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# Sick leave and workers' compensation for police officers in Australia

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*In Australia it has been necessary to enact specific provisions into industrial and employment laws to ensure workplace protection and coverage of police officers because at common law police officers have not been regarded as employees. Police unions in Australia have emerged as strong industrial players and have secured a range of terms and conditions of employment which do not apply to the broader workforce. However, the battle in relation to workers' compensation coverage and extended sick leave seems to be ongoing, particularly in Western Australia. The area of interaction between workers' compensation laws and sick leave entitlements is often neglected against the background of other industrial matters concerning police. This article investigates the entitlements of Australian police officers to these benefits against the historical background of industrial laws. It concludes that there is no uniformity in coverage for workers' compensation and sick leave and that the publicly available data in relation to absence from work of police officers due to sickness are generally incomplete and present challenges for cross-jurisdictional comparisons. The article points to future areas of research into police sick leave.*

## <DIV>INTRODUCTION

Police unions have been significant, outspoken<sup>1</sup> and successful industrial players in Australia. Police unions have been in existence in Australia since the early part of the 20th century. In fact, as early as 1917 police were given the right to argue before industrial tribunals for better pay and conditions in Queensland. Police unionism began in South Australia in 1911.<sup>2</sup> In Western Australia, the Western Australian Police Union of Workers was formed in 1926 and registered as an industrial union.

Police unions have been characterised by strong membership, often achieving closed shop arrangements.<sup>3</sup> This is despite the historical prohibitions on collective political activity and banning of police from membership of political organisations until the early part of the 20th century.

Governments have recognised the electoral importance of police unions. Political and industrial issues have always been closely linked in Australia. Finnane has identified that one of the primary objectives of police union campaigns over the last 80 years has been to seek provision of "delayed" benefits such as pensions, superannuation, sick leave and workers' compensation.<sup>4</sup> These objectives

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<sup>1</sup> See eg comments in relation to the negotiation of the Western Australian Police Industrial Agreement 2006 WAIRC 05857 by Dean M, President, Western Australia Police Union, *WA Police News* (February 2007), <https://www.wapolun.org.au/getfile/82.pdf> viewed 11 July 2008, noting that the excellent result of negotiations "was even more remarkable given that we were up against an intransigent Premier, an arrogant Treasurer, an unhelpful Minister and many Government Members of Parliament who proved to be only fair-weather friends".

<sup>2</sup> Burgess M, Fleming J and Marks M, "Thinking Critically about Police Unions in Australia: Internal Democracy and External Responsiveness" (2006) (7)5 *Police Practice and Research* 391 at 393.

<sup>3</sup> Burgess, Fleming and Marks, n 2.

<sup>4</sup> Other objectives have included wages and conditions, disciplinary matters and penal and social reform. See generally Finnane M, "Police Unions in Australia: A History of the Present" (2000) 12(1) *Current Issues in Criminal Justice* 5, paper presented at

are closely aligned to health and safety concerns in relation to police. Swanton points out that, given that there are over 35,000 sworn police,<sup>5</sup> the costs of lost time, early retirement, compensation and medical treatment are enormous. He notes that some of the factors contributing to these costs (eg resignations and recruitment) at times become the subject of industrial dispute and political manoeuvrings,<sup>6</sup> which further reduces the quality of police officers' working environments.<sup>7</sup>

This article is concerned with the issue of sick leave and workers' compensation entitlements for police officers. It discusses the apparent lack of uniformity in entitlements in Australia in relation to police sick leave and workers' compensation coverage.<sup>8</sup>

First, Western Australia remains the only Australian jurisdiction which does not provide workers' compensation coverage for police officers who suffer injury or disease through work. The article briefly examines the legal status of police officers.

Secondly, Western Australian police officers appear to have superior sick leave entitlements compared to officers in other Australian jurisdictions. However, this cluster of entitlements needs to be considered against the lack of coverage for workers' compensation. A range of sick leave options is reviewed in an examination of the nature and rate of injury and disease affecting police officers and the current coverage of officers for workers' compensation.

Thirdly, the use of sick leave by police officers is the source of continued investigation and concern in several Australian jurisdictions. The article examines the available data in relation to sick leave and workers' compensation claims.

Finally, the article reflects upon the lack of statistically uniform data in relation to injury and disease experienced by police officers in Australia. The article concludes that management of sick leave and workers' compensation claims would be improved if police department administrations gave priority to uniform data collection. It proposes that there is much to be gained from cross-border comparisons of the rates of absence from work caused through work and non-work-related illnesses.

#### <DIV>THE EMPLOYMENT STATUS OF POLICE OFFICERS IN AUSTRALIA

At common law Australian police do not fall within the employer-employee relationship. This position seems to remain stubbornly persistent despite some cracks in judicial opinion<sup>9</sup> and growing commentator criticism of the failure of the common law to review the status of police.<sup>10</sup> The oft-

the "History of Crime Policing and Punishment" Conference, Australian National University, Canberra, 9-10 December 1999, <http://www.aic.gov.au/conferences/hepp/finnane.pdf> viewed 8 July 2008. [AQ: change OK? Yes thanks ok] See also Burgess, Fleming and Marks, n 2.

<sup>5</sup> These data relate to a 1987 study: see Swanton B, "Police Work and Its Health Impacts", *Australian Institute of Criminology, Research Brief No 7* (1987) p 2, <http://www.aic.gov.au/documents/8/4/5/%7B8452E541-A7D6-45C7-93B0-5306400C35D7%7Di07.pdf> viewed 10 July 2008. For recent statistics on sworn police numbers, see Table 3 below.

<sup>6</sup> Note the strident comments of the President of the Western Australia Police Union asserting that the Labor Government had a "fascist pay stance" in relation to wage negotiations: "Police Told to Prepare for Bitter Pay Dispute" (23 June 2009), <http://www.abc.net.au/news/stories/2008/06/23/2282749.htm?site=southwestwa> viewed 11 July 2008. See also the pressure applied by Opposition spokesperson on police matters, Shadow Minister for Employment Protection Murray Cowper, in his statement on 27 February 2008, "Police Compensation Bill Stalled by Carpenter Government Since 2006", <http://murraycowper.com/mediareleases/policecompensation.pdf> viewed 19 March 2010.

<sup>7</sup> Swanton, n 5, p 2.

<sup>8</sup> This issue is also one of the matters nominated for further research by Lynch J, "Australian Police Workforce Planning Priority Research Directions – A Scoping Paper", *Australasian Centre for Polity-Policing Research, Report No 148.1* (2006), <http://webcache.googleusercontent.com/search?q=cache:v19Gmxz8deOJ:environmentcrimes.com/Police/Education%2520Researches/Australian%2520police%2520workforce%2520planning%2520priority%2520research%2520directions%2520A%2520scoping%2520paper%2520.pdf+Lynch+J,+%E2%80%9CAustralian+Police+Workforce+Planning&cd=1&hl=en&ct=clnk&gl=au> [AQ: I have added this new link – pl check OK wonderful work] viewed 19 March 2010.

<sup>9</sup> For example, *Konrad v Victoria Police* (1998) 152 ALR 132; 78 IR 54; *Re Australian Federal Police Association* (1997) 73 IR 155; and *Attorney General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237, in particular Dixon J (at 252) who seemed to departed from the majority on this point.

<sup>10</sup> See generally the excellent survey in Carabeta J, "Employment Status of the Police in Australia" (2003) MULR 1, <http://www.austlii.edu.au/au/journals/MULR/2003/1.htm> viewed 7 April 2010.

quoted authority for this proposition is *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1955) 92 CLR 113<sup>11</sup> which, together with a number of other cases,<sup>12</sup> holds that police officers are not employees but are office-holders with "original authority" in the execution of their duties. It has been observed that because police exercise special discretionary powers derived from the law itself, a police officer is a servant to the law and not to any other authority. In addition, police officers swear an oath of office.

These factors have led some superior courts to hold police to be outside the normal employer-employee relationship. As a consequence and important for the purposes of this discussion, the ability of police officers to obtain the protection of employment laws has been vexed. Police officers in most States and Territories have the protection of most employment laws by reason of special deeming provisions. State and Territory legislatures, being aware of the common law restrictions on the status of police officers, have moved to specifically include police officers in a range of employment-related legislation by amending threshold definitions of the employment relationship to broaden their scope beyond the common law. This is particularly the case in industrial matters.

More recently, this approach has broadened to include the deeming of police to be employees and/or workers for the purposes of occupational health and safety and workers' compensation. There is case law which holds that police officers will be regarded as employees for the purpose of the *Disability Discrimination Act 1992* (Cth), on the basis that the definition of "employee" under that Act encompasses the nature of the relationship between a police officer and Police Commissioner.

Police officers have also succeeded with claims under State and Territory anti-discrimination laws.<sup>13</sup> These cases may have some significance because they leave the way open for police officers to pursue claims (grounded upon anti-discrimination principles) relating to sick leave entitlements which may not have been granted or which may have been granted subject to conditions which do not apply to other forms of leave. In addition (as discussed below), the arbitrary application of regulations to terminate an officer's service on the grounds of ill health may be in breach of disability discrimination laws.

#### **<DIV>THE NATURE AND RATE OF INJURY AND DISEASE AFFECTING POLICE OFFICERS**

There is abundant literature to support the proposition that police officers are engaged in dangerous work. While significant publicity and media attention are given to the high incidence of injury and disease to police officers caused through intentional violence inflicted upon police officers, an even higher incidence of injury and disease to police officers can be attributed to accidental injury and contraction of disease. Also, considerable reliance is placed upon data obtained and research conducted in the United States of America which may not have direct application in Australia, due largely to the significant difference in gun ownership laws and the use of firearms by police officers in Australia.<sup>14</sup>

However, save for injuries inflicted by firearms, the United States literature has some resonance with the Australian situation where there are corresponding data. Mayhew, in her comprehensive international literature review of occupational health and safety risks to police officers, highlights the

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<sup>11</sup> A decision on appeal from the High Court to the Privy Council.

<sup>12</sup> For example in Western Australia, see *Minister of Police v Western Australian Union of Workers* [2000] WAIR Comm 226, in particular the extensive survey in the judgment of Sharkey P (with whom Commissioners Fielding and Scott agreed) as well as *Irvin v Whitrod (No 2)* [1978] Qld R 271; *Sellars v Woods* (1982) 69 FLR 105.

<sup>13</sup> *Taylor v Western Australia (WA Police Service)* HEROC H99/49 (8 December 1999) (held that the claimant could proceed with claim; dismissed respondent's defence that HEROC had no jurisdiction based on the claimant not being an employee); *Trindall v New South Wales Commissioner of Police* [2005] FMCA 2 (officer established claim for disability discrimination based on sickle cell condition; treated unreasonably in work allocations/restricted duties); *Coleman v Commissioner of Police* [2001] NSWADT 34 (officer denied promotion alleged this was related to disability; succeeded in claim for damages and apology); *Zraika v Commissioner of Police, New South Wales Police* [2004] NSWADT 67 (discrimination on the grounds of visual impairment established; ordered to pay damages and properly assess application).

<sup>14</sup> Swanton, n 5. Swanton notes that the rates of deaths and wounding by gunshot in Australia, compared to the United States of America, are infinitesimal.

diversity of potential dangers faced by police officers.<sup>15</sup> They include potential fatal injury and serious assaults, although she notes that relatively small numbers of police officers are killed in the course of their duties (about one per year). Police vehicle crashes result in more deaths than police officer homicides and are a considerable cause of concern. The numbers of assaults far exceed fatalities, and are probably increasing.<sup>16</sup> About 10% of all police officers are assaulted each year and Swanton notes police officers are subjected to higher rates of assault than the general community.<sup>17</sup>

In addition to the risk of assault, police officers face the additional risks of harm through exposure to communicable diseases, which include HIV, Hepatitis B and other debilitating viruses that may be transferred through attacks with syringes, bottles, saliva and airborne cough droplets. While the risk of HIV infection is low, the consequences are dire and give rise to serious anxiety.<sup>18</sup> Mayhew notes that police officers suffer stress through constant exposure to danger, traumatic events, prisoner threats, conflicting task demands, short-staffed stations, court appearances, departmental inquiries and work in isolated rural areas.<sup>19</sup>

Mayhew also notes that there may be gender differences in stress risks as women officers need to adapt to a male-dominated profession. Smith likewise notes that the hierarchical police culture and associated male-dominated workforce may lead some women to higher rates of alcohol intake (typical of male-dominated workplaces) due to peer pressure. He has noted that policewomen have reported higher rates of stress than their male counterparts.<sup>20</sup> These findings have been confirmed in recent United States studies which also show that ethnicity and race may be other predictors of stress and burnout.<sup>21</sup>

Mayhew and Chappell have identified three forms of workplace violence: external violence, client-initiated violence and internal violence. External violence is perpetrated outside the organisation; typically, this is relevant to robberies and violence which take place in banks, taxis and convenience stores, to name just a few. In the case of police, this relates to such incidents as armed hold-ups and robberies which involve felonious behaviour.<sup>22</sup> Client-initiated violence relates to violence which is inflicted by customers [AQ: "clients"? – yes this is as it appears in the article] and involves the highest risks for police, security workers, prison guards, teachers and social security workers. Internal violence relates to the institutional use of power.

Allied with the stresses involved in police work are issues relating to chronic fatigue bought on by the ill effects of shiftwork and rosters.<sup>23</sup> The ill effects of shiftwork are now well known and police, like other emergency workers, can be rostered or on call at almost any time over 24 hours. The disruption of circadian rhythms affects the ability of police officers to perform complicated tasks such as high-speed car chases. It also reduces their capacity to recognise warning signs in unpredictable working environments.<sup>24</sup>

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<sup>15</sup> Mayhew C, "Occupational Health and Safety Risks Faced by Police Officers", *Australian Institute of Criminology Paper No 196* (February 2001).

<sup>16</sup> Mayhew, n 15, p 2.

<sup>17</sup> Swanton, n 5, p 3.

<sup>18</sup> Mayhew, n 15, p 3.

<sup>19</sup> Mayhew, n 15, p 3.

<sup>20</sup> Smith D, "Psychological Occupational Health Issues in Contemporary Police Work; A Review of the Research Evidence" (2005) 21(3) *Journal of Occupational Health and Safety ANZ* 217 at 220-221.

<sup>21</sup> McCarty WP, Zhao JS and Garland BE, "Occupational Stress and Burnout Between Male and Female Police Officers. Are There Differences?" (2007) 30(4) *Policing: An International Journal of Police Strategies & Management* 672.

<sup>22</sup> Mayhew C and Chappell D, "Occupational Violence: Types, Reporting Patterns, and Variations between Health Sectors", *Working Paper Series, Industrial Relations Research Centre, University of New South Wales* (2001), <http://www.docs.fce.unsw.edu.au/orgmanagement/WorkingPapers/wp139.pdf> viewed 19 March 2010.

<sup>23</sup> Mayhew, n 15, p 3.

<sup>24</sup> Mayhew, n 15, p 3.

In addition, police officers engaged in undercover work are susceptible to a range of other debilitating health concerns, including chronic fatigue and post-traumatic stress disorder (PTSD).<sup>25</sup> A number of cases decided in the Australian courts have identified PTSD as an issue which may not only give rise to claims by police for sick leave and workers' compensation but also claims against their employers for negligence. As an aside, although a number of PTSD cases have now been litigated at high levels in Australia, there is no clear thread in the decisions, as the facts and circumstances of each case dictate whether the employer will be found liable for a lack of care towards police officers.<sup>26</sup> Smith asserts that Australian police work is a high-stress occupation and involves a wide range of physically arduous activities when compared with other jobs.<sup>27</sup>

Other commentators note that although violence is a significant stressor for some police, the major stresses that impact on police are organisational in nature. The pattern of organisational stresses forms a context in which the police officer must negotiate a response to sudden unpredictable events.<sup>28</sup> One Western Australian study found that a significant component of stress for police officers was the concern family members may have for an officer on duty encountering violence and concern that the officer may have about protecting her or his own family.<sup>29</sup> The United States literature also notes the alarming potential for some individuals to orchestrate the "suicide by cop" death, which occurs when a police officer fatally shoots a suspect who manipulates the circumstances so as to bring about their own death. Although the numbers of such shootings in the United States is in the hundreds annually, the phenomenon is not significant in Australia, probably because of the lower rates of gun ownership in Australia and generally lower rates of violence. A police officer involved in such a shooting would no doubt suffer from the exposure to those traumatic events.<sup>30</sup> Some Australian commentators note that although the exact rate of police suicide is hard to ascertain, police experience a high rate of suicide compared to other occupations.<sup>31</sup>

Mayhew has documented a range of other illnesses which police officers suffer in the course of their work. For example, there is evidence of hypertension, exposure to poisonous chemicals and toxic vapours (bomb squads and drug investigations) as well as injuries from attempting to apprehend offenders caused through leaping fences, booby traps and the like.<sup>32</sup>

It may be wrong to give the impression that the bulk of injuries sustained by police officers relate to felonious incidents. Again relying on research from the United States, there is evidence that injuries from felonious incidents are relatively rare events. The overwhelming majority of incidents are not a result of assaults and do not result in death or serious injury. Most injury incidents are a result of

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<sup>25</sup> Millar I, "Traumatic Experiences and Post-traumatic Stress Disorder in the New Zealand Police" (1998) 21(1) *Policing: An International Journal of Police Strategies & Management* 178.

<sup>26</sup> *Wicks v Railcorp; Sheehan v State Rail* [2007] NSWSC 1346 (police officer failed to establish duty of care by employer after suffering PTSD from attending aftermath of disaster); *New South Wales v Fahy* (2007) 232 CLR 486 (police officer suffering PTSD failed to establish a duty of care by employer to maintain buddy system at all times so as to prevent injury); *New South Wales v Burton* [2006] NSWCA 12 (finding that the employer's failure to provide counselling did not materially contribute to officer's PTSD). In each of these recent cases the courts were divided on questions of liability.

<sup>27</sup> Smith, n 20 at 218.

<sup>28</sup> Lennings CJ, "Police and Occupationally Related Violence: A Review" (1997) 20(3) *Policing: And International Journal of Police Strategies & Management* 555 at 564.

<sup>29</sup> Savery LK, Soutar GN and Weaver R, "Stress and the Police Officer: Some West Australian Evidence" (1993) 66 *Police Journal* 277.

<sup>30</sup> Mayhew, n 15, p 3.

<sup>31</sup> Smith, n 20 at 222.

<sup>32</sup> Mayhew, n 15, pp 4-5.

accidents and are relatively minor.<sup>33</sup> Brandi asserts that most serious injuries are due to accidents, in particular, motor vehicle accidents.<sup>34</sup>

Although felonious injuries are not the main source of harm for police compared with the balance of the working Australian population, they are still a significant factor. For example, Smith reports that, compared with the broader population, the rate of workplace deaths was nearly twice that of other occupations. Police officers also accounted for one-fifth of hospital admissions.<sup>35</sup> Although Smith asserts (perhaps at some divergence with Brandi) that “violence and assault can clearly be viewed as significant OHS considerations for police”,<sup>36</sup> these researchers do not necessarily contradict each other. Brandi simply highlights the fact that, viewed holistically, police officers can suffer injury from a range of sources, not all of them violent. Smith, on the other hand, suggests that the incidence of violence gives rise to a stressful work environment and sets police work apart from other occupations.

Importantly, Mayhew identifies substance abuse as an issue for police officers. New South Wales research reveals that over 40% of police officers consumed alcohol at harmful levels. Significantly, this level of substance abuse has been identified as primarily an occupational health and safety issue.<sup>37</sup> Smith also links stress and alcohol consumption in police work, suggesting that increased alcohol intake is a form of coping mechanism.<sup>38</sup> Interestingly, Smith highlights the potential for police officers to sustain musculoskeletal disorders and low back pain due to extended sitting and driving, wearing awkward body armour, riding motor bikes with sustained poor postures and wearing heavy duty belts.<sup>39</sup> Although not the primary focus of this article, it is clear that the unique blend of duties and occupational risks gives rise to special considerations of police occupational health and safety.

It is clear that the work performed by police officers is unique and dangerous. In terms of their employment conditions, they are special. They confront danger in many guises in unpredictable circumstances and this would suggest that there is ample reason for them to be given special protection. Yet, as is set out below in Australia and particularly in Western Australia, the arrangements in relation to sick leave and workers’ compensation may not be ideal. Further, it is also clear that we know little about what happens to police officers when they become ill or injured, a circumstance which is not unique to Australia.<sup>40</sup>

#### **<DIV>THE COVERAGE OF AUSTRALIAN POLICE OFFICERS FOR WORK-RELATED INJURY AND DISEASE**

Clayton et al observe that historically there have been issues about the legal employment status of what were formerly called “Crown servants”, including police officers.<sup>41</sup> They say this historical difficulty accounts for the deemed coverage of police under the *Safety, Rehabilitation and Compensation Act 1988* (Cth),<sup>42</sup> the *Work Health Act 1986* (NT),<sup>43</sup> the *Accident Compensation Act*

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<sup>33</sup> There are clearly exceptions to this proposition. For example, consider the circumstances outlined in the *Western Australian Coroner’s Report into the Death of William John Watkins* (28 September 2008), where police officer Sergeant Shane Gray received serious facial injuries from an assailant who threatened to kill him. Sergeant Gray shot and killed the assailant.

<sup>34</sup> Brandi S, “In the Line of Duty: A Descriptive Analysis of Police Assaults and Accidents” (1996) 24(3) *Journal of Criminal Justice* 255 at 262.

<sup>35</sup> Smith, n 20 at 218.

<sup>36</sup> Smith, n 20 at 218.

<sup>37</sup> Mayhew, n 15, pp 4-5 and the references cited therein. See also Waters JA and Ussery W, “Police Stress: History, Contributing Factors, Symptoms and Interventions Review” (2007) 30(2) *Policing: An International Journal of Police Strategies & Management* 169 for a detailed United States study.

<sup>38</sup> Smith, n 20 at 219.

<sup>39</sup> Smith, n 20 at 223-224.

<sup>40</sup> Korlin J, Alexanderson K and Svedberg P, “Sickness Absence Among Women and Men in the Police: A Systematic Literature Review” (2009) 37 *Scandinavian Journal of Public Health* 310.

<sup>41</sup> Clayton A, Johnstone R and Sceats S, “The Legal Concept of Work-related Injury and Disease in Australian OHS and Workers Compensation Systems” (2002) 15 *Australian Journal of Labour Law* 1 at 16.

<sup>42</sup> *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 5(2)(a).

1985 (Vic)<sup>44</sup> and the *Workers Rehabilitation and Compensation Act 1988* (Tas).<sup>45</sup> In Western Australia police officers are not entitled to workers' compensation except in the case of death. Under the *Workers Compensation and Injury Management Act 1981* (WA) there is a partial coverage or deeming.<sup>46</sup> These States and Territories use a legislative mechanism to deem police officers as workers, thereby confining the coverage for police officers to workers' compensation issues only. If additional protections were required, such as in the case of occupational health and safety and terms and conditions of employment, the relevant legislation would need to enact specific deeming provisions to provide coverage. Incidentally, the *Workers Compensation Act 1951* (ACT) makes no specific mention of police; however, Australian Capital Territory policing is performed by the Australian Federal Police (AFP) who are deemed to be workers under the *Safety, Rehabilitation and Compensation Act 1988* (Cth).

In South Australia and Queensland, deeming provisions to cover police officers are not included in the workers' compensation legislation. However, under specific legislation applying to police in those States, police officers are referred to as being engaged under contracts of service or agreements to serve which thereby include police officers as employees or workers under workers' compensation legislation.<sup>47</sup> This mechanism has advantages because it does not require any specific reference to police officers in the workers' compensation legislation or any other legislation directed at protecting employees or those under a contract of service.

Western Australia and New South Wales are the only jurisdictions which do not provide specific workers' compensation coverage for police officers. As mentioned, Western Australia only provides coverage for police officers in the event of death. In New South Wales, police officers are specifically excluded from coverage under the *Workers Compensation Act 1987* (NSW)<sup>48</sup> and the *Workplace Injury Management and Workers Compensation Act 1998* (NSW).<sup>49</sup> The *Police Regulation (Superannuation) Act 1906* (NSW) does make provision for payment of benefits (referred to as a gratuity) to a police officer or former police officer who has been "hurt on duty".<sup>50</sup> "Hurt on duty" is defined by s 1(2) of that Act to mean that the police officer has been injured in such circumstances as would entitle the member, if a worker within the meaning of the *Workers Compensation Act 1987* (NSW), to compensation under that Act.

There is a wealth of litigation on the meaning and application of the "hurt on duty" concept under the *Police Regulation (Superannuation) Act 1906* (NSW), and it is not the intention to traverse those issues here. However, it is instructive to consider the High Court decision in *Calman v Commissioner of Police* (1999) 73 ALJR 1609. The Full Court in *Calman* noted that police officers had been

<sup>43</sup> *Work Health Act 1986* (NT), s 3, which defines employers to include person by or for whom a worker is engaged or works or, in relation to a member of the Legislative Assembly, a Judge, a magistrate or a member of the Police Force, means the Territory (as the employer).

<sup>44</sup> *Accident Compensation Act 1985* (Vic), s 14, which provides, inter alia: "For the purposes of this Act every member of the police force or member of the Retired Police Reserve of Victoria shall be deemed to be employed by the Crown under a contract of service, and notwithstanding any rule of law to the contrary, that contract of service and the relationship of master and servant shall be deemed to exist between the Crown and each member of the police force or member of the Retired Police Reserve of Victoria in respect of the exercise and performance of all the powers and duties as such of a member, whether arising at common law or under any statute or by the instructions of superiors or otherwise."

<sup>45</sup> *Workers Rehabilitation and Compensation Act 1988* (Tas), s 4(2), deems police officers to be in the service of the Crown.

<sup>46</sup> *Workers Compensation and Injury Management Act 1981* (WA), s 5.

<sup>47</sup> Section 5.4(2)(b) of the *Police Service Administration Act 1990* (Qld) read with s 11 of the *Workers Compensation and Rehabilitation Act 2003* (Qld) and ss 16 and 26 of the *Police Act 1998* (SA) read with s 8 of the *Workers Rehabilitation and Compensation Act 1986* (SA).

<sup>48</sup> Section 2A of the *Workers Compensation Act 1987* (NSW) provides that that Act is read with the *Workplace Injury Management and Workers Compensation Act 1998* (NSW).

<sup>49</sup> Section 4 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) excludes a person who is a member of the Police Service and who is a contributor to the Police Superannuation Fund under the *Police Regulation (Superannuation) Act 1906* (NSW).

<sup>50</sup> *Police Regulation (Superannuation) Act 1906* (NSW), s 10.

specifically excluded from protection under workers' compensation because the *Police Regulation (Superannuation) Act 1906* (NSW) preceded the operation of workers' compensation legislation in New South Wales and also for the historical reasons noted above. However, with the advent of workers' compensation laws, the New South Wales Parliament decided to provide some parity in protection and coverage for police officers by including the "hurt on duty" provisions which would align entitlements for police officers with workers' compensation entitlements. These amendments took place in 1979 (at [13]). A review of the cases illustrates that the well-established principles applicable to workers' compensation apply under the *Police Regulation (Superannuation) Act 1906* (NSW). Indeed, specific reference to the provisions of the *Workers Compensation Act 1987* (NSW) provide New South Wales police officers with coverage equivalent to that which is provided to workers under this Act.<sup>51</sup>

It follows from this excursus that Western Australia stands alone as the only Australian jurisdiction which does not provide any form (save in the event of death) of workers' compensation coverage to police officers who are injured at work.

#### **<DIV>WORKERS' COMPENSATION COVERAGE**

While workers' compensation provisions are not uniform in all jurisdictions, the range of benefits is generally similar. It is not within the scope of this article to outline the full range of entitlements and the jurisdictional differences as this information is available elsewhere.<sup>52</sup> This section outlines the benefits which appear consistently in all jurisdictions.

The primary entitlement for injured workers is income support or weekly payments usually based upon average weekly earnings. This payment is paid where the worker can establish that a work-related injury or disease has resulted in an incapacity for work. Payment is made upon proof of incapacity which requires the worker to obtain medical certification to this effect.

In some jurisdictions, limits are placed upon the rate of weekly payments. Such limits might relate to the period over which payments can be made and the rate at which payments can be made. In all jurisdictions there are mechanisms for reducing the worker's payments where the worker has returned to work or has gained fitness for work. All jurisdictions provide for payment of medical and related expenses and rehabilitation costs. All jurisdictions provide for workers who have suffered permanent impairment through injury or disease to receive lump sum payments based on the level of impairment. This payment is sometimes in addition to weekly payments for incapacity for work, although in Western Australia any payments made as a weekly payment and/or lump sum impairment are cumulatively accounted for against a prescribed sum or maximum limit. Some schemes have abolished common law entitlements. Others have retained these rights by circumscribing them with threshold preconditions, usually requiring the worker to show a level of serious injury before obtaining access to common law. Importantly, all systems to some degree provide forms of employment protection for injured workers, usually prohibiting dismissal of workers within 12

<sup>51</sup> See eg *Commissioner of Police v Kennedy* [2007] NSWCA 328 which noted and followed *Calman v Commissioner of Police* (1999) 73 ALJR 1609; and *Dean v Commissioner of Police* [1998] NSWCC 19 at [96]; *Larson v Commissioner of Police* [2004] NSWCA 126 at [5]; *Adams v Commissioner of Police* [1995] NSWCC 20 noting the citations referred to therein by Armitage J who noted that not only do the entitlement provisions of the *Workers Compensation Act 1987* (NSW) apply but also any provisions (such as wilful misconduct) which disentitle a worker to compensation are also imported.

<sup>52</sup> A comparison of the workers' compensation arrangement is contained in Australian Safety and Compensation Council, *Comparison of Workers Compensation Arrangements in Australia and New Zealand* (Australian Government Printer, October 2006), [http://www.ascc.gov.au/NR/rdonlyres/0C72A6E7-25F0-43D3-9677-B4EFC0BC956A/0/Comparison\\_Workers\\_Compensation\\_Arrangements\\_Aust\\_NZ\\_Comparison\\_FULL.pdf](http://www.ascc.gov.au/NR/rdonlyres/0C72A6E7-25F0-43D3-9677-B4EFC0BC956A/0/Comparison_Workers_Compensation_Arrangements_Aust_NZ_Comparison_FULL.pdf) viewed 7 July 2008. For some comparisons of injury and disease rates, see Australian Safety and Compensation Council, *Compendium of Workers Compensation Statistics Australia 2005-06* (Australian Government Printer, 2008), [http://www.safeworkaustralia.gov.au/NR/rdonlyres/656E6571-D7B3-4DD6-846B-78C161CA0F4D/0/Compendium\\_of\\_Workers\\_Compensation\\_Statistics\\_200506\\_Full\\_version.pdf](http://www.safeworkaustralia.gov.au/NR/rdonlyres/656E6571-D7B3-4DD6-846B-78C161CA0F4D/0/Compendium_of_Workers_Compensation_Statistics_200506_Full_version.pdf) viewed 7 July 2008. Note that no identifiable data relating to police officers appear in this report. Police officers do have ANZSIC industry codings for insurance and data gathering purposes (9631: Police services; and 7711: Police Services – Public Order, Safety and Regulatory Services), so it may be possible to isolate specific data with appropriate access.



Sick leave and workers' compensation for police officers in Australia

months of injury.<sup>53</sup> In addition, workers are provided with various support mechanisms for return to work, referred to as injury management.

Given the unique situation in Western Australia, it is worthwhile laying out these respective workers' compensation entitlements as a comparison with extended sick leave entitlements. This is set out in Table 1 which suggests that the key differences lie in the lack of provision for lump sum payments for permanent impairment, rehabilitation support and employment protection of injured workers. Significantly, the Western Australia Police regulations and industrial agreements provide payment of non-work-related medical expenses, benefits which do not appear to be available to police officers in any other Australian jurisdiction.

**Table 1 Comparison of workers' compensation and sick leave entitlements for police in Western Australia**

Entitlement	Workers' compensation (limited to work-related injury and disease)	Sick leave and medical regulations (covers work and non-work-related conditions)
Weekly payments	Provided for under the <i>Workers Compensation and Injury Management Act 1981</i> (WA) up to a maximum of the prescribed amount of \$168,499 as at 1 July 2008.	Regulation 1304 provides for 168 days wages with an extension subject to the Commissioner's discretion. Entitlements cease on termination of employment: reg 1402(4). <sup>(a)</sup>
Medical expenses	<i>Workers Compensation and Injury Management Act 1981</i> (WA) up to a maximum of the prescribed amount of \$55,550 as at 1 July 2008.	Paid for work- and non-work-related conditions. Entitlements cease on termination of employment: <i>Western Australian Police Industrial Agreement 2006</i> , WAIRC 05857, cll 35-37.
Rehabilitation allowances	<i>Workers Compensation and Injury Management Act 1981</i> (WA) up to a maximum of the prescribed amount of \$11,795 as at 1 July 2008.	No structured assistance; some departmental assistance for return to work.
Employment protection provisions	<i>Workers Compensation and Injury Management Act 1981</i> (WA), s 84AA: 12-month prohibition on dismissal while on compensation.	No formal protection while on sick leave, although some protection under industrial laws.
Injury management policy and procedures	<i>Workers Compensation and Injury Management Act 1981</i> (WA) provides a statutory obligation to attempt to return worker to work subject to worker's capacity.	No formal obligation in relation to return to work.
Payment of lump sums for permanent impairment	<i>Workers Compensation and Injury Management Act 1981</i> (WA) provides for payment up to \$168,499. Available to all workers; calculated in accordance with medical assessment and statutory schedules.	No provision for this entitlement.
Payment to dependants on death of worker	Provided for under <i>Workers Compensation and Injury Management Act 1981</i> (WA).	Provided for under <i>Workers Compensation and Injury Management Act 1981</i> (WA).
Rights on termination of employment	All rights under <i>Workers Compensation and Injury Management Act 1981</i> (WA) continue.	Entitlements cease on termination of employment. <sup>(b)</sup>
Journey claims coverage (to and from work)	Not covered under <i>Workers Compensation and Injury Management Act 1981</i> (WA). <sup>(c)</sup>	Regulation 1306 provides coverage. Entitlements cease on termination of employment. See also <i>Western Australian Police Industrial Agreement 2006</i> , WAIRC 05857, cll 35-37.

<sup>(a)</sup> Cessation of payments on termination has been a controversial issue for some time, adversely affecting police officers with long-term injuries. See report by Webb H, "Who Looks After the Police", *ABC Local Radio* (18 November 2005), <http://www.abc.net.au/wa/stories/s1510335.htm> viewed 11 July 2008.

<sup>(b)</sup> Note, however, that at the time of writing it has been agreed that police officers ceasing employment will be entitled to claim medical expenses equivalent to the prescribed amount for medical expenses, provided the injury or disease is work-related. See further discussion in text below.

<sup>53</sup> Guthrie R, "The Dismissal of Workers Covered by Return to Work Provisions under Workers Compensation Laws" (2002) 44(4) *Journal of Industrial Relations* 545.

<sup>(c)</sup> Journey claims have only recently been removed from the *Safety Rehabilitation and Compensation Act 1998* (Cth), giving rise to the submission by the Australian Federal Police (29 February 2008) objecting to recent amendments to the *Safety Rehabilitation and Compensation Act 1998* (Cth), [http://pfa.org.au/files/uploads/2007\\_to\\_08.pdf](http://pfa.org.au/files/uploads/2007_to_08.pdf) viewed 19 March 2010. [AQ: change correct here? - yes checked this again and it works and covers what I want]

Several comparisons are worth making at this point. First, reg 1308 is significant because it excludes police officers from any entitlements to sick leave and/or payment of medical expenses where injury or illness is attributable to the *fault or misconduct* of the officer. Interestingly, this disjunctive limitation may be more restrictive than workers' compensation provisions because, although workers' compensation payments may be disallowed in the event of *wilful misconduct*, they are payable regardless of the fault of the worker.

Secondly, reg 1306 provides that the Commissioner will pay reasonable medical and hospital expenses incurred by a police officer through illness or injuries which arise out of, or in the course of, the officer's duties as well as expenses incurred travelling to and from the place of duty. Travel coverage has not been available to workers covered by the *Workers Compensation and Injury Management Act 1981* (WA) since 1993 and has been removed in all other jurisdictions over the last 15 years. The form of coverage provided by reg 1306 reduces the potential for hair-splitting litigation relating to whether the officer's travel was or was not a "to and from" journey.<sup>54</sup>

Thirdly, reg 1311 provides that an officer must submit evidence of medical fitness before returning to work. Under reg 1312, the Commissioner may order a police officer to undergo a medical examination. These regulations are significant because reg 1402 allows the Commissioner to refer an officer to a medical board if the Commissioner is of the opinion that the officer is not fit for further service. Regulation 1402(4) allows the Commissioner to nominate a date upon which the officer will cease duty. These regulations arguably do not provide any incentive for the Commissioner or department to engage in injury management procedures which are central to workers' compensation arrangements in all jurisdictions. In addition, reg 1402(4) is in stark contrast to s 84AA of the *Workers Compensation and Injury Management Act 1981* (WA). Section 84AA in essence provides for a moratorium on the dismissal of a worker who is able to return to work within 12 months. Further, the combination of regs 1311, 1312 and 1402 encourages the tendency (identified in the 2006 New South Wales Audit Office report)<sup>55</sup> for officers to be kept on sick leave until they are medically retired, giving rise to extended payments of sick leave.

#### <DIV>WESTERN AUSTRALIAN SICK LEAVE AND MEDICAL EXPENSES PROVISIONS

In this section the focus is retained on the Western Australian position, given the unique industrial situation which applies in that State. The proposition that police unions have been significant industrial players has some resonance when considering the history of sick leave entitlements for police officers in Western Australia. The most appropriate starting point for a discussion of the sick leave coverage of Western Australian police officers is 1979 when the police union engaged in discussions with the Police Department in relation to non-work-related medical benefits. At that time there was a review of the Police Force Regulations. The Police Department agreed to pay non-work-related medical benefits as a part of a package of conditions which took into account the position of police officers under workers' compensation (generally not covered) and sickness benefits and the commitments and responsibilities of police officers as members of the police force. The result was the adoption of regulations which ultimately took their current form around 1989.<sup>56</sup> Importantly, the now

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<sup>54</sup> See eg *Cusack v South Australia Police* [2005] SAWCT 21 (police officer injured returning home after five consecutive night shifts with overtime on fifth night; fell asleep; found to be work-related accident).

<sup>55</sup> New South Wales Audit Office, *Auditor General's Report, Performance Audit: Managing Sick Leave in NSW Police and the Department of Corrective Services: Follow-up of 2002 Performance Audit* (2006).

<sup>56</sup> *Police Act 1892 Police Amendment Regulations* (No 6 of 1989), *Government Gazette* (WA) (17 November 1989). See also *Western Australian Police Industrial Agreement 2006*, WAIRC 05857, cl 35-37, <http://www.wairc.wa.gov.au/Agreements/Agrmnt2006/WES001.doc> [AQ: link not working - leave as is? - yes please - best]

repealed reg 1307 provided that the Western Australian Police Commissioner would consider claims for payment of *any* medical expenses (consultation, treatment or other service by a medical practitioner, x-ray or other service not provided by a medical practitioner but provided under a referral given by a medical practitioner) and would reimburse those claims less the amount of any Medicare benefits paid or payable. Similar claims were available for pharmaceutical products. This meant that the Commissioner would underwrite medical costs for work- and non-work-related sicknesses.

However, in 1994 the then Commissioner for Police suspended reg 1307 on the grounds that the savings made from not paying non-work-related medical expenses could be better applied to other activities within the Police Department, in particular, the civilianisation<sup>57</sup> of the police force (shifting police work to civilians). This issue of the suspension of these key regulations proceeded to the Western Australian Industrial Relations Commission in *Western Australian Police Union of Workers v Minister for Police* [1995] WAIRComm 166 where it was argued that the regulations should be suspended because allowing additional allowances and benefits to police officers would prompt flow-on payments to other workers (eg fire-fighters) and unsworn employees of the Police Department.

Further, it was submitted that *Police Award 1965* (No 2 of 1966) should not be varied to include provisions similar to the suspended regulations as this would overturn the general proposition that public servants' conditions were governed by a range of Acts, regulations and statutory conditions. Embedding the regulations in the award would distort this principle. In addition, the respondent argued that, contrary to the submissions of the police union, there was no proof that the payment of non-work medical expenses supported the higher levels of general fitness needed by police officers to perform their work. The Western Australian Police Union successfully argued for the inclusion of provisions similar to reg 1307 in the *Police Award 1965*. The Western Australian Industrial Relations Commission accepted that, as a matter of public interest, police officers should be supported in their attempts to maintain high levels of fitness. It accepted that the need to maintain such levels was connected with the high stress levels of police work.

The Commission also accepted that the symptoms of stress may be such that it is not possible to determine if they are work-related or not. This problem, the Commission noted, is compounded by the community activities carried out by police which make the boundaries between police activities and other activities hard to distinguish. Importantly, the Commission held that the long-standing payment of non-work-related medical expenses was part of the terms and conditions of police officer employment and could not be unilaterally revoked by the Commissioner of Police. Importantly, the Commission noted the existence of similar regulations since 1979 and the continued operation after a review in 1989.

On the technical issue of whether the Commission had jurisdiction to deal with the matter, it was noted that the then Industrial Appeals Court<sup>58</sup> had held that this dispute concerned an "industrial matter" and, further, that the inclusion of non-work-related issues facilitated enterprise bargaining. The outcome of *Western Australian Police Union of Workers v Minister for Police* in 1995 was that the payment of non-work-related medical expenses became a matter which was embedded in the *Police Award 1965* and consequently the payment of those expenses can only be denied if that provision is removed from the award. Most recently, payment of non-work-related medical expenses has been embedded into the *Western Australian Police Industrial Agreement 2006*. It follows that the effect of the decision in *Western Australian Police Unions of Workers v Minister for Police* has been significant in that it has affected the negotiation of police terms and conditions since that time.

As to the question of sick leave, the regulations do not delineate between absences for work- and non-work-related sickness (as with the case for medical expenses which are limited and more specific). They provide that, pursuant to reg 1304, the Commissioner may grant up to 168 days leave per

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**we can do** viewed 11 July 2008; *Commissioner of Police v Western Australian Police Union of Workers* [2006] WAIRComm 5857; and comments in relation to the negotiation of this agreement by Dean, n 1.

<sup>57</sup> For a discussion of this concept, see Burgess, Fleming and Marks, n 2 at 402.

<sup>58</sup> **[AQ: add case name and date?]** 74 WAIG 1504.

calendar year for incapacity and, if necessary, a further period may be granted. Again, the Commissioner may attach conditions to the sick leave and it is not granted when the incapacity arises out of the officer's *own fault or misconduct*.<sup>59</sup>

It is noteworthy that a Western Australian police officer is covered under these sick leave and medical expenses provisions for a significant range of entitlements for work- and non-work-related matters subject to the limitation of fault noted above. Even if the Western Australian police officer suffers an extended period of incapacity, there is potential for sick leave to be extended. However, these entitlements cease on termination of employment whereas workers' compensation payments are dependent upon continued need and incapacity and are not generally affected by the termination of employment of the worker.<sup>60</sup>

Mulvey and Kelly, in their comprehensive survey of sick leave practices, observe that sick leave is generally intended to cover temporary incapacity for non-work-related sickness and that workers' compensation is intended to cover work-related conditions. They note the growing trend for awards to extend the amount of sick leave in the event of chronic illness.<sup>61</sup> They also observe that sick leave was originally introduced to protect employers from paying wages to sick employees for extended periods because the common law made the employer liable for unlimited absences.<sup>62</sup>

Mulvey and Kelly noted a range of flexible practices which have developed since the mid-1990s which include sick banks (discussed below), annualised salary-based sick leave (sick leave paid at annualised average wage rates) and cashing out of sick leave arrangements (trading off a number of sick leave days for cash each year).<sup>63</sup> It is not within the scope of this article to weigh the relative merits or costs of these schemes. However, it is worthwhile noting that Mulvey and Ross concluded that traditional fixed-term sick leave arrangements were obsolete and that changing market circumstance necessitated greater flexibility in sick leave arrangements.

Several other distinctive points arise in relation to Western Australian police officers. For example, s 3(4) of the *Occupational Safety and Health Act 1984* (WA) deems police to be employees for the purposes of that Act. As a consequence, police officers are owed a duty of care by the department so as to provide a safe place of work. The usual corollary of this form of protection is a statutory obligation to pay workers' compensation for injury and disease sustained at work but this co-related obligation is not currently in place, despite continued agitation from a range of sources.<sup>64</sup>

Notably, legislation to provide for payment of medical expenses (Post Separation Medical Benefit) which pertain to work-related injury or disease for police officers who have ceased employment has recently been enacted under the *Police (Medical and Other Expenses for Former Officers) Regulations 2009* (WA). The amount payable is to be limited to the equivalent of the prescribed amount for medical expenses under the *Workers Compensation and Injury Management Act 1981* (WA).<sup>65</sup> It is expected that, as a result of this additional benefit, closer attention will be paid within

<sup>59</sup> Regulation 1304 inserted in *Gazette* (17 November 1989) p 4111; amended in *Gazette* (30 June 2003) p 2623.

<sup>60</sup> *Ball v William Hunt & Sons Pty Ltd* [1912] AC 496; *McCann v Scottish Coop Laundry Assn Ltd* [1936] 1 All ER 475 [AQ: cite OK or 1936 SLT 138 – All England is the accepted reference for this case – leave as is

<sup>61</sup> Mulvey C and Kelly R, *Flexibility in Sick Leave* (Centre for Labour Market Research Discussion Paper Series 02/1, 1999) pp 5-8, [http://www.cbs.curtin.edu.au/files/02\\_1.pdf](http://www.cbs.curtin.edu.au/files/02_1.pdf) viewed 8 July 2008.

<sup>62</sup> Mulvey and Kelly, n 61, p 3. This proposition is probably subject to the doctrine of frustration of contract. See Guthrie R and Meredith F, "Long-term Employee Illness and Frustration of Contract of Employment" (2007) 49(1) *Journal of Industrial Relations* 87.

<sup>63</sup> Mulvey and Kelly, n 61, pp 5-8.

<sup>64</sup> See eg Cowper, n 6.

<sup>65</sup> Western Australia, Minister for Police and Emergency Services, "Government Introduces Post-separation Medical Benefits for Police", *Media Statement* (21 December 2007), <http://www.mediastatements.wa.gov.au/Lists/Statements/DispForm.aspx?ID=125720> viewed 22 July 2008.

the department to data collection and claims to distinguish work-related and non-work-related conditions.<sup>66</sup>

Of further interest are the provisions of the *Police Assistance Compensation Act 1964* (WA) which provide for payment of compensation to persons injured while assisting police in the execution of their duty. This Act provides, somewhat ironically, that a person other than a police officer will be entitled to compensation if they are injured while assisting a police officer, equivalent to the entitlements provided for a worker under the *Workers Compensation and Injury Management Act 1981* (WA).<sup>67</sup> In other words, police officers injured in the execution of their duty are not covered under the *Workers Compensation and Injury Management Act 1981* (WA), but those who assist them have coverage equivalent to the *Workers Compensation and Injury Management Act 1981* (WA).

This demonstrates that the situation in Western Australia can be traced to some successful advocacy by the Police Union. At the same time, the success of that advocacy, as explored below, may hinder provision of coverage for workers' compensation for Western Australian police officers.

#### <DIV>**SICK LEAVE FOR POLICE OFFICERS IN OTHER JURISDICTIONS**

All jurisdictions, save Western Australia, provide a form of coverage for work accidents and diseases, although the means by which this is achieved varies. It is relevant to the question of coverage to examine the issue of sick leave across jurisdictions and consider whether Western Australian police officers have adequate protection in the event of sickness.

Table 2 presents available data from various sources on the quantum of sick leave. For the most part, the data are patchy. It was not always possible to obtain data over a consistent time period, although some data were obtained from the most current annual reports of the relevant departments and from Auditors-General reviews. The latter applies to New South Wales and Western Australia where there have been concerns about the high rate of sick leave taken by police officers. Western Australian data from the *Profile of the Western Australian State Government Workforce June 2005*<sup>68</sup> (the most recent available data) note that Western Australian police officers had the highest rates of sick leave absence in the State Government workforce. However, there is an acknowledgment that the sick leave absence statistics for police officers include work-related injury data which are not included in the other categories of workers. It follows that the average leave taken by Western Australian police officers is likely to be less than the 10.3 days per annum reported above, which is clearly an inaccurate portrayal of the "true" sick leave taken by police officers in Western Australia.<sup>69</sup>

Given the data in Table 2, it is likely that the non-work-related sick leave component for Western Australian police is 20% to 30% lower than the stated figure of 10.3 days per annum. If the Australian Federal Police data are combined to cover work- and non-work-related absences, the total average days lost exceeds the Western Australian combined total. In New South Wales the Auditor-General noted in 2006 that the rate of sick leave for police officers in that State had increased since 2002. Importantly, the report states that one of the drivers for the higher rates of sick leave is the practice of allowing officers seeking retirement on medical grounds to take sick leave pending final certification of unfitness for service and consequent retirement.

Table 2 shows that, in South Australia and Queensland, a sick bank is available. Sick bank schemes make a specified allocation of sick leave to each employee; when that allocation is exhausted the employee may draw on the sick bank. The sick bank is created by the accumulation of "donations"

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<sup>66</sup> See *WA Police News* (April 2008), <https://www.wapolun.org.au/getfile/678.pdf> viewed 10 July 2008.

<sup>67</sup> *Police Assistance Compensation Act 1964* (WA), s 5. This Act continues to operate and has been revised as at February 2007.

<sup>68</sup> Government of Western Australia, Department of Premier and Cabinet, *Profile of the Western Australian State Government Workforce June 2005*, Ch 7, <http://www.dpc.wa.gov.au/psmd/pubs/wac/prof05/forewordexplanatorynotes.pdf> viewed 2 July 2008.

<sup>69</sup> The Minister for Police acknowledged that the data include sick leave, carer's leave as well as work-related and non-work-related illness and injury. See Spencer B and Emerson D, "Police Sickie Costs Soar to \$14m – Sick Blue Line", *The West Australian* (8 October 2007) p 4.

from other employees, usually one day of sick leave per employee/member per year. In most instances, this allows employees with prolonged sickness to draw down or borrow almost indefinitely on the sick bank.<sup>70</sup>

**Table 2 Police sick leave entitlements compared across Australian jurisdictions<sup>(a)</sup>**

Jurisdiction	Sick leave per annum	Average days leave taken per annum	Work-related sickness per annum	Other relevant provisions/comments
Australian Federal Police (AFP)	18 days	6.6	4.85	Combined sick leave and workers' compensation approximately 11.5 days per annum; note similarity with combined total for Western Australia.
Victoria	15 days	8	N/A	Cumulative sick leave allowed.
New South Wales	15 days <sup>(b)</sup>	9.6 <sup>(c)</sup>	N/A	Accrual of sick leave allowed for pre-1988 appointments (reg 94(3) up to 60 days per annum). Department of Corrective Service employees noted as averaging 12 days sick leave per annum for custodial officers. <sup>(d)</sup> As reported in Annual Report 2006-2007, a substantial reduction in long-term sick leave has taken place since 2002. Public sector average in NSW: 8 days (based on 7-hour day). Annual Report 2006-2007 shows declining rates of workers' compensation claims for police although days lost per officer per annum are not shown. <sup>(e)</sup>
Queensland	15 days <sup>(f)</sup>	N/A	N/A	Sick bank available.
South Australia	12 days <sup>(g)</sup>	7.3 <sup>(h)</sup>	N/A	Sick bank available. Declining rate of sick leave reported but compensation data show slight rise in rate of claims since 2004-2005. <sup>(i)</sup>
Western Australia	168 days	10.3	Included in the average leave figures.	No data available to separate sick leave and work-related-injury and disease.
Tasmania	75 days <sup>(j)</sup>	5.1 <sup>(k)</sup>	N/A	Sick bank available to extend beyond 75 days (Reg 6).
Northern Territory	Sick leave is not based on any specific allocation per year. <sup>(l)</sup>	N/A	N/A	A medical certificate is required when the officer has been absent for more than 4 shifts. Workers' compensation data available as to nature and frequency of claims only. <sup>(m)</sup>

<sup>(a)</sup> Sick leave statistics are available (possibly more accurate than publicly available data) in the *Actuarial Analysis and Projection of Post Separation Medical Benefits May 2007* attached to the Western Australian Police Force Ministerial Steering Committee Report (August 2007) (copy on file). Unfortunately, the sources of the data are not identified in the report.

<sup>(b)</sup> *Police Regulations 2000* (NSW), reg 94. See *Mooney v Commissioner of Police, New South Wales Police Service (No 2)* [2003] NSWADT 107 for a discussion of the potential for disability discrimination to occur where an overzealous approach to monitoring of sick leave is taken.

<sup>(c)</sup> This was an increase of 16% from the average calculated in 2002. However, civilian staff in these departments had similar levels of sick leave at the time of the survey (66.7 hours for police and 66.8 hours for civilian staff). See New South Wales Audit Office, *Auditor-General's Report, Performance Audit Managing Sick Leave in NSW Police and the Department of Corrective Services: Follow-up of 2002 Performance Audit* (2006) p 10, [http://www.audit.nsw.gov.au/publications/reports/performance/2006/followup\\_sickleave/sickleave-contents.html](http://www.audit.nsw.gov.au/publications/reports/performance/2006/followup_sickleave/sickleave-contents.html) viewed 7 July 2008. See also Hughes G, "A Sick Force", *The Australian* (27 June 2008).

<sup>(d)</sup> New South Wales Audit Office, *Auditor-General's Report, Performance Audit Managing Sick Leave in NSW Police and the Department of Corrective Services: Follow-up of 2002 Performance Audit* (2006) p 10,

<sup>70</sup> The sick bank is regarded as a substantial asset in South Australia; see Carroll M, "Sick Leave – Is It For Sale?" *Police Journal Online* (October 2003), <http://www.policejournalsa.org.au/0310/14a.html> viewed 10 July 2008. Also noted in Mulvey and Kelly, n 61, p 8, [http://www.cbs.curtin.edu.au/files/02\\_1.pdf](http://www.cbs.curtin.edu.au/files/02_1.pdf) viewed 8 July 2008.

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[http://www.audit.nsw.gov.au/publications/reports/performance/2006/followup\\_sickleave/sickleave-contents.html](http://www.audit.nsw.gov.au/publications/reports/performance/2006/followup_sickleave/sickleave-contents.html) viewed 7 July 2008.

<sup>(e)</sup> New South Wales Police Force, *Annual Report 2006-2007* (2007) p 51, [http://police.nsw.gov.au/\\_data/assets/file/0019/111277/2006-07\\_Annual\\_Report.pdf](http://police.nsw.gov.au/_data/assets/file/0019/111277/2006-07_Annual_Report.pdf) viewed 7 July 2008.

<sup>(f)</sup> *Police Service Award 2003* (Qld), cl 7.2, <http://www.wageline.qld.gov.au/awardsacts/showDoc.html?Awards/P0290/7.2+Sick+leave> viewed 19 March 2010. [AQ: new link not working?] Try [http://www.fwa.gov.au/consolidated\\_awards/an/AN140212/asframe.html](http://www.fwa.gov.au/consolidated_awards/an/AN140212/asframe.html) viewed 7th April 2010

<sup>(g)</sup> *Police Officers Award* (SA), cl 19, <http://www.industrialcourt.sa.gov.au/index.cfm?objectid=7B97CAB9-E7F2-2F96-317F10E51740FF23> viewed 7 July 2008.

<sup>(h)</sup> South Australia Police, *Annual Report 2006-2007* (2007) p 7.3, [http://www.police.sa.gov.au/sapol/about\\_us/publications.jsp](http://www.police.sa.gov.au/sapol/about_us/publications.jsp) viewed 7 July 2008.

<sup>(i)</sup> South Australia Police, *Annual Report 2006-2007* (2007) pp 89-90, [http://www.police.sa.gov.au/sapol/about\\_us/publications.jsp](http://www.police.sa.gov.au/sapol/about_us/publications.jsp) viewed 7 July 2008.

<sup>(j)</sup> *Police Regulations 2003* (Tas). A police officer is entitled to be absent from duty on sick leave on full pay for a period not exceeding 75 working days in any one year of service (see reg 4). This regulation does not apply to absence from duty as a result of an illness or injury contracted or sustained in the execution of duty. See [http://www.thelaw.tas.gov.au/print/index.w3p:doc\\_id=+189+2003+AT@EN+20080626000000;rec=0](http://www.thelaw.tas.gov.au/print/index.w3p:doc_id=+189+2003+AT@EN+20080626000000;rec=0) viewed 7 July 2008.

<sup>(k)</sup> Tasmanian Department of Police and Emergency Management, *Annual Report 2006-2007* (2007) p 128, [http://www.police.tas.gov.au/\\_data/assets/pdf\\_file/0016/25612/Annual\\_Report\\_2006-07.pdf](http://www.police.tas.gov.au/_data/assets/pdf_file/0016/25612/Annual_Report_2006-07.pdf) viewed 7 July 2008.

<sup>(l)</sup> Northern Territory Police, <http://www.pfes.nt.gov.au/index.cfm?fuseaction=page&p=433&m=23&sm=200> viewed 10 July 2008.

<sup>(m)</sup> Northern Territory, *Annual Report 2007* (2007), [http://www.nt.gov.au/pfes/documents/File/police/publications/annrep/Annual\\_Report\\_2007\\_FINAL.pdf](http://www.nt.gov.au/pfes/documents/File/police/publications/annrep/Annual_Report_2007_FINAL.pdf) viewed 10 July 2008.

The data available from Tasmania show a relatively low rate of absence through non-work-related sickness despite a generous sick leave allocation of 75 days (with extensions through a sick bank). Surprisingly, the Northern Territory has no formal arrangements for sick leave and sets no cap for sick leave entitlements. Unfortunately, no data are publicly available relating to the sick leave absences of Northern Territory police.

There appears to be little correlation between the form of sick leave available and the average absences of police officers or between average absences and whether police officers have workers' compensation coverage. While further research is clearly warranted, it is reasonable to surmise that the rates of sick leave for non-work-related matters may be influenced by a range of factors. On the sparse data available, the most populous jurisdictions with highest numbers of sworn officers (Table 3) appear to have the highest rates of sick leave. Clearly, other factors are at play: eg, crime rates, stress levels and administrative procedures for claiming sick leave.

**Table 3 Total number of full time equivalent sworn officers by jurisdiction<sup>(a)</sup>**

Jurisdiction	Total sworn officers
New South Wales	10,895
Victoria	8,854
Queensland	7,128
Western Australia	4,325
South Australia	2,906
Tasmania	937
Northern Territory	858
Australian Federal Police	489

<sup>(a)</sup> Australian Institute of Criminology, *Composition of Australia's Police Services as at 30 June 2006*, <http://www.aic.gov.au/stats/cjs/police/pol2006.html> [AQ: link not working – leave as is? Yes please] viewed 10 July 2008. The data vary slightly from the ABS data in the *Year Book 2002 Crime and Justice – Police*, although the differences are not substantial and the relative numbers/size of force are similar: see <http://www.yprl.vic.gov.au/cdroms/yearbook2002/cd/wcd00002/wcd00217.htm> viewed 10 July 2008.

Of some significance is the fact that the *Police Act 1892* (WA) regulations establish that the officers covered by those regulations are able to claim extensive sick leave for work-related and non-work-related illness. In addition, they may claim reimbursement of any medical expenses.

#### <DIV>CONCLUSIONS AND REFLECTIONS

Any conclusions drawn from the above discussion are largely speculative, given that the data publicly available in relation to sick leave and workers' compensation are incomplete. In 1987 Swanton noted the need to review health data collections in the relevant agencies.<sup>71</sup> The public compilation and publication in annual reports by police agencies of data relating to sick leave and workers' compensation are not uniform and in some cases data are simply not accessible. These issues are also reflected in current international research which notes the lack of data in relation to police sick leave generally.<sup>72</sup>

Some themes emerge in relation to sick leave entitlements. Most jurisdictions provide systems which allow for extended sick leave for police officers. This is done either through discretionary grants of sick leave or the use of sick leave banks. Western Australia and Tasmania have extensive primary sick leave entitlements and provision for further leave. These two jurisdictions, together with the Northern Territory, are probably the statistical outliers in relation to entitlements.

It is not possible to determine conclusively from the available data if the presence of extensive sick leave entitlement affects the amount of sick leave taken. This has implications for Western Australia which sits alone as the only Australian jurisdiction without workers' compensation coverage. From an industrial relations perspective, the resistance to gaining coverage for workers' compensation can probably be accounted for by the following factors:

- State government and/or departmental resistance to providing coverage for workers' compensation while allowing retention of extensive sick leave provisions;
- resistance of long-serving officers to losing sick leave and medical benefits; and
- resistance to surrendering coverage for non-work-related medical expenses.

Some comments can be made on these issues. The fear of increased costs due to the provision of coverage for workers' compensation and extended sick leave is probably ill-founded. For example, South Australia, Tasmania, the Northern Territory and Queensland all allow for the co-existence of workers' compensation and extended sick leave. These jurisdictions are useful models and sources of reference which may allow for compromise on the issue of the primary entitlement to sick leave and workers' compensation in Western Australia.

There are some issues relating to long-serving officers which may become critical and present resistance to change if the primary entitlement to sick leave is reduced markedly. However, the New South Wales arrangements allow for the "grandfathering" of sick leave entitlements and present an appropriate model for negotiation of this issue. A sticking point may be the sensitive matter relating to the surrender of entitlement to payment of non-work-related medical expenses currently provided for under cll 35-37 of the *Western Australian Police Industrial Agreement 2006*. The argument for the modified retention of these clauses can be based around the issues previously canvassed in the decision of *Western Australian Police Unions of Workers v Minister for Police* [1995] WAIRComm 166 relating to the nature and rate of disease and injury for police officers. It seems reasonable to continue to assert that police have a higher rate of injury than the general community and that the nature of their work patterns blurs the lines between work and non-work activities. This makes it harder to separate work-caused incapacity from non-work-related incapacity and consequently it may be appropriate to retain some coverage for non-work medical expenses. The current [AQ: still OK? –

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<sup>71</sup> Swanton, n 5, p 4.

<sup>72</sup> Korlin, Alexanderson and Svedberg, n 40 at 310-319.



yes still the same one!!] Commissioner has, however, expressed the view that non-work-related medical expenses are a perk which should be removed.<sup>73</sup>

There are also matters related to issues of recruitment, as Swanton has noted.<sup>74</sup> There is an argument that providing superior entitlements is an aid to recruitment of police officers. It follows that the biggest stumbling block to providing workers' compensation coverage for Western Australian police officers is the issue of the potential for a bloated sick leave system sitting in conjunction with a workers' compensation system. This fear may not be grounded in logic as the determination of workers' compensation liabilities will transfer some claims away from sick leave into the workers' compensation system.<sup>75</sup> The grant of a primary entitlement of 168 days of sick leave per calendar year is, in most cases, illusory as the bulk of officers will never draw on this entitlement. On this basis, the appeal of sick leave banks with leave accumulation "grandfathering", if necessary, is considerable. In other words, if the Western Australian Government were to legislate to include sworn police officers in workers' compensation, there is little evidence that this would affect the overall rate of absence from work.

It is worth noting that while Western Australian sworn police officers are the only police officers not covered by workers' compensation, their unsworn co-workers are covered, so that within the one department different conditions apply. Also, it could be argued that the continued provision of extended sick leave together with the proposed post-separation medical benefit allowance might provide a disincentive for current serving officers to seek workers' compensation coverage.

A key issue in this discussion is the proper management of sick leave, a matter which has been highlighted by the Auditors-General of New South Wales and Western Australia. Currently, the Western Australian police do not have employment security and injury management procedures consistent with other jurisdictions. The adoption of comprehensive injury management policies and procedures has been shown to reduce absence from work. Workers' compensation coverage makes injury management obligatory.

Finally, the [AQ: still OK? – removed *proposed here*] introduction of a post-separation medical benefit for police officers is significant. Although it adds to the hotch-potch of entitlements available to Western Australian police officers, it does require determinations to be made as to whether a police officer has suffered a work- or non-work-related injury or disease. It is expected that this may stimulate some changes in behaviour by police officers who see a benefit in attributing a medical condition to work causes so that a potential future claim based on the post-separation medical benefit can be made. In turn, this may allow for the better collection of data and reduction of the statistical sick leave absences.

The proposed introduction of the post-separation medical benefit also shows a trend towards conventional workers' compensation coverage. Some officers may seek comfort in the fact that their sick leave entitlements are established in an industrial agreement which requires negotiation of any changes in the industrial arena, whereas workers' compensation legislation has been the subject of unilateral legislative change in the past.

<sup>73</sup> As reported, Morfesse L, "Police Injury Perk on the Line", *The West Australian* (15 April 2006) p 5. Subsequent to these comments, cl 35-37 of the Western Australian Police Industrial Agreement were amended to remove the right to make claims in relation to injuries arising from extreme sports undertaken outside of work.

<sup>74</sup> Swanton, n 5. See also Edith Cowan University, *Attraction and Retention in the Western Australian Public Sector Regional Workforce* (Edith Cowan University, 2007) which notes the need to take a broad approach to offering incentives to retain staff: [http://isp.ecu.edu.au/ispdocs/Attract\\_Retent.pdf](http://isp.ecu.edu.au/ispdocs/Attract_Retent.pdf) [AQ: new link not working? Can we leave this one – this doesn't seem to come up now – but the report is regularly referred to in other documents - we could simply take the link out ] viewed 11 July 2008.

<sup>75</sup> When sick leave is paid pending a claim for compensation, the sick leave is re-credited when the compensation claim is approved: *New South Wales Police Service v Azimi* [2007] NSWWCPCD 125. [AQ: OK as is? Yes this is ok ]