

# In disarray

By Jnana Gumbert

**T**he compensation system in NSW is in disarray. Over the past year, the NSW committee has focused on eliminating its inconsistencies and injustices, making submissions on tort law reform both to the NSW government and the opposition,<sup>1</sup> calling for:

1. A single system of compensation for all fault-based claims, including work injury damages, based on the *Civil Liability Act* (NSW) 2002.
2. A 3 per cent discount rate in all cases.
3. Disclosure of insurer profits in each area of insurance.
4. Repeal of s338 of the *Legal Profession Act* to restore equality of costs bargaining.
5. Review of the costs regulations for work injury damages matters.
6. Review of the *Civil Liability Act*, *Motor Accidents Compensation Act* 1999 and *Limitation Act* 1969 to deal with obvious injustices and errors.

The priority is to introduce a single system of compensation in NSW. Currently, there are four major different compensation schemes: for public liability/medical negligence claims, motor accident claims, workers' compensation and work injury damages claims, and claims arising from intentional acts/assaults. Each scheme has a vastly different threshold and caps, resulting in a system that is inequitable, complicated, and unjust.

It is contrary to the recommendations of the Ipp Committee in its *Review of the Law of Negligence Report*,<sup>2</sup> which said that the proposed *Civil Liability Act* should apply 'to any claim for damages for personal injury or death resulting from negligence regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action'.

It is also contrary to the unanimous recommendations of the Legislative Council General Purpose Standing Committee of December 2005,<sup>3</sup> that 'where individuals suffer permanent injury with no realistic prospect of recovery, they should have access to the same level of compensation, regardless of whether their injury occurred in the workplace, a motor vehicle accident or in a public place'.<sup>4</sup>

These differences cannot be logically justified. Aside from obviously being unfair to the injured person, whose fate rests on definitions and technicalities, money is wasted on litigation regarding whether an accident is a work accident, a motor vehicle accident, or a public liability accident. As the Ipp Committee concluded, 'The differences between the law applicable in the various jurisdictions also give rise to perceptions of injustice. There is no principled reason, for example, why a person should receive less damages for an injury sustained in a motor accident than for one suffered while on holiday at the beach'.<sup>5</sup>

So how to rectify these discrepancies and injustices? First and foremost, abolish the whole person impairment thresholds for recovery of general damages in the motor accidents and workers' compensation schemes, and substitute the *Civil Liability Act* threshold of 15 per cent of a most extreme case (recommended by both the Ipp Committee<sup>6</sup> and the NSW Legislative Council Standing Committee in 2005<sup>7</sup>). Secondly, abolish the absurd restrictions that exist in work injury damages claims, requiring workers to sacrifice their entitlements to future treatment and care in order to pursue claims for loss of income.

Proposals to reform tort law invariably generate worries about unsustainable awards of damages and consequent increases in premiums. However, good evidence suggests that these proposals would be affordable



without changing the existing insurance structures and prices. For starters, the proposed scheme would still exclude minor injuries from significant compensation (as they are now) but with significant savings in administrative and legal costs involved in performing whole person impairment assessments. Furthermore, the current statutory schemes are significantly more profitable than predicted, suggesting that the reforms leading to the introduction of these schemes were far more draconian than affordability of premium prices required.

At the end of the day, what we want is a unified system that is simple, affordable, and fair. It just makes good sense. ■

**Notes:** **1** The complete submissions are available on the Australian Lawyers Alliance website. **2** *Review of the Law of Negligence Report*, 2 October 2002, available at <http://revofneg.treasury.gov.au/content/review2.asp>. **3** Available at: <http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/6DEB694C553E0DB8CA2570D100000C9A>. **4** NSW Legislative Council General Purpose Standing Committee No. 1, Personal injury compensation legislation, p xviii. **5** *Review of the Law of Negligence*, above n1, at 13.13. **6** *Ibid*, at 13.47. **7** NSW Legislative Council General Purpose Standing Committee, above n4 at xxi.

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