



Law Council
OF AUSTRALIA

PW:NP:1844

Mr Elton Humphrey
Committee Secretary
Community Affairs Legislation Committee
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Mr Humphrey

Health and Other Services (Compensation) Amendment Bill 2006

Thank you for allowing the Law Council an extension of time in order to make a submission in relation to this Bill.

The Law Council of Australia is the peak representative body of the Australian legal profession, representing approximately 50,000 Australian lawyers through its constituent members, the Law Societies and Bar Associations of the Australian States and Territories.

The Law Council supports the re-enactment of the advanced payments option but believes that there are ways in which the advanced payment option could be improved.

General observations

It is noted that much of the discussion in support of the *Health and Other Services (Compensation) Act 1995 (Cth)* ["HOSC Act"] is couched in language of "double dipping". This is a phrase repeated by the Minister for Health and Ageing in his second reading speech on 2 March 2006.

Although it is theoretically possible for claimants to receive the benefit of payments from both an insurer and Medicare, a nursing home or Centrelink, the reality prior to the enactment of this legislation was that injured plaintiffs who had medical expenses paid by Medicare Australia did not claim them against the insurer. This was because the original receipt went to Medicare Australia and few plaintiffs had the foresight to retain a duplicate receipt

unless there was a significant payment made by them above the Medicare rebate.

The practical effect of the legislation was that private insurers were receiving the benefit of these payments which otherwise ought to have been included in any settlement.

The recovery of Commonwealth or public monies in claims otherwise covered by private insurance is a laudable aim and a reasonable justification for the legislation without resort to the pejorative notion of "double dipping".

Cost of recovery under the present scheme

The Law Council remains concerned at the relatively high recovery cost under the scheme. It is noted that the last time the efficiency of the scheme was reviewed in 2001, it was reported that Medicare Australia expended nearly 50 per cent of amounts recovered¹ administering the scheme each year.

The Law Council is not aware of any review conducted since this time. It is submitted that a further review of the scheme may be long overdue, particularly following the recent spate of changes to personal injury compensation laws in various jurisdictions.

Advance payment option

The Law Council supports retaining the the advanced payment option in the legislation.

However, the Law Council is advised that 10 per cent has proved to be far more than is necessary to cover the actual amounts recoverable by the Commonwealth. Consideration should be given to lowering the advance payment to 5 per cent in respect of all claims.

It is also noted that the legislation is ambiguous as to whether legal costs, when identified separately, should be included in the definition of "judgment" or "settlement" within the meaning of the HOSC Act. Legal costs, by definition, do not include medical costs and, where they are separately identified, ought to be excluded from the sum used to calculate the advance payment option.

This could be clarified within the definitions or by Medicare Australia simply issuing a clarifying notice to insurers. Such a notice could be published in the Commonwealth Gazette advising that legal costs, where separately identified, should not be included as part of the calculation of the judgment or settlement sum for the purposes of advance payment.

¹ G.Pooley, 2001, *Review of the Health and Other Services (Compensation) Act 1995 and of its operation*, Canberra, 2001 (the "Pooley Report")

The Law Council has been advised that there is a continuing difficulty for claimants and their lawyers obtaining timely section 17 notices.

This problem could be overcome by:

- (a) greater liaison with the solicitors for the injured person and Medicare Australia. The Law Council understands that there may be privacy issues but, at the very least, there is an implied authority to release this information to the plaintiff's solicitors; and
- (b) providing time limits under the legislation on the issue of section 17 statements, so that they are issued within 28 days of a request being made or notice of a settlement or judgement.

The Law Council is pleased to report that it is the experience of the profession that there is a prompt process of issuing a Notice of Past Benefits following receipt of the s.18 statement.

However, the advance payment option, and the HOSC Act more generally, does not operate well with the provisions the *Safety, Rehabilitation & Compensation Act 1988* (Cth) ["SRC Act"]. The HOSC Act contemplates settlements or judgments following finalisation of claims, whereas the ethos of the SRC Act is ongoing entitlements in respect of the injured person.

Although Section 13 of the HOSC Act was intended to cover such schemes by way of reimbursement arrangements, the definition of "settlement" or "judgment" under the Act appears to incorporate decisions of the Administrative Appeals Tribunal and, arguably, decisions of delegates under the SRC Act.

Consideration is needed to determine how the HOSC Act ought to operate in this context. Whilst the Law Council can see there is some efficacy in respect of statutory corporations such as Telstra and Australia Post being bound by the Act, it is difficult to see the benefit of Comcare Australia and various Commonwealth Departments and Agencies paying Commonwealth monies to another Commonwealth entity.

Review of notices

In general, the Law Council supports the two-tiered approach proposed by the legislation in respect of review of notices. The approach appears to be a more timely and cheaper option than for the review of notices to proceed immediately to the Administrative Appeals Tribunal.

The Law Council strongly supports the provision of a time limit for an internal review decision. However, the Law Council is concerned that, whilst the legislation provides a series of time limits for claimants (eg. s.18, s.19 and

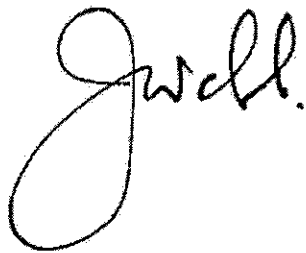
s.23), there are very few sections in which any time limit is set for Medicare Australia (ss.19(3) and 23B(2) being notable exceptions).

Finally, there is an element of difficulty in circumstances where treatment is deemed to be compensable pursuant to ss.18(5) of the HOSC Act. These "deeming" provisions may operate as a result of notices being sent to the wrong address, the claimant failing to realise that Medicare Australia does not have a current address or that the statement itself is simply lost, mislaid or for some other reason does not get to the claimant. As a result, a valid notice may be effected without the claimant being aware that the notice has been issued (as that valid notice under s.21 would be sent to the same address).

It may be appropriate in these circumstances for Medicare Australia to send a copy of the notice to the claimant's solicitors, if their identity is known, to ensure that an accurate document is completed.

Thank you for the opportunity to provide the Law Council's comments on the proposed amendments. If you have any queries regarding this letter, please contact Nick Parmeter on (02) 6246 3715 or email nick.parmeter@lawcouncil.asn.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J. Webb', with a large, stylized initial 'J'.

Peter Webb
Secretary-General

21 April 2006