Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

3 November 2011

The Hon David Clarke MLC
Chair, Standing Committee on Law and Justice
Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Mr Clarke,

Eleventh review of the MAA and MAC and fourth review of the LTCSA and LTCSAC

The Australian Lawyers Alliance thanks the Standing Committee on Law and Justice for the opportunity to appear at the hearing on 10 October 2011.

As requested, I **enclose** the amended transcripts of evidence given by myself and Dr Andrew Morrison SC on behalf of the ALA.

In response to the questions that were taken on notice, we now provide the following further submissions:

Eleventh review of the MAA and MAC

Pre-CARS Requirements

The Act underwent significant amendments in October 2008. Part of the package of amendments was the introduction of Sections 89A – 89E, which specify procedures that must be carried out prior to a matter being lodged with the Claims Assessment and Resolution Service for assessment.

The ALA submits that these amendments were completely unnecessary, are extremely difficult to comply with, and result in unnecessary costs being incurred. Most parties were already exercising common sense and making all efforts to settle cases prior to lodging a CARS dispute, in any event. The introduction of the s89A – s89E requirements have unduly complicated the process. They are extremely difficult, in practice, to comply with and are likely to result in a number of claims ultimately being "out of time", due to claimants being prevented from applying to CARS within the 3 year limitation period.

Suite 5, Level 7, 189 Kent Street, Sydney NSW 2000 GPO Box 7052 Sydney NSW 2001
DX 10126 Sydney Stock Exchange ABN 96 086 880 499

T + 61 2 9258 7700 F + 61 2 9258 7777 E enquiries@lawyersalliance.com.au www.lawyersalliance.com.au

For example, section 89A provides that the parties "must" participate in a settlement conference before lodging an application with CARS. Section 89B provides that the parties must exchange all of the evidence they want to rely on for the purposes of assessment of the claim prior to participating in the s89A conference. Thus the parties must have every piece of evidence they want to rely upon. This requirement has resulted in the s89A conferences having to be delayed and postponed. This could have the effect of the insurer delaying the settlement conference by requesting more and more material and preventing the claimant from proceeding to CARS within three years as they cannot participate in the s89A conference.

The technical complexity of sections 89A – 89E have seen insurers submitting that applications for CARS assessment should be dismissed for the technical non-compliance. The ALA understands that a significant number of claims which were otherwise ready to be assessed have had CARS applications dismissed by the Principal Claims Assessor for technical non-compliance.

The complexity of these provisions are such that no legally unrepresented claimant could ever hope to navigate through them alone. The complexity of the claims system drives the need for legal representation. The Motor Accidents Authority promised back in 2008 when these provisions were introduced that the costs Regulations would be amended to reflect the additional work required. Three years later, the Regulations have yet to be amended. As solicitors are required to perform more work for the same fees, claimants end up being even further out of pocket.

Furthermore, for the cases that are able to be lodged within CARS within time, the new provisions create ongoing difficulties due to the prohibition on the claimant lodging any more material. There is usually some months delay between lodgement and determination. During this time, claimants need more treatment, may change jobs, and otherwise have changes in circumstances.

The provisions do not allow the introduction of any new documents except in limited circumstances. This obviously has the potential to create injustice.

The ALA submits that sections 89A – 89E should be repealed.

Fourth review of the LTCSA and LTCSAC

Independent review of LTCSA decisions

1. *Your submission expressed your ongoing concern that the LTCS Scheme does not provide a right of appeal to an independent body on the merits of a LTCSA decision.*[1] *In relation to this concern, the LTCSA has previously noted that disputes are referred to 'external independent dispute assessors' comprising assessors not employed by the Authority, but appointed under the Motor Accidents (Lifetime Care and Support) Act 2006.*[2]
    - *In your view, does this constitute a right of appeal to an external body?*

---

1 Australian Lawyers Alliance, LTCSA Sub 7, p 4.

2 LTCSA answers to pre-hearing questions on notice, 2010, q 11, pp 11-12.

- *What modification to the current system would you propose in order to address this perceived weakness?*

The Assessors may not be technically "employed" by the LTCS Authority but they are nonetheless appointed by the Authority and paid by the Authority. They do not have tenure. The Authority can choose not to renew their appointments. In these circumstances, the ALA does not believe that such Assessors can be properly considered an external body. We propose that injured people have the right to have appeals determined by the Courts. We would suggest that a right of review to the District Court would be appropriate. Review to the Administrative Decisions Tribunal may also be an option.

Access to specialist legal advice

2. *Your submission states that sections 18 and 29 of the Motor Accidents (Lifetime Care and Support) Act 2006 effectively restrict participant's access to specialist legal advice.*[3] *In relation to this concern, the LTCSA has previously noted that sections 18 and 29 address decisions about medical or clinical issues and do not inhibit a participant recovering costs in relation to a dispute over legal issues.*[4]
    - *Can you elaborate on your concerns about sections 18 and 29 in light of the LTCSA's comments?*
    - *What avenues exist for participants wishing to dispute medical and clinical decisions?*

Disputes about medical and clinical issues can be complicated and many participants will require legal advice and assistance with these disputes. For example, many disputes relate to interpretation of the benefits that are allowed under the Act and the Guidelines. These disputes inevitably involve legal issues in relation to statutory interpretation and administrative law (validity of delegated legislation). It is unsatisfactory for participants of the Scheme to be without recourse to legal assistance for these disputes. At present, any participants wishing to lodge disputes about medical and clinical issues are unable to access legal advice unless they are able to find a lawyer who is prepared to assist them on a pro-bono basis. There are many lawyers out there who are currently doing this but it is not satisfactory to leave participants of the LTCS in a position where they have no certainty of getting legal assistance.

It should be borne in mind that many of the scheme participants have a traumatic brain injury. They do not have the skills to complete the forms, let alone argue with the Authority and assemble the evidence to challenge a care plan. They need assistance.

At present it is only possible to recover costs of legal assistance in relation to a dispute as to whether an injury is a "motor accident injury" within the meaning of the legislation. As explained above, this is not the only type of dispute that involves legal issues, and therefore it is inappropriate that cost recovery be limited to this type of dispute. Furthermore, there is no proper costs regime connected with these disputes.

---

3 Australian Lawyers Alliance, LTCSA Sub 7, p 2.

4 LTCSA answers to pre-hearing questions on notice, 2010, q 17, p 16.

All the LTCS Authority has introduced is a $5,000 grant, which may be adequate in some cases, but which will be far from adequate in a vast number of disputes.

By way of example, one of the ALA committee members acted for a young man who became a paraplegic as a result of a motorbike accident. The LTCS Authority rejected the man's application for participation in the scheme on the basis that his injury was not a motor accident injury within the definition in the legislation. A significant amount of legal work (by both solicitors and a barrister) was required to challenge the decision of the LTCS Authority. This included obtaining an expert's report, which cost $3,456.00. Ultimately, after receiving the evidence and the submissions prepared by the man's legal team the LTCS reversed its decision and accepted the young man as a participant in the scheme.

The solicitors involved in that case requested that the LTCS Authority agree to increase the grant to $10,000 to cover the actual legal costs incurred by the solicitors and barrister involved in the case (given that less than $1,500 was leftover after the disbursements were paid). The LTCS Authority refused this request, relying on the terms of the Accident Advice Support Grant, which provides as follows:

> **Services to be provided by solicitors**
> Solicitors who will be funded by the Authority under the Grant are expected to advise the injured person and family of their capacity to provide advice and assistance to obtain vehicle and or accident investigation reports to a maximum of $5,000. Payments for any additional services provided beyond the total of $5,000 are not the responsibility of the Authority.

The terms of the abovementioned grant are clearly inflexible and unjust. The simple fact is that if the legal team involved in the abovementioned case had only provided legal services (including cost of experts' reports) up to the amount of $5,000, then the required evidence would not have been obtained, the required submissions would not have been prepared, and the LTCS Authority would not have changed its decision about whether to accept this man into the scheme. Ultimately, the whole reason that the legal work was required was because the LTCS Authority had made an error of law in refusing to accept the man as a participant of the scheme in the first place. Why should the Authority not be required to pay proper legal costs associated with remedying their error?

The ALA submits that a proper regime for costs recovery should be introduced by Regulations.

Unpaid family assistance

3. *Your submission suggests that consideration should be given to making payments to individuals who provide care for a family member who is a participant in the Scheme.*[5] *In response, the LTCSA has stated that it is inappropriate to create a financial nexus between family members and the participant. The Authority explained that this has the potential to disrupt normal family relationships because*

---

5 Australian Lawyers Alliance, LTCSA Sub 7, p 5.

family income would be derived from a participant's degree of injury related dependence.[6]

- *What is your response to this?*

The fact is that in a situation where someone has been catastrophically injured and is being cared for by family, the "normal family relationship" is already disrupted. The task of caring for a catastrophically injured person is phenomenal. To suggest that paying a family member to perform this task will somehow cause more problems than it solves is a fallacy. We note that Centrelink sees fit to pay family members to care for their loved ones (in the form of a carer's pension); there is no reason why LTCS should not do likewise.

Many families find having carers in the home intrusive. Some find cleaning up after the carers to be exhausting. Those who choose to provide the care themselves rather than leave their child with rotating shifts of minimally trained carers end up subsiding the operation of the LTCS scheme. This is clearly unreasonable and needs to be changed.

Biennial review of the LTCSA

4. *The Committee is considering whether the review of the LTCSA should be conducted biennially. What do you think of this idea?*

The ALA believes that annual review would be preferable to biennial review, to ensure that any problems within the scheme can be dealt with promptly. The accountability of annual review means that the Authority responds more promptly to identified issues.

Yours faithfully,
AUSTRALIAN LAWYERS ALLIANCE

Jnana Gumbert
NSW Branch President

---

6 LTCSA answers to pre-hearing questions on notice, 2011, q 38, p 17.