Law Institute Victoria

1 June 2011

Commissioner P Scott and Associate Commissioner J Walsh
Disability Care and Support Inquiry
Productivity Commission
GPO BOX 1428
CANBERRA CITY A.C.T. 2601

By email: disability-support@pc.gov.au

Dear Commissioner Scott and Associate Commissioner Walsh,

Response to questions arising from public hearing in Melbourne on 6 April 2011

The Law Institute of Victoria (LIV) thanks the Productivity Commission for the opportunity to appear before it at the public hearing in Melbourne on 6 April 2011. Dimitra Dubrow represented the LIV at the public hearing on that date, and some queries arose in the course of that hearing which the LIV indicated it would take on notice. The following is the LIV's response to those queries:

At the public hearing on 6 April 2011 the LIV suggested that a common law claim for care and support costs co-exist with any entitlement under the NDIS. Whilst there are a range of mechanisms that could facilitate this, where no statutory entitlement exists under a State scheme, one proposal envisaged a claimant seeking access to the NDIS immediately post-accident and then upon settlement of a common law claim, refunding the NDIS scheme for expenses received up until the time of settlement. In relation to future care costs, where a claimant received a lump sum for those costs, they could be precluded from accessing the NDIS until such time as their lump sum payment is utilised for that purpose. This should not be seen as a conclusive position, given the complexity of the environment and there are other mechanisms outlined by the Law Council of Australia to secure the relationship between the NDIS whilst maintaining an individual's rights under common law. The LIV would look forward to further participation in planning the appropriate structure.

In this context, however, the Productivity Commission sought clarification as to whether this proposition would in fact lead to a reinstatement of common law entitlements for future care.

The scope of the Inquiry is in relation to care and support for people with significant and catastrophic injury. There are different laws that apply in States and Territories for access to common law depending on how an injury was sustained. Broadly, any thresholds do not prohibit injured people from accessing common law where they have such a level of injury. Where statutory `no fault' schemes **do** provide the highest levels of care and support, those schemes should not be altered. In circumstances where inadequate coverage is provided, those schemes ought to be improved, or alternatively a further entitlement to recover those expenses should be reinstated at common law. A person injured through the fault of another should not have to bear that additional cost themselves and it should be recoverable from the wrongdoer.

There was discussion at the public hearing on 6 April 2011 about the role of common law in risk management and deterrence, and the achievement of a sense of justice for an injured person. The Productivity Commission enquired about examples of where deductibles and impacts on premium are used in motor vehicle insurance.

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It is understood that motor vehicle insurers risk rate drivers and structure insurance products to reward good behaviour. It can be reasonably assumed that the insurance industry conducts itself in this way because it delivers outcomes. In relation to compulsory third party motor vehicle insurance, these are “safety net” products. They are not risk rated in the traditional sense. However, it is submitted that in the broader insurance market (for example, medical indemnity insurance), premium and deductibles play an important role in mitigating risky behaviour.

The LIV’s further comment relates to the assessment tools, and people under the scheme potentially missing out on treatment because it might not come within the definition of "reasonable and necessary". The LIV is concerned that many disability support services may not necessarily fall under the specified guidelines for “reasonable and necessary”.
The danger in having an overly prescriptive or restrictive definition is that medical treatments are progressive and developing, so any definitional approach needs to have the flexibility to keep pace with advances in medicine. Otherwise, maintaining this definition for eligibility of funding may lead to individuals missing out on beneficial services. Further, should there be an issue about the funding and cost of the scheme, a reduction in the amount and quality of the services, therapy and treatment is likely to result, and the criteria are likely to be applied restrictively.

Yours sincerely

Caroline Counsel
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