New Zealand Law Society
Te Kāhui Ture o Aotearoa

Level 4, 17–21 Whitmore Street, Wellington
PO Box 5041, Wellington 6140 · DX SP20202, Wellington
04 472 7837 · inquiries@lawsociety.org.nz

lawsociety.org.nz

29 April 2022

Social Unemployment Insurance Tripartite Working Group
Ministry of Business, Innovation and Employment
Wellington

By email: incomeinsurance@mbie.govt.nz

Re: *A New Zealand Income Insurance Scheme*: discussion document

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the *New Zealand Income Insurance Scheme* discussion document (**Discussion Document**).

1.2 The Law Society's approach in responding to such documents is limited to legal issues, issues affecting human rights or the rule of law, and ensuring the workability of proposals. It typically does not otherwise comment on the content of policy matters. As a result, this response does not respond to all consultation questions.

1.3 This submission has been prepared with input from the Law Society's Accident Compensation Committee, Employment Law Committee, Public & Administrative Law Committee and Tax Law Committee.

2 Honouring Te Tiriti o Waitangi

2.1 The Law Society does not have any particular comments about questions 2 to 5, other than noting that Māori representation in the proposed scheme's governance and operations is essential. The statistics cited in the Discussion Document demonstrate it will be important to the equity of the scheme that consideration is given to its accessibility and the involvement of Māori in assisting with the obligations that will apply to those entitled.

3 Coverage for displaced workers (chapter 6)

Q6. Do you agree with defining displacement as the involuntary loss of work due to the disestablishment of a job?

3.1 Yes, the Law Society agrees with the broad definition of displacement which should include:

(a) restructuring such that a position is no longer required and there are no suitable redeployment options; or

(b) an employer/part of the employer's business ceasing to operate; or

(c) a job that substantially alters through, for example, technological change.

3.2 The definition of displacement should not be too precise, to allow flexibility and accommodate change in employment arrangements, which will support the likely purpose of legislation implementing a scheme.

3.3 That said, consideration will need to be given to how to deal with situations where an employer and employee might collude to purportedly terminate employment by reason of redundancy where the real reason is, for example, performance or misconduct issues which the employee is challenging. The scheme proposed has potential to provide some incentive for such collusion. This also needs careful consideration for consistency with Part 6A of the Employment Relations Act 2000 and rights to transfer. Notions of optional loss of work should not attract coverage.

Q7. Do you agree with excluding poor performance and gross misconduct as reasons for claiming insurance?

3.4 Yes, including poor performance and gross misconduct would provide a perverse incentive for employees – and possibly also employers – to seek reasons for termination on that basis.

3.5 The Law Society considers that "serious" is a better epithet than "gross" (which is less modern terminology).

3.6 Consideration will need to be given to:

(a) whether termination on the grounds of "incompatibility" or "frustration of contract" (for example, Government orders, volcanic eruptions, earthquakes), where "no fault" can be ascribed to the employee or employer in relation to the termination, should be included;

(b) whether termination on the grounds of "risk of collusion" or existence of a "reporting relationship" under section 32 of the Human Rights Act 1993 should be included. This applies to persons who marry, enter into civil unions, or form de facto relationships with others in the workplace, or with others who are employees of another employer, in such a way that an employer has a legitimate concern of risks arising from the relationship. These are, again, "no fault" terminations; and

(c) Whether termination on notice on grounds of repeated misconduct (rather than simply gross or serious misconduct which can attract a sanction of summary dismissal) would also be specifically excluded. Given that termination on these grounds also constitutes "termination for cause", the Law Society considers that termination of employment on grounds of misconduct should also be excluded.

Q8. Do you agree with excluding resignation as a reason for claiming insurance?

3.7 Yes, covering resignation would provide a perverse incentive for resignation. That said, in the case of an employee opting for voluntary redundancy, the employee should be able to take up income insurance entitlements.

3.8 We have considered whether cover should be given in situations where a person resigns but claims they have been constructively dismissed. This would be a complex extension as constructive dismissal claims are difficult to bring and may take an extended period of time

to come to a hearing. Assessing such a claim promptly would be a very complex task and on balance would not likely prove workable.

3.9 It is likely, however, that if such claims are excluded, then any loss arising from that exclusion will form part of the damages sought by the employee in respect of the claim. This likelihood should be taken into account in formulating the legislation.

Q9. Do you agree that income insurance should cover only the complete loss of a job, and cover situations where a person loses only one of several jobs that they hold?

3.10 To the extent this is a policy question the Law Society does not have a particular response.

3.11 Otherwise, we observe that:

(a) the rationale for providing income insurance would seem to apply to any situation in which a person's income is reduced by reason of the involuntary loss of work due to the disestablishment of a job;

(b) depending upon the proportion of income relating to the job which is lost, the loss of one of several jobs could significantly adversely affect the economic circumstances of an employee; and

(c) if the scheme is to be funded by a levy, in principle all income upon which a levy has been paid should be insured.

Q10. Do you agree that insurance would be payable only where income loss was greater than a minimum threshold, such as a 20 percent loss of total earnings, counting income from all of their jobs?

3.12 To the extent this is a policy question the Law Society does not have a particular view on where the threshold is set. It would be consistent with other schemes, such as the ACC scheme, to provide for a minimum threshold. The administration of a large number of claims for small amounts of lost income would be complex and costly if all income losses including those from part-time work, or partial job loss, were to be covered.

Q11. Do you agree that it is important to provide income insurance coverage to non-standard workers, where practical?

3.13 The scheme proposes to cover a variety of non-standard working arrangements including fixed-term/seasonal and casual work, where there is a regular pattern of work and a reasonable expectation of future income. The scheme is intended to include non-permanent working arrangements to ensure those on lower incomes can access the same support as those in permanent work. Casual work makes up most of non-permanent work.

3.14 We agree income insurance should be extended to cover casual workers, but only in circumstances that the casual work is more akin to a permanent part-time arrangement with a regular pattern of work and a reasonable expectation of future income.

Q12. Do you agree that income insurance should cover the 'loss of reasonably anticipated income'?

3.15 Yes, the Law Society considers this is a rational approach. However, quantifying that amount in the case of some non-standard workers will be difficult and could be contentious. One

way of reducing the administration of the scheme in this area may be to develop a set of formula to approximate the level of reasonably anticipated income for such workers.

Q13. Do you agree that income insurance entitlements should be based on an 'established pattern of work'?

3.16 Yes, though we make the same comment as for question 12 about difficulties quantifying insurance entitlements in such cases.

Q14. Do you agree that income insurance should cover fixed-term and seasonal employees if they are displaced before the end of an employment agreement, with the duration of the payment running to the scheduled end of the employment agreement, or the maximum insurance entitlement duration, whichever is shorter?

3.17 The Law Society sees no reason in principle why fixed-term and seasonal employees should be treated differently from permanent employees if their employment is terminated before the end-date provided for in their employment agreement. We note that "seasonal" employees may not have an end date fixed by a calendar date. That could give rise to uncertainty and disputes about the quantum of entitlement.

Q15. Do you agree that income insurance should cover fixed-term and seasonal employees, where their employment agreements are not renewed, and they can show a regular pattern of work and reasonable expectation of future income?

3.18 If income insurance were to cover fixed-term and seasonal employees whose employment agreements are not renewed, we foresee potential legal and evidential difficulties in establishing whether in the particular circumstances there was a "regular pattern of work" and "reasonable expectation of future income". There has been extensive litigation in the Employment Relations Authority and Employment Court about whether seasonal workers, for example, are permanent employees and/or whether they have an enforceable reasonable expectation of employment for future seasons.

Q16. Do you agree that income insurance should cover casual employees who can show a regular pattern of work with an employer and a reasonable expectation of future income?

3.19 Yes, though the Law Society makes similar observations to those noted above. "Regular pattern of work" and "reasonable expectation" are difficult concepts which have been disputed in the employment institutions. They would likely prove to be centres for dispute in an insurance scheme.

Q17. How would these design choices work in practice? What risks can you see with the approach to establishing a regular pattern of work?

3.20 Carefully crafted criteria will be required. To an extent they may need to be arbitrary; for example, there could be averaging of work hours over a specified period of weeks or months.

3.21 We have significant reservations about the proposition in the Discussion Document (page 61) that to cover casual workers it may be necessary for the scheme to make a determination that they are in fact a permanent part-time employee. It is undesirable to create a situation where the employment institutions may reach a different conclusion

about the person's status for one purpose than the deemed status of the person under the scheme. If a determination is required, it will be important that the design is not too rigid, and that discretion is available to the decision maker. Significant emphasis should also be given to the levy payment history.

Q18. What risks do you see with covering, or not covering, people in self-employment?

3.22 We agree with the assessment, at page 65, of the various challenges involved in providing cover to self-employed workers. Nevertheless, the Law Society notes that the ACC scheme has always covered self-employed workers, and currently provides the option of self-employed workers specifying the income which will be the basis for the calculation of compensation in the event of incapacity for work, and paying a levy accordingly.

3.23 There would be difficulties in devising efficient and effective criteria and tests to ensure that the cessation of income due to the enforced ending of a self-employed worker's engagement with a single, or multiple, principal(s) did not involve threats to the integrity of the system. Accordingly, we agree with the suggestion that self-employed workers should receive coverage for health conditions and disabilities (to the extent not covered under the ACC scheme).

Q20. How can we practically distinguish between contractors who resemble employees, and those with a high degree of independence?

3.24 The Law Society agrees it will be difficult in practice or principle to distinguish between contractors who resemble employees and those with a high degree of independence. Such an approach would require a difficult policy choice about how much independence is necessary. It may be that such a distinction is not practicable or efficient for the purposes of a scheme. A principle of universality is simpler.

Q21. Because a self-employed person cannot technically be made redundant, what types of events would be appropriate 'triggers' for insurance payments?

3.25 To the extent this is a policy question the Law Society does not have a particular response.

3.26 Undesirable complexity would be involved in devising any criteria to discriminate between triggers where loss of income as a self-employed person should appropriately be covered and those where it should not.

Q22. How do you think the levy should be collected from self-employed workers?

3.27 The levy could be collected at the same time, and in the same manner, as ACC levies. This is logical since ACC is managing the scheme.

Q26. Could the risks associated with a low contribution history be managed in other ways?

3.28 It is probably better to have clearly defined timeframes for the sake of administration but it may be possible to give employers and the self-employed the option of purchasing full coverage straight away.

4 Chapter 7 – Entitlements for displaced workers

Q29. Do you agree with a replacement rate set at 80 percent?

4.1 This aligns with the 80% weekly compensation under the ACC scheme which has been determined to be 'fair compensation', capped in terms of amount and period of time. The Law Society agrees this is provided at a justified replacement rate and will look to provide an appropriate amount of support for those needing the support of the income insurance scheme. It also builds in a contribution by the displaced person.

Q30. Do you agree with a cap on insurable (and leviable) income set at the same rate as the accident compensation scheme (currently $130,911)?

4.2 The Law Society agrees there needs to be a cap on the income levels which is fair and equitable. We see no rationale for there to be changes to the limits set by the ACC. As it is with ACC, this should be inflation-adjusted.

4.3 Irrespective of the level that the cap is set at, clarity needs to be provided as to:

(a) Whether this is a gross amount (our assumption would be that it is); and

(b) How additional benefits such as KiwiSaver (employee and employer contributions), lump sum discretionary payments, employee accommodation and benefits provided by way of salary sacrifice are accounted for in determining the capped amount.

Q32. Do you agree that income insurance should have individualised entitlement, meaning a partner's income would not affect the rate payable?

4.4 Yes. As a matter of logic, if the rationale of the scheme is to replace the income that the person would have earned if the person had not been made redundant, fallen ill etc, it is difficult to see why a partner's income is relevant.

Q33. Do you agree that someone should be able to earn some income from paid employment before it affects their entitlements to income insurance?

4.5 Yes. In this respect the amount that can be earned before abatement applies should be the same as the ACC scheme. The amount that can be earned before abatement applies in the ACC scheme is long overdue for revision.

Q34. Do you agree that insurance should abate 'dollar for dollar' when earned income and insurance combined reach 100 percent of previous income?

4.6 The Law Society agrees abatement rules should align with ACC where the combined income insurance entitlement and income from employment can reach 100% of their prior employment income before it effects entitlement, as with ACC weekly compensation entitlement. Income above the 100% prior employment amount would be abated dollar for dollar. Abating entitlements dollar for dollar once the recipient has reached 100% of their previous income means that no one should be better off financially as a result of their redundancy, health condition or disability than they would have been in work.

Q35. Do you agree that insurance should be treated as income for assessing eligibility for income support such as main benefits and Working for Families tax credits and student support?

4.7 Yes, as a replacement of income.

Q36. Given the purpose of the In-Work Tax Credit and Minimum Family Tax Credit in encouraging people into employment and helping with in-work costs, do you agree that income insurance claimants would not be eligible for these tax credits?

4.8 The Law Society does not intend to comment on whether the stated tax credits should apply but does note that the purpose of the income insurance payments is to replace income lost due to circumstances outside of the control of the applicant. If eligibility for those tax credits is lost, individuals on lower levels of income will be left in a less advantageous position. Such impacts should be considered before this is decided.

4.9 The Law Society also notes an issue may arise where the benefit of the income insurance is partially lost due to an employee inadvertently falling into a higher tax bracket due to payment timings. Consideration should be given to the frequency of payments made under the scheme, and how it can ensure clarity around the periods for which payments are paid.

Q37. Do you agree that income insurance claimants could also receive New Zealand Superannuation or the Veteran's Pension?

4.10 Yes. If a person could have received the benefits while they were earning the income the insurance replaces, there is no reason why they should not receive the benefits while receiving the insurance.

Q38. Do you think a limit should be placed on the amount of time someone can receive New Zealand Superannuation or the Veteran's pension and insurance?

4.11 Given the receipt of insurance is proposed to be time-bound anyway – six months plus an initial four weeks – the Law Society does not consider this to be a significant issue. Given the number of employees potentially falling into this category (which is likely to be small) it would be acceptable for the scheme to be used as a transition to retirement in these cases. If the person obtains other employment and continues working then the receipt of insurance will have been appropriate.

Q39. Do you agree that income insurance and Paid Parental Leave could be accessed sequentially but not at the same time?

4.12 Yes. However, the Law Society considers that further consideration needs to be given to the order in which the two entitlements are taken (which may differ depending on whether they are being accessed for medical/redundancy purposes) to ensure that while in receipt of the income insurance payment, the employee is in a position to actively look for work.

4.13 For example, if an employee is made redundant while on Paid Parental Leave (**PPL**), they should arguably take their PPL first so that, during the period in which they are receiving the income insurance payment they are in a position to actively look for work. A new employer may be reluctant to employ an employee if the employee cannot commence employment for a period of time because they are taking the PPL that they became entitled to during

their previous employment. The inverse may be the case if the employee is unable to work due to a medical condition during pregnancy (and prior to taking PPL).

4.14 Careful consideration of the interaction between these two pieces of legislation is needed, as there are a number of different situations that may require different treatment in order to ensure an equitable outcome.

Q40. Do you agree that claimants should be able receive both ACC weekly compensation and income insurance at the same time for differing income loss subject to independently meeting the eligibility criteria for both?

4.15 Yes – this is fair because the person has paid separate levies to insure against different kinds of losses.

Q43. Do you think the scheme should allow extensions to the base period of income insurance entitlements for training or vocational rehabilitation?

4.16 To the extent this is a policy question the Law Society has no response. However, we note that this is likely to complicate the efficient administration of the scheme.

Q44. Do you agree that employers should give at least four weeks' notice to employees, and the insurer, before redundancy takes effect?

4.17 This proposal effectively introduces a new statutory minimum notice period. Accordingly, careful consideration should be given to its impact.

4.18 The Law Society suggests:

(a) The legislation should clearly set out whether the four-week minimum notice period applies to all termination of employment situations (including, for example, resignations and dismissals on notice for repeated misconduct) or whether it only applies in the situations in which an employee would be entitled to cover under the scheme. We note that differing notice periods for different reasons is likely to introduce an additional layer of complexity into employment relationships and, accordingly, an increased risk of non-compliance;

(b) The legislation should be clear whether the four-week minimum notice period is inclusive of, or in addition to, any contractual notice period; and

(c) The consequence of a failure to notify should also be clearly set out in the legislation. If the employer does not notify ACC of the termination (or notifies late) will this affect the employee's ability to receive the relevant payments? What will the penalty be for a late/non-notification?

4.19 Clarity will also be required as to whether:

(a) the employer can pay the notice period in lieu and, if so, whether there is a specific rate at which that must be paid (i.e. at ordinary pay/relevant daily pay/whether the value of benefits, such as a car, is paid out);

(b) an employee who is ill and unable to attend work during their notice period can be required to use their sick leave during that period; and

(c) whether the employer can direct the employee to take entitled annual leave or alternative leave during the notice period.

Q45. Do you agree that employers should pay former workers for the initial period of unemployment for four weeks? Q46. Should bridging payments be applied to all workers, including those not eligible for income insurance?

4.20 To the extent this is a policy question the Law Society has no response.

4.21 However, if these provisions are introduced, the Law Society considers that there are a number of factors that should be taken into account.

4.22 Introducing a statutory definition of redundancy will need to be carefully thought through. In particular:

(a) It should be made clear whether this definition only applies in terms of deciding whether the scheme is triggered or whether it applies more widely, noting that a number of employers already have a contractual definition of redundancy that determines whether their contractual redundancy payments are triggered. Consideration should be given to the interaction between any statutory definition, the current common law definition and any contractual definitions; and

(b) Consideration should be given as to whether the definition includes voluntary redundancy i.e. if an employee puts themselves forward for redundancy are they entitled to the benefits of the scheme? The effect of the definition on technical redundancy situations, where an employee is offered a suitable alternative role by the employer (or by the new employer in a sale and purchase situation) but turns that role down should also be considered. A statutory definition of "suitable alternative" may also be required if these types of redundancy are to be excluded and clarification would be needed as to whether this also exempts the employer from the four-week notice provision.

4.23 Similar considerations would also apply in respect of any statutory test introduced as to the genuineness of any redundancy.

4.24 In addition, consideration should be given to:

(a) The rate of the bridging payment and, in particular, whether it is at an 80% or a 100% rate, and, as set out above, what needs to be included in the payment rate (for example, tax (noting that changes may be needed to the Income Tax Act 2007 if tax is to be deducted at source from the payments following termination of employment), KiwiSaver, accommodation payments and payments in lieu of benefits);

(b) Whether the bridging payment would form part of gross earnings for holiday pay purposes;

(c) Whether allowing a bridging payment for workers who are "medically dismissed" but not those who resign on ill-health grounds creates a situation where ill employees feel obliged to hold on to their role (potentially worsening their condition) to obtain a bridging payment and how this interacts with other guidance from MBIE around a move to a "medical retirement", rather than dismissal. We note that an alternative

could centre potentially on getting an independent medical opinion to support a medical retirement;

(d) Whether the employee or the fund is required to repay the employer for all or part of the bridging payment (or whether the employer can withhold the unpaid amount) if the employee obtains alternative employment at the same or a greater rate of pay (as compared with their prior role) during the bridging period. If a repayment is introduced, consideration will need to be given as to how that repayment will work from an administrative perspective i.e. how will the employer/fund know that the employee has obtained new employment. Also, consideration of the recourse and enforcement mechanism an employer will have available if the employee does not make the relevant repayment or notify the fund of their new employment;

(e) What is required of an employer if any refund of bridging payments is dependent on employers "helping" employees to find work within the initial period of employment. In such circumstances, what does "help" entail and how can an employer demonstrate that they have helped; and

(f) If a decision is made to restrict bridging payments to citizens and residents, thought should be given to the interaction between this legislation and the information required to be collected and held by employers under the Immigration Act 2009 (which only requires employers to confirm eligibility to work and not to hold information regarding the specific visa class etc.).

Q47. Should the income insurance scheme finance bridging payments in circumstances where the payments are not forthcoming from employers, and refund employers for bridging payments if workers find work within this period?

4.25 To the extent this is a policy question the Law Society has no response.

4.26 However, if these provisions are introduced, the interaction with the Receiverships Act 1993 and schedule 7 of the Companies Act 1993 (preferential claims) will need to be taken into account and, in particular, how the bridging payments would interact with any other preference payments under those Acts.

Q48. Do you consider that stronger integrity measures are necessary to manage the risk of spurious claims to the income insurance scheme?

4.27 The limits on the scope of coverage set out above should provide sufficient protection for the scheme in a general sense. The scheme should however include statutory tests to ensure that a redundancy or illness is genuine, and that the associated economic loss is real.

5 Chapter 8 – Coverage and entitlements for loss of work due to health conditions or disabilities

Q49. Do you agree there should be no restrictions on the types of health conditions covered by the scheme?

5.1 To the extent this is a policy question the Law Society has no response.

5.2 However, we note that the Discussion Document indicates that pre-existing conditions will be covered. If so, there is a risk that some employers will be unwilling to employ staff with a

pre-existing medical condition, even if that is not presently a concern or potentially impacting on the person's ability to do the job. The unwillingness will arise because the employer will become liable to pay the initial period of salary if the person later is absent due to that condition and may also need to hold the role open for 6 months if the person were to become unwell. While discrimination on the basis of disability is unlawful, not all "health conditions" are captured by the definition in the Human Rights Act 1993. Also, the reality is that an employer can express other reasons for not employing a person with a health condition or disability where they are concerned about the potential costs of doing so. As the Discussion Document notes at page 99, it is challenging to verify health conditions and disabilities and their effect on work capacity. Some conditions are not simple to assess or verify.

Q50. Do you agree that all work arrangements should be covered (assuming other eligibility criteria are met)?

5.3 To the extent this is a policy question the Law Society has no response.

5.4 However, if all work arrangements are to be covered, practical issues will arise which will need to be addressed, such as:

(a) How to work out entitlements in casual arrangements, for example, for a person who works only occasionally or is very part-time and with flexible hours?

(b) What happens where an employee is on, say, parental leave and becomes incapacitated during that time?

(c) Who will be responsible for paying the initial absence for a contractor (engaged under a contract for service) where the contract payments are for work produced, not time spent?

Q51. Should the scheme cover partial loss of earnings due to a health condition or disability reducing work capacity?

5.5 If the scheme is to cover partial loss of earnings, it will be important to consider practical issues such as:

(a) How any percentage, say 50%, will be assessed, particularly for workers who have variable duties (see answer to question 52, also); and

(b) At what point is it determined that the employer is "unable to support" a drop to part time work; for instance, whether this places an onus on an employer to first try to fill part of a role even where a part-time replacement worker is undesirable for operational reasons or that option is more costly.

Q52. If partial loss is to be covered, do you agree claimants should have at least a 50 percent reduction of capacity to work caused by a health condition or disability and that reduction is expected to last for at least four working weeks?

5.6 It is sensible to have a threshold against which to measure the many and varied medical conditions and disabilities that would not result in 100% incapacity. However, it needs to be clear how this will be assessed – both initially, and as time progresses.

Q53. Do you agree that the claimants' health practitioner should be the main assessor of work capacity?

5.7 This is more a question for organisations such as the Medical Council or College of GPs to address, but the Law Society notes a concern that this obligation places a great deal of pressure on the person's medical practitioner, whose primary role is to support and treat the person. Note too:

(a) It is presently common for medical certificates to be issued readily, with little supporting information. In such cases, given the cost to employers, they are likely to challenge the veracity of the assessment. The scheme administrator will need to have sufficient resource to address such concerns and challenges;

(b) The Discussion Document notes that there could be occasions where the employee applies directly to the scheme because they do not want to disclose their health condition to their employer. This would not work in practical terms, because the employer will need to know of the employee's absence in order to manage their work requirements and will also be liable for the first portion of their absence. The employer also has responsibility for the employee's health and safety at work, so will need to be briefed on any medical conditions potentially impacting this, particularly where the employee is continuing to work (in a partial capacity situation) or is in the process of returning to work; and

(c) The availability of an appeals and review process, as proposed, is supported, as there will undoubtedly be cases where either the employer or the employee does not agree with a health practitioner or second opinion assessment. This will need to be a speedy process so that issues and disputes can be resolved promptly.

Q54. Do you agree that, where appropriate, employers could provide supporting information to inform the claimant's work capacity assessment process?

5.8 Yes, but this should be expressly permitted to ensure full information is able to be provided by employers without them facing Privacy Act 2020 implications.

5.9 Employers should also be able to express any observations of the employee which might impact on whether the employee is in fact limited in their work capacity, including any contextual circumstances that may impact the genuineness of a claim, for example, a recent disciplinary process or performance management being underway.

5.10 It is useful for a work capacity assessment to specify what the employee 'can do' – not only what they 'can't do' – as that helps the employer to determine whether any part-time or flexible work options are potentially available.

Q55. Are the current requirements on employers to make workplace changes sufficient to allow health condition and disability claimants to return to their regular employment (or alternative work)?

5.11 The Law Society considers that several aspects of the Discussion Document are not accurate in relation to this question:

(a) Employers are not presently responsible for cases outside of diagnosed disability so would not "remain" responsible in cases of other, non-disability, health conditions;

(b) The Human Rights Act 1993 does not expressly require an employer to take "reasonable steps to support an employee to continue working" (section 29 relates to making reasonable accommodations) so any such 'rules' or requirements would need to be gleaned from case law guidance; and

(c) The commentary on page 107 of the Discussion Document (directly under the heading "Preferred approach and rationale") is not an accurate statement about what the Human Rights Act 1993 requires. References to "reasonable measures" in the Act (which is mentioned in this section of the Discussion Document) are concerned with an employer being able to take reasonable measures to reduce health and safety risks, which is an entirely different point.

5.12 It follows that the "current requirements" and their sufficiency or otherwise will need further consideration.

Q56. How could employers be supported to help workers with health conditions or disabilities to remain in or return to work?

5.13 As stated in the Discussion Document, requirements to keep jobs open is likely to discourage employers from hiring people with disabilities or health conditions. The "help" that employers are required to provide to employees should not be so onerous that it impacts adversely on the business or operations, as that will likewise discourage employers from hiring those with disabilities or health conditions.

5.14 New Zealand averages a very small number of employees per employer, so references (in the Discussion Document) to it being easier for a larger employer to keep a job open for an employee will not apply to most cases.

Q57. Where an employee must stop work entirely because of a health condition or disability, do you think employers should be expected to keep a job open and help with vocational rehabilitation where a reasonable prognosis is made of return to work within six months?

5.15 To the extent this is a policy question the Law Society has no response, but notes that this period of time is consistent with case law in the area.

5.16 There are likely to be issues with measuring when a six months timeframe commences or how it is measured. For instance, an employee may become unwell with a virus and the initial prognosis is that they will be fully fit for work within two weeks, after some rest and recuperation. The virus then morphs into a bacterial infection and/or results in longer-term post-viral fatigue symptoms, at which point, several months may have passed and it remains unclear when the employee might be able to return to work.

5.17 There can be significant delays in obtaining medical prognoses, because of medical specialist availability and testing capacity (such as scans, MRIs, etc), which likewise impacts on diagnosis timing.

5.18 Any duty on employers to help with rehabilitation will require the provision of information to the employer, which would not otherwise be made available. That is, in order to help with vocational rehabilitation, employers will need to be privy to details about the employee's health condition – to ensure the employee's safe return and other's safety at work.

Q58. Should this be a statutory requirement placed on employers or an expectation?

5.19 As medical cases can vary wildly and be complex to manage, it is suggested that this be an expectation, to allow flexibility – and given there is some protection already available for employees via case law. As noted above, it should be coupled with the provision of sufficient information to the employer to enable it to assist with rehabilitation, safely.

5.20 If this is to be a statutory requirement, this should allow for situations where the employer is not able to hold open the job for the time period prescribed (for example, due to operational or recruitment requirements), or where the role requires a particular skill, qualification or is in a remote location (making it difficult to fill or to travel to).

Q59. Do you agree that employers should only pay a bridging payment to employees leaving work because of a health condition or disability when the employment is terminated by the employer?

5.21 By the time termination is being considered, the employer has usually already paid for extensive sick leave and sometimes for medical support and assistance. Requiring bridging payments to be made also, effectively doubles the employer's wage bill for that period, assuming they will need to replace the worker.

5.22 As the Discussion Document notes, this requirement will likely disincentivise employers from hiring those with health conditions or disabilities, or even those who might be more likely to develop health conditions in the future, such as older persons or overweight persons or those from an ethnic group which is more susceptible to certain health conditions.

6 Chapter 9 – Insurance claimants' obligations

Q60. Do you agree claimants should be obligated to look for work or prepare to return to work while receiving insurance?

6.1 Mitigation is an essential component of all other insurance schemes; there is no apparent policy reason for a different approach here, noting that in cases of illness as opposed to redundancy there would need to be clear medical advice that the person has recovered from their condition.

Q61. Do you agree that claimants would not be expected or required to accept offers of employment that provide lower wages or conditions?

6.2 The ACC scheme requires mitigation, and vocational independence requires taking account of (often) lower paid alternatives. There seems to be no good reason for a very highly paid employee to be encouraged to remain fully unemployed where there are lower paid roles available.

Q62. Do you agree the insurer could waive obligations partially or fully where a claimant is unable to meet those obligations?

6.3 Yes, to provide flexibility, but any decisions to waive obligations should be reviewable.

Q63. Do you agree claimants should be obligated to remain in New Zealand to remain eligible for income insurance?

6.4 To the extent this is a policy question the Law Society has no response, but notes there may be good reasons why a person should be able to travel, including in cases of terminal illness, or to seek treatment overseas.

Q65. Should claimants with health conditions or disabilities be subject to obligations to participate in rehabilitative programmes and other support, where appropriate?

6.5 Yes, but any obligations should be the subject of an independent review process.

Q66. Should claimants with health conditions and disabilities be subject to obligations to search for work or undertaking training where they are able to?

6.6 Yes, but any obligations should be the subject of an independent review process.

Q69. Do you think any other consequences should be in place for people repeatedly not meeting their obligations, such as permanent suspension of entitlements?

6.7 To the extent this is a policy question the Law Society has no response, but given the limits on the length of entitlement over an 18-month period, the scheme will be largely self-policing in this respect.

7 Chapter 10 – Delivering income insurance

Q70. Do you think it is best for ACC to deliver the income insurance scheme alongside the accident compensation scheme? Q71. Would the income insurance scheme be better delivered by a government department or a new entity?

7.1 The ACC scheme is established and its systems have been refined over an extended period. They are also well understood by those lawyers who work in the field. In our assessment the income insurance scheme is sufficiently cognate to the ACC scheme that there would be efficiencies and synergies in it being administered by ACC.

7.2 There is already a very significant shortage of expertise in this area. Such expertise would be further diluted if a new entity or department was involved.

Q72. How could employer and worker perspectives best be incorporated to strengthen the income insurance scheme's delivery for New Zealanders?

7.3 There should be employer, union, and Māori representation on the board as well as direct ministerial oversight.

Q73. How could Māori perspectives best be incorporated to ensure the income insurance scheme is delivered equitably and with aspiration?

7.4 These perspectives ought to be part of the governance of the scheme as noted in the previous question. Māori perspectives could also be incorporated through the obligations to be imposed on those entitled to upskill and seek work.

Q77. What do you think a 'return-to-work plan' should include?

7.5 These are broad, complex questions that should be the subject of a separate policy paper.

Q80. What type of claimants would need a case manager, and who could self-manage?

7.6 These are broad, complex questions that should be the subject of a separate policy paper. The examples provided from overseas schemes do not discuss how these aspects function.

Q81. Do you agree with the proposed four-step dispute resolution process for the scheme?

7.7 To the extent that the dispute resolution process is modelled on the ACC dispute resolution process the Law Society considers it sound. The ACC dispute resolution process typically works fairly efficiently and provides a fair and prompt mechanism for resolving disputes in that context.

7.8 However, consideration should be given to how claimants could be supported in the process, especially as a significant number (by definition) will lack the funds and resources to make their way through the process. Consideration could also be given to making the third step, which involves an independent third-party reviewer, a specialist tribunal, in order to give a less costly access to a judicial decision, rather than having to go the fourth stage of the District Court or High Court. If a specialist tribunal were created, then the appeal at the fourth stage could be on questions of law only or perhaps limited in some other ways.

Q82. Are there specific aspects to the scheme's dispute resolution you think should be considered?

7.9 See response to Q81.

7.10 Consideration should be given to how legal representation in the dispute process is funded, and in particular how costs are awarded in review proceedings. Under the ACC system, costs may be awarded to an applicant and their legal representative even if a review application is withdrawn. The rationale is to ensure that claimants are not inhibited from pursuing their rights by inability to get representation. But on the other hand, such a regime can lead to the incentivisation of applications which have little or no merit.

7.11 In this connection it is worth noting that disputed ACC claims/entitlements may have the capability of affecting a claimant's life and prospects for a much longer period than would, say, the loss a job and associated earnings due to redundancy for which compensation might be provided under the proposed scheme. On the other hand, illness or disability (not being covered by ACC) leading to loss of work might have an equivalent long-term impact. There may be some need to differentiate between the two situations in relation to costs and funding of legal representation.

Q83. Do you agree with the proposal to establish an effective offences and penalties framework to protect the scheme's integrity?

7.12 Yes, an effective offences and penalties framework is essential to proper administration of any entitlements scheme.

7.13 We note the Discussion Document suggests modelling offence and penalties provisions in the Accident Compensation Act 2001. The Law Society considers this to be sound.

Q84. Do you agree with the proposal to develop information sharing agreements and sharing arrangements with employers, other agencies and service providers?

7.14 The Law Society recognises that information sharing measures will be necessary for the operation of the scheme and agrees that they will need to be sensitive to the public interest and sensitivity around information sharing, collection, use and protection, and will require a clear rationale and the authority and capability to safely share information between agencies. The balance will need to be compliant with the Privacy Act 2020 and New Zealand Bill of Rights Act 1990.

Q85. Do you agree the income insurance scheme should be funded from compulsory levies on the income that is insured, rather than from general taxation?

7.15 Yes, as a matter of logic.

Q90. Do you agree that experience rating would not be an appropriate design setting for the employer levy?

7.16 Yes, for the reasons given in the Discussion Document.

Q91. Do you agree that an independent fund with a stable levy-setting system should be established to finance the income insurance scheme?

7.17 Yes, as a matter of logic.

Q92. Do you favour a Pay As You Go or Save As You Go funding approach?

7.18 A Save As You Go funding approach is preferable.

Q93. Do you agree that the legislation for the income insurance scheme should provide the flexibility to vary entitlements and eligibility in times of crisis, over and above the proposed income insurance scheme?

7.19 Clearly there has to be flexibility. How it is done is still up for discussion but allowing changes by regulation and Order-In-Council makes sense.

Q94. Does such flexibility create risks that require additional mitigations?

7.20 This would depend on how the flexibility is achieved.

Nāku noa, nā

Privacy of natural persons

Jacqueline Lethbridge
President