

New Zealand Law Society

SUBMISSION ON

INJURY PREVENTION, REHABILITATION AND COMPENSATION AMENDMENT BILL

1. INTRODUCTION

- 1.1 The Society notes that the no-fault accident compensation scheme introduced in 1974 involved a form of “social contract”. People in New Zealand lost their right to sue for most personal injuries caused by accident, but became entitled to a set of statutory benefits under the new scheme.
- 1.2 In addition, certain accident victims gave up statutory rights under the Workers Compensation Act, the Deaths by Accident Compensation Act and the Criminal Injuries Compensation Act.
- 1.3 Changes that reduce, replace or eliminate statutory entitlements (for which people may previously have been able to sue for damages) may give rise to pressure to reinstitute that right to sue.
- 1.4 In addition, International Labour Organisation Convention 17 provides, in article 9:
Injured workmen shall be entitled to medical aid and to such surgical and pharmaceutical aid as is recognised to be necessary in consequence of accidents. The cost of such aid shall be defrayed either by the employer, by accident insurance institutions, or by sickness or invalidity insurance institutions.
- 1.5 Since the introduction of regulations fixing co-payments for medical, surgical and pharmaceutical treatment for employees injured in work-accidents, New Zealand has been in breach of that provision.

2. SUBMISSIONS relating to specific clauses in the Bill

Clause 6: Personal injury

- 2.1 The amendment proposes adding to section 26 a new sub-section (4A) so that “personal injury” does not include any degree of hearing loss that is less than 6% of binaural hearing

loss. That means that any hearing loss less than 6% is not covered under s 20 of the Act. A person who suffers such a loss will therefore be able to sue to recover damages.

- 2.2 The exclusion of minor injuries from the scope of cover can be seen as an erosion of the social contract alluded to above. While it is true that a person who is not covered may sue for his or her injury, the reality is that such law suits would be expensive and are unlikely to be pursued. The universality and comprehensiveness of the ACC scheme has been something of a trade-off for the lesser sums recoverable for pain and suffering under the ACC scheme compared to those attainable under the previous personal injuries regime. The erosion of cover represented by the proposed s 26(4A), though capable of being regarded as minor in itself, is a token for a much larger and important concern about the simplicity and comprehensiveness of the scheme.

Recommendation:

That the proposed amendment not proceed.

Clause 8: Repeal of s.31 of the Act.

- 2.3 Section 31 of the Act establishes an advisory board of experts to advise the Minister on a number of issues arising “at the coal face” in connection with work related gradual process, disease or infection. The Board provides a mechanism that ensures that advances in science, technology and business methods leading to increased risk of injury by gradual process disease or infection, can be quickly brought to the Minister’s attention.
- 2.4 The Society believes that the Ministerial Advisory Board has an important function in reducing gradual process injuries and diseases in the workplace and consequential claims on ACC funds. It would be a retrograde step to abolish the Advisory Board.

Recommendation:

That Section 31 should not be repealed and the Ministerial Advisory Board should be retained.

Clause 9: Conduct of initial occupational assessment

- 2.5 The proposal is to amend section 91(1A) by making it discretionary for the occupational assessor to take into account, among other things, the claimant’s earnings before the claimant’s incapacity.
- 2.6 The current provisions ensure that the claimant’s pre-injury “earning capacity” is taken into account when making an occupational assessment. It enshrines in the legislation the findings

in numerous Court cases that the claimant's pre-injury work history, qualifications and experience and hence his "earning capacity" must be taken into account when assessing not only the type of work the claimant is capable of doing once vocational rehabilitation has been completed but also whether it is suitable for the claimant. It is designed to ensure that a highly paid and qualified worker or manager cannot be assessed as having attained vocational independence because he or she is capable of being a parking attendant. The current section 91(1)(b) requires the assessor to discuss with the claimant not only types of work which is available in New Zealand but also work which is suitable.

- 2.7 By replacing the work "must" with the word "may", it is likely that there will be increased litigation surrounding this issue. That is particularly the case when no criteria are supplied that guide an assessor in deciding whether to take pre-injury earnings into account.

Recommendation

That the proposed amendment of s91(A) to replace the word "must" with the word "may" is likely to lead to increased litigation and should not proceed.

Clause 11: Repeal of section 122 and new sections 122 and 122A substituted

- 2.8 The current section 122 requires the Corporation to apply to the Court for a determination as to whether it would be repugnant to justice to provide entitlements to a person injured in the course of committing an offence and the person has been sentenced to imprisonment.
- 2.9 The Court of Appeal has said that, in exercising its discretion as to whether granting entitlements would be repugnant to justice, the Court must consider, among other things: the gravity of the crime; the claimant's personal culpability; the harm caused by the crime; the extent of other penalties suffered; the claimant's personal circumstances; the nature of the proposed statutory assistance; the strength of the need; and the claimant's own resources to meet it.
- 2.10 Each case is different and if a blanket prohibition is placed on granting entitlements to a person injured during the commission of a crime for which that person is convicted and sentenced to imprisonment, injustices are bound to occur. The proposed amendment will apply to a convicted person after release from prison, which amounts to an additional penalty for which he/she has already served a sentence. The disentanglement will apply for life without regard for any of the issues which the Court of Appeal has said must be taken into account

when considering whether granting entitlements in a particular case would be repugnant to justice.

- 2.11 The Courts have a wide discretion when imposing sentences under the Sentencing Act. For the same offence, sentences may vary from home detention to community service or a short term of imprisonment. If the blanket prohibition against granting entitlements is imposed, it could lead to capricious outcomes and gross injustices depending on the sentence imposed.
- 2.12 Clause (2) of the proposed amendment raises an issue as to whether the Corporation is only liable to provide entitlements for treatment which under the current definition would include physical rehabilitation but not social or occupational rehabilitation.
- 2.13 Clause (3) raises an issue because it provides that the Corporation must not provide any entitlement for surgery unless the surgery is required to restore the claimant's function to enable him or her to *return* to work. This assumes that at the time the claimant was injured he/she was working. It would make more sense if the provision allowed the Corporation to provide an entitlement to surgery to enable the claimant to *undertake* work since that is one of the aims of training prisoners on their release from prison.
- 2.14 In addition it seems harsh completely to preclude the possibility of surgery for a person who is disentitled under this clause, unless it is to enable the person to work. Surgery for the relief of acute (or indeed any) pain, or to overcome disfigurement, or to remedy some other condition that makes daily life difficult ought not to be ruled out. It is recognised that the Minister has a power to grant exemptions under the proposed s 122A but it is submitted that there ought to be a right of appeal in such cases.

Recommendation:

The amendment to section 122 should not proceed, as it is likely to lead to capricious outcomes and injustices in a number of cases. If it does proceed there should be a right of appeal from a Minister's adverse decision under s 122A.

Clause 32 Persons eligible to purchase weekly compensation

- 2.15. By re-inserting the word "permanent" in section 223(3)(c)(i) which was removed by the 2008 Amendment, injustices will again be revealed where an employee in employment that is not within the definition of "permanent", applies to purchase the right to receive weekly compensation. Earners who for years have taken up regular seasonal work may not be

regarded as being in “permanent” employment and would not, under the proposed amendment, qualify.

Recommendation:

The word “permanent” should not be inserted as proposed in section 223 (3)(c)(i).

Clause 42 Section 291 repealed.

2.16 For the reasons already mentioned above the Society believes that the Ministerial Advisory Committee has an important function in eliminating or reducing the exposure of persons in the workplace to gradual process, disease or infection and it would be a retrograde step to abolish the Advisory Committee.

Recommendation:

That section 291 not be repealed.

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