-based. The implication for the Courts is to disavow opinion and false-evidence, and to entertain only scientifically based evidence.

That disenfranchises "professional" witnesses who persist in opinion and mythology; but they have two choices. They can retain their opinions and leave the system, or they can learn. The requirement is for doctors and witness to catch up with contemporary standards of knowledge in the field of spinal pain. Medicine does not tolerate the perpetuation of old beliefs that have been disproven. The Courts have the option of following suit. "Professional" witnesses can re-train in whatever new knowledge becomes available, and thereafter retain their professional role.

Under those circumstances, the role of the scientific expert is not to repeatedly appear to challenge the defendants, but to conduct University-based courses assessors so that they can promulgate evidence-based medical evidence. Such courses would be of critical importance to doctors but not only to them. Others involved in the medicolegal process are in dire need of education. Not only claims managers but also lawyers, barristers and even judges, need to be, brought up to date in two domains:

- the logic and rules of how to assess scientific data, and
- the contemporary evidence that satisfies that assessment, or not.

Judges who take such a course will at last understand why all these doctors cannot agree. Essentially they are all being unscientific and simply promulgating self-serving options.

Without such education, the system will continue to operate on mythology and confusion.<sup>45</sup>

## 4.6 Next Steps

- 4.6.1 When senior staff of NRMA Insurance gave evidence to the Committee on 26 September 1997 they said that, as soon as the computerised standard report format was in a working form, it was their intention to present the format to the relevant medical colleges. The medical colleges would also be encouraged to develop standard examination protocols for key injuries or conditions which are relevant to the CTP area. Mention was also made of a pilot scheme to further develop and refine the standard report format.

### **Recommendation 6:**

**The Committee recommends that the prototype computerised standard report format for medical reports be further refined through a pilot program.**

### **Recommendation 7:**

**The Committee recommends that the relevant medical colleges develop standard examination protocols for all key injuries or conditions that**

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<sup>45</sup>

Ibid, p 7.

arise in CTP matters, based upon prevailing, contemporary scientific evidence.

**Recommendation 8:**

The Committee recommends the use of video-conferencing in CTP matters as a way of involving leading medical specialists in the provision of evidence and therefore recommends that the Attorney General ensure that the Supreme and District Courts have sufficient resources to ensure that the necessary technology is put in place as soon as possible.

**Recommendation 9:**

The Committee recommends that the Motor Accidents Authority conduct a detailed examination of the possible application in NSW of the Designated Assessment Centre (DAC) system which operates in Ontario.

**Recommendation 10:**

The Committee recommends the use of evidence based medicine in CTP matters.

# Chapter Five

## Legal Costs

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### 5.1 Background

5.1.1 Chapter 13 of the Committee's *Interim Report* of December 1996 dealt with the related issues of legal costs and dispute resolution. The chapter recognised the valuable, indeed essential, role that high quality legal representation plays in the CTP scheme. The chapter noted the suggestion contained in a number of submissions, and repeated in evidence before the Committee during 1996, that there has been a significant increase in legal costs in the CTP scheme under the reforms to the legal profession introduced by the *Legal Profession Reform Act 1994*. The chapter made a number of recommendations in respect of issues such as the development of a precedents database and the training of members of the legal profession about the particular needs of persons with an acquired brain injury. However, in relation to the issue of legal costs, the Committee deferred making any firm recommendations. The Committee expressed the view that any recommendations for reform in this area must be based upon accurate data about what has been happening in regard to legal costs. The Committee noted that the Justice Research Centre had commenced a study of legal costs under the CTP scheme and recommended that the results of the Justice Research Centre's study be used as the basis for further consultation before the development of final recommendations for reform in the Committee's *Final Report* of this inquiry.<sup>46</sup>

### 5.2 Justice Research Centre study

5.2.1 The Justice Research Centre's study into legal costs in the CTP scheme is part of a larger research project examining claims under the scheme. The research is divided into three parts. Part One of the research project will examine decisions made by accident victims about whether or not to make a claim for compensation. This part of the study will involve interviews with two groups of accident victims. The first group will consist of those whose accidents occurred in 91/92 when the propensity to claim was 0.48, and the second group will involve those whose accident occurred in 1995/96 when the propensity to claim has been estimated to be 0.68. This part of the study may provide some indications of the reasons for the apparent rise in the propensity to claim. Part Two of the study will involve an examination of the

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<sup>46</sup> *Interim Report*, p 186.

process of resolving a CTP claim, including why disputes arise and how they are resolved, and which claims are most likely to involve litigation. Part Three of the study is concerned with the collection of information about legal and related costs in the CTP scheme. The research questions to be examined in Part Three include:

- how much do claimants and defendants (subrogated insurers) pay to solicitors for professional fees and disbursements (including counsel, medical and other experts' fees) to resolve claims?
- how much of their costs do claimants get back from defendants (or, if they are not successful, how much do they pay to defendants)?
- what kind of fee arrangements are being used by solicitors?
- how have legal costs and fee arrangements changed since the *Legal Profession Reform Act 1994* came into force?
- what is the relationship between cost and the stage claims are resolved?<sup>47</sup>

5.2.2 At the round table meeting on Legal Costs and Medical Evidence convened by the Committee on 6 February 1997 the Committee received a briefing from Professor Ted Wright, Director of the Justice Research Centre (JRC), about progress on the JRC's study of legal costs in the CTP scheme. Professor Wright stated that in order for the study to be successful it was essential for the JRC to have the explicit support of the Law Society of NSW. Professor Wright indicated that the President of the Law Society had indicated that morning his support for the JRC's study. Unfortunately, at the next round table meeting convened by the Committee on 1 April 1997 Professor Wright informed the Committee that the commencement of the study had been delayed due to ongoing negotiations with the Law Society in relation to conditions which the Law Society wished to impose upon its cooperation with the study. The JRC was therefore not able to begin distributing surveys until May. Professor Wright was hopeful at that stage that there would be some results in relation to legal costs by October or November 1997. However, Professor Wright has recently advised that in order to ensure a statistically valid sample is achieved it will be necessary to delay the compilation of results until further survey responses are received, and that this means that survey results in relation to legal costs will not now be finalised until March 1998.

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<sup>47</sup>Justice Research Centre, *Motor Accidents Scheme: Research Outline*.

### 5.3 Legal Costs Seminar and Submissions

5.3.1 During the Committee's initial consideration of the legal costs issue following the tabling of the *Interim Report* in December 1996, it became evident that one possible constraint that might affect the nature of any reforms that the Committee might recommend in this area, is the policy framework of national competition policy generally and the *Legal Profession Reform Act 1994* specifically. For this reason, the Committee convened a public seminar on 5 May 1997 to consider the policy framework underpinning the consideration of legal costs within the CTP scheme. A number of speakers addressed the relevant policy framework, and there was some further discussion about what was happening to legal costs under the CTP scheme. The Committee published the proceedings of the seminar in a report that was tabled in Parliament in June 1997.<sup>48</sup>

5.3.2 As outlined above in chapter one, the Committee announced in April that it would receive supplementary submissions addressing the three outstanding issues in the Committee's inquiry. The Committee received nine supplementary submissions dealing with the issue of legal costs.<sup>49</sup> The authors of those submissions are listed in appendix 5. Included in these submissions is a very detailed response by the Law Society of NSW to a document entitled "Policy Issues / Reform Ideas" published by the Committee as an appendix to the *Legal Costs Seminar* report. In addition to the nine supplementary submissions received by the Committee, Ms Susan Pattison, principal of Pattison Hardman and a leader in the field of costs assessment, provided a detailed response to the "Policy Issues / Reform Ideas" document published by the Committee, in a presentation to the Australian Insurance Law Association seminar, entitled *Green Slips Overhaul*, on 3 July 1997.<sup>50</sup>

### 5.4 Next Steps

**The Committee has not made any recommendations about the issue of legal costs in the CTP scheme. The Committee is**

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<sup>48</sup> *Legal Costs Seminar*, June 1997.

<sup>49</sup> *Supplementary Submissions, Volume Two: Submissions dealing with Legal Costs*, September 1997.

<sup>50</sup> Ms Susan Pattison, "Legal Costs in Perspective", Australian Insurance Law association seminar, *Green Slips Overhaul*, 3 July 1997.

awaiting the results of the Justice Research Centre's study of legal costs in the CTP scheme. Once this study is completed (which the Committee has been advised should be by March 1998) the Committee will be using the results of the study as the basis for further consultation and detailed consideration of legal costs in the CTP scheme.

5.4.1 The Committee will be consulting with all relevant interest groups before formulating any firm recommendations for reforms in the area of legal costs. As part of this process the Committee will be carefully considering the supplementary submissions received which deal with the issue of legal costs. At this stage the Committee has not yet conducted any formal review of these submissions (that is, none of the authors of those submissions have yet been invited to give evidence in relation to their submissions at Committee hearings). However, the following list indicates some of the suggestions contained in those supplementary submissions or raised at the *Legal Costs Seminar*. The Committee would expect to address these issues in its *Final Report*.

- the potential for the use of the Local Court for matters whose liability is estimated to be under \$40,000;
- the success and ongoing support by plaintiffs, defendants and the judiciary of court-annexed arbitration in the District Court;
- the use of court-annexed mediation and neutral evaluation under the reforms introduced by the *Courts Legislation (Mediation and Evaluation) Amendment Act 1994* to the District Court Act 1973;
- the role and success of the Law Society's mediation program (see page 195 of the *Interim Report*);
- alternative approaches to Alternative Dispute Resolution as suggested by the NRMA (see p 196 of the *Interim Report*);
- procedural reforms generally: in particular the success of Practice Note 33 of the District Court, and section 50A of the *Motor Accidents Act* in encouraging parties to settle once particulars have been revealed;
- with due consideration of national competition policy, and in the context of the results of the research being conducted by the Justice Research Centre, reforms to the costs assessment regime under Part 11 of the *Legal Profession Act 1987* (for example, reasons to be given by costs assessors and effective appeal rights in relation to a costs assessment);
- conditional costs agreements and the 25% uplift fee: should the uplift fee be amended by regulation to a lower percentage for motor accident cases because of the very low risk to plaintiff lawyers of 'losing' a motor accidents case where the issue of quantum alone is concerned? Should the uplift fee be assessed as party/party costs?

- the effectiveness of Rule 12 of Part 39A of the District Court Rules in discouraging the litigation of small claims, and recent case law in this area;
- offers of compromise and the effectiveness of Rule 25 of Part 39A of the District Court Rules in encouraging parties to settle;
- the simplification of dispute resolution and procedure in the District Court: for example the use of blood alcohol certificates as formal proof; a code for contributory negligence (for example, if the plaintiff was not wearing a seatbelt or helmet);
- the speedy determination of liability under section 45, and the rights of plaintiffs to interim payments under section 45;
- the incorporation in the Law Society Specialist Accreditation Programme for personal injury lawyers of awareness training in relation to acquired brain injury (see Recommendation 52 of the *Interim Report*);
- the development by the Judicial Commission of NSW of education for Judges of the District Court covering issues such as the economics of the CTP Scheme and the problems experienced by persons with an acquired brain injury in a courtroom situation (see Recommendation 53 of the *Interim Report*);
- the need for better information and statistics on an ongoing basis in relation to legal costs associated with the CTP Scheme, and the potential for the establishment of a legal costs database in relation to motor accident claims; and
- 'fixed costs' and fast track procedures for small claims litigation.

# Chapter Six

## Other Issues

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### 6.1 Infants Claims

6.1.1 The Committee's *Interim Report* of December 1996 contained a chapter dealing with the subject of Infants Claims. The chapter summarised evidence received by the Committee concerning the problems faced by the families of seriously injured infants. The chapter went on to outline difficulties faced by insurers in balancing complex liability issues with the need for infants claims to be resolved so that injured children can access appropriate services. The chapter then set out a proposal received from the Insurance Council for the introduction of a presumption of liability in infants claims. This would mean that liability would be admitted more quickly in all but a small proportion of claims involving children. Section 45 of the *Motor Accidents Act* would then come into operation so that insurers would pay for rehabilitation and other services for infants who are found to be compensable. The Committee expressed strong support for this proposal.<sup>51</sup>

6.1.2 In June 1997 the Committee received a supplementary submission from the Insurance Council which contained a detailed "Proposal for the Amendment of the *Motor Accidents Act 1988* to deal with Claims by Infants and Related Matters".<sup>52</sup> The submission includes a discussion of the proposal for a presumption of liability in infants claims, and drafting instructions for proposed amendments to the Act. The submission also refers to an actuarial costing of the proposal conducted by Trowbridge Consulting. The estimated cost of the proposal is identified as an additional \$12 to \$20 per Green Slip. The submission also notes a number of concerns raised by Trowbridge Consulting about the uncertainty of future claims arising from the proposal.

In advising the estimated cost, the actuaries have expressed a number of potential concerns, all of which are shared by insurers, the more significant of these being summarised as under:

- There is uncertainty over the future of cost claims, because the possible extent of new claims generated by the proposed change is the most difficult area to estimate.
- *Drift to Higher Ages* - that the judiciary will see an anomaly between infants and teenagers and will tend to apply "strict

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<sup>51</sup> *Interim Report*, p 120.

<sup>52</sup> *Supplementary Submissions, Volume ne*, September 1997.

liability” standards rather than negligence standards to claims arising from young people over the age of 9.

- *Potential for Fraud* - that the availability of the “strict liability” coverage will encourage fraud in falsely stating than an injury was caused in a motor vehicle accident when in fact it was not. This applies particularly to Nominal Defendant (unidentified vehicles) and also to off-road and unregistered vehicles such as farm bikes. There may also be a problem with claims involving stationary vehicles.
- *Escalating Legal Costs* - that the recent escalation of legal costs will continue and in fact be worse in infant claims where resolution can be extremely drawn out [due to the time taken for injuries to stabilise] and settlements must be agreed by the Court. This highlights the importance of suitable amendments to Section 45 of the Motor Accidents Act.

According to the consulting actuaries, their best estimate of the required average additional premium to cover the cost of the infant claims proposal, is in the range of \$12.00 to \$20.00 per policy. The indicative costing by the actuaries is provided to insurers by way of information guidance only and individual insurers must form their own view on the appropriate premium to charge for this extension of cover...

It is for the Government to decide whether or not this proposal is implemented. However, we are concerned that this proposal comes at a cost significantly higher than was originally contemplated. We believe that the most important issue facing the scheme is stability and the introduction of this proposal should not occur in isolation but rather as a part of a set of changes which will assist in addressing this issue.<sup>53</sup>

6.1.3 The Committee Chairman made reference to the proposal for the introduction of a presumption of liability in infants claims in his keynote address to the Australian Insurance Law Association seminar entitled *Green Slips Overhaul* on 3 July 1997. During the commentary and discussion which followed the Chairman’s presentation it was suggested that, if the proposed no fault long term care scheme is implemented, the proposal to introduce a presumption of liability in infants claims would be redundant.

6.1.4 As noted above, the cost of the presumption of liability in infants appears to be greater than originally predicted. As noted in chapter three, it has been estimated that the proposed no fault long term care scheme will cost an additional \$37 per Green Slip. An further \$12 to \$20 on top of this would be a significant increase upon the cost of a Green Slip.

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Ibid.



**Recommendation 11:**

**The Committee recommends that, should the proposed no fault long term care scheme not be adopted, there be a presumption of liability in infants claims.**

**6.2 Section 45**

6.2.1 In March 1997 the Committee received a submission from Dr Andrew Morrison SC which raised a number of issues that he was concerned were not addressed in the Committee's *Interim Report* of December 1996 and which had been the subject of recent developments. Of most interest, and indeed of most concern, to the Committee, were Dr Morrison's comments in relation to section 45 of the *Motor Accidents Act*. Section 45 provides that,

- (1) It is the duty of an insurer to endeavour to resolve a claim, by settlement or otherwise, as expeditiously as possible.
- (2) Once liability has been admitted (wholly or in part) or determined (wholly or in part) against the person whom the claim is made, it is the duty of an insurer to make payments to or on behalf of the claimant in respect of:
  - (a) hospital, medical and pharmaceutical expenses; and
  - (b) rehabilitation expenses, subject to Part 4,
 as incurred.
- (2A) The duty of an insurer under subsection (2) to make payments applies only to the extent to which those payments:
  - (a) are reasonable and necessary; and
  - (b) are properly verified; and
  - (c) relate to the injury caused by the fault of the owner or driver of the motor vehicle to which the third-party policy taken to have been issued by the insurer relates.
- (3) It is a condition of a third-party insurer's licence that the insurer must comply with this section.
- (4) Payments made under this section are taken to form part of any damages payable to the claimant.

6.2.2 Dr Morrison raised three issues concerning section 45. Firstly, he drew attention to the fact that, as a result of the fact that section 45 imposes no obligation in relation to the provision of "care", there are a substantial number of disputes between seriously injured motor accident victims and insurers about the provision of care. Dr Morrison called for section 45 to be

amended to add the provision of “reasonable, necessary and properly verified care” to the obligation imposed under section 45.

“The most important need of the catastrophically injured (paraplegic, quadriplegic and severe brain damage) is for care to enable such persons to leave hospitals and institutions and live in their own home. Paraplegics and quadriplegics frequently cannot return home and remain in hospital or rehabilitation institutions at enormous public expense, unless such care is provided at a cost. To their credit, insurers generally recognise and pay for this need, notwithstanding its omission from Section 45. However, insurers take advantage of the omission to pay for such care at the rates they determine and for the hours they determined, which may mean the imposition of substandard care or significantly lower hours than the treating practitioners think reasonable. The result may be to greatly increase the burden upon the families of those traumatically injured, forcing other members to give up work without compensation to care for those injured. Because care is not included under Section 45, the catastrophically injured have no remedy if they or their treating doctors find the level or standard of care allowed by the insurer to be inadequate or if the insurers simply refuses to pay for any care. There have been a substantial number of disputes with insurers over this issue and it is unacceptable that the injured be left with no rights in circumstances where they are entitled to a verdict and where the level of care requested is reasonable and verifiable.

It is submitted that the provision of reasonable, necessary and properly verified care be added to Section 45 (2) as an obligation upon insurers. It is to be noted that it would seem that the omission of care was a drafting oversight rather than an intention of those who prepared the legislation, but this oversight is clearly being taken advantage of by insurers.<sup>54</sup>

6.2.3 Secondly, Dr Morrison drew attention to the effect that substantial delays before the commencement of litigation can have upon an injured person’s ability to avail themselves of an insurer’s obligations under section 45. Dr Morrison called for the amendment of the Act to impose a sanction upon insurers who delay decision making.

The Act provides in Section 52 for substantial delays before litigation may be commenced. During this period, the injured person has no remedy under Section 45 whatever. He cannot even bring his case before the Court. An insurer which adds cross-defendants, such as the Roads and Traffic Authority or a local council in respect of the state of the road, may significantly delay any hearing on liability, whether intentionally or not. Again, the plaintiff is left without remedy where liability is denied. There has been considerable experience of insurers failing to make any decision despite being provided with notice of claim and the extensive particulars required

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*Supplementary Submissions, Volume One, September 1997.*

pursuant to Section 50A, Section 44 and Section 48. These sections allow an insurer to delay the onset of litigation by requests for further particulars which must be answered before proceedings can be commenced. It is arguable that under Section 50A, no proceeding will ever be valid because no case is absolutely the same as the original particulars, but this is yet to be tested.

In Queensland, it is provided that if an insurer does not respond to a claim within a specified period (there three months) liability is to be taken as conceded. A similar provision in New South Wales would at least bring into play Section 45 and give the plaintiff such limited rights as that section affords. The Motor Accidents Authority has prepared a paper reviewing the relevant Queensland legislation and it is submitted that similar provisions should be implemented to place some sanction upon insurers which delay decision-making in their own financial interests (no interest running on claims) and to the great hardship of the injured.<sup>55</sup>

- 6.2.4 Thirdly, Dr Morrison drew the Committee's attention to the unreported decision of Dowd J in *Stubbs v NRMA*, concerning the question of whether an injured person may take a cause of action to enforce the duties imposed upon an insurer by section 45. Dowd J held that as section 45 does not create a statutory duty for a breach of which there arises a common law action, it was therefore not justiciable.

There are very few Acts which set up a duty, as here in the MAA, as part of the resolution of proceedings which may already be before a court, it being remembered that Section 45 applies to matters whether initiating process has been commenced or not. It is my view that the legislature intended, when imposing duties on insurers, to impose positive duties with which the insurer had to comply, the sanction for which may be the loss of a licence or may be a stiff note from the Authority reminding an insurer of the insurer's obligations, or such other procedures as the Authority may take to ensure the insurer carries out an obligation during the period of the licence. Indeed, these would be matters the Authority might take into account in relation to a decision to renew any licence renewal application.

However, I do not see that the framing of Section 45, or indeed those other sections, such as ss. 37 and 38, or any of the other regulatory provisions of the MAA, set up positive statutory duties for a breach of which there arises a common law action. Certainly, in the context of the MAA, the duty imposed to make interim payments is a duty imposed on the insurer for which the plaintiff in this case, or any party affected by the failure to carry out that duty, is not given a cause of action at law, either as part of existing procedures already before the court, or otherwise.<sup>56</sup>

- 6.2.5 The matter went on appeal to the Court of Appeal. Mason P, Powell JA and Stein JA brought down their decisions on 31 October 1997. All three judges

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<sup>55</sup>

Ibid.

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*Stubbs v NRMA*, Dowd J, SC NSW, 1/12/96, unreported.

upheld the decision of Dowd J. Mason P drew attention to a number of sections of the *Motor Accidents Act* which provide remedies in respect of section 45. He also drew attention to section 118 which provides that no proceedings may be taken against a licensed insurer for a failure to comply with the terms of its licence or the Act generally, except by the Motor Accidents Authority.

Section 45(3) makes the insurer's obligation to comply with s45 a condition of its third-party licence. By this means the insurer in breach becomes liable to prosecution, licence suspension or licence cancellation. I shall later discuss the question of who may initiate such remedies.

The Act appears to offer two additional sanctions. Section 110, which requires a licenced insurer to deliver to the Authority and maintain a current "*business plan for its third-party insurance business*" and to prepare that plan in accordance with such guidelines as the Authority determines from time to time, may provide a mechanism whereby the Authority may monitor the effectiveness with which an insurer complies with its s45 obligations in a general sense.

Section 73(4)(a)(iii) also provides a limited sanction in the sense that an insurer becomes exposed to an order for interest if the defendant is insured and the insurer has failed to comply with its duty under s45(2) and (2A).<sup>57</sup>

In my view [Section 118] means what it says. Only the Authority may institute "*proceedings against a licensed insurer*" for failure to comply with the terms of its licence or the Act or the regulations. The duty imposed on an insurer by s45(2) is of this nature. It is both statutory and a duty which (by s45(3)) is made a condition of the insurer's licence. As a provision which purports to preclude access to the courts at the suit of persons who, like the appellant, are owed the relevant duty, s 118A needs to be closely scrutinised. Nevertheless its terms are plain and general. I do not believe that they may be read down so as to apply only to those categories of proceeding, such as licence suspension or licence cancellation, the power to take which is conferred exclusively by other provisions of the Act. In my view Dowd J was correct in holding that the Authority alone has the power to invoke proceedings against a licensed insurer designed to require that insurer to comply with the Act and with the terms of its licence.

6.2.6 Powell JA also upheld the decision of Dowd J, concluding by drawing attention to the inadequacies of section 45. Stein JA, who also agreed with Mason P and Powell JA expressly supported the concluding remarks of Powell JA.

I cannot, however, part with this matter without recording my view that, given what appears to have been the intention of the legislature that the scheme established under the Act should, in a case such as this is, make effective

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<sup>57</sup>

*Stubbs v NRMA*, Mason P, CA NSW, 31/10/97, unreported.

provision for the speedy supply to the injured of benefits in the nature of services the subject of s45(2) of the Act, the means which the Act has provided is unsatisfactory and that, in the circumstances the matter should be referred to the Government to consider whether some better means - perhaps as simple as the repeal of s76H of the Supreme Court Act 1970 and s61 of the District Court Act 1973 - to achieve that intention might be devised.<sup>58</sup>

I expressly associate myself with the concluding remarks of Powell JA. The means provided by the Act are unsatisfactory and a better fairer system needs to be put in place.<sup>59</sup>

6.2.7 The Committee discussed section 45 in its *Interim Report* of December 1996, in the context of a chapter dealing with complaints handling mechanisms in the CTP scheme. The chapter summarised evidence received by the Committee which suggested that there were significant differences in the practices of the 14 licensed CTP insurers in relation to the exercise of their duties under section 45. The Committee took the view that there was, at that time, a need for a means of quickly and finally resolving disputes arising between plaintiffs and insurers about section 45. The Committee made the same recommendation in relation to section 37, which imposes a duty upon CTP insurers to provide for reasonable and necessary rehabilitation services. The Committee tentatively suggested that the Claims Review panel Scheme, administered by Insurance Enquiries and Complaints Limited may be an option worthy of consideration.

The Committee recommends that the Motor Accidents Authority and the Insurance Council of Australia investigate, and report to the Committee by April 1997, whether a claimant should be able to elect to have an issue of quantum under section 37 or section 45 of the *Motor Accidents Act 1988* (that is, what constitutes 'reasonable and necessary' rehabilitation services or 'reasonable and necessary' payments) quickly and finally resolved by the Claims Review Panel Scheme (with appropriate expertise available to the Panel, including access to rehabilitation plans prepared by treating doctors).<sup>60</sup>

6.2.8 Interestingly, this recommendation was criticised by representatives of the insurance industry on the basis that disputes about section 45 were appropriately resolved through litigation. This criticism appears somewhat hollow following the Court of Appeal's decision in *Stubbs v NRMA*.

#### **Recommendation 12:**

<sup>58</sup> *Stubbs v NRMA*, Powell JA, CA NSW, 31/10/97, unreported

<sup>59</sup> *Stubbs v NRMA*, Stein JA, CA NSW, 31/10/97, unreported

<sup>60</sup> *Interim Report*, p 93.

**The Committee recommends that, in view of the Court of Appeal's decision in *Stubbs v NRMA*, the Motor Accidents Authority give urgent consideration to the development of means by which disputes about what constitutes reasonable and necessary services or payments under section 37 or 45 of the *Motor Accidents Act 1988* may be quickly and finally resolved.**