

**Submission
No 8**

**FIFTH REVIEW OF THE EXERCISE OF THE FUNCTIONS
OF THE LIFETIME CARE AND SUPPORT**

Organisation: Australian Lawyers Alliance

Date received: 18/11/2013

Towards review

Submission to the NSW Legislative Council Committee Review of the
Lifetime Care and Support Authority and the Lifetime Care and Support
Advisory Council

18 November 2013

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INTRODUCTION

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the NSW Legislative Council Committee Review of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council.

WHO WE ARE

The ALA is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia. We therefore have excellent knowledge regarding legislative change and what impact this will have upon our clients.

More information about us is available on our website.¹

OUR STANDING TO COMMENT

The ALA is well placed to provide commentary to the Committee.

Members of the ALA regularly advise clients all over the country that have been caused injury or disability by the wrongdoing of another.

Our members advise clients of their rights under current state based and federal schemes, including motor accident legislation, workers compensation schemes and Comcare. Our members also advise in cases of medical negligence, product liability and other areas of tort.

We therefore have expert knowledge of compensation schemes across the country, and of the specific ways in which individuals' rights are violated or supported by different Scheme models.

We are well aware of existing methods of compensation reimbursement across the country, in order for individuals to gain access to care, as they deal with intersecting Schemes.



Our members also often contribute to law reform in a range of host jurisdictions in relation to compensation, existing schemes and their practical impact on our clients. Many of our members are also legal specialists in their field. We are happy to provide further comment on a range of topics for the Committee.

EXECUTIVE SUMMARY

The ALA makes the following recommendations:

1. Review the cost of the scheme.
2. The *Motor Accidents (Lifetime Care & Support) Act 2006* (the Act) be amended to promote access to independent advice and advocacy for participants of the scheme.
3. The Act be amended to provide for independent review of decisions.
4. The Act be amended to remove the prohibition of recovery of any Griffith – v- Kerkmeyer damages for voluntary domestic assistance.
5. The scheme should make provision for funding the capital costs involved with purchasing a suitable house, car, and/or computer equipment.
6. Limitations on funding for increased cost of holidays should be removed.
7. The Act should be amended to require the consent of the injured person to become a participant in the scheme.

RECOMMENDATION 1 – REVIEW THE COST OF THE SCHEME

Over 20% of the CTP premium currently goes to support the LTCS scheme. Every motorist pays over \$100 per year in premium to fund care and treatment for less than 200 people per year.

Whilst recognising the need to provide proper care for the most catastrophically



injured, there are serious concerns about the efficiency of the LTCS scheme. It appears to be collecting far more in premium than the level of benefits being paid out would justify. However, only very limited data is publicly available about this.

The Legislative Council Standing Committee on Law and Justice's Review of the exercise of the functions of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council, Third Report (December 2011) (hereafter referred to as "The Committee's Fourth Report") noted, at 3.21:

"The LTCSA reported the implementation of a 2.5 per cent reduction in the levy on motorists in February 2009 and it had approved a further 3.5 per cent reduction from August 2009. At the time, the Authority explained that they were able to allow a reduction in the levy because the increase in CTP premiums was delivering a higher income to the LTCSA than was required to maintain full funding. The levy has not been reduced since 2009."

The ALA submits that a comprehensive review of the scheme is warranted to ascertain whether premiums can be reduced further and/or whether the benefits that are being provided to participants of the scheme can be improved.

RECOMMENDATION 2 - INDEPENDENT ADVICE AND ADVOCACY FOR PARTICIPANTS

The current situation

In the first review report the committee made a recommendation relating to independent advice and advocacy. It recommended that the LTCSA and the LTCSAC consider options for the provision of independent advice and advocacy for participants in the scheme. In response, as part of a discussion paper process on advocacy for participants, the LTCSA advised that there already is a well-established advocacy network that participants could access.

Since then the LTCSA has published information on its website for participants of the LTCS with regard to advocacy. There an advocate is described as 'another person who is on the side of the participant to help solve a problem'. It is described as an 'individual (an advocate), who speaks out on your behalf to protect and promote your rights and interests'.

Of the services nominated as providing advocacy to people with a disability in NSW, only one is a legal service (Sydney Regional Aboriginal Corporation Legal

Service).

The ALA submits that for an advocate to be in the position to assist in protecting an individual's rights, that person must have a clear understanding of what those rights are.

The ALA remains concerned about the ability of catastrophically injured persons, particularly of brain-injured participants, to initiate contact with advocacy groups, to fully appreciate their rights under the scheme and the implications of decisions made by the LTCSA. It is not realistic to expect, for example, the non-English speaking parents of a catastrophically injured child to be able to fully understand, let alone draw up submissions in relation to, any inadequacy in a care plan developed by an assessor.

The ALA strongly supports the need for independent advice and advocacy for participants. It is preferable that this advice and advocacy be by those who have training and specific expertise in providing legal services to catastrophically injured persons.

The Act effectively restricts access to legal services. Section 18 of the act provides that no legal costs are payable by the authority in respect of a dispute regarding eligibility for the scheme. Section 29 of the act provides that no legal costs are payable with respect to disputes concerning treatment and care assessments. It is only where there is a dispute about whether an injury is a "motor accident injury" that there is an entitlement to recover costs for legal representation.

The Lifetime Care and Support Authority has introduced an Accident Advice Support Grant of \$5,000 which provides one-off funding to facilitate access to legal and accident investigation advice in relation to a dispute as to whether an injury is a motor accident injury for the purposes of the scheme. This Grant is a positive step but it is quite inadequate in many cases.

For example, the ALA is aware of at least a case where a very complex and novel issue arose in relation to whether an accident was a motor vehicle accident that was covered by the LTCS Scheme. The LTCS Authority initially rejected the injured person's application for participation in the scheme. It was necessary for the injured person to engage solicitors and Counsel, and to obtain a costly expert's report (in excess of \$2,000) in order to provide evidence and submissions as to why he should be accepted into the Scheme. The injured person in this instance was ultimately accepted into the Scheme but the \$5,000 grant was quite inadequate to cover the cost of the expert's report plus the legal costs that were reasonably

incurred. In that case, the lawyers wrote off fees to ensure that the injured person did not have to pay anything out of his own pocket. However, injured people should not be put in a position where they are forced to hope for the benevolence of lawyers prepared to act for little or no payment, in order to assert their rights.

The most important point that the abovementioned case illustrates is that there can be complex legal issues that pertain to accessing the LTCS Scheme and that it is necessary for injured people to have access to legal advice to ensure that their rights are protected. As a result of the abovementioned case, the LTCS Authority now has to review the decisions its previously made to exclude a number of injured people from the Scheme. If those injured people had been afforded access to legal advice then it is likely that this issue would have been resolved in their favour and they would have been accepted into the Scheme at a much earlier point in time.

Proposal for reform

The ALA refers to the Legislative Council Standing Committee on Law and Justice's Review of the exercise of the functions of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council, Third Report (November 2010) – hereafter referred to as “The Committee’s Third Report” – and notes that Recommendation 5 stated:

“That the Lifetime Care and Support Authority consult with legal organisations to identify additional legal advocacy groups with expertise in providing advice to people with disabilities to include in its information about advocacy services on its website.”

The ALA endorses this recommendation and specifically submits that this information should include information about where injured people can obtain legal advice.

The Committee’s Third Report also stated, at 4.151:

“The Committee agrees with the view of the Australian Lawyers Alliance that participants and their carers must be able to understand their legal rights and access legal advocacy services. The Committee recognises the Authority’s comments that legal costs are recoverable for disputes about legal questions, rather than medical or clinical issues. The creation of the Accident Advice Support Grants is a positive step in improving access to legal advice and accident investigation advice by Scheme participants.”

The Committee's Fourth Report recommended (at Recommendation 4):

“That the Lifetime Care and Support Authority should review the adequacy of the Accident Advice Support Grant on an annual basis and at minimum annually increase the grant to meet increases in the Consumer Price Index.”

As far as the ALA is aware, the adequacy of the grant has not been reviewed and the grant has not been increased. The ALA submits that this should occur as a matter of priority.

Ultimately, whilst the ALA agrees that the Accident Advice Support Grant has been a positive step, it submits that it does not go far enough. The ALA submits that the LTCSA should introduce a proper regime for costs recovery (as it is permitted to do under the provisions of the Act), to ensure that injured people are able to get the legal advice that they require.

RECOMMENDATION 3 – INDEPENDENT REVIEW OF DECISIONS

The Act, and associated Guidelines, contemplate three kinds of disputes. These are:

- (a) Disputes about eligibility for the scheme;
- (b) Disputes about whether an injury is a “motor accident injury”; and
- (c) Disputes about treatment and care.

With respect to disputes about eligibility for the scheme, the review process is:

- (a) The Authority makes a decision regarding eligibility;
- (b) Panel of Assessors of the Authority to determine any dispute about eligibility; then
- (c) The Authority may review the determination of panel of assessors but on limited grounds.

Disputes about whether an injury is a “motor accident injury” are referred to a panel of three Assessors appointed by the Authority.

Treatment and care disputes are referred to an Assessor appointed by the authority. The only right of appeal from an assessor's decision is to a panel of three other Assessors, also appointed by the Authority. Limited circumstances and strict time limits apply.



The scheme does not provide for a right of appeal on the merits of a decision to any body external to the Authority. The ALA submits that this is a major weakness of the scheme and inherently unjust.

The Committee's Fourth Report recommended (at Recommendation 5):

“That the Lifetime Care and Support Authority work with the Brain Injury Rehabilitation Directorate and other stakeholders to examine the feasibility of a more robust and independent dispute resolution process for disputes concerning eligibility and treatment.”

As far as the ALA is aware, the above recommendation has not been followed, and the ALA submits that steps should be taken to review the dispute resolution system as a matter of priority.

RECOMMENDATION 4 – UNPAID FAMILY ASSISTANCE

As a consequence of receiving their treatment and care needs from the LTCSA, a participant is prohibited from recovering damages in respect of their treatment and care needs from the CTP insurer against whom fault can be established.

This includes a prohibition on recovering any *Griffith –v- Kerkmeyer* damages for voluntary domestic assistance. The argument is that the scheme will cover all care needs on a paid basis so no voluntary domestic assistance should be required.

The reality is that many families will choose to continue to provide some care on an unpaid basis. For example:

- (a) The family may choose not to have a carer in the home for 24 hours to look after a young child but may prefer to cover overnight care needs in exchange for some privacy.
- (b) A parent may choose to give up or restrict their work hours in order to accompany their brain-injured child to school rather than use a paid carer.

By volunteering to provide such services the family member, in effect, becomes an unpaid subsidiser of the LTCS Scheme.

Consideration should be given to family members being paid for the provisions of care services, subject to the family member having undergone suitable training. This may involve family members being formally employed and receiving work



benefits (such as superannuation and workers' compensation cover), although whether the employment would be by the injured party, a contractor or the LTCSA would need to be the subject of consideration.

RECOMMENDATION 5 – FUNDING FOR CAPITAL COSTS OF ACCOMMODATION, TRANSPORT & COMPUTERS

The scheme makes no provision for funding the capital costs involved with purchasing a suitable house, car, or computer equipment. There is only provision to modify existing property. The scheme does not cover increased costs of rental, where, for instance, a family is forced to move to a larger rental property to accommodate a child with profound disabilities.

Those who can prove fault may be able to claim the capital costs, where required, as part of their CTP claim. However, this means that injured people will inevitably have to wait for the finalisation of the CTP claim before they have the funds to purchase a house/car/computer to be modified. This will have the effect of delaying rehabilitation.

Those who cannot prove fault are left without any remedy.

This requires reconsideration and amendment.

RECOMMENDATION 6 – LIMITATIONS ON FUNDING FOR INCREASED COSTS OF HOLIDAYS

The scheme will pay for one economy airfare within Australia for one carer each year, in addition to the increased costs of accommodation due to the carer staying with the injured person.

There is no provision for funding for a second carer, business class travel, or higher level accommodation. Injured people who are unable to travel in economy class, or who need to stay in a more expensive hotel with better facilities, will either have to pay for the additional expense themselves or they won't be able to travel at all.

There is no provision for funding of overseas travel at all. This will particularly affect

those injured people with family overseas.

This matter should be reviewed and addressed within the Guidelines.

RECOMMENDATION 7 – VOLUNTARY PARTICIPATION IN THE SCHEME

Section 8(2) of the Act provides that an application by an insurer for a claimant to participate in the scheme does not require the consent of the injured person. The amendment of this clause to require consent would effectively make it a voluntary scheme. A vote to amend the Act to require a claimant's consent to participation in the scheme was defeated 23-17 in the Legislative Council.

The ALA refers to the Committee's Third Report and particularly the comments at 4.46:

“The Committee notes that the issue of opting out of the Scheme has developed since the last Review and we expect that, as the Scheme matures and more participants are accepted into the Scheme, this issue will continue to be raised as an issue of relevant to the future of the Scheme.

The Committee notes the arguments presented by Mr Mark Harris [a scheme participant] and his family in support of being given the opportunity to opt-out of the Scheme and receive a lump sum payment. Their position was shared by the NSW Law Society and Spinal Cord Injuries Australia. The Harris' experiences valuably serve to illustrate that some LTCS Scheme participants are likely to be dissatisfied with the nature of the Scheme and various aspects of its administration. The Scheme is designed to assist people who suffer serious and lifelong injuries as a result of motor accidents and where those negative experiences can be minimized they should be.”

The principal thrust of the former NSW Government's tort law reform programme has been to enhance personal responsibility. However, the same government did not appear willing to give the catastrophically injured the same opportunity to adopt personal responsibility for their own future. Rather, the injured will spend a lifetime having to approach the Authority every time their treatment needs alter.

The ALA submits that s8(2) of the Act should be repealed.

CONCLUSION

The ALA is happy to elaborate further on the issues raised.

REFERENCES

¹ Australian Lawyers Alliance (2012) <www.lawyersalliance.com.au>