



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Accident Compensation Amendment Bill

29/06/2018

Accident Compensation Amendment Bill

1 Introduction

- 1.1 The New Zealand Law Society (Law Society) appreciates the opportunity to comment on the Accident Compensation Amendment Bill (Bill).
- 1.2 This submission focuses on clause 10 of the Bill. Clause 10 would amend the Accident Compensation Act 2001 (Act):
- (a) to provide up to 2 years of weekly compensation for entitled persons, regardless of whether they receive New Zealand Superannuation (NZS) as well, by removing the current requirement to make an election between weekly compensation and superannuation after receiving a year of both; and
 - (b) to allow surviving spouses to receive up to 5 years of weekly compensation, regardless of age.
- 1.3 The removal of the requirement to elect between weekly compensation and NZS, and the decision to remove age limits for surviving spouses' entitlements, are welcome reforms. These changes address provisions in the Act which the Human Rights Review Tribunal declared were inconsistent with the right to freedom from discrimination on the basis of age.¹
- 1.4 However, clause 10 gives rise to two concerns:
- (a) The provision of up to 2 years' weekly compensation for entitled persons, regardless of whether they also receive NZS, causes *prima facie* discrimination for some claimants based on age and it is not clear that the discrimination is demonstrably justified.
 - (b) Whether the 2-year limit on weekly compensation for entitled persons near, at or past the age of 65 (the New Zealand Superannuation Qualification Age (NZSQA)) should be extended to an upper age limit of 70 years, to recognise that today many people work well beyond the age of 65. This would effectively be a reversion to the position under the original 1972 accident compensation legislation.
- 1.5 The Law Society does not seek to be heard, but is happy to discuss potential drafting amendments with officials if that would be of assistance.

2 Clause 10: transitional overlap between weekly compensation and superannuation

The current position

- 2.1 The Act provides weekly compensation to people who are injured and cannot work. As some people continue to work past the age of 65 (NZSQA), the Act provides transitional provisions for people who are first injured near, at or past NZSQA.

¹ *Heads v Attorney-General* [2015] NZHRRT 12 (17 April 2015).

2.2 Entitlement to NZS is not means-tested, so superannuitants are entitled to receive earnings from employment as well as superannuation. However, if a superannuitant suffers an injury that is covered by ACC, clause 52(5) of Schedule 1 of the Act currently requires them to make an election to receive either weekly compensation or NZS.

Clause 10

2.3 As noted above, clause 10 removes the requirement for claimants or dependants to make an election between weekly compensation and NZS, when they reach NZSQA. Instead, those who first become entitled to weekly compensation for a personal injury:

- (a) **at, or after reaching NZSQA**, will be able to receive up to two years of weekly compensation, together with any superannuation they may be eligible for;
- (b) **more than 24 months before reaching NZSQA**, will cease to be entitled to compensation on reaching NZSQA; and
- (c) **24 months or less before reaching NZSQA**, will be eligible for a maximum of two years' weekly compensation from the date of entitlement, along with any superannuation they may be eligible for upon reaching **NZSQA**.

2.4 In short, clause 10 provides that where a claimant first became entitled to weekly compensation at or after NZSQA (paragraph 2.3(a)), or less than 24 months before reaching NZSQA (paragraph 2.3(c)), the claimant is entitled to weekly compensation for a maximum of 2 years from the date of entitlement to the compensation.

2.5 The practical application of these changes is set out in the table below:

Age (A) when first entitled to weekly compensation	How long has the person been entitled to weekly compensation before reaching NZSQA?	When eligible for weekly compensation?	Eligible for simultaneous NZS and weekly compensation (WC)?
Any time from their 65 th birthday (paragraph 2.3(a))	N/A	From (A) for up to 2 years	Yes, both for up to 2 years, then NZS only
Any time prior to their 65 th birthday	More than 24 months	Until age 65 only	No; only NZS from 65

Any time between their 63rd and 64th birthday (paragraph 2.3(c))	Less than 24 months	From (A) for up to 2 years (i.e. up to a maximum age of 65 years and 364 days)	Yes, both NZS and WC for up to 2 years (i.e. up to a maximum age of 65 years and 364 days); then NZS only
Any time between their 64th and 65th birthday (paragraph 2.3(c))	Less than 24 months	From (A) for up to 2 years (up to a maximum age of 66 years and 364 days)	Yes, both NZS and WC for up to 2 years (i.e. up to a maximum age of 66 years and 364 days); then NZS only

Unequal treatment of some claimants

- 2.6 The shaded portion of the table illustrates the effect of clause 10: the closer a claimant is to their 65th birthday when they become eligible for weekly compensation, the longer the period they will receive both weekly compensation and superannuation, compared to persons who first become eligible for weekly compensation nearer their 63rd birthday.
- 2.7 The Ministry of Justice’s advice on the Bill’s consistency with the New Zealand Bill of Rights Act 1990 (NZBORA) notes that this “appear[s] to discriminate on the basis of age for claimants or dependents aged 63 or 64”.²
- 2.8 The Ministry concluded that this *prima facie* age discrimination is justified, on the basis that:³
- It is appropriate for a bright line [the 2-year limit] to be drawn for eligibility for both weekly compensation and superannuation. Both forms of assistance are ways that the State compensates people who are no longer working. Accident compensation is intended to reflect the loss of wages that would have been earned but for the injury, while the superannuation scheme reflects societal expectations that there will come an age where people no longer work.*
- 2.9 For the purposes of determining whether the *prima facie* age discrimination illustrated in the table is demonstrably justified, the Law Society notes that it is not correct to say that weekly ACC compensation is State “assistance”. It is a statutory entitlement designed to replace earnings lost to all earners who suffer personal injury in New Zealand, and is funded from levies paid by employers, self-employed persons and motor vehicle owners.

² Ministry of Justice, *Consistency with the New Zealand Bill of Rights Act 1990: Accident Compensation Amendment Bill*, advice to the Attorney-General, 29 March 2018, at [9]. The advice also notes at [8] that clauses 13 and 14 amend the Veterans’ Support Act 2014 to mirror the clause 10 changes (see the explanatory note to the Bill at p2).

³ *Ibid*, at [12].

2.10 As the Regulatory Impact Statement notes:⁴

Weekly compensation is intended to be compensation for lost wages. It therefore is reasonable that people would be able to receive both weekly compensation and NZS, as they would have been allowed to receive both their wages from employment and NZS had they not been injured.

2.11 Section 5 of NZBORA requires that “... the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

2.12 The factors that demonstrably justify discrimination, as required by section 5 of NZBORA, need to be carefully articulated. In the Law Society’s view, the Ministry’s advice does not provide an adequate basis for concluding that the *prima facie* age discrimination noted above is justified. The Law Society **recommends** that the Committee give careful consideration to whether the section 5 test has been met in this context.

The ‘bright line’: a 2-year limit on weekly compensation near, at or past NZSQA

2.13 The Law Society agrees with the Ministry that achieving a fair and efficient accident compensation scheme involves complex social policy questions and that it is a matter of legitimate policy choice as to where thresholds are drawn.⁵

2.14 It is also acknowledged that there needs to be a point at which compensation for loss of earnings stops. The Human Rights Review Tribunal noted in *Heads v Attorney-General* that:⁶

[A]s compensation under Part 2 of Schedule 1 is paid as compensation for lost earnings, those earnings will inevitably come to an end once the individual retires from the paid workforce. A suitable proxy for fixing that point is NZSQA. It is not realistic to assume that weekly compensation will continue for the whole of life post-retirement.

2.15 Where the end point is set is a policy choice, but one that must be made having due regard to section 19 of the New Zealand Bill of Rights Act, which affirms the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993 (HRA). The grounds set out in the HRA include discrimination on account of age and on account of disability.

2.16 The Law Society recognises that there has to be a point at which compensation for loss of earnings stops and that whatever age is selected may be *prima facie* discriminatory. However, setting the limit at 70 years (rather than the 2-year transitional provision in clause 10) would reflect the upper age limit for payment of earnings-related compensation in the original 1972 accident compensation legislation,⁷ and would recognise that today many people work well beyond 65 years of age.

⁴ Regulatory Impact Statement for the Accident Compensation Amendments to be included in the Regulatory Systems Amendment Bill (2), 5 December 2016, at p9.

⁵ Note 2, at [11].

⁶ [2015] NZHRRT 12, at [157.4]

⁷ Section 128, Accident Compensation Act 1972

- 2.17 The Law Society therefore **recommends** the Bill is amended to provide that superannuitants injured while in employment are entitled to receive both weekly compensation and NZS until reaching the age of 70 years. As noted, this would effectively be a reversion to the 1972 position. Adopting a limit of 70 years of age would better achieve the Bill's aims of consistent provision of cover and entitlement, and keeping the scheme up to date and relevant.
- 2.18 An amendment to this effect should have negligible impact on ACC funds because an ACC levy is payable on earnings received by superannuitants who are in employment and who should be treated in the same way as other earners.

A handwritten signature in black ink, appearing to be 'Kathryn Beck', written in a cursive style.

Kathryn Beck
President
29 June 2018