TABLED IN HOUSE
OF ASSEMBLY
17/2/98

RESPONSE TO THE

FINAL REPORT

OF THE

LAW REFORM COMMITTEE

OF

PARLIAMENT OF VICTORIA

LEGAL LIABILITY OF HEALTH SERVICE PROVIDERS

VICTORIA 1997

TERMS OF REFERENCE FOR AN INQUIRY INTO THE LIABILITY OF THE STATE OF VICTORIA AND HEALTH SERVICES PROVIDERS

1. The Parliament is concerned that the increasing cost of professional indemnity insurance could affect access to medical services.

2. The Parliamentary Law Reform Committee is requested to investigate options with respect to the following -

   a) the need to ensure medical services provided are of a high standard and that where standards are not maintained people have suitable redress;

   (b) the reduction of any disincentives to the provision of health services by fears of inappropriate liability;

   (c) the use of structured settlements to maximise the benefit to an injured person of any financial compensation ordered by a court; and

   (d) alternatives to the current system of court-based compensation for people injured in the use of health services.

Each Recommendation is listed below. Comments follow each recommendation with the exception of Recommendations 7 - 24 which concern the payment of compensation. (It is anticipated that the Attorney-General will respond to these issues.)

Recommendation 1

The Australian common law standard of reasonable care in medical negligence cases is appropriate and should not be replaced by a statutory standard, other than in the limited ways recommended in this report.

The Government agrees that the common law standard is appropriate and should not be altered.

Recommendation 2

The Victorian Government should enact legislation to provide a limited defence for medical practitioners and nurses who provide medical assistance at the scene of an accident or other emergency. The Queensland provisions contained in the Voluntary Aid in Emergency Act 1974 *should be used as a model in formulating the Victorian laws.*

While it is clear that no rescuer has incurred liability of the provision of health services in an accident, it is clear that many health service providers are fearful of liability arising in such circumstances.

Emergency Management Australia, a Federal agency established by the Department of Defence which includes State representation, has commissioned a review into this area which is presently underway. The review is relevant to provisions of the *Emergency Management Act* 1986 which currently provides some protection for volunteers. It is therefore recommended that the response to this issue be deferred pending the findings of the review.

Recommendation 3

The Wrongs Act 1958 *(Vic.) should be amended to provide that a false report arising out of a screening procedure does not of itself constitute a breach of a duty of care in negligence, although it may be relied upon as a material fact in determining whether there has been negligence:*

Supported.

Recommendation 4

The Cancer Act 1958 *(Vic.) should be amended to allow information on breast and cervical cancer to be forwarded to health service providers in screening programs.*

The recommendation has been implemented. The amendments were enacted in the *Miscellaneous Acts (Omnibus No.3) Act* 1997, Part 5.

Recommendation 5

Statutorily recognised health service providers should be required to obtain compulsory professional indemnity insurance cover with respect to privately funded patients, in order to become and remain registered. The minimum level of cover should be specified by the appropriate registration board, in consultation with relevant professional associations. Runoff cover should be provided for those who are currently insured on a different basis to the mandatory requirement.

Supported.

Recommendation 6

The Victorian Government should ask the Commonwealth Government to amend the Income Tax Assessment Act 1936 *(Cwlth) to provide that payment of compensation, including by way of structured judgments and settlements, for personal injuries are non-taxable in the hands of the payee.*

The Report makes a number of recommendations with respect to structured judgements and settlements. The recommendations have significant taxation impacts which require further consideration. One effect of a structured judgement or settlement is that payments would be made in a similar manner to an annuity, taxed differently to lump sum payments, as the Report notes.

It should be noted that the Full Federal Court's decision in *Whitaker v Commissioner of Taxation* which concerns the taxation of components of damages payments has not yet been handed down. That decision will clarify the taxation of the statutory interest component of a compensatory damages award. Furthermore, as the Report points out, an extensive debate on the assessability of compensation payments is currently underway and has yet to be finalised. It is suggested that action on this recommendation be deferred until these issues are clarified.

Recommendations 7 - 24

Recommendations 7-24 outline a number of proposals to change the manner of payment of damages and compensation to successful plaintiffs with personal injuries arising from the use of health services which are listed in a group below.

The Report recommends that legislation be introduced to allow Courts to make structured judgements to enable successful plaintiffs with health service related injuries to receive ongoing payments of compensation rather than lump sum payments where appropriate.

In addition, the Report recommends that provision also be made for structured settlements.

In making these Recommendations, the Report also notes the need for consequent changes to taxation and pension entitlement. In addition, the Report also supports the introduction of interim payments to plaintiffs during the course of a trial before final judgements where the Court considers necessary.

It is recognised that many of the recommendations have merit, not only for plaintiffs with health service related personal injuries but for many persons with personal injuries arising from negligence.

Given that the recommendations have far reaching implications for the law of damages in general, considerable consultation with the Attorney-General, the Government and other interested parties and peak bodies, such as the Victorian Bar Council, plaintiff and defendant lawyers, insurers and other peak bodies will be necessary before any changes could be implemented.

In addition, payments made in a structured manner, arising either from a structured judgement or structured settlement may have significant taxation and pension eligibility consequences which require consultation with the Commonwealth Government.

The issues raised are considerably wider than those which have an impact on the legal liability of health services providers.

Recommendation 7

Sub-section (1) of section 73 of the County Court Act 1958 *(Vic.) which provides that judgments and orders in civil proceedings are final, should not apply to claims for compensation for personal injuries suffered through the use of health services.*

Recommendation 8

The Supreme Court Act 1986 *(Vic.) and the* County Court 1958 *(Vic.) should be amended to permit the court to make an interim award of damages to a plaintiff in actions for damages for personal injuries arising out of the use of health services. The amendment should be along the lines of the provisions contained in Order 29, rule 11 of the Rules of the Supreme Court (Eng.) and section 76E of the* Supreme Court Act 1970 *(NSW).*

Recommendation 9

The Victorian Government should ask the Commonwealth Government to amend the Social Security Act 1991 *(Cwlth) to permit interim payments of compensation for injuries suffered through the use of health services to be received by claimants without any requirement to pay any sum to the Health Insurance Commission, until the final assessment of damages*

takes place. The notification provisions of the Act should continue to apply to the payment of interim damages.

Recommendation 10

The Supreme Court 1986 *(Vic.) and the* County Court Act 1958 *(Vic.) should be amended to permit the court to make a provisional award of damages to a plaintiff in actions for damages for personal injuries arising out of the use of health services along the lines of the provisions contained in section 32A Supreme Court Act 1981 (Eng.) and section 11A* Dust Diseases Tribunal Act 1989 *(NSW). Payment of compensation for future non-pecuniary loss should be able to be paid provisionally in the circumstances where provisional damages may be awarded.*

Recommendation 11

In assessing damages for personal injuries suffered through the use of health services, the court making an award or the parties agreeing to compromise an action, should allocate specific sums to the various heads of damage, and in particular should specify what sums are payable in respect of past losses and what sums are payable in respect of future pecuniary losses.

Recommendation 12

The payment of compensation made in respect of past losses should be made by way of a lump sum.

Recommendation 13

A list of recommended financial advisers should be compiled by appropriate court officers, and approved by the judges of the Supreme and County Court for distribution to persons who receive large awards of damages, whether as a result of court judgments or negotiated settlements.

Recommendation 14

Damages awarded for injuries caused through the use of health services should be paid by way of lump sum in all cases where the amount awarded in respect of future pecuniary losses is less than $50,000 (subject to indexation), but without affecting the ability of the court to award interim or provisional damages.

Recommendation 15

Damages awarded for injuries caused through the use of health services may, at the discretion of the court, be paid by way of a structured judgment approved of by the court in all cases where the amount awarded in respect of future pecuniary losses is greater than $50,000 but less than $500,000 (subject to indexation), but without affecting the ability of the court to award interim or provisional damages.

Recommendation 16

Legislation should be enacted to provide a licensing system for bodies which are authorised to provide annuities for use in structured judgments. Minimum statutory requirements should be laid down. The office of the Senior Master of the Supreme Court the Registrar of

the County Court should be approved as bodies authorised to provide annuities for use in structured judgments.

Recommendation 17

Except where exceptional circumstances are demonstrated, all awards of damages where the amount allowed for future pecuniary losses exceeds $500,000 (subject to indexation), arising from the use of health services, should be paid in accordance with a structured judgment approved by the court.

Recommendation 18

The Administration and Probate Act 1958 *(Vic.) should be amended to permit the estate of a plaintiff who was a party to a structured judgment, to recover any sums payable in respect of loss of earning capacity which would have been paid to the plaintiff had he or she continued to live.*

Recommendation 19

In agreeing to compromise a claim for damaged for injuries suffered through the use of health services, the parties should be required to allocate specific sums to the various heads of damage, and in particular should specify what sums are payable in respect of past losses and what sums are payable in respect of future pecuniary losses.

Recommendation 20

Except where exceptional circumstances are demonstrated, in all claims for compensation for injuries suffered through the use of health services where it is agreed between the parties that the amount of compensation awarded in respect of future pecuniary losses exceeds $500,000 (subject to indexation), the monies should be paid in accordance with a structured settlement, approved by the court and administered by the Senior Master of the Supreme Court of the Registrar of the County Court.

Recommendation 21

The Administration and Probate Act 1958 *(Vic.) should be amended to permit the estate of a plaintiff who was a party to a structured settlement, to recover any sums payable in respect of a loss of earning capacity which would have been paid to the plaintiff had he or she continued to live.*

Recommendation 22

Consideration should be given to making payments of compensation for loss suffered other than in respect of personal injuries arising out of the use of health services, subject to the rules governing the payment of compensation recommended elsewhere in this report.

Recommendation 23

Consideration should be given to making awards of compensation made pursuant to the provisions of the Accident Compensation Act 1985 *(Vic.) the* Transport Accidents Act 1987 *(Vic.) the* Victoria State Emergency Service Act 1987 *and payments made to claimants arising out of agreements conciliated by the office of the Health Services Commissioner,*

subject to the rules governing the payment of compensation recommended elsewhere in this report.

Recommendation 24

Consideration should be given to making payments of compensation made pursuant to the provisions of the Country Fire Authority Act 1958 *(Vic.), the* Education Act 1958 *(Vic.), the* Police Assistance Compensation Act 1968 *(Vic.), the* Victoria State Emergency Service Act 1987 *(Vic.) subject to the rules governing the payment of compensation recommended elsewhere in this report.*

Recommendation 25

The continued use of case management measures by Victoria's courts should be encouraged.

Supported.

In its response to the Issues Paper released by the Committee in 1996, the Government advised that the procedure for civil actions has undergone significant reform in this State in all courts, but particularly in the County and Supreme Courts, where the issue of liability of health service providers is likely to be determined. Further reforms for the entire civil process are anticipated in the future and current reforms are succeeding in reducing cost and delay for all types of civil matters. This development is expected to continue and there is no apparent reason to distinguish personal injuries litigation from other types of litigation, all of which are being case-managed in an increasingly effective manner.

Recommendation 26

A party to a claim for negligence arising out of the provision of health services should be able to choose conciliation before the Health Services Commissioner prior to the issue of proceedings as an alternative to court-run pre-trial conferences.

It is currently open to parties to choose conciliation before the Health Services Commissioner prior to the issue of proceedings and the commencement of litigation. The use of conciliation services is strongly supported as an alternative to the court system.

It should be noted that significant changes have occurred in the case management practices of the County Court since the release of the Annual Report of the County Court of 1994/95 which informed the Committee's considerations with respect to this recommendation. Compulsory pre-trial conferences are no longer held.

The County Court has initiated a system of judicial control of cases for the time of issue of proceedings to settlement or trial. The system involves a directions hearing on case management issues before a judge in all personal injuries cases. The directions hearings are held much earlier than the former pre-trial conferences which assists in earlier finalisation of cases.

Orders can be made for compulsory mediation at these hearings. Since 1 January 1996, some 10,000 civil cases in the Damages list of the County Court have gone through this system. Of those, approximately 30% have been referred to mediation and about 54% of completed mediations have been settled. This system, with its increased emphasis on

mediation and other forms of alternative dispute resolution, has seen significant reductions in the waiting times for case disposition in the County Court.

While the Government supports the use of conciliation prior to the issue of proceedings, it does not support the recommendation of the Committee in cases where conciliation has occurred prior to issue, that it be regarded as a substitute for Court ordered conciliation or mediation.

Where proceedings have been issued, an interlocutory process has usually clarified and refined the issues in dispute which may be considerably different from those arising prior to issue and the resultant settlement or conciliation may be significantly different.

Pre-trial conferences are compulsory in civil proceedings in the Magistrate's Court. The conferences are used for the joint purposes of conciliation or settlement and case management. Given the joint purposes, the Government does not support the adoption of conciliation prior to the issue of proceedings as an alternative to subsequent Court ordered conferences.

Recommendation 27

The legislation governing the Office of the Health Services Commissioner should be amended to address the potential conflict between two of its main functions; namely resolving complaints to the satisfaction of the parties, and the Commissioner's responsibility for standards of health. This should be achieved by adopting the model which exists under New South Wales Legislation.

Not supported. This Recommendation arises from the fact that once a complaint goes to conciliation, there is a perception that its impact on the wider health system can be lost. The Committee recommended that this problem be resolved by amending the Act so as to incorporate similar provisions to sections 55 and 56 of the New South Wales ***Health Care Complaints Act*** 1993.

However, it is suggested that there is no conflict between the conciliation provisions in the Act and the other powers of the HSC and that therefore such amendments are not necessary.

It is correct that a complaint which has been conciliated is not included in the matters which the HSC is permitted by section 21(1) of the Act to investigate. However, the HSC can decide to investigate a complaint, rather than to refer it for conciliation, and can investigate a matter which has been the subject of unsuccessful conciliation proceedings (sections 21(9) and 21(10)).

Moreover, there is nothing to stop the HSC using information gained as a result of complaints which have been successfully conciliated to assist her in carrying out those of her functions which do not relate to the investigation of complaints. Indeed, the Act provides a facility by which this can happen by requiring conciliators to report to the HSC details of any agreement reached as a result of successful conciliation proceedings.

There are significant differences in the purposes of the New South Wales legislation referred to by the Committee and the Victorian **Health Services (Conciliation and Review) Act 1987.** It should be noted that the provisions in New South Wales **Health Care Complaints Act 1993** gives the Health Care Complaints Commission the power to prosecute health service providers, unlike the Victorian legislation.

There does not therefore appear to be any need for the amendments to the Act proposed by the Committee in recommendation 27.

Recommendation 28

Despite a complaint being referred to the Medical Practitioner's Board, the Office of the Health Services Commissioner should still be able to provide conciliation services to the parties in the complaint.

Not supported.

The Committee has recommended that the Act be amended so as to provide that the HSC's conciliation procedure continues to be available despite the fact that a complaint has been referred to the registration board of the relevant health service provider. This would require repeal of section 23(4) of the Act which currently provides that the HSC must stop dealing with a complaint about a person who has been licensed, registered or certificated by a registration board which the HSC has referred to that board unless the board has asked the Commissioner to continue to deal with the matter, or unless the Minister has referred the matter to the HSC for inquiry.

However, it should be noted that under section 19(6) of the Act the HSC would only refer a matter to the relevant health service provider's registration board if he or she considered that the board had power to resolve or deal with the matter and that the matter was not suitable for conciliation.

There would not appear to be any need to enact a provision allowing a matter which the HSC had originally referred to a registration board on the grounds that it was not suitable for conciliation to then be referred back to the HSC for conciliation at a later date. It is unlikely that a matter which was originally not suitable for conciliation become suitable for conciliation at a later date.

Recommendations 29 - 39

The Committee has made a number of recommendations with respect to rural health service provision. While many of these recommendations go beyond the issues of legal liability of health service providers, the issues are of significant concern to the Government.

The Government has a number of initiatives in place regarding rural health services.

These recommendations will be considered in the further development of rural health policies and strategies.

Recommendation 29

Consideration should be given to increasing the subsidy for general practitioners under the State Government's Continuing Medical Education Program. The program should be extended to cover other areas where continuing education would be particularly useful, such as paediatrics and the treatment of infectious disease.

Recommendation 30

Medical professional colleges should review the delivery of continuing medical education so as not to create unnecessary barriers in credentialling, recertification and recruitment of rural doctors.

Recommendation 31

Federal and State Governments should provide financial incentives to rural practices which accept an assignment of medical students, so that they are financially disadvantaged by the provision of this service.

Recommendation 32

The feasibility of extending teleconferencing services to assist rural practitioners should be investigated by the Federal and State Governments. These facilities can provide valuable peer support and access to specialist advice for rural doctors.

Recommendation 33

Rural doctors should be encouraged to form an Australian College of Rural and Remote Medicine.

Recommendation 34

Consideration should be given to providing a cost alternative to insurance which extends the basic indemnity cover of urban locums who provide coverage for rural doctors on recreation or other leave. This may be achieved by using a variation of the arrangement available to general practitioners engaging in rural practice in small communities, or by way of a subsidy.

Recommendation 35

Consideration should be given to addressing the need to provide employment opportunities for spouses of doctors who are willing to work in rural areas.

Recommendation 36

Consideration should be given to the provision of employment paths for those doctors who return to metropolitan areas after working in rural or remote areas for 5 to 10 years.

Recommendation 37

The difficulties facing medical practitioners in rural and remote areas should be further investigated in 1998. A detailed examination of the efficacy of each Federal and Victorian Government initiative and proposal should be undertaken.

Recommendation 38

The admission of suitably qualified overseas doctors who wish to practice in rural Victoria should be facilitated by the Victorian Government and the Medical Board of Victoria.

Recommendation 39

Consideration should be given to providing greater incentives for Australian trained medical practitioners to work in rural areas.