

REPORT OF THE

MINISTERIAL ADVISORY PANEL

ON

WORK RELATED GRADUAL PROCESS,

DISEASE OR INFECTION

SECTION 31 INJURY, PREVENTION, REHABILITATION

AND COMPENSATION ACT 2001

TERMS OF REFERENCE

- 1 Section 31 Injury, Prevention, Rehabilitation and Compensation Act 2001 (“IPRC Act”) requires the Minister responsible for administering the IPRC Act to appoint an advisory panel on work related gradual process, disease or infection (“advisory panel”).
- 2 The functions of the advisory panel are set out in s.31(2) and (3) IPRC Act. The advisory panel’s terms of reference include the provision of advice to the Minister on any matter relating to work related gradual process, disease, or infection. More specifically, the advisory panel is required to keep under review and advise the Minister on three subjects, namely:
 - 2.1 Whether the second schedule of the IPRC Act should be amended. As explained later in this report the second schedule defines 17 occupational diseases which are deemed by s.30(3) IPRC Act to be caused by work related gradual process, disease, or infection.
 - 2.2 How the Corporation deals with claims for cover for personal injury caused by work related gradual process, disease, or infection.
 - 2.3 The definition of work related gradual process, disease, or infection found in s.30 of the IPRC Act.
- 3 In establishing the advisory panel, the Minister drew attention to the advisory panel’s statutory terms of reference (as described in the preceding paragraph) and also invited the advisory panel to comment on “ACC policy and procedure relating to work related gradual process, disease, or infection”.
- 4 The Minister for ACC established the advisory panel in June 2003. The panel has convened on eight occasions since its establishment and conferred with a number of interested persons and organisations.
- 5 The advisory panel has pleasure in presenting the following report. In this report the advisory panel has identified key issues associated with current scopes of cover for those who suffer work related gradual process, disease, or infection and propose significant changes to assisting those unable to perform their daily living activities.

6 This report is divided into the following sections:

Part I

**Section 30 and Schedule 2
IPRC Act:**

An explanation of s.30 and Schedule 2 of the IPRC Act 2001.

Part II

The Woodhouse Vision:

An explanation of the concerns and recommendations set out in the Woodhouse Report.

Part III

**Parliament's Responses to the
Woodhouse Vision:**

An analysis of Parliament's response to the Woodhouse Report and the evolution of ACC statutes leading to s.30 IPRC Act 2001.

Part IV

Problems With the Current Law:

An analysis of flaws in the current law relating to the provision of cover to those who suffer personal injury caused by work related gradual process, disease, or infection.

Part V

A Principled Approach:

An explanation of the key policy changes recommended by the advisory panel.

7 The advisory panel recognises that further research is required to fully calculate the cost implications of the advisory panel's recommendations. An assessment of the fiscal implications of the advisory panel's recommendations is beyond the immediate resources of the advisory panel and requires input from the Department of Labour, ACC and the Treasury.

- 8 The advisory panel's report can be distilled to eight fundamental recommendations. Those recommendations are:
- 8.1 When implementing the changes recommended by the advisory panel it is imperative there be no reduction in current entitlements provided to those who have cover under the IPRC Act.
 - 8.2 Schedule 2 of the IPRC Act should be updated as quickly as possible. This can be achieved by way of an Order in Council promulgated pursuant to s.336 IPRC Act. The National Occupational Health and Safety Advisory Committee's ("NOHSAC") experience and skill should be utilised in preparing an updated Schedule 2.
 - 8.3 Cover for gradual process, disease, and infections under s.30 of the IPRC Act should be extended to all who suffer a work related impairment. Cover under s.30 should not be dependent on a claimant having to prove they have suffered a physical injury. This recommendation includes providing cover to those born with disabilities caused by the work environment of a parent or ancestor. The advisory panel recommends cover for impairment include cover for those who suffer a diagnosable psychiatric condition, regardless of whether or not they have suffered a physical injury.
 - 8.4 All members of our community who require treatment and rehabilitation services as defined in the IPRC Act should receive those services regardless of whether their need for those services arises by reason of disability, illness, or injury, and regardless of whether or not their disability, illness or injury was caused by work events.
 - 8.5 ACC's experience and understanding of delivering treatment and rehabilitation services should be utilised when providing treatment and rehabilitation services for all who require those services.
 - 8.6 Inequities will arise if those who are disabled or sick do not receive the full range of entitlements provided to those who have cover under the IPRC Act. However, it is important to appreciate that entitlements to compensation under the IPRC Act and previous ACC statutes, replaced common law compensatory damages which were not normally available to those who were disabled or sick.

- 8.7 The advisory panel appreciates that its recommendations should be considered in conjunction with related studies and investigations being conducted by a number of entities. In particular:
- 8.7.1 The advisory panel's recommendations concerning amending Schedule 2 of the IPRC Act should be considered alongside the recommendations made by NOHSAC.
 - 8.7.2 The advisory panel's recommendations that those impaired through sickness and disability should receive the same level of treatment and rehabilitation entitlements as those who currently have cover under the IPRC Act should be considered alongside the "Review of Long Term Disability Support Services: Achieving Equity of Access and Coherence with the New Zealand Disability Strategy" being undertaken by the Office of Disability Issues.
 - 8.7.3 The advisory panel's recommendations should also be considered in conjunction with work and research currently being undertaken in relation to access to employment support and return to sustainable earning, being undertaken by the Ministry of Social Development.
- 8.8 The advisory panel should continue to review the progress of implementing its recommendations and the manner in which s.30 of the IPRC Act is administered. In particular, the panel will continue to assess how ACC applies the causation test discussed in paragraphs 94 to 124 of this report.
- 9 The recommendations set out in paragraph 8.2 should be addressed during the course of 2005. The recommendation in paragraph 8.3 is viewed as a medium term recommendation and should be achieved during the course of 2006. The recommendations in paragraph 8.4 and 8.5 are seen as being longer term recommendations that should be achieved within the next three years.

PART I

Section 30 and Schedule 2 IPRC Act

10 Section 30, IPRC Act provides:

“30 Personal injury caused by work-related gradual process, disease, or infection

(1) **Personal injury caused by a work-related gradual process, disease, or infection** means personal injury –

- (a) suffered by a person; and
- (b) caused by a gradual process, disease, or infection, and
- (c) caused in the circumstances described in subsection (2).

(2) The circumstances are:

(a) the person-

- (i) performs an employment task that has a particular property or characteristic; or
- (ii) is employed in an environment that has a particular property or characteristic; and

(b) the particular property or characteristic-

- (i) causes, or contributes to the cause of, the personal injury; and
- (ii) is not found to any material extent in the non-employment activities or environment of the person; and
- (iii) may or may not be present throughout the whole of the person's employment; and

(c) the risk of suffering the personal injury-

- (i) is significantly greater for persons who perform the employment task than for persons who do not perform it; or
- (ii) is significantly greater for persons who are employed in that type of environment than for persons who are not.

(3) **Personal injury caused by a work-related gradual process, disease, or infection** includes personal injury that is of a type described in Schedule 2 that is suffered by a person who is or has been in employment involving exposure to agents, dusts, compounds, substances, radiation, or things (as the case may be) described in that schedule in relation to that type of personal injury.

(4) Personal injury of a type described in subsection (3) does not require an assessment of causation under subsection (1)(b) or (c).

(5) **Personal injury caused by a work-related gradual process, disease, or infection** does not include –

- (a) personal injury related to non physical stress; or
- (b) any degree of deafness for which compensation has been paid under the Workers' Compensation Act 1956.

(6) Subsection (7) applies if, before 1 April 1974, the person –

- (a) performed an employment task that had a particular property or characteristic; or
 - (b) was employed in an environment that had a particular property or characteristic.
- (7) The circumstances referred to in subsection (6) do not prevent the person's personal injury from being personal injury caused by a work-related gradual process, disease, or infection, but he or she does not have cover for it if section 24 or section 361 applies to him or her."

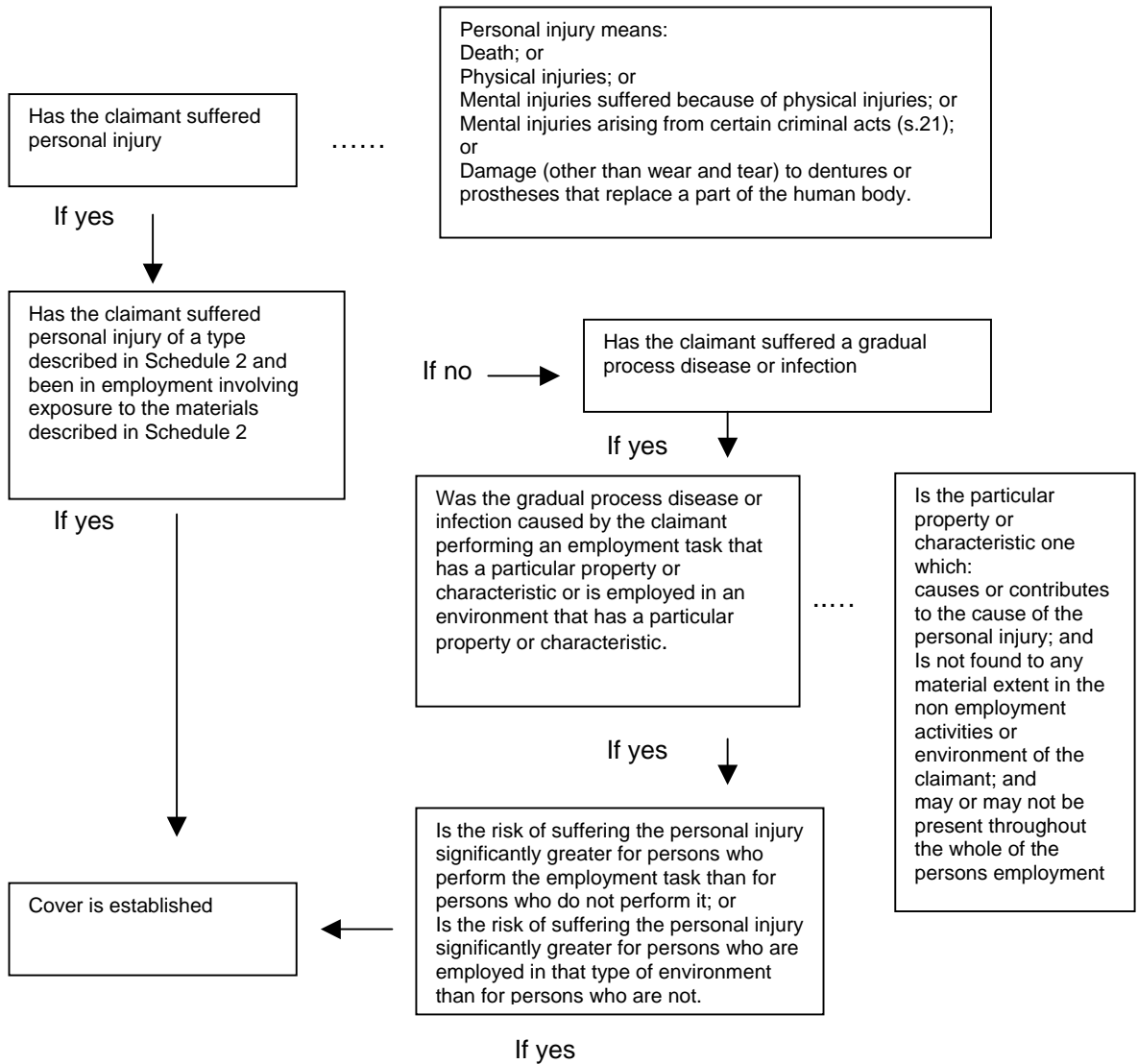
11 Schedule 2 IPRC Act provides:

"Occupational Diseases

- 1 *Pneumoconioses caused by sclerogenetic mineral dust (silicosis, anthraco-silicosis, asbestosis) and silico-tuberculosis, provided that silicosis is an essential factor in causing the resultant incapacity and death.*
- 2 *Lung cancer or mesothelioma diagnosed as caused by asbestos.*
- 3 *Diseases of a type generally accepted by the medical profession as caused by beryllium or its toxic compounds.*
- 4 *Diseases of a type generally accepted by the medical profession as caused by phosphorus or its toxic compounds.*
- 5 *Diseases of a type generally accepted by the medical profession as caused by chrome or its toxic compounds.*
- 6 *Diseases of a type generally accepted by the medical profession as caused by manganese or its toxic compounds.*
- 7 *Diseases of a type generally accepted by the medical profession as caused by arsenic or its toxic compounds.*
- 8 *Diseases of a type generally accepted by the medical profession as caused by mercury or its toxic compounds.*
- 9 *Diseases of a type generally accepted by the medical profession as caused by lead or its toxic compounds.*
- 10 *Diseases of a type generally accepted by the medical profession as caused by carbon bisulfide.*
- 11 *Diseases of a type generally accepted by the medical profession as caused by the toxic halogen derivatives of hydrocarbons of the aliphatic series.*
- 12 *Diseases of a type generally accepted by the medical profession as caused by benzene or its toxic homologues.*
- 13 *Diseases of a type generally accepted by the medical profession as caused by nitro- and amido-toxic derivatives of benzene or its homologues.*
- 14 *Diseases of a type generally accepted by the medical profession as caused by ionising radiations.*

- 15 *Primary epitheliomatous cancer of the skin diagnosed as caused by tar, pitch, bitumen, mineral oil, anthracene, or the compounds, products or residues of these substances.*
- 16 *Anthrax infection.*
- 17 *Leptospirosis diagnosed as caused by working with animals or their carcasses.”*

12 The following diagram explains the core provisions of s.30:



- 13 It will be immediately apparent that the labyrinth of tests imposed by s.30 are complex and place burdens upon claimants which in many cases are difficult to surmount. Section 30 (and its earlier manifestations) has been the subject of numerous review and appellate court decisions. Those decisions illustrate the difficulties associated with answering the multiple questions posed by s.30. In Part IV of this report the advisory panel explains in detail its concerns about s.30 of the IPRC Act. Before considering those concerns it is important to appreciate how s.30 evolved against the background of the recommendations and principles enunciated in the Woodhouse Report.

PART II

The Woodhouse Vision

- 14 By the end of the 19th Century it was widely appreciated common law claims did not provide the most equitable and socially desirable response to industrial injuries. There was by that time a growing belief that industry needed to have regard to the welfare of its workers and that the cost of injury needed to be borne as part of the costs of production. Workmen's Compensation Acts, starting with the English Workmen's Compensation Act 1897, introduced a system of social insurance designed to protect workers and their families from financial ruin caused by work injury.
- 15 The first legislation in New Zealand to confer upon workers a right to compensation for work injuries was the Workers' Compensation for Accidents Act 1900. As with their counterparts in the United Kingdom, New Zealand claimants had to prove "injury by accident arising out of and in the course of employment" before they were eligible for cover. This required proof of a causal connection between injury and employment. Cover for disease was precluded.
- 16 In 1908 Parliament enacted the Workers' Compensation Act 1908 which departed from the earlier policy of providing compensation for work related death or injury by making provision for compensation for certain "schedule injuries".
- 17 From 1940 coverage for industrial disease was gradually introduced. After the passing of the Workers' Compensation Act 1947 compensation became payable in respect of any disease contracted in the course of employment and due to the nature of employment (with the exception of a disease for which a worker was in receipt of a miner's benefit).
- 18 The Workers' Compensation Act 1956 came into force for all practical purposes on 1 April 1957.

The essential elements in the 1956 regime were summarised in the following way in McDonald's Law Relating to Workers' Compensation in New Zealand (4th Ed 1968, Butterworth and Co, p.7):

“The 1956 Act provides a system of insurance at the expense of the employer of the workmen against accidents arising out of and in the course of his employment. The payment of premiums is charged to the expense of the business and made a part of the cost of the product – as much so as the cost of labour and materials, and so becomes ultimately a part of the price to the purchaser.

The essential feature, therefore, of a worker’s compensation Act is that in the case of injury to a worker due to a risk or hazard of his employment there is indemnity dependent upon the amount of his wages and independent of considerations as to contributory negligence”.

- 19 The three essential elements for cover under the 1956 Act were:
- 19.1 That the plaintiff suffered personal injury by accident or contracted a disease due to the nature of the claimant's employment;
 - 19.2 That the accident arose in the course of, or out of, employment;
 - 19.3 That total or partial incapacity resulted from the injury, or, that the injury was one listed in the first schedule to the Act, or was able to be assessed having regard to the percentage of disability described in the first schedule to the Act.
- 20 The benefits available under the Workers’ Compensation Act 1956 were far from satisfactory. The maximum compensation corresponded to approximately 52% of the average weekly earnings¹. Compensation could only be paid for six years, after which it ceased automatically.
- 21 Dissatisfaction with the low levels of workers compensation benefits led to the establishment of a Royal Commission of Inquiry chaired by the Honourable Justice Woodhouse. The Commissioners believed workers compensation could not be examined in isolation and had to be reviewed in the context of other systems of compensation for injury.²

¹ The Law of Torts in New Zealand (3rd Ed) Brookers 2001, paragraph 1.6.2

² Other sources of compensation available to those injured in New Zealand prior to 1 April 1974 were:

- Common Law actions;
- Owners of motor vehicles had to be insured against the possibility of common law liability;
- Criminal injuries compensation;
- Social Security benefits.

22 The Commissioners recommended replacing the existing fragmented and arbitrary system of compensating persons injured by accident with a comprehensive scheme characterised by five “guiding principles” which the Commissioners noted should be accepted by any modern system of compensation. Those five guiding principles were³:

- “(1) *In the national interest, and as a matter of national obligation, the community must protect all citizens (including the self employed) and the housewives who sustain them from the burden of sudden individual losses when their ability to contribute to the general welfare by their work has been interrupted by physical incapacity.*
- (2) *All injured persons should receive compensation from any community financial scheme on the same uniform method of assessment, regardless of the causes that gave rise to their injuries.*
- (3) *The scheme should be deliberately organised to urge forward their physical and vocational recovery while at the same time providing a real measure of money compensation for their losses.*
- (4) *Real compensation demands that income related benefits should be paid for the whole period of incapacity and recognition of the plain fact that any permanent bodily impairment is a loss in itself regardless of its effect on earning capacity.*
- (5) *The achievement of the system must not be eroded by delays in compensation, inconsistencies in assessments, or waste in administration.”*

23 The Commissioners recorded that any logical analysis would recognise victims of sickness and disease should be covered in the same way as victims of accidents. They noted:

“It may be asked how incapacity arising from sickness and disease can be left aside. In logic there is no answer. A man overcome by ill health is no more able to work and no less afflicted than his neighbour hit by a car. In the industrial field certain diseases are included already. But logic on this occasion must give way to other considerations. First, it might be thought unwise to attempt one massive leap when two considered steps can be taken. Second, the urgent need is to co-ordinate the unrelated systems at present working in the injury field. Third, there is a virtual absence of the statistical signposting which alone can demonstrate the feasibility of the further move. And finally, the proposals now put forward for injury leave the way entirely open for sickness to follow whenever the relevant decision is taken.”⁴

³ “Royal Commission of Inquiry – Compensation for Personal Injury in New Zealand – Government Printer, 1967 (“The Woodhouse Report”) paragraph 484:

⁴ Woodhouse Report paragraph 17

- 24 Sir Owen Woodhouse and his fellow Commissioners referred to the fact that certain industrial diseases were included within the scope of the Workers' Compensation Act 1956. They recommended, that for reasons of pragmatism, industrial diseases covered under the Workers' Compensation Act 1956 should be the subject of cover under the new regime.⁵ The Commissioners made a special case for those who suffered damage to their hearing as a result of repetitious noise. They recommended that those who suffered hearing impairment should have the advantage of a rebuttable presumption that their hearing damage was caused by repetitious noise and that in the absence of evidence to the contrary their injury should be regarded as an injury arising from accident.⁶
- 25 A key recommendation made by the Commissioners was the abolition of common law claims for compensatory damages for those who had cover under the proposed scheme. It was recommended New Zealand should replace the common law "lottery" with a comprehensive, meaningful, no fault compensation scheme in exchange for which those who had cover would surrender their right to sue.
- 26 The advisory panel believes the time has now come to ensure that the treatment and rehabilitation benefits provided to those who have cover under our accident compensation regime are provided to all who are disabled or sick in addition to those who are injured by accident. The reasons for such a significant extension of the benefits of cover will be explained in detail in this report . Suffice to say at this juncture:
- 26.1 New Zealand now has had the experience of 30 years of providing cover for those disabled by accident, and work related gradual process and disease cover. Providing the same level of services to all who are disabled or sick is no longer a "massive leap" but rather a logical step which can be taken against the background of 30 years experience of our accident compensation regime.

⁵ Woodhouse Report paragraph 290(c)

⁶ Woodhouse Report paragraph 290(d)

- 26.2 The concerns expressed by Sir Owen Woodhouse and his fellow Commissioners about the need to co-ordinate the unrelated systems working in the field of assisting those who were injured have now been substantially addressed. In particular New Zealand's accident compensation regime now provides cost effective treatment and rehabilitation as well as meaningful compensation entitlements to those who have the misfortune to suffer injury by accident and work related sickness and disease. The emphasis in the IPRC Act upon injury prevention is a long overdue and laudable development. It is logical to extend the benefit of treatment and rehabilitation to all who suffer disability and sickness regardless of their cause.
- 26.3 There are now resources within the wider realms of government to evaluate the impact of extending the scope of cover recommended by the advisory panel.
- 26.4 Too many inconsistencies and anomalies exist under the present system of providing cover to some who suffer work related gradual process, disease, or infection but deny others who are equally disabled the benefits of cover under the accident compensation scheme.

PART III**Parliament's Responses to the Woodhouse Vision**

27 New Zealand's Accident Compensation regime has been subjected to almost continuous change since the passing of the Accident Compensation Act 1972. There have been no less than five major legislative re-writes of the scheme and 38 amending Statutes. The accident compensation scheme has been changed and modified by Parliament in the following principal statutes since the passing of the Accident Compensation Act 1972:

Accident Compensation Amendment (No.2) Act 1973

Accident Compensation Act 1982

Accident Rehabilitation and Compensation Insurance Act 1992

Accident Insurance Act 1998

Injury, Prevention, Rehabilitation, and Compensation Act 2001.

28 Each major legislative change to the accident compensation scheme has been preceded by reports which have explained the policy and political reasons for change. It is instructive to briefly explain the background to the key changes that have occurred to New Zealand's accident compensation scheme. There are two reasons for undertaking this particular exercise; namely:

28.1 To demonstrate how successive statutes have responded to the Woodhouse principles; and

28.2 To explain the policies that have led to the law currently set out in s.30 of the IPRC Act.

29 It has always been apparent that the Woodhouse Report contained a complex set of policy considerations which were readily susceptible to attack by influential sections of our community. It is also apparent that Sir Owen Woodhouse developed and expanded his principles in two subsequent reports which need to be considered in conjunction with the first Woodhouse Report.

29.1 The Australian Government commissioned Sir Owen Woodhouse to prepare a proposal to reform that country's compensation scheme⁷. The Australian Woodhouse Report recommended cover for disability arising from sickness, disease and congenital incapacities.

29.2 The "Third Woodhouse Report" was prepared by the Law Commission when Sir Owen Woodhouse was its president. In its report "Personal Injury, Prevention and Recovery"⁸, the Law Commission recommended an end to the "inequality of luck" which flows from providing cover for those who suffer personal injury by accident, but not to those who are disabled by sickness or disease.

Accident Compensation Act 1972

30 The Accident Compensation Act 1972 gave legislative effect to approximately half the recommendations in the Woodhouse Report⁹. The Woodhouse Report was followed by a "commentary"¹⁰ and a Parliamentary Select Committee Report.¹¹ It has been said that each of these reports which followed the Woodhouse Report was "*... closer to the political process than its predecessors with the result that the amount of pragmatism ... increased and the amount of principle and clear vision ... decreased*".¹²

31 When originally enacted the Accident Compensation Act 1972 did not attempt to define "personal injury by accident". The Act provided that "personal injury by accident" included incapacity resulting from occupational diseases as prescribed in the Act. Cover for occupational diseases occurred in the following circumstances:

31.1 If the incapacity was caused by a hernia;

31.2 If the incapacity resulted from "disease due to the nature of employment" and the incapacity occurred within prescribed periods;

31.3 The incapacity was "industrial deafness".

⁷ Report of the National Committee of Inquiry, Compensation and Rehabilitation in Australia, July 1974

⁸ Law Commission Report No.4 1988

⁹ Refer G W Palmer "What Happened to Woodhouse Report" [1981] NZLJ 561 in which it is said that only 17 of the 36 major policy recommendations in the Woodhouse Report were actually enacted.

¹⁰ "Personal Injury – a Commentary on the report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand." (1969)

¹¹ Select Committee on Compensation for Personal Injury in New Zealand 1970

¹² Palmer, supra, p.566

- 32 The Accident Compensation Amendment (No.2) Act 1973 introduced a number of changes to the ACC scheme before its commencement on 1 April 1974. A limited definition of personal injury by accident was adopted in 1975. That definition included incapacity arising from an occupational disease or industrial deafness.

Accident Compensation Act 1982

- 33 The most significant feature of the Accident Compensation Act 1982 was that it converted the scheme from one based upon the principle of being fully funded to one that was “pay as you go”. This change was to have major implications for the ACC scheme over the ensuing 20 years. An almost immediate consequence was a 34.5 percent reduction in levies. This reduction in levies then affected the level of reserves which had built up since 1974. By 1986 it was apparent that levies had to again be substantially increased. This factor, perhaps more than any other, politicised ACC policies. In 1986 the then Labour Government increased levies very significantly. This in turn provoked the National Opposition to pledge a reduction in employer’s levies if elected to the Government benches.
- 34 The definition of personal injury by accident in s.28 of the Accident Compensation Act 1982 continued to include “*incapacity resulting from an occupational disease or industrial deafness...*”. The scope of cover for those who suffered diseases arising out of employment was broadened so that any incapacity resulting from a disease due to the nature of employment could be the subject of cover provided the claimant was employed in an occupation that gave rise to their disease after 1 April 1974. The 1982 Act continued to provide cover for “industrial deafness”.
- 35 Section 28 Accident Compensation Act 1982 was carefully examined by the Court of Appeal in *West v Firestone Tyre and Rubber Co of New Zealand Limited*¹³ a case involving asbestos related cancer. The Court noted that for a claimant to have cover for a disease arising out of employment under the 1982 Act the following needed to be established:

- 35.1 That the disease was caused by the nature of any employment;

¹³ [1991] NZAR 514

35.2 The question of causation was answered by determining whether the claimant's work had some particular "quality, characteristic or incident" which distinguished it from work generally and which was a substantial cause of the disease.¹⁴

The Court of Appeal said it was not necessary that the claimant's disease be a recognised or inherent risk of the particular trade or occupation or the particular type of activities in which the claimant was employed. It was enough that the particular employment had something in it which caused or contributed to the disease, regardless of whether other employment of the same class had a tendency to do so.

35.3 The Court of Appeal said "incapacity" under s.28 Accident Compensation Act 1982 was not confined to economic incapacity but referred to "purely physical incapacity".

36 The financial pressures on the ACC scheme during the 1980's inspired a revision of the scheme by the Law Commission. The Law Commission, under the presidency of Sir Owen Woodhouse prepared two reports; one focused upon funding¹⁵ and the other examined amongst other issues, the scope of cover of the scheme.¹⁶

37 The Law Commission's substantive report was released a month after a Royal Commission of Inquiry on social policy stated it could find no justification for the stark inequality caused by society's response to the injured compared to the sick and disabled. The authors of the Royal Commission Report said:

*"Sickness, and injury and disability are hazards of life to which all are potentially subject. It has been increasingly accepted that the community should bear a share of the costs of relieving some of the burden of individual victims and their families. But developments have occurred in a piecemeal fashion and on any application of the criteria of equity and efficiency present arrangements fail badly. A person struck down by disease may suffer the same kinds of economic and social loss as are sustained by a person struck down by a car, yet the community's response as measured by community funded support is markedly different."*¹⁷

¹⁴ cf Technical Information Circular 469 set out in full in *Leitch v ACC* [1990] NZAR 26

¹⁵ Law Commission Report No.3 The Accident Compensation Scheme Interim Report on Funding.

¹⁶ Law Commission Report No.4, Personal Injury, Prevention and Recovery [3rd Woodhouse Report]

¹⁷ Report of the Royal Commission on Social Policy, Vol 2, Future Directions, April 1988

- 38 The Law Commission recommended abolition of lump sum benefits which at that stage were capped at \$27,000. Lump sum payments were at that time disproportionately high compared to periodic payments. The Law Commission reasoned that lump sum payments were an anomalous vestige of common law damages and that their abolition would assist in the funding of those disabled by sickness. The Law Commission referred to the omission of sickness from the original scheme in the following way:

“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? ... Some will assume that ... there would be insurmountable expense ...

It is easy to be beaten in advance in matters such as this. In the present context we think it possible for sickness incapacity to be brought within the injury scheme without any wholesale retreat from principle. After the repeal of lump sum compensation ... 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”.

- 39 The Law Commission noted that the accident compensation scheme already provided cover for industrial disease and this provided sound precedent for placing sickness into an injury compensation system.
- 40 The Government appointed a working party under the chairmanship of Sir Kenneth Keith, then of the Law Commission, to further develop the policy of extending ACC cover to sickness.¹⁸ The Government’s intention to expand the scope of cover was announced in the 1989 Budget.¹⁹ The legislation to implement the Government’s policy was introduced as the Rehabilitation and Incapacity Bill 1990. That Bill was never enacted.

Accident Rehabilitation and Compensation Insurance Act 1992

- 41 Upon being elected to office in 1990 the National Government proceeded to deliver on its pledge to reduce the cost of levies to employers. The new Government took the view that the “cost of the [existing] scheme was unsustainable”.²⁰ Three reports soon emerged.²¹

¹⁸ C G Palmer “New Zealand’s Accident compensation Scheme; Twenty Years On” (1994) 44 UTLR223

¹⁹ Hon D F Caygill, Minister of Finance, 1989, Budget and Tables B6 p.13 – House of Representatives 27 July 1989

²⁰ Statement from the Minister of Labour, Accident Compensation Corporation Annual Report (1991) p.3

²¹ Report of a Ministerial Working Party on the Accident Compensation Corporation Incapacity (1991); Report of a Ministerial Working Party on Accident Compensation and Incapacity (first supplementary report) (1991); and “Accident Compensation – A Fairer Scheme” 30 July 1991

- 42 The final report in the trilogy of reports delivered at this time (Accident Compensation – A Fairer Scheme) was released in conjunction with the 1991 Budget. The Hon W Birch said in that report:

“... since the inception of the scheme, a series of statutes, administrative, and judicial decisions has resulted in an extension of the scheme’s boundaries beyond what was originally intended in respect of ‘injuries’ arising from ‘accident’; and this has resulted in substantial cost increases.”

In the same document it was said:

“The Government has considered that the scope of the Act would be more easily understood if the conditions intended to be covered were separately identified ...

Coverage for occupational disease will be similar to the present scheme ... the new legislation will provide a clear definition.”

- 43 The Accident Rehabilitation and Compensation Insurance Act 1992 contained extensive definitions of:

43.1 Accident.²²

43.2 Personal injury.²³ Personal injury was defined to mean death, physical injuries and mental injuries arising from physical injuries.

43.3 Gradual process, disease, or infection arising out of and in the course of employment.²⁴

- 44 Before there could be cover under the Accident Rehabilitation and Compensation Insurance Act 1992 a claimant needed to suffer personal injury caused by either:

44.1 Accident; or

44.2 Gradual process, disease, or infection arising out of and in the course of employment; or

44.3 Medical misadventure; or

44.4 Treatment for personal injury.²⁵

²² Section 3 Accident Rehabilitation Compensation Insurance Act 1992

²³ Sections 4 and 8 Accident Rehabilitation Compensation Insurance Act 1992

²⁴ Section 7 Accident Rehabilitation Compensation Insurance Act 1992

²⁵ S.8 Accident Rehabilitation Compensation Insurance Act 1992

- 45 The requirements that a claimant suffer personal injury and the definition of gradual process, disease, or infection need to be examined in some detail because these provisions in the 1992 Act became the statutory template for subsequent legislation.

Personal Injury

- 46 It is apparent from Accident Compensation – A Fairer Scheme that the Government of the day was concerned about Court decisions which, it was thought, had extended the scope of cover beyond the scheme’s original boundaries. A case which caused considerable concern was *ACC v E*²⁶ in which the Court of Appeal held that under the Accident Compensation Act 1982 it was not necessary for a claimant to have suffered physical injury in order to have cover for personal injury by accident when he was incapacitated by mental injury. The 1992 Act “plugged” this perceived lacuna by requiring that all claimants have suffered either death, physical injuries, or mental injuries arising from physical injuries as fundamental preconditions to cover.

Gradual Process, Disease or Infection

- 47 An extensive definition of gradual process, disease, or infection was introduced into the Accident Rehabilitation and Compensation Insurance Act 1992 because of concern about the lack of precision to the term “occupational disease or industrial deafness” found in the definition of Personal Injury by Accident in the Accident Compensation Act 1982.
- 48 The definition of gradual process, disease, or infection in the 1992 Act stipulated a claimant could only have cover for a gradual process, disease, or infection if:
- 48.1 They suffered personal injury;
 - 48.2 Since 1 April 1974 their employment or work environment had a particular “property or characteristic” which caused or contributed to the claimant’s personal injury;
 - 48.3 The “property or characteristic” in question was not found to any material extent in the non employment activities or environment of the claimant;

²⁶ [1992] 2 NZLR 426

- 48.4 The risk of suffering the personal injury in question was significantly greater for persons performing the particular employment task in that environment.
- 49 Personal injury caused by air conditioning systems or passive smoking were specifically excluded from cover. Similarly personal injury relating to “non physical stress” was also excluded from the definition of gradual process, disease or infection.
- 50 The date a claimant was deemed to have suffered from a gradual process, disease, or infection was assessed by reference to either:
- 50.1 The date the claimant first received treatment for their condition; or
- 50.2 The date they first became disabled.
- 51 Where a claimant was employed by one or more employers which resulted in their exposure to the risk of gradual process, disease, or infection then the costs of their claim were to be divided between the employers in proportion to the claimant’s periods of employment.
- 52 The definition of gradual process, disease, or infection excluded those who had cover under the Workers’ Compensation Act 1956 for industrial deafness. Instead, a series of criteria were put into place for assessing whether or not deafness was caused in the course of employment.

Accident Insurance Act 1998

- 53 The Accident Insurance Act 1998 introduced a further major policy change to New Zealand’s accident compensation regime. The 1998 Act was driven by two desires, namely:
- 53.1 To introduce competition to aspects of ACC’s business; and
- 53.2 To introduce insurance concepts and principles to the administration of the scheme.
- The new Act:
- 53.3 Required all employers to purchase accident insurance for work related personal injuries suffered by their employees;

- 53.4 Enabled self employed persons to purchase accident insurance from insurers other than ACC for both work related personal injury and non work injury (other than motor vehicle injury);
- 53.5 Allowed insurance companies to compete to manage claims and underwrite accident insurance for all work related personal injury, and for non work injury (other than motor vehicle injury) to self employed persons.
- 54 The definition of cover for personal injury caused by a work related gradual process, disease, or infection was set out in s.33 Accident Insurance Act 1998. A material change between the 1992 and 1998 statutes concerning cover for personal injury caused by work related gradual process, disease, or infection was the abandonment of the requirement that the gradual process, disease, or infection “arise out of and in the course of employment” and the introduction of the requirement that a claimant’s personal injury be caused by a “work related” gradual process, disease, or infection.
- 55 The term “work related personal injury” was defined in s.32 Accident Insurance Act 1998 to include personal injury of a kind described in Schedule 2 of that Act. Schedule 2 listed eleven diseases and toxic substances and corresponding occupations extracted from the International Labour Organisation (ILO) Convention 42. Those who suffered one of the Schedule 2 diseases and who had been employed in one of the corresponding trades, industries or processes listed in Schedule 2 were deemed to have suffered a “work related personal injury” unless an insurer established:
- 55.1 The claimant was not suffering from a personal injury of the kind described in Schedule 2; or
- 55.2 The claimant’s personal injury was caused by factors other than their employment in one of the trades, industries or processes listed in Schedule 2 of the Act.

Injury, Prevention, Rehabilitation and Compensation Act 2001

- 56 The IPRC Act requires ACC's primary focus to be upon rehabilitating those who are injured by providing them with entitlements that restore, so far as is practicable, a claimant's health, independence and participation in society. The new legislation reintroduced lump sum payments for those who suffered permanent impairment.
- 57 The definition of personal injury caused by work related gradual process, disease, or infection found in s.30 of the IPRC Act is similar to that which could be found in s.32 and s.33 of the Accident Insurance Act 1998. The key changes between the two statutes are:
- 57.1 Schedule 2 Occupational Diseases have been extended to 17 diseases and conditions;
 - 57.2 There is no longer a reference to corresponding trades, industries or processes in Schedule 2;
 - 57.3 The presumption that a Schedule 2 disease is a work related gradual process, disease, or infection replaces the presumption in the 1998 Act that a Schedule 2 disease suffered by a person employed in one of the Schedule 2 occupations was a "work related personal injury".

PART IV

Problems With the Current Law

58 There are three general problems with the current criteria for determining whether or not a claimant has cover for a gradual process disease or infection. Those problems are:

58.1 The burden of proving personal injury;

58.2 The limited scope of Schedule 2;

58.3 The burden of proving personal injury is caused by work related circumstances (causation).

Each of these problems will be explained in further detail.

The Burden of Proving Personal Injury

59 The requirement that a claimant prove they have suffered personal injury (in most cases this requires proof of physical injuries) creates anomalies and inequities for many who are disabled because of their employment. The advisory panel is aware that many claimants have been denied cover because of their inability to prove they have suffered physical injuries notwithstanding the fact they have been disabled by reason of their work. This problem is perhaps best highlighted by reference to three groups in our community, namely:

59.1 Those who suffer regional pain syndrome (RPS) which is a type of condition that is more commonly known to fall under the umbrella term of occupational overuse syndrome (OOS);

59.2 Those who suffer multiple chemical sensitivity (MCS);

59.3 Those who suffer serious injuries and illnesses caused by stress.

Regional Pain Syndrome Sufferers

60 Those who suffer RPS, as a result of work related activities where there is no other physical injury present are currently denied cover because ACC does not recognise RPS on its own as being a “physical injury”. The Corporation’s stance has been endorsed by the High Court.²⁷ But ACC does cover those people who suffer RPS where there is a previous physical injury.

61 The medical community is divided over whether or not RPS constitutes physical injury. For example, in the *Teen* case reference was made to research which suggests that with RPS there is deterioration (physical damage) to the sensory cells. This damage can, according to some medical experts, be regarded as physical injury.

62 ACC and the Courts have been far from consistent in their views as to whether or not RPS constitutes physical injury. The conflicting Court approaches can be illustrated by reference to two cases:

62.1 In *Waitemata Health Limited v ACE Insurance Limited*²⁸ the District Court heard evidence from three experts. The judgment refers to all three experts accepting RPS

“...involves physiological changes, they being changes of the central nervous system ...”.

The Judge emphatically concluded:

“For these reasons therefore I rule that the condition known as a regional pain syndrome is a physical injury within the definition of personal injury...”.

62.2 In *Teen v ARCIC and Telecom*²⁹ the same Judge who decided the *Waitemata Health Limited* case ruled that RPS was “pain without tissue injury” and therefore not a personal injury.

63 The advisory panel has examined 19 cases of RPS (and associated conditions) considered by the District Court during 2001, 2002 and 2003. In seven of those 19 cases RPS (or associated conditions) were held to be personal injury and the claimant’s application for cover allowed. In 12 cases RPS (or associated conditions) were not thought to be personal injury and the claimant’s applications for cover were dismissed.

²⁷ *Teen v ARCIC and Telecom* (unreported HC Wellington, CIV 2003-485-1478, 11/11/03, Wild J.

²⁸ Unreported DC Auckland, 68/2002, 7 March 2002, Beattie DCJ

²⁹ Unreported DC Wellington, 244/2002, 3 September 2002, Beattie DCJ

- 64 An examination of the cases on this topic reveals that an application for cover by a person suffering RPS is unlikely to be accepted today. However this was not always the case. Applications by those who suffered RPS during the latter half of the last decade were likely to be accepted. ACC's changed stance about RPS reflects the fluctuating positions on this topic which can be found in Court decisions. This unsatisfactory state of affairs can be directly linked to the fact that there is a lack of unanimity in the medical community about whether or not there is an identifiable biological structural change associated with RPS. The medical view which holds sway with the Courts at the moment (namely that RPS is not a physical injury) is not shared by equally authoritative medical experts.
- 65 Applications for cover by persons who have suffered work related RPS resemble many of the unfortunate features of common law personal injury claims criticised in the Woodhouse Report. In particular, in recent years those who have suffered work related RPS have effectively entered a lottery when seeking cover. The outcome of their applications has often hinged on debatable medical distinctions which in turn have led to conflicting Court decisions.
- 66 Those who suffer RPS are often seriously disabled and unable to return to work. Some continue to debate that RPS is not caused by repetitive strain relating to unsatisfactory work practices and environments. However the advisory panel's assessment of the evidence leads to the conclusion RPS is usually caused by repetitive strain which in turn is related to unsatisfactory work practices and environments. The fact a significant group in our community is disabled by reason of their work but are still denied any cover by ACC is an issue that has caused considerable concern to the advisory panel. A more principled solution needs to be found to the plight of these people.

Multiple Chemical Sensitivity

- 67 In 2003 the Minister of Labour established an Inquiry Into the Management of Certain Hazardous Substances in Workplaces. The hazardous substances in question were glutaraldehyde, aldehydes and organic solvents. The Minister of Labour's decision to establish that Inquiry was influenced in part by the experiences of nurses and radiographers who had suffered considerable frustration with ACC after succumbing to MCS as a result of being exposed to glutaraldehyde.

- 68 The Inquiry's report was published in July 2003.³⁰ The Report notes that people who suffer MCS react adversely and severely to a wide range of types and concentrations of chemicals encountered in every day life by most other people without any adverse affect. A typical range of symptoms of MCS referred to in submissions before the Inquiry included severe loss of breath, asthma, heart palpitations, dizziness, muscular pain, nausea, fatigue, mood swings, lack of concentration and memory loss.
- 69 The Inquiry's report notes that views on MCS and whether it should be recognised as a disease cover a wide spectrum of opinions. At one end of the spectrum, MCS is regarded as a spurious diagnosis for any number of separate health phenomena, many of them of psychological origins. At the other end of the spectrum, MCS is seen as a disease of the 21st Century, plain evidence that we are poisoned by the world around us. In medical circles, proponents of a more traditional, evidence based approach generally do not accept MCS as a disease, nor exposure to chemicals as its cause. Others in the medical community are generally receptive to concerns about adverse affects of chemical exposure. Practitioners in this category worry less about scientific certainty as to cause and effect and accept the illnesses identified by their patients and treat those illnesses with a variety of approaches, often involving detoxification techniques.
- 70 The Inquiry's report notes that MCS has received the greatest degree of official recognition in the United States. MCS is recognised in the United States in a variety of ways at both Federal and State levels. American attitudes towards MCS are perhaps most succinctly summarised in the US Federal Inter-Agency Working Group on Multiple Chemical Sensitivity (Draft Statement) 1998 in which the authors stated:

"It is currently unknown whether MCS is a distinct disease and what role, if any, the biological mechanisms of specific chemicals have in the onset of this condition. The Working Group finds that MCS is currently a symptom based diagnosis without supportive laboratory tests or agreed upon clinical manifestations. This dependence on symptom based diagnosis has resulted in the absence of a uniformly agreed upon case definition. The Group could locate no previously published reports of definitive end organ damage attributable to MCS. However, scientific knowledge changes over time as additional findings are reported; it is therefore important not to lose sight of lessons from the past in which suspected health effects of environmental exposures were verified at a later date through scientific research."

³⁰ Report of a Ministerial Inquiry into the Management of Certain Hazardous Substances in Workplaces:
<http://www.hazsubstancesinquiry.osh.govt.nz/index.html>

71 ACC's official position in relation to MCS is that:

*"A physical injury must involve bodily harm or damage. As multiple chemical sensitivity syndrome does not have the basic requirement of being a physical injury, it cannot be seen to constitute a personal injury under the IPRC Act 2001."*³¹

72 ACC's view that MCS does not constitute physical injury has been supported by a number of District Court decisions.³²

73 Sufferers of MCS have not always been denied cover by ACC. Section 28 of the Accident Compensation Act 1982 referred to "*total or partial incapacity resulting from any disease, and the disease being due to the nature of any employment*". In those circumstances, cover existed as if the disease were a personal injury by accident. Under the provisions of the 1982 Act the Accident Compensation Appeal Authority accepted a number of claims for MCS.³³

74 As with sufferers of RPS, those who suffer MCS are also frequently seriously disabled as a result of being exposed to hazardous substances in their work environment. It is totally unsatisfactory that persons who would otherwise be productive members of our community are frustrated by being denied cover by our ACC scheme. The most important consequence of MCS sufferers being denied cover is that they are frequently denied the opportunity of rehabilitation.

Sufferers of Serious Injuries and Illnesses Caused by Stress

75 A further problem caused by the requirement that a claimant establish they have suffered personal injury as defined since 1992 before they are eligible for cover is that those who suffer serious psychological and psychiatric conditions such as post traumatic stress disorder as a result of work related stress are ineligible for cover. This particular difficulty was illustrated by a case involving a former police officer who sought cover for a serious and debilitating psychological condition caused by being exposed to unusual stress while working as a police officer. Because he did not suffer any identifiable physical injury his claim could not be accepted.³⁴

³¹ Paragraph 196 Report of a Ministerial Inquiry Into Management of Certain Hazardous Substances in Workplaces.

³² See for example, *Robertson v Accident Compensation Corporation*, District Court, Auckland, 21 March 2001, Decision No. 58/2001, Beattie DCJ

³³ See for example *Wilde v ACC*, Cartwright P, 20 November 2001, 10/2002

³⁴ *Gill v ARCIC* (1996) 1 BACR 151; see also *WDS v ARCIC* DC Christchurch, 1/98, 7/1/98, Beattie DCJ

- 76 The provisions of s.30(5)(a) IPRC Act which precludes cover for “personal injury related to non physical stress” raises a parallel and equally important issue. Section 30(5)(a) excludes from cover those who suffer physical injuries (such as for example, a cardiovascular infarct) caused by non physical factors such as emotional stress.
- 77 Those who have the misfortune to suffer a serious debilitating psychological/psychiatric condition such as post traumatic stress disorder, or a major physical injury, such as a heart attack caused by work stress deserve assistance and support. As a minimum, they deserve the same entitlements to treatment and rehabilitation as those who suffer equally debilitating physical injuries at work. In all cases persons who were otherwise productive members of society are precluded from working and functioning as normal because of their misfortune to work in an environment that has caused them to become disabled.
- 78 Our community should not countenance any suggestion that would preclude cover from those who suffer stress induced physical and mental injuries because of their susceptibility to succumbing to stress related conditions. For a century the courts have recognised that:
- “If a man’s physical condition is such to render him peculiarly susceptible to grave consequences for an accident which in a normally healthy person would have no such consequences, that will not affect the right to compensation for the more serious results.”³⁵*
- 79 Precisely the same considerations apply in relation to those who suffer serious debilitation through work stress, even though others working in the same environment may not suffer adverse consequences.
- 80 The difficulties faced by those who have the misfortune to suffer RPS, MCS or stress related conditions arising from their work environment illustrate that the requirement a claimant prove they have suffered physical injury creates too many anomalies and inconsistencies. The advisory panel recommends abandoning the need to prove physical injury as a pre-condition to cover under s.30 of the IPRC Act. This would create a more principled approach to providing cover for those who become disabled because of work environments.

³⁵ *McCarthy v Union Steam Ship Co of New Zealand Limited* [1916] NZLR 1154

The Limited Scope of Schedule 2

- 81 A second general problem with the current criteria for determining whether or not a claimant has cover for gradual process, disease, or infection is the limited scope of Schedule 2. Schedule 2 was introduced to ease access for cover in limited circumstances where a claimant's gradual process, disease, or infection invariably arose because of their work environment.
- 82 Section 32(3) Accident Insurance Act 1998 introduced the concept of a presumption that certain occupational diseases were "work related personal injuries" for which the claimant would have cover.
- 83 The occupational diseases referred to in s.32(3) Accident Insurance 1998 were listed in Schedule 2 of the Accident Insurance Act 1998. That Schedule was copied from International Labour Organisation Convention No.42 which had been adopted by members of the ILO in 1934. The Convention was ratified by New Zealand in 1938. ILO Convention 42, and Schedule 2 of the Accident Insurance Act 1998 was divided into two columns. One column listed 11 diseases. The other column listed a series of "corresponding trades, industries or processes" most of which related to the manufacture of metals, alloys or compounds listed in the schedule.
- 84 If a claimant suffered one of the diseases listed in Schedule 2 and also established they had worked in one of the corresponding occupations listed in the schedule then it was presumed they had suffered a "work related personal injury".
- 85 Schedule 2 of the IPRC Act includes an additional six occupational diseases which were not referred to in Schedule 2 of the Accident Insurance Act 1998. The six additional occupational diseases inserted into Schedule 2 of the IRPC Act 2001 are:
- 85.1 Lung cancer or mesothelioma diagnosed as caused by asbestos;
 - 85.2 Diseases of a type generally accepted by the medical profession as caused by beryllium or its toxic compounds;
 - 85.3 Diseases of a type generally accepted by the medical profession as caused by chrome or its toxic compounds;
 - 85.4 Diseases of a type generally accepted by the medical profession as caused by manganese or its toxic compounds;
 - 85.5 Diseases of a type generally accepted by the medical profession as caused by carbon bisulfide;

- 85.6 Leptospirosis diagnosed as caused by work with animals or their carcasses.
- 86 Schedule 2 of IPRC Act also dispensed with the need for claimants to establish they were employed in one of the occupational categories listed in the second column of Schedule 2 of the Accident Insurance Act 1998 and ILO Convention 42. This change eliminated a fundamental injustice. The list of “corresponding trades, industries or processes” in Schedule 2 Accident Insurance Act 1998 and ILO Convention 42 generally referred only to occupations involved in the handling and manufacture of metals, alloys and compounds as well as some specific occupations which were renowned for using those substances. Schedule 2 of the Accident Insurance Act 1998 was of little assistance to those who were exposed to hazardous substances in the workplace but who were not engaged in one of the specific occupations listed in Schedule 2 of the Accident Insurance Act 1998.
- 87 Section 30(3) IPRC Act requires the claimant to only prove they have one of the 17 occupational diseases listed in Schedule 2 and that they were exposed to the dangerous substances in employment described in the schedule in relation to that type of personal injury. A claimant who passes this threshold does not have to prove that their personal injury was caused by gradual process, disease, or infection and that their personal injury was caused by the circumstances defined in s.30(2) IPRC Act.
- 88 Under s.60 IPRC Act the Corporation can rebut the presumption of cover in Schedule 2 cases if the Corporation establishes that:
- 88.1 The claimant “is not suffering from a personal injury of a kind described in Schedule 2”; or
- 88.2 That the claimant’s “personal injury has a cause other than his or her employment”.
- 89 Parliament attempted in the IPRC Act to address some of the injustices and anomalies created when it adopted ILO Convention 42 as Schedule 2 of the Accident Insurance Act 1998. Nevertheless there are still significant deficiencies with schedule 2 of the IPRC Act.

90 Schedule 2 IPRC Act is still fundamentally based on ILO Convention 42. As a consequence it is antiquated and, apart from the modifications made when the IPRC Act was passed, Schedule 2 diseases substantially reflect pre World War II epidemiological and medical knowledge. The shortcomings of Schedule 2 can be quickly illustrated by referring to a number of illnesses and diseases widely accepted as being capable of being caused by exposure to hazardous substances in a work environment:

Disease or Illness	Cause
Cancer of the Liver	Hepatitis B and C infection and hepatocellular carcinoma arising from occupational exposures (eg healthcare workers)
Cancer of the Stomach	Arising from occupational exposures to grain dust, herbicides, diesel fumes
Cancers of the Oral Cavity and Oesophagus	Arising from polycyclic aromatic hydrocarbons
Cancer of the Pharynx and Colon	Arising from welding fumes, soldering fumes and grain dust
Cancer of the Liver	Arising from aflatoxins from crops used by the livestock feed processing industry
Cancer of the Pancreas	Arising from rubber chemicals such as acrylonitrile and pesticides
Cancer of Nasal Cavity – Middle ear	Arising from wood dust and leather dust
Cancer of Larynx	Arising from welding fumes
Cancer of Trachea, bronchus and lungs	Arising from cadmium dust, secondary tobacco smoke
Cancer of Bladder	Arising from textile dust, rubber, chlorinated hydrocarbon solvents
Cancer of Kidney	Arising from gasoline solvents, cadmium dust
Chronic Bronchitis	Arising from welding fumes
COPD	Arising from organic dust, endotoxins, welding fumes, secondary tobacco smoke
Asthma	Arising from grain dust, hay dust, animal epithelia, epoxy resins, flour dust, welding fumes, textile dust, secondary tobacco smoke

- 91 It is to be stressed that the preceding list does not purport to be exhaustive. It has been drawn from authoritative sources to illustrate the arbitrariness of listing diseases such as those found in Schedule 2 IPRC Act for special attention when many equally deserving claimants are faced with complex causation hurdles before they can qualify for cover.
- 92 Schedule 2 provides comparatively easy access for cover to a limited number of claimants who meet the schedule criteria. However many persons in our workforce suffer personal injury that is caused by work related gradual process, disease, and infection but are denied cover because of the difficulties of proving causation. This is an important issue which is addressed in paragraphs 94 to 104 of this report. Suffice to say for present purposes Schedule 2 is substantially based on antiquated knowledge. The conditions listed in Schedule 2 do not fairly reflect the medical community's knowledge about the causes of occupational illnesses and diseases. There is a fundamental inequity in providing cover to one group who satisfy the Schedule 2 criteria and at the same time deny cover to those who are equally deserving of assistance but cannot meet the difficult evidentiary burden of proving their personal injury was caused by a work related gradual process, disease, or infection. The magnitude of this problem is not to be underestimated. In paragraphs 119 to 121 the advisory panel provides some guidance on the number of persons affected by occupational diseases but who do not receive ACC cover.
- 93 In paragraphs 132 to 136 of this report the advisory panel recommends an immediate and thorough review of Schedule 2. The conditions listed in that schedule should be amended so that it reflects modern epidemiological and medical knowledge.

The Burden of Proving Causation

- 94 The third general problem with the current criteria for determining whether or not a claimant has cover for a gradual, process, disease, or infection concerns confusion and misunderstanding about the test of proving a causal connection between a claimant's work environment and their condition.

95 Claimants who wish to have cover under Schedule 2 need to establish that their condition or disease (i.e. their personal injury) is caused by exposure to one of the toxic substances listed in that schedule and that they came into contact with that toxic substance during their employment. Those who do not meet the Schedule 2 criteria must establish that their personal injury was caused by a gradual process, disease, or infection and, in addition, satisfy the following three part test:

95.1 That they performed an employment task that has a particular property or characteristic, or that they were employed in an environment that has a particular property or characteristic; and

95.2 That the particular property or characteristic caused or contributed to the claimant's personal injury. Furthermore, the claimant must establish that the particular property or characteristic is not found to any material extent in their non employment activities or environment;

95.3 Persons who perform the claimant's employment task, or work in the same environment are at significantly greater risk of suffering from the personal injury suffered by the claimant.

96 The onus is on the claimant to show, on the balance of probabilities, that their circumstances satisfy the tests described in the preceding paragraph.

97 Legal scholars acknowledge that an:

*"... inquiry into cause is apt to produce perplexing legal and philosophical problems ..."*³⁶

The obligation on a claimant to prove causation on the balance of probabilities is fraught with difficulties in claims based on exposure to hazardous substances.

³⁶ The Law of Torts in New Zealand, Third Ed, 2001 paragraph 20.1

The Courts frequently apply the “but for test” which is based on the premise that A is a cause of B if B would not have occurred “but for” A. A is not a cause of B if B would have occurred, irrespective of A.³⁷ The “but for” test “merely acts as a preliminary filter to eliminate the irrelevant”.³⁸ In complex cases which involve an analysis of epidemiological and medical evidence the “but for test” frequently proves to be a very unsatisfactorily blunt tool of analysis³⁹. Whereas lawyers and Judges are content to establish causation (at least in a civil context) upon a balance of probabilities, such a simplistic approach is frequently an anathema to members of the medical profession for whom causation is important in discharging their clinical tasks of prevention, diagnosis and treatment.⁴⁰ To those who wish to know the cause of a patient’s condition in order to discharge their clinical responsibilities a simple balance of probabilities provides little assurance.

- 98 It is the fundamental difference in purpose between law and medicine when establishing causation that leads to much confusion and difficulty when trying to assign a legal test of causation to a medical condition.
- 99 These difficulties can be illustrated by reference to one case in which ACC wrongly denied an applicant’s claim for cover.⁴¹ The applicant was involved in degreasing and cleaning the inside of containers using solvents. In 2002 the claimant started to feel unwell and to experience changes in his personality and behaviour. The claimant saw his general practitioner who lodged a claim for cover on the basis that he suffered work related gradual process, disease, and infection, namely solvent toxicity. The claimant was subsequently assessed by five medical specialists.
- 100 ACC relied on the advice of one expert who concluded chronic solvent neuro-toxicity was “extremely unlikely” in the claimant’s case.
- 101 The claimant’s circumstances were also evaluated by a Department of Labour (OSH) Solvent Neuro-toxicity Panel which concluded unequivocally the claimant had “chronic solvent induced neuro-toxicity”.

³⁷ *Cork v Kirby MacLean Limited* [1952] 2 All ER 402

³⁸ Winfield and Jolowicz “The Law of Torts” (15th Ed) 1998 p.199

³⁹ See *Chester v Afshar* [2005] 1 AC 134, *Gregg v Scott* [2005] UKHL 2 as recent examples of departures from the “but for test” in claims of medical negligence

⁴⁰ Fletcher, Fletcher and Wagner 1988

⁴¹ Application for Review by M F Tokana, Review No.23203, 17 March 2004

- 102 The claimant's employer was prosecuted under the Health and Safety in Employment Act 1992 for not providing a safe working environment by exposing the claimant to hazardous substances. The employer accepted their responsibilities and pleaded guilty.
- 103 Thus, in this case, ACC concluded that chronic solvent neuro-toxicity was an extremely unlikely consequence of the claimant's exposure to solvents. At the same time, a solvent neuro-toxicity panel and the claimant's employer concluded the claimant's illness was solvent induced neuro-toxicity.
- 104 It must be a source of bewilderment to any objective person that two dramatically different conclusions can be drawn from the same facts. However, whilst the advisory panel was concerned by this case, it was not overly surprised by what had occurred. It is a case which graphically illustrates the lack of harmony that can exist between medical and legal assessments of causation.

"Test of poisoning"

- 105 The advisory panel is aware that considerable efforts have been made to devise tools of analysis to assist in determining whether or not a claimant's disease or illness was caused by exposure to hazardous substances. One particularly important test is the "test of poisoning" established by the Australasian Faculty of Occupational Medicine of the Royal Australasian College of Physicians. That test was devised in response to the dilemmas faced by doctors who practise occupational and environmental medicine when asked to determine the likelihood of a patient's health problems being caused by poisoning.
- 106 The "test of poisoning" is based on the classification of a patient's symptoms and findings into major, intermediate and minor categories. The major criteria are allocated ten points each, while the intermediate and minor criteria are each respectively allocated five and two points. The criteria that are applicable to a patient are identified, points are allocated for each of the criteria and a total reached to determine the likelihood of whether or not the patient's health problems are a result of poisoning.
- 107 The categories of the "test of poisoning" are:

Category	Description	Points
A.1	The patient has <u>both</u> body levels of the chemicals in excess of that which has been associated with toxic effect <u>and</u> objective biological markers of the poisoning effect being	10

Category	Description	Points
	considered and that are characteristic of the chemical.	
A.2	The patient has symptoms <u>and</u> findings that are <u>both</u> characteristic of the chemical and that <u>either</u> be precipitated or aggravated by the chemical, <u>or</u> relieved by specific antidotes to the chemical	10
B.1	The patient has had an appropriate exposure to the chemical <u>and/or</u> the chemical has been measured in the subject environment at levels that have been associated with toxic effects	5
B.2	The patient has <u>either</u> body levels of the chemical in excess of that which has been associated with toxic effects <u>or</u> objective biological markers of the poisoning effect being considered and that are characteristic of the chemical.	5
B.3	The patient has symptoms <u>and</u> findings that are characteristic of the chemical.	5
C.1	The patient has symptoms <u>and/or</u> findings that have a clear temporal relationship to an exposure to the chemical <u>and</u> that resolve within the expected time frame after the exposure ceases.	2
C.2	The patient has symptoms <u>and/or</u> findings that can not be explained by alternative mechanisms, <u>or</u> alternative mechanisms that can cause the same symptoms and findings have been reasonably excluded.	2
C.3	The patient has symptoms <u>and/or</u> findings that are biologically plausible effects of the chemical.	2

It is to be noted that Category A.1 cannot co-exist with Category B.2 and Category B.3 cannot co-exist with Category C.3.

108 The likelihood of health problems being due to poisoning is calculated by reference to the following scale:

Number of Points	Probability of chemical poisoning
2 – 4	The chemical is unlikely to be the cause of the patient's symptoms, signs or findings.
5 – 8	The chemical is possibly the cause of the patient's symptoms, signs or findings.
9 – 14	The chemical is probably the cause of the patient's symptoms, signs or findings.
15 – 20	The chemical is a highly probably cause of the patient's symptoms, signs or findings.
Greater than 20	The chemical is almost certainly the cause of the patient's symptoms, signs or findings.

109 The “test of poisoning” has its detractors. One group of researchers has said:

“The “test of poisoning” asks questions of the claimant which ACC knows cannot be answered with our current scientific understanding of PCP and dioxins ... the main reason why so few of the questions raised by the “test of poisoning” cannot be answered with regard to PCP/Dioxins is that few, if any, epidemiological studies have been done on the dioxins found in all technical grade PCP.”⁴²

110 An occupational physician has said:

“The [test of poisoning] formula builds as it does on the concept of major and minor criteria, has a logical approach but is flawed by our limited state of knowledge concerning the absorption, metabolism and excretion of the great majority of toxic substances ... the formula is robust only in those circumstances where evidence based measures of toxicity exist, in themselves making the formula unnecessary.”⁴³

111 Another senior physician has suggested the “test of poisoning” is not appropriate for those who suffer occupational asthma where it is said doctors have to assess the probability of cause on the basis of symptoms and clinical findings. The same doctor said that the “test of poisoning” is not appropriate where objective findings (such as self monitored peak expiry flow rates by asthma sufferers) are either not available or may not be reliable.⁴⁴

112 The advisory panel believes there were many commendable objectives to the “test of poisoning”, not the least being its goal of trying to achieve consistency in evaluations. Nevertheless the test is capable of being mis-applied as evidenced by the fact that an application for review by M F Tokana (discussed in paragraphs 99 to 104 of this report) ACC’s medical advisers applied the “test of poisoning” and assessed the claimant’s score as zero.

113 The advisory panel is also aware that many claimants are sceptical about the “test of poisoning” and how it is applied by ACC.

114 Special reference needs to be made to representatives of an organisation called Sawmill Workers Against Poisoning (SWAP). The advisory panel met with representatives of SWAP in Whakatane in December 2003. The experiences of those people was distressing. Their patience has been immeasurable.

⁴² PCP in the Timber Industry, Wellington School of Medicine 1999.

⁴³ C Walls, 1998 NZ Med J; 111; 258

⁴⁴ O'Donnell 1998 NZMed J 111; 372

- 115 Members of SWAP were former employees at the Whakatane Sawmill and were exposed to PCP and other chemicals used in treating timber. The former employees of the sawmill had linked a high incidence of cancer and deaths to their exposure to PCP and other chemicals. Those affected appeared not only to have been those employed in the immediate vicinity of where PCP was used. For example some claimants recalled eating their lunch while sitting on freshly treated timber, and taking treated timber off-cuts home to be burnt in domestic fires, thereby exposing whole families to PCP.
- 116 The list of diseases affecting those formerly employed at the Whakatane Sawmill was very distressing, as was the evidence of debilitating conditions and illness amongst the children and grandchildren of former workers at the sawmill. The advisory panel was told by the SWAP representatives that 59 claimants had sought cover from ACC but of those 59 approximately 40 had been denied cover by ACC on the grounds that they had failed to establish that they had suffered a work related gradual process, disease, or infection.
- 117 The experiences of those represented by SWAP appear to have been very similar to the experiences of many who gave evidence to the Ministerial Inquiry into Management of Certain Hazardous Substances in Workplaces. Of the 120 submissions received by that Inquiry 78, (approximately 2/3rds) were made by or in relation to individuals who had suffered or who had identified themselves as suffering adverse health consequences from exposure to hazardous substances in their places of employment. Of those 78 submissions, 52 commented adversely on ACC and the experiences they had with the Corporation. At the centre of their complaints is the practical and philosophical difficulty of trying to prove a causal connection between their exposure to hazardous substances and their subsequent illnesses.
- 118 The advisory panel was satisfied after meeting with representatives from SWAP that a comprehensive and equitable method of providing cover must recognise the plight of those disabled as a result of being descendent from or otherwise associated with the "primary victim".

Magnitude of the Problem

- 119 The advisory panel is very concerned that a significant number of persons who succumb to work related gradual processes, diseases, and infections may be denied cover by ACC because of confusion over the test as to what constitutes a causal connection between their condition and their work environment. The advisory panel examined a report prepared by the National Occupational Health & Safety Advisory Committee's (NOHSAC) Report on Occupational Disease and Injury in New Zealand. That Committee's researches reveal that each year somewhere between 700 and 1,000 die in New Zealand from occupational diseases and that between 17,000 and 20,000 new cases of work related diseases occur. The figures calculated by NOHSAC are estimates based upon international studies and limited information from New Zealand. Of particular concern is the conclusion drawn by NOHSAC that ACC claims represent a significant understatement of the number of persons truly affected by work related diseases in New Zealand. For example, NOHSAC has estimated that between 300 and 800 occupational cancers occur each year in New Zealand. However ACC rarely provides cover for occupational cancer. In 2001 and 2002 ACC provided cover for occupational cancer on only four occasions. The disparity between NOHSAC's estimates and ACC's rates of cover are dramatic.
- 120 The NOHSAC figures are calculated from 1999 records. The advisory panel endeavoured to obtain comparative figures from ACC and sought information about the number of fatal and non fatal claims accepted by ACC as resulting from work-related gradual process, disease, or illness. Unfortunately ACC was unable to provide statistics for fatal claims. However, the claims accepted for non fatal work related gradual processes, diseases, and illnesses are significantly below NOHSAC's estimate. ACC's records suggest there have been on average approximately 6,500 non fatal claims for work related gradual process, disease, or infection each year since 2000.⁴⁵ It is surprising ACC does not have more comprehensive statistics which identify fatal claims based on work related gradual process, disease and illness.

⁴⁵ 2000/2001 - 7,337; 2001/2002 - 6,454; 2002/2003 - 6,368; 2003/2004 - 6,137

- 121 The fact that there is such a wide divergence between the estimates calculated by NOHSAC and ACC's records of non fatal work related diseases strongly indicates that many who are subjected to work related diseases are not accepted for cover because of difficulties in establishing either that they have succumbed to a personal injury as defined in the IPRC Act or are unable to satisfactorily answer the causation questions posed by the questions in s.30(2) IPRC Act.
- 122 It may never be possible to establish a completely effective test of causation which satisfies the potentially conflicting demands of law and medicine. However, notwithstanding the inherent differences in approach to causation taken by the medical and legal communities, the advisory panel believes that claimants should not be placed in the invidious position of having to prove the cause of their incapacitation in order to qualify for treatment and rehabilitation services. The two crucial questions should be:
- 122.1 Is the claimant disabled or suffering sickness or injury? If so,
- 122.2 What, if anything, can be done to treat and/or rehabilitate them?
- 123 Despite the fundamental problems associated with proving a causal connection between a claimant's disability, sickness, or injury and their work environment, the advisory panel believes it desirable to retain the existing causation test of work-relatedness for those seeking to obtain weekly and lump sum compensation. It is imperative however that those administering the scheme ensure that questions of causation are assessed by fairly applying the balance of probabilities test. The advisory panel believes that many of the difficulties encountered in applying the existing causation criteria can be overcome if those charged with making determinations bear uppermost in their minds that the legal test of causation differs significantly from the approach medical people instinctively take to answering the question of what has caused a person's gradual process, disease, or infection.
- 124 The advisory panel believes it has an important role to play in continuing to monitor the way the troublesome issue of causation is administered under s.30 of the IPRC Act. The advisory panel intends to continue to monitor and report to the Minister on cases which illustrate a failure to correctly apply the causation criteria set out in s.30 of the IPRC Act.

Part V

A Principled Approach

- 125 The preclusions to cover presently in place create too many anomalies:
- 125.1 A person who becomes disabled and who is unable to work because they suffer RPS caused by the repetitive strain of using a keyboard in their workplace should be treated in the same way as a person whose hands are physically damaged by accident;
 - 125.2 A person who suffers a heart attack or post traumatic stress disorder because of work stress should be entitled to cover;
 - 125.3 A person whose life is decimated after being exposed to hazardous substances should be assisted, not frustrated in obtaining access to appropriate treatment and rehabilitation services.
- 126 A truly equitable and principled scheme should focus upon:
- 126.1 Assisting all members of society who become disabled or suffer sickness or injury regardless of the cause of their condition;
 - 126.2 Providing basic entitlements to all who are disabled, or suffer sickness or injury.
- 127 The basic entitlements that should be provided are:
- 127.1 treatment; and
 - 127.2 rehabilitation services.
- The objective must be to ensure all who are disabled or suffer sickness or injury receive appropriate treatment and assistance with rehabilitation so as to ensure they participate as fully as they possibly can in our society.
- 128 The advisory panel believes that in an ideal world those who are disabled or suffer sickness should receive the full range of entitlements currently afforded to those who have cover under the IPRC Act. However the costs associated with such a dramatic extension of entitlements are likely to be prohibitive. Furthermore, there is a logical reason for distinguishing between:

128.1 Those who are disabled or suffer sickness; and

128.2 Those who are injured or suffer from an occupational disease.

That reason relates to the fact that at common law, some who were disabled by injury and occupational diseases had the option of seeking compensation through the Courts. Those who became disabled through sickness (not caused by their work environment) could not seek compensation. The abolition of common law claims, and the corresponding introduction of our no fault compensation scheme for those who suffer injury through accident and work related illness provides an explanation as to why those who are disabled or suffer sickness should not anticipate receiving compensation in the form of weekly compensation or lump sum payments. Persons in those categories have never received compensation for their condition.

- 129 Under no circumstances should current entitlements be reduced. The advisory panel believes there is merit in the view that the current three part test of causation should be retained as a means of assessing whether or not a claimant should receive more than the basic entitlements of treatment and rehabilitation services. It is important however that when a claimant is required to prove their condition was caused by a work environment in order to qualify for weekly/lump sum compensation that the test of causation be applied fairly and reasonably.
- 130 The advisory panel believes the time has now come to address the inequities caused by illogical distinctions which have been a hallmark of successive ACC statutes. In particular, the distinction traditionally drawn in New Zealand ACC schemes which has precluded cover for those disabled by (non work related) sickness must be remedied.
- 131 Undoubtedly this recommendation will be met by strong opposition about the costs associated with a significant change in policy. The advisory panel does not under-estimate those concerns but is adamant its recommendation should not be exposed to the same fate as the recommendations contained in the Law Commission's 1988 Report on Personal Injury: Prevention and Recovery. Accordingly, the advisory panel recommends a three step process to achieving the policy objectives articulated in this discussion paper.

Step One – Amending Schedule 2

- 132 The advisory panel recognises that difficulties are often encountered in employing a general formula to try and capture the conditions which are to be covered by the ACC scheme. The advisory panel also recognises that the task of determining coverage can be simplified for a great majority of cases by using a schedule which removes from debate the requirement to prove that a claimant's condition was caused by work related circumstance, where the condition is such that it is almost certainly caused by workplace exposure.
- 133 It will be appreciated that if the advisory panel's recommendation that "disability" replace personal injury as the entry criterion for cover, the need for Schedule 2 will be substantially reduced. The only remaining need for Schedule 2 may relate to determining the extent of entitlements.
- 134 The advisory panel believes Schedule 2, based as it is on ILO Convention 42, is outdated and fails to recognise a significant number of medical conditions caused by occupational environments. Schedule 2 urgently requires updating.
- 135 The advisory panel is aware the NOHSAC report contains an extensive review of occupational disease and injury in New Zealand. The diseases listed in that report should be used as a basis for re-assessing the Schedule 2 list. It is important that Schedule 2 retain the conditions identified in ILO 42 (in order that New Zealand honour its obligations under the ILO Convention). However, NOHSAC research provides a useful basis from which a revised Schedule 2 can be compiled.
- 136 The advisory panel recommends that NOHSAC and the advisory panel submit a revised Schedule 2 to the Minister. The revised Schedule 2 could be compiled in a matter of months and enacted by way of Order in Council pursuant to s.336 of the IPRC Act.

Step Two - Removing the requirement of proving physical injury

- 137 The current requirement that those who suffer gradual process, disease, and infection prove they have suffered personal injury as defined in the IPRC Act should be removed. This legislative change can be achieved relatively easily by re-drafting s.30 of the IPRC Act so as to make it clear that those seeking cover for a gradual process, disease, or illness prove they have suffered a disability, illness or injury regardless of whether or not they have suffered personal injury.

138 There are two aspects of this recommendation that require special mention:

138.1 The advisory panel is concerned to ensure that those who suffer debilitating work related stress induced conditions be entitled to cover regardless of whether or not they suffer physical injury. Concerns about “loose and vague” criteria for cover associated with stress can be met by ensuring that cover is provided to those who suffer a clinically diagnosable condition, such as post traumatic stress disorder. The Panel wishes to avoid cover being provided to those who subjectively feel “stressed” but have not succumbed to a properly diagnosable condition.

138.2 By re-drafting s.30 so as to avoid the need for a claimant to prove physical injury the Panel intends to expand the scope of cover to persons who have been disabled and whose disability was caused by the work environment of a parent or ancestor. This recommendation is designed to meet part of the concerns of representatives of SWAP who wish to achieve cover for children and grandchildren of persons exposed to PCP.

Step Three – Extending treatment and rehabilitation services to all who are disabled or suffer sickness or injury

139 A thorough and objective analysis needs to be undertaken to extending cover for basic entitlements (treatment and/or rehabilitation) to all who have become disabled or suffer sickness or injury regardless of the cause of their condition. The advisory panel believes that the recommendations in the 1988 Law Commission Report on Personal Injury; Prevention and Recovery must be revisited. That report suggested that the costs of extending cover to all who were disabled may not be as dramatic as initially thought if invalids and sickness benefits payable under the Social Security Act 1964 are used as a basis for funding entitlements under a new comprehensive scheme.

140 The advisory panel envisages most of the additional costs of expanded cover will need to be borne by society as a whole, rather than from the employers and self employed work accounts.

Conclusions

- 141 The current restrictions for cover for those who suffer personal injury caused by work related gradual process, disease, of infection create anomalies and inequities which should not be permitted to continue.
- 142 The Second Schedule to the IPRC Act is antiquated and should be immediately revised so that it reflects modern epidemiological and medical knowledge.
- 143 It is neither fair nor reasonable to preclude from cover persons who are disabled because of work but who cannot establish their condition involved personal injury as defined in the IPRC Act. It is essential that the requirement a claimant prove they have suffered physical injury be eliminated from s.30 of the IPRC Act.
- 144 Ultimately, all in our community who are disabled or suffer sickness or injury should receive the same basic entitlements to treatment and rehabilitation services. In an ideal world, those who are disabled and suffer sickness should also receive the same level of entitlements to weekly and lump sum compensation currently provided to those eligible for cover under the IPRC Act. Unfortunately questions of costs are likely to preclude an achievement of total equality, at least in the medium term. Current inequalities can be substantially addressed by ensuring that those who are disabled, or suffer sickness receive the same basic entitlements of treatment and rehabilitation services as others entitled to those services under the IPRC Act. To this extent, the time has come to give effect to the Woodhouse vision of removing distinctions between those who are disabled or suffer sickness and those who are injured.

Dr D B Collins QC

Committee Members: Ms Hazel Armstrong
Ms Karen Below
Dr Evan Dryson
Prof Neil Pearce
Mr Tony Wilton

An addendum prepared by committee member Mr David Wutzer will be submitted to you as soon as possible.