the *medical* indemnity 'crisis'

"A responsible profession such as the medical profession ought to own up to its obligations to compensate patients for the true negligence of its members."

-Dr Richard Tjiong
Chairman of the Board,
United Medical Protection
Position Paper on Medical
Indemnity Reform

The recent increase in premiums payable by the medical profession for professional indemnity insurance, particularly in New South Wales, and the alleged medical indemnity "crisis" have led to proposed tort reforms in New South Wales which would have a significant impact on the legal rights of innocent victims of medical negligence. The New South Wales Government has recently announced a package of proposals in order to deal with the problem. United Medical Protection has apparently indicated that such reform proposals will result in a 12% reduction in subscription rates payable by doctors who are members of UMP.

Before outlining the reform proposals and APLA's position, it is instructive to have regard to the origins of the medical negligence insurance "crisis".

According to Dr Richard Tjiong, Chair of the Board of UMP, *"there has been no real ... accountability by ... [medical defence] organizations"* (Position Paper on Medical Indemnity Reform). Historically, claims liabilities have not been stated in the balance sheet of their accounts. Many organisations have tended to resort to cash rather than accrual accounting. The only explanation usually offered for steep subscription increases in recent years has been so-called claims escalation. Accountability is also a lacking with respect to the management of corporate affairs especially (a) management of claims and (b) investment of members' funds.

Moreover, historically medical defence organisations have not adopted a uniform minimum standard of accounting for known claims or estimated liabilities.

Regulatory scrutiny has been lacking. Medical defence organisations, because they are discretionary mutuals rather than insurers, are not covered by the *Insurance Act* and have not been monitored by the insurance industry regulators, including the Australian Prudential Regulation Authority. By way of contrast, authorised insurers are required to comply with solvency margins and reserve requirements.

Recent accounting provision for Incidents Incurred But Not Reported (IBNRs) has artificially created or exacerbated the so-called insurance "crisis". It is only in recent years that medical defence organisations have started to bring their IBNR liabilities to account in their financial statements. Whether they should do so is debatable given that mutual organisations can make a call on members if and when actual claims exceed reserves. UMP has not made any provision for IBNR liabilities in its financial accounts published to date. However, the recent attempt to make provision for potential future claims has led to a substantial increase in estimated claims liabilities and the consequential call on UMP members who have been required to pay an additional year's subscription over 5 years. This has reinforced political pressure for tort reform measures which will have the effect of taking away the rights of victims in order to reduce insurance premiums payable by doctors.

Making accounting provision for IBNRs is one of a number of factors which would appear to have precipitated the recent "crisis".

It is clear that many medical defence organisations have been underfunded for some years. This is not news. What is new is that belated attempts to make accounting adjustments have precipitated the so-called "crisis" and led to calls being made on members to pay additional fees.

As the annual report of the Medical Defence Association of Western Australia notes: *"Under funding can easily be dismissed as the result of claims costs being unpredictably high ... the legal profession is also targeted as an additional cause. However, underfunding may also be caused by poor business operations and inadequate advice on subscription pricing."*

The problem has been compounded by the increased rate of processing and paying claims.

Not long ago it was reported that medical indemnity cases took on average nine years to resolve (Dr Richard Tjiong citing a 1995 paper by O'Dowd). Between 1980 and 1989 it has been reported that the average claims settlement delay period was six years. This period apparently shortened to 2.9 years for the period 1990-1999. In New South Wales cases can now be heard in the District Court much more quickly. Cases in the Supreme Court are now also being resolved much more expeditiously.

As recently noted in Australian Doctor, *"in the past, slower claims settlements meant more time to accumulate funds to pay and allowed inflation to reduce the cost"* (Janine Mace, "Making sense of the MDO market", *Australian Doctor*, 23 February 2001). As the same author notes, faster claims settlement means less return on investment of premiums and member subscriptions.

In summary, relevant contributing factors to the medical indemnity "crisis" include (a) historically low premiums and under insurance; (b) questionable treatment of IBNRs; (c) an increase in the rate of claims processing or claims "velocity"; (d) a corresponding decrease in investment income; (e) financial mismanagement; (f) substantial defence costs incurred in defending claims; (g) an unreasonable refusal on the part of various medical defence organisations to settle claims resulting in an escalation in the legal costs incurred by all parties; (h) the unreasonable rejection in many instances of settlement offers made by the plaintiffs resulting in further delays, an increase in legal costs and payouts which are significantly higher than the amount which the plaintiff agreed to accept for settlement purposes.

Moreover, a significant proportion of the expenditure is incurred in providing services to members of medical defence organisations unrelated to civil claims for negligence. These services include the provision of assistance in relation to complaints to the Health Care Complaints Commission; the investigation of complaints in relation to over-servicing; disciplinary proceedings; coronial inquiries; complaints and other proceedings arising out of alleged sexual misconduct with patients; investigations of alleged fraud and a multitude of

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and tort reform

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other complaints relating to ethical matters and misconduct. The cost of providing services in relation to these matters are included in the costs incurred by medical defence organisations which have led to the so-called "crisis". Moreover, unlike virtually every other category of insurance, including indemnity insurance for other professionals, there is no deductible or excess routinely paid by doctors when a claim is made which results in a payout by the insurer.

In the case of United Medical Protection the recent "call" made on members, who are required to pay an additional year's subscription, is difficult to reconcile with the fact that UMP had told the New South Wales Government and its own members not long ago that there would be no substantial increase in subscription rates and no need for a call on members.

However, on 17 November 2000 the United Board determined, purportedly under United's Constitution, to make a call on the majority of members.

In the explanatory documents sent to members, UMP stated: *"given the exceptional increase in claims reserves and the forecast of continuing substantial and significant increases in the cost of claims, we need additional funding beyond our usual subscription rates"*. The call was said to be made in an exercise of responsible forward planning to address the estimated cost of future claims (not yet notified or reported), and not to address funding of United's current claims for which United has always contended it has made adequate provision. Interestingly, United is also moving away from an "occurrence" policy toward a "claims made" policy. Various disgruntled members have lodged complaints with the ACCC and at least one complaint has been filed on behalf of another medical defence organisation alleging that UMP has engaged in misleading and deceptive conduct. It has been reported in the press that UMP is under investigation by the ACCC, the Australian Securities and Investments Commission and the Australian Prudential Regulatory Authority. United now has over 42,000 members and has a virtual monopoly on medical indemnity insurance in Australia.

In response to the alleged "crisis" the New South Wales Government has announced a package of reforms including various "tort reform" measures.

Those reform proposals announced by the New South Wales Government which are supported by APLA include (a) a renewed focus on clinical quality to reduce errors and reduce claims, including through risk management programs; (b) compulsory professional indemnity insurance; (c) improved case management by courts and the establishment of a specialist medical negligence list in the New South Wales District Court; (d) greater financial accountability by medical defence organisations; (e) changes to Federal tax laws to facilitate structured settlements.

Other reform proposals announced by the New South Wales Government are considered by APLA to be unnecessary and in any event will have little impact on premiums. These include (a) legislation to protect actions of "good samaritans"; (b) the abolition of exemplary and punitive damages; (c) fixing the maximum level of general damages at the current level, with provision for future indexation; and (d) confirming that gratuitous care costs which would have been provided regardless of the injury are not compensable.

Contrary to popular perception, general damages awards in New South Wales Courts have not increased in over a decade (with the exception of an occasional aberrant decision which is invariably overturned on appeal). Moreover, the incidence of medical negligence claims filed in courts in Australia appears to have declined in recent years. In the New South Wales Supreme Court there are less medical negligence cases than there were 12 months ago.

Reform proposals by the New South Wales Government opposed by APLA include; (a) changing the discount rate from 3% to 5%; (b) fixing the maximum level for future lost income to the motor accidents scheme limit (approximately $2,600 per week); (c) the introduction of a threshold of seriousness for the award of general damages and; (d) abolition of interest on general damages.

APLA has formulated and is advocating a number of reforms which would, if implemented, alleviate or at least ameliorate the problem without the necessity for taking away the rights of innocent victims for medical negligence. Those reforms proposed by APLA include; (a) removal of tax impediments to structured settlements; (b) an early evaluation scheme to facilitate the expeditious and economical resolution of claims; (c) alternative dispute resolution, including mediation, for small claims; (d) rationalisation of indemnity arrangements in respect of claims arising out of public hospitals, including; (i) review of the law governing liability of public hospitals in respect of services provided by "independent" private doctors; (ii) review of defence arrangements where a claim is made against both the treating doctor and a public hospital to avoid duplication of the indemnity cover and duplication of legal defence costs; (iii) extension of cover provided through the Treasury Managed Fund. APLA also supports greater financial incentives for medical defence organisations to accept reasonable offers of settlement by plaintiffs. Other reform options under consideration by APLA include; (e) separate rating and payment for services other then indemnity insurance; (f) the introduction of an excess or deductible when claims are made; (g) variation of the existing rating arrangements for certain specialists to achieve more equitable subscription rates. The combined data of three Australian medical defence organisations indicate that membership subscriptions have increased 10% per annum over the past decade. Actuarial data indicates that in 1990 indemnity claims payments cost $600 per member. In 2000 this was $2,500 per member. Such costs are affordable, if spread on a more equitable basis, without the need to take away rights to reduce subscription rates for certain specialist groups.

It is APLA's understanding that medical defence organisations and medical organisations including the AMA are also lobbying the state and Federal Governments to implement tort reforms in other jurisdictions.

Whilst reform measures are clearly needed, tort "reform" is not the answer. The artificially created and short-term indemnity "crisis" should not be a basis for legislation which takes away the rights of innocent victims of medical negligence. PL