

Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 2)

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18 October 2007

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

INJURY PREVENTION, REHABILITATION, AND COMPENSATION AMENDMENT BILL (No 2)

1. We have considered the Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 2) (the 'Bill') (PCO 8183/11), for consistency with the New Zealand Bill of Rights Act 1990 (the 'Bill of Rights Act'). We understand that this Bill will be considered by the Cabinet Legislation Committee at its meeting on 25 October 2007.
2. We have concluded that the Bill appears to be consistent with the Bill of Rights Act. In coming to this conclusion we considered whether an issue arises with section 19(1) (freedom from discrimination).

PURPOSE OF THE BILL

3. The Bill introduces some changes to the Injury Prevention, Rehabilitation, and Compensation Act (the 'IPRC Act') to ensure a fair and sustainable Accident Compensation Corporation ('ACC') scheme for reducing the incidence and impact of personal injury. The proposed amendments include:
 - changes to cover for work-related injuries;
 - cover for mental injury arising from traumatic events in the workplace;
 - changes to eligibility and entitlement provisions for weekly compensation;
 - changes to provisions for vocational rehabilitation and independence;
 - repeal of disentitlements for wilfully self-inflicted injuries; and,
 - eligibility of nurse practitioners to determine incapacity and undertake assessment for ACC purposes.

POSSIBLE INCONSISTENCY WITH SECTION 19(1) OF THE BILL OF RIGHTS ACT

4. Section 19(1) of the Bill of Rights Act provides:

"Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993."

5. Section 21 of the Human Rights Act 1993 specifies the prohibited grounds of discrimination. These grounds include, *inter alia*, "disability", which includes but is not limited to psychiatric illness, intellectual or psychological disability or impairment, or any other loss or abnormality of psychological, physiological or anatomical structure or function.

6. In our view, taking into account the various domestic and overseas judicial pronouncements as to the meaning of discrimination, the key questions in assessing whether discrimination under section 19 exists are:

i does the legislation draw a distinction based on one of the prohibited grounds of discrimination?

ii does the distinction involve disadvantage to one or more classes of individuals?

7. If these questions are answered in the affirmative, we consider that the legislation gives rise to a *prima facie* issue of "discrimination" under section 19(1) of the Bill of Rights Act. Where this is the case, the legislation falls to be justified under section 5 of that Act.

Possible Discrimination on Grounds of Disability

8. We have considered whether clause 6, new section 21B(2)(c) of the Bill ('section 21B(2)(c)') could give rise to an issue of discrimination under section 19(1) of the Bill of Rights Act.

9. The Bill establishes cover for work-related mental injuries at section 21B. The purpose of this particular amendment is to cover significant mental injuries such as post-traumatic stress disorder rather than the temporary distress that constitutes a normal reaction to trauma.

10. Section 21B(2) establishes the causation requirements for work-related mental injuries. For a person to receive cover for an injury that is a work-related mental injury, the single event causing the injury must be:

a) suffered while the person is at any place for the purposes of their employment (or other enumerated criteria under s. 28(1) of the IPRC Act);[\[1\]](#) and

b) sudden; and

c) an event that could reasonably be expected to cause mental injury; and

d) experienced, seen, or heard by the person directly;^[2] and

e) occurs in New Zealand or outside New Zealand to a person who is ordinarily resident in New Zealand when the event occurs.

11. Section 21B(2)(c) (requiring that the event could reasonably be expected to cause mental injury) appears to raise the issue of intra-ground discrimination between the comparator groups of individuals suffering a physical disability from work-related personal injury and individuals suffering a mental disability from work-related mental injuries.
12. In addition, there may be an issue of discrimination between individuals with pre-existing mental illness that suffer a work-related mental injury and those without pre-existing mental illness that suffer a work-related mental injury.
13. Both an individual suffering work-related mental injuries and an individual with pre-existing mental illness that suffers a work-related mental injury may find it more difficult to receive rehabilitation and compensation under the IPRC Act. It may be more difficult because of the nature of the causation assessment under section 21B(2)(c).
14. There is, however, an element of causation for both physical injuries as well as mental injuries suffered in the course of employment. For example:
 - a personal injury has an inherent and explicit consideration of causation in its definition at section 26 of the IPRC Act and a work-related personal injury relies on that consideration;
 - there a causation analysis for personal injury caused by a work-related gradual process, disease, or infection at section 30 of the IPRC Act; and,
 - a mental injury is only briefly defined under the IPRC Act and causation analysis for a work-related mental injury occurs under section 21B(2).
15. The superficial differences between statutory requirements for each causation analysis reflect the inherent differences in the nature of the injuries. It is arguable that there is no distinction on the prohibited grounds of discrimination of physical and mental disability and of pre-existing and non pre-existing mental illness.
16. For completeness, if there was a distinction and corresponding disadvantage arising from section 21B(2)(c), it would then be considered under section 5 of the Bill of Rights Act.

JUSTIFICATIONS UNDER SECTION 5 OF THE BILL OF RIGHTS ACT

17. Where a provision is found to be *prima facie* inconsistent with a particular right or freedom, it may nevertheless be found to be consistent with the Bill of Rights Act if

the inconsistency is considered to be a reasonable limit that is justifiable under section 5 of that Act. The inquiry under section 5 is essentially two-fold:

- does the provision serve an important and significant objective; and
- is there a rational and proportionate connection between that objective and the provision?

Important and Significant Objective

18. One of the purposes of the Bill is to provide cover for mental injury (defined under the IPRC Act as a clinically significant behavioural, cognitive or psychological dysfunction) caused wholly or substantially by direct experience of a sudden traumatic event during the course of employment. Section 21B(2)(c) is intended to limit coverage to where the event is one that could reasonably be expected to cause mental injury as opposed to cumulative workplace stress or minor events. An example of a situation where coverage would be available under the Bill, but is not available under the current IPRC Act, is where the colleague of a bank teller is shot and killed in a robbery, and the bank teller witnesses the murder, fears for his or her own life and then develops a mental illness such as Post Traumatic Stress Disorder.
19. Accordingly, for the purposes of this advice, we have concluded that this objective is a significant and important objective under section 5 of the Bill of Rights Act.

Rational and Proportionate Connection

20. For the provision to be justified, however, there must be a rational and proportionate connection between the objective (namely of providing coverage to the person who suffered a mental injury as the result of an acute, sudden or unexpected traumatic event in the course of their work) and the requirement that the injury arise from an event that could reasonably be expected to cause a mental injury.
21. We are advised by the Department of Labour ('DoL') that it is necessary that the cause of the injury be clearly identified to ensure that the injury is not the result of work-related stress or a minor event. The IPRC Act currently excludes all injuries caused by non-physical stress. Section 21B(2)(c) also excludes mental injuries caused by a series of cumulative events. It is particularly hard to define the difference between a mental injury caused by stress and by a series of events.
22. DoL advises that section 21B(2)(c) of the Bill ensures that a mental injury whose primary cause lies outside of the traumatic event at work is excluded from coverage. An example is an event that is the "final straw" in a series of events but the final event would not, in itself, cause a mental injury. DoL advises that this is similar to the causation analysis for a gradual process injury.
23. DoL advises the Bill is intended to cover someone with a pre-existing mental disability who suffered an additional injury that would have caused an injury to a

person without that pre-existing condition. It is not the intention to specifically exclude people because they are particularly susceptible to mental injury. The assessment is whether, objectively, the injury itself could reasonably be expected to cause a mental injury.

24. We are also advised by DoL that the causation issue under section 21B(2)(c) will be considered by a psychiatrist in the context of the decision by ACC about coverage. In the event of a disagreement, the IPRC Act also contains a Code of ACC Claimants' Rights under Part 3 and an extensive dispute resolution process under Part 5.

25. The Bill seeks to remedy a gap in coverage under the IPRC Act for significant mental injuries that occur at work. We consider the requirement that the event be reasonably expected to cause a mental injury to be a justifiable limitation.

CONCLUSION

26. Based on the analysis set out above, we have concluded that the Bill appears to be consistent with the Bill of Rights Act.

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Footnotes

1 Section 28(1) also includes other instances where coverage is available including, generally, work breaks, employer provided transport or travelling for purposes of getting treatment for a work-related personal injury.

2 The directness requirement at section 21B(2)(d) is further defined at sections 21B(5) and 21B(6) of the Bill.

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