

Our Ref: Injury Compensation 2010
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16 August 2010

Disability Care and Support Inquiry
Productivity Commission,
GPO Box 1428
Canberra City ACT 2601

Email: disability-support@pc.gov.au

Dear Sir/Madam

Disability Care and Support – Public Inquiry

The Law Society of NSW appreciates the opportunity to present submissions to the Productivity Commission to assist with its disability, care and support inquiry.

The Law Society of NSW is the peak industry body for solicitors in NSW. Some of our members represent persons living with disability, afflicted with disability through injury or acquired in other forms and also represents many organisations that provide services to those persons living with disability and various associated advocacy groups. The Injury Compensation Committee (Committee) has responsibility to consider and monitor all aspects of personal injury law, its development and amendment and advise the Council of the Law Society of these developments.

The Committee has considered the Issues Paper and associated documents and the Committee makes the following comments.

The Committee supports any proposal that will improve the quality of life for those suffering from any form of disability. Moreover, the Committee is keen to see the creation and enhancement of rights for those so affected. Importantly, any proposal(s) arising from the inquiry ought not to erode existing rights. Reform and policy initiatives should supplement and enhance existing regimes to make access to services easier, less costly and more beneficial. Importantly, for those whose rights are affected by any regime proposed to be implemented, the Committee is of the firm view that those rights need to be protected by way of a robust and independent review process.

The Committee notes that it is premature and inappropriate to make comment at this stage of the inquiry on the precise details of the proposed scheme and to comment with any degree of certainty on the cost, cost effectiveness, benefits or feasibility of those

matters listed within the terms of reference for the inquiry. The Committee is willing to work with the Commission and the Commonwealth and State Governments to assist in whatever way it can with the implementation of any proposal(s).

The Committee considers it important that any proposed scheme ensure consistency in approach and uniformity in benefits without eroding existing rights. There is potential that the introduction of a disability care and support scheme will impact litigation and regulation both at a Federal and State level. The potential areas that may be impacted include, but are not limited to highly specialised areas of law including equal opportunity, discrimination, human rights, occupational health and safety, employment and industrial law, health law, workers' compensation, motor accidents, public and products liability, professional indemnity, medical negligence, disability and income protection insurance law, sickness and personal accident law, criminal law and victims compensation, estate planning and guardianship law and sporting injuries compensation.

Any proposed scheme for a disability care and support scheme will result in claims and dispute management issues. To address these issues the Committee submits that there must be a robust independent review system built into any proposed scheme. The review system must allow for the independent review of decisions regarding eligibility for and participation in the scheme. The review process should be undertaken by an independently appointed judicial officer who is required to give reasons for any decision. Moreover, any process by which eligibility is determined must be open and transparent and capable of an independent and objective review. The experience of various State Governments with motor accidents and workers' compensation schemes would suggest that the establishment of a tribunal is a possible approach that could be undertaken although absent the ability for disputes to be determined judicially the quality of outcomes is, in our opinion, significantly jeopardised and compromised.

The Committee is also of the view that, any scheme must provide for properly funded and readily accessible advocacy services so that those with disability are able to have their rights properly protected. It is noted that numerous organisations exist that provide advocacy services and advice, but the legal profession is often required to provide further assistance through pro bono work as there is inadequate or no funding available which limits proper access to justice.

The Committee considers that it is important that the methodologies and findings as stated in the various Disability Investment Group reports be independently reviewed and confirmed before any proposal based upon those findings is adopted. For example, in 2005 the Law Society of NSW and the Australian Lawyers Alliance independently retained a report from Cumpston Sarjeant Pty Limited being an independent actuarial advice in response to a costing study prepared for the NSW Life Time Care and Support Scheme prepared by PricewaterhouseCoopers in June 2005. The PricewaterhouseCoopers costing study was adopted by the NSW Motor Accidents Authority and the NSW Government. The independent actuarial advice from Cumpston Sarjeant Pty Limited submitted to the NSW Motor Accidents Authority on 19 December 2005 raised various concerns regarding the underlying assumptions in the PricewaterhouseCoopers report. Our experience in this case highlighted how important it is that the proposal(s) to be adopted proceed on verifiable and valid assumptions. It is worthwhile to undertake a process of careful review to avoid the potentially serious implications of having an error in the ultimate scheme design.

The Committee will continue to review the existing reports and will make further submissions to this inquiry where appropriate. The Law Society of NSW is willing to nominate representatives to appear at the inquiry to provide further information.

Once again the Committee thanks you for the opportunity to provide these comments.

Yours sincerely,

Mary Macken
President