

Lifetime Care and Support (Catastrophic Injuries) Guidelines 2014 (No 4)

Disallowable instrument DI2014–205

made under the

Lifetime Care and Support (Catastrophic Injuries) Act 2014, section 93 (Making of Guidelines)

1 Name of instrument

This instrument is the *Lifetime Care and Support (Catastrophic Injuries) Guidelines 2014 (No 4)*.

2 Delegation

In the LTCS Guidelines any reference to the LTCS Commissioner includes any delegate of the LTCS Commissioner.

3 Commencement

This instrument commences on the day after its notification.

4 Guidelines

The Guidelines at Schedule 1 are Part 4 of the LTCS Guidelines made under section 93 of the *Lifetime Care and Support (Catastrophic Injuries) Act 2014*.

Karen Doran

Lifetime Care and Support Commissioner of the Australian Capital Territory

1 July 2014

PART 4 – Guidelines for disputes about participants' treatment and care needs

Introduction

This Part of the LTCS Guidelines is issued under section 93 of the *Lifetime Care and Support (Catastrophic Injuries) Act 2014* ("the LTCS Act") and applies to disputes about an assessment or any aspect of an assessment by the LTCS Commissioner of the treatment and care needs of a participant under Part 5 of the LTCS Act.

To avoid requirements that might be unreasonable in the circumstances on any participant, the LTCS Commissioner may waive observance of any part or parts of these LTCS Guidelines.

Any reference to the participant means the participant's legal guardian where applicable.

Time periods and extension of time

Any period of time referred to in these LTCS Guidelines:

- excludes the day that the act is done, e.g. a reference to 5 working days means 5 working days from the next day; and
- excludes days that are not working days when the LTCS Commissioner is closed (such as weekends and public holidays).

The LTCS Commissioner reserves the right to extend or abridge any time limit in these LTCS Guidelines that affects a participant, the LTCS Commissioner or an assessor. The LTCS Commissioner may extend any of the time periods in these LTCS Guidelines, whether or not a request is made to extend any time limit.

1. Jurisdiction

An application may be made to the LTCS Commissioner for referral of a dispute of a kind referred to in section 55(1) of the LTCS Act in relation to the treatment and care needs of the participant.

An application can only be made after the LTCS Commissioner has notified the participant in writing as to the LTCS Commissioner's assessment of their treatment and care needs under section 23(5) of the LTCS Act.

An application for the LTCS Commissioner to refer the dispute must be made by or on behalf of the participant within 28 days of receiving the LTCS Commissioner's certificate of assessment of the participant's treatment and care needs under section 23(5) of the LTCS Act.

The LTCS Commissioner may reject an application if the LTCS Commissioner is satisfied that the application:

- does not establish that it relates to a dispute over an assessment, or any aspect of an assessment, of the participant's treatment and care needs;
- has not been made by the participant; or
- has not been received by the LTCS Commissioner within 28 days of receipt of the LTCS Commissioner's certificate of assessment under section 23(5) of the LTCS Act.

2. Application for dispute

An application for dispute must:

- be in writing (letter or email);
- include a clear statement that there is disagreement with the assessment or aspects of the assessment; and
- include detailed reasons why there is disagreement with the LTCS Commissioner's decision. If a treatment or service has not been approved by the LTCS Commissioner and is the subject of the dispute, the participant must clearly outline the reasons as to why the request is reasonable and necessary with reference to any other relevant information.

In exceptional circumstances the LTCS Commissioner may allow the notice to be given orally, with assistance provided to transfer the notice into written form (section 55(3)).

If the applicant does not provide the above information, then the LTCS Commissioner may request that the applicant provide the information to the LTCS Commissioner before the request is referred for assessment.

The LTCS Commissioner is to send a written acknowledgement of the application to the participant within 5 days of receipt.

The participant should be aware that any information provided to the LTCS Commissioner may have to be shared with an insurer if a claim has been made. This may occur either at the time of the dispute or after the dispute has been resolved. The LTCS Commissioner is authorised to exchange information about the treatment and care needs of participants with insurers under Section 94 of the LTCS Act.

3. Requesting further information or documentation

If the LTCS Commissioner is satisfied that further information or documentation is required in the application or is likely to assist in the resolution of the dispute, the LTCS Commissioner may:

- request that the participant or a service provider provide this information within a period of up to 20 days; and
- proceed with processing the application without the information, but only after the stated time has passed for the submission of the information.

The LTCS Commissioner may contact any of the participant's treating health practitioners or service providers in order to assist with obtaining information relevant to the dispute. At any stage during the dispute, the LTCS Commissioner may contact any of the participant's

treating health practitioners about health or physical safety issues noted by an assessor as being urgent or serious.

4. Contact with participant prior to assessment by dispute assessor

The LTCS Commissioner may contact the participant prior to any assessment by a dispute assessor. This contact is in order to:

- discuss or clarify the issues in dispute (for example, to discuss the reasons for disagreement with the LTCS Commissioner's decision, if this is unclear from the participant's application);
- explore other avenues for early resolution of the dispute, prior to referral to a dispute assessor; or
- make arrangements for the assessment by the dispute assessor so that the participant's individual needs can be considered.

The LTCS Commissioner will arrange a suitable time and venue with the participant if a meeting is required. The LTCS Commissioner will attempt to contact the participant as soon as possible and ideally within 10 days of receipt of the application.

If a meeting is arranged the LTCS Commissioner will notify the participant of:

- the proposed time, date and location of any meeting;
- the names of any other people attending the meeting (e.g. service providers or treating health professionals); and
- the purpose of the meeting, e.g. to explore issues in dispute and discuss options for resolution.

The LTCS Commissioner may contact any of the participant's treating health practitioners or service providers to discuss or clarify any issues in dispute, whether a meeting occurs or not.

The assessment by a dispute assessor will not proceed if the participant withdraws their request to refer the dispute to an assessor, whether a meeting occurs or not.

If it is agreed that the dispute is to be referred to an assessor, the participant will be notified of the details of the assessment, in writing, as soon as possible and within 30 days of receipt of the application.

5. Referral to an assessor

Within 5 days of agreeing that the dispute is to be referred to an assessor, the LTCS Commissioner will choose an assessor from the LTCS Commissioner's list of assessors. The LTCS Commissioner will advise the participant of the arrangements of the assessment in writing, which will include the name and specialty of the assessor.

When choosing an assessor the LTCS Commissioner will consider:

- the needs of the participant, for example, the nature of their injury (e.g. traumatic brain injury, spinal cord injury);
- the issue in dispute or the aspect of the LTCS Commissioner's assessment of treatment and care needs that is in dispute;

- the location of the participant and the assessor;
- the specialty and expertise of the assessor;
- the availability of the assessor; and
- whether an interpreter is required.

6. Grounds for objection to the assessor

The participant may request the LTCS Commissioner reallocate the dispute to a different assessor on the basis that the assessor is unsuitable. To do this, the participant must:

- apply within 10 days of receiving the notification of the name of the assessor; and
- provide detailed reasons as to why the assessor is unsuitable.

The LTCS Commissioner will make a decision on the request for reallocation within 10 days of receipt. The LTCS Commissioner will reallocate the dispute to a different assessor if satisfied that there are reasonable grounds for believing that the assessor is unsuitable.

It is not unsuitable for an assessor who has previously completed a dispute assessment for a participant, to assess another dispute relating to that participant.

7. Assessment by the dispute assessor

When referring a dispute to the assessor, the LTCS Commissioner will provide the assessor with:

- a letter referring the assessment of the dispute;
- copies of the participant's application in relation to the dispute, and any supporting documents;
- copies of the LTCS Commissioner's certificate of assessment of the treatment and care needs of the participant and all other documentation by the LTCS Commissioner in relation to this certificate; and
- copies of any additional documentation or information received since the request was made.

The assessor is not bound by the rules of evidence in conducting an assessment. The assessor may determine their own procedure and may inquire into any such issue as they see fit. The assessor must follow these LTCS Guidelines at the time of their assessment and must also follow any practice notes that are in force at the time of their assessment.

Once the dispute is referred to an assessor, the assessor determines how the assessment will proceed and may do any or all of the following:

- contact the participant to clarify issues in dispute;
- contact any treating health professional or service provider, where appropriate, to clarify any issues in dispute or request further information;
- request the participant attend an assessment (clinical examination) with the assessor;
- request that the participant attend an assessment (clinical examination) with another health professional (who is not the assessor) in accordance with section 27 of the LTCS Act and a report be provided to the dispute assessor to make their decision; and/or

- assess the dispute on the documentary material provided.

The assessor may decide that a matter be assessed without a clinical examination of the participant if the assessor is satisfied that:

- a decision can be made based on the information provided;
- a clinical examination is unnecessary in that it would not provide new information besides that already provided in the documentation; or
- the individual needs of the participant preclude an examination, or an examination would cause the participant distress.

In all cases, the assessor must attempt to resolve the dispute fairly and as quickly as possible.

8. Clinical examination arranged if required

When a clinical examination is required, the LTCS Commissioner will notify the participant in writing of the time, date and location of the clinical examination, and the name and specialty of the assessor.

Before the examination the LTCS Commissioner will notify the participant:

- how to prepare for the examination (e.g. what to wear and bring) and what to expect; and
- what may occur at the examination, for example the questions that may be asked of the participant and support person.

9. Clinical examination procedures

The assessor determines who may be present at a clinical examination and how the examination proceeds. A parent, legal guardian, carer or other support person may be present during an examination involving the participant in order to assist in any way required. Legal or medical representatives of the participant cannot be present during a clinical examination unless the LTCS Commissioner gives prior approval and is satisfied that the circumstances warrant it.

A legal guardian, carer or other support person may provide information to the assessor during a clinical examination but only when asked by the assessor. At the assessor's discretion the assessor may ask any legal guardian, carer or support person to leave the clinical examination.

The LTCS Commissioner will pay the reasonable costs associated with attendance of the participant, and if required, the reasonable expenses of one accompanying person such as the participant's guardian, carer or other support person to attend any clinical examination arranged by the LTCS Commissioner.

When the clinical examination occurs, the assessor will take such measures as are reasonably practicable to ensure that the participant and anyone accompanying them:

- understands the reason for the examination and the issues the assessor will consider in assessing the dispute;
- is aware of what the examination will involve; and

- is aware of the role of the assessor as an independent decision-maker, making a legally binding decision that will be documented in their certificate.

10. Use of interpreters in clinical examinations

Interpreters accredited by NAATI (National Accreditation Commissioner for Translators and Interpreters) should be used during the course of an assessment if an interpreter is required.

If a NAATI interpreter is not available, a non-NAATI interpreter may be used at the discretion of the assessor or the LTCS Commissioner. Any person accompanying the participant to an examination or assessment, such as a carer or support person, cannot act as an interpreter.

11. Certificate issued by assessor

The assessor will issue a certificate under section 60(2) of the LTCS Act. The certificate will include written reasons for the decision and will be in the form approved by the LTCS Commissioner.

The assessor will send the certificate to the participant and the LTCS Commissioner within 15 days of the assessment conducted by the assessor, whether a clinical examination was conducted or whether the assessment occurred on the papers provided to the assessor.

12. Review of the assessor's determination

Under section 61(1) of the LTCS Act, the participant or the LTCS Commissioner may apply for review of the determination of an assessor. Only the participant and the LTCS Commissioner may be a party to a review application. The application for review must be made within 28 days of receipt of the assessor's certificate.

Applications for review can only seek review of a determination made by an assessor, and cannot seek review of a determination made by a review panel about a participant's treatment and care needs.

An application for review must:

- be in writing (letter or email);
- include the participant's name, address and contact details;
- include a clear statement as to why a review is requested in relation to the grounds for review listed in section 61(3) of the LTCS Act, together with detailed reasons;
- clearly outline the reasons why the issue is capable of reversing the outcome of the previous assessment; and
- attach any relevant information or medical reports that are relevant to the application.

A copy will be provided to the other party within 10 days of receipt, after which time the other party has 20 days in which to make a submission to the LTCS Commissioner on the application.

The application for review will be rejected if it:

- is not received within 28 days of receipt of the assessor's certificate;

- relates to a review panel certificate; or
- is not completed by those persons outlined in section 61(1) of the LTCS Act.

The LTCS Commissioner will consider the application to determine whether there is reasonable cause to suspect that the application meets the criteria in section 61(3) of the LTCS Act, within 10 days of receipt of the application or any submission by another party.

In considering the application, the LTCS Commissioner may:

- contact the applicant or the other party to clarify any issues in the application;
- contact the applicant to request additional information be provided before a decision is made;
- consider the application and make a determination on the information provided; or
- in the case of section 61(3)(a) of the LTCS Act, contact a third party in order to clarify as to whether information was available at the time of the assessor's determination.

The LTCS Commissioner will advise the parties as to whether the application is to be referred to a review panel or is rejected, supported by a brief statement of reasons, within 5 days of considering the application.

13. Referral to a review panel

Within 10 days of the advice from the LTCS Commissioner that the matter is to be referred to a panel, the LTCS Commissioner will convene a review panel of 3 assessors from the LTCS Commissioner's list of assessors.

When convening the review panel, the LTCS Commissioner will consider:

- the needs of the injured person, for example, the nature of their injury (e.g. traumatic brain injury, spinal cord injury);
- the issues in dispute and the applicant's grounds for review;
- the location of the injured person and the assessors;
- the specialty and expertise of the assessors;
- the availability of the assessors; and
- whether an interpreter is required.

The review panel will not include the assessor whose decision is the subject of the application for review.

The LTCS Commissioner will advise the parties of the arrangements of the assessment, in writing, within 5 days of the panel being convened. This will include the names and specialties of the assessors on the panel.

14. Grounds for objection to the review panel

Either party to the dispute may request the LTCS Commissioner reallocate the dispute to a different assessor on the basis that the assessor is unsuitable. This request may apply to any or all of the assessors on the panel. To do this, the party must:

- apply within 10 days of receiving the notification of the names of the assessors on the panel; and
- provide detailed reasons as to why the assessor is unsuitable.

The LTCS Commissioner will forward this request to any other party, who must provide any submissions within 10 days of receipt. The LTCS Commissioner will make a decision on the request for reallocation within 10 days of receipt of the request, or within 10 days of receipt of the submission from the other party. The LTCS Commissioner will reallocate the dispute if satisfied that there are reasonable grounds for believing that the assessor is unsuitable.

It is not unsuitable for an assessor who has previously completed a dispute assessment for a participant, to assess another dispute relating to that participant. However, the review panel will not include the assessor whose decision is the subject of the application for review.

15. Review panel hold initial meeting

When the panel is convened, the LTCS Commissioner will appoint a chairperson and will send the panel copies of:

- all material that was before the previous dispute assessor, including the decision by the LTCS Commissioner about the participant's treatment and care needs;
- the original certificate issued by the dispute assessor;
- the written reasons for accepting the review application;
- the review application and all accompanying documents; and
- any additional documentation or information received since the review application was made.

The LTCS Commissioner may contact the injured person prior to any assessment by a review panel. This contact is in order to ensure that the injured person's individual needs can be considered in any assessment or clinical examination if required.

The review panel's initial meeting or teleconference will occur as soon as possible and within 30 days of the date the panel was convened.

16. Procedures for review panel assessment

The panel is not bound by the rules of evidence in conducting an assessment. The panel may determine its own procedure and may inquire into any such issue as the panel sees fit.

The review panel assessment process will consider all aspects of the dispute afresh which will involve:

- deciding whether another clinical examination of the participant is required, or if the assessment will be completed on the papers provided;
- deciding whether the panel will confirm the decision of the previous assessor or revoke that decision;
- deciding whether any additional information is required in order to make a decision; and
- considering any new information that was not before the previous assessor.

If the panel decides that another clinical examination or additional information is required, the previous sections of these LTCS Guidelines apply in relation to requesting further information or documentation, arrangement of the clinical examination, clinical examination procedures and use of interpreters.

If a clinical examination occurs, the panel may hold as many meetings or teleconferences as required after the examination in order to finalise their determination. However, in all cases, the panel must attempt to resolve the dispute as quickly as possible.

17. Review panel certificate

The review panel will issue a certificate that certifies its decision on the dispute. The review panel will confirm the assessor's determination or revoke it and issue its own determination. The certificate will include written reasons for the decision and will be in the form approved by the LTCS Commissioner.

The panel will provide their certificate to the LTCS Commissioner and the participant within 20 days of the clinical examination or final teleconference.

18. Corrections of obvious errors in certificates

If a party (the participant or the LTCS Commissioner) considers that an assessor or review panel has made an obvious error in a certificate, that party may make an application to the LTCS Commissioner to have the error corrected within 28 days of the date of the certificate.

The application to have the error corrected must be made in writing, including the details of the obvious error and the suggested correction. An obvious error in the certificate may only include an obvious clerical or typographical error in the certificate, or an error arising from an obvious omission or inconsistency.

The LTCS Commissioner will forward this request to any other party within 10 days of receipt, after which time that party has 20 days in which to make a submission to the LTCS Commissioner on the application to have the error corrected.

The LTCS Commissioner will send the application to the assessor or review panel within 10 days of receipt of the application or any submission from the other party. The assessor or review panel must decide whether to issue a replacement certificate within 28 days of receipt of the application to correct the obvious error, or receipt of the submission from the other party.

The assessor or review panel may issue a replacement certificate that corrects any obvious error and that will replace the previous certificate. Any replacement certificate must be issued to the LTCS Commissioner and the participant. If a replacement certificate is issued, the replacement certificate is to be titled as a replacement certificate and will supersede the previous certificate.

APPENDIX A

Definitions and legal representation for disputes about participants' treatment and care needs

In this Part of the LTCS Guidelines:

Assessor has the meaning given to it in section 54 of the LTCS Act. A reference to an assessor can also include a group of assessors as a review panel.

Certificate means a certificate issued under sections 60(2) or 62(3) of the LTCS Act including the reasons for any finding.

Days is a reference to the number of working days.

Dispute means a dispute about an assessment or any aspect of an assessment by the LTCS Commissioner of the treatment and care needs of the participant which has the meaning given to it under section 55 of the LTCS Act.

LTCS Act means *Lifetime Care and Support (Catastrophic Injuries) Act 2014*.

LTCS Commissioner means the Lifetime Care and Support Commissioner of the ACT.

Participant means an injured person who is an interim or lifetime participant in the Lifetime Care and Support Scheme. Any reference to a participant in these LTCS Guidelines is a reference to the participant's legal guardian in cases where this applies.

Panel means a review panel of three assessors convened to review an assessor's determination of a dispute under section 62(3) of the LTCS Act.

Review means a review of an assessor's determination referred to in section 62 of the LTCS Act

A reference in these LTCS Guidelines to a section "X" is a reference to a section of the *Lifetime Care and Support (Catastrophic Injuries) Act 2014*.

Legal representation

If the participant has legal representation in respect of the dispute, the LTCS Commissioner will send copies of any document required to be sent to the participant to their legal representative. However, despite the presence of a legal representative, the assessor or the LTCS Commissioner may contact the participant directly in relation to any aspect of a dispute or assessment if required.

If a participant has made a request for a dispute to be referred to an assessor or review panel, they are entitled to:

- view and receive a copy of all documents held by the LTCS Commissioner in relation to the dispute; and

- make a written submission about any aspect of the dispute or issues in dispute which will be forwarded to the assessor or review panel; and
- receive the certificate issued by the assessor or review panel.

APPENDIX B

Sending documents to the LTCS Commissioner

To deliver or send documents to the LTCS Commissioner, the postal address is:

Lifetime Care and Support Commissioner of the ACT
1 Constitution Ave
Canberra ACT 2601

GPO Box 158
Canberra City ACT 2601

Documents sent to or from the LTCS Commissioner or to the LTCS Commissioner shall be assumed to be received on the same day as they were sent:

- if delivered by hand;
- if sent via email or internet transfer.

Any email or internet transfer sent on or after 4.30pm will be taken to be received on the next business day.

Documents sent to or from the LTCS Commissioner shall be assumed to be received 5 days after sending if posted by mail.

Documentation and other supporting material

The participant should only submit copies of documents to the LTCS Commissioner, not original documents.

The participant must not contact an assessor directly in relation to the dispute unless the LTCS Commissioner gives permission to do so. This applies whether the assessment is current or has finished.

Medical documentation

All medical documentation must be listed in the application or otherwise listed in writing (sent with a cover letter) when sent to the LTCS Commissioner.

In the case of X-rays, Computerised Tomography (CT or CAT scans), Magnetic Resonance Imaging or other radiological or similar investigations, only the resulting report should be sent to the LTCS Commissioner.

No original films or scans should be submitted to the LTCS Commissioner. These can be brought to any examination by the participant. If an examination does not occur, the LTCS Commissioner will arrange for the original films or scans to be viewed by the assessor if required.