

THE LAW SOCIETY OF NEW SOUTH WALES

ANSWERS TO QUESTIONS ON NOTICE

LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND JUSTICE

2008 EXERCISE OF FUNCTIONS REVIEWS:

- **Motor Accidents Authority and Motor Accidents Council (Ninth review)**
- **Lifetime Care and Support Authority and Lifetime Care and Support Advisory Council (First review)**

Motor Accidents Authority/Motor Accidents Council (Ninth review)

Question 1 – NSW Bar Association submission re CARS

The Law Society does not regard the CARS process as either too bureaucratic or overly complex.

CARS can readily accommodate complex matters – issues can be addressed in written submission with any necessary clarification provided by the claimant. In fact, complex matters where injuries are catastrophic can be easier to deal with at CARS in many respects.

With respect to any perceived decline in discretionary exemptions, the Law Society fully endorses the CARS process as being the premier example of a dispute resolution process. The Society suggests the real issue of concern is entitlement to non economic loss. The Society would prefer assessment on the worth of a claim, subject to an indexed ceiling.

The Society stresses its confidence in the system. What once were seen as difficult matters because of the number of heads of damage that would be too laborious and too difficult to run, now are seen as being able to be managed more simply and easier with good expert reports and comprehensive evidence from witness by way of witnesses statements. There are exceptions, of course, in relation to matters affecting juveniles and where there are issues of capacity.

With respect to reduction in claims resolution times v. time taken in case preparation, the time needed for stabilisation of injuries or for medical assessments in MAS should be addressed.

Question 2 – ICA submission that CARS process results in higher compensation

There are two reasons for this to occur:

- The CARS process deals with more serious and catastrophic injuries,
- Claimants go to CARS when they do not settle for the amount offered by the insurer, on the basis that they have an expectation that the CARS process will give them a higher amount.

The Law Society's view is that the CARS process is completely transparent. All information is exchanged and parties must attempt to come to a resolution. All parties can seek specific orders and directions, and where parties require medical information etc it can be obtained. The Society comments on the particular submissions made by the ICA as follows:

- The assertion that the process allows individual assessors to make determinations without providing evidenced-based reasons is disputed. An enormous amount of work is done in bringing CARS assessors up to speed. The high calibre of CARS assessors is what makes the system work as well as it does.
- With respect to the greater use of treatment reports and records, it should be noted that the reports of treating doctors are crucial and always have been. In this way, their use in the system is no different to that of courts.
- Increased publication of reports and data is a matter for CARS.

It should be remembered that the ICA membership has a statutory obligation to reduce the size of claims and to reduce the amount of compensation paid to insured people, together with a duty to shareholders. The ICA submission reflects that duty.

Question 3 – insurers' communications with self-represented claimants

The only way lawyers come into contact with claimants is when they seek legal advice. Given that approximately 43% of claims are finalised without the assistance of lawyers (source MAA Annual Reports 1999-2006), there is concern that certain claimants may be disadvantaged in dealing directly with insurers. The Law Society is particularly concerned about unrepresented claimants who are commercially inexperienced, vulnerable or where there is some indication that capacity may be an issue.

In November 2007, the Society wrote to all CTP insurers asking for information about their policies in dealing with such claimants. None of the insurers has responded and the Society considers that this issue needs some momentum. The review that the MAA proposes in its response to Question 34 is supported (see answer to Question 5 below).

Question 4 – Decrease in number of claims

This issue was raised during the 8th review by the NSW Bar Association, when it was suggested that CTP insurers were enjoying profits arising from a fall in claim numbers due, in part, to improved car safety and tighter regulation. In common with the Taylor Fry 2008 unpublished report, the Law Society does not know whether the decrease in claim frequency is either as a consequence of, or simultaneous with, decreasing traffic casualty frequency.

The Bar Association suggested that what it termed "the road safety dividend" has benefited:

- Insurers by the fact that claims payments are well down on actuarial projections, and
- Motorists by the fall in premiums.

The Bar Association's submission, and it remains valid, was that injured claimants should also be granted some advantage from the road safety dividend and that benefits should be increased.

Question 5 – Insurers’ communications with represented claimants

Some material provided by insurers to potential claimants is selective in the information it provides about heads of damage, entitlements, resolving disputes and the availability and cost of obtaining legal advice. The Law Society has attempted to address a number of concerns raised by legal practitioners. Firstly, concerns about the generic information provided by GIO to claimants were referred to the MAA Compliance Department. After consultation with the MAA, GIO revised its Personal Injury Claim Information Pack. (GIO provided the Law Society with the new Pack in December 2007, however the Society notes that the revised Personal Injury Claim Pack has not yet been placed on the GIO website.) The Law Society also engaged directly with the NRMA to assist in a review of that insurer’s information letters.

However, it is the Law Society’s view that industry-wide pro forma documents, developed in consultation between the MAA, insurers and legal representatives would assist in providing claimants with consistent information about their entitlements and rights. The Society will be very pleased to participate in the review that the MAA proposes, and suggests that the MAAS Reference Group is an appropriate forum for this project.

Question 6 – Ongoing inconsistency in Whole Person Impairment assessments

The Law Society is of the view that the government response does not address the essence of the Law and Justice Committee’s recommendation. Additional work is required in relation to Whole Person Impairment generally.

Lifetime Care and Support Authority and Lifetime Care and Support Advisory Council (First review)

Question 7 - Inability to opt-out of the LTCS Scheme

The relevant provision of the Motor Accidents (Lifetime Care and Support) Act 2006 is set out below.

8 Application for participation in the Scheme

- (1) An application for a person to become a participant in the Scheme in respect of a motor accident injury is to be made to the Authority and can only be made by or on behalf of the person or by the insurer of a claim made by the person in respect of the injury.
- (2) An application by an insurer does not require the consent of the person.
- (3) The MAA may direct the insurer of a claim made by a person in respect of an injury to make an application for the person to become a participant in the Scheme, and the insurer must comply with such a direction.

Section 8 provides insurers with the power to bring injured people within the Scheme without their consent, and the MAA with the power to direct an insurer to bring people within the Scheme.

The LTCS Authority’s response to Question 36 is only relevant to self-managed care and does not address the fundamental issue of a claimant being able to opt-out of the Scheme in its entirety. The strong view of the Law Society remains that injured people with the relevant capacity should be able to opt-out of the Scheme. This has been the Law Society’s standing

submission since the Scheme was first proposed. It is as much a civil rights issue as anything else: people should have the right to accept personal responsibility for managing their own future.

Question 8 – Financing of the LTCS Scheme

The Cumpston Sarjeant Pty Ltd report is attached, together with copy of the MAA's letter in response to the report.

With respect to funding for the LTCS Scheme, there is always the concern that actuarial estimates will prove inadequate and that benefits will be cut so that budgets can be met. However, the Society has not done any recent modelling on the information currently available about the funding of the Scheme.

Questions 9 – LTCS appeals process

The Scheme as it relates to adults has been operating for less than 12 months and there are, as yet, no relevant examples as to inadequacies of the appeal process.

The Law Society's objection relates to the enabling legislation which does not allow for an adequate appeal process and, in particular, does not provide the right to retain legal representation in conducting an appeal to an independent authority from a decision of members of the LTCS Authority. The Law Society acknowledges that LTCS Authority is correct in its response to Question 31: many administrative decisions – involving variously medical, rehabilitation, care and support issues – will be made during a person's lifetime in the Scheme. It remains the Law Society's view that there must be an appropriate mechanism in place to accommodate those times when a person wishes to challenge a decision. This mechanism should extend to the availability of an external review.

The Society has not been specific in proposing what would be an appropriate external appeal from an administrative decision. As the legislation currently stands, all disputes are to be determined by assessors appointed by the Authority. Once those internal reviews have been exhausted, the only remedy available would be to seek a judicial review in the Supreme Court. An appropriate suggestion may be to provide an avenue of appeal to the Administrative Decisions Tribunal. This would require legislative amendment.

Also important is the need for flexibility in the LTCS in terms of allowances to participants. It is particularly important to consider the economic realities of the cost of care in other jurisdictions when people injured in New South Wales return to their homes overseas.