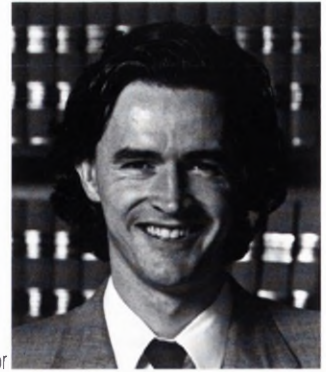


Legal reform in Australia

Simon McGregor, APLA Policy Manager



Simon McGregor

Over the last nine months APLA has been surveying the legal reform landscape, and making submissions wherever possible. We have been developing a consistent policy platform to use in the direct lobbying of Australian lawmakers, and this will be completed and circulated shortly. Personally, I have found this process most rewarding, and will take the opportunity to give you a brief summary of the issues we are currently lobbying on.

The main impression I am left with as I reflect on this period is how amazingly similar many of the issues and debates are. From state to state or territory, and one area of practice to another, there are similar arguments being deployed. For this reason, I hope you can all take the time to digest this article, and ponder the implications for your own careers and the com-

munities which you assist.

The good news for APLA members is that we can deal with these many separate debates using similar methods. And as we are learning, this sharing of knowledge, skills and resources is what has allowed APLA to create such a high profile in such a short time.

As predicted at the National Conference in Coolumb, any jurisdiction with common law rights remaining in Workers Compensation Schemes is experiencing moves to abolish or restrict it. This is the stated aim of this ill founded and misnamed HWCA report, *Promoting Excellence: National Consistency in Workers Compensation* (May 1997). This document was in turn drawn as a result of the Council of Australian Governments'

(COAG) National Competition Policy signed in April 1995. As an aside, this is the policy driving most of the restrictive proposals we now face.

Changes to Workers Compensation Victoria

As reported in earlier editions of *Plaintiff*, common law rights were abolished in November 1997. The 4th edition *AMA Guides* were also introduced, but in conjunction with a new rule prohibiting any claim from persons assessed as having less than 10% impairment. Compulsory medical assessment panels have been introduced, from which there is no right of appeal. Although we could not stop the abolition of common law rights, APLA ran a politically successful campaign which



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resulted in the resignation of a government back-bencher and the biggest swing ever against a governing party in an Australian by-election. The legislation was also amended to remove its retrospective operation, and a three year sunset clause substituted. APLA will now lobby for the reinstatement of common law at the next elections, and an amendment to the *Trade Practices Act* to allow workers to sue over defective products as long as they repay their compensation scheme if successful.

New South Wales

The *Grellman Report* recommended the following: (a) privatisation of the insurance underwriting and power for insurance companies to set premium levels, (b) introducing "whole of person" (AMA) assessment which would lower overall assessments, (c) a 25% threshold for common law claims under (b), and (d) the introduction of a "Final Offer Adjudication Principle" which restricts judicial determination of injuries to within 5% of one of the medical reports tendered as evidence, meaning that judges cannot find in the middle ground of diverse assessments. The report appears to be unpopular within Government, although concern at the total cost of the scheme is high. A compromise involving lowering costs by improved case management rather than reduction of common law access may be possible.

Western Australia

A relatively mundane act amending the scheme has been further amended to bring in substantive changes. Since 1993, WA workers have been prohibited from pursuing claims at common law unless they have a 30% loss of bodily function, or a future earnings loss greater than \$104,000. The Government now proposes to entirely remove this so called "second gateway", and has no plans to increase statutory benefits under the scheme by way of compensation.

Tasmania

Although they currently have unrestricted common law access, the State Government is currently considering introducing a 30% injury threshold.

Queensland

APLA plans to implement specific visits program to confirm Labor's position that it will reinstate common law rights if elected in the forthcoming election.

South Australia

Law Society of SA is planning campaign for reinstatement of some common law rights. Historically, SA had common law rights abolished in 1993, and we understand anecdotally that there has been an increase in Occupational Health & Safety breaches since that time. This is obviously persuasive evidence for use in the national debate on the issue of abolition of common law rights, and Stephen Lieschke is currently obtaining some data to back up this proposition.

Motor Vehicle Schemes

New South Wales

Under the COAG National Competition Policy, NSW is reviewing third party insurance arrangements under its Motor Vehicle scheme. The issue which concerns APLA is that the compulsory nature of the insurance scheme is being reconsidered, along with the terms of the third party policy, deregulation of the rehabilitation programs and the funding of injury prevention programs. Any review here has the potential to disadvantage plaintiffs enormously. Deregulation of the industry generally will probably have the same detrimental effect, in that successful tenderers for insurance work will keep tenders low by offering lower benefit levels. Tom Goudkamp is co-ordinating the NSW Motor Vehicle Special Interest Group to tackle issues problems in NSW.

Victoria

Regarding the possibility that TAC will be targeted for abolition of common law, it has been noted that TAC has paid out all the outstanding fees to the defence firms sacked following the Workcover campaign, and that this will leave a \$10 million 'blow out' in legal fees which can be used as a justification to abolish common law. There have also been clandestine amendments made to scheme made in an Act read in Parliament at eleven p.m. on Good Friday Eve without any community consultation at all (see *John Voyage's article in this edition - Ed.*) The worst change is that the courts have lost all discretion to grant extensions of time for applications to the AAT for review of TAC decisions. They must now be conducted absolutely within a twelve month period. This clearly disadvantages parties with capacity problems such as children and brain damaged per-

sons. The amendments also introduce the 4th edition *AMA Guides*, and contain one positive change for APLA clients, namely that motor bike riders who are injured at the training centre where they take their learners permit test can now make claims. This was not previously the case, despite the fact that they had to pay compulsory insurance before they were allowed to apply to take the license test. This amendment was the result of an APLA submission to the TAC seeking this change.

South Australia

There are legislative caps on some heads of damage but SA Motor Vehicle SIG Chair Angela Bentley believes the States' injured are well off compared to other jurisdictions. There are few problems when liability is proved, and there is a good system for interim payments.

However, as part of the National Competition Policy legislation review, the government is accepting tenders from accounting firms for review of the scheme, and will announce the appointment this month. The entire review will be due on 1/7/98, which means it will not be well researched. The review will focus on whether the compulsory third party insurance scheme ought be privatised, so will raise similar issues to the NSW review. (A working party has been set up in SA to prepare a submission for the review - see Angela Bentley's article in this edition - Ed.)

Western Australia

APLA supports the introduction of case management procedures which it is hoped will bring quicker results in cases.

Developments in Medical Negligence

Adverse Hospital Outcomes

There has been another survey of medical practitioners, this time by *Australian Doctor*, reporting that half of the 450 GPs surveyed had patients who had died or become disabled because of systemic problems in the health care system. This informal survey confirms that there has been no progress at correcting this alarming statistic first publicised in the *Lawrence Report* in 1995.

Access to Medical Records

The Federal Government has ignored the recommendation of the *Senate Report on Access to Medical Records*, and has not legislated to give patients a right of access to their private health care records. In

accordance with the policy of the Ministerial Council of Consumer Affairs, the matter has been left to the industry for self-regulation. This policy provides that the Government will only intervene when self-regulation has proved ineffective. The AMA and Royal College of Surgeons have now produced such a code. Our paper opposing the AMA code contains the theoretical basis of our opposition, and we should now collect data to back it up, then conduct specific MP visits on the issue.

NSW Joint Departmental Review of Medical Negligence Liability

No issues paper has been delivered yet, but we understand that a Medical Defence Organisation has made a new submission. APLA will respond if necessary.

Legal Liability of Health Service Providers

Victorian Government response due to this report was tabled in February. The central recommendation was that the common law standard is appropriate and should not be altered. The Attorney-General will also provide specific response on compensation issues, which APLA will attempt to make a submission on.

Medical treatment of Minors

Law Reform Commission of WA will prepare an issues paper to obtain up to date comment on the desirability or otherwise of replacing the common law with a statutory scheme along the lines of that recently recommended by the QLD Law Reform Commission. APLA will make a submission.

Other Developments

Consumer Law Committee

APLA now has several members sitting on the Consumer Law Committee of the Law Council of Australia. This is an excellent opportunity to use this peak body to advance our agenda in relation to both these areas. To date we have drawn submissions on Country of Origin Labelling, Principles of Electronic Commerce, Aged Care Reforms, Trade Practices Act Remedies and a Representative Actions Handbook. Copies of these submissions are available at www.apla.com

Tax reform

Tax reform is high on the political agenda, and APLA has made a submission opposing the introduction of a GST on

legal costs. A GST will particularly disadvantage plaintiffs as they cannot claim legal costs as a tax deduction. We will remain involved in the consultation process as long as possible.

Administrative Law

In the field of Administrative Law, the Federal Government has announced its intention to amalgamate the AAT, SSAT, IRT and RRT into a single tribunal known as the Administrative Review Tribunal (ART). Parties will have no legal representation, decision makers will not be required to give reasons for decisions and matters can be determined by one member. Being a federal proposal, it will have national impact.

Limitation periods are under review in two States. The Queensland Law Reform Commission is considering reducing the period to be only three years, which APLA opposes.

The Law Reform Commission of WA has also completed a review reference on this topic. They have recommended a uniform three year period, a judicial discretion to extend, and an absolute limit of 15 years.

Bill of Rights

Although none of our candidates were elected, the Bill of Rights Campaign for the Constitutional Convention was a moderate success, with several of the other elected delegates raising the Bill of Rights issue at the Convention, and a loose promise being made to convene working groups to discuss the issue at a later stage.

We have established contact with the elected delegates who support a Bill of Rights, and the Campaign members are now considering the feasibility of convening the promised working groups of the Convention, as no other group has any concrete plans to do so. The first step should be to seek expressions of support from as many interested persons as possible. We are asking interested parties to contact their mailing lists regarding the same, and have been pleased with the responses to date.

We are also agreed that a suitable model for discussion purposes would be the recently passed UK Bill of Rights, but with our model adopting the UN's international rights charter (the International Covenant on Civil and Political Rights (ICCPR)) instead of the European version (European Convention for the Protection

of Human Rights and Fundamental Freedoms (ECHR)).

Member Involvement in Campaigns

Before I finish, the National Council and I would like to thank the numerous members who have worked on the above lobbying projects, and remind everyone else that with more help we can achieve more.

Any member interested in starting or working on particular campaigns should contact me to discuss the possibilities. I stress that although APLA is expanding rapidly, we are still reliant on our members to fund and conduct the campaigns which protect our client's rights, and urge you to join the appropriate special interest groups and contribute in any way you can. We will make a difference. ■

Simon McGregor is APLA's Policy Manager and can be contacted on **phone** 03 9601 6439, **fax** 03 9601 6580 or **email** smcgregor@apla.com

DR JOHN LAWSON

M.B.B.S. (Uni of Sydney)
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