

Proposed Reform in the Area of Health Professional Liability: Another Attempt To 'Cap & Slash' Claimants' Rights

Catherine Henry, MacMahon Drake Balding,
Sydney

Late last year, the NSW government announced a Tito-like review to be conducted by an inter-departmental group comprised of officers from the state Attorney-General's and Health Departments. It was indicated that the review had been called in response to "numerous representations from a range of groups and individuals concerning legal claims for personal injury arising from the provision of health care services" with "particular concerns ... having been raised in regard to medical negligence claims and the costs of professional indemnity premiums." (Letter from Assistant Director, Attorney-General's Department dated 3 Nov '96).

We are all familiar with the arguments

"Medical negligence awards are getting bigger."

"Claims are going through the roof".

"There is a feared blow out in general damages and future economic loss."

"Future care costs cannot be contained".

"Increased claims raise premiums and are therefore forced on to consumers through increased charges for services".

Such concerns were certainly pushed at the public forum held on 5 December to discuss the review's terms of reference.

Unlike the Federal ('Tito') review, this review is being conducted on the understanding that '*no fault*' compensation is not an option.

The review has called for submissions from all interested groups with the closing date being 7 March.

The NSW government has indicated that it will be giving serious consideration to the capping of different heads of damages. General damages have already been the subject of legislative intervention in NSW in the area of motor accident claims and in the context of this review, a similar legislative provision has specifically been alluded to.

Of far greater concern, of course, is the introduction of caps on future care and economic loss claims. It is important that the point be hammered home to the government that such costs are not optional for those who claim them. If not met by insurers, these costs will have to be picked up by the social welfare

system, an option that is neither morally right nor politically acceptable.

Also on the agenda are the introduction of court based reforms such as the establishment of a separate health professional negligence court list, use of pre-trial disclosure panels, appointment of court assessors and appointment of independent court experts.

NSW members of the Medical Negligence Special Interest Group are currently working on a lengthy submission to the inter-departmental group, the broad thrust of which is as follows:

- (i) Certain myths need to be scotched (eg the perception of a medical negligence "crisis") if the review is to proceed on a realistic footing
- (ii) Claims have increased and this is consistent with greater public awareness of professional accountability
- (iii) More litigation is no justification for arbitrary limits to heads of loss which have *actually* been sustained by victims of negligence
- (iv) Aside from the social justice function of the tort system, caps have largely been ineffective in reducing insurance premiums eg Indiana
- (v) Structured settlements with appropriate tax relief are a realistic alternative

Any member who would like to learn more about what is proposed in NSW can contact either Catherine Henry at MacMahon Drake Balding or David Hirsch at Cashman & Partners. We would also be grateful to receive any material from members in other states which might be of assistance to us in the preparation of our submission.

There were two papers given on the topic of the medical profession's perception of the medical negligence crisis at a recent Insurance Law Congress organised by IIR Conferences and held in Sydney on 4-5 February.

One paper was given by the writer: '*Should There Be A Limit To Common Law Rights for Compensation for Negligence?*' and the other by Jim Poulos QC: '*The Insurance Litigation Climate in Australia: Is Australia becoming the "New America" When It Comes To Litigation?*'.

Catherine Henry is National Councillor and NSW President of APLA and Chair of APLA's Medical Negligence Special Interest Group.