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COMMENTARY

ACC 1997: A Fairer Scheme or a Breach of the Social Contract?

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What we now tend to overlook is what a major step was taken in 1974 when New Zealand abolished the right to sue in the civil courts in exchange for the entitlements under the Accident Compensation Scheme. The editors of the *American Journal of Comparative Law* described it as "an unparalleled event in our cultural history, the first casualty among the core legal institutions of the civilised world".

In the current Accident Compensation Corporation (ACC) debate it is important not to forget that:

- The object of the reform in 1974 was the abolition of the right to sue because it was seen as inefficient and increasingly expensive.
- As a consequence there was a very real social trade-off - the social contract - because it was necessary to negotiate through the political process a level of entitlements under the Accident Compensation Scheme which would persuade New Zealanders that surrendering the right to sue was worthwhile.

The Woodhouse principles

I believe it is valid, despite the New Right influenced political reforms of the past ten years, to conclude that the original five principles laid down by the 1967 Royal Commission still reflect New Zealand society's values thirty years later.

The Woodhouse principles were:

- **Community Responsibility** (i.e., Community financed);
- **Comprehensive Entitlement** ("wisdom, logic and justice all require that every citizen who is injured must be included and equal losses must be given equal treatment");

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- **Complete Rehabilitation** ("the restoration of 'injured people' to the fullest physical, mental, social, vocational and economic usefulness of which they are capable");

- **Real Compensation** ("income-related benefits for income losses, payment throughout the whole period of incapacity, and recognition of permanent bodily impairment as a loss in itself");

- **Administrative Efficiency** ("the collection of funds and their distribution should be handled speedily, consistently, economically, and without contention").

In a national opinion poll of 2,500 people at the time of the Law Commission review of ACC in 1988, 80 percent expressed support for the Scheme.

It is significant, too, that in promoting his 1992 legislation the former Minister for ACC, Bill Birch, claimed it was consistent with the original Woodhouse principles. That his Act breaches all five principles is a fact that has been now well demonstrated in practice; but we are entitled to conclude that the current Government subscribes to the founding principles. The Government's Coalition Agreement statement of general direction for ACC is to "rebuild public confidence in ACC by restoring it to a world-leading, 24 hour, comprehensive but affordable accident cover" and in doing so to ensure "the provision of publicly owned comprehensive ACC services by the Accident Rehabilitation and Compensation Insurance Corporation" (ACC).

It seems therefore that any new reform initiatives should be directed at restoring our publicly owned scheme to a "world-leading" position.

1992 Act fatally flawed

The Coalition Agreement also refers to "replacing the harsh and unfair aspects of existing legislation and regulation", "providing greater flexibility to meet individual circumstances and expedite effective social and vocational rehabilitation", and "modernising the administration and management of ACC". All good stuff if it can be read literally.

It appears to acknowledge the fundamental conceptual problem in the 1992 Act which is the notion that the entitlements and diverse needs of injured people can be prescribed in every detail by Government regulation.

The 1992 Act, and the Regulations under it, are fatally flawed and are the most absurd example of Government regulatory overkill since the efforts of Robert Muldoon to control the economy in 1983-84.

There is clear evidence from the 1990 Galvin Committee and other sources that the inflexible and prescriptive approach taken in the 1992 Act, and the Regulations made under it, were (and may still be) intended to be the basis of a regulatory regime for competing private insurers.

Because private insurers cannot be relied upon to exercise discretions in favour of the injured claimant, a system had to be devised to comprehensively prescribe entitlements, which would then be administered by competing insurers.

Modern social insurance statute needed

The Coalition Agreement implies acceptance that the Birch experiment has failed and the 1992 Act, and the plethora of regulations made under it, should be scrapped or substantially amended.

The Council of Trade Unions believes it should be replaced with a modern social insurance statute laying down clearly the entitlements of persons having cover under the scheme and providing the ACC with the administrative discretion to meet the individual needs of injured people in accordance with, and within the parameters of, criteria defined in the Act.

This would require the Corporation to play an important role in ensuring that the detail of policy to be applied in practice is notified publicly, and debated, before being implemented as uniformly as possible.

This raises a serious question about the present corporate model of ACC, which sometimes sees individuals appointed to the Board more for reasons of political patronage than competence or interest in the quite complex issues involved in the development, and administration of, accident compensation policy.

Similarly, the criteria for ACC performance should not be bottom line profitability but the much less easily achievable objectives of injury and disease prevention and the effective rehabilitation and compensation of injured people.

For these reasons, any new legislation should contain strict criteria to ensure a very high level of relevant competence, and representation of people involved in the day to day working of the scheme. It should also contain provision for accountability in meeting stated objectives for the Scheme, which should include excellent rehabilitation policies, speedy and fair administration and consumer satisfaction. Failure to achieve the objectives should result in Board dismissal. No doubt this would then be carried through into management contracts of employment.

Injury prevention

The Woodhouse Commission was adamant that injury prevention should be given top priority. There were good economic and social reasons for this. If accidents and occupational disease were prevented, the cost and misery of their impact on people could be avoided.

Unfortunately, this has never occurred and the ACC cannot be blamed for this.

The right to sue was, to some extent, a prevention policy in itself. The legal duty on employers, motorists, occupiers of property and others to safeguard others was backed up by the penalty and embarrassment of a public trial and damages award.

While its effectiveness as an injury prevention tool is debatable, it didn't help that it was not replaced with other effective legal penalties or mechanisms.

The ACC itself was given high sounding statutory responsibilities to prevent accidents and occupational disease but without legal powers or mechanisms to discharge them.

It is an important responsibility of Government to ensure that minimum standards of safety and responsibility should be rigorously enforced as a matter of law in the workplace, on the roads, in the operating theatre, and elsewhere. We, as citizens, have a right to expect that the law will impose penalties if socially acceptable behaviour is not observed.

The half-hearted commitment of Government to the Health & Safety in Employment Act, the inadequate resources provided to the Labour Department to ensure effective enforcement, and the recent legislative changes to weaken the duty of care imposed by the Criminal Law on doctors, are examples of Government acceptance of lower than reasonable standards of protection.

There is no doubt that we can do a lot better. Success has been achieved in Victoria, and more recently in New Zealand, with road safety policies. Effective policies have been pursued in many European countries, and particularly Scandinavia, for many years.

It is worth noting that in the workplace context the Woodhouse Commission specifically rejected the experience rating of employers' premiums (penalties and bonuses depending upon claims record) as an injury prevention measure in favour of the Swedish model. Yet twenty-five years later the 1992 Birch Act introduced experience rating despite the fact that Canadian experience has shown it to be administratively expensive and inefficient, as well as ineffective, as an injury prevention measure.

It is interesting that the Coalition Agreement mentions an intention "to consider the implementation of an Employers' Code of Practice to enable the achievement of observable safety standards upon which to base risk/experience ratings". This seems to refer to the successful

British Columbian administrative model which imposes penalties on employers on the basis of observed workplace conditions and risk.

Good models for injury prevention exist internationally for effective injury prevention measures. It merely requires political will and competence to ensure that they are adopted in New Zealand.

Compensation

When prevention policies fail and accidents occur there are costs and losses which inevitably result. The issue in accident compensation policy is what proportion of those inevitable costs and losses will be indemnified by the insurance scheme, and what proportion will be left with the injured person and his or her caregiver and/or family.

Some politicians and ACC spokespeople have attempted to redefine the principle of Real Compensation in recent years by suggesting that the Woodhouse Commission only intended that the Scheme should "contribute" to the losses and costs which fall on an injured person.

In fact, the Woodhouse Report makes very clear that a 20 percent deduction from compensation for income loss was the only burden which was to be left with the injured person.

It is clear that the intent of the Woodhouse proposals was that, apart from the 20 percent deduction for income loss, the Accident Compensation Scheme should operate on the indemnity principle and should reimburse injured people in full for their other losses and costs. This indemnity principle was carried forward into the 1972 and 1982 Acts but is notably absent from the 1992 Act.

In addition to absorbing a 20 percent income loss (if he or she had any income), an injured person must now meet a substantial proportion of medical treatment, rehabilitation costs, travelling costs, and the other inevitable costs which follow from injury and disability.

The mean-spirited and totally inadequate compensation under the 1992 Act and regulations for treatment, rehabilitation and other costs of injury has caused widespread hardship, some of which has attracted publicity in the media.

Weekly Earnings Related Compensation (ERC)

There are several inequities and other difficulties which have arisen as a result of the 1992 Act:

- The definition of earner, and other provisions in the Act, exclude many casual employees as well as persons temporarily out of the workplace, those who are denied potential future earnings as a result of the accident injury, and voluntary workers.

- The criteria for calculation of ERC, and the removal of any discretion in applying it, have denied fair compensation to many workers who are injured.

- There is no enforcement provision for payment of first week compensation by an employer.

The denial of ERC (other than transitional) to workers concurrently in receipt of National Superannuation is inconsistent with the alleged insurance nature of the Scheme. The workers concerned, and their employers have been paying ACC premiums like everybody else.

Work capacity test

It is a fundamental denial of the principle of real compensation that the 1992 Act should not only contain (in s.37) a more severe definition of "incapacity" than appears in private insurance policies, but will also under the Work Capacity procedures currently being introduced deny any compensation to persons who may have a partial capacity to work, even if such work is not available.

The work capacity assessment not only seriously weakens the incentive for pre-accident employers to consider re-employment, but also has the potential to retrospectively terminate permanent pension assessments under the 1972 and 1982 Acts. The assessments will put New Zealand workers' compensation law back 30 years.

It is ironic that the Woodhouse Commission was established partly because the statutory limitation on payment of earnings compensation (six years) under the 1956 Workers Compensation Act put New Zealand below minimum international standards laid down by the International Labour Organisation. The 1992 Act, when the Work Capacity Process is implemented, will effectively limit earnings compensation to two years for most injured workers.

Rehabilitation

Much has been said by politicians in recent years about improving rehabilitation of people injured in accidents. The statements are usually made in the context of changes which transfer more cost and responsibility onto the injured person. Recent comments from the current Prime Minister, Mrs Shipley, the then Minister of ACC, about the Work Capacity procedures being intended to "assist rehabilitation" are an example.

What is really needed is a commitment, by Government, employers, unions, health professionals and injured workers, to rehabilitation programmes as an investment.

The commitment may require:

- Parliamentary assistance to get the statutory framework right. The strong statutory requirements in the 1972 and 1982 Acts had real value but need to be supplemented by the right for an injured worker to return to the pre-accident job within a specified period. We need to be careful to ensure that such a "right" doesn't become an obligation on a worker to accept unsuitable work.
- Specific and carefully focussed financial incentives to encourage employers to make the necessary workplace modifications. Again, we need to ensure that the worker is valued and it is not just a subsidy that attracts the employer. This raises the issue of education.

- A sustained educational campaign at workplace level directed at both management and workers. We have come a long way in recent years in outlawing discrimination on the grounds of disability and the Human Rights legislation in New Zealand has the potential to have a huge and positive impact for disabled workers. But enforcement of these human rights must be accompanied by education.

- A national rehabilitation plan. A succession of reports in New Zealand have recognised this failing and such a policy and other steps are needed to enable ratification of International Labour Convention No. 159 of 1983 on Vocational Rehabilitation and Employment (Disabled Persons).

- The further development of specialist services for the placement in suitable employment of disabled persons. We have a unique model in New Zealand with Workbridge, a specialist Government-funded employment agency.

- A creative approach to alternative work at workplace level. In many workplaces, the workers themselves are the untapped source of that innovation. A safe return to a rewarding job is a more achievable objective if there is a combined approach from employers, ACC, workers and their unions, and the injured worker. An important part of maintaining an injured worker's motivation is to ensure that the link with workmates is kept alive during the period of absence from work. ACC is

currently working with several large employers and unions on such initiatives which are showing very promising benefits for all parties involved.

- Finally, the cornerstone of the Woodhouse concept, the permanent pension assessed on the basis of loss of earning capacity, must be reinstated so that the injured worker can be assured of some income security but also given an incentive to improve his or her economic position without the fear that that income base will be reduced.

Non-economic losses

In its submission to the Select Committee of Parliament on the 1992 ARCI Bill the New Zealand Law Society condemned the removal of lump sum compensation from the Scheme as:

> ". . . the clearest possible breach of the social contract and raises serious questions about the continued justification for the loss of the right to sue".

The CTU strongly supports the Law Society's view and if the Government is not prepared to reinstate lump sum compensation for non-economic losses into the Accident Compensation Scheme, then the right to sue in the Courts for this head of compensation should be restored.

It is relevant and important to note that the Employers Federation and the Chambers of Commerce, in their joint submission to the 1970 Gair Select Committee, advocated the retention of the right to sue for non-economic losses.

Damages awards of six figure sums in recent years for defamation dramatically highlight the gross distortion in our legal system which now, with the abolition of lump sum compensation for non-economic losses, provides no compensation for pain and suffering and loss of enjoyment of life through personal injury, but provides several hundred thousand dollars for the damage to a person's reputation.

It is a serious injustice to the people of New Zealand that they now have no remedy at law for this loss.

Implementing the Coalition Agreement

In order to meet the Coalition Agreement commitment to replace the harsh and unfair aspects of existing legislation the CTU considers that the Government must ensure that:

- A fair method of assessing income loss is restored including potential loss for people not yet in, or temporarily out of, the paid workforce.

- Treatment costs and all other doctors, physiotherapists and other costs are paid on an actual and reasonable basis.

- The cost of all necessary rehabilitation assistance is met, and regarded as a worthwhile investment.

- Travelling and other incidental costs of disability are met on an actual and reasonable basis as provided in s.80 of the 1982 Act, rather than being covered by the inadequate and grotesquely misnamed Independence Allowance under the 1992 Act.
- Lump sum compensation for non-economic losses (permanent disability, pain and suffering, and loss of enjoyment of life) should be restored as an integral part of the Accident Compensation Scheme.

The privatisation option

The 1992 Act and regulations created an almost impossible administration challenge for the ACC and this, together with the meanness of the entitlements and unfortunate publicity relating to the ACC Chief Executives, has seriously affected the public image of ACC.

Some employer groups have seized on this dissatisfaction to promote privatisation as the solution to all ACC's ills. More recently the former Prime Minister Jim Bolger jumped onto the band wagon despite his public assurances both before and after the election that there would be no privatisation of ACC.

The CTU is sceptical of the proposals for the following reasons:

- The 1992 Act and Regulations have been a preview of a de-regulated environment and it has no attraction at all.

- The record of private insurers in workers'compensation internationally is very poor, particularly as far as injury prevention and rehabilitation programmes are concerned. The ACC is starting to do some very good work in this area and if the Government and employers would give the ACC workable legislation and stop interfering we might see some results.

- Private insurers are in it for profit. This is why the Woodhouse Commission recommended ACC originally. Thirty to forty percent of every premium dollar before 1974 went on private insurers profits and administration costs. Even now ACC administration costs are only 10-12 percent.

- Privatisation would require full funding. This would require increases to premiums and would put further pressures on already inadequate entitlements.

- Private insurers in New Zealand have no experience in this area of insurance and I think even the Insurance Council acknowledge this.

This said, it is certainly true that for many injured people, dealing with ACC has been a frustrating and soul destroying experience. There is an urgent need for inspired leadership and management which unashamedly advocates the interests of the people for whom the scheme was established; workers and others who suffer the tragedy of serious accidental injury and occupational disease.