

Working Paper 62

**The Industrial Relations of Sick Leave and Workers
Compensation for Police Officers in Australia**

**Robert Guthrie, Professor of Workers Compensation and Workplace
Laws, School of Business Law and Taxation,
Curtin University of Technology**

January 2009

About the Centre

The National Research Centre for Occupational Health and Safety Regulation (NRCOHSR) is funded by WorkCover New South Wales and WorkSafe Victoria to work to achieve excellence in OHS research and regulation development. The NRCOHSR is a research centre within the Regulatory Institutions Network (RegNet) at The Australian National University (Canberra), and operates in association with the Socio-Legal Research Centre (SLRC) at Griffith University (Brisbane).

The NRCOHSR conducts and facilitates high quality empirical and policy-focused research into OHS regulation, and facilitates the integration of research into OHS regulation with research findings in other areas of regulation. We encourage and support collaborating researchers to conduct empirical and policy-focused research into OHS regulation. The NRCOHSR also monitors, documents and analyses Australian and international developments in OHS regulation and research, as well as related areas of regulation, and produces a web-based series of working papers reporting on research into OHS regulation.

Address for correspondence

National Research Centre for OHS Regulation
Regulatory Institutions Network
Coombs Extension
Cnr Fellows and Garran Road
The Australian National University
Canberra, ACT, 0200

Email: nrcohsr@anu.edu.au

Abstract

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. One area not often considered is the interaction of workers compensation laws and sick leave entitlements. This paper 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 is generally incomplete and presents challenges for cross-jurisdictional comparisons.

1. Introduction

Police unions have been significant, outspoken¹ 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 1911.² In Western Australia, the WA 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.³ 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. The political and industrial have always been closely linked in Australia. Professor 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.⁴ These objectives are closely aligned to health and

¹ See, for example, the comments made in relation to the negotiation of the Western Australian Police Industrial Agreement 2006 WAIRC 05857. Available at <http://www.wairc.wa.gov.au/Agreements/Agrmnt2006/WES001.doc> last viewed on 11 July 2008. Also, the comments in relation to the negotiation of this agreement by M Dean, President, WA Police Union *WA Police News* February 2007 at <https://www.wapolun.org.au/getfile/82.pdf> last 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'.

² Burgess M, Fleming J and Marks M (2006) 'Thinking Critically about Police Unions in Australia: Internal Democracy and External Responsiveness' (7)5 *Police Practice and Research* pp. 391–409 at 393.

³ Ibid.

⁴ Other objectives have included wages and conditions, disciplinary matters and penal and social reform. See generally Finnane M *Police Unions in Australia: A*

safety concerns in relation to police. Swanton points out that, given that there are over 35,000 sworn police⁵, the costs of lost time, early retirement, compensation and medical treatment are enormous. He notes that some of the factors contributing to these costs (for example, resignations and recruitment) at times become the subject of industrial dispute and political maneuverings,⁶ which further reduces the quality of police officers' working environments.⁷

This paper 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.⁸

History of the Present. Paper presented at the History of Crime Policing and Punishment Conference—Australian National University, Canberra, 9–10 December 1999. Available at <http://www.aic.gov.au/conferences/hcpp/finnane.pdf> last viewed 8 July 2008. See also Burgess M, Fleming J and Marks M (2006) 'Thinking Critically about Police Unions in Australia: Internal Democracy and External Responsiveness' *Police Practice and Research* (7)5 pp. 391–409.

⁵ This data relates to a 1987 study. For current statistics on sworn police numbers, see Table 3 below.

⁶ Note the strident comments of the President of the WA Police Union asserting that the Labor Government had a 'fascist pay stance' in relation to wage negotiations. Available at <http://www.abc.net.au/news/stories/2008/06/23/2282749.htm?site=southwestwa> last 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 19 February 2008, 'Still no sign of police compensation from Carpenter Government'. Available at http://www.wa.liberal.org.au/index.php?view=article&catid=54%3Aloop-news-category&id=209%3Astill-no-sign-of-police-compensation&option=com_content&Itemid=109 last viewed 11 July 2008. See also the speech by Bill Shorten, AWU National Secretary, 15 August 2006, exhorting the Western Australian Government to provide workers compensation coverage for WA police. Available at http://www.awu.net.au/national/speeches/1155715264_6944.html last viewed 10 July 2008.

⁷ Swanton B (1987) Research brief (No. 7): 'Police work and its health impacts' *Australian Institute of Criminology*. Available at <http://www.aic.gov.au/publications/tandi/ti07.pdf> last viewed 10 July 2008 at 2.

⁸ This issue is also one of the matters nominated for further research by Lynch J (2006) 'Australian Police Workforce planning priority research directions – A scoping paper'. Report No. 148.1 *Australasian Centre for Policy Research*.

Firstly, Western Australia remains the only jurisdiction which does not provide workers compensation coverage for police officers who suffer injury or disease through work. The paper 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 jurisdictions. However, this cluster of entitlements needs to be considered against the lack of coverage for workers compensation. A range of sick leave options are 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 jurisdictions. The paper examines the available data in relation to sick leave and workers compensation claims.

Finally, this paper reflects upon the lack of statistically uniform data in relation to injury and disease experienced by police officers in Australia. The paper 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 by cross-border comparisons of the rates of absence from work caused through work and non-work related illnesses.

2. 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 opinion⁹ and growing commentator

Available at http://www.acpr.gov.au/pdf/ACPR148_1.pdf last viewed 11 July 2008.

⁹ For example, *Konrad v Victoria Police* (1998) 152 ALR 132 and *Re Australian Federal Police Association* (1997) 73 IR 155 and the minority decisions of the

criticism of the failure of the common law to review the status of police.¹⁰ The oft quoted authority for this proposition is *Attorney General (NSW) v Perpetual Trustee Co Ltd*¹¹ which together with a number of other cases¹² 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 legislators, 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 as noted in the introduction.

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

High Court in *Attorney General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 in particular Dixon J at 252.

¹⁰ See generally the excellent survey in J Carabetta, ‘Employment Status of the Police in Australia’ (2003) *Melbourne University Law Review* 1.

¹¹ (1955) 92 CLR 113, a decision on appeal from the High Court to the Privy Council.

¹² 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 judgement of Sharkey P (with whom Commissioners Fielding and Scott agreed) as well as *Irwin v Whitrod* [No. 2][1978] Qld R 271, *Sellars v Wood* (1982) 45 ALR 113.

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.¹³ 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.

3. 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 is 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

¹³ *Taylor v State of 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 for Police* [2005] FMCA 2 (officer establishes 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 alleges this is related to disability; succeeds 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; order to pay damages and properly assess application).

Australia, due largely to the significant difference in gun ownership laws and the used of fire-arms by police officers.¹⁴

However, save for injuries inflicted by fire-arms, the US literature has some resonance with the Australian situation where there is corresponding data. Mayhew, in her comprehensive international literature review of occupational health and safety risks to police officers, highlights the diversity of potential dangers faced by police officers.¹⁵ This includes 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 exceeds fatalities, and are probably increasing.¹⁶ 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.¹⁷

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.¹⁸ Mayhew notes that police officers suffer stress through

¹⁴ Swanton B (1987) Research brief (No. 7): 'Police work and its health impacts' *Australian Institute of Criminology*. Available at <http://www.aic.gov.au/publications/tandi/ti07.pdf> last viewed 10 July 2008 at 2. Swanton notes the rates of deaths and wounding by gun shot in Australia compared to the USA is infinitesimal.

¹⁵ Mayhew C 'Occupational Health and Safety Risks Faced by Police Officers' Australian Institute of Criminology Paper No. 196 February 2001.

¹⁶ Mayhew C 'Occupational Health and Safety Risks Faced by Police Officers' Australian Institute of Criminology Paper No. 196 February 2001 at 2.

¹⁷ Swanton B (1987) Research brief (No. 7): 'Police work and its health impacts' *Australian Institute of Criminology*. Available at <http://www.aic.gov.au/publications/tandi/ti07.pdf> last viewed 10 July 2008 at 3.

¹⁸ Mayhew C 'Occupational Health and Safety Risks Faced by Police Officers' Australian Institute of Criminology Paper No. 196 February 2001 at 3.

constant exposure to danger, traumatic events, prisoner threats, conflicting task demands, short-staffed stations, court appearances, departmental enquiries and work in isolated rural areas.¹⁹

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.²⁰ These findings have been confirmed in recent US studies which also show that ethnicity and race may be other predictors of stress and burnout.²¹

Mayhew and Chappell have identified three forms of workplace 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 things as armed hold-ups and robberies which involve felonious behaviour.²²

Client-initiated violence relates to violence which is inflicted by customers with the highest risks for police, security workers, prison guards, teachers and social security workers. Thirdly, internal violence relates to the institutional use of power.

¹⁹ Mayhew C 'Occupational Health and Safety Risks Faced by Police Officers' Australian Institute of Criminology Paper No. 196 February 2001 at 3.

²⁰ Smith D (2005) 'Psychological occupational health issues in contemporary police work; a review of the research evidence' *Journal of Occupational Health and Safety ANZ* Vol 21 No. 3 pp. 217–228 at 220–21.

²¹ McCarty WP, Zhou JS and Garland BE (2007) 'Occupational stress and burnout between male and female police officers. Are there differences?' *Policing and International Journal of Police Strategies & Management* Vol 30 No. 4 pp. 672–691.

²² As noted by Kruse D and Wijmer DJ (1991) 'The use of force in daily police procedure in the Hague' *Police Studies* Vol 14 pp. 121–6.

Allied with the stresses involved in police work are issues relating to chronic fatigue brought on by the ill effects of shiftwork and rosters.²³ 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.²⁴

In addition, police officers engaged in under-cover work are susceptible to a range of other debilitating health concerns, including chronic fatigue and Post Traumatic Stress Disorder (PTSD).²⁵ 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 dictates whether the employer will be found liable for a lack of care towards police officers.²⁶ Smith asserts that Australian police work is

²³ Mayhew C 'Occupational Health and Safety Risks Faced by Police Officers' Australian Institute of Criminology Paper No 196 February 2001 at 3.

²⁴ Mayhew C 'Occupational Health and Safety Risks Faced by Police Officers' Australian Institute of Criminology Paper No. 196 February 2001 at 3.

²⁵ Millar I (1998) 'Traumatic experiences and post-traumatic stress disorder in the New Zealand police' *Policing and International Journal of Police Strategies & Management* Vol 21 No. 1 pp. 178–191.

²⁶ *Wicks v Railcorp*; *Sheehan v State Rail* [2007] NSWSC 1346 (police officer fails to establish duty of care by employer after suffering PTSD from attending aftermath of disaster);, *New South Wales v Fahy* [2007] HCA 20; (2007) 81 ALJR 1021 (22 May 2007) (police officer suffering PTSD fails to establish a duty of care by employer to maintain buddy system at all times so as to prevent injury);, *State of New South Wales v Burton* [2006] NSWCA 12 (finding that the employer's failure to provide counseling did not materially contribute to officer's PTSD). In each of these recent cases the courts were divided on questions of liability.

a high stress occupation and involves a wide range of physically arduous activities when compared with other jobs.²⁷

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 organizational stresses forms a context in which the police officer must negotiate a response to sudden unpredictable events.²⁸ One Western Australian study found that a significant component of stress for police officers was the concerns family members may have for an officer on duty encountering violence and concerns that the officer may have about protecting their own family.²⁹ The US 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 US is in the hundreds annually, the phenomenon is not well known 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.³⁰ 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.³¹

²⁷ Smith D (2005) ‘Psychological occupational health issues in contemporary police work: a review of the research evidence’ *Journal of Occupational Health and Safety ANZ* Vol 21 No. 3 pp. 217–228 at 218.

²⁸ Lennings CJ (1997) ‘Police and occupationally related violence: a review’ *Policing and International Journal of Police Strategies & Management* Vol 20 No. 3, pp. 555–566 at 564.

²⁹ Savery LK, Soutar GN and Weaver R (1993) ‘Stress and the police officer: Some West Australian evidence’ *The Police Journal* 66, pp. 277–90.

³⁰ Mayhew C ‘Occupational Health and Safety Risks Faced by Police Officers’ Australian Institute of Criminology Paper No. 196 February 2001 at 3.

³¹ Smith D (2005) ‘Psychological occupational health issues in contemporary police work; a review of the research evidence’ *Journal of Occupational Health and Safety ANZ* Vol 21 No. 3 pp. 217–228 at 222.

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.³²

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

Although felonious injuries are not the main source of harm for police compared with 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.³⁵ Although Smith asserts (perhaps at some divergence with Brandi) that ‘violence and assault can clearly be viewed as significant

³² Mayhew C ‘Occupational Health and Safety Risks Faced by Police Officers’ Australian Institute of Criminology Paper No. 196 February 2001 at 4–5.

³³ There are clearly exceptions to this proposition. For example, consider the circumstances outlined in the Western Australian Coroners 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.

³⁴ Brandi S (1996) ‘In the line of duty; A descriptive analysis of police assaults and accidents’ *Journal of Criminal Justice* Vol 24 No. 3 pp. 255–265 at 262.

³⁵ Smith D (2005) ‘Psychological occupational health issues in contemporary police work; a review of the research evidence’ *Journal of Occupational Health and Safety ANZ* Vol 21 No. 3 pp. 217–228 at 218.

OHS considerations for police’,³⁶ 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.³⁷ Smith also links stress and alcohol consumption in police work, suggesting that increased alcohol intake is a form of coping mechanism.³⁸ 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.³⁹ Although not the primary focus of this paper, it is clear that the unique blend of duties and occupational risks gives rise to special considerations of police occupational health and safety.

³⁶ Ibid.

³⁷ Mayhew C ‘Occupational Health and Safety Risks Faced by Police Officers’ Australian Institute of Criminology Paper No. 196 February 2001 at 4–5 and the references cited therein. See also Waters JA and Ussery W (2007) ‘Police stress: history, contributing factors, symptoms and interventions review’ *Policing and International Journal of Police Strategies & Management* Vol 30 No. 2, pp. 169–188 for a detailed US study.

³⁸ Smith D (2005) ‘Psychological occupational health issues in contemporary police work: a review of the research evidence’ *Journal of Occupational Health and Safety ANZ* Vol 21 No. 3, pp. 217–228 at 219.

³⁹ Smith D (2005) ‘Psychological occupational health issues in contemporary police work: a review of the research evidence’ *Journal of Occupational Health and Safety ANZ* Vol 21 No. 3, pp. 217–228 at 223–4.

4. 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.⁴⁰ They say this historical difficulty accounts for the deemed coverage of police under the *Safety, Rehabilitation and Compensation Act 1988* (Cth),⁴¹ the *Work Health Act 1986* (NT),⁴² the *Accident Compensation Act 1985* (Vic)⁴³ and the *Workers Rehabilitation and Compensation Act 1988* (Tas).⁴⁴ 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.⁴⁵ These States and Territories use a legislative mechanism to deem police officers as workers that confines 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, ACT policing is performed by the

⁴⁰ 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.

⁴¹ Section 5(2)(a).

⁴² Section 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).

⁴³ Section 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.’

⁴⁴ Section 4(2) deems police officers to be in the service of the Crown.

⁴⁵ Section 5.

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 include 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 includes police officers as employees or workers under workers compensation legislation.⁴⁶ 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)⁴⁷ and the *Workplace Injury Management and Workers Compensation Act 1998* (NSW).⁴⁸ 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'.⁴⁹ 'Hurt on duty' is defined by section

⁴⁶ Section 5.4(2)(b) of the *Police Service Administration Act 1990* (Qld) read with section 11 of the *Workers Compensation and Rehabilitation Act 2003* (Qld) and section 16 and 26 of the *Police Act 1998* (SA) read with section 8 of the *Workers Rehabilitation and Compensation Act 1986* (SA).

⁴⁷ 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).

⁴⁸ Section 4 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) which 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*.

⁴⁹ Section 10.

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*.⁵⁰ The Full Court in *Calman* noted that police officers had been 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 1979.⁵¹ 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.⁵²

⁵⁰ For ease of reference herein relate to [1999] HCA 60, although the case is reported at (1999) 167 ALR 91, (1999) ALJR 1609.

⁵¹ At para 13.

⁵² See, for example, *Commissioner of Police v Kennedy* [2007] NSWCA 328 which noted and followed *Calman v Commissioner of Police* [1999] HCA 60 and *Dean v Commissioner of Police* [1998] NSWCC 19 at para 96, *Larson v Commissioner of Police* [2004] NSWCA 126 at para 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*

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.

5. 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 paper to outline the full range of entitlements and the jurisdictional differences as this information is available elsewhere.⁵³ This section will outline 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.

⁵³ *Compensation Act 1987* (NSW) apply but also any provisions (such as willful misconduct) which disentitle a worker to compensation are also imported. A comparison of the workers compensation arrangement is contained in Australian Safety and Compensation Council (2008) 'Comparison of Workers Compensation Arrangements in Australia and New Zealand' October 2006, Australian Government Printer. Available at http://www.ascc.gov.au/NR/rdonlyres/0C72A6E7-25F0-43D3-9677-B4EFC0BC956A/0/Comparison_Workers_Compensation_Arrangements_Aust_NZ_Comparison_FULL.pdf last viewed at 7 July 2008. For some comparisons of injury and disease rates, see *Australian Safety and Compensation Council (2008) Compendium of Workers Compensation Statistics Australia 2005-06*, Australian Government Printer. Available at http://www.ascc.gov.au/NR/rdonlyres/656E6571-D7B3-4DD6-846B-78C161CA0F4D/0/Compendium_of_Workers_Compensation_Statistics_200506_Full_version.pdf last viewed 7 July 2008. Note that no identifiable data relating to police officers appears 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.

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 pre-conditions, 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 months of injury.⁵⁴ 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

⁵⁴ Guthrie R (2002) 'The dismissal of workers covered by return to work provisions under workers compensation laws' *Journal of Industrial Relations* (44) 4 pp. 545–561.

non-work related medical expenses, benefits which do not appear to be available to police officers in any other jurisdiction.

Table 1. Comparison of workers compensation and sick leave entitlements in Western Australia

Entitlement	Workers compensation (limited to work-related injury and disease)	Western Australian police 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 (WA)</i> up to a maximum of the prescribed amount of \$168,499.00 as at 1 July 2008	Regulation 1304 provides for 168 days wages with a extension subject to the Commissioner's discretion. Entitlements cease on termination of employment: Regulation 1402(4) ⁵⁵
Medical expenses	<i>Workers Compensation and Injury Management Act 1981 (WA)</i> up to a maximum of the prescribed amount of \$55,550.00 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 WAIRC 05857</i> clauses 35–37
Rehabilitation allowances	<i>Workers Compensation and Injury Management Act 1981 (WA)</i> up to a maximum of the prescribed amount of \$11,795.00 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 (WA)</i> section 84AA. 12-month	No formal protection while on sick leave, although some protection under industrial laws

⁵⁵ 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 is looking after Police' *ABC Local Radio* 18 November 2005. Available at <http://www.abc.net.au/wa/stories/s1510335.htm> last viewed 11 July 2008.

	prohibition on dismissal while on compensation	
Injury management policy and procedures	<i>Workers Compensation and Injury Management Act 1981 (WA)</i> 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 (WA)</i> provides for payment up to \$168,499.00. 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 (WA)</i>	Provided for under <i>Workers Compensation and Injury Management Act 1981 (WA)</i>
Rights on termination of employment	All rights under <i>Workers Compensation and Injury Management Act 1981 (WA)</i> continue.	Entitlements cease on termination of employment ⁵⁶
Journey claims coverage (to and from work)	Not covered under <i>Workers Compensation and</i>	Regulation 1306 provides coverage. Entitlements cease on

⁵⁶

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.

	<i>Injury Management Act 1981 (WA)</i> ⁵⁷	termination of employment. See also <i>Western Australian Police Industrial Agreement 2006</i> WAIRC 05857 clauses 35–37.
--	--	---

Several comparisons are worth making at this point. Firstly, Police Regulation 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, Regulation 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 Regulation 1306 reduces the potential for hair-splitting litigation relating to whether the officer’s travel was or was not a ‘to and from’ journey.⁵⁸

⁵⁷ Journey claims have only recently been removed from *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)*. Available at <http://www.workplace.gov.au/NR/rdonlyres/AA40294B-08C3-4A6C-95C2-B731CCF89066/0/ComCareReviewFINAL290208.pdf> last viewed 10 July 2008.

⁵⁸ See, for example, *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).

Thirdly, Regulation 1311 provides that an officer must submit evidence of medical fitness before returning to work. Under Regulation 1312, the Commissioner may order a police officer to undergo a medical examination. These regulations are significant because Regulation 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, Regulation 1402(4) is in stark contrast to section 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 regulations 1311, 1312 and 1402 encourages the tendency (identified in the 2006 New South Wales Audit Office report⁵⁹) for officers to be kept on sick leave until they are medically retired, giving rise to extended payments of sick leave.

6. 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 discussion of the sick leave coverage of Western Australian police officers is 1979 when the police union engaged in discussions with

⁵⁹ New South Wales Audit Office (2006) *Auditor General's Report—Performance Audit Managing Sick Leave in NSW Police and the Department of Corrective Services Follow-up of 2002 Performance Audit*.

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 a member of the Force. The result was the adoption of regulations which ultimately took their current form around 1989.⁶⁰ Importantly, the now repealed Regulation 1307 provided that the WA 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 Regulation 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 civilianisation⁶¹ of the police force (shifting police work to civilians). This issue of the suspension of

⁶⁰ *Police Act 1892* Police Amendment Regulations (No. 6 of 1989) Government Gazette WA 17 November 1989 (emphasis added). See also *Western Australian Police Industrial Agreement 2006* WAIRC 05857 clauses 35–37. Available at <http://www.wairc.wa.gov.au/Agreements/Agrmnt2006/WES001.doc> last viewed 11 July 2008, *Commissioner of Police v The Western Australian Police Union of Workers* [2006] WAIRComm 5857 (20 December 2006); and the comments in relation to the negotiation of this agreement by M Dean, President, WA Police Union, *WA Police News* February 2007 at <https://www.wapolun.org.au/getfile/82.pdf> last viewed 11 July 2008.

⁶¹ For a discussion of this concept, see Burgess M, Fleming J and Marks M (2006) 'Thinking Critically about Police Unions in Australia: Internal Democracy and External Responsiveness' (7)5 *Police Practice and Research*, pp. 391–409 at 402.

these key regulations proceeded to the Western Australian Industrial Relations Commission in *Western Australian Police Unions of Workers v Honourable Minister for Police*⁶² 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 (for example, 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 WA Police Union successfully argued for the inclusion of provisions similar to Regulation 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 makes 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

⁶² [1995] WAIRComm 166 (22 November 1995).

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 Court⁶³ 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 Unions of Workers v Honourable 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 Honourable 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 Regulation 1304 the Commissioner may grant up to 168 days leave per 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*.⁶⁴

It is noteworthy that a Western Australian police officer is covered under these sick leave and medical expenses provisions for a significant range of

⁶³ 74 WAIG 1504.

⁶⁴ Regulation 1304 inserted in Gazette 17 Nov 1989 p. 4111; amended in Gazette 30 Jun 2003 p. 2623.

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.⁶⁵

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.⁶⁶ 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.⁶⁷

Mulvey and Ross 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).⁶⁸ It is not within the scope of this paper to weigh the relative merits or costs of these schemes.

⁶⁵ *Ball v William Hunt & Sons Pty Ltd* [1912] AC 496 and *McCann v Scottish Co-op Laundry Assn Ltd* [1936] 1 All ER 475.

⁶⁶ Mulvey C and Kelly R (1999) *Flexibility and Sick Leave* Centre for Labour Market Research Discussion Paper Series 02/1. Available at http://www.cbs.curtin.edu.au/files/02_1.pdf last viewed 8 July 2008 at pp. 5–8.

⁶⁷ Mulvey C and Kelly R (1999) *Flexibility and Sick Leave* Centre for Labour Market Research Discussion Paper Series 02/1. Available at http://www.cbs.curtin.edu.au/files/02_1.pdf last viewed 8 July 2008 at p. 3. This proposition is probably subject to the doctrine of frustration of contract. See Guthrie R and Meredith F (2007) Long-term Employee Illness and Frustration of Contract of Employment 49(1) *Journal of Industrial Relations* 87

⁶⁸ Mulvey C and Kelly R (1999) *Flexibility and Sick Leave* Centre for Labour Market Research Discussion Paper Series 02/1. Available at http://www.cbs.curtin.edu.au/files/02_1.pdf last viewed 8 July 2008 at pp. 5–8.

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, section 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.⁶⁹

Notably, at the time of writing there is draft 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. 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).⁷⁰ It is expected

⁶⁹ See, for example, the pressure applied by opposition spokesperson on police matters Shadow Minister for Employment Protection, Murray Cowper in his statement 19 February 2008 'Still no sign of police compensation from Carpenter Government'. Available at http://www.wa.liberal.org.au/index.php?view=article&catid=54%3Aloop-news-category&id=209%3Astill-no-sign-of-police-compensation&option=com_content&Itemid=109 last viewed 11 July 2008. See also the speech by Bill Shorten as AWU National Secretary 15 August 2006 exhorting the Western Australian Government to provide workers compensation coverage for WA police. Available at http://www.awu.net.au/national/speeches/1155715264_6944.html last viewed 10 July 2008.

⁷⁰ Minister for Police and Emergency Services - Media Statement 21 December 2007 'Government introduces post-separation medical benefits for police'. Available at <http://www.mediastatements.wa.gov.au/Lists/Statements/DispForm.aspx?ID=125720> last viewed 22 July 2008.

that as a result of this additional benefit closer attention will be paid within the department to data collection and claims to distinguish work-related and non-work related conditions.⁷¹

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).⁷² 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 WA Police Union. At the same time, the success of that advocacy, as explored below, may retard provision of coverage for workers compensation for Western Australian police officers.

7. Sick Leave for Police Officers in Other Jurisdictions

All jurisdictions, save for 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.

⁷¹ See *WA Police News* April 2008. Available at <https://www.wapolun.org.au/getfile/678.pdf> last viewed 10 July 2008.

⁷² Section 5 *Police Assistance Compensation Act 1964* (WA). This Act continues to operate and has been revised as at February 2007.

Table 2 presents available data from various sources on the quantum of sick leave. For the most part, the data is patchy. It was not always possible to obtain data over a consistent time period, although some data was obtained from the most current annual reports from 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*⁷³ (the most recent available data), notes that Western Australian police officers had the highest rates of sick leave absence in the State Government workforce. However, there is an acknowledgement that the sick leave absence statistics for police officers include work-related injury data which is 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 in *Western Australian State Government Workforce June 2005*. This is clearly an inaccurate portrayal of the ‘true’ sick leave taken by police officers in Western Australia.⁷⁴

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 is 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

⁷³ *Western Australian State Government Workforce June 2005* Chapter 7 Department of Premier and Cabinet Government of Western Australia. Available at <http://www.dpc.wa.gov.au/psmd/pubs/wac/prof05/forewordexplanatorynotes.pdf> last accessed 2 July 2008.

⁷⁴ The Minister for Police acknowledged that the data includes sick leave, carers leave as well as work-related and non-work related illness and injury. As reported, Spencer B and Emerson D ‘Police sickie costs soar to \$14m – sick blue line’ *The West Australian* 8 October 2007 p. 4.

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’ 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.⁷⁵

⁷⁵ The Sick Bank is regarded as a substantial asset in South Australia; see Carroll M ‘Sick Leave—is it for sale?’ <http://www.policejournalsa.org.au/0310/14a.html> October 2003 *Police Journal Online* last viewed on 10 July 2008. Also noted in Mulvey C and Kelly R (1999) *Flexibility and Sick Leave*, Centre for Labour Market Research Discussion Paper Series 02/1. Available at http://www.cbs.curtin.edu.au/files/02_1.pdf last viewed 8 July 2008 at p. 8.

Table 2. Sick leave entitlements compared across Australian jurisdictions⁷⁶

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 ⁷⁷	9.6 ⁷⁸	N/A	Accrual of sick leave allowed for pre-1988 appointments (Regulation 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. ⁷⁹ As reported in annual report 2006–07, 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 2006–07 shows declining rates of workers compensation claims for police although days lost per officer per annum are not shown. ⁸⁰

⁷⁶ 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 that data are not identified in the report.

⁷⁷ *Police Regulations 2000* (NSW) Regulation 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.

⁷⁸ 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 (2006) *Auditor General's Report—Performance Audit Managing Sick Leave in NSW Police and the Department of Corrective Services Follow-up of 2002 Performance Audit*. Available at http://www.audit.nsw.gov.au/publications/reports/performance/2006/followup_sickleave/sickleave-contents.html Last viewed 7 July 2008 p. 10. See also Hughes G 'A Sick Force' *The Australian* June 27 2008.

Queensland	15 days ⁸¹	N/A	N/A	Sick Bank available
South Australia	12 days ⁸²	7.3 ⁸³	N/A	Sick Bank available. Declining rate of sick leave reported but compensation data shows slight rise in rate of claims since 2004–05. ⁸⁴
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 ⁸⁵	5.1 ⁸⁶		Sick Bank available to extend beyond 75 days (Regulation 6)
Northern Territory	Sick leave is not based on any specific	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

⁷⁹ Ibid p. 10.

⁸⁰ NSW Police Report–Annual Report 2006–07. Available at http://police.nsw.gov.au/data/assets/file/0019/111277/2006-07_Annual_Report.pdf last viewed 7 July 2008 p. 51.

⁸¹ *Police Service Award* 2003 (Qld) Clause 7.2. Available at <http://www.wageline.qld.gov.au/awardsacts/showDoc.jsp?Awards/P0290/7.2+Sick+leave> last viewed 7 July 2008.

⁸² Clause 19 *Police Officers Award* (SA). Available at <http://www.industrialcourt.sa.gov.au/index.cfm?objectid=7B97CAE9-E7F2-2F96-317F10E51740FF23> last viewed 7 July 2008.

⁸³ South Australia Police Annual Report 2006–2007. Available at http://www.police.sa.gov.au/sapol/about_us/publications.jsp last viewed 7 July 2008 p. 7.3.

⁸⁴ South Australia Police Annual Report 2006–2007. Available at http://www.police.sa.gov.au/sapol/about_us/publications.jsp last viewed 7 July 2008 pp. 89–90.

⁸⁵ *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 Regulation 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. Available at http://www.thelaw.tas.gov.au/print/index.w3p:doc_id=+189+2003+AT@EN+20080626000000:rec=0 last viewed 7 July 2008.

⁸⁶ Tasmanian Department of Police and Emergency Management, Annual Report 2006–07. Available at http://www.police.tas.gov.au/data/assets/pdf_file/0016/25612/Annual_Report_2006-07.pdf last viewed 7 July 2008 p. 128.

	allocation per year. ⁸⁷			frequency of claims only. ⁸⁸
--	------------------------------------	--	--	---

⁸⁷ Northern Territory Police website. Available at <http://www.pfes.nt.gov.au/index.cfm?fuseaction=page&p=433&m=23&sm=200> last viewed 10 July 2008.

⁸⁸ Northern Territory Annual Report 2007. Available at http://www.nt.gov.au/pfes/documents/File/police/publications/annrep/Annual_Report_2007_FINAL.pdf last viewed 10 July 2008.

The data available from Tasmania shows 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, Northern Territory has no formal arrangements for sick leave and sets no cap for sick leave entitlements. Unfortunately, no data is publically 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)⁸⁹ appear to have the highest rates of sick leave. Clearly, other factors are at play, for example, crime rates, stress levels and administrative procedures for claiming sick leave.

⁸⁹ Australian Institute of Criminology *Composition of Australia's Police services as at 30 June 2006*. Available at <http://www.aic.gov.au/stats/cjs/police/pol2006.html> last viewed 10 July 2008. This data varies 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. Available at <http://www.yprl.vic.gov.au/cdroms/yearbook2002/cd/wcd00002/wcd00217.htm> last viewed 10 July 2008.

Table 3. Total number of FTE sworn officers by jurisdiction

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

Of some significance is the fact that the Western Australian *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.

8. 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 is incomplete. In 1987 Swanton noted the need to review health data collections in the relevant agencies.⁹⁰ The public compilation and publication in annual reports by police agencies of data relating to sick leave and workers compensation is not uniform and in some cases data is simply not accessible.⁹¹

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.

⁹⁰ Swanton B (1987) Research brief (No. 7): 'Police work and its health impacts' *Australian Institute of Criminology*. Available at <http://www.aic.gov.au/publications/tandi/ti07.pdf> last viewed 10 July 2008 at 4.

⁹¹ This is despite guidelines in Western Australia on the issue of data collection for work-related injuries being made available in the HR Benchmarking Report. Available at http://209.85.141.104/search?q=cache:0p_k5CBfYgwJ:www.dpc.wa.gov.au/psmd/pubs/wac/navbench/benchmk.pdf+HR+Benchmarking+Report+western+australia+government&hl=en&ct=clnk&cd=1 last viewed 11 July 2008.

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 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:

1. State government and/or departmental resistance to providing coverage for workers compensation while allowing retention of extensive sick leave provisions
2. resistance of long serving officers to losing sick leave and medical benefits
3. 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, 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 clauses 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 Honourable Minister for Police*⁹² relating to the nature and rate of disease and injury for police officers. It seems

⁹² [1995] WAIRComm 166 (22 November 1995).

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 Commissioner has, however, expressed the view that non-work related medical expenses are a perk which should be removed.⁹³

There are also matters related to issues of recruitment, as Swanton has noted.⁹⁴ 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.⁹⁵ 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

⁹³ As reported, Morfesse L ‘Police injury perk on the line’ *The West Australian* 15 April 2006 p. 5. Subsequent to these comments the Western Australian Police Industrial Agreement clauses 35–37 were amended to remove the right to make claims in relation to injuries arising from extreme sports undertaken outside of work.

⁹⁴ Swanton B (1987) Research brief (No. 7): ‘Police work and its health impacts’ *Australian Institute of Criminology*. Available at <http://www.aic.gov.au/publications/tandi/ti07.pdf> last viewed 10 July 2008. See also *Attraction and Retention in the Western Australian Public Sector Regional Workforce* (2007) Edith Cowan University, which notes the need to take a broad approach to offering incentives to retain staff. Available at http://isp.ecu.edu.au/ispdocs/Attract_Retent.pdf last viewed 11 July 2008.

⁹⁵ 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] NSWCCPD 125.

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 proposed 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 behaviours 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. The industrial agreement between police officers and the Western Australian State Government and Commissioner is due for renegotiation in 2009 and will be watched with interest as these issues are once again on the agenda.