

## THE SCHEME OF THE ACT

by  
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New Zealand's Accident Compensation Scheme has been described by one overseas observer as "a unique experiment"; by another as "a milestone in social and legal history".

"A unique experiment?" "Unique" it certainly is, although some disparagers have been heard to say that it is no more than an improved Workers' Compensation system, a modified damages process to accommodate the no-fault principle, with platitudes concerning safety and rehabilitation added to make the whole package more palatable. Even if that were true which it is not, it would still be unique in the sense that no country has yet put together these elements in the one operating system. Certainly overseas countries are regarding it as unique — the Commission has received visits from Ministers of the Canadian Federal and Provincial Governments who have expressed more than mere curiosity; we are in communication with the Pearson Commission in England and the Woodhouse Committee in Australia; and many other overseas Governments and organisations have sought information.

It is only partly true to say that it is an experiment. Over the six years since the Woodhouse Report was presented, its proposals have been subjected to the most intense scrutiny by experts and interested parties in all fields. The Bill was drafted with meticulous care and attention to detail. After it became law on 20 October 1972, the Commission had the formidable task of constructing the systems to implement the legislation; and since 1 April the Schemes have been operating as a going concern. It now remains experimental only in the sense that time may demonstrate that systems should be altered, levels of benefits should be extended, and coverage widened. But the concept of no-faults compensation for accidents in New Zealand is no longer an experiment. It is an accomplished social and legal reality.

The other overseas comment that it represents "a milestone in social and legal history" must wait for history to confirm or deny. For while Parliament has decided that the advantages of the Schemes override the criticisms, only future history will tell whether the voices of the critics will be stilled, whether their criticisms will be confirmed, or whether in the end it will remain a question of balancing advantages against disadvantages.

These criticisms provide the theme for my remarks today. I hope to summarise the principal arguments that have been presented against the Schemes, and to offer such answers to them as have been revealed in the years of preparation and in the single month of practice.

I believe that there have been six main points of criticism. These are:

- (1) Loss of rights
- (2) Poorer benefits

- (3) Extra costs
- (4) Problems in implementation
- (5) Bureaucracy
- (6) Decline in national character

I will deal with each of these in turn.

## **1. LOSS OF RIGHTS**

The total abolition of the common law remedy for damages for personal injury as recommended in the Woodhouse Report, and finally brought about by the Accident Compensation Amendment (No. 2) Act 1973, predictably caused some people to believe that a centuries-old bastion of British justice was being demolished; that once more we were seeing the modern State removing justice from the open courts and placing it in the hands of a semi-secret bureaucracy. The academics amongst you will know that the negligence action has no lengthy tradition behind it and has been a comparatively modern legal development. Then what is it that is being lost? Opinions may well differ, particularly on the use of words such as "capricious" and "lottery" by the advocates of change when describing the common law process. But can one deny that in losing the negligence action, we have lost a remedy that existed for the benefit of only a chosen few? To those lucky ones it was splendid. It was an excellent and complete remedy. But to a man injured at work, without negligence, the remedy was unavailable, although he was entitled to a limited measure of financial protection. However, to the third man, injured identically with the other two, but without negligence and outside the work environment, the common law action was seen as an unnatural discrimination, looking to the causes, and not to his needs. It is fine to think of what a paraplegic might do with his \$90,000 damages. But what, in comparison, can a paraplegic, who brought about his own injury, do with his social security benefit?

I therefore do not bemoan the loss of the damages system. In its limited area, it served a good purpose in its time. I nevertheless think it is proper for us to watch that benefits some people previously possessed should not drop too much, if at all, for the sake of accommodating a more comprehensive benefit system. Accident Compensation must therefore move with changing times, just as common law damages did.

Some people advocate that the damages action should still be available as an alternative to Accident Compensation, or be available for certain levels of injury. The whole idea of Accident Compensation is to do away with the anomalies and injustices of the damages process. Any suggestion of retaining it is, in my opinion, not only quite illogical, but totally impracticable from an administrative and economic point of view.

## **2. POORER BENEFITS**

I have no doubt that cases can be presented where a person will appear to receive less immediate financial benefits under Accident Compensation than under the damages system. In such comparisons stress should be laid on the word "immediate"; and there will be a tendency to ignore the funds which the Commission can employ in professional or job retraining and other forms of

rehabilitation, quite apart from the Commission's role in providing for a claimant's earnings loss throughout the whole of working life. Now the concern will be, not on whether or not the plaintiff gets his verdict and if so for how much, but what are his real needs from the moment of the accident through to the end of his working life. Concern for the injured man will not end, as it so often does now, on the day of settlement or verdict. Whatever opinion is held concerning the comparison of benefits, surely the availability of compensation to all is an advance on a system whereby it was available to a limited number. 24-hour protection for everyone in New Zealand, covering accidents at work, on the roads, at home, or in sport, providing earnings-related benefits for widows and other dependants; providing long-term benefits for those who suffer injury while undertaking commendable voluntary social services, such as Search and Rescue, St. John Ambulance, or volunteer firemen — all these considerations bear on any comparison of benefits.

And in answer to every criticism put forward on the amount of benefits available, in some instances rigidly controlled by the Act, one can ultimately point to s.179A. This extraordinary and overlooked section enables the Commission to make *ex gratia* payments, without limit, to persons who may not even be covered by the Act, or to whom the Commission considers additional compensation should be awarded. This is a most valuable provision to enable the Commission to deal with what would otherwise be the hard and the hardship cases. Because any such *ex gratia* payments are to be met out of general taxation it is not unreasonable that the Minister of Finance is required to add his approval to a proposed award. In other words, quote me an example where a person stands to do worse under Accident Compensation than at common law. If considered appropriate, we can use the *ex gratia* section to do what is fair and right.

### 3. EXTRA COSTS

One of the earliest doubts concerning the Woodhouse Report related to its confidence that costs could be contained in reasonable comparison with existing insurance costs. Economic studies showed, however, that this confidence was justified — to the surprise of many.

So far as levies on employers are concerned, the former premiums under the Workers Compensation Act amounted to approximately 0.9 of 1% of the national salary and wage bill. Cover under the Accident Compensation Act is being achieved at only fractionally more, namely 1%. Many former premiums have been reduced; many have increased, but the greatest increase has not exceeded 30c per \$100 of payroll. Admittedly on top of this 1% Cot, employers are undertaking to pay the first week of compensation, but a large, and increasing, number of employers are already obliged to do substantially the same thing by Awards prescribing sick leave payments.

The 1% levy on the self-employed is, of course, new. It is in effect a compulsory personal accident insurance policy.

Levies on motor vehicles will increase 25% this year. Compulsory Third Party insurance premium for a private car last year was \$11.35. The vastly increased coverage provided by Accident Compensation will require this to be increased this year by \$2.84. This is trifling and, considering the benefits

provided, represents an amazing bargain by world insurance standards.

Estimates for the first year of operations must be cautious. But using the best information and statistics that we have, the total costs for the first year are expected to approximate:

The employees' section of the Earners Scheme	\$46m.
The self-employed section of the Earners Scheme	\$ 7m.
The Motor Vehicle Accident Scheme	\$20m.
The Supplementary Scheme for non-earners	\$1.6m.

Only a full year's operational running will tell, but we estimate that the Schemes will be administered for as little as 7% or 8% in the first year. This is a considerable improvement on the 30%, more recently 20%, allowed to insurance companies for administration and profit in handling Workers Compensation business.

Any discussion concerning extra costs must not ignore the role cast upon the Commission in the fields of accident prevention and rehabilitation. If these roles can be properly implemented, long-term but intangible savings will result.

While the compensation aspects of the new Scheme are revolutionary, the Act places equal importance on the Commission's role in accident prevention and rehabilitation. In both these areas there are well-known existing services and facilities. For many reasons the Commission therefore cannot enter these areas like a new broom. Its activities will take longer to plan, longer to integrate with the activities of those already operating, and longer for our influence to be felt.

In the field of safety, there are already a number of organisations actively engaged. Some have undisputed knowledge and expertise, for example, the Ministry of Transport, in connection with road accidents. The Labour Department, and the National Safety Association of New Zealand, are deeply involved in industrial safety. There are a number of others in their particular fields. But there is room, a vacancy, for a new body of sufficient authority to gather together much of the fragmented approach and overlapping that occurs now, and to offer a more cohesive and melding function in the whole area of accident prevention throughout all forms of activity of our citizens.

This new role is one designed for the Accident Compensation Commission. It will enter upon it in full appreciation of the good work already being done. In the short term it will offer assistance and co-ordination. In the longer term it will develop an innovative programme of its own.

Rehabilitation is a word that encompasses a variety of activities in relation to an injured person — medical rehabilitation, social, economic, and vocational. This work is now being done. But from the survey that the Commission has already conducted in New Zealand, it appears clear that a greater awareness, and a greater emphasis; must be directed towards rehabilitation, and this will be one of the Commission's primary functions.

Once again, it will be a policy of appreciation of what is already being done; of assembling and co-ordinating what might now be fragmented; of assisting where we can without interference; and in time developing new programmes of our own. As in the area of safety, the Commission's influence on rehabilitation may take some time to be manifest.

One of the first steps will be that, probably within a few months, the Commission will have stationed at Auckland, in the first instance, one or more

Rehabilitation Liaison Officers, whose main functions will be to ensure that the rehabilitation needs of our own clients — those injured by accident — are under constant review, and receive the attention of the persons and agencies engaged in the actual physical work of rehabilitation.

#### **4. PROBLEMS IN IMPLEMENTATION**

Critics have foreseen a number of difficulties in applying the Schemes in practice. Let us not pretend that the Schemes are free of difficulties. But let us see how they are being coped with.

##### **(a) Medical Profession.**

Some doctors have predicted an intolerable increase in workload. It is pointless to be dogmatic about this. Only time will tell. The Commission believes that there may well be a very slight increase, but does not believe that there will be a wholesale descent on doctors' surgeries from people with minor injuries who, in the past, have bandaged themselves at home and who might now decide to go to a doctor's rooms in the belief that treatment will be free.

Some doctors also expressed concern that they will be required to face new responsibilities in deciding whether cases are accident or sickness. We have told them that we believe that, in the great majority of cases, they will face no difficulty in deciding. But, in the remainder, they should not attempt to grapple with any problem of definition but should simply report the condition and circumstances to the Commission. It is the Commission's responsibility to decide.

Of course we would like to have a statutory definition if an appropriate one can be devised. But the Workers Compensation Act was administered for 73 years without one. I suppose we should not complain too much if we are asked to operate in the same fashion for a few months. We have sent to every doctor and legal firm a statement of some elementary principles which will be applied in making these decisions, but we are wary of saying in advance that some circumstances will qualify as personal injury by accident, and others not, to avoid pre-judgment of claims that are not yet presented. However, the Commission does intend publication of, not only formal law reports from our appellate structure, but of decisions at lower levels which may indicate policies and the pattern of decisions.

You are probably aware that Parliament has requested the Statutes Revision Committee to hear submissions on whether a definition should be incorporated in the legislation and, if so, what that definition should be. That Committee will be commencing its sittings soon.

Some doctors have also expressed the view that the charging of medical fees to the Commission may endanger the traditional doctor-patient relationship and be a step towards nationalisation of medicine. The Commission has failed to see the validity of that view. It will not interfere in the clinical management of a patient's case by his doctor. Nor will it interfere with what a doctor chooses to charge for his services. The Commission's only involvement is in paying to a doctor or dentist such an amount in respect of his fee as it considers it is reasonable for it to pay. For obvious reasons it is hoped that the views of the doctor on what he should charge, and the views of the Commission on what it should pay, should coincide. But in the course of a number of amicable and

constructive discussions with representatives of the medical profession, there has been worked out a satisfactory system for dealing with any disagreement in views. We do not now see this as presenting any substantial problem. There will be isolated occasions, as there have been already, when it seems to the Commission that a doctor or dentist is regarding the advent of Accident Compensation as a new opening to riches. This is no real difficulty.

#### **(b) Levies**

The construction of an equitable system of levies for the Earners Scheme has been a problem of some dimensions. As you know, levies are charged on employers according to the risk factors in their industrial activity. Levies on the self-employed are on a flat 1% rate. There were a number of good reasons why this differentiation was made which I will not go into now. But you may have recently observed that the Commission has already exercised a discretion it is given in the Act of amending the amount of levies payable by any person if, in the special circumstances of the case, a different levy would be fair and reasonable. This discretion has been exercised to meet cases of hardship. We are not yet prepared to use this discretion for immediately reducing levies on certain employers, solely on the ground of allegedly good safety records in the past, or on the commonly expressed ground that their insurance companies have previously given them discounts. Past statistics are either not sufficiently reliable, or are not available to the Commission, to enable it to consider at this stage any merit ratings for particular employers. A few years' experience, with our own highly computerised statistical information, will be required.

#### **Compensation**

My fellow Commissioner, Mr Graham, will later be speaking on assessment of compensation. At this stage I will therefore mention only two topics which have been the subject of comment:

##### **(1) When, and to what extent, should amounts prescribed in the Act be raised:**

The commission is required to make periodical recommendations to Government on this subject. It can be expected that recommendations will be made during the present calendar year; and as soon as sufficient information is available. The Commission is fully conscious of past criticism often voiced at Workers Compensation and Social Security benefits — namely that they were always lagging behind up-to-date financial trends. We will try to avoid that criticism and will recommend changes to Government as soon as circumstances, and there are a variety of circumstances, appear to us to require a change. In turn, spokesmen for the Government have said that they likewise want a policy of Accident Compensation payments keeping abreast of the times.

##### **(2) Calculation of compensation for the self-employed.**

This has long been recognised as one of our real practical problems. An accountant running a one-man firm may suffer total cessation of income if he enters hospital. But if that accountant is in a firm of 8 partners he may suffer no loss whatever in the same circumstances. Between these two ex-

tremes lie an infinite variety of circumstances, which apply also with equal difficulty to the farming community.

Mr Graham will no doubt remind you of s.113(4B) which, for the period of short-term incapacity (from the 7th to the 35th day), gives the Commission an arbitrary power to cut through the difficulties and award what it considers fair and reasonable. Even with this provision, the Commission acknowledges that this aspect of compensation is and will probably always remain its most difficult problem.

## **5. BUREAUCRACY**

Critics have said that it is a retrograde step to take people's rights from the courts and put them in the hands of a bureaucracy.

I wish to make three points in reply:

(1) From a primary decision made either by the Commission's staff or by its Agent, there is a right to apply for a Review. This Review may be conducted either by the Commission itself, or by a Hearing Officer. It is intended that these Hearing Officers will be suitably qualified persons in the area where the claimant lives. Prominent lawyers will be asked to act, and probably members of other callings also in particular cases. The effect of this is that the bureaucratic process is immediately removed from the so-called bureaucrats themselves, and powers given to selected independent members of the community. The Commission has no power to override any decision given by a local Hearing Officer. The Commission believes that his appointment represents an important community involvement in its own community-financed Scheme.

(2) Apart from Reviews, the Act provides for additional appeal steps, to an Appeal authority and, in certain cases, to the Supreme Court and the Court of Appeal, which should effectively provide a check on any unwarranted bureaucratic influence.

(3) The Commission is further required to report annually to Parliament, where its policies can be debated, and it is subject to investigation by the Ombudsman.

## **6. DECLINE IN NATIONAL CHARACTER**

This is entirely a philosophical question. Some people say that the more a State legislates for welfare, the weaker becomes the fibre of its citizens, their self-reliance, and their incentive. It is of course a vital matter and must never be ignored.

But can it ever be detected or ever measured? Who can prove it? All I can say is that I know of no evidence that the fibre of our nation declined as a result of the first introduction of pensions in the 1890s, or the first introduction of Workers Compensation in 1900, or following the Social Security legislation of 1938.

I see in Accident Compensation, not so much a slackening of self-reliance and calibre, but an increased confidence, an increased willingness to undertake matters of initiative and spirit, because now one of the great fears of the past has been removed — the fear that injury might bring calamitous financial consequences.

In the three-pronged approach of the Schemes — prevention of accident,

rehabilitation of the injured, and fair compensation for all, the removal of fear and the consequent release of new confidence appears to me to represent a great advance in our social life, and not a retrogression.

## **CONCLUSION**

I have used past and present criticisms of the Accident Compensation Scheme as the vehicle for not only reminding you of some of the answers, but of indicating some of the policies that the Commission is pursuing.

Whatever views are held about it now, for sure it will in future grow and change, expanding here, possibly retracting there. For all of us living in New Zealand at this time it must be regarded as an intensely interesting social and legal development. To those of us in the Commission, dealing with the problems of its creation and application, with the many difficulties but many satisfactions it has provided, we find our involvement affecting us in this way — that in no sense are we carrying out any utopian idealism, but rather that we are coming closer to the real and practical needs of injured people in a way that has never been possible before.

## **QUESTIONS ADDRESSED TO MR SANDFORD.**

*Question:*

**Dr Kahn:**

We at the Accident Department, Auckland Hospital, are on the receiving end. We get approximately 80 accidents a day and it is most annoying to us to find the recurrent bad habit. We are paying the price that comes time and again of liquor. These people come to our hospitals. They constantly save money; they are rehabilitated. And yet the old lady of 87 with a broken hip cannot get into hospital. She has to wait. We are subsidising these baddies. Is there no way to fine them? Can the Commission do something?

*Reply:*

**Mr Sandford:**

I do not think we can stop a person being a bad hat. You know, of course, the Act is framed on the basis that the whole concept is that we do not look at the causes; we do not look at people's conduct that brought about their injury. We look at the fact that they are injured and we are debarred from enquiring that this person received his injury in a drunken brawl, or by someone's negligence. Whether this is quite good enough I do not know. Whether we should compensate out of the money you and I provide the drunken



brawler or the extreme case the newspapers picked up of the burglar who blew himself up when blowing a safe? I think this is a fair philosophical argument. Why should we use the money we all pay in to pay compensation. The Act says we do and the only case we do not pay is in the case of suicide or murder.

I think that is a subject well worth looking at as to whether we should pay compensation to people who suffer their injuries in the course of committing certain crimes. Where you draw the line is a problem. I cannot answer your point as to why these bad hats should get all this favoured treatment and the poor old lady cannot get into hospital. That is out of my field.

*Question:*

**Mr Ross:**

I am a little bit concerned about the comment you made about the isolated doctor and dentist charging a high fee taking advantage of the fund. Speaking from the dental point of view there is some work that varies. The Act takes a reasonable and fair fee according to New Zealand standards. In the short time the scheme has been operating can you already establish that you have a fair and reasonable fee by New Zealand standards for all this type of work? And your comments that these fees seem too high. Have you already been able to establish fees that a normal dentist should charge?

*Reply:*

**Mr Sandford:**

No. We have had great assistance and co-operation with the doctors in this way. We are in the course now of trying to establish with the governing body of the N.Z. Dental Association a similar kind of assistance. Some dental procedures are expensive.

*Question:*

**Mr Ring:**

You mentioned the the suggestion of allowing firms a rebate if they are not a frequency risk. You said it may take time to establish this and your computers will tell you when. I would like to know how you propose to determine when the frequency and severity rate is correct by computers. If not, what procedures does the Commission propose using?

*Reply:*

**Mr Sandford:**

I did not, with respect, say the computers will tell us everything. What the computers will do is to print out information on what accidents have cost us in money for every individual employer in New Zealand; what sort of accidents they were; how frequent they were in relation to his work force. Some will stand out as being very different from a very broad norm and if they stand out so much they are worth looking at. Particularly with penalty ratings we will

need to be very careful about this. If a particular firm's records show we have paid out greater compensation in a particular year, that figure alone means nothing until we can find out why. It may possibly be they had a disaster for which the firm is not responsible at all, and yet the compensation payments get charged on our records. There will be no penal ratings on firms without knowing why they have an accident rating worse than others.

Merit ratings:

I really cannot answer you on what we will rely on in deciding whether a merit rating will be given. We have an official on a world tour at the moment and this will be one of the subjects we are gathering information about.

*Question:*

**Mr Robertshaw:**

Mr Sandford has mentioned that the Commission is an autonomous independent body and not a Government department. Would you please explain how that statement fits in with Section 20 of the Act, and second, how then it is envisaged that Section 20 of the Act will be used; Section 20 reads:

"In the exercise of these functions and powers the Commission shall give effect to the policy of Government in relation to those functions and powers as communicated to it from time to time by the Minister."

*Reply:*

**Mr Sandford:**

We still claim we are an autonomous body, not a Government department, but a statutory body and all statutory bodies are subject to some restraints. You might think N.A.C. is a pretty individual organisation. They are. They are a statutory organisation regarded as autonomous and independent. They also are subject to the identical words of Section 20. In a crunch the Government can give a policy directive. Of course they couldn't step in daily and take over the running of the show, but I don't think Mr Robertshaw went on to read the rest of the sentence. To give us a directive under Section 20 that directive must be in writing, laid on the table of the House, open for the world and the Opposition to see, and if they attempted to do it too often I should think the Parliamentarians would say "This is no longer an independent body. You are making it a Government organisation."

I do not object to this provision. I believe that if an organisation is set up to which the public are compelled to pay money, I think the representatives of the public, namely Parliament, have an ultimate right to say how we go about dispensing this money. True it is there in theory, but it would only be in the ultimate crunch situation this would be done.

I give you one possible example. The Ontario Workers Compensation

Board runs its own 400 bed hospital. Our Act gives us power to erect a chain of hospitals throughout New Zealand if we wanted to. We could do it and of course that would be totally absurd. But if we did it, I would expect a written directive from Government to say "You are not to use public money to do that". It is only in that area of policy that any such directives are expected.