Australian Doctor.

Dr Atkins ... tort law reforms have left him "pissed off ... both as a doctor and as a human being".

Pressure is growing to wind back law reforms that have helped reduce legal action against doctors.

BY JOHN KRON

Damage control

DR Chris Atkins is in a unique position to observe the impact of tort law reforms on patients injured in medical mishaps. And he is "pissed off ... both as a doctor and as a human being".

Dr Atkins, a GP in Woodend in country Victoria and a part-time lawyer at Melbourne law firm Galbally & O'Bryan, is one of many people who believe the reforms have gone too far.

The reforms restrict personal injury claims, including claims for medical malpractice, making it more difficult for people to sue for compensation when they are injured as a result of negligence. The reforms are credited with reducing insurance premiums, including medical indemnity, and have lead to a substantial fall in personal injury claims.

However, calls to reconsider the reforms and roll some back are growing louder, with the Law Council of Australia saying the system is out of balance and the NSW Supreme Court Chief Justice Jim Spigelman saying the changes have gone well beyond recommended changes, resulting in "anomalies and injustices". At least one state government is inquiring into the impact of the reforms.

Dr Atkins says a case involving a woman in her 50s highlights how unfair the reforms are for injured people.

The woman came to his law office earlier this year to inquire about suing a hospital for negligence after her bowel was perforated during surgery.

Dr Atkins says her injuries were avoidable.

In January 2004 the woman was admitted to hospital with a bowel obstruction, but was kept under observation for about a week. The perforation occurred when she finally had exploratory surgery, but it was not diagnosed until a few days later.

Subsequently, she lost a substantial part of her bowel and 10 weeks after admission was discharged from hospital.

"The woman was left with a small amount of residual pain, but it was a large, unsightly abdominal scar that troubled her most," Dr Atkins says.

"For a year after she was discharged she didn't have sex with her husband, and [even then] still felt reluctant because she didn't feel attractive to him."

Before the tort law reforms, Dr Atkins says the woman would have been eligible for $60,000-$100,000 if negligence had been proved. However, now he had to tell her he could not take on the case because under the reforms she would not receive any compensation for pain and suffering and could even be out of pocket.

"I get pissed off when cases like these come in, both as a doctor and as a human being," Dr Atkins says.

> "I am acutely aware of the suffering she has been through. Yet I highly doubt she will get any compensation."

"As a medico I can see there has been negligence. And unlike other lawyers who are sympathetic but don't have as good an understanding of what patients experience, I am also acutely aware of the suffering she has been through. Yet I highly doubt that she will get any compensation."

The tort law reforms introduced in recent years by state and territory governments are mostly based on recommendations from the Federal Government's Review of the Law of Negligence, released in October 2002.

Yet, on the eve of the review's third anniversary, there are concerns the negative impact on patients injured in medical mishaps outweighs the claimed benefits of the reforms.

The setting of impairment thresholds on compensation for general damages, which take into account non-economic loss such as the emotional and physical distress of pain and suffering, has angered critics of the reforms most of all. They say it effectively gives a negligent doctor the "right to injure a patient up to a specific level".

Last month Justice Spigelman told an international law conference in London that "the speed, some would say haste, with which the changes were introduced in Australia was such that there are substantial pressures emerging for some changes to be reversed".

In June, Mr John North, Law Council of Australia president, told a personal injury and compensation forum that arbitrary restrictions on compensation, particularly thresholds on compensation for pain and suffering "are hardly changes for the better — which is what reform meant last time I looked".

Mr North says the changes to the law since 2002 were made "hastily and without sufficient regard to the consequences they would have for injured Australians".

Most states have introduced thresholds on compensation for general damages. For example, in NSW a person

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Review wrap

THE Federal Government announced in July 2002 that it would conduct a review of negligence laws, headed by NSW Supreme Court judge Justice David Ipp. The recommendations of the review were released in October 2002.

State and territory governments implemented most of the recommendations, including:

- Reduced time to make a claim. For example, in Victoria claims can be made up to three years after discovery or 12 years after the incident occurred.
- Introduction of thresholds for compensation. This makes smaller claims for general damages, including pain and suffering, uneconomical to pursue.
- Caps on payments such as general damages, future wages and payments to family members providing care. For example, in Queensland the cap is $250,000.

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cannot claim general damages if their injury is judged as being 15% or less of the most extreme case such as a quadriplegia.

Even if patients, such as the one seen by Dr Atkins, are assessed above that threshold, the cost of the claim, particularly legal fees, can stop them pursuing the claim. A case that goes to court can be very costly, with the added risk of having costs awarded against the patient if they do not succeed.

"Even if the woman who suffered a perforated bowel was to win $40,000, it might not be enough to cover the legal costs," Dr Atkins says. "In addition, if she were to lose she may receive an order to pay the [hospital's] legal costs.

"So we usually have to tell clients like her that pursuing the case is not worth the risk."

The NSW Parliament is holding an inquiry into the tort law reforms in that state and expects to release a report before the end of the year. Other states and territories will be looking at the inquiry outcome as they continue to monitor the impact of the reforms.

The NSW inquiry may include recommendations to roll back some of the reforms or introduce a scheme to deal with the harshest effects.

Ms Lee Rhiannon, a Greens NSW parliamentarian who sits on the committee conducting the inquiry, says there are members of both Labor and the Coalition who agree that the tort law reforms have gone too far.

Whether the major parties will allow their members to support a roll-back of the reforms is unclear, "however there are precedents for them to vote according to their conscience", Ms Rhiannon says.

The inquiry may recommend reducing the threshold for general damages or the introduction of a workers' compensation-like scheme for medical negligence that covers injured people who are deterred from making legitimate claims because they fall below the threshold.

However, the recommendations will have to consider the financial consequences of rolling back the reforms.

One of the principal goals of the Review of the Law of Negligence and subsequent tort law reforms was to decrease medical indemnity and other insurance premiums by reducing the total number and cost of payouts. In this respect, they have had some success.

Dr Andrew Miller, Medical Indemnity Industry Association of Australia (MIIAA) chairman, says medical indemnity premiums fell by 4% from June 2003 to June 2004. "Anecdotally, it seems the reduction for the year 2004-05 will be similar or greater," he says.

At the same time the total number of claims fell by 7% in 2003-04 "after a rapid increase in the previous decade, [and] some of this reduction is attributable to tort law reform", Dr Miller says.

Although the total cost of claims increased by 3% in 2003-04, considering the rises in previous years "this demonstrates the need to ensure that tort law reform stays in place", he says.

However, for many it is disconcerting that tort law reforms that have directly benefited doctors have had a detrimental effect on some victims of medical mishaps.

Professor Peter Cane, an academic lawyer and co-author of the *Review of the Law of Negligence* report, admits that some patients injured by medical negligence are losers under the reforms.

"If we assume that no more money has been put into the public health and social security systems, and that the outcome of the tort law reforms has been that less money is going into compensating victims of medical accidents, then these victims have been the losers," he says.

Mr Bill Madden, of the Australian Lawyers Alliance, says it is unfair to deny compensation to people with legitimate claims, because the link between premiums and claims has not been proved.

"The [MIIAA] states that 49% of the total cost of claims is attributable to those costing $500,000 or more," says Mr Madden, a plaintiff lawyer at Sydney law firm Slater & Gordon.

"The government underwrites 50% of these large claims. That means about one-quarter of all claims are underwritten by the government, which would have had the greatest impact on reducing premiums," he says.

Professor Cane, of the Australian National University law faculty, agrees that the rise in premiums before the tort law reforms was largely due to events affecting the insurance industry, particularly the terrorist attacks on New York, the collapse of reinsurance company HIH and the financial problems at United Medical Protection. He also agrees that government underwriting has turned the heat down on insurance costs.

"But at the same time there is a link with premiums because the largest single expense for insurance companies, more than 50%, are tort payouts," he says.

"The system is extremely complex. However, there's no doubt that the tort law reforms have contributed to a downward pressure."

Regardless of the economics, Dr Paul Nisselle, senior risk management adviser with the Medical Defence Association of Victoria, defends the reforms in terms of fairness.

"Despite plaintiff lawyers saying people have lost the right to sue for justified negligence, the fact is that this only applies for non-economic loss such as compensation for pain and suffering," he says. "The right to sue for economic loss has not changed.

"So if you have had a bowel perforated during surgery and have been unable to work for six months, you can still make a claim for the lost wages."

As for pain and suffering, Dr Nisselle says: "The tort system is about restorative justice and that means making up for economic loss. A payment for pain and suffering cannot be portrayed as restorative."

A missed opportunity

THE Federal Government "wimped out" when it commissioned the *Review of the Law of Negligence*, says Ms Fiona Tito-Wheatland, who conducted a wide-ranging review of professional indemnity in 1995.

Ms Tito-Wheatland saw the danger signs for the medical indemnity industry when she conducted the Review of Professional Indemnity Arrangements for Health Care Professionals and warned that governments had to take action to avert a crisis.

She repeated her warning to successive governments, claiming that a crisis was inevitable if the substantive changes recommended by her review weren't implemented.

There was no response to her warning and the crisis she predicted occurred with the near collapse of Australia's biggest medical indemnity insurer, United Medical Protection, in 2002.

Ms Tito-Wheatland says the opportunity to achieve a lasting solution was missed again by the latest review.

"The government had a pre-determined solution to the medical indemnity problem that they didn't understand or did understand but found the most appropriate solutions too unpalatable," says Ms Tito-Wheatland, who is now a health policy analyst at the Australian National University's research school of social sciences.

"What they ended up implementing were reforms that were anti-patient and anti-quality health care."

The most commonly touted alternative solutions remain a no-fault scheme, which has little government support, and a scheme similar to existing workers' compensation systems, which are fault-based but the amounts paid to injured people are set and guaranteed.

In June 2003 then AMA president Dr Bill Glasson told a press conference: "Essentially ... we've got to move away from a system where we've got to prove fault. And we've got to judge people on the fact they have a disability, for whatever reason, and hence they need compensation.

"[Without this change] I think we're going to follow the American history [where] we repeat this cycle every five years."

By his counting, the next medical indemnity crisis is just two years away.