

17 January 2014



Dr Matthew Butlin  
Chair  
Inquiry into Aspects of the *Wrongs Act 1958*  
Victorian Competition and Efficiency Commission  
GPO Box 4379  
MELBOURNE VIC 3001

Avant Mutual Group Limited  
ABN 58 123 154 898

Registered Office  
Level 28 HSBC Centre  
580 George Street Sydney NSW 2000

PO Box 746 Queen Victoria Building  
Sydney NSW 1230

DX 11583 Sydney Downtown

[www.avant.org.au](http://www.avant.org.au)

Telephone 02 9260 9000 Fax 02 9261 2921  
Freecall 1800 128 268 Freefax 1800 228 268

**By email: [wrongstactinquiry@vcec.vic.gov.au](mailto:wrongstactinquiry@vcec.vic.gov.au)**

Dear Dr Butlin

**Comments on Draft Report “Adjusting the Balance: Inquiry into Aspects of the *Wrongs Act 1958*”**

Thank you for the invitation to provide further input into the Commission’s Inquiry.

We attach our submissions on the Commission’s draft report.

Please contact me if you require any further information or clarification of the matters raised in our submissions.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Georgie", with a long horizontal flourish extending to the right.

Georgie Haysom  
Head of Advocacy

Direct: (02) 9260 9185

Email: [georgie.haysom@avant.org.au](mailto:georgie.haysom@avant.org.au)

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## Avant Mutual Group Limited

### Submissions on Draft Report of the Victorian Competition and Efficiency Commission's Inquiry into Aspects of the *Wrongs Act 1958*

#### 1. Key points and general comments

- Avant does not support winding back tort law reforms implemented following the Ipp report. Tort law reform has contributed significantly to the sustainability of the professional indemnity insurance industry and affordability of professional indemnity insurance.
- Any changes expanding the scope of compensation recovery will have an upward pressure on premiums.
- The Commission has estimated the overall potential average impact of the reforms on insurance premiums to be an increase with an upper bound of 4%. However Avant believes that overall the modelling behind the assumptions made in the report to reach this conclusion underestimates the additional claims costs, and hence underestimates the impact that these changes will have on premiums.
- The impact on claims costs and on premiums is inherently uncertain. One of the greatest sources of uncertainty in the costs estimates relates to how they may impact on scheme utilisation. The possible behavioural impact of the proposed changes, namely that plaintiffs are more likely to sue if their chances of success are higher, needs to be taken into account, as this can lead to an increased risk of unmeritorious claims, increased claims in the courts and increased legal costs.
- While the estimated overall potential average impact on insurance premiums may not be considered by the Commission to be “unduly adverse”, this does not take into account the impact upon individual insureds (for whom such an increase may be significant), nor does it take into account the potential for greater increases for individuals depending on their risk rating and specialty group/category of practice.
- The potential impact of the proposed changes needs to be considered in the context of any changes that may be made to the Federal Government's High Cost Claims Scheme and Premium Support Scheme for medical indemnity.
- The impact of the National Disability Insurance Scheme (NDIS) (when fully operational) on tort law is likely to be minimal in our view. It will not in our view reduce claims but has the potential to increase claims because the right to sue has not been extinguished under the Act, and in any event will only apply to the future care component. The potential

impact of the state-based National Injury Insurance Scheme (NIIS) is unknown given the lack of progress in implementation of this scheme.

- Any premium increases resulting from the proposed changes will be ultimately passed on to consumers via increased health care costs, an impact that is to the detriment of the community rather than to its benefit.
- Any change to the legislation may have a retrospective impact on previously notified matters which would need to be recouped by increases in future premiums, over and above those resulting from the impact of the proposed changes on future claims.
- As an organisation representing members practising around Australia we favour national consistency. We support changes that are consistent with the Ipp recommendations and the position adopted elsewhere in Australia. Differences in approach around the country leads to uncertainty, inconsistency and added cost.
- Lowering the thresholds for whole person impairments risks increased referrals to the Medical Panel, thereby increasing costs, and is likely to encourage smaller claims.
- The proposed changes to economic loss and the new head of damage for provision of care for others will have the biggest impact in larger claims. Although the numbers of claims affected are small, the increases in quantum resulting from these changes may be significant in larger claims.
- Avant supports the Commission's recommendation that a narrative test **not** be introduced. A narrative test increases uncertainty and will lead to increased costs due to increased referrals to Medical Panels.
- Avant supports the Commission's recommendation **not** to lower the discount rate. To do so would have a significant impact on the cost of claims and cost of professional indemnity insurance. We agree with the Commission's conclusion that lowering the discount rate would have an unduly adverse impact on the cost of professional indemnity insurance.
- Avant supports changes to the Medical Panel process to ensure that it is fair, more efficient and timely and less costly. Further discussion about actions that may assist the Medical Panels to make timely and accurate decisions would be beneficial.

## **2. Comments on particular proposed reforms**

### ***Domestic care and assistance***

Avant supports the Commission's recommendation that the threshold for recovery for damages for gratuitous care and assistance be cumulative (ie care for 6 hours a week *and* for 6 months). This is consistent with the Ipp report and the position taken in other Australian jurisdictions.

Permitting a plaintiff to recover damages for care to others is a new head of damage and will expand the scope and amount of compensation recoverable and put upwards pressure on premiums. However Avant notes that this head of damage is recoverable in NSW, Queensland and the ACT.

If this new head of damage is permitted in Victoria, the limitations and thresholds for recovery of damages under this head should mirror those for gratuitous care and assistance provided to a plaintiff.

### ***Discount Rate***

Avant supports the Commission's recommendation **not** to lower the discount rate. To do so would have a significant impact on the cost of claims and cost of professional indemnity insurance.

Avant agrees with the Commission's conclusion that lowering the discount rate would have an unduly adverse impact on the cost of professional indemnity insurance.

### ***Impact of NDIS and other government schemes***

Avant's view is that the impact of the NDIS on the proposed changes, and on tort law as a whole is likely to be minimal and will not reduce the likelihood of claims. Under the NDIS a participant in the scheme retains the right to sue, and may be required by the National Disability Insurance Agency to bring an action to obtain compensation. This may lead to an increase in claims which may put further upwards pressure on premiums.

The potential impact of the NIIS on tort reforms is unknown given the lack of progress in implementation of this scheme.

Any changes to the Federal Government's High Cost Claims Scheme and Premium Support Scheme will also put upwards pressure on premiums. The potential impact of the proposed

reforms on premiums for medical practitioners needs to be considered in the broader context of these medical indemnity schemes.

### **3. Information Requests**

#### ***Asymptomatic Blood borne diseases***

Avant does not support any changes to the position regarding blood borne diseases. Damage is the “gist of the action” in tort law and permitting recovery of non-economic loss for asymptomatic blood borne diseases would be contrary to fundamental principles of tort law.

To properly assess the potential impact on claims requires medical input regarding the clinical course of known blood borne diseases. The clinical course has an impact on if and when it is likely that a patient who has contracted a blood borne disease is likely to suffer damage to the extent that they would meet the threshold for non-economic loss under the Act.

#### ***Medical Panel Process***

Avant agrees that the Medical Panel process should be improved to increase efficiency and reduce costs.

From Avant’s perspective early access to relevant health information about the injuries claimed by the claimant would assist in determining:

- if a referral to the Medical Panel should be made, and
- if such a referral was made, specific submissions identifying issues within the health records that are relevant to the determination would then be possible.

One option for consideration is as follows: the claimant should supply to the respondent at the time of service of the Certificate of Impairment:

- a schedule of all injuries that are alleged to be the fault of the respondent and
- a further schedule listing all health information that the claimant has in his or her possession power or control.

The respondent would then have the right to obtain the health information it considered relevant, identify any other relevant health information and request the claimant provide that information. When both parties agree all relevant information has been obtained then the referral would be completed and the Medical Panel would be entitled to make a determination based on the material agreed to and supplied by the parties.

This could result in a decrease in disputes concerning determination being made in the absence of relevant information as both parties would agree at the time of referral that all relevant information had been supplied. Further it would potentially result in a quicker

resolution of meritorious claims as the full extent of injuries would be clear at the start of the claim process.

A further ongoing issue remains the nature and formulation of the medical question for consideration by the Medical Panel. The issue remains unresolved and this leads to significant delay and costs. We would welcome further discussion with the Commission and the Convenor of Medical Panels to consider ways of resolving this issue.

Avant Mutual Group

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