

LJ10/1506

Lawyers

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

Dear Ms Robertson,

#### **Tenth review of the MAA and MAC and third review of the LTCSA and LTCSAC**

On behalf of the Australian Lawyers Alliance I would like to thank you for providing Dr Andrew Morrison SC and myself with the opportunity to give evidence at the hearing on 11 June 2010.

There are two small corrections to be made to the transcript:

1. On page 40 in the final line the word "*permanent*" should appear after the words "*the prognosis is not for*". The entire sentence should therefore read: "*Generally on the psychiatric it has to be a gross injury to recover because for most psychiatric injuries the prognosis is not for permanent impairment.*"
2. On page 47, in the first comment from myself, the word "credited" should actually read "accredited".

There are two questions that we took on notice. The first question came from The Hon. John Ajaka, as follows:

**The Hon. John Ajaka:** *On that issue the same principle could apply to many of the city suburban firms. If they do not have deep pockets they will not be able to fund one claim for \$40,000. Are we creating an environment in which we are compelling claimants to go to the large firms that put on the 1,000 or 2,000 cases and – if I can use the word – churn them?*

**Dr Morrison:** *I do not like the word "churn" because good large firms vary. There are those that do not do a good job and there are those that do a very good job.*

**The Hon. John Ajaka:** *I meant churning from the deep pocket funding point of view.*

**Dr Morrison:** *The fact of the matter is that, sadly, you need deep pockets to run major cases.*

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**Ms Gumbert:** *I could add to that, although I might take that question on notice. I believe that arrangements are currently in place for certain organisations that fund disbursements to be set up so that it is credited by the Law Society. Essentially they can fund smaller practitioners and smaller firms who have the expertise to do this sort of work, but perhaps not the deep pockets.*

**The Hon. John Ajaka:** *You then go back into the litigation lending concept. There is always a cost to litigation lending, no matter how wonderful it sounds. At the end of the day, there is an ultimate cost. They are not doing it for nothing.*

**Ms Gumbert:** *That is the case. I will take that question on notice so that I can provide you with a proper answer. However, I believe that part of the process with the Law Society is to ensure that it is done properly.*

As far as the Australian Lawyers Alliance is aware, the main organisation that provides disbursement funding for personal injury cases in NSW is Ask Funding Limited.

Ask Funding provides a Disbursement Facility, which is a cash flow product for law firms, whereby ASK approves the firm for an amount that they can draw down against on an individual basis to cover a client's disbursements. The client signs an individual credit contract with ASK which states the cost associated with the loan, and the law firm guarantees the principal cost plus interest in the event the matter fails, so the loan to the client is non recourse. The client pays an interest (on a scale between 14.5-18.5% pa depending on the guarantee the law firm can give) on the amount borrowed with no repayments due until settlement. Ask Funding is governed by the Consumer Credit Code and does not take a percentage of the eventual settlement or verdict but instead charges an interest rate. In this way the facility is distinguishable from litigation lending.

Difficulties have sometimes arisen when a client wishes to transfer to a new solicitor, but the new solicitor does not have the funds available to pay the disbursements of the former solicitor. Until those disbursements are paid, the former solicitor is entitled to retain a solicitor's lien over the file. The Australian Lawyers Alliance has engaged in discussions with the Law Society of NSW and Ask Funding, in relation to setting up a protocol for the transfer of files between solicitors, with the disbursements being funded by Ask Funding. There has not yet been any outcome arising from these discussions.

We are informed that Ask Funding is currently running two test cases to establish whether the interest charged can be recovered from the defendant. The Australian Lawyers Alliance submits that interest charged on disbursements should be recoverable from the defendant, regardless of whether the disbursements are being funded by the law firm or by an organisation such as Ask Funding.

The second question taken on notice also came from The Hon. John Ajaka, as follows:

**The Hon. John Ajaka:** *I was not trying to be critical of law firms: I wanted to establish whether the system should be looking more at the insurer providing money upfront to meet some of these disbursements. That is where I was ultimately heading. In other words, why should either the claimant or the law firm have to meet those disbursements? Why are the insurers not providing an upfront disbursement allowance?*

**Ms Gumbert:** *That is an excellent point. In the current system there are already severe deficiencies in the upfront payment that are being made. Generally, claimants are not*

*entitled to receive any of their lost income until their claim is finalised, which can take many years. Obviously, that places huge financial pressure on them. At present the only area in which the insurer is obliged to make upfront payments is in relation to medical expenses. It is something that we will probably need to take on notice in order to provide a proper response.*

As mentioned above, the Australian Lawyers Alliance submits that the interest on disbursements should be recoverable from the defendant at the conclusion of the claim.

It should be noted that claimant's lawyers provide an important community service as almost all of them agree to act on a "no win no fee" basis. It is only if the claimant's claim succeeds that the lawyers are paid at their usual hourly rate. There is no interest charged on the legal fees incurred when the lawyers wait years to get paid. There is no commission charged on a successful outcome. If claimant's lawyers did not provide this service then many accident victims would never be able to pursue their claim.

In relation to upfront payments for damages, Section 83 of the *Motor Accidents Compensation Act 1999* imposes a duty on CTP insurers to pay for medical, rehabilitation and care expenses on an "as incurred" basis once liability for a claim has been admitted. There is no other general duty on insurers to make any payments until such time as the claim is finalised, except in limited circumstances. In this regard, the ALA notes that s84A of the *Motor Accidents Compensation Act 1999* provides as follows:

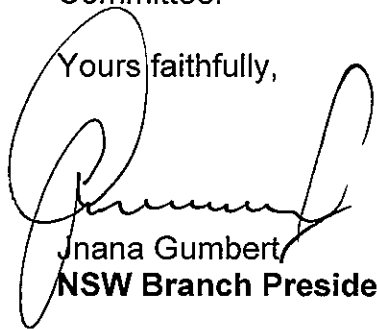
***84A Duty of insurer to make interim payments in case of financial hardship***

- (1) Once liability has been admitted (wholly or in part) or determined (wholly or in part) against the person against 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 economic loss but only to the extent that such a payment is necessary to avoid the claimant suffering financial hardship.*
- (2) It is a condition of an insurer's licence under Part 7.1 that the insurer must comply with this section.*
- (3) A payment made under this section to or on behalf of a claimant before the claimant obtains judgment for damages against the defendant is, to the extent of its amount, a defence to proceedings by the claimant against the defendant for damages.*
- (4) The amount of a payment made under this section to or on behalf of a claimant is to be included in the damages recoverable by the claimant for the purposes of any reduction of those damages by reason of the contributory negligence of the deceased or injured person.*

In reality it is often difficult for a claimant to prove that he or she is suffering "financial hardship" so as to activate the insurer's duty to make payments for loss of income. The Australian Lawyers Alliance submits that once liability has been admitted, there should be an obligation on CTP insurers to make payments for economic loss in all cases, so that the injured person is able to meet their day to day expenses whilst the claim is in progress. It is submitted that the words "*but only to the extent that such a payment is necessary to avoid the claimant suffering financial hardship*" should be removed from s84A(1).

We would be happy to provide any further information that may be of use to the Committee.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Jnana Gumbert', written over the closing 'Yours faithfully,'.

Jnana Gumbert  
**NSW Branch President**