

THE LAW COMMISSION'S 1988 REPORT ON ACCIDENT COMPENSATION

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As economic restructuring was changing many state functions, the New Zealand Law Commission under the Presidency of Sir Owen Woodhouse undertook its own review of ACC, vigorously reaffirming the Woodhouse principles in its 1988 Report, while proposing further extensions of the scheme. This paper, written by a member of the Commission, summarises the Report's major recommendations, including a new strategy for accident prevention, extension of the scheme to include illness, and a generally sceptical approach to incentive-based premiums for employers.

I am asked to "comment on the main points of the 1988 Law Commission Report on the Accident Compensation Scheme". Considering the climate of the late 1980s (including the emerging emphasis on market mechanisms), what were the chief aims of the report? Toward what eventual goal was the report seeking to move the scheme? And finally (if time permits), how were issues of prevention to be reframed?

I meet my main responsibility by attaching the Summary of the report and its principal recommendations as an Appendix to this paper. The title of the report emphasises one significant feature of it: like the scheme, the report is not just about compensation; and the word "accident" can be misleading as suggesting inevitability and denying responsibility. Rather it is a report on *Personal Injury: Prevention and Recovery*.

I THE VUW LAW FACULTY AND THE ROYAL COMMISSION

Before I highlight some aspects of the Law Commission processes, which did not end with the 1988 report, I would like to go back to the 1960s and to changes made then in the legal system course then taught at this University. Professor Colin Aikman returned from sabbatical leave with a

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fascinating legal method book by Mermin and Auerbach.¹ It examined the development of the law, with much relevant factual material, about injury and death caused at work. The VUW Legal System publication also included relevant New Zealand material, common law and legislative, and we soon had the added contemporary inquiry of the Committee on Absolute Liability. By 1967 some of us – Professor Aikman, Professor Richardson, Peter McKenzie and I – were preparing submissions and presenting them to Mr Justice Woodhouse and his colleagues on the Royal Commission. We were encouraged in that course by the Dean reporting on a conversation he had had with the chairman of the Commission.

In my case at least I was influenced towards a comprehensive no-fault scheme for financial and other assistance as a matter of right to persons incapacitated by injury by three matters at least: first, by our study of the inadequacies and inequities of the remedies provided by the contemporary law of negligence, workers' compensation, compulsory insurance and social security; secondly, by the broad policy stated in the preamble to the Social Security Act 1938; and, thirdly, by the argument of the Beveridge Report in the United Kingdom.² That range of material, among other things, sensitised us to the importance of facts (a matter picked up in the subtitle of an excellent book produced in 1996 by Michael Trebilcock and his colleagues on personal injury compensation, *Exploring the Domain of Accident Law: Taking the Facts Seriously*).³ One of those facts concerned the effect (or lack of it) of tort liability and other alleged financial deterrents. The material also enabled us to see the issues in a more comprehensive way and in particular to see the value of separating the policing and sanctioning of risky activity from compensating the injured and helping them to recover to the extent possible.

We were not to know how close we were to the thinking of the members of the Royal Commission, nor to their willingness to examine personal injury generally and not just work injuries – a wide view of their terms of reference and especially of the final paragraph as Professor Aikman contended, citing a 1945 Court of Appeal judgment on the powers of the Royal Commission on Liquor Licensing.⁴ The Woodhouse Royal Commission decided that it should adopt the wider approach as the basis for its general recommendations and continued:⁵

1 Carl Auerbach and Samuel Mermin *The Legal Process* (Chandler Pub, San Francisco, 1961).

2 Social Insurance and Allied Services (1942) Cmnd 6404.

3 Don Dewees, David Duff and Michael Trebilcock *Exploring the Domain of Accident Law: Taking the Facts Seriously* (Oxford University Press, Oxford, 1996).

4 *In re The Royal Commission on Licensing* [1945] NZLR 665 (CA).

5 New Zealand Royal Commission of Inquiry into Compensation for Personal Injury *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Government Printer, Wellington, 1967) para 169 [*Woodhouse Report*].

In carefully documented submissions this wider approach accompanied by abolition of the common law remedy was strongly urged upon us by the Social Security Department at the outset of our public hearings and at a later stage by a group of four members of the Law Faculty of the Victoria University of Wellington led by the Dean of the Faculty, Professor C C Aikman. Similar arguments were addressed to us by other citizens who presented submissions on their own account.

The Commission provided us with an easy, if unnecessary, answer to those students who had difficulty with the legal system course examining closely the development and decline of the common employment rule, particularly when they discovered that it had been abolished by legislation decades before.

II "MARKET MECHANISMS"

I come to the Law Commission and to the attached extracts from its report. I begin with one of the matters mentioned in the invitation to me to participate in this Symposium – the emerging emphasis on market mechanisms in the climate of the late 1980s. In the course of our review, the question of private insurance was raised, although not from within the industry. As paragraph 3 of the Summary indicates, we were not troubled by it. One major insurance company expressed strong opposition to any such change.

A related issue was bonuses and penalties deducted from, or added to, premiums by reference to an employer's experience compared with the general experience of those in the same class. Again the facts were critical. They answered a large number of submissions, including one prepared for the New Zealand Business Round Table, supporting the exercise of the existing bonus and penalty power. The evidence led to a general conclusion that experience rating in industry did not act as an incentive to reduce injuries.⁶ As we said of the contention that variable industry classification also acted as an incentive, "the proposition is one of theory, not of experience".⁷

But the Commission was of course very concerned with incentives. There was evidence, at least at the anecdotal level, of some abuse. As paragraph 9 of the Summary says, a fair margin for personal initiative would be left to the individual, with 80 per cent replacement of lost earnings being instanced. Individual responsibility received major emphasis in the discussion of safety and the prevention of injury to which I now turn.

III SAFETY AND "PREVENTION"

The Commission proposed a broader and more coordinated approach to the promotion of safety and to the prevention of accidents of all kinds; better statistics were a critical part of this (for example, paragraph 5 of the Summary and the first recommendation, paragraph 25). In support of

6 New Zealand Law Commission *Personal Injury: Prevention and Recovery* (Report on the Accident Compensation Scheme) (NZLC R4, Wellington, 1988) paras 140-149.

7 New Zealand Law Commission, above, para 139.

that approach, the first substantive chapter discussed the responsibility of government, central and local, arising in part from international obligations undertaken within the International Labour Organisation (ILO) the International Maritime Organisation (IMO) and the International Civil Aviation Organisation (ICAO); as mentioned, individual responsibility; and recent work on occupational safety and health. It then highlighted characteristics of safety and health responsibilities:

- *Temporal* - steps taken *before* the possible point of injury (safe plant, instructions ...), *at* (not using unsafe systems ...), and *after* (health service, monitoring of those exposed to hazard ...);
- the generality or preciseness of the statement of the *principle* or *rule* (drive safely ... at under 50 kph);
- the *source* of the rule: Parliament, executive, local government, codes of practice of varying legal force ...;
- methods of seeking *compliance* or *enforcement* (taken by workers, employers, unions, officials, penalties ...); and
- *different strategies*: education (warning against the danger); design (removing the danger); legislation; cooperation of those affected.

The report considered a 1981 ILO Convention which indicated possible future directions, the proposals for "One Act – One Authority", and the present fragmentation in the safety area. That led to the proposals for greater coordination of information and advice, and a Minister with responsibility for the promotion of safety and the prevention of accidents across the whole field.

The Commission then moved to consider financial incentives against the background of a discussion of safety incentives in general (paragraphs 131-136, also attached). In this brief comment on the Law Commission work I have deliberately emphasised safety promotion and injury prevention. Major improvements have occurred in some areas, for instance in the reduction of road deaths, but attention too easily focuses on compensation and its funding alone. The Commission did of course give much thought to those critical matters.

IV COVERAGE AND BENEFITS

A major "eventual goal of the reform" was the extension of the scheme to sickness (paragraphs 6-7, 15, and 26). The 1988 report also proposed greater precision of the definition of injury by accident by using the World Health Organisation International Classification (paragraphs 8 and 27(1)) schedule assessments for permanent partial disabilities (together with the removal of lump sums) (paragraphs 11, 13 and 29) and the preparation of a better drafted statute (paragraph 23).⁸

⁸ See also the scheduled Accident Rehabilitation and Compensation Insurance Act 1992.

Again careful attention had to be given to the facts about the costs of the scheme and our proposals on that matter were greatly helped by Australian expertise. Two main points about costs are summarised in paragraph 16:

- almost all of the recent increases (which had led to banner headlines of a dire kind shortly before the Commission received the reference) came from the maturing of the scheme;
- the scheme was cheaper in Gross Domestic Product terms than Australian compulsory motor vehicle and employers' liability insurance and gave wider coverage; one factor was the different proportions of its income paid out by the ACC compared with insurance companies

On funding, we recommended simplification and a flat rate for employers (paragraphs 19-22 and 30).

V THE OVERALL PROCESSES

The Commission had a very large number of submissions, with some of those interested making three submissions. We consulted extensively with interested bodies and persons interested. (Lawyers showed very limited interest.) We were greatly helped by expert advice by Ian Campbell on safety and related matters, Professor L V Castle on economic and public policy principles and Mr J R Cumpston and Dr R C Madden on actuarial and policy matters. There were extensive exchanges with officials and Ministers, exchanges that continued after reporting into 1989 and 1990 when, first, we were asked to advise on a scheme covering disability caused by illness as well (where again we needed extensive expert help on the financial aspects) and, second, when legislation was being prepared and introduced into Parliament. There was of course no immediate legislative product.

At least two other products that did eventuate were, I think, of value. The first was the robust statement of the facts especially about the cost of the scheme, as well as about the likely cost of the proposals (including the later suggested extension to illness). That statement for some time provided a valuable answer to those who claimed the scheme was too expensive and put New Zealand and particular businesses at a competitive disadvantage. Invitations to deliver conference papers provided opportunities to update the figures. As indicated, the process also enabled the testing of other hypotheses about the incentives to behave safely.

A second product was the development of approaches to public policy in a wide range of areas. For instance, should we be putting so much effort into worrying about limitation periods for latent defects – in practice the main situation in New Zealand was collapsing house foundations – if possibly better answers were a compulsory first owner insurance scheme and closer control over the credentialling of builders and others? Or what components should be included in new occupational safety and health legislation? Or, much more broadly, how was the law to deal with emergencies of all kinds? That elaboration of approaches began to appear as well in the work of the Legislation Advisory Committee.

A final question arising from the late 1980s and early 1990s is about possible roles of the Law Commission in broad areas of policy, particularly when there was no Ministry with primary responsibility. Where were we to get our policy or philosophy from? History, developing principle, experience and good consultative and interdisciplinary research processes, in my experience, meant that the Commission could help with such areas of policy. But that runs beyond the concerns of this Symposium, or does it?

APPENDIX: EXTRACT FROM LAW COMMISSION'S 1988 REPORT***TERMS OF REFERENCE***

The Law Commission is asked to examine and review that part of the Accident Compensation Act 1982 which recognises and is intended to promote the general principles of community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and in particular administrative efficiency as propounded by the 1967 Royal Commission Report on Personal Injury in New Zealand. It may be accepted that those principles are broadly acceptable and deserve to be supported.

The basis upon which the Accident Compensation Corporation or its predecessor has made provision from time to time for the annual amounts needed by the accident compensation scheme for benefits, administration and contingency or other reserves together with the principles and methods applied in their allocation or distribution will form part of the overall inquiry.

SUMMARY OF REPORT***1 Purpose of review***

The accident compensation scheme was brought to life on 1 April 1974. Fourteen years later it is clear from national surveys taken recently on a random basis and the 1698 submissions received by the Law Commission that its purposes and principles continue to have general public support. This opinion is shared by the 1988 Royal Commission on Social Policy.

However at the end of 1986 there were large and sudden demands upon employers for increased levy income. All this was associated with complaints about cost and administration. Other issues were raised as to some aspects of benefits and entitlement. In this situation the Law Commission was asked to examine and make recommendations concerning the system as it is operating.

2 Nature of the scheme

The accident scheme protects the whole population against the consequences of personal injury. It depends upon an acceptance of community responsibility. Its purpose is to encourage safety and promote physical and economic rehabilitation. Its compensation aim is income maintenance in order to provide a fair measure of support for living standards.

The scheme replaced compulsory insurance schemes which had been underwriting the risk of claims in the Courts or under workers' compensation legislation. That fact, together with its use of funds collected from those who earlier had paid premiums to insurers for their indemnity, has left behind for some people the misconception that it is simply a new means of obtaining cover against new risks.

It is wrong and a cause of confusion to think of it in this way. This scheme is not in any sense an insurance system. Its benefits are provided as of right without reference to cause and regardless of risk. It is simply one component of the general social welfare provisions of the country.

3 *Private insurers*

At one point we were urged to consider that the system be handed over to the private sector, with the legislative provision requiring individuals to purchase their own first party insurance. Immediate reasons against this proposal speak for themselves.

First there would be the problem of ensuring that those who could afford it actually would insure; and that there would be provision for those who could not. Second, there is the expense of such arrangements. Were private insurers to provide equivalent benefits either on a first party or third party basis, the added cost might be as much as \$400 million. Third, the extra cost would be quite unmanageable if the system were to be extended to sickness as it should be. Fourth is the fact that arguable claims would produce a return to the adversary environment it was designed to leave behind. And finally, there is the lack of interest of the insurance industry itself.

4 *Social compact*

As recently as 1974, following a broadly based understanding, proposals for the new scheme received bi-partisan acceptance. It happened because the scheme seemed likely to be able to deal in a balanced way and so fairly with all who might thereafter be affected. It was agreed that certain rights to have losses shifted or shared would be given away with the corresponding responsibilities thereby removed (such as those implicit in workers' compensation and the negligence action) in exchange for the universal benefits and different duties which were to arise under the new legislation.

5 *Prevention and recovery*

The legislation expressly speaks of the importance of safety and rehabilitation as the first and second purposes of the scheme. And the Act specifies a coordinating role for the Corporation in both these areas. Unfortunately, what seemed to it to be the more tangible and pressing issues concerning compensation have tended to submerge these priorities. As well there has continued to be a lack of statistical information. This can and should be gathered together in ways which would show where and how the most effective efforts are to be made.

There are no easy solutions and all is complicated by present divisions of responsibility between departments and local authorities and other organisations. That problem affects general policy as well as delivery and safety as well as rehabilitation.

Independent delivery of services to promote safety on the roads or in factories or at sea or in domestic environments is one matter. Similar considerations apply to primary health care at a first

stage of rehabilitation and vocational retraining at another. But policy and its coordination must have a much wider perspective and be decided at a different and earlier level.

It would be difficult if not impossible for the Accident Compensation Corporation to discharge that kind of oversight. We think it needs the attention of a Minister charged with a policy responsibility. However the Corporation should be left with the task of promoting safety and rehabilitation objectives wherever it is able.

6 *Sickness*

For historical and pragmatic reasons sickness incapacities were not included in the new comprehensive scheme. The concept of earnings related benefits across the whole field of personal injury was itself a new one. Funds which already were supporting the compulsory work and road accident systems could be applied to the wider injury scheme. And there were questions about the additional and uncertain cost of extending cover to sickness.

So it seemed wise to take only one step, at least for the time being. But clearly the demarcation is anomalous. It is the kind of situation which gives hard emphasis to what has been called the inequality of luck. It ought to disappear. And sooner rather than later. But how?

Even if it were proper in the face of the compact so recently arrived at, can the way be opened only by taking an axe to the value of injury benefits? For reasons of free market theories in 1988 some will at once say that the 1974 consensus should be ignored. Some will assume that otherwise there would be insurmountable expense. As happened when claims were made against the injury proposals (sometimes with actuarial as well as lay confidence) that it would be impossible to afford such a comprehensive scheme.

7 *By stages*

It is too easy to be beaten in advance in matters such as this. In the present context we think it possible for sickness incapacities to be brought within the injury scheme without any wholesale retreat from principle. After the removal of lump sum compensation (as mentioned in paragraph 11) it could be done by stages: first by providing health services on an equal basis; then by accepting congenital incapacities already supported by the social welfare system or which become manifest by a defined age; later by taking in higher level disabilities; and finally others less serious.

A long-standing precedent for phasing sickness into an injury system is the acceptance of industrial disease by workers' compensation statutes. Indeed, this very situation already exists within the Accident Compensation Act.

A move to include sickness by stages is also thought possibly the Royal Commission on Social Policy. However the Royal Commission would cut back present accident benefits to an extent which we think is unnecessary and social undesirable.

8 *Injury by accident*

So long as it is necessary to distinguish between injury and sickness the boundary needs to be defined with greater clarity. Problems have arisen for some who have alleged a work-related disease; for others who complain of lasting mental distress produced by sexual assault or other criminal attack. In some cases where medical treatment has gone wrong entitlement to benefit has been refused on grounds that the mishap was a known risk of the therapy, a reason which sits oddly beside the ready acceptance of the known risks of injury on the highway.

The general concept of "personal injury by accident" can be given precision by adding to it a detailed specification of injury causes as a schedule to the legislation. Such a tabulation exists within the "International Classification of Diseases" evolved by the World Health Organisation. The classes can be extended or reduced as appropriate. If used it would do much to remove administrative doubt and personal worry.

9 *Incentive*

If there is to be public confidence in the system it must not allow itself to be hijacked by all the minor injuries and every short-term problem. This approach is accepted because most people wish to do what they can for themselves. This kind of set-back does not require outside assistance. Similar considerations meant from the outset that the scheme would not provide a complete indemnity. A fair margin for personal initiative would be left to the individual. Thus earnings related compensation does not replace the whole of lost earnings but at a proportionate level of 80 per cent.

10 *Targetting*

But individual initiative will not be promoted by offering the same flat-rate benefit to everybody or begrudging help for long-term incapacities or by means-testing entitlement at levels of subsistence. Those plain English concepts have been seeking new life recently under the euphemism "targetting".

Exclusionary devices which seemed essential fifty years ago in order to ensure that a new era of social security would be launched and kept on course have probably attracted some contemporary interest because it is thought they can be used to squeeze expense out of social welfare programmes and aid a drive to the free market economy. But pure economic efficiency is not an end in itself. Its value lies in easing the way to social objectives. For present purposes those screening devices do not have that kind of relevance.

They cannot stand beside the aims of income maintenance. In the case of work injuries the time barrier would be incompatible with International Labour Organisation Convention 121. In terms of equity they would penalise personal effort and providence, and the time barrier would treat most harshly the most seriously injured.

A capital payment may be due to those who suffer permanent impairment or significant pain as the result of injury. At present the maxima are \$17,000 and \$10,000. Their origins lie in claims for common law damages.

Recently awards in less serious cases have tended to be disproportionately high because the ceilings have been kept at those modest levels. But this has not meant that their overall cost is modest. The figure of \$122.6 million for 1986/1987 may be compared with total periodic payments of \$61.08 million for all seriously handicapped people who were still receiving benefits after two years.

Against the income maintenance purposes of the injury system all this is illogical. And for sickness such capital payments would become incongruous. We think they should disappear from the accident scheme provided there is enlargement of the provisions for periodic benefits to enable an assessment to be made on a schedule basis of the extent to which there has been a loss of physical or mental capacity with discretion to commute to a capital amount all or part of periodic benefits in special cases.

The removal of lump sum awards will require some way of assessing periodic payments for non-earners. It should be done against a notional earnings base.

12 Periodic payments

In order to fix the level of periodic benefits the Act speaks inaccurately of assessing lost earning capacity. In fact it requires in each case a tailor-made assessment of actual lost earnings. For those who are totally disabled, whether temporarily or not, there is no special problem. But acute difficulty can be associated with others left with a permanent handicap which permits some activity. In the case of permanent partial disabilities much time and trouble has to be given to finding and checking the precise earnings loss. So there is delay, sometimes argument and no incentive for the individual to make the best of the problem by maximum effort and work.

13 Schedule assessments

The solution is to make assessments for permanent partial disabilities on a schedule basis which reflects average experience for the given level of impairment; and for this purpose the earnings in order to assist the manual worker and others on lower wages while avoiding unduly large benefits for those with higher incomes who usually are better able to make subsequent adjustments. There must, however, be a discretion to depart from the base of average weekly earnings where in a particular case its use would result in injustice of under-compensation.

The schedule method is widely used in other countries to settle such problems. Used here it will permit fair and early answers to be given. Those who may wish to compare the value of a lump sum and periodic benefit under the old regime with these proposals should know that the capitalised value of the new periodic benefit will be entirely comparable with and often well exceed a present

assessment. And if any subsequent review could be used only to increase the earlier assessment but never bring it down the aim of rehabilitation would be greatly assisted.

Taken together with removal of lump sums these proposals would initially reduce expenditure and only after several years involve any increase.

14 Time limits

To accommodate a subsequent move to sickness it is said by the Royal Commission on Social Policy that earnings related benefits would need to be replaced by a modest flat-rate payment after two years; and there should be a waiting period, not of one week as at present, but four weeks.

We are unable to agree, both for reasons of equity and the limited savings which could be achieved. It would not be right to curtail payments to those most seriously disabled in order to maintain a higher level of benefit for everybody during the first two years. Particularly as the proposed economy could be only about 2.5 per cent of expenditures.

And the long waiting period of four weeks could create real hardship. Instead we have proposed two weeks instead of the present week, subject to a statutory requirement that in the case of all work-connected injuries compensation would be met directly by the employer.

15 Latent disease

Recently it has become apparent that some industrial diseases have a latency period of 15 years and even longer. One is asbestosis.

Accident compensation is concerned with industrial diseases having origins in an employment which continued after 1 April 1974. Responsibility for earlier cases was left to those with an earlier liability. No attention was given to the risk of the insidious onset of disease already at work but which would not produce incapacity for a good many years. Today the victims may be without a remedy, either because passage of time has removed possible defendants or given rise to a Limitation Act defence.

The time has arrived when latent effects of pre-1974 injury or industrial disease could be taken into the accident scheme without undue strain upon the fund. We so recommend.

There is a limitation period of one year in the Accident Compensation Act. It is not and ought not to be used in such a context as this. That view is reinforced by the problems which can surround latent disease. The present provision should disappear.

16 The costs of the scheme

There have been complaints of escalating and unexpected cost increases in the operation of the scheme. Indeed the Officials Committee Report of 1986 states bluntly that a "massive cost blow-out in compensation has occurred". That, we think, is misleading.

Certainly since 1983 there have been major increases in expenditure. Indeed there was evidence that this was happening. Yet in that very year decisions were taken to reduce levy income by about 30 per cent. Hence a drastic run-down in reserves.

Among several explanations for the increases is the particularly important fact that almost all of it (in constant dollar terms) is for claims *continuing from earlier years*. There is very little real change in the amounts paid in each year for *new* claims – as there would be if the cost blow-out description were justified. It is a clear pattern. And it shows earlier claims accumulating in a still maturing scheme. For that reason spending had to increase. As would have been expected.

But the injury scheme is inexpensive. The expenditure for 1987/1988 was \$693 million or 1.2 per cent of gross domestic product. For that outlay it provides 24 hour protection for the whole population. Considered in another way it costs only 60c per person per day for protection against every kind of accident.

The overall cost may be compared with national superannuation at \$3,860 million. Or the 1986 total in Australia for the direct premiums needed by the limited systems supported by compulsory Third Party motor vehicle insurance and Employers' Liability insurance. The respective amounts (\$1,461 million and \$2,399 million) when taken together are 1.7 per cent of that country's gross domestic product and for more restricted purposes.

17 Abuse

Nonetheless it is essential to avoid unnecessary expense just as it is essential to meet any valid perception of abuse. There are complaints that medical and physiotherapy costs of treating numerous non-accident incapacities have been finding their way into the Accident Compensation Corporation accounts. It would be wrong to regard this as something wide-spread; and at worst the effect upon the expenditures of the Corporation could not be great because when general practitioner, specialist and paramedical fees and the cost of industrial clinics, pharmaceuticals and certain aids are all taken together those various charges are only about 11.8 per cent of total costs.

But limited in extent or not should be stopped if possible. One simple precaution (previously ignored) will require each patient to sign a brief form personally alleging an accident. However, a different and decisive step could be taken.

18 Medical benefits

Without any doubt any problem of abuse will be removed completely if health and related services were provided for both sick and injured on the same footing. This we recommend as eliminating at least one important distinction between the two groups. The change can and should be made at an early date.

The starting point for determining the level of benefits is the de facto decision of the Corporation that a payment of \$14.25 discharges its statutory duty to meet the "reasonable" fee for

attendance by a general practitioner. The average charge is approximately \$22.00; yet the fractional payment has not produced any general complaint from injured patients, probably because it is felt to be a fair level.

19 Source of funds

For historical reasons touched on in paragraph 2 the scheme continues to be largely financed by levies on employers, the self-employed and owners of motor vehicles. A variable balance, about 14 per cent, is directly supplied from the consolidated account. We think the last contribution should be kept at least to that quite modest level. Ideally the system should now be wholly supported by general taxation.

If, in the present economic climate, the levy sources must remain we would not accept the historical reasons as justifying further increased demands upon them. Future assessments can and should be kept relatively stable.

A considerable margin was added to the levy last year in order to quickly rebuild reserves. It is a cushion against the need for increases since the reserve target is now in sight with a supplement of significant income from reserve investments already flowing into the system. Further we recommend some additional income should be added from part of the excise duty collected on road transport fuel.

We are unable to support suggestions for levies upon sports bodies or those who engage in sporting activities on grounds that total income could not justify administrative problems of collection or the initial difficulty of defining accurately and fairly the groups and individuals to be levied.

20 System and method

Proper functioning of the scheme demands systematic organization. It is difficult to achieve where the Act itself requires departures from simple in favour of more complicated procedures.

Three individual accounts must still be used by the Corporation to collect income which is then disbursed for one common purpose. In itself this is pointless. At the same time it encourages argument about responsibility for particular outgoings which in the absence of fault is irrelevant. And if present sources of income are to remain, at least the basis for obtaining the funds should be made more equitable and simplified.

21 Employer levies

Take the levies assessed and collected from employers. It is done by attempting to classify employment risks under no fewer than 103 separate heads with numerous sub-groupings. All this complication is then disregarded for every other purpose. Unlike individual experience rating which some think can be an incentive to safety at the work-place, this process does not even purport to be

that. Yet a year ago the same approach was used for the first time to assess levies upon the self employed.

From both employers and self-employed there has been widespread complaint about the resultant demands and the injustice of particular classifications. Already supposed principle has given way to something a little fairer when on 1 April 1988 the levy fixed for the aerial top-dressing industry was cut from \$27.85 to \$11.00. That process needs to be followed through. In the United Kingdom income is provided on the same proportionate basis by all employers. There should be a single levy rate here and fixed by Parliament. Taken at about the average for the 1987/1988 year \$2.50 or even a little less, it could then be left unaltered - at least for several years.

22 The self-employed

In the case of the self-employed there are long and inevitable delays waiting for annual accounts in order to measure benefit against precise net income. This is unnecessary in the interests of the accident fund and a handicap for self-employed persons who suffer injury. It would be sensible and sufficient to permit a nominated income to be used both to determine the levy base and for purposes to benefit. It is not difficult to find a formula which would keep the chosen income within some broad but fair boundaries.

23 Legislation

The Accident Compensation Act 1982 is a complicated piece of legislation which occupies 145 pages of the Statute Book and already has been the subject of several amendments. For some time it has been a target for general revision. The present proposals for reform could not easily be accommodated within the structure of the Act as it stands.

Together with our Report we provide draft legislative proposals for its replacement. In doing so we acknowledge with gratitude the use we have been able to make of an exemplary model: a Bill for an Act to be cited as the National Compensation and Rehabilitation Act 1977, prepared by an eminent Australian draftsman, Mr J Q Ewens, CMG CBE QC, of Canberra. It was read a first time in the House of Representatives of the Australian Parliament on 24 February 1977.

24 Transition

Any change to entitlement or benefits could not be made in a way which would retrospectively deprive any person of accrued rights. The fair and clean-cut solution to transitional issues in the present context is to provide those who had acquired rights to choose by election whether to proceed under the earlier law or the new provisions.

PRINCIPAL RECOMMENDATIONS

25 Safety and rehabilitation

(1) A Minister should be charged with a general policy responsibility for the promotion of safety and the prevention of accidents of all kinds. (Para 128)

(2) The same or another Minister should be charged with general policy responsibilities for the optimum rehabilitation of all persons who suffer physical or mental impairment, whatever the origin or cause. (Para 160)

(3) The Accident Compensation Corporation should keep and maintain the best statistical picture possible which bears upon the purposes of safety or rehabilitation; and energetically promote those purposes. (Paras 5 and 282; clauses 6 and 8 of draft Bill)

26 Entitlement

(1) The present right to benefits depends upon injury. It should include sickness as soon as possible. (Paras 6 and 176)

(2) This can be done if it is tackled in stages. An immediate step would be to provide all health and related services on the same basis to the sick and injured. In particular general practitioner and para-medical benefits should be equated at about the two-thirds fractional level at present paid by the Accident Compensation Corporation for general practitioner fees. (Paras 7, 58 and 176)

(3) In passing this would be fair to all; and it would remove all reason for possible abuse. (Para 179)

(4) At the same time, or soon after, significant congenital incapacities which are manifest at an early age could be included by the simple method of "deeming" them to be injuries. (Para 172)

(5) Then would follow the more seriously disabled and later the less serious cases. (Para 172)

27 Accident and incapacity

(1) The general concept of "accident" creates problems. To avoid uncertainty, physical or mental injury should be related to the comprehensive list of external causes of injury formulated by the World Health Organisation. (Para 165)

(2) Medical mishap should not be excluded simply because in advance there was some recognised risk of the therapy any more than the risks of using the highway could sensibly disqualify victims of road accidents. (Para 165)

(3) There is a need for special provision in the case of victims of sexual assault or other criminal attack involving significant or lasting mental distress or other impairment. (Para 211)

(4) The delayed effects of such industry-related diseases as asbestosis or of latent injury (whether or not the origins may appear to pre-date 1 April 1974) should be accepted as compensable. (Paras 168 and 169)

(5) The present limit on the period within which an application for benefit must be made should be abolished. (Para 171)

28 Benefits

(1) Periodic benefits, in general, should be earnings-related, have no means test qualification, be payable during incapacity until age 65 (or dependency in the case of survivors), and be assessed at a level of total incapacity of 80 per cent of earnings. (Para 182 and Parts V and VI of draft Bill)

(2) Incapacities suffered after age 60 should carry a benefit for a maximum of five years. (Parts V and VI of draft Bill)

(3) There should be a waiting period of two rather than the present one week before commencement of earnings-related benefit; with a statutory obligation upon the employer to pay an employee injured in a work-related accident an amount equivalent to the benefit to cover the waiting period. (Para 185)

(4) Maximum earnings-related benefit should be defined by reference to a weekly income of \$1,000. No benefit for a totally incapacitated earner should be less than the minimum weekly wage. (Parts V and VI of draft Bill)

(5) Housewives and other non earners should have a periodic benefit assessed against notional earnings equal to average ordinary weekly earnings for "all sectors, all persons". Their work though directly unpaid has important economic benefits for the community as well as families. (Paras 182, 213 and 214)

(6) There should be provision for such personal assistance as some home help and counseling services. (Para 177)

(7) And payment of professional charges if properly incurred by an applicant in seeking a benefit. (Para 277)

29 Permanent disability

(1) Lump sums for permanent impairment or for pain and suffering should be abolished. (Paras 194)

(2) Instead, to encompass lost physical faculty and any economic consequences, any significant partial disability should be evaluated as a percentage of total disability by reference to the American Medical Association "Guides to the Evaluation of Permanent Impairment". (Paras 194 and 195)

(3) But to avoid over-compensation of higher paid and sedentary earners or under-compensation of manual and lower paid earners the base for everybody including non-earners should be average ordinary weekly earnings for all persons. (Paras 195 and 203)

(4) There should be a discretion to increase that earnings base in order to avoid injustice in the particular case. (Para 203)

(5) And in exceptional cases there should be a discretion to commute part of a periodic payment to a present capital sum where it would clearly be in the beneficiary's real interests to do so. (Paras 198 and 211)

(6) To qualify for a permanent partial benefit the impairment should be 5 per cent or more of total; and 85% or higher should be assessed as 100 per cent. (Para 195)

(7) On assessment of any application every decision should be based on the real merits and justice of the case. (Para 275)

30 Income

(1) No useful purpose is served by three separate compensation accounts for a scheme which provides benefits regardless of cause. (Para 244)

(2) The motor vehicle levy should be geared to changes in the Consumer Price Index. (Para 241)

(3) An appropriate part of the excise duty paid on petrol should be paid in support of the accident fund. (Para 241)

(4) Employers and the self-employed should not longer be levied by reference to classified business activities but at the same uniform rate for all (Para 265)

(5) Parliament itself should fix the rate. If taken initially at \$2.50 per \$100 of payroll or income it is unlikely that change would be needed for at least several years. (Paras 21, 244 and 250)

(6) The contribution from the Consolidated Fund should be kept at or above the same proportionate level provided over several years immediately preceding 1987/1988 – approximately 14 per cent. (Para 249)

31 Transition

(1) If these recommendations are accepted new legislation will be needed to replace the present statute. (Para 23 and appendix B)

(2) Those with an accrued but pending entitlement under the 1982 Act should have the right to elect whether to obtain benefit under those or the substituted provisions. (Para 24)

SAFETY INCENTIVES IN GENERAL

131 What persuades people at risk of injury or able to inflict it on others to take care to avoid it? The question is a very big one. It has many answers. We have considered some of those applying in employment. We give now an indication of their range, in part to show why we do not accept that our proposed changes to the levy scheme would discourage any effort made by an employer to reduce workplace hazards.

132 As we explain elsewhere the present accident compensation scheme already places financial incentives in favour of safety and minimizing injury on employers and workers – the employer or the workers has to meet the cost of the first week and the workers does not receive full earnings related compensation. The proposal we make to extend the waiting period for a second week would further enhance that incentive. The total amounts of money involved are already large and would be increased by at least a further \$20 million. That is to say the direct financial incentive to safety contained within the accident scheme is already large, and would be made larger.

133 The incentives outside the scheme are probably even more significant. The first of them must be self interest – of the employee, the driver, the "do-it-yourselfer", the tramper and especially in the present context the employer. The employer as a result of accident may lose the services of a skilled experienced employee. Whether the loss of human resources is significant for the employer or not (for some but not all employees can be quickly replaced), other direct costs may be – in damaged and destroyed property, plant, machinery, buildings, spoilage of material, interruption of production, loss of sales and profits and other consequential losses. Many of those property losses are of course covered by insurance taken out in very large amounts. (The total of fire and accident premiums in New Zealand is considerably in excess of Accident Compensation levies.) Accordingly such incentives as an insurance policy may provide through experience rating, accident prevention (by increasing premiums if safety measures are not taken), no claims bonuses, and the like are already relevant to many accidents that may also cause personal injury.

134 The prospects of such losses have led some businesses (see for example paragraph 121), in some cases with the support of the Corporation, to introduce sophisticated safety audit programmes (International Safety Rating). In addition to a substantial drop in recorded accidents such programmes can produce other benefits – in one case, big increases in production, improved communication between the company and the employees, employees' increased awareness that they are part of a team, decreased fuel consumption, increased employee respect for equipment, and improved control over production.

135 A related development also mentioned earlier is the growing acceptance of the need for methods for the promotion of workplace safety involving cooperation between all involved. Over recent years legislation relating to railways, construction, electricity, factories and commercial premises has provided for the drawing up of codes of safety practice by departments in consultation with those affected. These codes are not necessarily directly and legally binding, but they can have

legal significance. They are also part of a world-wide movement towards greater worker participation in occupational health and safety.

136 The law provides at least four other incentives towards safety, again touched on earlier. Unsafe methods of work or products which cause damage to property outside the work place can be the subject of civil actions in the courts by those damaged. Again insurance may have a role.

Secondly, professional and occupational disciplinary processes will be significant in some situations. That prospect and the next two cannot be the subject of insurance and accordingly individual responsibility is greater in these areas.

Thirdly, much safety legislation imposes standards and rules which can be supervised and enforced through inspection, courts and commissions of inquiry, and prosecution in the criminal courts. Sometimes the official remedies may include the stopping of unsafe activities, such as the closing down of a factory. The general emphasis in the administration of this law so far as it relates to factories and commercial activities, in New Zealand as elsewhere, is however on guidance and education rather than on coercive measures. Road safety law is seen differently, with large numbers of drivers being prosecuted and heavily penalized for unsafe driving.

Fourthly, the general criminal law may be invoked – manslaughter prosecutions for deaths caused in or by industry are not unknown, and some have urged that they should be more widely invoked.