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Submission of Hazel Armstrong Law  
to the  
Education and Workforce Committee  
on the  
Accident Compensation Amendment Bill (49-1).

Introduced 12 April 2018,  
to amend the  
Accident Compensation Act 2001.

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## **Accident Compensation Amendment Bill.**

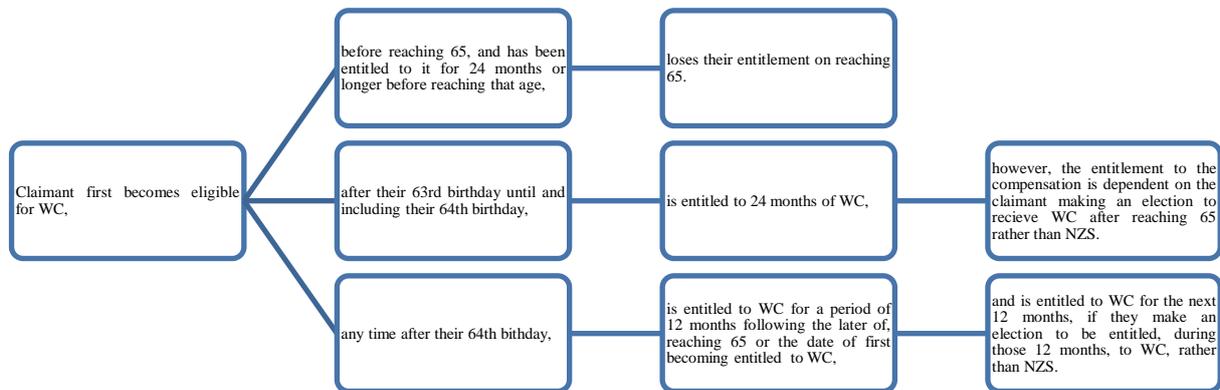
1. Hazel Armstrong Law is a law firm specialising in accident compensation law, and also acts for clients in health and safety and employment law. Hazel Armstrong, a partner, has been resolving ACC disputes for over a decade, and is the Spokesperson for the ACC Futures Coalition.
2. The ACC Futures Coalition is a group of health providers, lawyers, ACC consumers, academics and unions campaigning to maintain and improve ACC.
3. This submission has been endorsed by ACC Futures.
4. The Bill relates age with eligibility to entitlement. Eligibility to weekly compensation should not be age-related except as it relates to cover under s 26. Clause 10 of the Bill should be amended to remove the transitional period's limit to eligibility to weekly compensation while receiving New Zealand Superannuation (NZS). Workers compensation (WC) should extend to a worker's actual intended retirement age.

## **Current Legislation and the Bill.**

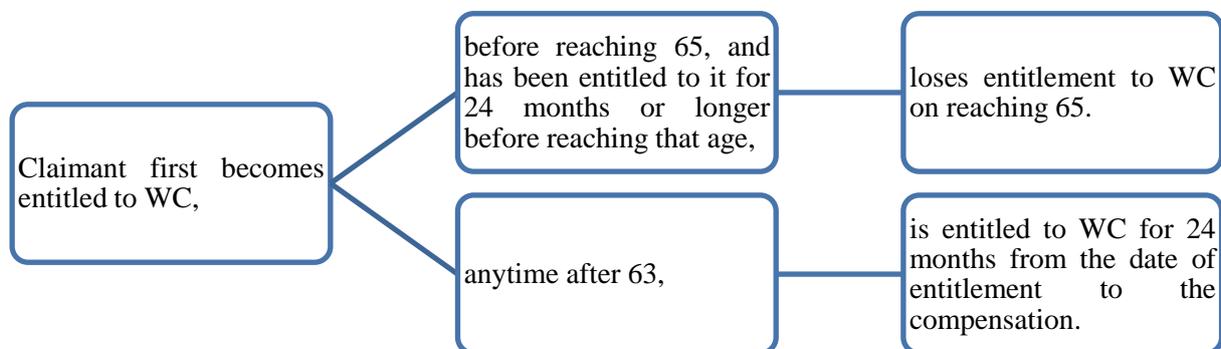
5. The current situation is that there is a maximum of one year of WC and NZS if you are injured within 12 months before 65, or if you are injured on or after 65. After that one year, you make an election between WC and NZS for one further year.
6. If you are injured before reaching 65 and have been entitled to WC for 24 months or longer before reaching that age, you lose your entitlement to weekly compensation at reaching 65. This is not affected by the Bill.
7. The Accident Compensation Amendment Bill provides for a person who is first entitled to NZS 24 months before reaching New Zealand Superannuation Qualification Age (NZSQA), or on or after reaching NZSQA to receive 24 months of weekly compensation. At reaching NZSQA an injured person can receive both until the expiry of the 24 months from when they were first entitled. The amendment removes the necessity to make an election. The Bill is more generous for those injured on or after reaching NZSQA. These people can get both WC and NZS for 2 years.

8. The current law is more generous for those injured after their 64<sup>th</sup> birthday but before their 65<sup>th</sup> birthday. If you are injured within 12 months of reaching NZSQA, you receive WC until NZSQA, then you are entitled 12 months of WC and NZS from NZSQA, and after 12 months you are entitled to choose either WC or NZS.
9. Under the Bill, you are entitled 24 months of WC from the date of entitlement. Upon reaching NZSQA you also receive NZS. NZS is unaffected by the 24 months period on WC. Under the Bill, the claimant loses the ability to choose between WC or NZS at the expiry of the 24 months of eligibility, and default to NZS only.

**Accident Compensation Act 2001, sch 1 cl 52.**



**Accident Compensation Amendment Bill (49-1), cl 10(1).**



<b>Date of claimant first becoming entitled to WC.</b>	<b>Act.</b>	<b>Bill.</b>	<b>Effect of reform on group of claimants.</b>
Before reaching 65, and has been entitled to it for 24 months or longer before reaching that age.	Loses entitlement at 65.	Loses entitlement at 65.	No change.
After their 63 <sup>rd</sup> birthday up until and including their 64 <sup>th</sup> birthday.	24 months of WC, however, must make an election to WC rather than NZS after 65.	24 months WC without election, NZS following 65	Bill more favourable to claimants.
After their 64 <sup>th</sup> birthday, but before 65 <sup>th</sup> birthday.	WC until 65, 12 months WC and NZS to 66, then 12 months WC if election to WC rather than NZS made.	24 months WC without election, NZS following 65.	Bill less favourable to claimants.
After and including 65 <sup>th</sup> birthday.	12 months WC and NZS after injury, then 12 months WC if election to WC rather than NZS made.	24 months WC and NZS without election.	Bill more favourable to claimants.

10. The regulatory impact statement states there are only 150 people who make the election a year to receive weekly compensation (rather than NZS).

### **Proposed Amendment to the Bill.**

11. The Bill should be amended so that workers who are in receipt of WC prior to or at 65 should not be cut off WC when the 24 months expire. An injured person over 65 should be entitled to WC and NZS for as long as they are incapacitated from employment due to the injury where they otherwise would have been working.
12. Eligibility to WC should not be age-related except as it relates to cover under s 26; a personal injury does not include personal injury caused wholly or substantially by the ageing process.<sup>1</sup> Furthermore, WC will be tied to the question of whether the claimant because of his or her personal injury is unable to engage in employment in which he or she was employed when he or she suffered the personal injury. Entitlement can be suspended when the Corporation is satisfied that the claimant is no longer entitled to receive WC.
13. The New Zealand Bill of Rights Act and public policy support this view.

### **New Zealand Bill of Rights Act.**

14. The limit to receive both NZS and WC is likely discriminatory and unjustified under the New Zealand Bill of Rights. To be discriminatory under *Atkinson*<sup>2</sup> there must be:
  - a. Differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination.
  - b. And, there must be a discriminatory impact (meaning that the differential treatment imposes a material disadvantage on the person or group differentiated against).
15. Both age and disability are prohibited grounds of discrimination under NZBORA s 19.<sup>3</sup> At the end of the 24 months a claimant, who but for the covered personal injury would otherwise still be working, is unable to continue to receive weekly compensation. Following the transitional period, there is a loss of one income stream that the superannuate would have received. This is a significant loss of income that may cause material financial hardship where financial hardship would not have

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<sup>1</sup> Accident Compensation Act 2001, S 26.

<sup>2</sup> *Ministry of Health v Atkinson* [2012] 3 NZLR 456, at [55].

<sup>3</sup> New Zealand Bill of Rights Act, s 19. Human Rights Act 1993, ss 21(1)(h-i).

resulted without an injury. Workers still able to work after meeting NZSQA do not have to select between their incomes from work or their NZS following 24 months. This has a discriminatory impact on injured superannuates. It is likely there would be discrimination under NZBORA.

16. For discrimination to be justified,<sup>4</sup>

1. The objective must be sufficiently important.

2. The result must be proportionate. Proportionate means,

a. rationally connected to the objective and not arbitrary, irrational or unfair;  
and

b. Impair the right “as little as possible”; and

c. Be such that their effects on the limitation of rights are proportional to the objective.

17. It is not clear if the first limb would be satisfied. If the objective is to ensure cost effectiveness it is unclear that the objective would meet the sufficiently important threshold.

18. The limited transitional period would not be proportionate. The discrimination would not meet parts 2.a. and 2.b. of the second limb.

19. The limit to the transitional period is arbitrary. Each claimant has individual circumstances and factors determining their ability to work. The transitional period does not consider these factors and applies a limit of 24 months to each person eligible for NZS and WC.

20. The limit would impair the right to be free from discrimination more than required. The Accident Compensation Corporation (ACC) can exclude cover to a claimant if their injury is caused wholly or substantially by the ageing process.<sup>5</sup> ACC is able to determine if an injury is no longer causing incapacity for employment or if a claimant

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<sup>4</sup> *R v Hansen* [2007] 3 NZLR 1, at [64].

<sup>5</sup> Accident Compensation Act 2001, s 20(1)(b).

is able to engage in work<sup>6</sup> and to remove cover from that claimant.<sup>7</sup> The circumstances of a claimant and their entitlement to WC could be already determined by legislative tools already provided for in the Act, rather than employing the blunt instrument of a transitional period.

21. The transitional period is an arbitrary and blunt instrument for assessing whether the personal circumstances of a claimant entitle them to WC, and will impair the right more than necessary. The discrimination against age and disability of this bill would not be justified under NZBORA s 5 due to its arbitrary nature and of the unnecessary impairment of the right.

### **Policy.**

22. There are 33,414 workers injured at work who are over NZSQA. This unfairness affects a large number of New Zealanders.
23. The transitional provision wrongly applies the one pension principle and too closely relates WC with social security. NZS is part of the social security scheme; one purpose of the scheme is to provide financial support to those for whom work is not appropriate.<sup>8</sup>
24. WC system is a scheme of social insurance for workers who receive compensation for loss of earnings caused by injuries. It is compensation for earnings that would be received for work rather than social security. There is a clear and long-established conceptual distinction between a social security system and a scheme of workers compensation.<sup>9</sup>
25. The one pension principle restricts social security to one form received by each claimant. The limited transitional provision is a restriction to receive both NZS and WC. This is an implicit acceptance of the one pension principle. The distinction between NZS as social security and WC as workers compensation means the one pension principle does not apply. The separate stream of income to injured

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<sup>6</sup> s 111.

<sup>7</sup> s 112.

<sup>8</sup> Social Security Act 1964, s 1A(a)(ii).

<sup>9</sup> *Heads v Attorney-General* HRRT 048/2011, [90].

superannuitants should not affect the other. There should be no consideration of the effect of income from NZS on WC. NZS payments are not abated under the ACC Act,<sup>10</sup> supporting the conclusion that the schemes are to be treated as separate. Therefore injured workers should not lose WC following the transitional period.

26. The Act limits cover on the basis of ageing. Personal injury is defined to exclude personal injury caused wholly or substantially by the ageing process.<sup>11</sup> One does not get cover if the personal injury is caused by ageing. If injuries caused by ageing are restricted by requirements for cover, then age shouldn't be a consideration of entitlement.
27. There is no mandatory retirement age in New Zealand. It is good policy for those above NZSQA to continue working; this Bill does not reflect this policy. The lived reality that people expect to work beyond NZSQA is not reflected in the Bill. The previous Government recognised the reality that some people work beyond NZSQA. It moved to raise the NZSQA age to 67 by 2040. Cutting workers from WC following the 24 months is inconsistent to good policy and the expectation on some workers that they continue working. While there is an expectation that those workers continue working, this Bill would not continue to provide those workers with equal WC. Society should provide equal WC to workers close to or above NZSQA where it expects them to keep working. To do otherwise would be inconsistent.
28. The United Kingdom uses personal circumstances to calculate an expected retirement age for claimants in tort close to retirement. Where a court is calculating the retirement age expected for a claimant close to that age at trial for pecuniary damages for personal injury, circumstances of the individual case are appropriate to take into account.<sup>12</sup>
29. Workers who are earning after reaching NZSQA are paying levies, and therefore should be entitled to equivalent WC. There is no justification for people to be required to pay the same level of levies and not receive the equivalent entitlement.

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<sup>10</sup> Accident Compensation Act 2001, s 11.

<sup>11</sup> s 26 (4)(a).

<sup>12</sup> Government Actuary's Department "Actuarial Tables With explanatory notes for use in Personal Injury and Fatal Accident Cases" (7<sup>th</sup> ed, The Stationery Office, London, 2011), at [43].

30. Workers have paid into the compensation scheme through levies throughout their working life. To remove the ability to receive entitlement to weekly compensation following the transitional period is a failure to support those workers who have paid into the scheme the longest.
31. As the Act already provides ACC with powers to consider the personal circumstances of the claimant; if the injury is no longer causing incapacity or the claimant has vocational independence to return to paid work. Intended retirement age and other personal circumstances could be taken into account. There is no need for the transitional period where legislative tools already exist. It provides a blunt end to entitlement for injured workers, causing some workers material hardship.
32. There is an internal inconsistency in the Bill. Surviving spouses can receive 5 years of WC, whereas injured workers are limited to only 24 months of WC. If contrary to this submission Parliament adopts an arbitrary limit, that arbitrary limit should be 5 years. This would reduce financial hardship and have internal consistency in the Bill.

### **Earnings.**

33. NZS payments are not considered earnings under the Accident Compensation Act.<sup>13</sup> NZS is therefore not abated.

### **Conclusion.**

34. Where a worker has an expectation that they will work beyond NZSQA, however, is injured and is unable to continue working even after 24 months of WC, the transitional period can result in material financial hardship. As the transitional period is not supported by NZBORA nor policy, this resulting hardship should be avoided. The Amendment Bill does not address a fundamental inequity in the Accident Compensation Act. Parliament must substantially amend this Bill to remove discrimination based on age.

Hazel Armstrong Law.

8<sup>th</sup> June 2018.

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<sup>13</sup> Accident Compensation Act 2001, s 11.