separate the arbitral and judicial functions of the Industrial Commission by bringing in a new Industrial Court.

A system of sanctions designed to bolster the enterprise agreements included making certain industrial action unlawful. There were to be new regulatory provisions allowing individuals to fight victimisation within a union; a controversial clause cancelling union membership for members more than three months in arrears in union fees; and a provision making closed shops legal when supported by 65% of workers in a secret ballot.

The reforms met a largely unfavourable reception. Union reaction was predictably hostile, but key employer groups also expressed their reservations. When industrial relations Minister John Fahey released his White Paper last November, the State's three main employer bodies began lobbying the main parties in the NSW Upper House to stop the legislation.

According to the *Sydney Morning Herald,* 28 November 1989, the Metal Trades Industry Association, the NSW Employers Federation and the NSW Division of the Australian Chamber of Manufacturers all expressed concern that small but militant enterprise unions would gain the legal right to extract huge pay rises in targeted workplaces. The Executive Director of the NSW Employers Federation, Mr Garry Brack, also criticised the proposal to split the functions of the Industrial Commission by creating an Industrial Court. He told the Sydney Morning Herald that a similar split in the federal sphere 'had not produced a superior result' (*Sydney Morning Herald* 28 November 1989).

As a result of the united objections of lobby groups representing unions and employers, as well as the opposition from the Australian Democrats and the ALP in the Upper House, the Government withdrew the Industrial Arbitration (Enterprise Bargaining) Amendment Bill from debate in the final week of Parliament last year. But Premier Greiner was still insisting as recently as January 1 this year that the main thrust of the legislation allowing single site union agreements for workers covered by NSW awards, would go ahead.

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informed decisions about medical procedures

> Physicians are like kings –
> They brook no contradiction.
>
> John Webster, *The Duchess of Malfi,* 1613

In a historic first, three law reform commissions have jointly published a report which recommends that doctors should provide enough information to allow their patients to make informed decisions about their treatment.

The report, *Informed Decisions About Medical Procedures* (VLRC24, ALRC50, NSWLRC62), was prepared by the ALRC, the NSWLRC and the VLRC, recommends that the National Health and Medical Research Council (NHMRC) should establish a committee to draw up guidelines recommending information that should be given for particular medical procedures. Committee members are to include patient and legal representatives as well as doctors.

The report also recommends that these guidelines should be admissible in evidence in any legal proceedings in which it is alleged that a medical practitioner was negligent or guilty of professional misconduct. Further, failure to inform should be a ground for a malpractice complaint.

The report stresses that decisions about medical procedures are taken by the patient, not the doctor, and that any decision to consent to a particular procedure should be 'informed'. The general principle is that the doctor should act reasonably in all circumstances by giving a patient sufficient information (including risks, benefits and alternatives) to enable the patient to make a real choice. The report only considers the case of competent patients.

empirical studies. The VLRC, which was the lead agency in the project, conducted three empirical studies to find out more about what doctors told their patients. Their report, *Doctor and Patient Studies,* provides details. The first study relates to doctors' attitudes to, and practice in, giving information, and their opinions on informed consent. It was based on interviews with 121 doctors and was conducted in 1986. The second study relates to patients' expectations and experiences in relation to receiving information from doctors and their general opinions on informed consent. This study was based on responses to questionaires and discussions with 396 people and was carried out in 1987. A third study observed doctor-patient interaction.

The studies showed quite clearly that the majority of patients want more information than they usually receive during medical consultations. They want to take an active part in treatment and some want to be able to take action to prevent further health problems. The doctors believed that patients should have information, but were of the view that they, the doctors, should still retain some discretion about giving it. Patients indicated that they are confident about their ability to understand information and said quite strongly that they did not want information withheld from them, even if it is unfavourable.

The majority of doctors and patients thought that the doctor should give all the information possible on risks of treatment but they differed on which circumstances justified the withholding of information.

These findings correspond to many of the findings of the surveys of patients and doctors conducted for the President's Commission in the United States in 1982. Ninety-two percent of the Australian sample of patients and 94% of Americans say they want to be told everything about their condition and treatment even if unfavourable.

The general conclusions from the doctor and patient studes are:

- patients want information
- doctors are giving them less information than they want
- certain problems needs to be addressed if patients are to receive the range of information required to fulfil the legal standard for informed consent
- doctors have an attitude that a patient's best interests are served if doctors decide what information to give to patients and what treatment is best for them.

The study also concluded that what appears most necessary is significant improvement in communication between doctors and patients. If both patient and doctor are engaged in seeking a mutually acceptable outcome and if patients are involved in making decisions, patients are more likely to accept whatever outcome can be achieved.

reactions to the report. Reactions to the reports were mixed. The Federal President of the Australian Medical Association, Dr Bryce Phillips, said it was impracticable to require the provision of a certain level of information and asked, where do you draw the line? He also argued that doctors needed to be free to use their judgment about the information they gave, especially when that information could be detrimental to the patient (The Age 30 January 1990, page 11).

This was rejected by the Health Issues Centre in Victoria. A representative of the centre, Ms Jaleen Caples, said

> the onus is on the doctor to try and ensure that the patient is comprehending what is being said. The onus is on the patient, too, to say they don't understand. But often they feel they are in a situation of less power and some people find it difficult to assert themselves (*The Age* 30 January 1990).

The Royal Australasian College of Physicians supported the law reform proposals. Its President, Professor Arthur Clark, indicated the proposed guidelines would set down what was expected of doctors.

> He said guidelines were preferrable to imposing regulations, which would be far more rigid. He said courts already took into account what was normal medical practice (*The Age* 30 January 1990).

Professor Ron Penny, Chief Commonwealth Education and Services Advisor on AIDS for the Australian National Council of AIDS, believes that it is essential that patients be informed about what is happening to them. Despite the amount of information available to the community about AIDS, Professor Penny believes that it is still the doctors responsibility to ensure patients understand the ramifications of the disease. He said

> often patients need the information repeated because they don't retain that information because of the stress at the time and go away with the impression that the doctor never told them (*Sydney Morning Herald* 21 November 1989).

The President of the New South Wales Branch of the Australian Medical Association, Dr Bruce Shepherd, was not on the proposal to amend legislation to make it clear that professional misconduct includes a failure to provide adequate information to a patient. He said such legislation will frighten doctors and convince many young people not to take a medical career.

> You are going to get nowhere by threatening doctors with deregistration. All we can do is keep trying to educate young doctors by teaching them how to communicate with patients (*Sydney Morning Herald* 20 November 1989).

The Chairman of the Queensland Branch of the Australian Medical Association, Dr Warwick Carter, said that a legislative move to ensure patients were given adequate information about their illnesses was 'using a sledgehammer to deal with something which could be solved more subtly'. If the plan was adopted, patients could more easily sue 'secretive' doctors for negligence (Queensland Sun 20 November 1989).

The President of the Doctor's Reform Society of New South Wales, DrCon Costa, said:

> No doctor who is practising with high standards would have anything to fear from such legislation. It's a matter of professionalism to give full explanations about medicine, treatment and conditions. The patient has a right to know ... I always make a point of letting my patients know that they can have a copy of their records. It's part of the service they pay for. If doctors won't show patients their records, perhaps they should charge less (*Sydney Morning Herald,* 21 November 1989, page 13).

According to the Victorian Health Issues Centre, consumer groups believe these proposals do not go far enough in protecting patients.

> Statutory reform was needed through an Act of the Victorian Parliament, rather than just guidelines. Even if the guidelines could be used in negligence actions. She [Jaleen Caples] said there were significant barriers to people taking court action because it was costly and it was often difficult to get one doctor to testify against another. It was disappointing that the Commissions had not proposed an alternative compensation scheme, such as the medical no-fault misadventure scheme which was in place in Sweden and being considered in Britain (The *Age* 30 January 1990, page 11).

The report and a separate volume containing the doctor and patient studies are obtainable from the ALRC and from Information, Victoria, 318 Little Bourke Street, Melbourne.

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courts consider informed consent

> Show him death, and he'll be content with fever.
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> *Persian proverb*