

**STANDING COMMITTEE ON LAW AND JUSTICE
FIRST REVIEW OF THE LIFETIME CARE AND SUPPORT SCHEME
QUESTIONS ON NOTICE - icare**

1)

Acceptance of liability

Mr DAVID SHOEBRIDGE: In relation to Lifetime Care and Support, a whole series of issues have been raised this morning. Suncorp was seeking a change of when lifetime care and support liability kicks in to either the date of the accident or the date a claim is made on the scheme. What, if anything, is your answer to that? They sought it for a couple of reasons, one of which was that it would have the law more closely align itself with, if you, self-interest. If these insurers have a claim that they think is going to go into the scheme there is some self-interest in delaying payments or services until they go into the scheme.

Mr FERGUSON: I think that is quite insightful, the challenge being in relation to perverse behaviour. We certainly do not want to see any postponement of important services for people, particularly those with serious injuries, as early intervention is absolutely key. The supports that are provided in the first instance, whilst people are in hospital, are covered under a bulk billing agreement that we have with the health system. Irrespective of liability those services are made available. There is no consideration of ability to pay for the funder before they are made available.

Mr DAVID SHOEBRIDGE: They effectively accepted that point. A catastrophic motor accident, all of that is being provided at a hospital and nobody is making discretionary calls about service providers. It is probably more the marginal injuries.

Mr FERGUSON: Yes. There is a very small number of individuals that sit at the margins, if you like, particularly around mild brain injury where the certainty of recovery may be unknown and even the level of severity. It is probably for that smaller group that I think that we could potentially look more closely at how we resolve the issue of timeliness and decision making and clarity of liability between insurers and lifetime care. It is not something that has been raised as being of great significance to us but it is an area where there is uncertainty because of the lack of clarity around the level of severity of an injury.

Mr DAVID SHOEBRIDGE: Could you on notice consider what the impact would be of changing it so as liability for the scheme coincided with the time of the claim as opposed to the date of the accident?

Mr BHATIA: Absolutely. We will take it on notice.

The Hon. DANIEL MOOKHEY: Does that require a legislative change or is it a matter of policy on your part?

The Hon. TREVOR KHAN: Or a regulatory?

Mr BHATIA: Or regulatory change. We will take that on notice. I think it may be an Act change but I will take it on notice.

The Hon. TREVOR KHAN: I ask in a related sense, if you think there is some merit in it—I am quite convinced by the argument of Mr David Shoebridge that the date of application seems attractive—is there some other trigger apart from the date of the application that may be a more suitable day?

Mr DAVID SHOEBRIDGE: Do not be trapped by the question if there is another date?

Mr BHATIA: No. We want to make sure that we have more efficient interaction with the CTP insurers upfront at the time of accident so that there is by any chance no cracks that those individuals fall under. I think as Don said, it is really at the margins but even if it just one person it is not good enough. So from our perspective we will take that on board.

ANSWER:

The Lifetime Care (LTC) scheme has a legislative obligation to fund treatment and care expenses from the date an injured person is accepted as an interim participant in the scheme. Legislative change would be required for icare to accept liability from either the date of application to the scheme or the date of accident.

However, icare is committed to working with SIRA, legal stakeholders and CTP insurers to discuss these issues and work together to ensure effective service delivery for those with serious injuries from motor vehicle accidents.

When a CTP claim is made and accepted, CTP insurers are on risk for any additional expenses incurred between the date of the motor accident and the date of acceptance into the LTC scheme. There are usually few additional treatment and care expenses that a CTP insurer would be required to fund that are not already covered by the bulk billing arrangement with NSW Health.

icare acknowledges that it can be difficult for some types of injuries (such as mild to moderate brain injury) to be identified and assessed. This can result in applications being made several months to several years after the accident, lengthening the period of time during which CTP insurers are on risk.

The advantages and disadvantages of **bringing forward the** LTC scheme’s liability to the date an application is made to it include:

ADVANTAGES	DISADVANTAGES
Impact on insurer behaviour	
<p>This change could theoretically encourage earlier notification and application from CTP insurers.</p> <p>The existing statutory obligation of CTP insurers to meet an injured person’s treatment and care needs between the date of accident and date an application is made would remain unchanged.</p>	<p>The current system encourages early notification to icare by CTP insurers. This means icare can ensure specialist providers are involved, which is particularly relevant for brain injury rehabilitation.</p> <p>Any change may inadvertently provide a disincentive for insurers to make complete applications that provide all relevant information. icare could consider accepting liability from the time an insurer provides it with the complete information required for an eligibility decision to be made. However, this may lead to differences of opinion between icare and CTP insurers about the amount or quality of information provided.</p> <p>As explained in the Pre-Hearing Questions on Notice, delays in eligibility decisions are most likely to occur when applications are made by the CTP insurer. This is generally the result of incomplete applications or lack of required documentation (such as medical information and reports).</p> <p>icare can request, but is unable to compel, insurers to provide information relevant to an application.</p>

ADVANTAGES	DISADVANTAGES
	<p>Over the last three years, 33 out of 39 applications made by the CTP insurer were made an average of 500 days after the injury.</p> <p>This is compared to the overall average for all participants being 100 days from date of accident to date of notification to icare.</p>
Impact on number of applications	
	<p>This change could provide an incentive to CTP insurers to lodge a higher number of applications.</p> <p>Current data indicates that CTP insurers lodge a small number of applications. Over the last 3 financial years (up to 31 March 2017), insurers lodged 39 applications out of 626 applications made, being 6 per cent of all applications. These applications were made on average 500 days after the injury, compared with the overall average of 100 days.</p>
Perceptions of delays in access to services	
<p>This change could potentially improve the timeliness of services funded by a CTP insurer that are not already covered by the existing bulk billing agreement, for a very small number of injured people.</p>	<p>The majority of services while a participant is in hospital are funded under the bulk billing arrangement with NSW Health. This means the majority of services are already covered from the date of accident, regardless of which entity provides funding.</p> <p>icare is not aware of any instances where a CTP insurer has made an application to the scheme and has delayed treatment for an injured person pending an acceptance decision.</p> <p>CTP insurers are able to make “without prejudice” payments for treatment, whereas icare is unable to make such payments prior to an injured person’s acceptance.</p> <p>CTP insurers have a statutory obligation to meet an injured person’s treatment and care needs between the date of accident and date an application is made.</p>
Impact on scheme sustainability	
<p>icare’s LTC levy collection and the very long term nature of its investments places it in a financial position to accept liability from an earlier date, such as date of application, with minimal financial impact on the scheme.</p> <p>The levy collection does not make assumptions about the timing of the making of an application and has to provide for applications made very early after injury.</p>	<p>There could be a shift in liability from CTP insurers to the LTC scheme for the few expenses not already covered by the bulk billing agreement. This could allow CTP insurers to lower their premium (which is subject to GST). This could result in a corresponding increase to the LTC scheme levy by a slightly lower amount, or may be offset, because the LTC scheme levy is not subject to GST.</p> <p>Further detailed analysis and collaboration with SIRA would be required to quantify cost differences.</p>

ADVANTAGES	DISADVANTAGES
Reimbursement/ recovery issues	
<p>CTP insurers do not have a right of recovery for any additional expenses they incur between the date of accident and date of application to the LTC scheme.</p> <p>This change would therefore be an advantage for CTP insurers.</p>	<p>Reimbursement to a CTP insurer does occur on a case-by-case basis. In rare circumstances when an application has been made after an injured person has left hospital or inpatient rehabilitation, icare has agreed to reimburse expenses incurred by the CTP insurer (such as private hospital expenses) for treatment and care needs.</p>

2)

Gratuitous care:

Mr DAVID SHOEBRIDGE: But you are so that is a good thing. One of their concerns is about where the treatment of service is for the participant's family members. They gave an example of regional travel from Cootamundra to Wagga Wagga. They said that the sister of the participant was available and wanted to do the travel but there was no agreement to pay so, instead, a much more expensive non-family service was provided. They said it is basically a philosophy in Lifetime Care and Support not to pay for family members.

The Hon. TREVOR KHAN: I am not being critical of you but were you watching the evidence?

Mr FERGUSON: Yes.

Mr DAVID SHOEBRIDGE: There is also the payment for any service that is of a parental nature. The last was about general discretion.

Mr FERGUSON: I am happy to go through all three of those. Just to clarify, I had some of my team watching and sending me email updates.

The Hon. TREVOR KHAN: I am not being critical but I would have been surprised if you were not taking an interest in what was going on.

Mr FERGUSON: Could I start by noting that with the review of our guidelines we take seriously the process of consultation. We get enormous value from the feedback that we get from a whole range of stakeholders, including some of the people who have been here this morning, who take great interest in providing us very detailed feedback—similarly with the New Bar Association and the Australian Lawyers Alliance. Of the matters that have been raised going to the point of it being a philosophy around the payment of family members, I will answer a couple of those. One is that we do avoid paying family members, except in exceptional circumstances. We will pay for a family member to support an individual where there is an unavailability or it is just simply impractical for a paid carer to be made available.

What I would say is from a philosophical perspective—to use that word—I think we have been great custodians of the scheme for the first 10 years, being a young scheme, and I think we have probably been quite conservative in some of our decision-making. I think we are also open to being able to understand, now that we know that a broader level scheme is very sustainable, that some of our decision-making could be more nuanced. There are circumstances such as the impact on a loved one in relation to travel that we would be happy to look at in more detail now that it is coming back.

Mr DAVID SHOEBRIDGE: So can we expect, now that you are aware of the issue and are engaging in it, that the new guidelines will reflect a more nuanced position? Is that the hope?

Mr BHATIA: I think that is exactly right. From our perspective some of the other feedback we also heard this morning was about being overly prescriptive and not leaving enough discretion in our coordinators to be able to approve such things. We are very aware of that and receptive of that as well.

The CHAIR: There is quite a contrast to the NDIS model—in global budget and a more independent approach to care for themselves.

Mr BHATIA: We have—

Mr DAVID SHOEBRIDGE: I think that is a different issue that would be good to address.

Mr BHATIA: We can address that separately.

ANSWER:

icare's position on payment to family members is based on strong feedback from other schemes and the disability sector that suggests such payments create a financial nexus between the participant and their family member.

However, in exceptional circumstances, there are mechanisms in place to allow a family member to be paid for care provided, and to be employed by an approved attendant care provider where an attendant carer worker is unavailable or it is impractical for such a worker to be made available, such as instances of geographical isolation or due to cultural factors.

This being said, icare recognises the importance of individualised and nuanced decision-making and agrees that this is something we can improve on. icare is currently working on an updated decision-making framework, which will move away from prescriptive decision-making towards an approach which is risk-based, individualised and flexible.

icare's model of self-management allows participants to have greater choice and control, similar to the NDIS approach to providing in-global budgets. As part of providing a budget for a plan, the NDIS is also required to make a decision about whether supports are reasonable and necessary. icare's approach to approving services for a set period of time, such as 12 months, where participants self-manage some or all supports during that period of time, is very similar to the planning process that occurs in the NDIS.

LTC scheme participants have all sustained an acquired severe injury, and participants and their families may be continuing to adjust to their disability. This could mean a different, or more gradual, take-up of self-management options as participants move from a more intensive phase of rehabilitation towards developing greater independence. Icare will continue to work with participants and their families to promote its self-management models, and expects the numbers of participants electing to take up self-management to increase over time.

3)

Reimbursement of family members:

Mr DAVID SHOEBRIDGE: Can we just go through those three elements? The other one was the parental responsibility?

Mr FERGUSON: That was really in relation to the line we take in terms of paying family members, there are exceptions—we have examples of exceptions where we have either difficulty in finding a care provider to provide that support because of rural and remote locations; and we have an individual who has particular language difficulties and the only person who is able to communicate effectively with them is a family member.

The Hon. TREVOR KHAN: Does that mean members of the Indigenous community?

Mr FERGUSON: No, actually it is a person with a Chinese dialect.

Mr BHATIA: A very rare Chinese dialect. She is 80 years old. It is more worthwhile that she is accompanied by a family member as opposed to—

Mr DAVID SHOEBRIDGE: There are two aspects. One is where the family member is providing the transport or the assistance and the support. The other one is where, say, a child is injured and it would be expected that the parent would go to the doctor's appointment, but in order to do that they have to take a day off work and they are not being compensated. That struck me as an unfairness.

The Hon. TREVOR KHAN: It is more than unfair. It is actually very discomforting.

Mr BHATIA: As we have said, we have taken that on board and those are things we are going to look at from a nuanced perspective. In those cases we can put ourselves in the shoes of those parents. We have young children and I completely understand where they are coming from.

The Hon. DAVID CLARKE: Have you been receiving many complaints in that area?

Mr FERGUSON: It is not something that has featured highly but there have been individual cases where it has been raised with us. What we have really tried to do was to think laterally about how we can best meet those needs, but we have been cobbled a little bit by our own approach in relation to payment of family members. It is really against the broader concerns about payment of family members. I think within that broader approach we have caught up some of these more specific situations that could benefit from it.

The Hon. DAVID CLARKE: For how long have you been looking at this issue?

Mr FERGUSON: This is something that we have only recently started to look at specifically in relation to how we can apply a more nuanced approach. Previously when we have had these issues raised with us we have looked at how we can try and find a suitable solution within the rulebook, if you like. So we have not looked laterally about how to change the rules previously.

The Hon. TREVOR KHAN: Can I say we had a similar time frame issue dealing with the State Insurance Regulatory Authority on one occasion and the answer that came back to us was less than satisfactory. Without defaming them too far, it was along the lines of "We will make our mind up in the fullness of time." You have never been like that when you have come to give evidence before the Committee. Are you able to give a time frame as to when you might be able to tell us as to what maybe a change in policy or the like?

Mr FERGUSON: We would be pleased in our questions on notice to be able to come back and provide the Committee with more details.

ANSWER:

icare has a philosophy not to pay family members to deliver care, based on strong feedback from other schemes and the disability sector. This is different to paying or reimbursing a family member to assist the participant to travel to or from a treatment, rehabilitation or care appointment.

icare works with the participant and family to establish what their need is for transport and how this need could be met in a flexible way. It is acknowledged that there may be fewer options to meet a transport need in rural and remote areas.

The LTC scheme either pays for, or reimburses, the participant's travel to and from treatment, rehabilitation and care appointments as per its *Participant Travel Policy*. This can occur in several ways including:

- providing reimbursement (via cents per kilometre method) for the participant or their family member using the participant's or family member's vehicle;
- providing reimbursement via cents per kilometre method to an attendant care provider driving the participant's vehicle; or
- providing a taxi voucher or hire car.

icare also provides vehicle modifications to enable the participant to drive a vehicle or be transported as a passenger. icare works with the participant and family to determine which vehicle is to be modified and the ownership of it. After the vehicle is modified, other types of travel assistance such as taxi vouchers usually cease because they are no longer needed. The LTC scheme reimburses the participant's travel to and from treatment, rehabilitation and care appointments in their modified vehicle.

icare is currently reviewing its *Participant Travel Policy* to ensure that it applies a more nuanced approach to decision making, including providing more flexibility in how a participant's travel need can be met. icare plans to consult with stakeholders on the revised policy in the first quarter of financial year 2017/18 (or third quarter of 2017).

Participants who take up self-management options have greater choice and control over their funded supports and may be able to achieve greater flexibility in meeting their transport needs. As previously mentioned, icare is continuing to work with participants and their families who are considering self-management.

4)

The Hon. DAVID CLARKE: Is it already in progress or are you starting to look at it?

Mr DAVID SHOEBRIDGE: The last two things on the guidelines were the general discretion and the concern about a no-more children policy.

Mr FERGUSON: On those two points, the general discretion is something that we received feedback from the New South Wales Bar Association on. We have taken that on board and we are looking at how we might be able to maintain it. So that is something that we are in agreement with and we are pleased to look at ensuring that we retain that discretion. What we do not want to end up with is black and white letter of law decision-making. That is exactly opposite the direction we are going. That discretion power is really important.

Mr DAVID SHOEBRIDGE: The computer says no.

Mr BHATIA: Absolutely.

The CHAIR: Mr Ferguson, Mr Clarke asked you a question and you nodded. Was the answer that it is already in progress?

Mr BHATIA: Yes, it is in progress. Over the past few months we have been bringing in participants to help point out some of the pain points. One of the pain points is about how to make sure that there is a nuanced, not the one size fits all which has plagued accident compensation schemes for a very long period of time. What Mr Ferguson said about the nuancing is something that we are definitely taking on board. From a parental perspective there is a lot more merit in the parent actually attending and being compensated for taking the day off. We will look into it and come back to you with a time frame for when we can implement it.

ANSWER:

As clarified in evidence given at the hearing, icare is working on the preferred wording to retain its discretions in its statutory guidelines relating to funding of treatment and care needs for participants. This will include defining the process for how the discretion can be exercised. icare intends to consult with stakeholders on its revised guidelines, which will include the discretionary clauses, commencing in July 2017.

Part of this review will consider how to reimburse a parent's attendance at a medical appointment for a child participant if evidence demonstrates that the parent has lost income as a result of that attendance. This approach would also need to be extended to others with caring responsibilities, such as a participant's partner, in circumstances where the participant lacks legal capacity and it is reasonable for a spouse or partner to attend an appointment. icare intends to include a discretion relating to this issue in its statutory guideline for attendant care services.

Reimbursement of a family member's lost wages in some situations may be a compensable expense in the CTP scheme for participants who have an accepted CTP claim. Accordingly, icare may need to consult with SIRA and CTP insurers to ensure that family members are not accessing funded reimbursement or compensation for the same expense under both schemes, which could jeopardise their sustainability.

5)

Mr DAVID SHOEBRIDGE: But what about if it is "I used to go to the cinema every months or every two weeks before my accident. Now I can't afford to go because it is a very expensive transport cost and I need a carer to come with me", are you accepting liability for the transport costs and the carer?

Mr FERGUSON: We pay for the carer to accompany an individual. We pay for whatever level of care that individual needs to participate in whatever activities they choose to, including going on holidays. We do not pay for separate transport. So for somebody to be transported independently to participate in the community, the transport is not what we are paying for; we pay for the care to assist them with that access. That is probably the difference.

Mr DAVID SHOEBRIDGE: I have got to say, from an external perspective it seems a very fine and kind of arbitrary distinction. Maybe you could expand upon that on notice about how those decisions are made and whether it is a legislative imperative or a policy imperative.

The CHAIR: When you consider the depression and engagement—

The Hon. TREVOR KHAN: I am not joining in this because I think there are lines that are going to be drawn—

Mr BHATIA: There are.

The Hon. TREVOR KHAN: —and we can sit here and throw everything up in the air and—

Mr BHATIA: And the costs will go up as well.

The Hon. TREVOR KHAN: That is right, there is an outcome to all of this.

Mr DAVID SHOEBRIDGE: That is why I said we might ask this on notice, because these decisions seem arbitrary but there is sometimes very good rationale behind them.

The Hon. DANIEL MOOKHEY: Except for the fact that, I think, the Bar Association's proposal was that should a proportion of an entitlement or a budget be essentially provided at large, without necessarily being tied to this, that that is a cost savings device and is just a better way of structuring it because it avoids the disputation argument. I accept that there is a category of things which we will look forward to on notice, but is there policy merit in establishing a form of entitlement like that that would avoid disputation, avoid the need for you guys to have to make decisions on things like this all the time?

Mr FERGUSON: Part of looking at how we become more flexible with individuals within the bounds of the scheme—so we are not looking at making changes that have a direct impact on levy setting—but where we can introduce flexibility that achieves greater outcomes for individuals and we do not have to make as many line item decisions, that is exactly what we are looking at at the moment.

The Hon. DANIEL MOOKHEY: But that would require us to somewhat loosen the nexus between entitlement and the injury. Is that correct? Because you are saying to us that there has to be a connection between the injury or the recovery from an injury—

Mr DAVID SHOEBRIDGE: The law says it.

The Hon. DANIEL MOOKHEY: That is my point: it is what the law says. But what I am asking is if there were to be a relaxation of the law, would that make things easier for you?

The Hon. TREVOR KHAN: That is where I would like to go. I think that is more productive.

The CHAIR: We are running out of time and we want to move on to the discussion about NDIS and the nexus.

Mr DAVID SHOEBRIDGE: Could I just ask, if everyone is comfortable with it, if that answer could be provided on notice?

The CHAIR: Yes, please take that on notice.

Mr BHATIA: Absolutely.

ANSWER:

The LTC scheme currently funds attendant care services to assist a participant engage in activities, regardless of the type of activity. The scheme also funds transport costs relating to treatment, rehabilitation and care appointments.

Whether the scheme provides transport funding depends on the activity undertaken by the participant. This is because the current legislation requires a relationship between the expense incurred and the motor accident injury.

The LTC scheme's current statutory guidelines do allow for a degree of flexibility in decision-making about this relationship. icare will approve the request if there is sufficient evidence to demonstrate that the service relates to the injury sustained in the motor accident, including exacerbation of pre-existing injuries. Time since injury, subsequent injuries and comorbidities are also considered.

A relaxation of the law in this area could achieve this aim, but may not be required if icare is able to achieve even greater flexibility and consistency within its existing decision making processes and frameworks.

The LTC scheme also funds a wide range of rehabilitation support to enable a participant to travel as independently as possible. This is highly individualised and could include:

- occupational therapy to assist the participant learn to travel safely and independently on public transport;
- rehabilitation to assist with returning to driving after injury, such as driving assessment and driving lessons;
- modifying the participant's or family member's vehicle to enable them to drive or travel as a passenger; and
- providing support to access other transport assistance such as the taxi transport subsidy scheme.

For the LTC scheme to fund all participant transport costs, or increase funding for transport for all participants across it, would be an expansion of the scheme. This has the potential to impact on the scheme's long term financial sustainability. The National Disability Insurance Agency (NDIA) is currently appealing a decision made by the Federal Court, which relates to whether the National Disability Insurance Scheme should cover part, or all, of a participant's transport costs.¹ The NDIA have stated that its reason for appealing is that the case has serious implications for the long-term financial sustainability of the National Disability Insurance Scheme:

<https://www.ndis.gov.au/appeal>.

As stated previously, icare does recognise the importance of individualised and nuanced decision making and agrees it is something we can improve on. The updated decision-making framework that icare is currently developing will move away from prescriptive decision making towards an approach which is risk-based, individualised and flexible. This will include decisions that icare makes about transport funding.

icare is progressively implementing the first phase of a revised decision-making framework in August 2017, along with a fast-tracked approval process enabling participants to receive faster access to a range of services such as replacement equipment and regular pharmaceutical needs. These changes form part of a range of initiatives co-designed with participants, service providers and icare staff as part of the Optimal Care program.

6.

Interactions with the NDIA:

Mr DAVID SHOEBRIDGE: Could we get a little more detail on notice about the formal or informal arrangement with the NDIA. I note that Ms Morris, who gave the evidence, is in the room so maybe you could have a talk with her as that would be really helpful.

The Hon. DANIEL MOOKHEY: In addition, could you on notice describe the mechanisms of interaction between icare and the NDIA on a formal level? Is there a council or committee and how often do you talk? That information would be really useful. Secondly on notice relating to dust disease, can we get the dates of all meetings of the board and board membership?

Mr BHATIA: Yes, absolutely.

¹ The Federal Court decision under appeal to the Full Court is *McGarrigle v National Disability Insurance Agency* [2017] FCA 308 (28 March 2017).

ANSWER:

The mechanisms of interaction with the NDIA and icare are as follows:

- icare is working with the NDIA executive to establish a Memorandum of Understanding between agencies to exchange information relating to participants.

This is to ensure that both agencies are able to access information needed to determine eligibility for either scheme and ensures participant privacy is respected. This will also ensure an effective handover between schemes;

- icare has established regular contact with the directors from the NDIA's NSW Branch and Head Office in Geelong; and
- At the local level, icare also works with NDIA planners and other staff at each NDIS region when participants are contacted by NDIA staff or have applied to the NDIS.