Appendix 2: Discussion of Issues for Reform

Disentitlement in Cases of Self Inflicted Injuries or Suicide

Amendments to the Act in 2010 disentitle a certain class of claimants where injuries are self-inflicted or are caused by suicide.

Section 119 means claimants will not receive entitlement (except for treatment costs) in cases where the self-inflicted injury or suicide is unrelated to a covered injury. This is mean-spirited. It shows legislative contempt to those suffering mental illness.

Further, it is an affront to the underpinning Woodhouse principle of removing fault from personal injury claims.

It leaves ACC with no power at all to provide for the dependents of claimants who are disentitled – no matter how genuine and deserving the needs of those dependants are.

The compassionate response would return entitlement for self-inflicted injuries or suicide.

ACC Futures recommends the repeal of s 119.

Work-Related Gradual Process

The 2010 changes to the Accident Compensation Act make it more difficult for New Zealanders suffering from a work-related gradual process injury to receive cover for their injury. For a claimant to receive cover for a work-related gradual process injury, they must now satisfy the three-part test under s 30, namely,

1. They performed an employment task, or were employed in an environment, that contained a property or characteristic that caused, or contributed to the cause of, their personal injury; and

2. That causative property/characteristic was not found to any material extent in their non-work activities or environment; and

3. The risk of suffering their personal injury is significantly greater:

    a. for people who perform the employment task, when compared with people who do not; or

    b. for people who are employed in that type of environment, when compared with people who are not.

The three-part test is too stringent a test in establishing a work-related gradual process injury.

The second and third parts of the test operate as artificial barriers to cover. These barriers can result in a claimant who has proved that their injury was caused by workplace exposure being denied cover. If workplace causation can be proven to the requisite standard, there is no principled reason to rule out cover on the basis that the claimant was not at a significantly greater risk due to their task or employment, or that the causative workplace property/characteristic existed in the claimant's non-work environment.

This negatively affects claimants. For example, Claimant A was a police officer who developed fairly localised lumbar facet arthrosis due to the weight of his body armour. The specialist evidence stated there was a significant contribution from wearing the vest to developing the condition, but this depended also on his naturally increased lumbar lordosis, which predisposed him to developing that condition. As it was not a true increased risk across all those undertaking that employment task given the predisposition, the claimant did not get cover. Clearly, this is not a just outcome for the officer.

ACC Futures recommends the repeal of ss 30(2)(b)-(c).

Vocational Independence

The definition of vocational independence was amended to 30 hours per week. If a claimant can be determined through a work-capacity assessment as fit to work in hypothetical occupations for 30 hours per week, they can be made vocationally independent under s 107 and lose entitlement to weekly compensation.

30 hours work per week does not amount to full time work. Prior to 2010 vocational independence was defined as being able to work for 35 hours per week.

Determining vocational independence at 30 hours per week can lead to real financial hardship for a greater number of claimants. A lower criteria for making a claimants vocationally independent, shifts more claimants off weekly compensation. It should be raised to 35 hours to ameliorate some hardship.

ACC Futures recommends the reversion of the definition of vocation independence as 35 hours per week.

Dis-establishment of the Ministerial Advisory Panel on Work-Related Gradual Process, Disease or Infection

Where workers are being made sick by their work, the Government should invest in preventing occupational disease, and compensate those who are made sick.

However, the previous Government dis-established the Ministerial Advisory Panel on Work-Related Gradual Process, Disease or Infection. If this had not been dis-established, better policy would likely have been developed to protect workers.

Work done by the panel remains a relevant and important part of the evolving law regarding cover and entitlements for occupational disease. In 2007, the Panel recommended a further 24 occupational diseases and corresponding causes to be added to Schedule 2 of the Act. This provided a faster process for New Zealanders suffering from occupational diseases to receive cover.

Because of the latency period between exposure to workplace hazards and diagnosis of occupational disease, identification of risks, injury prevention and monitoring are made more difficult. The Panel's specialist knowledge is important to shape policy to prevent exposure and long term consequences.

The Panel should be re-established, as protection of New Zealander's health at work through effective management of occupational disease now will constrain and reduce long term harm to New Zealander's health, and costs.

ACC Futures recommends the re-establishment of the Ministerial Advisory Panel on Work-Related Gradual Process, Disease or Infection.

Abatement of Holiday Pay

The Accident Compensation Act, sch 1 cls 49 allows all payments at the termination of employment to be abated from the amount of weekly compensation that the claimant can receive under cls 51. Where an injury results in termination, the payment of holiday pay also is abated from the weekly compensation that the claimant is entitled to receive.

Holiday pay is a payment made to a claimant in respect of a time when that claimant was not incapacitated. Therefore, even though the actual payment may take place at a point in time when the claimant is incapacitated, it was 'earned' at an earlier point in time. Abatement of holiday pay reduces the amount of entitlement received by the injured person. Had the employee exhausted their leave entitlements prior to termination of employment, they would not be penalised in this way.

ACC Futures recommends that an earner's holiday pay is not abated from their weekly compensation following incapacitation.

6 Per Cent Threshold for Hearing Loss

The definition of 'personal injury' was amended to exclude any degree of hearing loss that is less than 6 per cent of binaural hearing loss. A claimant must have suffered a personal injury as defined in s 8 to receive cover. Those with hearing loss below 6 per cent are not covered and therefore

prevented from accessing any entitlements whatsoever. This definition is the only exclusion which uses a percentage impairment to determine cover in the Act. [1]

In 2009, Professor Peter Thorne submitted to the Transport and Industrial Relations Select Committee that, because of the way the percentage is calculated, noise damage has to be very extensive before it registers as a handicap on the scale; a 6 per cent threshold is not reached until there is a substantial loss of hearing. This has a particularly marked effect on seniors as the 6 per cent does not include any age related hearing loss.

This threshold should be removed to return to the Woodhouse principle of comprehensive entitlement, and to remove the discrimination against those suffering noise induced hearing loss.

ACC Futures recommends the removal of the 6 per cent hearing loss threshold for personal injury.

Weekly Compensation for 'Non-Permanent' Employees

Seasonal workers are disproportionately affected by the compensation calculation for weekly compensation.

The long term weekly compensation rate for non-permanent employees is calculated by taking the amount that the employee earned in the 52 week period immediately prior to incapacity and dividing that figure by 52.

This disproportionally affects seasonal workers (many of whom work in the regions) as their earnings will be divided by 52 weeks, regardless of the number of weeks it took them to earn the amount.

ACC Futures recommends a reversion to the pre-2010 positon.

Other Legislative Changes

Tax on Backdated Compensation

It is unfair that an injured person's payment of arrears is regarded as being received in the year at which it is paid out.

Those who are disadvantaged by injury end up with a higher and disproportionate tax burden when they receive arrears of weekly compensation.

Claimants pay tax at a higher rate as that year's income is increased due to the payout. IRD receives a proportion of the compensation payments that ought to be enjoyed by the injured person. Were it to be paid out at as it should have been, that person would likely pay a lower tax rate. This could

[1] Percentages of impairments are used to determine lump sum compensation, but the 6% threshold is the only injury that requires a certain percentage of injury to obtain **cover** as distinct from entitlement.

lead to a monetary loss for the claimant due to ACC's failure in decision making, which may be unfair. It would be fairer if the arrears of compensation are spread over the years of entitlement.

ACC Futures recommends that payment of arrears is taxed at the rate that it would have been originally paid at.

Earner Status at Time of Injury and at Time of Incapacity

Vandy held that entitlement to weekly compensation relies on the claimant being an earner at the time of their injury *and* at the time of their incapacitation.

A claimant could be injured at a point where they are not earning, however, symptoms could later cause incapacity when they are earning.

The unfairness is highlighted by the facts of *Vandy*.[2] Ms Vandy fell from a horse she was riding when she was 12. Much later, when in employment, Ms Vandy was incapacitated from the injury. She was not entitled to weekly compensation as she was not earning at the point of incapacity.

Justice Gendall held that the statute is clear, despite understandable notions of what might be 'fair' in an individual case; Justice Gendall held the remedy has to be provided by Parliament. This particular aspect of the Accident Compensation Act is clearly not working as intended, and undermines the schemes purpose to provide fair compensation for loss from injury.[3]

This has a significant effect on seasonal employees. If a claimant is injured or incapacitated during a seasonal layoff, this claimant would not get entitlement to weekly compensation. The Statute should be amended to allow weekly compensation if they are earning at the time of incapacity.

ACC Futures recommends that weekly compensation is determined by point of the incapacity.

Weekly Compensation and New Zealand Superannuation for Senior Citizens

The current law has a discriminatory effect on superannuates' ability to receive weekly compensation.

The Accident Compensation Amendment Bill limits a person who is first entitled to weekly compensation in the 24 months prior to reaching New Zealand Superannuation Qualification Age, or thereafter, to receive only 24 months of weekly compensation.[4] This amends the current legislation by simplifying the timeframes to entitlement, but does substantially address the unfairness caused by limits.

Superannuates continue to pay ACC levies while they work.

[2] *Vandy v ACC* [2011] 2 NZLR 13.
[3] Accident Compensation Act 2001, s 3(d).
[4] Accident Compensation Bill (49-1), cl 10(1).

The 24 month limit can have serious financial implications on senior citizens who would have expected to continue working past 65, but are injured. This means that many of our most vulnerable are not getting the weekly compensation they need while recovering from their injuries.

For this discrimination to be justified under the New Zealand Bill of Rights Act 1990, it must be sufficiently important and proportionate (meaning rationally connected to objective and not be arbitrary, irrational or unfair, and impair the right as little as possible).[5]

The 24 month limit is both arbitrary, as it does not take into account personal circumstances, and impairs the right to be free from discrimination greater than necessary as legislative tools are already provided for in the Act. ACC can suspend entitlement to a claimant if their injury is caused wholly or substantially by the ageing process; or, ACC is able to determine if an injury is no longer causing incapacity for employment, or if a claimant is able to engage in other work.

An injured person over 65 should be entitled to both weekly compensation and superannuation for as long as they cannot work due to the injury where otherwise they would have been working. The Act should be amended so that injured superannuates who are in receipt of weekly compensation are not cut off weekly compensation when the 24 months expire.

ACC Futures recommends this 24 month limit should be removed.

Appeals to the Supreme Court

New Zealanders cannot appeal ACC cases to the Supreme Court. Accident Compensation Act, s 163 (4) limits appeals of decisions made by ACC to the Court of Appeal.

The Accident Compensation Act 2001 is not easy to follow; even the Chief Justice has stated so.[6] The Supreme Court should be able to clarify important pieces of law in New Zealand's unique ACC jurisdiction.

As the Senior Courts Act, s 74 limits the Supreme Court's ability to take appeals and prevents unnecessary appeals; an internal bar in the Accident Compensation Act on appeals to the Supreme Court is both unnecessary and unfair.

Limiting appeal to the Court of Appeal seems a historical overhang. It could have been acceptable where appeals were to the Privy Council, however, the Supreme Court should be able to adjudicate on matters of law of which it sees as relevant. It is an anomaly that decisions and review decisions cannot be appealed to the Supreme Court.

Further it is inconsistent that ACC cases can be heard by the Supreme Court if they are not appeals on ACC decisions, such as judicial review proceedings.

[5] *R v Hansen* [2007] 3 NZLR 1, at [64].
[6] Allenby v H [2012] NZSC 33; [2012] 3 NZLR 425 at [7].

ACC Futures recommends ss 163(4) be repealed.

ACC Does Not Contribute to KiwiSaver

KiwiSaver employer contributions are not considered to be lost earnings in the calculation of weekly compensation. The loss of KiwiSaver employer contributions leaves a claimant in a worse position at the point of retirement. A claimant could miss out on a significant amount of earnings over an extended period. This goes against the Woodhouse principle of comprehensive entitlement. The Act should be amended to account for the loss of employer contributions.

ACC Futures recommends that ACC contributes to claimants' KiwiSaver.

Unenforceability of Review Decisions

ACC review decisions are not enforceable. ACC reviews are quasi-judicial in nature and can involve large sums of money with the ability for positive impact on the lives of New Zealanders. Claimants can wait months for weekly compensation to be reinstated following a review decision. These should be able to be enforced in the Courts where necessary.

ACC Futures recommends that an enforcement provision is legislated.

Timeliness of Primary Entitlement Decisions

There is no requirement in the Accident Compensation Act for ACC to make primary entitlement decisions in a timely manner. This can result in stalling on behalf of ACC, with little power of the claimant to compel ACC to make a decision.

There are statutory requirements for timeliness of decisions in regards to decisions on cover, and review decisions under ss 54, 56 and 57. It is not clear why there are no such requirements for entitlement.

This can negatively affect claimants. For example, in 2013, ACC granted Claimant B cover for sepsis resulting in hysterectomy. In December 2015, a formal application for weekly compensation was made. When a decision still had not been produced by the following November, Claimant B filed for review. In June 2017, one week before this review was due to take place, and one and a half years after the application for weekly compensation was made, ACC issued an entitlement decision agreeing to pay backdated weekly compensation.

The Accident Insurance Act 1998, ss 56-57 provided statutory requirements for a decision on a claim to be made 'as soon as practicable, and no later than 21 days', or for an extension to be requested and accepted by the insured person. Under the 1998 Act, this applied to both cover and entitlement.

A claimant can apply for a review of the delay; however, this is after the claimant has suffered the delay. Requirements for a timely decision are a better mechanism to protect claimants and should be adopted.

ACC Futures recommends that a statutory requirement for timeliness for entitlement is legislated.

Ineffective Safeguards Against Vocational Independence Testing

Prior to making a claimant undertake a vocational independence assessment, s 110(3) requires ACC to assess that the claimant is likely to achieve vocational independence and that they have completed any vocational rehabilitation required. The Supreme Court has said that the legislative history of s 110(3) suggests its purpose is to protect claimants from unnecessary assessment, as such assessments are intrusive and may be upsetting.[7]

The Court of Appeal in *Splite v ACC* found that an assessment under s 110(3) was not a decision, and therefore the statutory disputes process does not apply.[8] The safeguard in s 110(3) is effectively circumvented; a challenge to the ACC's assessment against criteria in the s 110(3) safeguard cannot be challenged until the intrusive and upsetting assessment takes place.

ACC Futures recommends the s 110 (3) assessment is added to the definition of decision under s 6.

Regulatory Changes

Diagnostic and Statistical Manual of Mental Disorders (DSM) in ACC Regulations

There has been a serious lag in updating the relevant DSM in regulations. DSM IV, first published in 1994, is still the relevant manual, despite an updated fifth edition being published in 2013.

The regulations require assessors to use the AMA Guide 4th Edition, and the ACC handbook for assessors also directs assessors to AMA 4th Edition and the Diagnostic and Statistical Manual of Mental Disorders (DSM) IV. If a claimant has an injury described by the updated edition DSM V, this would fall outside the regulations and the ACC User Guide for impairment assessors.

An example of where this lack of regulatory update negatively affects claimants are those claimants suffering from Chronic Pain Syndrome. DSM V updates DSM IV on the basis of developing science. Chronic Pain can now be classified as a Somatic Symptom Disorder; this classification would not be able to be assessed due to the limited ability to use DSM IV.

A further example is that the AMA Editions carry a bias that disadvantages females with sexual dysfunction arising from a covered injury. There is no impairment rating for these impairments.

[7] *McGrath v ACC* [2011] NZSC 77; [2011] 3 NZLR 733 at [32].
[8] *Splite v ACC* [2016] NZCA 302; [2016] NZAR 947 at [38].

It is also a conflict of interest that the ACC User Handbook takes priority over the AMA. Injury Prevention, Rehabilitation, and Compensation (Lump Sum and Independence Allowance) Regulations 2002, r (3) states that the ACC User Handbook to AMA4 prevails if there is a conflict between it and the American Medical Association Guides to the Evaluation of Permanent Impairment (Fourth Edition). Therefore, it is suggested there should be a regulatory hierarchy of DSM V, DSM IV, then the ACC User Handbook.

ACC Futures recommends that DSM IV is replaced by DSM V in the regulations and the hierarchy of impairment assessment tools is amended.

Attribution of Hearing Loss to Idiopathic Cause by ENTs

ACC seems to be misinterpreting regulations, with the effect of limiting the cover and entitlement for many people suffering from a noise induced hearing loss. The Accident Compensation Act, s 323 allows the Governor General on the advice of the Minister by order in council to make regulations to create tests to determine the proportion of Noise-Induced Hearing Loss that it work related. This power to make tests is exercised in the Accident Compensation (Apportioning Entitlements for Hearing Loss) Regulations 2010, r 6.

An ENT receives information from a claimant on possible noise exposure. The ENT then decides whether the pattern of hearing loss is consistent with the distinguishing features of work-related noise-induced hearing loss and if not, must give reasons. The ENT attributes a proportion of the hearing loss to occupational noise-induced hearing loss and the rest to other causes. In many instances, ENTs are apportioning a considerable percentage of the hearing loss to unknown causes, without providing any robust reasoning, or undertaking any tests to further investigate the cause of the loss.

The regulations only apply an audiometry test to determine the relevant loss. The regulations need to be amended to ensure that any attribution to unknown cause is accompanied by robust reasoning, is rare, and accompanied by an investigation and testing where relevant.

ACC's ENT assessors frequently fail to make enquiries into other work-related causes such as ototoxic exposures.

ACC Futures recommends that the regulations require ENTs to fully investigate and report on all causes of hearing loss.

Costs

Many of ACC's decisions are wrong and unfair, yet decisions go unchallenged because of the high cost of medical and legal fees. These lock many claimants out of access to justice at review. This limits New Zealanders' powers to ensure one of our biggest state entities is working properly and acting within its legal powers.

Accident Compensation (Review Costs and Appeals) Regulations 2002, sch 1 sets out the scale of costs that can be awarded against ACC. This was uplifted to meet inflation in 2017.

The Dean Report found the maximum costs awards for medical specialists and non-specialists reports failed to meet the actual report costs. The Dean Report recommended that these costs be substantially uplifted. The shortfall of costs substantively locks out many people from going to review to ensure that they receive cover or entitlement for their injury. This shortfall also locks them out of an accountability mechanism against ACC.

Without a substantial uplift in medical and legal fees two major planks of the Dean report, access to evidence and access to representation, are left un-responded to.

The Dean Report recommended an ability for a reviewer to make early costs decision. This would indicate to claimants that they would be able to receive costs to obtain medical reports, which may be critical to their prospects of success, or for early payments to pay for a report pre-review. This has not been implemented.

The scale of costs being set by regulation leaves no leeway for reviewers to award extra costs. These could be justified where a review is complex, or where ACC has been unreasonable in its decision, or otherwise. As clients do not have the same statutory cost protection against ACC as ACC has, some discretion should be available to reviewers in regulation.

At appeal, if the claimant is successful, the High Court Rules apply, which are considerably more generous than the current review costs regulations. It is proposed that the High Court Rules apply in relation to costs awards at review as well as at appeal.

ACC Futures recommends that the Dean Report recommendation is followed and there is a substantial uplift in costs at review.