

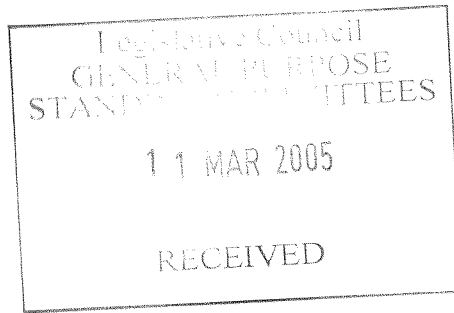
## INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

**Organisation:** United Medical Protection Group of Companies  
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**Telephone:** 9260 9150  
**Date Received:** 11/03/2005

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**Subject:**

**Summary**



11 March 2005

The Director  
General Purpose Standing Committee No 1  
Legislative Council  
Parliament House  
Macquarie Street  
SYDNEY 2000

Email: [gpscno1@parliament.nsw.gov.au](mailto:gpscno1@parliament.nsw.gov.au)

## INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

It is understood that the Committee is inquiring into the operations and outcomes of all personal injury compensation legislation approved by the Parliament of New South Wales from 1999 with particular reference to (and so far as concerns UNITED Medical Protection) "the impact on insurance premium levels and the availability of cost effective insurance." One of the Committee's terms of reference is "Public liability insurance and tort law reform in NSW".

UNITED Medical Protection ("UNITED") is the largest Medical Indemnity Organisation in Australia. Its members are medical practitioners and, to a lesser extent other health care professionals. The majority of its members practise in NSW and the majority of NSW medical practitioners are members of UNITED.

UNITED provides a range of medico-legal services and facilities to its members. Most particularly, through its wholly owned insurer, Australasian Medical Insurance Limited, ("AMIL") medical practitioners receive medical indemnity insurance.

Legal claims against NSW medical practitioners in relation to their private practice are conducted, pursuant to the insurance arrangement, by AMIL's claims staff and internal and external solicitors.

UNITED has been actively involved in seeking tort law reform for many years - so far as it relates to medical negligence claims - and among other activities, provided submissions both written and oral to the Federal Review Panel instigated by the Commonwealth Treasury and chaired by Mr Justice Ipp. As you know many of the Panel's recommendations were the basis for a series of reforms enacted throughout Australia, including the (New South Wales) *Civil Liability Act 2002* and the *Civil Liability Amendment (Personal Responsibility) Act 2002*. It is noted that these two enactments are referred in the Committee's Information Sheet.



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Because of the specific nature of UNITED's business and its association with AMIL we only propose to put submissions to the Committee as to the impact of tort law reform in New South Wales on insurance premium levels and the effect that the reforms have had on those premiums.

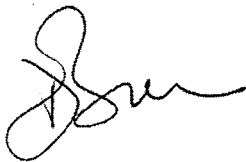
Our submission is enclosed.

We note in your document relating to the making of a submission under the heading "Protecting you from being sued" you say, in effect, that our submission becomes the property of the Committee and that this means we cannot publish or disclose it without the committee's authorisation.

Some of the data and information contained in our submission has already been published in a number of ways. The discussion of the claims trends in this submission derives substantially from a paper delivered to the Medico-Legal Society on 17 November 2004 by UNITED's General Manager, Professional Services, Allan Hunter. As a service to our members in keeping them abreast of what our organisation is doing, it is proposed that a copy of our submission be published in the near future in our Journal. In the circumstances we seek the Committee's authorisation of that limited publication.

We also note that we have received a request from the Cabinet Office for a copy of our submission and that this matter has been raised by telephone enquiry with the Committee's secretariat. We have no objection to a copy being provided to the Cabinet Office but understand that the Committee may regard this as inappropriate, at least until the Committee has formally received and considered the submission. We will therefore refrain from providing a copy to the Cabinet Office until authorised by the Committee to do so.

Should you have any queries in relation to our submission contact should be made with the writer of this letter. We look forward to hearing from you in relation to the Committee's authorisation referred to above.



David Brown  
General Manager Legal Services Division  
United Medical protection Ltd &  
Australasian Medical Insurance Ltd

enc



**UNITED**  
M E D I C A L  
P R O T E C T I O N

# INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

## SUBMISSION OF UNITED MEDICAL PROTECTION

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*[In this submission, for ease of expression, companies within the United Medical Protection group of companies are referred to as "UNITED". Matters relating to or affecting medical indemnity insurance primarily concern UNITED's insurance arm, **Australasian Medical Insurance Ltd.** Issues affecting the general medico-legal position of doctors are primarily the concern of **United Medical Protection Ltd.**, the group's parent company.]*

The New South Wales reforms are largely contained in the Health Care Liability Act 2001 (HCLA), the Civil Liability Act 2002 (CLA) and the Civil Liability Amendment (Personal Responsibility) Act 2002 (CLAPRA).

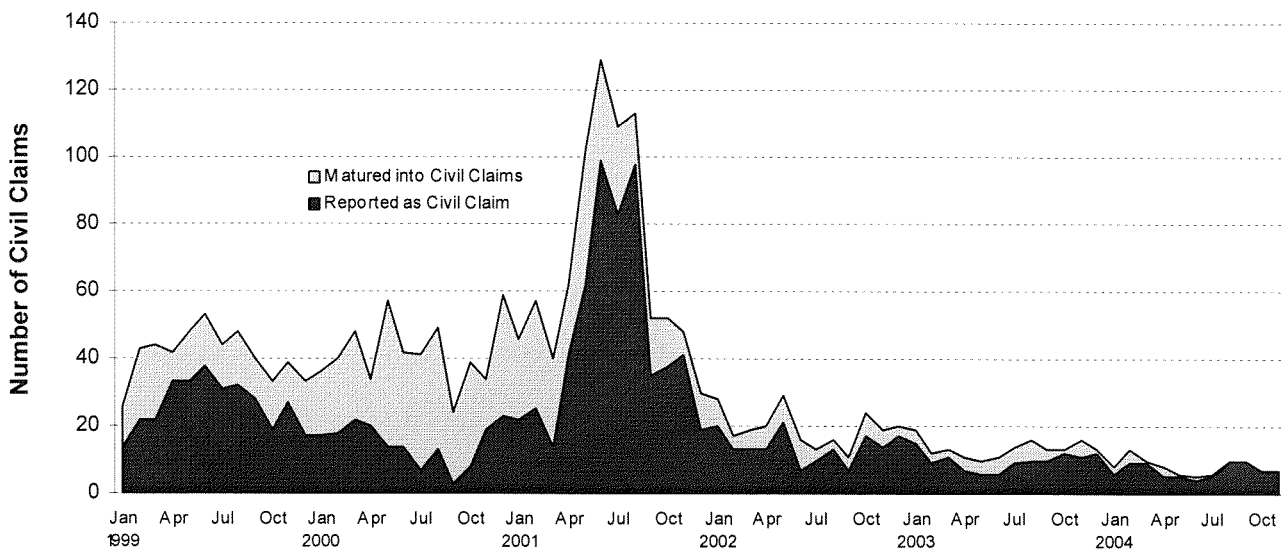
When the reforms were introduced UNITED's initial assessment of the impact of those reforms was a likely reduction in overall cost claims of between 20% and 25%, reflecting both the reduction in size of claims and in the number of small claims.

The most crucial reforms were considered to be:

1. A threshold and cap for non-economic loss. The threshold is more significant in New South Wales than elsewhere, with nil general damages below 15% of a most extreme case and a sliding scale up to 30%. The cap is now \$400,000.
2. The change to a 5% discount rate for calculating the present value of future losses.
3. A return to a "peer acceptance" test for professional negligence.
4. Cost restrictions concerning claims up to \$100,000.

The announcement of the HCLA reforms prior to implementation brought forward many claims in New South Wales and created what was known as the HCLA claims spike. For clarity the spike should probably be called the "Pre HCLA Spike" in that it was caused by the rush of claims lodged to "beat" the introduction of the legislation. The spike is graphically illustrated below. 950 new litigated claims were reported to UNITED in 2001 (466 in 2000), and 412 prior year notifications matured into claims in that year. 112 of these claims were valued in excess of \$300,000 and 49 claims were valued in excess of \$500,000. By comparison, of claims lodged in 2003, 20 claims are currently valued in excess of \$300,000 and only 8 in excess of \$500,000.

## UNITED NSW Civil Claims by Notification Month, 1999 - 2004



An issue in assessing the impact of the NSW law reform is that this spike is still colouring the claims environment. We are not able to deal with a sample which is unaffected by this spike or the initial trough that inevitably followed.

The claims figures also reflect the impact of the NSW Government's initiative, whereby the State, through the NSW Treasury Managed Fund assumed liability for claims made against Visiting Medical Officers after 1 January 2002, in relation to their treatment of public patients in public hospitals.

We have identified two data sets of similar maturity for comparison purposes.

### The Pre Reform Data

8,646 NSW incidents were reported to UNITED during the thirty month period from 1 September 1998 to 31 March 2001, inclusive. Incidents are notifications by doctors, patients' letters or letters of inquiry of possible future legal action resulting from past medical procedures or services. Each member involved in an incident is allocated a separate claim. As at 31 December 2001, (that is, at a point in time 9 months after end of the selected period), 1,985 (23%) of these reported incidents had incurred costs. A matter is regarded as having incurred costs if there has been or it is anticipated there will be a payment for costs and/or damages. Within these were 1252 litigated claims, 157 unlitigated claims and 231 disciplinary claims.

### The Post Reform Data

8,239 NSW incidents were reported to UNITED during the thirty month period from 1 September 2001 to 31 March 2004, inclusive. As at 31 December 2004, (again, a point in time 9 months after the end of the selected period), 1,194 (14%) of these reported incidents had incurred costs, with 471 litigated claims, 149 unlitigated claims and 345 disciplinary matters.

## Claims as at December 2001 & 2004

### i) All Claims

The assessment of the cost of open claims is based upon the current claim estimates, which includes legal costs. In closed claims (ie claims that have been finalised) the actual settlement and legal costs are used.

Disciplinary claims include "inquests, criminal cases, enquiries, complaints and disciplinary cases" where legal and other costs are incurred.

There has been a substantial drop in the number of litigated and unlitigated claims since the reforms with a significant reduction in average claim costs, particularly in the unlitigated claims. Claims that cost under \$30,000 and between \$1million and \$5million have significant reductions in average claims cost, -29% and -34% respectively.

It appears that the damages (non-economic loss) threshold has reduced the number of small claims, however this factor remains difficult to assess with precision.

The disciplinary claims increased by 49% in number and 5% in average claim cost. The increase in number may reflect the impact of the damages threshold, resulting in patients seeking redress by now advising an appropriate complaints body, rather than pursuing a legal claim.

### ii) Closed Claims

The closed claims are still a relatively small sample. The figures below should be read in contrast to the figures for "All Claims", above. Interestingly there have been proportionately more claims closed in the post reform group. This probably reflects the impact in smaller claims, and the more streamlined litigation management process now in place in the New South Wales District Court.

The average litigated claim cost has reduced by 34% and the unlitigated claim cost by 73%. This impact will probably be less significant as the more complex claims resolve.

Disciplinary cases have increased in numbers (84%), after the reforms, but at a reduced average cost per disciplinary claim (-21%).

The average cost of unlitigated claims has dropped by 73%, which is a further reflection on the impact of the threshold.

Litigated claims have dropped both in number (-47%) and average claim cost (-34%). The reduction varies between claims bands. Mid-range claims have reduced less. An award of \$177,000 is likely to be reduced by 8% to \$162,000, see **Appendix "A"**.

## Summary Table

This table summarises the figures included in the discussion of "All Claims" and "Closed Claims", above.

Case Type	Claims Numbers						Change in Average Claims Cost	
	Pre Reforms		Post Reforms		% Change		% Change	
	All	Closed	All	Closed	All	Closed	All	Closed
Litigated	1,252	570	471	304	-62%	-47%	-24%	-34%
Unlitigated	157	79	149	76	-5%	-4%	-12%	-73%
Disciplinary	231	64	345	118	49%	84%	5%	-21%

## Claims in Excess of \$500,000

Because of the lack of finalised large claims, a hypothetical example has been provided in **Appendix "A"** as an indication of the anticipated impact. This simply gives a guide to the possible difference between the assessment at common law and under the Civil Liability Act. The reduction differential comes through.

### Indicative Assessments - Large Claims

CASE	COMMON LAW	POST REFORM	DIFFERENCE	%
Case 2	\$1,236,537.14	\$784,221.26	\$452,315.88	36%
Case 3	\$1,019,936.05	\$808,136.95	\$211,799.10	20%
Case 4	\$10,998,692.00	\$8,372,485.00	\$2,626,207.00	23.8%



## **Action taken by UNITED in response to reforms**

In assessing the financial impact of the reforms and its capacity to pass on the benefits of reform to its insured doctors (and thereby the wider community), UNITED has had to consider:

- i) Current indications as to claim numbers and cost.
- ii) The factors influencing these figures.
- iii) Likely future trends, and in particular whether the benefits of tort reform are likely to endure over time.

Current figures in relation to claims numbers and cost have been discussed above.

## **Factors influencing the figures**

In any actuarial treatment of the raw claims figures, certain assumptions must be made about the contributing factors. In the current New South Wales environment this involves consideration of a number of issues.

At least three factors have contributed to the reduction in claims costs and numbers:

- i) Impact of Civil Liability Act damages reforms.
- ii) The initial trough after the HCLA spike (the spike having caused a major "acceleration" of claims through the system).
- iii) The impact of the New South Wales Government's VMO initiative, whereby liability was assumed by the NSW Treasury Managed Fund for claims arising after January 2002 against Visiting Medical Practitioners relating to their treatment of public patients in public hospitals.

These multiple factors have to be taken into account when endeavouring to accurately predict the medium to long term trends in claims numbers and costs.

## **Will the reforms have a lasting effect?**

Notoriously tort reforms have had a short-term (honeymoon) effect and then "version two" is required to achieve or reinforce the objectives of the original legislation. This was clearly evident in the case of the motor accident compensation reforms in the 1980's and early 1990's in New South Wales. It is thought that the Civil Liability Act will have a more lasting effect because the crucial reforms will impact both individually and in combination in most situations.

Additionally, some of the New South Wales Court of Appeal decisions to date, reviewing the determination of damages for non-economic loss, suggest a more conservative judicial view. [For example, in *Penrith City Council v Parks* (2004) NSWCA 201 the initial assessment of 28% was reduced to 15%. In *Batger Pty Ltd v Khayat* (2004) NSWCA 276 the assessment of one third of "most extreme case" was considered excessive. The Court of Appeal indicated it would have assessed it at 15%.]

Nonetheless the reforms have been introduced against a backdrop of rising court awards and in our submission it will be necessary to continue to closely monitor the

way in which courts apply the relevant legislation over time. On the basis of past experience of tort law reform programmes, actuarial advisers anticipate more generous interpretations of the damages-capping provisions over time. In excess of 90% of all UNITED's civil claims are resolved by settlement out of court or discontinuance. Accordingly there have been very few court decisions applying the Civil Liability Act to claims against NSW doctors.

### **Action taken in the 2005 Insurance Renewal**

Since 2001/2002, UNITED's approved actuary has acted cautiously in assessing the unfolding evidence about these various factors. By 30 June 2004 the actuary judged that the evidence of tort reform benefits was reasonably consistent and widespread. There was a resulting downward revaluation of outstanding insurance claims liabilities, from \$432 million to \$345 million. UNITED's Incurred But Not Reported (IBNR) liabilities were also revalued down from \$455 million to \$367 million.

Taking all of these matters into account a cautious 5 year claims forecast approach to pricing was adopted. A decision was taken to reduce premiums for the 2005 insurance year by an average of 20.5%.

This represented a very significant "turn around" after a decade of escalating claims cost and corresponding premium increases.

### **Conclusions and Further Issues**

New South Wales tort law reforms appear to have had a significant impact in reducing claims numbers and costs. This development was vital, because the previous decade had seen an unmanageable upward spiral in medical litigation and court awards.

The impact on smaller claims (under \$100,000) has been marked.

The non-economic loss threshold and caps on legal costs for smaller claims appear to have resulted in a decreased number of civil claims against medical practitioners. This may in part explain an increase in the number of complaints against doctors within the disciplinary process.

There has also been an impact on the cost of large claims and a reduction in the number of mid-range claims.

This has enabled UNITED to deliver average insurance premium reductions of 20.5% in 2005.

However considerable caution is required on the issue of the longer-term trends.

In the medical indemnity area there remain some underlying issues which have not been fully addressed.

Certain medical specialties such as obstetrics and neurosurgery remain exposed to extraordinary financial risk because of the inherent nature of the field of practice and the potential for catastrophic outcomes (with or without negligence).

The greatest financial issue remains the cost of long term care in such cases. There remains a need for a national care-funding scheme. This need is perhaps best illustrated by catastrophic birth injury cases. It should not be the case that one child

born with cerebral palsy obtains the cost of "Rolls Royce" future care and another must make do with the bare minimum, depending on the outcome of a highly technical and contentious dispute about compliance with foetal heart monitoring protocols.

This inequity could be addressed by a scheme whereby the community at large and all personal injury insurers contribute to a care-funding scheme. The cost of care would then be otherwise removed from the medical indemnity equation allowing a moderate absolute limit on damages awards without compromising the needs of the severely injured or disabled.

It is hoped that the above material will provide some useful factual information on the impact of recent New South Wales personal injury compensation legislation in the medical litigation area. The Contact Person will be happy to assist with any matters requiring clarification.

# APPENDIX A \*

## Case 1

HEAD OF DAMAGE	ASSESSMENT UNDER COMMON LAW	ASSESSMENT UNDER CIVIL LIABILITY ACT	DIFFERENCE
General damages loss	\$100,000.00	\$88,435.00	\$11,565.00
Interest (calculated on 1/2 at 2%pa for 3 years)	\$3,000.00	\$0.00	\$3,000.00
Future economic loss (buffer)	\$30,000.00	\$30,000.00	\$0.00
Past out-of-pocket expenses	\$4,000.00	\$4,000.00	\$0.00
Future out-of-pocket expenses	\$40,000.00	\$40,000.00	\$0.00
<b>Sub Total</b>	<b>\$177,000.00</b>	<b>\$162,435.00</b>	<b>\$14,565.00</b>

## Case 2

HEAD OF DAMAGE	ASSESSMENT UNDER COMMON LAW	ASSESSMENT UNDER CIVIL LIABILITY ACT	DIFFERENCE
General damages - 1st plaintiff	\$45,000.00	\$24,992.50	\$20,007.50
General damages - 2nd plaintiff	\$35,000.00	\$13,457.50	\$21,542.50
Interest	\$6,400.00		\$6,400.00
Past economic loss [combined]	\$0.00		
- 1st plaintiff		\$0.00	
- 2nd plaintiff		\$0.00	
			\$0.00
Future economic loss [combined]	\$40,000.00		
- 1st plaintiff		\$0.00	
- 2nd plaintiff		\$0.00	
			\$40,000.00
Past domestic and parental assistance	\$286,000.00	\$154,076.00	\$131,924.00
Interest	\$65,208.00	\$21,663.09	\$43,544.91
Future domestic and parental assistance	\$622,089.14	\$485,899.67	\$136,189.47
Past treatment expenses	\$30,000.00	\$30,000.00	\$0.00
Interest	\$6,840.00	\$4,132.50	\$2,707.50
Future treatment expenses	\$100,000.00	\$50,000.00	\$50,000.00
<b>TOTAL</b>	<b>\$1,236,537.14</b>	<b>\$784,221.26</b>	<b>\$452,315.88</b>

## Case 3

HEAD OF DAMAGE	ASSESSMENT UNDER COMMON LAW	ASSESSMENT UNDER CIVIL LIABILITY ACT	DIFFERENCE
General damages loss	\$70,000.00	\$24,992.50	\$45,007.50
Interest on general damages	\$2,562.00	\$0.00	\$2,562.00
Past out-of-pocket expenses	\$2,800.00	\$2,800.00	\$0.00
Int on past OPs (CL: allow on \$1K high range only) (CLA: allow on \$1K high range only at 2.96% (balance is HIC charge)	\$0.00	\$0.00	\$0.00
Funeral expenses	\$12,800.00	\$12,800.00	\$0.00
Interest on funeral expenses (CLA: allow 2.96% for 3.66 years)	\$2,342.40	\$2,773.40	-\$431.00
Future out-of-pocket expenses	\$0.00	\$0.00	\$0.00
Past economic loss (CL: allow 1yr low+3yrs high) (CLA: allow 1yr low+3.66yrs high)	\$18,304.00	\$18,304.00	\$0.00
Interest on past economic loss (CLA: at 2.96%)	\$3,349.63	\$1,982.98	\$1,366.65
Loss of financial support (past & future incl int)	\$240,957.77		
Past loss of financial support		\$42,680.72	
Interest		\$4,623.86	
Future loss of financial support (incl super)		\$190,466.48	\$3,186.71
Past loss of domestic support	\$162,296.00	\$149,848.24	\$12,447.76
Interest on past domestic support	\$29,700.17	\$17,582.50	\$12,117.67
Future loss of domestic support	\$459,824.08	\$324,282.27	\$135,541.81
Future economic loss	\$0.00	\$0.00	\$0.00
Management fees	\$15,000.00	\$15,000.00	\$0.00
<b>TOTAL</b>	<b>\$1,019,936.05</b>	<b>\$808,136.95</b>	<b>\$211,799.10</b>

## Case 4

### Diamond v Simpson

HEAD OF DAMAGE	Court of Appeal Award	Notional Civil Liability Act	DIFFERENCE
GD's	\$390,000	\$350,000	\$40,000
Interest on GD's	\$87,087	\$0	\$87,087
Past Loss of Earnings	50,880	\$50,880	\$0
Interest on Post Loss of Earnings	\$15,860	\$6,000	\$9860
Future Loss of Earning Capacity	\$720,169	\$531,976	\$188,193
Past Loss of Superannuation	\$2,100	\$2,100	\$0
Future Loss of Superannuation	\$84,700	\$62,600	\$22,100
Long Service Leave	\$5,000	\$2,400	\$2,600
Past Gratuitous Services	\$119,730	\$119,730	\$0
Interest on Past Gratuitous Services	\$310,880	\$140,489	\$170,391
Future Gratuitous Services	\$10,000	\$10,000	\$0
Future Attendant Care	\$4,933,800	\$3,520,800	\$1,413,000
Home Building and Architecture	\$300,000	\$300,000	\$0
Pool	\$95,467	\$95,467	\$0
Home Maintenance	\$390,606	\$278,739	\$111,867
Aids and Appliances	\$427,980	\$305,410	\$122,570
Maintenance on Aids and Appliances	\$25,916	\$18,494	\$7,422
Computer	\$292,679	\$213,311	\$79,368
Educational Tutoring	\$158,628	\$163,775	-\$5,147
Car	\$161,623	\$115,336	\$46,287
Future Medical	\$125,564	\$98,567	\$26,997
Future Paramedical	\$476,625	\$343,619	\$133,006
Future Pharmaceutical	\$16,569	\$11,804	\$4,765
Additional Vacation Costs	\$200,000	\$200,000	\$0
Case Manager	\$542,718	\$387,288	\$155,430
OP's	\$488,700	\$488,700	\$0
Interest on OP's	\$510,411	\$500,000	\$10,411
Funds Management	\$55,000	\$55,000	\$0
<b>TOTAL</b>	<b>\$10,998,692</b>	<b>\$8,372,485</b>	<b>\$2,626,207</b>

\*

Assessed by David Brown, General Manager Legal Services  
UNITED Medical Protection Limited