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ACC Discussion  
Department of Labour  
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Hon Nick Smith  
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### **Increasing choice in workplace accident compensation – Discussion Document**

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the discussion paper on increasing choice in workplace accident compensation (Discussion Paper) issued by the Department of Labour. This submission has been prepared with the assistance of the Law Society's ACC Committee.

#### **Introduction: the Law Society's historical position on ACC**

2. The Law Society has historically engaged in the policy discussions on accident compensation and played an influential role in supporting the Woodhouse Royal Commission proposal for the abolition of the common law and the establishment of a statutory no fault scheme. The Law Society made detailed submissions to the Gair Select Committee on the Royal Commission Report in the early 1970s and made policy suggestions for changes to the proposals. The most significant of these, as Sir Geoffrey Palmer has noted,<sup>1</sup> were the Law Society's recommendations for lump sum compensation for pain and suffering and loss of enjoyment of life that were adopted by the Gair Committee.
3. The Law Society has continued to take an interest in accident compensation policy, at least to the extent of scrutinizing proposals for substantial changes to the model it supported in the original legislation the Accident Compensation Act 1972. The Law Society has noted that the accident compensation scheme, and the ACC, have been the subject of considerable policy debate over the 39 years since the original legislation. The Law Society has taken an "evidence based" approach to the changes proposed in the Discussion Paper. Such an approach is consistent with the key policy role the Law Society played in shaping the original government policy on ACC, and with a proper role for the Law Society in scrutinizing possible policy changes. It is also consistent with the policy approach of the current Government that has charged its Chief Scientific Adviser Dr Peter Gluckman with "promot[ing] discourse that will lead New Zealand to better apply evidence-based knowledge and research across all domains of public endeavour".<sup>2</sup>
4. The second part of this submission reflects some current practitioner issues.

<sup>1</sup> G Palmer, *Compensation for Incapacity* (Oxford University Press, 1979)

<sup>2</sup> Gluckman Sir Peter April 2011 "Towards the better use of evidence in policy formation"

## **PART 1: IS THERE AN EVIDENTIAL BASIS FOR THE POLICY CHANGES PROPOSED?**

### **(a) *Injury prevention, occupational disease and experience rating***

5. The Discussion Paper (p10) suggests that it is a failure by ACC that has resulted in the current situation where New Zealand's rate of work-related deaths has been high compared with other countries. Nowhere in the Discussion Paper is it acknowledged that it is the Department of Labour, not the ACC, that has the primary responsibility for workplace health and safety, and enforcement responsibility for the Health and Safety in Employment Act 1992. Before promoting changes to ACC legislation predicated on New Zealand's comparatively poor performance in achieving acceptable levels of workplace safety and health, the Discussion Paper should be clear about the reasons for this failure, and point to clear evidence (perhaps from international experience) to support the changes proposed to ACC legislation as being the best policy solution(s) to address that failure.
6. The proposal for reintroducing experience rating is an example. The Discussion Paper (p13) proposes experience rating as the means to reduce injury rates. There does not appear to be any evidence to support this major policy change, implemented on 1 April 2011, apart from the statement that:
 

Employers naturally want to keep costs down. The more employers are exposed to the actual costs of injuries in their workplace, the stronger their incentives to reduce those costs by reducing injury rates...
7. International evidence does not support this statement. For example, a submission to an Ontario Workers Compensation Board by an Experience Rating Working Group in April 2011<sup>3</sup> refers to several studies by Canadian experts, along with a substantial amount of other evidence from day-to-day experience in support of its recommendation that experience rating be abolished.
8. The New Zealand accident compensation scheme architect, Sir Owen Woodhouse, opposed risk and experience rating of levies because there was no evidence that employers could control the incident of accidents, and the financial incentive associated with their levies was too small to induce employer investment in a safer workplace. Experience rating may lead to the under-reporting of accidents rather than a reduction in the frequency with which accidents occur. It also cuts across the notion of community responsibility to pool the costs of all accidents, given the interdependence of different sectors of the economy.<sup>4</sup>
9. From the evidence referred to in the above submission it would appear that there is no good policy reason or evidential basis from which to conclude that the situation is any different in 2011. From a practical perspective, occupational disease is not a good fit with experience rating as it is difficult to attribute the claims cost to a particular employer.
10. The National Occupational Health and Safety Advisory Committee (NOHSAC) reported to the Associate Minister of Labour in 2004. It estimated that each year in New Zealand there are:
  - 700-1,000 deaths from occupational disease, particularly cancer, respiratory disease and ischaemic heart disease
  - 17,000-20,000 new cases of work-related disease

<sup>3</sup> Experience Rating Working Group, "An Addiction looking for a Rationale" Submission dated 5<sup>th</sup> April 2011 to Ontario WCB Funding Review.

<sup>4</sup> Woodhouse Report paras 328-336 pp134-135

- 2-4% of all deaths in people aged 20 or older are due to occupational disease, and
- 3-6% of all cancer deaths in people 30 or older are due to occupational cancer.

11. Unlike a traumatic injury, it will be rare when the exposure to the source of harm occurred as a result of a one-off accidental exposure that can be attributed to a single employer.

**(b) Rehabilitation**

12. The Discussion Paper makes no mention of the comprehensive comparative research undertaken by Price Waterhouse Cooper (PWC) in 2008.<sup>5</sup> The PWC report concluded that, compared with other comparable schemes around the world, New Zealand's ACC scheme provided better rehabilitation and return to work rates. PWC also concluded that ACC provided:

- broader coverage than any other scheme (except for workplace stress)
- better benefit structures, with the advantage of a primary focus on periodic payments rather than lump sums
- generally comparable benefit levels, with the exception of our requirement for co-payments for medical treatment
- lower scheme costs and expenses.

13. This evidence reflects the similar conclusions of the Burton Thomasin study in the 1990s which showed that the Canadian public fund workers compensation schemes provided better benefits, at a lower cost, than their private sector counterparts in the United States of America.

14. Despite this, the Discussion Paper implies that ACC rehabilitation has been unsatisfactory and the Minister in his Foreword refers to "new initiatives to reverse the deterioration in rehabilitation rates". In fact, as the ACC 2010 Annual Report notes, major rehabilitation initiatives were undertaken in 2008 and these are reflected in the improvements shown in the durable return to work rate graph on page 11 of the Discussion Paper.

15. It is unclear what problem the proposed policy change is purporting to address, and what evidence there is that the changes proposed will improve rehabilitation.

**(c) Scheme Delivery**

16. The PWC report looked at the four main structural approaches internationally for the implementation and delivery of accident compensation schemes:

- pure government monopoly – the ACC model
- closer integration with the social welfare system – the North European model
- private competitive underwriting – the US model
- Government underwriting with outsourced service delivery – the Australian (New South Wales and Victoria model).

17. In examining the operation of these models internationally, PWC noted that a clustering pattern emerged:

- Schemes delivered through pure private underwriting had relatively short financial "tails" due to the use of lump sum settlements, did not feature vocational rehabilitation as a claimant entitlement, and lent themselves to private insurance product delivery.

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<sup>5</sup> Price Waterhouse Coopers Australia Accident Compensation Corporation New Zealand: Scheme Review March 2008

- Schemes which featured high levels of periodic payments and provided a wide spectrum of defined vocational rehabilitation entitlements were all delivered through government monopolies.
- The two largest workers' compensation monopolies in Australia (NSW and Victoria) had evolved systems for the contracting out of their claims management to competitive providers
- Northern European countries had evolved social insurance systems which include case management and vocational rehabilitation.

18. PWC recommended a continuation of the current ACC model.

19. The Discussion Paper (p 24) states that:

The Government wants to introduce choice to improve the efficiency and effectiveness of the delivery of accident compensation and reduce the rate of workplace injury.

20. While the "choice" proposed (for employers and self-employed) ignores the reality that there will be no choice (or required involvement in the choice) for the workers for whom the scheme was originally established, no evidence is produced, or referred to, to support the government's policy objective in paragraph 19 above.

### **Conclusion to Part 1**

21. The Law Society does not accept that there is persuasive evidence to support the suggestion that there are problems which require the significant legislative changes proposed to achieve the stated policy.

## **PART 2: PRACTITIONER ISSUES**

### ***(a) Review process in a competitive ACC model***

22. The Law Society's ACC committee members practice extensively in accident compensation law. Collectively, the committee has experience in review hearings and appeals in the District Court, High Court and Court of Appeal. The committee members act variously for claimants, unions and employers on accident compensation matters.

23. The review hearing is the primary hearing for all accident compensation disputes. This is the hearing where disputed claims for cover for personal injury by accident and for entitlements such as lump sum, weekly compensation, attendant care, treatment and rehabilitation must be canvassed in full.

### The variety and complexity of matters at review and the review's role in the Act

24. Review hearings involve a broad range of matters, from simple through to complex. A reviewer can hear matters ranging from entitlement to physiotherapy, through to matters involving informed consent or attempting to determine if cerebral palsy in a newborn baby was caused by medical treatment. Suspensions, revocations of cover, debt decisions and entitlement to interest on unpaid compensation are just some of the many issues that come under a single procedure.

25. Set out below are two examples of District Court appeals that arose from review hearings.

These illustrate the complexity of matters that have been subject of reviews:

- “Gradual process injury” (solvent neurotoxicity) – in *ACC v Scoullar* (366/05) the District Court considered the case of a spray painter who suffered numerous physiological and psychiatric symptoms which he linked to his work at Fulton Hogan. There was conflicting evidence provided by two leading specialists, and the claim was also opposed by the employer.
  - “Vocational independence” – in *Dekker v ACC* (10/07) the Court considered that there was substantial doubt over the appellant’s ability to do the jobs ACC said he could. There were difficult questions about the nature and timing of rehabilitation initiatives and when they had ceased.
26. Complex review hearings of this type will occur in greater frequency under a competitive regime. Accredited employers and their providers often contest whether a work injury is covered, or refuse to provide entitlements (particularly surgery), or provide entitlements at a reduced level (particularly attendant care and childcare).
  27. Reviews also often involve challenging issues of law. The Accident Compensation Act 2001 (Act) runs to 401 sections and has a number of schedules. The largest schedule (schedule 1, which details entitlements) runs to a further 78 clauses.
  28. The correct interpretation of accident compensation legislation is the subject of numerous decisions in the District Court, High Court and Court of Appeal. An advocate or solicitor representing a claimant at review often needs to discuss both the relevant sections and the interpretation of those sections in the case law. Two recent examples of the challenges presented by compensation law are the Court of Appeal decisions in *ACC v Ambros* [2007] NZCA 304 and *ACC v Kearney* [2010] NZCA 327.
  29. The range of decisions that come before reviewers, the complexity of matters that may require consideration, and the review’s status as the only remedy available to claimants (they are statute barred from raising the dispute in a court of law) mean the review is fundamental to the proper operation of the scheme. The importance of properly run reviews was the subject of judicial comment in *Wikeepa v ARCIC* [1998] NZAR 402, where the Court said (at pp 405-406):
 

The whole concept of the review procedure is to revisit the issue which is the bone of contention as raised by the claimant and look at it afresh having regard to any new evidence or information which might be pertinent to the particular issue that needs to be determined. I find that the review procedure is more than simply casting an eye over the first instance decision of the Corporation to see whether the particular officer who made the decision got it right.

The review procedure allows for representation by the interested parties, the making of submissions and the giving of evidence and the whole issue which is the subject of the review hearing is alive and the Review Officer who conducts that hearing has the power to substitute his own decision for that which had earlier been made.
  30. In the Court of Appeal decision of *Ambros v ACC* (NZCA 304) the Court emphasised the role of the review as the primary venue for the establishment of facts in disputes (paragraph 64):
 

...the essentially inquisitorial role of the Corporation, both when an initial claim is made and in the review function — see *Medical Law in New Zealand* at [24.12]. The inquisitorial approach should generally mean that, to the extent this is practical, all aspects of the claim (including causation) have been investigated by the Corporation before matters reach the courts. If that occurs, the situation in *Cochrane*

v Accident Compensation Corporation [2005] NZAR 193 (HC) would be avoided. In that case, the medical evidence at the review stages had not been directed to the legal test of causation. As a consequence, a rehearing was ordered in the District Court.

31. In other words, the courts rely on the reviewer and the review process to test the evidence and the law to get to the truth of a matter.

#### Issues with the current process

32. Dispute Resolution Services Limited (DRSL) is conducting an increasing number of reviews. Many of these review decisions are being appealed and there are now large numbers of appeals (over 800) before the courts, involving issues such as surgery, vocational independence and weekly compensation.
33. The large number of appeals reflects in part the failure of the current review process to handle the more insurance-based competitive approach adopted by ACC. That problem will increase if more insurers are added to the marketplace.
34. The Law Society believes that competition will lead to increased litigation as insurers seek to minimise the costs they believe they are responsible for. The existing review process was not designed with competition in mind and, at present, leads to a large number of appeals.
35. Disputes at review take several months to be heard. Significant sums of money are often involved and accredited employers and ACC often instruct specialist barristers to act for them.
36. Under a competitive regime, more than one insurer may be involved and legal representation will increase (for instance, where there is a dispute between the workplace insurer and the non-workplace insurer over whether or not the injury was caused by a workplace accident). In such disputes, it is likely that the claimant will be caught in the middle, with both insurers refusing to pay entitlements until the issue is resolved. The claimant will end up being involved in and paying for a dispute between insurers.
37. The present review procedure is largely informal. There is little oversight provided by reviewers under the present system. There is some case management, but DRSL operates largely on good faith and there is no power in the Act allowing reviewers to control the conduct of insurers or claimants. For example, reviewers do not have the power to summon a witness or order the production of documentary evidence.
38. Although in theory the reviewer's role is inquisitorial, the reality is that reviewers do not have the time to conduct investigations into complex claims. They are reliant on the good faith of the parties and the quality of the advocacy to get to the truth.
39. Although the hearing must comply with the rules of natural justice, there are no powers in the Act ensuring that takes place. There is, for example, no power to award costs for failure to adhere to timelines or act on a reviewer's direction. As a result, time tables and directions issued by a reviewer are often ignored. There is no sanction a reviewer can apply to vexatious litigants (whether insurer or claimant) and no power to award costs for unreasonable conduct or time wasting.
40. This leads to the review process becoming slow and inefficient, which inherently benefits an insurer as it greatly increases the chances of a claimant abandoning the review process and giving up on obtaining the entitlement at issue. This can have a devastating effect on claimants and their families. The cost of the claim is shifted to either the families or the social welfare system, and the insurer escapes the cost of the claim when they have received the benefit of

levies. There is also no recognition of the public cost in the legal aid system supporting claimants who then, after public cost, don't proceed.

41. Under a competitive regime, the law and regulations must give the reviewer the power to control and censure the parties at the review hearing, and throughout the review process. An informal procedure is not appropriate in a competitive ACC system.

#### Reviews in a competitive regime

42. Under a competitive regime, ACC and workplace insurers will likely challenge the relevance of earlier injuries, prior decisions of either ACC or other insurers, or claim that conditions for which the claimant does not have cover (e.g. disease) are responsible for his/her condition.
43. This type of review is particularly complex and will involve reviewing large historic ACC files and medical files. Although an experienced solicitor can do this quickly, a number of hours will still be required, reviewing the file to extract and collate relevant evidence.
44. The current review process makes no allowance for such complicated matters. Complex reviews will occur at greater frequency in a competitive regime, as the losing insurer will bear the liability for the future cost of the claim.
45. In complex cases, it will often be necessary to draft a statement of evidence. Statements may be required from the applicant, family members, medical specialists or other health professionals, and eye-witnesses to particular events (such as work colleagues who can give evidence on the work tasks that a claimant performed).
46. In terms of expert evidence, it is necessary to read all the medical reports and draft an instruction letter to a specialist. An instruction letter generally includes a comprehensive background to the injury, the medical evidence, an explanation of the relevant statutory criteria, and a series of questions to be answered. In most cases, a bundle of documents is also provided to the report writer.
47. In most cases, preparation for the review will require written submissions to be drafted. This involves setting out the following: the issue, the factual background, the testamentary evidence, the medical evidence, the relevant statutory provisions, the relevant case law, and the submissions. Written submissions can extend to 10-20 pages in more complex cases and can take 10-15 hours to draft.
48. Hearings normally take around an hour in terms of submissions and the giving of claimant evidence. Hearings where other witnesses need to give evidence or where cross-examination is required can last for 3 or 4 hours and occasionally a full day.
49. The current review process makes no allowance for these steps. It does not recognise the complexity of the review process. The Law Society has previously made submissions seeking redress on this issue, particularly with respect to the current cost regime, which is out of step with reality. There is now a considerable gulf between the costs awarded at review for representation (around \$600) and costs awarded by the District Court for a rehearing of the same matter (around \$3,000). The cost differences means that matters not settled at the review level are often settled at the appeal level, as there is no cost incentive to settle at review.

#### Closing comments on the review process in a competitive model

50. The present review procedure makes no allowance for the complexity of matters that can come to a review hearing. There has been no recent recognition by Parliament of the importance of

the process, although this has been the subject of repeated comment from the superior courts.

51. An informal review process that makes no allowance for complexity or cost, and fails to recognise the vital nature of the entitlements at issue (particularly weekly compensation, attendant care and treatment) is ill-suited to a market system whose stated aim is to improve the efficiency and quality of decision making. The existing review process is focused more on informal investigation than litigation. It is unsuited to competition as there is no meaningful way to control the parties or to enforce review decisions. That undermines access to justice given that disputes on issues as important as cover, access to treatment, attendant care and rehabilitation will often be the most important civil matter that a person can be involved in.
52. The ACC is represented at reviews by qualified persons whose remuneration is fully funded from the levy system. Many accredited employers and the ACC now instruct specialist barristers to represent their interests at review.
53. Claimants naturally do not understand why insurers are allowed the advantage of a lawyer who is fully funded by the compensation system (whether or not they are successful), while they have to pay the majority of their own legal costs, even if they are successful. It is at odds with a competitive market-driven system and basic notions of fairness that the insured should bear the cost of the insurer's incorrect decision.
54. The present review procedure and cost structure encourages insurers to make incorrect decisions because there is no market consequence for getting a decision wrong; rather there is a profit incentive to decline claims as the present review regime is strongly weighted in favour of the insurer.
55. A possible solution that will encourage fair competition is to return to the earlier review process in place under the 1972 and 1982 legislation, which gave reviewers the powers of a commission of enquiry and also allowed the awarding of reasonable costs if the insurer was unsuccessful.
56. These powers are still in force with respect to reviews run under the 1972 and 1982 Accident Compensation Acts. This system allows the reviewer to obtain the evidence necessary to conclude the matter and to control the conduct of the parties.
57. The discretion to award costs under this system allowed reviewers to take into account such things as whether a solicitor was necessary, the conduct of the parties prior to the review, and the importance of the subject matter, so that reasonable costs were only awarded in deserving cases. This would be a return to the previous review regime that operated successfully for 20 years and did not impose any undue cost burden on either the insurer or the claimant.
58. There must be some financial deterrent with respect to making incorrect decisions, especially given the opportunities for an insurer to correct decisions before the review hearing. If an insurer forces a claimant to a hearing and is unsuccessful, it is unfair to require the claimant to bear most of the cost of correcting a wrong decision.
59. When it comes to a competitive environment, the significantly increased litigation that will follow, together with the vast discrepancy in power between the parties, brings to mind the comments made by Judge Trapski in his 1994 report on the accident compensation scheme (*Report of the Inquiry into the Procedures of the Accident Compensation Corporation (1994)*). On pages 101-4 of the report he observed that:

All this raises a point of principle; one that has been argued on many occasions. Should a claimant suffer any financial loss in taking a decision on review where the original decision was wrong; where it was the Corporation which drove the process which resulted in that wrong decision; where the process which resulted in that

wrong decision was driven in a wrong direction and often for the wrong reasons; where the resulting decision was entirely the fault of the Corporation. It is often claimed that in these circumstances the Corporation or the party who initiated the error should bear the entire cost of correcting that error.

As a matter of logic it is difficult to fault that line of thinking but it suffices to say that traditionally that view has not found favour with the courts in this jurisdiction or in any other jurisdiction of a similar nature. The defaulting party is generally required only to make a contribution to the successful party's costs, and successful party is always left dissatisfied with the result. The usual comment is – the little man can never win against the big corporation, especially where a monopoly is involved.

Personally I have real sympathy for that view, especially in those cases where compensation payments are involved over a long period of time and where the claimant is of necessity and compulsorily losing 20% of their income in any case, even when they win. But rarely if ever is such a plea successful. ...

There is a great deal of legal involvement in these matters and if the Corporation is unable to get it right the first time, it ought in the main bear the cost of the consequences. If that was the case it may encourage the Corporation to require claims officers to obtain greater legal input at the stage of initial decision-making instead of proceeding to make perverse or inadequate decisions without legal input.

60. These comments are relevant where multiple insurers will be in the market. A reason why the accident compensation scheme was introduced in the first place was because of the litigious nature of personal injury disputes where insurers were involved. The worst excesses of the conduct of insurance companies in that litigation was controlled then (as it is now overseas) by an award of costs against the party proved to be wrong.
61. If the Governments reintroduces insurers back into personal injury litigation it must come with a market consequence for incorrect decisions, rather than incentives to behave badly. The current review regime encourages poor conduct. If competition is introduced without a return to the commission of inquiry model, thousands of matters will likely be appealed to the District Court, which already faces a back-log of over 800 appeals due to the more stringent and litigious stance adopted by a more “competitive” Accident Compensation Corporation.
62. There is a risk that New Zealanders will lose faith in a system so heavily skewed in favour of insurers, and revisit the worth of a system where they cannot sue at common law for personal injury.

### **Recommendations**

63. That the current review process be removed and replaced with the review process promulgated under the Accident Compensation Acts of 1972 and 1982.
  64. That the Act be amended so that review decisions are enforceable in a court of law.
- (b) Regulatory structure to wrap around choice of insurer*
65. The Discussion Paper gives insufficient information about the regulatory structure and the cost that will be required to support the introduction of a choice of private insurer.
  66. We know from the Discussion Paper that there will be:
    - a register of employers alongside the contracted insurer
    - an independent claims lodgement (handling and clearing) unit

- an independent disputes resolution agency
- a market regulator to monitor and enforce compliance
- a central data pool to gather information on historical claims and costs to help insurers set prices and develop products
- a default regime in event of insurer insolvency, with ACC to take over cost of claims management to be paid for by levy on all insurers
- prudential regulation of potential insurers (with adaptations of the standard insurer regulation to deal with circumstances specific to work related personal injury insurance: such as having adequate reserves to meet the “tail” of claims).

67. However, no indication is given about how much this regulatory structure will cost, how it will be funded, and whether it will be effective in achieving the objectives claimed: reduced injury rates, safer workplaces, and better return to work outcomes for injured workers.

#### Details requiring development

68. These include:

- “How to fund and manage the on-going cost of claims relating to workplace injuries suffered before 1 October 2012”. It is noted that this is at least 40 percent of current levies. Department of Labour officials advise that the intention is to recover costs of residual claims through a levy on all employers, in much the same way that the fire service levy on households is collected by insurers and passed on to the New Zealand Fire Service. They suggest that the liability is now likely to be low, so do not see this as a major problem, but if that is the case the reduction from the current 40 percent of levies to a small amount has to be taken on trust.
- How to handle costs of occupational disease/gradual process injuries and how to recover these from previous insurers (including ACC).
- Calculation and allocation of share of cost of public health acute services and emergency transport services. The intention is to allocate these through a mechanism similar to that proposed for recovery of residual claims costs.
- The nature of the prudential regime that will apply to insurers seeking to enter this market.

#### Unknown dimensions of cost (partly derived from the unknown scheme detail)

69. These include:

- Level of levy to cover operating cost (administration of regulatory regime)
- Residual claims levy (see above).
- Public health and emergency services cost allocations
- Default minimum prices for treatment services when claims handed back to ACC at employer behest

- The Government says it wants to improve the delivery of the Accident Compensation scheme, but there is no evidence provided in the Discussion Paper that the proposals will deliver that result. The number of unknowns means that the proposals are based on assumption, rather than soundly based data.
- It is possible that the changes will increase cost, and deliver an inferior result.

(c) *Other Issues*

Appeal rights

70. The appeal rights contained in the legislation end with the Court of Appeal. There should be a final right of appeal to the Supreme Court on questions of law. *McGrath v ACC* (SC127/2010) is a recent decision by the Supreme Court concerning the correct interpretation and application of s110(3) of the Act, which expressly limits ACC's power to require a claimant to undertake the vocational independence assessment process if it is unlikely the claimant will achieve vocational independence. This is an important question of law and arose in the context of judicial review proceedings commenced in the High Court. If this matter had been substantively determined by a reviewer and District Court, then the final right of appeal would have ended with the Court of Appeal.
71. Currently appeals to the High Court from the District Court are limited to questions of law. This right of appeal should be extended to errors of fact in appropriate cases. This is particularly so when the issue comes down to conflicting medical opinions. A good example is *Teen v ACC* [2002] NZACC 244, where a factual finding substantively determined the entitlement to cover for claimants with occupational overuse injuries.

**Recommendations**

72. That there be a right of appeal to the High Court on questions of fact in appropriate cases
73. That there be a right of appeal to the Supreme Court on questions of law with leave from the Court of Appeal.

Right to complain to Ombudsmen

74. The Ombudsmen Act 1975 provides for those departments and organisations to which the Ombudsmen Act applies. This includes the ACC. The Office of the Ombudsmen has determined that there is no right of complaint in relation to an ACC matter where the provider is not the ACC, but an accredited employer. Many people regard the right to complain to the Ombudsmen as a necessary avenue for relief. In the case of accredited employers, it seems that the avenue of complaint is to the partnership programme coordinator, an ACC official. It is desirable that there be a truly independent external body to whom legitimate complaints can be made.

**Recommendation**

75. That the Ombudsmen Act be amended to ensure that there is a right of complaint to the Ombudsmen whether the respondent is the Corporation itself, an accredited employer or a private insurer.

Interest

76. The rationale for providing for the interest entitlement was to provide a financial disincentive to private insurers to delay paying out entitlements. The interest provision was introduced when

the Government explored privatisation. In civil jurisprudence, the award of interest compensates a successful party for being kept out of its monetary entitlement during the currency of the dispute. The Court of Appeal decision in *ACC v Kearney* [2010] NZCA 327 was thought by many practitioners to represent a significant breakthrough in the jurisprudence around the application of the interest provisions in the Act, but experience has quickly shown that ACC has applied a restrictive interpretation of this decision. One situation that the current interest provision does not cover is where ACC delays seeking the very information it needs in order to calculate and make the payment of weekly compensation. ACC should not be rewarded for inaction.

### **Recommendation**

77. That the interest provision be amended so as to cover this situation involving delay by the ACC in seeking information so that interest will accrue from the date when the Corporation ought to have obtained the necessary information.
78. Whether or not a claimant has been in receipt of an income tested benefit should not affect the interest entitlement.

### Income tax

79. Income is deemed to be derived in the year of receipt, rather than over the period of time to which it properly relates. This results in an injustice for those claimants whose weekly compensation has not been paid at all, or under paid, sometimes for many years. Those claimants then have their accumulated arrears of weekly compensation taxed at the highest taxable rate because it is received in one income tax year. They thereby lose the benefit of the lower tax rates which would probably apply had the weekly compensation been paid along the way. A simple amendment to the Income Tax Act 2007 is all that is required to enable the Inland Revenue Department to calculate and deduct income tax on a pro rata basis.

### **Recommendation**

80. That the income tax legislation be amended so that income tax on weekly compensation which has been found to be due and owing, is charged and payable at the rate applicable to the year or years when the compensation should have been paid not the year it is actually received.

The Law Society trusts that these comments are of assistance. If you would like to discuss them further, please do not hesitate to contact the Convenor of the ACC Committee, Don Rennie, through the secretary, Julie Smith, on (04) 463 2967 or by email to [Julie.Smith@lawsociety.org.nz](mailto:Julie.Smith@lawsociety.org.nz).

Yours sincerely



Jonathan Temm  
**President**