

Australian Capital Territory

Lifetime Care and Support (Catastrophic Injuries) Guidelines 2014 (No 3)

Disallowable instrument DI2014–204

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 3)*.

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 3 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 3 – Guidelines for disputes about motor accident injury

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 eligibility under Division 7.2 of the Act.

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

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

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 following 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 the LTCS Commissioner, an injured person or an assessor including the principal claims 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. Disputes about motor accident injury: jurisdiction

An application may be made to the LTCS Commissioner for referral of a dispute as to whether an injury is a motor accident injury. Such a dispute can only arise after the LTCS Commissioner has notified the injured person in writing as to the LTCS Commissioner's decision about eligibility to the LTCS Scheme under section 19 or 21 of the LTCS Act.

Any request for the LTCS Commissioner to refer a dispute must be received within 6 months of the LTCS Commissioner's decision about eligibility.

The LTCS Commissioner may reject any such request if the LTCS Commissioner is satisfied that the request:

- does not establish that it relates to a dispute as to whether an injury is a motor accident injury;

- has not been made by an interested person as specified in sections 45 and 47 of the LTCS Act; or
- has not been made within 6 months of the LTCS Commissioner’s decision about eligibility.

2. Application

The application must include:

- the injured person’s name, address and contact details (if the injured person is not making the application);
- a clear statement that there is disagreement with LTCS Commissioner’s decision about whether the injury is a motor accident injury;
- detailed reasons why there is disagreement with the LTCS Commissioner’s decision as to whether an injury is a motor accident injury; and
- any information or reports that are relevant to the application.

In exceptional circumstances the LTCS Commissioner may allow the notice to be given orally and followed up by the submission of a written Application Form.

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 application can proceed to be assessed.

The applicant should be aware that any information provided to the LTCS Commissioner will be shared with any other party to the dispute, regardless of whether they are a party to the dispute at the time the information is provided.

The LTCS Commissioner will send a written acknowledgement of the application to the sender within 10 days of receipt.

3. Further information or documentation required

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 person lodging the dispute provides the information within a period of up to 20 days; or
- 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 is to ensure that within 10 days of the acknowledgment date by the LTCS Commissioner, the parties are advised of the outcome of their request to refer the dispute.

4. Referral to principal claims assessor

The LTCS Commissioner will refer the dispute to the principal claims assessor under section 48 of the LTCS Act.

The principal claims assessor will convene a panel of three claims assessors from the list of claims assessors appointed under section 46. The panel will be convened within 10 days of receipt of the referral from the LTCS Commissioner.

When convening the assessment panel, the principal claims assessor will consider:

- the needs of the injured person, for example, the nature of their injury (e.g. traumatic brain injury, spinal cord injury)
- the nature of the dispute;
- the location of the injured person and the assessors;
- the availability of the assessors; and
- whether an interpreter is required.

The principal claims assessor will appoint a panel chairperson. The panel chairperson may be the principal claims assessor.

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 of the assessors on the panel.

When the panel is convened the LTCS Commissioner will:

- send the panel copies of the dispute application and all accompanying documents; and
- send the panel copies of any additional documentation or information received since the application, including the LTCS Commissioner's original determination of eligibility and reasons.

5. Grounds for objection to the assessment panel

A party may request the principal claims assessor 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 principal claims assessor will forward this request to any other party, who must provide any submissions within 10 days of receipt. The principal claims assessor 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 principal claims assessor will reallocate the dispute if satisfied that there are reasonable grounds for believing that the assessor is unsuitable.

6. Panel hold initial meeting (preliminary conference)

The panel is to conduct an initial meeting, called the preliminary conference, within 10 days of the date the panel was convened. This may be conducted by way of a teleconference or a face to face meeting.

At the first preliminary conference, the panel will decide how their assessment will proceed and will decide:

- whether oral evidence or oral argument is required from any of the parties or if the assessment can be completed on the information provided;
- whether additional information is required for the panel to make a decision;
- if further information is required in order for a decision to be made;
- which member of the panel will sign the certificate on behalf of the panel; and
- whether a further meeting of the panel is required.

Within 5 days of the preliminary conference, the chairperson will provide a written report advising how the assessment will proceed with reference to the points above, and any other decisions made at the conference. The chairperson will forward this report to the parties.

7. Procedures for the panel's assessment

The panel is bound to follow these LTCS Guidelines for assessment issued by the LTCS Commissioner when conducting an assessment of a dispute. The panel must also follow any practice notes in relation to disputes about motor accident injury that are in force at the time of their assessment.

The panel may do any or all of the following in their assessment of the dispute:

- contact each other by teleconference, email or by meeting;
- contact any of the injured person's past or present treating health professionals or witnesses to the accident;
- request records or other documentation that the panel consider relevant to the dispute; and
- request the injured person or any other party attend an oral hearing at an assessment conference.

Administrative support will be provided to the panel during the assessment process where required.

8. External locations

In coming to its decision, the panel may visit or hold preliminary conferences at external locations such as the site of the motor accident. In deciding whether to visit external locations the panel will consider:

- evidence in relation to the circumstances of the motor accident and the presence of any conflicting evidence and reports;
- whether there were any witnesses to the accident; and
- the complexity of the dispute.

When the panel visits an external location and an injured person or a party (or a witness to the accident) is requested to attend, the chairperson will:

- provide notification of the time, date and location to all parties involved; and
- provide the panel's reasons in writing as to why the visit is required.

9. Panel may make decision at preliminary conference

The panel may make a decision at a preliminary conference if satisfied that the information before them is sufficient to enable a decision to be made in relation to the dispute. However, if oral evidence or oral argument is required from any of the parties, an assessment conference must be held.

In exercising their discretion to make a decision before an assessment conference is held, the panel must consider:

- the complexity of the dispute;
- whether oral evidence or argument is required from any of the parties;
- whether the credit of the injured person or any witness is in issue; and
- any submission by any party as to why an oral hearing at an assessment conference is required.

10. Panel arranges assessment conference

An assessment conference may be conducted by way of a telephone conversation (teleconference) or a face to face conference between the panel, the injured person and any party.

Where the chairperson notifies the parties of an intention to conduct an assessment conference, the parties must advise the chairperson within 10 days of the notification:

- whether or not they will have legal representation;
- whether an interpreter is required; and
- whether there are any specific requirements for the injured person to attend.

Before the assessment conference the injured person will be notified:

- about how to prepare (e.g. what to bring) and what to expect;
- about what may occur at the assessment conference, for example the kind of questions that may be asked of the injured person and support person; and
- that they can bring a support person.

The LTCS Commissioner will pay reasonable costs associated with attendance for the injured person and a support person to attend any assessment conference that does not occur at the injured person's home.

The panel will determine who may be present at an assessment conference, how the assessment will proceed, and the role of each party in giving evidence to the panel. The panel is to ensure wherever possible that all parties attending the conference understand:

- the reason for the assessment conference and the issues the panel will consider in assessing the dispute;
- the role of the panel assessors as independent decision-makers, making a legally binding decision that will be documented in the panel's certificate; and
- that there are no provisions for the panel's determination to be reviewed.

A parent, legal guardian, carer or other support person may be present during an assessment conference involving the injured person in order to assist in any way required. At their discretion, the assessor/s may ask any legal guardian, carer or support person to leave the clinical examination for a period. Any person attending the assessment conference may provide information to the panel, if the panel is satisfied it is reasonable in the circumstances. However, the panel may ask any person to leave the assessment conference if their presence is impeding the assessment process in any way.

If a party is legally represented, then the legal representative must be available where possible. In the case of a party without legal representation, such as an insurer, a person with appropriate authority and knowledge of the dispute must be available for the assessment conference.

If any party is unavailable at the time of an assessment conference, or fails to attend without reasonable excuse, then the panel may conduct the conference in their absence.

11. Procedures for assessment conference

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.

During the assessment conference, the panel may ask each party to limit the presentation of their case to a period of time that the panel considers fair and adequate for each party to present their case.

The panel will determine the manner in which evidence is presented at an assessment conference:

- Each person attending is to be given an opportunity to address the panel, and to put to the panel any questions that any party would like the panel to ask any other person, or any areas that the party wants the panel to explore.
- Any questioning of parties and witnesses is conducted by the panel, and questions to other parties or witnesses may only be put as directed by the panel.
- The panel may allow a party to question another party, or may question any party or witness to such extent that the panel considers reasonable in order to elicit information relevant to the dispute.
- The panel cannot compel any party or witness to answer any question, but in making their decision, the panel may consider the refusal of a party or witness to answer a question.

The panel may adjourn a conference to another time and place if they decide to, or at the request of a party.

The panel may hold as many preliminary conferences or assessment conferences as required in order to finalise their decision. However, in all cases, the panel must attempt to resolve the dispute as quickly and as fairly as possible.

12. Use of interpreters in assessments

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 panel. Any person accompanying the injured person to an assessment conference, such as a carer or support person, cannot act as an interpreter.

13. Panel give their decision

The panel will give their decision within 15 days of their final preliminary conference or assessment conference. The panel will certify its decision in writing under section 49 of the LTCS Act, including written reasons for the decision. The panel's decision will be in the form approved by the LTCS Commissioner.

The chairperson will forward the decision to the LTCS Commissioner, who will forward a copy to all parties within 5 days of receipt.

14. Legal costs

Where applicable, the panel will include in its decision the amount of the reasonable legal costs payable by the injured person for or in respect of legal services provided in connection with the dispute.

The panel will not assess the amount of reasonable legal costs if the injured person did not receive legal services in connection with the dispute.

In connection with a dispute about whether an injury is a motor accident injury, no legal costs are payable by the LTCS Commissioner for or in respect to legal services provided to the insurer of a claim made by the injured person in respect of the injury or the Nominal Defendant.

The legal costs as assessed by the panel will be paid by the LTCS Commissioner within 28 days of receipt of the panel's decision.

15. Correction of obvious error in panel decision

If a party to an assessment considers that a panel has made an obvious error in their decision, that party may make an application to the principal claims assessor to have the error corrected, within 30 days of the date of the decision.

Any such application is to be made in writing, including the details of the obvious error and the suggested correction.

The principal claims assessor 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 principal claims assessor will send the application to the panel within 10 days of receipt of the application or any submission from the other party. The panel must decide whether to issue a replacement certificate within 30 days of receipt of the application to correct the obvious error, or receipt of the submission from the other party.

An obvious error in the certificate may include a clerical or typographical error in the certificate, or an error arising from an obvious omission or inconsistency.

The panel may issue a replacement decision that corrects any obvious error and that will replace the previous decision. If the decision is replaced, the replacement:

- will be dated the same day as the original decision;
- will be titled as a replacement certificate; and
- will supersede the previous certificate.

APPENDIX A

Definitions and information about parties to a dispute about motor accident injury

In this Part of the LTCS Guidelines:

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

Applicant means an interested person who initiates the request for referral of a dispute.

Assessment means an assessment of the dispute conducted by the panel of claims assessors.

Assessor means a claims assessor designated by the LTCS Commissioner to assess a dispute under section 46 of the *Lifetime Care and Support (Catastrophic Injuries) Act 2014*. Any reference to an assessor in this section of the LTCS Guidelines may also include the principal claims assessor.

Certificate means a determination issued under section 49(2) of the LTCS Act including the reasons for any finding.

Days is a reference to the number of working days.

Dispute means a dispute as to whether an injury is a motor accident injury under Part 7, Division 7.2 of the Act.

Form means the form approved by the LTCS Commissioner that may contain a request to refer a dispute.

Insurer means an insurer of a claim as defined in section 16(8) of the LTCS Act.

LTCS Commissioner means the Lifetime Care and Support Commissioner.

principal claims assessor (PCA) means the principal claims assessor appointed by the LTCS Commissioner, designated under Section 46 of the Act .

Request means a request for the LTCS Commissioner to refer a dispute for determination under section 47 (1) of the Act.

Interested person has the meaning as defined in section 45 of the Act. A reference to an interested person or party in these LTCS Guidelines includes multiples of parties or multiple parties to any application or request to refer a dispute.

Injured person means the person who is the subject of the LTCS Commissioner's decision about eligibility. Any reference to an injured person in these LTCS Guidelines is a reference to the injured person's legal guardian where applicable.

nominal defendant has the meaning given to it in section 13 of the *Road Transport (Third Party Insurance) Act 2008*.

Panel means a panel of three claims assessors convened by the principal claims assessor under section 49(1) 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.

Parties to a dispute and legal representation

The following may be regarded as parties to a dispute:

- the applicant, that is, the person making the dispute application (if the applicant is not the injured person);
- the injured person who is the subject of the LTCS Commissioner's decision about whether the injury is a motor accident injury, whether or not they are a participant of the LTCS Scheme at the time that the dispute application is made;
- the insurer of a claim made by the injured person in respect of the injury; and
- the nominal defendant.

An insurer may become a party to a dispute about whether an injury is a motor accident injury after a claim has been made. The date that the insurer may become involved in the dispute is the date that the claim form was received by the insurer.

If a person is a party to a dispute, they will:

- receive a copy of the request to refer a dispute, and any other documents related to the dispute submitted to the LTCS Commissioner in relation to that dispute;
- receive a copy of the LTCS Commissioner's decision about eligibility, and any documents related to that decision that were submitted to the LTCS Commissioner, including the Application Form to the LTCS Scheme;
- have opportunity to make a written submission or submissions in relation to the dispute or issues in dispute, which may be in response to any information in the application or any documents attached to the application, which will be forwarded to the panel;
- receive written reports from the panel of claims assessors in relation to the dispute, including the panel's decision;
- be entitled to attend an assessment conference (if held) with the panel of claims assessors; and
- receive the panel certificate.

If a person is not a party to the dispute, then no information will be provided to that person in relation to the dispute without the injured person's written consent.

If the injured person or a party has legal representation, the LTCS Commissioner will send any document required to be sent to the injured person or party to their legal practitioner or agent.

However, despite the existence of legal representation, the LTCS Commissioner may contact the injured person directly in relation to any aspect of a dispute or assessment if required.

APPENDIX B

Sending documents to the LTCS Commissioner

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

LTCS Commissioner
ACT Lifetime Care and Support Scheme
1 Constitution Ave
Canberra ACT 2601

GPO Box 158 Canberra City ACT 2601

Email: ltcss@act.gov.au

Documents sent to or from the LTCS Commissioner will 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

Parties should only submit copies of documents, not original documents.

If documents or other material are submitted, the LTCS Commissioner or principal claims assessor will give a copy of that document or material to any other party to the dispute.

Documentation

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

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.

No original films or scans should be submitted. If required, these can be brought to any assessment conference by the injured person. If an assessment conference does not occur, the chairperson will arrange for the original films or scans to be viewed by all panel members if required.