



THE LAW SOCIETY
OF NEW SOUTH WALES

7 April 2011

Mr Nick Parmeter
Director of General Policy Unit
Law Council of Australia
DX 5719 Canberra

By email: nick.parmeter@lawcouncil.asn.au

Dear Mr Parmeter,

Productivity Commission Draft Report on Disability Care and Support

The NSW Law Society's Injury Compensation Committee (the Committee) has reviewed and discussed the Productivity Commission's Draft Report on Disability Care and Support.

The Committee has set up a Subcommittee (the Subcommittee) to specifically address the issues raised in the Draft Report.

The Subcommittee understands that the Law Council of Australia has already made substantive arguments to the Productivity Commission supporting the importance of protecting the common law rights of injured people. The Subcommittee wholeheartedly agrees with this. The Subcommittee also support the Law Council's broader submissions to the Productivity Commission.

The Subcommittee makes the following additional comments for your consideration.

The Draft Report states at Chapter 15:

Existing fault based insurance arrangements for catastrophic injury do not meet people's care costs efficiently. Legal costs can be substantial, only a fraction of claims succeed and monies recovered often fall well short of meeting people's lifetime needs.

The Subcommittee believe this to be simply incorrect. It is the view of the Subcommittee that the vast majority of catastrophic injury claims do indeed succeed, either by way of a settlement or an order of a court or tribunal.

Possibly the Productivity Commission intended to convey the point that catastrophic injury cases are only pursued where there are reasonable prospects of success. The Subcommittee agrees with this sentiment. However, where claims are pursued, success for the claimant by way of a settlement or an order of a court or tribunal is the most common outcome.

There are a number of comparisons to make between the recommendations made in the Draft Report and the existing NSW Lifetime Care and Support Scheme (the Scheme).

The Subcommittee believes that it may be useful for the Productivity Commission to consider some issues of concern with the Scheme.

The Subcommittee has identified the following as shortcomings of the existing Scheme in NSW:

1. The legislation under which the Scheme operates provides that an application by an insurer for a claimant to participate in the Scheme does not require the injured person's consent. This mandatory participation in the Scheme reduces the autonomy of the injured person and potentially increases their need for legal advice.
2. The Scheme has been set up to limit the involvement of insurers and lawyers. The effect of this is clearly that participants in the Scheme have minimal access to legal advice, advocacy and representation. Participation in the Scheme is often met with significant decisions and challenges. Injured parties, and their families, are confronted with complex legal issues. The minimised access to legal representation and advice, addressed in point one, places the claimant and their family at a further disadvantage.
3. The legislation under which the Scheme operates allows for limited avenues to appeal decisions made by the Scheme Authority. The legislation should be amended to provide for independent review.

Please feel free to contact the Law Society should you wish to discuss the matter further.

The President of the Law Society of NSW and the Subcommittee will be attending the Public Hearing in Sydney on 13 April 2010.

The policy lawyer with responsibility for this matter is Patrick McCarthy, who can be contacted on (02) 9926 0214 or by email at patrick.mccarthy@lawsociety.com.au.

Yours sincerely,


Stuart Westgarth
President