



National Policy Paper

2005

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The Philosophy of the Australian Lawyers Alliance

The Australian Lawyers Alliance believes strongly in individual freedom. We believe the primary function of a civilised society is to provide, to the maximum extent possible, an environment in which all individuals can achieve their full potential and engage in the pursuit of happiness without fear of injury, or the unwanted actions or attentions of others.

All civilised societies are fragile structures in which the rights and duties of individuals must be balanced against each other and in which the rights of individuals must, in turn, be balanced against the powers of social institutions and governments.

But it is important to recognise that governments and institutions exist solely to maintain and enforce the rights of individuals, and occasionally to mediate between them. Governments and social institutions are the servants of the people, not the other way around.

But how should that balance between institutional power and individual freedom be struck? The Australian Lawyers Alliance believes that power must be limited to the social purpose for which it is conferred. As John Stuart Mill put it in *On Liberty*:

‘The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.’

Lawyers and the independent judiciary have a fine tradition of standing between the power of the state and the rights of the individual. Where there is oppression or injustice, there are often lawyers helping people to fight it. Sometimes these people advocates suffer ridicule, even violence, at the hands of those whom they oppose.

Unfortunately, their fight is often a lonely one as, all too often, the public is either apathetic, or even hostile, to their stand. Edmund Burke once said that all it takes for evil to flourish is for good people to stand by and do nothing.

The Australian Lawyers Alliance believes that civil society requires us to do more than stand mute in the face of injustice. We are committed to advocating the rights of the individual through the rule of law.

We believe individual freedoms must be predicated on:

1. the recognition that all people are free to live their lives without injury, personal, political or religious oppression or prejudice;
2. equal access to justice before a truly independent judiciary;
3. limits on government power to interfere with individual rights;
4. a constitutional representative democracy in which all citizens have the right and ability to periodically elect governments.

Australian Lawyers Alliance policies are all based on these fundamental principles.

The Strength of Common Law

A principal objective of the Australian Lawyers Alliance is to ensure that people who have been injured by the wrongful conduct of others are able to recover adequate compensation for those injuries. We believe that the common law system of awarding compensation to accident victims is the most appropriate mechanism to dispense justice and deter wrongdoings in these circumstances.

The Australian Lawyers Alliance is opposed to no-fault schemes, which award compensation regardless of whether the person who caused the accident was at fault. We also oppose welfare-based compensation schemes, in which accident victims are forced to rely on social security payments, and are denied a right of redress before the courts. As a mechanism for dispensing compensation, common law is superior to these alternatives for four reasons.

First, a victim's entitlement to compensation under the common law is calculated according to their loss: the compensation should be sufficient to restore them to the position in which they would have been, had the accident not occurred. Empirical studies have demonstrated that no-fault and welfare-based schemes fail to provide anywhere near this level of compensation. As a result, these schemes are hopelessly inadequate as a means of providing accident victims with the assistance they require.

Second, common law deters people engaging in conduct that poses an unreasonable risk of injury to others. By requiring wrongdoers to pay compensation to those whom they intentionally or negligently injure, the common law performs an important social and regulatory function: encouraging the adoption of reasonable safeguards to protect others. Especially for governments and corporations – which typically obey only the imperative of their own bottom line – common law provides an economic incentive to avoid injury or damage to others: it's cheaper to control risk than to pay out damages. Under a no-fault or welfare based system of compensation, this regulatory effect simply evaporates.

Third, the common law system of awarding compensation discharges a vital role in revealing latent risks to society. Because the common law mechanism involves a causal analysis of the injury or damage, it assesses the adequacy of existing safety precautions and risk of injury. Discovery and proof of the detrimental effects of cigarette smoke and asbestos would have been delayed by many years had sufferers of smoking and asbestos-related illnesses not sued cigarette and asbestos manufacturers. No-fault and welfare-based schemes do not analyse why injuries occur, and so do not expose public hazards to analysis, scrutiny and regulation.

Fourth, no-fault and welfare-based schemes are inflexible, 'one size fits all', statutory systems that do not treat people according to their individual needs and circumstances. Consequently, they are invariably unfair to some accident victims. However, the common law system of awarding compensation commensurable with the injury suffered, which has been developed over hundreds of years, is far more flexible, and can be adapted to suit the particular parameters of each case.

The Australian Lawyers Alliance will always support the justice, flexibility and transparency of common law solutions to compensation issues over alternatives that are based on the cheaper or faster outcomes of inflexible statutory schemes.

The Litigation Explosion Myth

The Australian media regularly blames the so-called 'litigation explosion' for skyrocketing liability insurance premiums, and is particularly fond of citing this negative impact on worthy but penurious community groups and voluntary organisations that can no longer afford adequate insurance to hold their events.

These claims are based on the widely held assumption that the number of public liability and other civil claims being made in Australian courts is increasing. It is not. Data collected by the Productivity Commission from courts across Australia every year shows that civil court filing rates are static, or declining in some areas, and that this has been the trend for a number of years.

Nor are Australians becoming 'more American' and more litigious, or being consumed by a culture of blame, despite the constant media spin on this theme. Australians are suing at the same, or lower, rates than at any time in our history.

Insurers and politicians are also responsible for generating these spurious claims, keen to explain the 'hard' insurance market.

Economic downturns are experienced in every market sector and the insurance industry is no different. Hard insurance markets recur periodically and are usually the result of reduced profits following a period of aggressive competition among insurers. Occasionally periods of aggressive price-cutting are followed by a downturn in either the local or the global economy, resulting in capital flooding out of the insurance market and the liquidation of less prudently managed insurers.

This last happened in Australia in 2001-2003, when HIH/FAI and a number of associated insurers failed, triggering a collapse in competition. The surviving insurers were able to increase their premiums quickly and with few restraints, a phenomenon known as 'market failure'.

Sudden premium increases naturally worry consumers, particularly when they have become used to cheap and accessible insurance during periods of intense price competition between insurers. Instead of being easy and cheap, insurance becomes hard and expensive, and consumers clamour for explanations. In this instance, the easy way out for both insurers and politicians was to blame lawyers, litigation rates and the courts.

We say 'easy' because both sectors stood to benefit more from propagating the litigation blow-out myth than from acknowledging the truth.

When profits decline, insurers derive no benefit from admitting the true causes. Like politicians, insurance executives tend to take credit for increasing profits but blame declining profits on other factors 'beyond their control'. Blaming the litigation system for their woes had the added bonus of enabling them to lobby governments to pursue further 'tort reform' to reduce their risk exposure under already written policies. In short, not only could they blame someone else for the consequences of their own mismanagement, but they were rewarded for their trouble!

Even with depressed profits, insurers spend massive amounts on PR to reinforce their lobbying efforts. Often they find willing (though naïve) allies in consumers who are faced with paying steeply increased premiums. The injured, on the other hand, are out of work, struggling to make ends meet and unable to counter insurance propaganda. Lawyers who rise to their defence are accused of having a vested interest (an

allegation which, curiously enough, is rarely levelled against insurers who have a far greater interest in propagating their claims).

Politicians, meanwhile, are expected to fix things. They know that market failures are regular events, but also that there are no votes in acknowledging that this can happen for reasons over which they have no control. Nor are there any votes in opposing insurers' claims that increased premiums are the result of a litigation explosion.

'Tort reform' was the response. It allowed politicians to appear to be doing something which not only satisfied the insurers, and reinforced public opinion but passed the financial burden of having to subsidise the profits of failing insurers on to vulnerable, injured people by reducing their injury compensation.

To summarise: contrary to popular belief - whipped up by a combination of media spin and the dishonesty of politicians and the insurance industry - there has been no litigation explosion in Australia. Periodic premium increases are driven by normal market forces, and are not affected by tort reform. The insurance industry pushed for tort reform at a low point in its cycle. Now that the cycle is turning and insurers are announcing record profits - without any commensurate benefits flowing to consumers in the form of reduced premiums - we must oppose the erosion of our rights and campaign for their reinstatement.

Legal Advertising

Traditionally, lawyers have not advertised their services. But during the 1980s governments around Australia - responding to the imperatives of competitive practice advocated by numerous government and independent reports – introduced reforms allowing legal advertising.

The rationale was simple: people's needs are best met if lawyers can actively tailor their services to consumers' requirements and compete on that basis by advertising. Competition policy applies as much to legal services as it does to other markets and consumer services.

More importantly, content-rich advertising not only promotes competition but, increases the quality, volume and prominence of public information about the legal system. Because of what lawyers do, legal advertising tends to incorporate valuable legal information. The result is improved access to justice for people who might otherwise be unaware of, or poorly informed about, their rights.

However, as part of their response to the 'insurance crisis', some Australian governments have sought to reduce or ban legal advertising, particularly by personal injury lawyers. The most draconian legislation was passed in NSW, where advertising of personal injury or workers' compensation legal services was totally banned in 2002.

The NSW ban is written in very broad language. Regardless of the purpose of a public communication by a lawyer, if one of its effects is to promote a personal injury legal practitioner or service, then it is illegal.

The ban contradicts all the previous findings that recommended legal advertising in the first place. Increased advertising of legal services promotes access to justice; it does not increase 'frivolous' suits.

Second, banning advertising is an approach to law reform that is perverse at best. Politicians like to be photographed alongside asbestos disease sufferers as champions of injured people. Yet, simultaneously, they outlaw the best mechanism for informing people about their rights: public communications from a lawyer. The stated aim of the NSW ban is to reduce court cases. The message from policymakers is confused: you have rights; but we don't want you to know what they are, or to find a lawyer who can help you enforce them.

The last point concerns the wording of the regulations enshrining the ban, which is so broad as to catch not only commercial advertising, but *any* communication. Letters inviting people to participate in class actions and informing them of their rights at law, pamphlets and web material – not only from private law firms but also from community legal centres and other government agencies – and seminars or other public gatherings that disseminate information about legal rights, are all in breach if they contain information about personal injury or workers' compensation.

We believe that the advertising of legal services plays an important public information role and effectively promotes access to justice. It is preposterous for governments to claim to advocate rights on the one hand but on the other outlaws any discussion of them. Provided that advertising is not vulgar or misleading – requirements set out the Australian Lawyers Alliance code of conduct for members – it is a healthy part of our legal system.

Industrial Manslaughter

Some Australian jurisdictions allow criminal sanctions against employers whose negligence contributes to the death of a worker. The Australian Lawyers Alliance supports strong industrial manslaughter provisions and rigorous pursuit of prosecutions by state and federal authorities.

Statutory workers' compensation schemes help to protect workers and their families from the medical costs and lost income caused by serious workplace injury or death.

Common law damages, where available, give the worker or their family some compensation to recognise their intangible pain, trauma and loss of enjoyment of life. Common law damages also act as an economic disincentive: a rational employer or company will choose to implement safe systems of work rather than risk court-awarded damages payouts where it is cheaper to do so.

However, in some circumstances companies choose to continue to produce dangerous goods, or maintain dangerous workplace practices, because the profit involved is so great that it is worth the risk of continuing poor practice. Ford's approach to the explosive fuel tank in its Pinto hatch, and James Hardie's continued production of asbestos products are clear examples of this kind of rational, yet psychopathic, corporate behaviour.

Industrial manslaughter laws create criminal sanctions, including jail terms, for employers. In the case of corporations, those sanctions should include jail terms for senior executives who knew, or ought to have known, about the safety issue involved. By reinforcing the individual responsibility and accountability of senior managers, industrial manslaughter laws supplement common law with a powerful deterrent. The question of whether or not to stop a dangerous practice ceases to be a financial choice about the corporate bottom line and becomes instead a personal question for managers: do you want to go to jail for this?

Manslaughter and murder laws are used chiefly to punish violent acts perpetrated in moments of extreme personal stress; perhaps under the influence of drugs or in response to violent provocation. Taking life is seldom justified. It is most understandable when it occurs as part of a complex human story.

But when a company decides to continue production of deadly asbestos, or exposes workers to the dangers of a threshing machine without safety guards – and all in pursuit of greater profit – then the act is doubly culpable. What possible justification can there be for allowing corporate law to protect people from their cold, financially driven decisions to kill or maim?

Discount Rates

When a court awards damages for future economic loss (which include lost future income; expected medical and care costs; home or vehicle modifications to accommodate wheelchairs or other special needs), it assumes that the plaintiff will invest the lump sum and earn income from the investment.

Discount rates are percentages used to reduce the total amount of lump-sum compensation awarded to an injured person. The rationale for discount rates is that since the injured person will invest their lump sum, interest earned will increase the total amount of their damages award.

To ensure that the plaintiff is not 'better off' as a result of receiving money now – which they would otherwise receive only over time – the court applies a discount rate to reduce the lump sum. The higher the discount rate, the lower the lump sum awarded to a plaintiff.

The discount rate is intended to take into account:

- the expected rate of return on investments;
- real growth in wages/inflation; and
- likely future tax rates. (Tax rates are relevant because although the lump sum is not taxed, any income earned from the investment is taxed as income.)

In 1981, 3% was the appropriate discount rate determined by the High Court in *Todorovic v Waller*.

In recent years different states and territories have legislated various discount rates, some as high as 7%. Tort law reform applied these higher statutory rates to medical negligence and public liability cases on the pretext of ensuring consistency. This was an easy way to cut the cost of claims.

In March 1983 the NSW Motor Accidents Authority commissioned a report from two senior actuaries on the appropriateness of a 5% discount rate. They noted that the long-term real rate of return on investments was 2.6%, and that once tax is taken into account, the actual discount rate should be -1%. They concluded that the 5% discount rate was a totally inappropriate means of calculating an equivalent lump sum, which will satisfy the requirements of indemnity.

In 2001 in the UK, following investigations and economic research, the Lord Chancellor reduced the discount rate from 3% to 2.5%.

The difference that a few percentage points makes in the life of an injured person is best illustrated by an example.

A woman is seriously injured. She has a life expectancy of 44 years and has assessed expenses of \$5,000 a week for the rest of her life. At a 3% discount rate, if her award were invested 50% in fixed interest and 50% in fully franked shares, the \$5,000 could be drawn for about 44 years before the funds run out. With the proposed 6% discount rate, the funds would run out after about 23 years.

The Australian Lawyers Alliance opposes excessive discount rates and will continue to lobby for their reduction to the reasonable levels mandated by the High Court.

Statutory Workers' Compensation and Common Law

Common law rights to sue negligent employers for injuries caused to employees, once an accepted part of the industrial relations framework, have been eroded in many Australian jurisdictions: South Australia has a no-fault system with no access to common law; while NSW has set the injury threshold (30% whole person impairment or 'WPI') so high that it is almost impossible for workers to qualify.

Workers' compensation law of some kind has existed since the time of Bismarck. It was the humane state's response to increased danger in industrialised workplaces and remains a basic building block of law in Australia and other industrialised economies. Statutory workers' compensation benefits operate on a no-fault basis. To qualify for benefits, workers need show only that they were at work when injured - or, in some states, on the way to or from work. There is no need for workers to show that their employer was at fault.

Common law confers different rights on a worker. Where an employer breaches the terms of a work contract, or engages in a negligent act or omission, the worker may have a claim. Common law remedies always require proof that the employer was in some way at fault.

Combined with statutory schemes, common law remedies make a workers' compensation scheme cheaper and fairer by removing claims caused by negligent employers from the public purse: state resources are not used to subsidise negligent employers.

From an economic perspective, the award of common law damages also acts as an incentive to employers to provide safe working environments, since claims against them will increase their insurance premiums. Both through the economic imperative, and the public opprobrium associated with a finding of negligence, common law provides a valuable deterrent against dangerous work practices. Common law makes workplaces safer.

In some states, such as Queensland and Victoria, the two systems work very well together. An injured worker, needing medical treatment and no longer drawing a wage, is able to immediately access statutory benefits. Where the employer is not at fault, the worker can rely on the statutory scheme. But where an injury is caused through the fault of the employer, the worker can make a common law claim. Any damages awarded to the worker are then used first to repay the statutory scheme. The result is that the worker is prevented from 'double-dipping' and the statutory scheme recovers costs where fault is proved against the employer.

Comparisons of scheme performance show that well-structured schemes combining statutory and common law benefits financially outperform no-fault statutory schemes. Many state-run no-fault schemes run at a net loss to treasury. The role of common law in workers' compensation is therefore not only fundamental to the rights of workers, but also integral to the financial viability of statutory schemes.

The Australian Lawyers Alliance opposes any reduction in access to the common law in Australian workers' compensation schemes. We will continue to lobby for common law rights to be restored to those workers who have lost that access and promote workers' compensation schemes that combine statutory and common law rights as superior in every respect: in terms of financial viability, efficiency and fairness for workers.

Medical Assessment Panels

Medical assessment panels (MAPs) are groups of doctors brought together to assess degree of injury in disputed personal injury claims. The Medical Indemnity Policy Review Panel in December 2003, and the Ipp *Review of the Law of Negligence* in September 2002, both recommended increased use of MAPs.

MAPs are already in use in a number of Australian jurisdictions. The WA workers' compensation and NSW motor accidents schemes are two examples. In NSW, the medical determination of an injured person's rights is made by a single doctor rather than a panel.

Fiona Tito, principal consultant to the Australian Health Ministers' Advisory Council, reported on MAPs for the Australian Consumers Association:

"Setting up yet another formal determination body staffed by doctors without any protection of the rights of an injured patient is another administratively costly exercise, which will simply add costs, adversarial elements and delays to an already tortuous system. If it can decide whether or not a claim can proceed, it would need to be more independent and appealable to avoid accusations of doctors being judges in their own courts."

The Australian Lawyers Alliance opposes the use of MAPs for the following reasons:

1. MAPs take decisions affecting the rights of injured people away from the courts and place them in the hands of doctors. Whereas the judicial system is subject to open and accessible systems of review and appeal, MAPS wholly or partly remove these rights. Transferring these decisions from the judicial system undermines our system of justice.
2. MAPs can require doctors to decide questions of causation and therefore liability. Established legal tests are subverted by doctors who apply medical standards of causation that are inconsistent with current law.
3. There are serious concerns about the independence of the doctors appointed to MAPs. For example, doctors retained by the WA WorkCover Authority are employed without public consultation, on confidential contracts, and are subject to summary dismissal. Doctors are effectively under pressure to make medical assessments that favour the interests of the WorkCover Authority, contrary to the interests of the injured.

Similar concerns have been echoed in NSW, where a district court judge has held that interference by the Motor Accidents Authority with a medical assessment report constituted *'an absence of procedural fairness'*, went *'beyond power and [was] unauthorised'*, and was *'suggestive of bias on the part of the MAA'*.

4. Concerns about independence are more acute where doctors are asked to assess cases of alleged medical negligence, particularly as specialists are likely to be close colleagues if not friends. The recent Walker Inquiry into NSW Hospitals has shown that it is not efficient, safe or reliable for medical practitioners to assess their own colleagues' conduct.

5. MAPs add another layer of bureaucracy and delay to court proceedings. In NSW, a medical assessment takes a minimum of six months with delays often extending this to ten months.

The Australian Lawyers Alliance opposes the further introduction of MAPs and will lobby to remove MAPs in jurisdictions where they already operate.

Where MAPs are already in operation we support the following principles to maximise the independence and fairness of a medical assessment process:

- i. Stakeholders should be consulted in the appointment of doctors.
- ii. Treating clinicians should be appointed in preference to medico-legal consultants.
- iii. Assessors should be guaranteed independence from regulatory authorities, just as judicial officers are independent of the legislature.
- iv. Communications between regulatory authorities and doctors should be public and transparent.
- v. Clearly defined rights of review and appeal should be readily available.
- vi. Ultimate rights of review should rest with a court.
- vii. Legal questions of causation should be decided according to established legal principles by legal experts, rather than by medical experts operating in a medical paradigm.
- viii. Where there is a major conflict of medical opinion, the issue should not be determined by a single doctor.

Caps on Legal Costs

In some Australian jurisdictions there is an upper limit on the amount of legal fees that a successful plaintiff can be awarded. NSW provides a simple example: in any claim for damages for personal injury that results in an award of damages less than \$100,000, the maximum that a lawyer can be awarded in costs is \$10,000 or 20% of the damages awarded – whichever is the greater.

There are two key difficulties with this kind of restriction:

1. The amount of damages recovered is not related to the complexity of a claim. The fact that the compensation awarded in a case does not exceed \$100,000, does not mean that the case didn't raise serious legal complexities, involve many different people and companies in a complicated factual scenario, or involve questions on important matters of public interest that needed to be investigated.
2. Where an injured person pursues litigation but is awarded less than the \$100,000 limit, their legal fees – especially in a complex case – may well exceed \$10,000. The result is that the injured person will have to dip into their damages award to pay their lawyers. Even in claims under \$100,000, defendants can mount such vigorous defences that the legal costs involved exceed the ultimate judgment. This can happen whether the defence was meritorious and the legal costs stemmed from the inherent complexity of the case, but can also occur where defences are dilatory and merely delay the case, thereby adding to the costs.

Caps on legal costs prevent some claims from reaching the courts, as pursuing complex cases for amounts less than \$100,000 is a financially questionable proposition. Injured people who can afford lawyers will question the risk involved themselves. Lawyers who offer no-win no-fee services – thereby effectively supplying the civil legal aid no longer widely available through Legal Aid Commissions – will find it economically unviable to support complex claims under \$100,000.

The result is an effective barrier to accessing the justice system for those people whose injuries are assessed as being worth less than \$100,000. No equivalent barrier exists for economic losses sustained in business.

Proposals to limit the costs recoverable in relation to the amount awarded in a particular claim must be approached with caution. Contingency fees are illegal in Australia: lawyers cannot charge fees proportionate to the eventual damages award. However, the converse is legal: recoverable lawyers fees can be limited proportionate to the eventual damages award.

The Australian Lawyers Alliance is opposed to any system of caps that prevents injured people having full access to unfettered legal advice and being able to exercise their rights to pursue valid claims through the courts.

Access to Justice

All Australians are entitled to be treated equally before the law irrespective of their sexual, religious, ethnic, cultural, social background. But people are not equal before the law unless they have equal access to an equitable justice system before a truly independent judiciary. A fair and equitable justice system must address the legal needs of the community and work to improve access to justice, particularly by economically and socially disadvantaged people. However, there are now more barriers than ever marginalising disadvantaged groups from the justice system.

Many of those considering litigation or review proceedings require assistance to meet the costs involved. Such assistance is provided by legal practitioners and by the government. It can be secured through a variety of pro bono, litigation lending and insurance schemes, via legal aid and, indirectly, through tax-deductible legal expenses. However, Justice Kirby has commented that, in Australia, plenty of people do not even know their legal rights and are often afraid of exercising them. They fear the costs and rightly so, and unless they receive some help they effectively do not have access to the courts or to the law.

The high cost of legal services, one of the key barriers to access to justice for disadvantaged groups, is exacerbated by inadequate funding for assistance schemes, especially legal aid. The availability of legal aid is extremely limited (and is subject to a stringent means test), while funding for community legal centres (CLCs), legal aid and other organisations has decreased and services such as aboriginal legal services have been tendered. All these factors have resulted in an increase in self-represented individuals, particularly in the Family Court. The increase in unrepresented litigation is held responsible for making litigation slower and settlement less likely, increasing costs to the other party and to the court or tribunal, and in more people pleading guilty because they feel they have no option. Thus, existing inequalities have become more deeply entrenched.

Access to justice is also about more than just formal representation and courts. It is about being able to:

- 1) obtain adequate legal assistance including information, basic legal advice, initial legal assistance and legal representation;
- 2) participate effectively in the legal system, including having access to courts, tribunals, and formal alternative-dispute resolution mechanisms;
- 3) obtain assistance from non-legal advocacy and support including non-legal early intervention and preventative mechanisms, non-legal forms of redress and community based justice; and
- 4) participate effectively in law reform processes.

Attempts to limit claims and litigation, including capping legal costs for claims and restricting or banning legal advertising, have been at the expense of people's access to justice. Moreover, the public's general lack of understanding of the law effectively limits people's scope to participate in law reform processes affecting their civil rights. The erosion of the presumption of innocence, the right to silence, access to legal

representation and to the system of review and appeals, together with ever-increasing powers to detain individuals, all undermine our democratic rights.

The Australian Lawyers Alliance opposes further reductions in funding for legal access. Commonwealth funding for legal aid and community legal centres (especially family law and child protection) must be adequate to ensure a reasonable level of access for all. We also oppose proposals restricting the right to legal representation, since access to legal services and information is vital in promoting equality before the law.

Independence of the Judiciary

The Australian Lawyers Alliance believes that individual freedoms ultimately depend on equal access to justice before a truly independent judiciary. We support the principles and institutions of our common law system, which serve to ensure equality and fairness before the law and a fearless independent judiciary free that is from political influence, as required under the Westminster system of government.

Public confidence in this system requires that it is perceived to adhere to these principles, as well as to adhere to them in fact. It is crucial for the judiciary both to be and to be seen as independent of the government, as work involves reviewing and interpreting acts of the executive. Judges have security of employment by nature of their tenured appointment, and this security allows them the freedom to make decisions that may not be popular with government. Independence means that a judge has no personal stake in the outcome other than determining a correct and fair decision. Impartial decision-making means that there is less chance of any perception of bias and that the judiciary will enjoy the respect and trust of the community. Chapter III of the Australian Constitution provides security of tenure maintaining a retiring age for judges at seventy in both the High Court of Australia and Federal courts.

However, judges can be appointed on a fixed-term basis (so-called 'acting judges') to state courts thereby threatening to undermine the judicial independence protected by security of tenure. In Victoria proposals to allow the Governor-in-Council to appoint as many acting judges of the Supreme Court as are necessary for transacting the business of the court would seriously impair the judicial independence of judges. An acting judge is eligible for appointment for a second five-year term subject to the government's discretion, and not entitled to reappointment thereafter. Fixed term appointments are likely to generate the perception that appointees are subject to political pressure. Even if the government has no intention of putting any pressure on appointees to act in a particular manner, appointees must be aware that, after their term expires, any further appointment is entirely at the discretion of the government.

Similar proposals have been made to modify the appointment of president of the Administrative Appeals tribunal (AAT) from a tenured position to a fixed term. Tenured appointments were seen as reducing the flexibility of the tribunal to respond to the changing caseload. Why that would be the case is unclear. There is no valid reason why the standard of judicial independence in the AAT, Australia's highest administrative tribunal, should be any lower than that guaranteed to judges of federal courts.

The Australian Lawyers Alliance believes that removing guaranteed tenure will erode judicial independence. No efficiency or fiscal imperative should supersede the interests of justice, both in fact and perception.

Children in custody

Australia is the only country in the world with a national mandatory detention policy, which cannot be reviewed by a court. Detention of asylum-seekers is automatic. From the outset, asylum seekers are classified as non-citizens with unlawful status because they have tried to enter the country without a visa or travel authorisation. In fact, Australian law prohibits the release of detained asylum seekers while their refugee status is being determined. Mandatory detention therefore applies until they are either granted a visa, or are deported.

The Australian Lawyers Alliance opposes mandatory detention. Detention is undesirable for vulnerable people including children who have already suffered great hardship and who should not be imprisoned in any event like convicted criminals. While opinions as to the legitimacy and justification of our migration policy are polarised, our obligations in relation to children in particular, are clear.

Australia's ratification of the United Nations Convention on the Rights of the Child (CROC) in 1990 obliges it to maintain standards to protect children's rights, upholding the 'best interests of the child' as paramount and providing them with humanitarian assistance. Detaining children is strongly discouraged under the CROC. Article 37(b) of the Convention provides that detention should be used only as a measure of last resort and for the shortest appropriate period of time. Any detention of children must be subject to periodic judicial review. This provision was not intended to be used to endorse the mandatory non-reviewable detention of unauthorised child arrivals for prolonged periods in Australia.

The Australian Government argues that a major factor contributing to prolonged asylum-detention is the typically lengthy process when asylum-seekers lodge appeals with the Refugee Review tribunal and courts. Reforms invariably aim at allowing courts to dispose of matters summarily and prohibit lawyers, migration agents and others from encouraging 'unmeritorious' migration litigation, which will involve the risk of a personal cost order against lawyers. These measures are claimed to facilitate quicker handling of migration cases by deterring unmeritorious cases. However, they greatly reduce the ability of refugees to exercise their legal rights to redress. Australia not only uses the CROC provisions to justify the detention of children, but also continues to restrict access to judicial review required by CROC.

Limiting access to judicial review for asylum-seekers, including children, not only violates CROC, but denies detainees equal access to justice before a truly independent judiciary. Such access is fundamental to satisfy the 'well-founded fear' test required for refugee status.

The current mandatory system effectively condemns children to live in a confined depressing environment with inadequate facilities and services, and deprived of an appropriate standard of education. Not only does the Government deny that such violation of the rights of children are endemic in the current system of mandatory detention, but any 'lapses' are justified on the basis of necessary 'border control'.

The Australian Lawyers Alliance believes that all children must be released from detention immediately and that the system of mandatory detention in general should be reviewed. An alternative system must be developed with a revision in policy with the primary consideration being the best interests of the child.