

**INQUIRY INTO THE EXERCISE OF THE FUNCTIONS OF
THE LIFETIME CARE AND SUPPORT AUTHORITY AND
LIFETIME CARE AND SUPPORT ADVISORY COUNCIL -
THIRD REVIEW**

Organisation: Australian Lawyers Alliance
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21 April 2010

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

The Australian Lawyers Alliance thanks the Standing Committee on Law and Justice for the opportunity to comment on the tenth review of the Motor Accidents Authority and the Motor Accident Council, and the third review of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council.

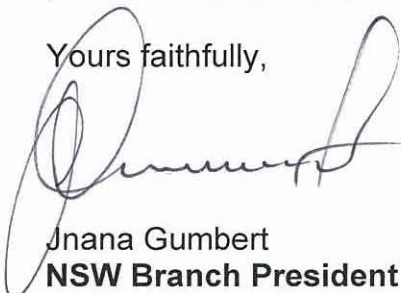
The Australian Lawyers Alliance is a national association of lawyers primarily practising in the areas of personal injury. It is estimated that our membership represents no fewer than 200,000 people nationwide each year. The Lawyers Alliance started out in 1994 as the Australian Plaintiff Lawyers Association when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – injured accident victims. The Lawyers Alliance approached this particular submission via the expertise and auspices of its NSW branch.

Enclosed are the following submissions:

1. The Australian Lawyers Alliance submissions in relation to the review of the Motor Accidents Authority and Motor Accidents Council.
2. The Australian Lawyers Alliance submissions in relation to the review of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council.

If there is any way the Lawyers Alliance can assist the Committee further on these issues, please do not hesitate to contact our office on (02) 9258 7700.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Jnana Gumbert".

Jnana Gumbert
NSW Branch President

AUSTRALIAN LAWYERS ALLIANCE
SUBMISSIONS TO THE LEGISLATIVE COUNCIL COMMITTEE
REVIEW OF THE LIFETIME CARE & SUPPORT AUTHORITY
AND THE LIFETIME CARE & SUPPORT ADVISORY COUNCIL

EXECUTIVE SUMMARY

The ALA makes the following recommendations:

1. 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.
2. The Act be amended to provide for independent review of decisions.
3. The Act be amended to remove the prohibition of any recovery of any Griffith –v- Kerkmeyer damages for voluntary domestic assistance.
4. The scheme should make provision for funding the capital costs involved with purchasing a suitable house, car, and/or computer equipment.
5. Limitations on funding for increased cost of holidays should be removed.
6. The Act should be amended to require the consent of the injured person to become a participant in the scheme.

INTRODUCTION

The ALA refers to its submissions dated 13 May 2009 (copy attached) that were provided for the Second Review of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council. The recommendations contained in those submissions have not been acted upon, and the ALA maintains its position in relation to the issues raised therein.

In addition, the ALA makes the following specific recommendations:

RECOMMENDATION 1 – INDEPENDENT ADVICE AND ADVOCACY FOR PARTICIPANTS

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).

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.

This means that participants are effectively left without access to specialist legal advice.

RECOMMENDATION 2 – 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.

RECOMMENDATION 3 – 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 4 – 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 5 – 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 6 – 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 principal thrust of the NSW Government's tort law reform programme has been to enhance personal responsibility. However, the same government does 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.



13 May 2009

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

Dear Ms Robertson,

Second Review of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council

The Australian Lawyers Alliance would like to thank the Standing Committee on Law and Justice for the opportunity to comment on the Second Review of the exercise of the functions of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council.

The Australian Lawyers Alliance is a national association of lawyers, primarily practising in the areas of personal injury. It is estimated that our membership represents no fewer than 200,000 people nationwide each year. The Lawyers Alliance started out 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 – injured accident victims. The Lawyers Alliance approaches this particular submission via the expertise and auspices of its NSW branch.

The Lawyers Alliance has had the opportunity to consider the submissions of the NSW Bar Association and endorses its submissions, particularly the following elements:

The purpose of the Lifetime Care and Support Authority (LTCS) is to manage the rehabilitation and care needs of those seriously injured in motor accidents in NSW. Nonetheless, participants in the scheme need adequate access to legal advice and advocacy services in order to allow the full realisation of their legal rights under the scheme. Participants should also be able to recover their legal costs where appropriate. By virtue of their disabilities, participants or potential participants in the LTCS are inherently vulnerable and may not have adequate support from family and friends to ensure, for example, that assessments of their treatment and care needs are appropriate. For this reason, the Lawyers Alliance submits that adequate access to independent legal advice and assistance services is extremely important.

The LTCS operates on the basis of both interim and permanent participation. As the Bar Association noted, interim participation is appropriate for those who have suffered traumatic brain injury from which they may recover within a two-year period. However, the automatic categorisation of those suffering spinal cord injuries as interim participants has significant implications for resolving their legal claims for general damages and economic loss. Clearly, the final determination as to whether an injured person will become a permanent participant can significantly affect the settlement and resolution of their compensation rights. Therefore, the Lawyers Alliance submits that those suffering spinal cord injuries should be accepted as permanent participants in the scheme.

The Lawyers Alliance also mirrors the concerns of the NSW Bar Association regarding the legal validity of the guidelines under the *Motor Accidents (Lifetime Care and Support Scheme) Act 2006* ('the Act') as being *ultra vires*, or beyond power. Section 6 provides the LTCS with the obligation to pay for treatment and care needs that are reasonable and necessary for the participant. There are many examples of unnecessary restrictions being placed on participants to claim costs that are reasonable and necessary given their personal circumstances. For example, the LTCS reduces payments for air conditioning, by factoring in any other family members that may benefit. Therefore, as the Bar Association noted, a quadriplegic mother with three children will be able to recover only one-quarter of the costs of her air

conditioner. This is clearly inequitable, as the participant has a reasonable and necessary need for an air conditioner to regulate her body temperature and this should not be reduced by virtue of the participant's home and family situation. While recognising that guidelines can create consistency in a scheme, the Lawyers Alliance submits that the LTCS should be flexible enough to take into account individual circumstances of a participant when determining appropriate treatment and care.

If there is any way the Lawyers Alliance can assist the Committee further on these issues, please do not hesitate to contact our office on 02 9258 7700.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'A Scarcella', written in a cursive style.

Anthony Scarcella
NSW Branch President