



Institute of Actuaries of Australia

## The NSW Lifetime Care and Support Scheme

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## ABOUT THE AUTHOR

**Andrew Stone** is a barrister at Sir James Martin Chambers, specialising in personal injury law, including motor accident and public liability cases. Andrew has a particular expertise with the technical application of the *Motor Accidents Compensation Act 1999*.

Andrew is the NSW Bar Association's representative on the Motor Accident Council (the statutory consulting body to the Motor Accidents Authority) and a member of the Bar Association's Common Law Committee. Andrew edits Volume 3 of the Lawbook Co. motor vehicle practice: *Leslie & Britts Motor Vehicle Law* and is a regular contributor to the MAAS Bulletin published by the Motor Accidents Authority.

# **The NSW LTCS Scheme**

**Andrew Stone**

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## **Introduction**

In March 2006 the NSW Government tabled the Motor Accidents (Lifetime Care and Support) Bill 2006.

The Bill was passed by both Houses of the NSW Parliament although the LTCS Bill was amended (with the consent of the Government) by the Legislative Council. The Bill received Royal Assent on 8 May with the Assent published in the Government Gazette of 12 May. The administrative provisions of the *Motor Accidents (Lifetime Care and Support) Act 2006* commenced on 1 July 2006.

The LTCS Scheme only applies to accidents occurring after the date of commencement. Due to the required lead in time for premium collection the Lifetime Care and Support scheme cannot be in full operation before October 2007. However, the scheme became operative for children under the age of 16 from 1 October 2006 and will become operative for adults from 1 October 2007.

## **1 Structure of the Scheme**

### **A Administrative Structure**

The Act creates a Lifetime Care and Support Authority (“the LTCS Authority”) to administer the scheme. The Authority will be managed by a board of directors appointed by the Minister and there will be an Advisory Council with the membership drawn from the medical profession and disability groups. Neither insurers nor lawyers are involved in the Advisory Council.

In its initial phase, the LTCS Authority has some staff overlap with the Motor Accidents Authority (“MAA”). Mr. David Bowen is General Manager of both Authorities. Both organisations operate from the same building.

### **B Funding**

Part 7 of the Act creates provisions for funding of the scheme. There is to be an independent Lifetime Care and Support Authority fund (s48). A levy will be raised on all CTP policies to form the basis of contributions to the fund (s50). This levy is currently in the order of \$40-\$60 per premium. However, premiums have not had to rise \$60 to cover this new levy as there are considerable savings to CTP insurers from the new scheme. The insurers will be relieved of obligations to make payments for future care and treatment in relation to catastrophic injuries. This will, in turn, lead to potentially significant reinsurance savings as the insurers are no longer at risk of multimillion dollar payments for future care claims.

Clearly, one of the major concerns about this new scheme is whether there will be adequate funds available to meet future needs. New Zealand launched a comprehensive no fault injury compensation scheme decades ago. The scheme initially provided generous benefits to those who were injured. However, revenue collections proved to be inadequate to meet long term needs and, as a consequence, benefits have been significantly reduced over time. Compensation provided by the NZ No Fault scheme is now generally regarded as pitifully inadequate.

The NSW Lifetime Care and Support Scheme has been costed by John Walsh and his team at Price WaterhouseCoopers. The legislation was amended in the Legislative Council to make further provision for the NSW

Auditor General to review the figures to ensure the scheme's financial viability.

## **C Eligibility**

The Parliamentary drafters have craftily set out the Act so that it looks like participation in the scheme does not appear mandatory. A claimant has the opportunity to elect to participate in the scheme (s8(1)). Similarly, an insurer can nominate a claimant for participation in the scheme. The MAA can direct an insurer to nominate a claimant to participate in the scheme!

The reality is that the insurers will nominate every possible eligible claimant for participation in the scheme. It is in the insurer's financial interests to do so. By nominating a claimant for participation in the scheme the insurer escapes any further liability to pay treatment or care expenses.

A claimant cannot resist an insurer's decision to nominate them for participation in the scheme except on grounds that they do not meet the eligibility criteria (s8(2)).

The scheme is intended to cover those with serious spinal cord or traumatic brain injury. It also extends to multiple amputees, severe burns victims and the blind. It is estimated that the scheme will cover between 120 and 200 accident victims per year, approximately half of whom will have an entitlement to pursue other fault based benefits (such as general damages and loss of income).

The Act provides that a claimant will not be eligible to participate in the scheme if they have been awarded common law damages for their treatment and care needs (s7(3)). However, this is unlikely to occur as no rational insurer would pay common law damages for those heads of damage where they could escape liability by nominating the claimant for participation in the scheme.

The Authority has the power to issue guidelines setting eligibility criteria (s8(6)). The MAA has now issued *Guidelines on the Injury Criteria*. If there is a dispute as to eligibility, the Act provides for an assessment by a panel of three medical professionals to see whether the guideline criteria are met (s14). A review of this decision is available by reference to a review panel, comprising a further three medical practitioners, although the grounds on which a review can be sought are limited (s15(1)).

A person accepted as a lifetime participant in the scheme remains a participant for life (s9(4)).

There is provision for acceptance as an interim participant in the scheme for a period of two years. This is designed to cover cases of traumatic brain injury where initial care and medical needs may be extensive, but recovery can be anticipated that would see the participant no longer eligible to remain within the scheme. A traumatic brain injury victim is generally regarded as having progressed to maximum medical improvement at two years post accident. It is likely that most brain injury cases will initially be admitted as interim members.

The limitation period under s109 of the MAC Act does not run as against an interim participant in the LTCS scheme (s11(2)).

Eligibility for the scheme applies irrespective of fault. If there is a dispute as to whether the injury arises from a motor accident, as relevantly defined under the MAC Act, then such dispute is to be referred to a panel of three CARS assessors for determination (s20).

## **D The Benefits**

Section 6 provides that the Authority is to pay for scheme participants' treatment and care. Treatment and care is defined to incorporate the following:

- (a) medical treatment (including pharmaceuticals);
- (b) dental treatment;
- (c) rehabilitation;
- (d) ambulance transportation;
- (e) respite care;
- (f) attendant care services;
- (g) domestic assistance,
- (h) aids and appliances;
- (i) artificial members, eyes and teeth;
- (j) education and vocational training,
- (k) home and transport modification;
- (l) workplace and educational facility modifications,
- (m) such other kinds of treatment, care, support or services as may be prescribed by the regulations.

These categories are broad enough to cover hospital expenses and the cost of placement of the claimant in a nursing home, group home or other institution.

The LTCS Authority will be publishing guidelines as to what treatment and care is deemed reasonable and necessary – the *Lifetime Care and Support Guidelines*. The Guidelines specify, in greater detail what treatment and care is covered by the scheme. The Guidelines provide for attendant care services for the dependants of claimants under the scheme, in effect reinstating *Sullivan v Gordon* style damages for the loss of capacity to care for a dependant.

Whilst section 6(2)(k) specifies that the scheme will cover home and transport modification costs (modifying a house for wheelchair use, modifying vehicle controls for hand operation by a paraplegic), the Guidelines specify that in acquiring a suitable home or vehicle the scheme will not cover the capital costs involved.

The capital costs will remain a claimable item where fault based damages can be recovered.

The trade off for recovery of the allowed benefits is that the claimant who can establish fault cannot sue to recover a lump sum in relation those benefits. Section 130A has been inserted into the MAC Act:

No damages may be awarded to a person who is a participant in the Scheme under the Motor Accidents (Lifetime Care and Support) Act 2006 for economic loss in respect of the treatment and care needs (within the meaning of that Act) of the participant that relate to the motor accident injury in respect of which the person is a participant in that scheme and that are provided for or are to be provided for while the person is a participant in that scheme.

It remains to be seen how broadly s130A will be interpreted. For example, will the capital costs of home and transport modification still be recoverable as a lump sum benefit?

Will lump sum damages be recoverable for treatment expenses which the LTCS Authority has deemed unreasonable, even if a judge can be persuaded as to reasonableness? For example, if the LTCS scheme provides for a hydrotherapy spa for quadriplegics, is it still open to a judge to award the additional costs of upgrading to a heated pool in a common law claim for damages where it can be established to the judge's satisfaction that a pool is reasonable and necessary?

The Guidelines provide for the reasonable costs of a carer accompanying a claimant on holidays within Australia. It is still possible to recover the costs of a carer accompanying the claimant overseas if a judge is satisfied that overseas travel would have occurred but for the accident, and would still occur if a carer was available to accompany the claimant?

## **E        Distributing Benefits**

Part 4 of the Act provides for the Authority to conduct treatment and care assessments. It is likely that assessment would be needed at frequent intervals during the first few years post-accident, especially in brain injury cases. Thereafter reassessment of a claimant's needs may become more periodic.

There is provision, in s24, for a claimant to dispute that Authority's assessment of their care and treatment needs by referral of the assessment to an assessor. There is further provision for the assessor's decision to be subject to a Review Panel, although the right of review is restricted (s25). Section 29 provides that no legal costs are payable by the Authority for or in respect of legal services provided to a participant in the scheme in connection with an assessment or a review under Part 4.

## **2        My Views as to the LTCS Scheme**

For those who are at fault in a motor accident or for those who face a finding of significant contributory negligence, the Act will represent a significant enhancement of the provision of medical services and care to meet their needs. This, in turn, eases the burden placed upon the families of those so injured.

There is always the concern that, with a scheme of this nature, the actuarial estimates will prove inadequate and in the long run benefits will be cut so that budgets can be met. Such an outcome is not inevitable, but there is little that can be done in the legislation to safeguard against it. The reality is that for most of those who are catastrophically injured and recover damages, their court awarded lump sum runs out in any event, principally due to the operation of the 5% discount rate.

The Act does contain protective clauses designed to stop future Ministers treating funds accumulated by the Authority as a "hollow log" to be raided when convenient.

My principal concerns regarding the drafting and implementation of the Act are as follows:

**A Mandatory Participation**

Section 8(2) 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.

I note in passing that s6(3) provides (as an alternative to the Authority paying all expenses) that the Authority may give a lump sum to the claimant to cover treatment and care expenses over a fixed period pursuant to an agreement between the Authority and the participant for the payment of those expenses by the participant. In short, there might be an annual allowance given to a quadriplegic capable of managing his or her own affairs for that period. If utilised, this provision goes some way to ameliorating the emotional distress of a claimant having to go cap in hand to the Authority for approval of each and every item of expenditure.

**B Unpaid Family Assistance**

As a consequence of receiving their treatment and care needs from the LTCS Authority the catastrophically injured claimant 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 *Griffiths v Kerkemeyer* 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.

My concern is that by volunteering to provide such services the family member, in effect, becomes an unpaid subsidiser of the Lifetime Care and Support scheme.

The LTCS Authority may be amenable to family members being paid for the provision of care services, subject to the family member having undergone suitable training. This may involve the family member 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 LTCS Authority is as yet undetermined.

For many families it may not be desirable to have such a formal arrangement with taxable income being paid to the family carer.

### **C Legal Representation**

The Lifetime Care and Support scheme has been set up to minimise the involvement of insurers and lawyers. The insurers put a submission to the Government that they ought to be allowed to administer the first two years of an injured claimant's participation on the basis that they would charge a commission and make a profit for doing so! The serious long term risks of paying for an indeterminate lifetime's worth of care would then be offloaded on the LTCS Authority and its fund. Thankfully, this submission has been rejected.

The focus of the scheme is on maximising the provision of treatment and care to the injured, and minimising the involvement of lawyers in disputes. Whilst there is provision for recovery of legal fees in relation to a dispute as to whether the circumstances of an accident fall within the scope of the motor accident regime, there is no recovery of legal fees in relation to a

medical dispute over eligibility (s18) or for a dispute about treatment needs (s29).

I have suggested that s15 and s25 be expanded to cover an absence of procedural fairness in the original assessment process. I have also suggested that there should be provision for representation or assistance to help claimants access their rights under the scheme.

It is just not realistic to expect the non-English speaking parents of a brain 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.

I have made the suggestion that if there are to be no lawyers then there at least should be an independent advocate to represent the catastrophically injured in making applications in relation to the scheme.

### **3 Conclusion on LTCS Scheme**

There are a number of common misconceptions about the LTCS scheme.

Firstly, it should be emphasised that the scheme will only apply to accidents that occur on or after 1 October 2007 (or, for children under 16, 1 October 2006). There is no entitlement for anyone injured before that date to access or opt into the scheme. Those who have already suffered injury or are catastrophically injured prior to 1 October 2007 will only be able to access the current fault based benefits under the MAC Act.

Secondly, nothing in the LTCS scheme will affect the rights of those who can establish fault to recover general damages, loss of earnings or other items of lump sum compensation that are not covered by the scheme. Compensable rights are unaffected.

Thirdly, there is an important distinction between the no fault benefit for children available under s7J of the MAC Act (from 1 October 2006) and the benefits under the LTCS scheme. The no fault benefit for children applies to any child under the age of 16, no matter how severely or mildly injured. A claim on behalf of such a child for the no fault benefit is pursued as against the CTP insurer of the vehicle which caused injury.

The LTCS scheme is an independent and separate benefit accessible only by the catastrophically injured, with payment of benefits being drawn from the LTCS fund.

Clearly, a child who is catastrophically injured would be entitled to benefits under both regimes. However, once an insurer nominates that child under the LTCS scheme, there is no longer any entitlement to recover identical benefits under the MAC Act. The care and treatment needs of that child would be met by the LTCS scheme. If a child had an independent right to additional damages by establishing fault (such as general damages and economic loss) then those damages would have to be pursued by a claim against the CTP insurer of the vehicle at fault.

Subject to the reservations set out above, the LTCS scheme will provide previously unattainable benefits to those at fault or those who have contributed heavily to the circumstances of their own injury. Even for those who can establish fault and otherwise miss out on recovering a lump sum, the LTCS scheme does provide the certainty that their care and treatment needs will always be met.

The key to the LTCS scheme will be its financial viability. Ongoing vigilance will be required to ensure that sufficient funds are recovered to meet ongoing liabilities and that benefits are not cut to cover budget shortfalls.

It is worth noting that once the LTCS scheme is in place it is difficult to see any claimant under the NSW motor accident scheme recovering lump sum damages in excess of \$2 million.

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