ACCIDENT COMPENSATION IN EREWHON

A commentary on the Woodhouse Report prepared by Dick Jessup for presentation to the New Zealand Society of Actuaries Conference in Dunedin, November 2014.

OVERVIEW

This paper deals briefly with events leading up to and following the Woodhouse report. It focuses on the arguments put forward in the report to justify the five principles underlying their recommendations and argues that they contain serious inadequacies and anomalies. It outlines how New Zealand was landed with an arrangement which is not only out of kilter with the rest of our social security provisions, but also has not overcome all of the problems and deficiencies of the old system.

INTRODUCTION

Samuel Butler's explorer who stumbled into the land of Erewhon was surprised to find that those who fell ill were sent to prison whereas those who committed crimes were treated in hospitals.

He would be equally bemused if he was washed up in New Zealand in 2014 to find that a person who has an accident (even if it occurs while they are doing something foolish, dangerous or even illegal) is looked on as a victim, given priority medical treatment and if unable to work paid a benefit related to their income prior to the event. On the other hand a person struck by an illness, the occurrence of which is almost always beyond their control, takes their chances in the health system and if unable to work has to make do with a flat rate sickness benefit.

This strange difference in attitude and treatment has its origins in the 1967 report of a Royal Commission chaired by Sir Owen Woodhouse which recommended the arrangement which has evolved into a system of entitlements managed by an Accident Compensation Corporation which is usually referred to as ACC. The Woodhouse report recognised that their proposal to have a different regime for those disabled by an accident to that for those who were sick, would create a glaring anomaly. But it ducked the issue – saying "*it might be thought unwise to attempt one massive leap when two considered steps can be taken*". Instead of this piece of irresponsibility the Commission should have taken note of Benjamin Disraeli's advice that "*The most dangerous strategy is to jump a chasm in two leaps*".

Despite this and other matters which will be referred to below, the radical recommendations for a no-fault system for all accident 'victims' were finally brought into effect when the Accident Compensation Act 1972, as amended in 1973, came into effect in 1974.

BACKGROUND

My interest in the subject dates back to 1971. In that year I was the (very junior) co-author with Vic Thompson, the then recently retired New Zealand Government Actuary, of a paper on Social Security in New Zealand presented to a Convention of the Institute of Actuaries of Australia and New Zealand. The ACC legislation was still under discussion at the time . Our paper made reference to the anomalies that would be created by the scheme as proposed, and commented on the question of earnings-related benefits.

Vic, in his time as Government Actuary, had had some involvement in commenting on the cost of the Royal Commission proposals which are referred to below. This paper started from an attempt to find a record of the way the costs were estimated. My researches soon showed that there is a great deal of archival material about ACC but the stuff about cost estimates proved elusive. In the course of these studies I looked more closely at the way the Royal Commission justified its conclusions and in particular at the enunciation of the five principles on which the recommendations are based.

PRE WOODHOUSE

The unsatisfactory processes by which a person injured in an accident might seek compensation before the introduction of ACC, are described in detail in the Woodhouse Royal Commission report. The outcomes were uncertain and subject to long delays. They were criticised as bringing more benefit to the lawyers and insurers involved than to the accident victims the system was intended to protect. They were colourfully described as a forensic lottery. There had been previous reports and suggestions for reform without much effect. Clamour for radical change seems to have been led by a group of academic lawyers and resulted in the appointment of the three-man Royal Commission in September 1966.

THE COMMISSION

The chairman of the Commission was the Honourable Arthur Owen Woodhouse a Supreme Court Judge. Sir Owen, as he subsequently became, has been described as *"a radical judge with a messianic streak who could state that the practices of the past were irrelevant"* Ross Wilson, who I refer to below, says that Sir Owen wrote most of the report himself.

The other commissioners were H L Bockett who was a retired Secretary of Labour and Geoffrey Parsons a retired Public Accountant.

The warrant given to the Commission was ;-

> *To be a Commission to receive representations upon, inquire into, investigate, and report upon the law relating to compensation and claims for damages arising out of accidents (including diseases) suffered by persons in employment and the medical care,retraining, and rehabilitation of persons so incapacitated,and the administration of the said law, and to recommend such changes therein as the Commission considers desirable; and in particular, to receive representations upon,inquire into, investigate, and report on the following matters:*
> 1. *Any need for a change in the law relating to claims for compensation or damages in respect of persons incapacitated or killed in employment.*
> 2. *The institution and administration of a scheme for the payment of compensation for damages in respect of persons incapacitated or killed in employment.*
> 3. *The desirability of adopting, in whole or in part or with suitable modifications,any scheme or system of compensation, medical care, retraining, and rehabilitation in operation in any other country which the Commission feels justified in investigating.*
> *4. The relationship between money payable by way of compensation or allowances or damages in respect of persons incapacitated or killed in employment and money payable pursuant to legislation concerned with social security or welfare or pensions.*

5. The desirability of amending the legislation to conform with the International Labour Convention (No. 121) Concerning Benefits in the Case of Employment Injury.
6. The provision of facilities for medical examination of persons injured or incapacitated <u>in employment</u> or their treatment, training, and rehabilitation.
7. Any amendment that should be made in the legislation to implement any changes recommended in respect of any of the above matters.
8. *Any associated matters that the Commission may deem to be relevant to the objects of the inquiry*"

I have underlined the words "in employment" where they appear in the above to draw attention to the fact that this was the focus of the list of matters set out for the Commission to consider.

The Commission invited public submissions and held public sittings in November and December 1966. In the first half of 1967 they travelled extensively overseas. The report include a fifteen page bibliography of books, pamphlets, reports and other material on the subject to which they had referred.

In April they wrote to those who had expressed an interest in the inquiry, indicating that there were to be final hearings and drawing attention to matters which "might deserve further examination". The matters were in four sections which covered administrative costs, the decision process for awarding compensation, how to evaluate partial disabilities and how a scheme should take notice of social security benefits. There was no hint in this communication or elsewhere that the Commission was considering a scheme which went way beyond their terms of reference.

<u>THE ROYAL COMMISSION REPORT</u>

The Commission reported under the terms of their warrant in December 1967. The letter of transmittal to the Governor General said *"We now humbly submit our report for Your Excellency's consideration"*. But there was nothing humble about the way they had interpreted their warrant. Taking advantage of the catchall clause authorising them to investigate and report on any associated matters relevant to the inquiry, they decided (without seeking submissions on the implications of extending their ambit) to recommend a scheme which covered any person injured in an accident anywhere in New Zealand at any time and on a "no-fault" basis. Their proposal included paying benefits related to pre-accident earnings.

Having taken this breathtaking leap the Commission noted that the logical thing was to extend the same arrangements to people who were incapacitated by sickness. Here their courage failed them. They dealt with the problem in section 17 of the report which I think is worth quoting in full:-

> ***Sickness and Disease*** *— 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 sign posting 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 decision is taken.*

So the Woodhouse Commission, after dwelling on the inconsistencies in the outcomes under the old workers compensation scheme, shut their eyes to the huge anomaly created by treating accidents separately, and more generously, than other causes of incapacity. "Two considered steps" sounds like a sensible way forward but no consideration was given to the second step. It was admitted that there was no information on which to decide whether this second step, which logic would require, was feasible. Even a survey of what sign posting was available would have shown that there were extreme difficulties and major costs involved in that second unconsidered step.

THE PRINCIPLES

The Commission set out five principles which were to underlie their proposals. These principles have come to be treated with the sort of reverence given to the commandments handed down to Moses on Mount Sinai. One committee, charged with reviewing ACC after it had been in operation for a few years, was specifically instructed not to question the five principles.

This attitude is illustrated by the following extract from an address given by Ross Wilson, who was an ex-Chairman of the Corporation, to a gathering assembled in 2009 to celebrate the 40th year since the Woodhouse report:-

> *"It is an acknowledgement of the enduring potency of the Woodhouse ideals that both the two main political parties remain committed to the five Woodhouse principles:-*
>
> *Community responsibility, Comprehensive Entitlement, Complete Rehabilitation, Real Compensation, Administrative Efficiency.*
>
> *These principles, and the scheme which should be constantly measured against them are the continuing legacy of Sir Owen's work, but 40 years on we can still be inspired and impressed by the power and elegance of the language and analysis in the Report, all written by Sir Owen himself, which so convincingly exposed the inequity and inefficiency of the common law and the inadequacy of our old statutory workers compensation scheme."*

In what follows I suggest that language of the report is far from elegant and that the seemingly powerful words mask serious weaknesses and loose thinking in the analysis.

THE PRINCIPLES EXAMINED

Each of the five principles is given a one sentence introduction in Section 6 of the report which then says it will "*proceed to examine them in turn"*. Every one of the principles deals with areas where there are issues involving social, economic, philosophical and other questions as well as practical issues in their application. But the examination which follows is a perfunctory discussion in which each of four of the principles are dealt with in only four sentences. The principle of Real Compensation is given fuller treatment but nine sentences divided into three paragraphs cannot be considered an adequate exploration of this complex topic. Further references to some aspects of some of these fundamental principles in the later sections of the report do not strengthen the arguments put forward in Section 6.

The following sections are a brief discussion of the principles. I have underlined the words 'work', 'worker' or 'workman' where they appear to draw attention to the fact that most of the arguments are developed around the position of an injured worker.

Principle 1 - COMMUNITY RESPONSIBILITY

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Here is how the report justifies the first principle which it says is fundamental:-.

56 .This first principle is fundamental. It rests on a double argument. Just as a modern society benefits from the productive work of its citizens, so should society accept responsibility for those willing to work but prevented from doing so by physical incapacity. And since we all persist in following community activities, which year by year exact a predictable and inevitable price in bodily injury, so should we all share in sustaining those who become the random but statistically necessary victims. The inherent cost of these community purposes should be borne on a basis of equity by the community."

The language and analysis here are neither elegant nor powerful. The treatment would be better described as incoherent and incomplete. What is the meaning of "*statistically necessary victims"* and what is the *"predictable and inevitable price"* of "*following community activities"*? There is no exploration here or elsewhere of why the community should take complete responsibility for all accidents? Should, for example, the community 'compensate' for the earnings lost by someone who is injured in activities such as base jumping – leaping off a high point on a mountainside supported only by a rather flimsy parachute like device. Woodhouse suggests that *"we should all share in sustaining those who become random but statistically necessary victims"*. Surely those who deliberately expose themselves to recognised risks are neither random nor "*statistically necessary"* (whatever that means) and should bear at least some of the responsibility and cost themselves.

An equally brief but more compelling treatment of community responsibility is this extract from the 1972 report of the McCarthy Royal Commission on Social Security which said that preserving a former level of comfort was not the task of the wider national community, but the job of the individual to organise privately. In this light it could not justify the State's decreeing:-

"that Citizen A must lower his current standard of living in order to maintain Citizen B at a standard which is better than A is able to reach". In other words, "the community is hardly obliged to keep a retired skilled worker in a larger car than a retired semi-skilled worker, or a retired officer manager in smoked salmon because he was accustomed to it"

To my mind the McCarthy extract sets out an approach which is more in line with the traditions of our welfare system and states it in language which is clear and simple whereas the Woodhouse Report uses convoluted prose and polysyllabic language to obscure incomplete and muddled thinking.

Principle 2 - COMPREHENSIVE ENTITLEMENT

The principle of comprehensive entitlement was intended to lead to *"consistent awards for precisely similar incapacity"*. Here are the four sentences examining this principle:-

57. *The second principle involves an acceptance of the argument advanced in paragraphs 42 to 46. It cannot be regarded as just that workmen sustaining equal losses should be treated unequally by society. The productive section of the community must sustain the elderly and the young, and the latter groups cannot reasonably expect to be provided with a form of social insurance on the same level. But subject to this consideration there can be no justification for providing from community funds for the same class of worker entirely inconsistent awards for precisely similar incapacities merely because the causes which gave rise to them*

have at different stages of our social development been the subject of conflicting responses.

This principle requires us to accept the "arguments" of paragraphs 42 to 46. I will not quote these in full but if you look at paragraph 42 you will see that, rather than arguing the case, it employs a debater's trick. It claims that there will be "*confident assertions*" (by whom it does not say) that accident victims should battle along unaided by the community. Then having put up this extreme position as a straw man it is knocked down with '*We do not agree'* and '*We regard it as an entirely anomalous situation'* as if that is all that is required to support the alternative presented in the report.

The unsupported statement above that "*there can be no justification*" is typical of the reports own "confident assertions" made without any supporting argument throughout the document.

Principle 3 - COMPLETE REHABILITATION

Again a complex subject is disposed of in four short sentences.

58. The third principle would seem to state the obvious. Nevertheless although it is always remembered that injury losses must be quantified in money terms, it is often overlooked that the rehabilitation of incapacitated workers cannot be achieved by money payments except to the extent of money losses. The consideration of overriding importance must be to encourage every injured worker to recover the maximum degree of bodily health and vocational utility in a minimum of time. Any impediment to this should be regarded as a serious failure to safeguard the real interests of the man himself and the interest which the community has in his restored productive capacity.

There can be no disagreement about the importance of rehabilitation. And perhaps it is nitpicking to suggest that the unsupported statements that "*it is always remembered*" and "*it is often overlooked*" are anything but verbal flourishes to give a portentous air to the statements but add nothing to the case being made.

Principle 4 - REAL COMPENSATION

The examination of this principle is relatively prolix but still disposes of the difficulties in nine sentences spread over three paragraphs which again I set out in full:-

59. Clearly if compensation is to meet real losses it must provide adequate recompense, unrestricted by earlier philosophies which put forward tests related merely to need. Such an approach may have been appropriate when poverty was a widespread evil demanding considerable mobilisation of the country's financial resources. But average modern households, geared to the regular injection of incomes undreamed of at the turn of the century, have corresponding commitments that do not disappear conveniently if one of the hazards of modern life suddenly produces physical misfortune. Increasing affluence has brought with it additional social hazards for every citizen; but fortunately at the same time, it has left society better able to afford their real cost.

60. To the individual concerned, the cost will include any permanent physical deprivation which he might have to endure following an accident. Such disabilities can have damaging effects upon ordinary activities of both young and old, regardless of their influence upon a capacity to work in any given occupation.

61. Accordingly we are in no doubt that in modern conditions a compensation system of the type under discussion should rest upon a realistic assessment of actual loss, both physical and economic followed by a shifting of that loss on a suitably generous basis. If there might seem to be an issue as to whether the compensation due to injured workers should be restricted to meet their current needs or be assessed on a uniform flat rate basis, then these are propositions which we reject as entirely unacceptable. These are the considerations which support the fourth principle.

It did not need a Royal Commission to point out, as they do in the first two of the above paragraphs, that standards of living had improved and that a disability can restrict a person's activities. But it escapes me how these commonplace observations support the statement in the third that "accordingly" the proposition that there should be flat rate benefits is rejected as entirely unacceptable. There is absolutely no connection between the sweeping assertions of paragraph 61 and the two which precede it.

The Report returns to the question of income related benefits in paragraphs 261 to 267. I will limit my comments to what it has to say in paragraph 267 :-

267. A final issue was put on the basis of equity. We were asked to consider whether the community should "maintain a person at his pre-accident income if the income was well above what an average person would receive in full-time employment". Our answer is that if the person should become the chance victim of socially acceptable activity it would be wrong to leave him to make a drastic adjustment in his standard of living merely to pay lip service to egalitarian doctrines unneeded by any economic consideration.

This is infuriating stuff. New Zealand society has been characterised by an egalitarian ethos since earliest times. If a different approach was to be recommended it surely deserved serious discussion. Instead it is brushed aside contemptuously as required *"merely to pay lip service"* to egalitarian doctrines. These are said to be *"unneeded"* (a strange terminology) *"by any economic considerations"*. Yet nowhere else in the report is there any serious concern for economic considerations. And since the recommendation for earnings related payments would increase costs substantially there were in fact significant economic considerations.

And what is this about the *"chance victims of socially acceptable activity"* The scheme outlined covered "victims" of all accidents, however caused, at any time. Are those who seek the thrill of dangerous pastimes "chance victims". And the proposal did not suggest whether, or where, a line should be drawn to define what was socially acceptable. The activities of drunk drivers and escaping criminals are not generally looked on as socially acceptable but they are not excluded from full coverage. There are many other less clear cut situations.

Section 17 of the report headed "Persons to be Protected" has seven subsections. The first six of these deal in turn with "comprehensive entitlement", "age limits", "dependants of living beneficiaries", "dependants of deceased persons", "New Zealand residents injured overseas" and "visitors to New Zealand". The seventh subsection is headed "Special Groups" but mentions only that victims of criminal violence and voluntary rescue

workers should be included. That seems to imply that other groups were to be excluded but the difficult issues in this area were avoided with these final Delphic words on the subject:- *"The scheme is all-embracing and particular groups in the community need not be specially mentioned".*

Principle 5 - ADMINISTRATIVE EFFICIENCY

A matter which Woodhouse acknowledged as important was the question of affordability. The fifth principle covered this aspect under heading "Administrative Efficiency" as follows:-

> *62. This final principle needs no elaboration. It speaks for itself in terms which are clear enough. It looks to evenness and method in every aspect of assessment, adjudication and administration. The collection of funds and their distribution as benefits should be handled speedily, consistently, economically, and without contention.*

Again there are fine words but not much meat in the sandwich. The sentences above refer only to the cost of administration. Looked at overall the affordability question rests on the cost of claims. In any case saying that the principle *"looks to"* and that handling *"should be"* are not the same as examining how and whether these aims were to be achieved.

The report claimed that the cost of the scheme would be of the order of $38 million a year based on 1965 statistics but gives little information about exactly how this cost was arrived at. There were further cost estimates by the Officials Committee which prepared a white paper which is referred to below.

THE COST ESTIMATES

The Woodhouse Report claimed that implementing their radical and wide sweeping recommendations would cost very little more than the combined cost of the existing systems. The costs were to be met by levies on employers and motor vehicle owners supplemented by contributions from the Social Security Fund and the Health Department. The Commission's estimate of the amounts required to fund their proposals compared with those for existing systems were as follows:-

Estimate of Source of Funds

$(millions)

From	Proposed Scheme	Present
Insured employers	15.0	15.0
Self insurers Government	3.5	3.1
Self insurers Other	0.8	1.0
Self-employed	3.5	
Owners of Motor Vehicles	9.0	9.0
Drivers of Motor Vehicles	2.0	
Social Security Fund		2.0
Health Department	8.0	6.5
TOTAL	41.8	36.6

The tables had a footnote saying that all periodic payments had been commuted at 4% interest.

Their estimate of the cost was calculated by two mathematicians employed on the staff of the Commission on the basis of assumptions which were "*all settled by the members of the Commission after evaluating the evidence in regard to them*".

The results were set out in Table 11 of Appendix 9 to the Report:-

Table 11 – Estimated Cost of Proposed Injury Compensation Scheme
(Based on 1965 Statistics)

$(000)

	Work Injuries		Road Accidents	All Other Injuries	Total
	Employees	Self - employed			
Compensation for those temporarily and permanently incapacitated	6,362	1,120	1,921	3,000	12,403
Widows (initial allowance)	23	3	54	32	112
Widows (Periodical Payments)	738	142	1,771	1,053	3,204
Child dependants (periodical payments)	236	44	567	340	1,187
Public hospital treatment	850	97	1,514	4,489	6,950
Private hospital treatment,Private medical fees (including specialists)	1,920	140	169	1,396	2,920
Auxiliary medical services (ambulances, transport,aids etc.)	200	20	200	500	920
Funeral allowances	22	3	111	135	271
Subtotals					28,467
Administration,rehabilitation and safety (11percent)					3,131
					31,598
Contingencies (20 per cent)					6,320
					37,918

The calculations were referred to the Government Statistician who checked the Commission's estimates and made some calculations of his own and thought the total annual cost would be in the range $35 to $45 million.

The figures in these tables look ridiculously small in terms of ACC's present operation. The Reserve Bank's inflation calculator gives the equivalent of $1 in December 1967 is $17.2 in December 2013. On this basis the current equivalent of the predicted annual cost of some $40 million in 1967 is of the order of $700 million. The ACC's Financial Condition Report for 2013 shows claims for that year as $3,500 million. So it appears that the real costs have turned out to be about five times those estimated and set out in the Commission's report.

It seems certain that if the cost of the Woodhouse proposals been more accurately predicted, the scheme would not have proceeded.

SOCIAL SECURITY OR SOCIAL INSURANCE

Another question discussed in the report is whether the scheme is one of social security or of insurance. The report says the recommendations are Social Insurance and distinguishes such arrangements as ones in which benefits are balanced against contributions as against Social Security where the purpose is to provide basic assistance.

But the balancing of contributions and benefits in real insurance operations is the result of a complex process in which both insured and insurer make independent decisions. The insurer is free to adjust premiums or the range of cover or to decline cover for risks individually or by class. An individual can take his business to one of a number of competing insurers or decide not to insure himself.

Under social security schemes entitlement and the level of benefits are laid down by statute and funding is from general taxation.

ACC muddles these two different approaches. Coverage is universal. Entitlements are laid down in statutes. Levies are compulsory and the rates are subject to Ministerial approval. These are not the characteristics of an insurance scheme. If accident compensation is to be a scheme of insurance then the corporation and its public will need to be given the freedom to act independently and contributions and benefits will be balanced by a market process. A better course would be to identify it as a form of social security and integrate it with the rest of the welfare system.

In a submission to the Woodhouse Commission the Social Security Commission made a proposal for such an integrated system. In paragraph 255 of their report the Commission said *'This proposal has the virtue that it is uncomplicated, it could be merged easily with the general social security system, and it would create no difficult administrative problems. It is nevertheless open to a number of criticisms which we regard as insuperable.'* In the following four paragraphs they outline these insuperable criticisms which boil down to the fact that Woodhouse had a fixation with the idea of earnings-related compensation and was not prepared to consider any alternative system.

POST WOODHOUSE

The following is a brief summary of events between the presentation of the report in December 1967 and the passing of the Accident Compensation Act in 1972.

Initial reactions to the report were varied. The insurance companies and the lawyers involved in workers compensation business were naturally unhappy with the prospect of the end of that line of business. The trade unions were suspicious. Many others such as the Automobile Association were interested and had comments on aspects of the proposals.

The Government needed advice on how to proceed and a Departmental Committee was commissioned to prepare a white paper. A R Perry, a Deputy Secretary of the Labour Department, was the convenor and the Social Security Commission, Treasury, the Transport and Justice Departments were represented. Geoffrey Palmer was engaged to assist and played a major part in preparing the white paper although he went off to an academic post the USA in the final stages. As he later made obvious in his submission to the select Committee, Palmer had become a disciple of the messianic Woodhouse and it was perhaps his influence which gives the white paper its character of approval for the Woodhouse concepts with some relatively mild suggestions for changes. The white paper was tabled in October 1969.

The interdepartmental committee established to prepare the white paper asked the Government Actuary (Vic Thompson) to comment on the cost estimates and the Government Statistician's comments thereon. He said that the methods used for estimating costs in areas where there were no statistics “fell far short of the ideal”. In particular the estimates for accidents other than those at work and on the road were based on very tenuous grounds. His view was that the overall cost was likely to be of the order of $50 million.

The Thompson comments provoked critical responses from Commissioner Bockett and the Government Statistician. J L Wright who was Secretary to the Commission wrote a lengthy note defending the Commission's cost estimates. Vic responded in notes which accepted some relatively minor changes to his figures but stuck to his contention that the total cost should be of the order of $50 million. Even this estimate was well short of the of the cost which emerged as the scheme developed.

It is sometimes suggested that ACC is less expensive than overseas systems. Possibly such remarks come from comparing the rate of employer levies rather than looking at the cost to the community of the whole ACC system.

The next step was the appointment of a Parliamentary Select Committee in December 1969 which finally reported in October 1970. There was a second Select Committee which reported in 1972. A significant submission amongst the many presented to the Committee was from the Social Security Department which discussed the difficulties they saw in having a separate system for accident benefits. These difficulties were set out under eight headings. The Department said they would prefer a universal social compensation system.

GEOFFREY PALMER'S SUBMISSION

Another notable submission to the Select Committee was that of Geoffrey Palmer. In his forty-one pages he gave a catalogue of his impressive qualifications and outlined his involvement in the production of the White Paper which he said had been largely written by himself under the supervision of Mr Perry. His drafts had been reviewed by others on the Committee and then revised. He poured scorn on the criticisms of the scheme in other submissions and accused some of presenting views which were extreme and unsupportable. He said that the White Paper had received detailed attention and approval of some of the Government's most senior advisers - people who had no sectional interest to promote. The proposals had been considered from all points of view and that it was clear that they were feasible and could be implemented within the framework set out in the white paper. He rubbished the suggestion that the costings were nothing but calculated guesses.

It is difficult to see how he could justify statements which implied that senior officials supported the proposal. The Social Security Department, which was the Government agency most experienced and knowledgeable in the area had set out a detailed catalogue of potential difficulties and recommended a different approach. Palmer must have been aware of their strong reservations and likewise he was surely aware of the comments of the Government Actuary who, as Registrar of Friendly Societies knew about their experience in meeting sickness and accident claims, and who said that the cost estimates for large parts of the proposed scheme could only be guessed at.

Palmer gave the MP's on the Committee the sense that they had the opportunity to take a great step forwarding the social laboratory of the world with the words *"Once New Zealand was known as a place where the forces of social change were recognised and acceded to. I hope that time has not passed"*

Palmer concluded his forty-one page submission by saying that the Woodhouse Report had been subject to an extensive and thorough public and private examination. In his view it was time to bite the bullet and make some decisions. He hoped his comments would be of assistance and said they were stated with a little more force than they might have been if he was still associated with the Government Officials. His final challenging sentence was "*It is time to stand up and be counted"*

This lengthy and forceful submission from someone who had been immersed in the details of the issue for some time presumably had a powerful impact on the committee. They were no doubt unaware that he had over-egged his case and that some of his claims did not line up with the facts.

THE SOCIAL CONTRACT

Those who suggest changes to ACC and particularly anything seen as reducing entitlements are accused of wishing to break a "Social Contract" which is said to have been entered into when the old Workers Compensation scheme was given away and replaced by ACC.

There is nothing in the Woodhouse or subsequent reports or the legislation about a social contract. The term was dreamt up subsequently. It probably referred to the fact that those who had doubts about making a change, particularly the trade unions - agreed to give away rights under the old workers compensation laws on the understanding that they would be replaced by the package in the Woodhouse report.

Even if there was some implied contract there must have been two sides to it. On the one hand there were those who would benefit from the new arrangement. On the other were those who were paying for the deal. The Woodhouse package was promoted as having an annual cost which was not much more than the estimate of the combined cost of worker's compensation and motor insurance at that time. It seemed that the dramatic increase in coverage and the simplifying of the claims process could be achieved at a cost which was only a fraction more than what was already in place.

In fact the annual cost has blown out in real terms to several times the original estimates. No doubt if there is such a thing as a social contract it will have its own rules but in the world of commercial contracts such an escalation in price would invalidate the deal.

THE EARLY DAYS OF ACC

The following is a brief sketch of events in the early development of ACC. A much more complete treatment of the 1980s is given by Don Rennie in a paper in volume 34 of the Victoria University Law Review on which the following largely depends.

The scheme established by Accident Compensation Act 1972 was quite a different animal from that recommended by the Royal Commission. The original structure had been modified by the recommendations in the White Paper and further modified by the Select Committee and was in two parts. There was an earner's scheme for employed workers and a motor accident scheme. Those incurring non-work and non-motor accidents were excluded from coverage but retained their common law rights.

This arrangement only lasted a few months. The Kirk Government, elected in November 1972 extended coverage to all accidents at all times as envisaged by the Woodhouse Report. In order to make this change quickly it was effected by amending the legislation which had already been passed rather than writing a new act.

In the first full year of operation there were 105,108 claims. Levy income of $81.3 million was almost twice the claims of $43.6 million. However claims costs escalated rapidly. The levy rates were criticised particularly by employers in industries with a low accident history who felt their levies were not correspondingly lower. Other problems stemmed from the fact that ACC was an orphan in the public sector with a unique governance and management structure.

There was a change of Government in 1975 and in 1980 a Parliamentary Committee chaired by Derek Quigley was appointed to review the operation. Their recommendation for a complete change in the structure of the administration with a supervising Board of Directors and a Managing Director was brought into effect by amending the Act in 1980. A requirement to fully fund future liabilities was implemented by a further amendment in 1982.

In 1986 levies were increased by 192% for employers and 265% for the self employed. An officials committee was appointed "*to review the substance of the scheme to ensure that the foundation principles are put into practice in a manner appropriate to the environment of today and the future"*

There was another change of Government in 1987 and in response to the outcry about the large increases in levies in 1986, Geoffrey Palmer, who by now was Minister of Justice and Deputy Prime Minister, asked the Law Commission to *'examine and review'* how the whole thing was working. The terms of reference for the Commission's examination said that *"It may be accepted that the principles deserve to be supported".*

The president of the Law Commission was the now knighted Sir Owen Woodhouse. So this was a case of the disciple asking the Messiah to comment on the outcome of applying his earlier utterances. Predictably the final report resulting from this bizarre arrangement was largely a harking back to things recommended by the Commission. There was some waffling about extending cover to sickness and an unrealistic call to have flat rate levies for all employers. The report included a report by two Australian actuaries, J R Cumpston and R C Madden on the costs of the scheme in response to questions put to them by Sir Owen Woodhouse.

The 1988 budget announced that it was proposed to extend coverage to include sickness but the Committee appointed to look into the proposal does not appear to have ever met.

ACC TODAY

There is an old joke that suggests that the boffins in Treasury worry that something which is working perfectly well in practice may not work in theory. Correspondingly a critic of the theoretical foundations of ACC should look to see whether despite the weaknesses in the founding principles it might on fact be working well in practice. This is particularly true of ACC.

I have not attempted to describe the position in detail or to draw up a balance sheet of the positive and negative aspects. In short it seems to be certainly true that ACC has resulted in much better and speedier attention to the treatment and rehabilitation of those disabled by accidents. Some of this improvement may have taken place in any case in parallel with developments in the rest of the health and welfare system.

However on the negative side the scheme has seldom been out of the headlines for such things as increasing costs, arguments about entitlements and operational difficulties. There have been a number of investigations and reports some of which are referred to above. Difficulties in 2012 were such that the Minister in charge, the Chairman of the Board and the Chief Executive were all replaced. Administrative problems continue. Claims that ACC treats "clients" in a heartless manner continue. One commentator suggested that ACC is "rotten to the core".

The underlying problem is that ACC has a split personality - torn between trying to satisfy those who wish to extend coverage on the one hand and those who wish to keep the costs down on the other. There is not a satisfactory mechanism for resolving these conflicting pressures.

CONCLUSION

In the course of developing and discussing this paper I have been asked what I think should replace ACC. I will conclude with a few rather disorderly and not very detailed thoughts.

The specifications for a satisfactory system were well summed up by the Social Security Department in their submissions on the proposals for a work injury scheme. They said that the consequences of sickness and injury were social problems that required a responsible, consistent and equitable community approach and any

criteria of where, how or when the incapacity occurred were irrelevant in deciding what provision should be made for an incapacitated person.

A responsible, consistent and equitable community approach can only be achieved by getting rid of the inconsistencies between ACC and the rest of the welfare system. The main inconsistency is in the income benefits - earnings related under ACC and flat rate for sickness. The Woodhouse arguments in favour of earnings related benefits are particularly weak and it is this feature which gives rise to many of the difficulties, particularly about coverage. The argument set out by the McCarthy Royal Commission quoted above the cost and administrative complication mean that extension of ACC coverage to sickness and other welfare areas is insupportable.

If incapacity caused by accidents was treated on the same basis as sickness there would be no need for a special system administered by a separate ACC organisation. Those incapacitated by an injury would be dealt with in the same way and by the same agencies as those incapacitated by sickness.

A flat rate base benefit would need to be supplemented in certain cases. Work place and motor accidents might require special provision and there could be a case for different treatment where there was fault on the part of someone other than the victim. The fault principle got a bad press in the pre–Woodhouse era. It was manifestly unsatisfactory that an accident victim – even when an innocent and deserving party – was left in limbo while the legal processes wound their way to a conclusion. But the concept of fault has something going for it. Surely, for example, the person who deliberately or carelessly exposes themselves to danger does not deserve to have his income protected at the communities expense if he is injured as a result. And it must be possible to fashion a less cumbersome system than the old legal process for determining fault.

There are some other questions which need to be revisited. One of these is where to draw a line between personal and community responsibility. The arguments for an all embracing community responsibility in the Woodhouse Report is incomplete and unconvincing.

Acceptance of the Woodhouse Commissions recommendations have taken us down an unsatisfactory path. But having travelled the ACC road for over forty years it will not be easy to get things back onto a sensible footing.