

## *Accident Rehabilitation and Compensation Bill : A feminist assessment*

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*This article argues that the changes to New Zealand's accident compensation scheme proposed in the Accident Rehabilitation and Compensation Bill will disadvantage women to a greater extent than the present scheme. Women already receive far fewer benefits from the scheme because of their lower claims rates, earning levels, and accident rates; and because they are more likely than men to be non-earners. In the 1989 financial year \$148 030 573 was spent on claims from males, as against \$41 360 291 for females.*

*The provisions in the Bill will be likely to increase the differences in male and female compensation levels, particularly given the proposed discontinuance of lump sum payments, often the only significant monetary assistance to non-earners. The article suggests a number of ways in which the Bill could be amended to attain a greater degree of gender-neutrality. It also discusses some of the issues arising from the concept of gender-neutrality in terms of feminist legal theory.*

### I INTRODUCTION

The Accident Rehabilitation and Compensation Insurance Bill was introduced into Parliament in November 1991. The Bill will, if enacted in its present form, greatly change the present accident compensation scheme in New Zealand. The Bill incorporates most of the policy proposals set out in *Accident Compensation : A Fairer Scheme*, released on Budget Night, 30 July 1991. *A Fairer Scheme* is largely based on options examined in *Ministerial Working Party On The Accident Compensation Corporation and Incapacity Report*.<sup>1</sup>

This article discusses aspects of the proposed changes to the accident compensation scheme. It argues that the changes will disadvantage women, in comparison to men, to an even greater extent than the present scheme. The critique will be principally confined to considerations of particular concern to women, rather than more general arguments such as, for instance, the issue of whether the proposals imply a breach of the "social contract" bound up with the loss of the right to sue.

The article has two principal purposes. The first is to outline ways in which the Bill could feasibly be amended to attain a greater degree of "gender-neutrality". The

\* This article was written as part of the LL.B degree at Victoria University.

1 Report to the Ministers of Labour and Health (BV Galvin, Convenor, Wellington, 1991).

second, more academic, objective is to discuss some of the issues arising from the concept of gender-neutrality in terms of feminist legal theory.

## II OVERVIEW OF THE ACCIDENT COMPENSATION SCHEME

The accident compensation scheme in New Zealand is the outcome of the 1967 Report of the Royal Commission of Inquiry on Compensation for Personal Injury, commonly known as the Woodhouse Report. Legislation based on its recommendations was enacted in 1972. Further amendments passed in 1973 extended its provisions to cover non-earners, and on 1 April 1974 the accident compensation scheme began to operate. In 1975 the scheme was expanded to include criminal injuries previously covered by the Criminal Injuries Compensation Act 1963.

The Act is the sole significant remedy in New Zealand for injury by accident since it removes the right to sue (Common Law actions for exemplary damages remain possible). The scheme is relatively comprehensive and based on a no-fault principle. It is administered by the Accident Compensation Corporation (ACC) and is funded by a levy on employers, a levy on owners of motor vehicles, and general taxation. Benefits include earnings related compensation, lump sum payments, health care, and funding for recurring expenses. Earnings related compensation is currently paid at the rate of 80 percent of pre-injury earnings, up to a maximum of \$1,179 per week before tax. ACC has an accident prevention role as well as a compensatory function.

## III WHO DOES THE PRESENT SYSTEM COMPENSATE?

The differences between men and women in relation to injury rates, claims rates, and benefit levels are major and systemic, applying across all categories of work, sport, vehicle and the home. In the financial year 1989 \$148,030,573 was spent on claims from males, as against \$41,360,291 for females (for the combined categories of work, sport, vehicle and home).<sup>2</sup>

Men have higher accident rates in each of the four categories, as is indicated in this summary.

<i>Vehicle</i>	Claims	Costs
Females:	5 774	\$6 897 516
Males:	13 645	\$23 770 618

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<sup>2</sup> These figures and all those below relating to accident/claims rates and compensation amounts are drawn from Accident Compensation Corporation *ACC Injury Statistics* (1990) Vol 1 Work; Vol 2 Sport; Vol 3 Home Injuries; and Vol 4 Vehicle Injuries.

The ratio of female to male claims in this category is 1 to 2.36.

#### *Home*

	Claims	Costs
Females:	18 124	\$13 683 758
Males:	20 984	\$23 070 483

The ratio of female to male claims in this category is 1 to 1.16.

#### *Sport*

	Claims	Costs
Females:	7 238	\$5 541 520
Males:	22 943	\$24 425 746

The ratio of female to male claims in this category is 1 to 3.17.

The injury rates per 1,000 participants were lower for females than males in every one of the forty sporting categories listed.

#### *Work*

	Claims	Costs
Females:	11 501	\$15 237 497
Males:	46 575	\$76 763 726

The female injury rate (that is, calculated in relation to the female labour force) was 18.6 while the male injury rate was 56.0.

## IV WHY THE DIFFERENCES?

Women appear to suffer far fewer accidents than men. This would be a very positive feature of women's health status if it were certain that the present system accurately recognised injuries on a basis of equal treatment of the sexes. What are the causes of the differences in compensation levels and accident rates?

### *A Differences in Compensation Levels*

#### *1 Differences in treatment of earners and non-earners*

Women are more likely to be non-earners than men because of their child-raising and domestic responsibilities. The female paid labour force participation rate in June 1991 was 54.3, whereas the male paid labour force participation rate was 73.4. Women form 44 percent of the paid workforce.<sup>3</sup>

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<sup>3</sup> *Hot Off The Press* "Household Labour Force Survey September 1991 Quarter", Table 1, Department of Statistics, Catalogue No. 05.500, Set No. 91-92/102.

A non-earning woman is not entitled to earnings-related compensation but may be entitled under the present scheme to a lump sum payment for loss of faculty or pain, suffering or loss of enjoyment of life; and/or expenses related to child-care and household responsibilities. It is doubtful that such payments adequately recognise the economic and social loss caused by disruption to unpaid activities. For this reason the original Woodhouse Report proposed that periodic payments be made to non-earners as well as earners, based on some standard notional income.<sup>4</sup>

## 2 *Differences in levels of salaries*

Even if accident rates of men and women were the same, because women earn less than men they receive less earnings related compensation. In August 1991 the average total for weekly earnings for males was \$637.81, and for females was \$477.25.<sup>5</sup> The fact that a woman is more likely than a man to have been a non-earner at some point in her adult life is one reason for the differences in earnings; other reasons include the different values associated with work traditionally associated with men and women and different educational levels.

### *B Differences in Accident and Claims Rates*

ACC statistics would not on their own be a reliable indicator of the differences in male and female accident rates, as a non-earning woman who has an accident will be less likely to claim for it, given the level of compensation she may gain. The ACC rates are however consistent with mortality and demographic data which would not be influenced by compensation issues.<sup>6</sup>

Accidents are therefore things that men have more than women.<sup>7</sup> Although the word "accident" often connotes something completely out of the blue and uncaused, in fact an accident does not simply happen or occur to people. The idea, however, that an accident is one of the "unavoidable and largely irreducible realities of life"<sup>8</sup> - one which happens to people rather than being caused by them - means, perhaps, that it is natural that it should be compensatable. The implication is that it is not possible to avoid accidents or make provision for a possible occurrence.

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4 This idea was discussed but rejected by the Royal Commission on Social Policy *Working Papers on Income Maintenance and Taxation* (1988) Working Paper No 5, 21.

5 *Hot Off The Press* "Quarterly Employment Survey Mid-August 1991", Table 1, Department of Statistics, Catalogue No. 05.504, Set No. 91-92/093.

6 As set out in: John Langley and Elizabeth McLoughlin *A Review of Research on Unintentional Injury: A Report to the Medical Research Council of New Zealand* (no date, but probably 1986)

7 Excluding those for people over the age of 70, where the risk for females exceeds that for males. There are more women in this older group as women live longer. Given the fact that people in this age group are rarely earners, their claims do not form a significant component of ACC expenditure.

8 Above n6, 13.

Accidents are, however, very predictable and to a significant extent, at least in theory, preventable. The fact that men have more accidents than women is surely related to their higher levels of aggression and risk-taking behaviour, with consequences both for themselves and others. It is not far-fetched to see their higher accident rates as an expression and consequence of the male sexual role.

### C *Comments on the Differences in Compensation Levels and Accident Rates.*

The differences in compensation levels are caused by inequalities within the scheme itself, such as the discrimination between earners and non-earners; and also reflect existing disparities in society as a whole. These differences in turn relate to underlying values placed on women's activities, tasks performed in the private sphere of the home versus tasks in the public world of the workplace.

At a more fundamental level, what seems to be a concept with value-free, gender-neutral implications, that of the concept of "accident" itself, turns out to be problematic. The scheme clearly advantages those who suffer accidents as compared to those for whom there are other causes of temporary or permanent incapacity, such as childbirth and illness. Accidents are second only to pregnancy/childbirth as a leading causes of hospital admissions in New Zealand.<sup>9</sup> Both may have equal effects in terms of the necessity to take time off work, but accidents, largely suffered by men, are well compensated whereas childbirth, only undergone by women, is not.

In addition there may be some gender implications in illness rates. Women and men express distress in different ways, and it is worth considering whether men express hurt in "external" ways, by aggressive and risk-taking ways that lead them to have accidents; whereas women may "internalise" distress and hurt in ways and life-style behaviours that result in illness.<sup>10</sup> The fact that accidents are compensatable, while illness is not, may, if this hypothesis is valid, be in itself a form of gender-bias built into the scheme.

## V OVERVIEW OF CHANGES IN ACCIDENT REHABILITATION AND COMPENSATION BILL

The principal reason given in *A Fairer Scheme* for the changes incorporated in the Accident Rehabilitation and Compensation Bill is the view that the present accident compensation scheme costs too much:<sup>11</sup>

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9 Above n6, 17.

10 Illness patterns vary in very significant ways between men and women, whether in relation to cancer, heart disease, or various forms of mental illness. For example neurotic depression and other depressive disorders are the leading cause of female admissions to psychiatric hospitals while alcoholism is the main cause of men being admitted (*1988 Mental Health Data*). It is also true that many physical illnesses are thought to have some mental components as contributing factors - again, cancer and possibly heart disease are both examples.

11 *Accident Compensation: A Fairer Scheme* (1991) 1.

The cost of accident compensation rose at an average of 25 percent per annum between 1985 and 1990, and continues to rise at an unacceptably high rate.

It is considered there are unfair aspects in the scheme, particularly as employers presently fund nearly 70 percent of the total scheme while work accidents account for only about 40 percent of total scheme costs.

The Bill contains changes both to the funding of the scheme and its benefits. The contribution of employers will be decreased, a levy on petrol is proposed, and there will be a new employee's contribution. This is called a "premium" - emphasising the "insurance" concept underlying the proposed changes. Changes to benefits include the abolition of lump sum payments, abolition of claims for mental or emotional harm (unless caused by physical or criminal injury) and restrictions on death benefits and social rehabilitation.

## VI IMPLICATIONS OF THE CHANGES FOR WOMEN

The changes will further disadvantage women, who already as a group are under-compensated by the scheme as it presently operates. Some of the more significant changes are:

### A *The abolition of lump sum payments for loss of faculty, and pain and suffering and loss of enjoyment of life*<sup>12</sup>

This change is of particular importance to women as, given that they are more likely than men to be non-earners, the existence of the provision for lump sum payments is at present the only significant form of monetary compensation available for non-earning women. A non-earner who has an accident will now only be able to receive some of the costs of household help (under the heading of social rehabilitation), and possibly an "independence allowance". This allowance is payable when the personal injury results in a degree of disability of 15 percent or more. Entitlement to the allowance begins 13 weeks after the date upon which the personal injury occurs.

While the benefits to earners have been reduced in a number of ways - for example an age limit is proposed - it seems certain that the discontinuance of lump-sum payments will mean that proportionately less compensation of the overall total will be paid to women than at present.

### B *Stress and mental injury are not covered unless physical injury is present*

The Bill defines "personal injury" in clause 3 as meaning:

- physical injury;
- mental injury suffered as an outcome of physical injury;
- mental injury suffered as an outcome of specified criminal acts, generally sexual offences.

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<sup>12</sup> Above n11, 50.

Mental injury is by itself not recognised by the Bill as being eligible for cover. The reason given in *A Fairer Scheme* for this change is:

Stress claims are a major cause of escalating costs in those overseas workers' compensation schemes that compensate for stress. The present scheme does not include stress cover and the Working Party<sup>13</sup> considered that this should not change. ... The Working Party also recommended that physical injury should be present before mental injury is covered. Although this may give an appearance of arbitrariness, this requirement was seen as necessary in order to avoid stress claims entering "through the back door".

No evidence was given, either in *A Fairer Scheme* or the Working Party papers, to substantiate the claim that abuse is likely to be greater in the case of mental consequences alone than in the case of mental consequences accompanied by physical injury. Neither is any information given of the amount of money that would be saved if this proposal were implemented.

It is not possible to tell from the available information whether women or men receive proportionately greater amounts of compensation for mental injuries as opposed to physical ones (leaving aside the issue of criminally inflicted injuries). It is however arguable that the proposed exclusion of mental injury reflects traditional attitudes to claims associated with female plaintiffs. The New Zealand compensation system has strong roots in the law of torts, which customarily:<sup>14</sup>

... values physical security and property more highly than emotional security and human relationships. This apparently gender-neutral hierarchy of values has privileged men, as the traditional owners and managers of property, and has burdened women, to whom the emotional work of maintaining human relationships has commonly been assigned.

Chamallas and Kerber trace the history of tort law's treatment of fright-based injuries, a type of claim historically brought more often by women. When actions for compensation for miscarriages induced by frightening experiences were first claimed in the nineteenth century, they were declined on the seeming assumption that an ordinary reasonable man would not be so silly as to have a miscarriage simply because of a mere fright.<sup>15</sup>

Chamallas and Kerber consider that "emotional harm has been distorted by gendering it female".<sup>16</sup> The changes to the accident compensation system will now not only distort emotional harm, but ignore it unless it occurs in conjunction with physical harm or as a result of sexual crime.

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13 The Working Party Report, above, n1.

14 Martha Chamallas and Kinda K Kerber *Women, Mothers and the Law of Fright: A History* (1990) 88 Mich LR 814.

15 Above n14, 833.

16 Above n 14, 864.

### C *Mental consequences of criminal injury*

A *Fairer Scheme* left open the question whether criminal injury victims suffering mental injury unaccompanied by physical injury should be given compensation.<sup>17</sup> The Bill now specifically includes mental disorder suffered as an outcome of sexual offence under its definition of "personal injury". It is a positive feature of the Bill, as compared with *A Fairer Scheme*, that such injury will be recognised as compensatable. This is one area where women appear to receive greater levels of compensation than men.<sup>18</sup>

In the year ending March 1991, 961 women and girls and 114 men and boys who had been subjected to sexual abuse received lump sum payments totalling \$9.7 million. The Accident Compensation Corporation also assists with funding for counselling sessions (3.6 million for the two and a half years to the end of June 1991) and directly funding the costs of running services such as Wellington Help.

The availability of compensation under the accident compensation system has been seen as very helpful by counsellors in the area:<sup>19</sup>

The fact that there's compensation available from a no-fault scheme such as ACC says to abused women it's not their fault. The lump sum is a public and concrete acknowledgement that a woman has suffered through no fault of her own. That's hugely positive for the women who receive it. They've been disbelieved all their lives and when a government agency says it believes her, it recognises the damage that's been done to her and is prepared to help her rebuild her life, it's very positive and very liberating.

Although the inclusion of this category of "personal injury" is welcome, it may have little tangible effect because of the discontinuance of lump sum payments. For most women, it may simply mean the payment of an amount - unspecified in the legislation - for health care services.

### D *Definition of "medical misadventure"*

The Bill, unlike the present Act, defines "medical misadventure" in clause 4. It will mean actual medical, surgical, dental, or first-aid treatment by a registered health professional which causes personal injury where -

- (a) the likelihood that the personal injury would occur as a result of the treatment is rare and not merely uncommon, undesired, or unanticipated; and
- (b) the consequences of the injury are severe.

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17 Above n11, 32.

18 As reported in *The Dominion* Wellington, 26 August 1991 "Who pays the price of nursing invisible scars?".

19 Help counsellor, Lesley Huffan, quoted in article referred to above n18.



Tests for the meaning of "rare" and "severe" are given. It is a little difficult to tell whether the tests are gender-neutral as they are so narrowly defined as to seemingly include very little at all. An injury would be rare only if the likelihood of occurrence as a result of treatment is less than one chance in two thousand. Under this test it would be difficult if not impossible for rarity to be assessed in the case of new medical procedures.

The consequences of an injury is "severe" only if the injury has resulted in or is reasonably certain to result in a permanent impairment of 15 percent or more determined in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment (subclause 4(4)). For example, the criteria for evaluating permanent impairment of the fallopian tubes and/or ovaries include:<sup>20</sup>

**Class 1 - Impairment of the whole person, 0-10%:**

A patient belongs in Class 1 when (a) symptoms and signs of disease or deformity of the fallopian tubes and/or ovaries are present that do not require continuous treatment; or (b) only one fallopian tube and/or ovary is functioning in the premenopausal years; or (c) there is bilateral loss of function of the fallopian tubes and/or ovaries in the premenopausal years.

**Class 2 - Impairment of the whole person, 15-25%:**

A patient belongs in Class 2 when symptoms and signs of disease or deformity of the fallopian tubes and/or ovaries are present that require continuous treatment, but tubal patency exists and ovulation is possible.

### *E Death benefits*

The Accident Rehabilitation and Compensation Insurance Bill will reduce the benefits presently payable to a surviving spouse following a death by accident. The changes will have a disproportionate effect on women, as compared with the present scheme, as most "surviving spouses" will be women, given the higher accident rates of men and the fact that women are more likely to be non-earners.

Surviving spouses are only eligible if they are "dependent", that is, not in paid employment. At present under section 65 a surviving spouse, deemed "totally dependent", is paid compensation at the rate of three-fifths of the earnings-related compensation that would have been payable to the deceased spouse. This is payable until remarriage, death, or an upper age limit is reached.

Under the Bill benefits will be reduced, for example, by taking inadequate account of what is involved in being responsible for children. It is proposed that weekly compensation only be payable if the surviving spouse is dependent on the deceased person at the date of the deceased's death (that is, earns less than 52 times 80 percent of

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20 American Medical Association *Guides to the Evaluation of Permanent Impairment* (3ed (Revised), 1990), 209.

the minimum wage) (clause 53); and while the spouse cares for a child under the age of seven; or if the spouse is over the age of 45 (clause 54).

Once any child for whom the surviving spouse is responsible is over the age of seven, the compensation ceases to be payable. A "transition to work allowance" may be payable, as long as the surviving spouse "has agreed to and is implementing an individual vocational rehabilitation programme" (clause 57); but ceases if the spouse refuses without good reason an offer of permanent employment in which the spouse could earn more than 80 percent of the minimum wage; and in any case is not payable beyond a maximum of 2 years (clause 57(3)). It is specified that caring for a child over the age of seven is not a good reason to refuse an offer of employment. Even if a surviving spouse is caring for several children over the age of seven she or he may no longer receive compensation.

While having tests for dependency and benefit eligibility may be reasonable, they should be flexible, and able to take into account information relevant to whether the spouse is indeed able to resume full-time employment. Present employment patterns indicate that not all women return to work after their youngest child reaches seven:<sup>21</sup>

At the time of the 1986 census, even with the support of partners, 27% of mothers with a youngest child aged 5-9 were employed full-time and 24% parttime. Even mothers with youngest children aged between 10-14 had relatively low participation rates in paid employment. (35% full-time and 28% part-time). Sole parents had even lower participation rates.

For employment to be a viable option, if a spouse has one or more children over the age of seven, some child-care arrangements will need to be made for after school and during school holidays. A wage of 80 percent of the minimum wage affords little leeway for such expenses. In addition caring for children makes choice of employment difficult and tends to push women into low-paid, part-time employment.

## VII VOCATIONAL AND SOCIAL REHABILITATION

### A *Vocational Rehabilitation*

The Bill appears to envisage, in clause 24, that vocational rehabilitation will, in general, be available only to earners. In some cases it will be available as compensation for loss of potential earnings and surviving spouses. The class of those compensatable for loss of potential earnings is very tightly defined in clause 42, and is restricted to those who suffer personal injury before attaining the age of 18 or while engaged in full-time study, and who meet the specified criteria.

Vocational rehabilitation, for example the cost of retraining, will not therefore be available to the general class of non-earners. This seems both very unrealistic, given

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<sup>21</sup> Ministry of Women's Affairs *Submission of the Ministry of Women's Affairs on the Proposed Changes to Accident Compensation* (Wellington, August 1991)10.

the high present rates of unemployment, and unfair, given the needs of those temporarily away from the workplace, such as women looking after children. The exclusion of non-earners from eligibility for vocational rehabilitation impliedly denies that non-earners may also work, and in its general disregard of the needs of non-earners devalues them.

Vocational rehabilitation could be very helpful to, for example, the person who is injured in such a way that she or he cannot continue satisfactorily child-care responsibilities, considering their significant physical component. In such a case the person may benefit from vocational rehabilitation so as to enter the paid workforce and fund alternative child care arrangements.

### *B Social Rehabilitation*

*A Fairer Scheme* envisages that the situations in which social rehabilitation will be granted will be fewer than at present and the amount of assistance will be considerably limited. They are therefore explicitly defined in clause 28. As this form of rehabilitation is one of the few benefits presently available to the non-earner, this change will further disadvantage them.

## VIII PAYMENT OF PART-CHARGES OF PUBLIC HEALTH COST

The implications of the Bill for non-earners in relation to public health costs are not clear. Clause 61 states that "where a person requires any health care treatment or service ..., the Corporation shall contribute to the cost of that treatment..., to the extent required or permitted by regulations made under this Act". This applies to both earners and non-earners.

If the regulations require or permit all public health costs to be paid, there will be no disadvantage for non-earners in this provision. If only some costs are to be paid, the non-earner may be discriminated against in terms of simply having less money to pay the shortfall - although this may be mitigated by the "community card".

It is a major weakness of the Bill that this major component of any accident compensation scheme, namely the cost of treatment and hospital costs, cannot be commented on given the vagueness of the clause and the intention to leave the matter to regulations. These regulations are presumably not drafted and even when drafted may not, if the usual process is followed, be circulated for public comment.

## IX EXTENSION OF COMPENSATION FOR LOSS OF POTENTIAL EARNINGS<sup>22</sup>

One proposal in *A Fairer Scheme* was a step in the direction of gender equity, but seems to have been dropped in the drafting of the Bill. *A Fairer Scheme* notes that the

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22 Above n11, 45.

present Act provides for children and those studying to receive compensation for loss of potential earning capacity. *A Fairer Scheme* states:<sup>23</sup>

There is an anomaly in that the same provision is not available to others injured while not in the workforce, such as a woman injured in a motor vehicle accident during a period when she was caring for young children. The Government has decided that persons temporarily out of the work force when injured will in future receive some compensation for loss of potential earnings.

The Government has now apparently decided that this anomaly is to remain, and that the one step in the direction of gender equity proposed in *A Fairer Scheme* is to disappear. As noted above, compensation for loss of potential earnings is confined to those under the age of 18 or studying.

## X SUMMARY OF IMPLICATIONS FOR WOMEN OF CHANGES TO THE SCHEME

The main ways the proposals will disadvantage women will be by a substantial reduction in the level of benefits available to non-earners, thus sharpening the distinction between earners and non-earners; and by limiting the categories of harms seen as compensatable by the scheme, including mental injury and medical misadventure. At present women receive 21.84 percent of the total amount of benefits paid out under the scheme.<sup>24</sup> This proportion is likely to decrease after the changes are implemented. In addition the scheme will disadvantage women by making earning women pay directly to the scheme by way of employee premiums, so that women - who form 44 percent of the total number of employees - will contribute to a scheme from which on present levels they receive less than 22 percent of amounts paid in compensation. Women employees will therefore be subsidising male employees.<sup>25</sup>

How do we explain the fact that the scheme is regressing in terms of equal treatment of men and women? The impetus of the changes is derived from an understandable need to reduce the costs of the scheme. But this does not explain the particular decisions made. Other options for cutting costs were available to the decision-makers, and not chosen.<sup>26</sup>

It is unfortunate that some of the gains often thought to have been made by women in the last 20 years can now be employed against their interests. This is particularly evident in the death benefits. The expectation is now clearly that a surviving spouse goes out to work when her youngest reaches seven, unsupported though this is by actual working patterns.

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23 Above n11, 46.

24 This percentage is based on the totals of figures from ACC Injury Statistics, above n 2.

25 This is partially qualified by the fact that the level of women's premiums will be on average lower, given their lower wages.

26 See below, section 8.

## XI POSSIBLE AMENDMENTS TO THE BILL TO ACHIEVE A GREATER DEGREE OF GENDER NEUTRALITY

### A *Need for Principles*

The original Woodhouse Report articulated clearly the principles that it was hoped would underlie the present accident compensation system, that is: community responsibility, comprehensive entitlement, complete rehabilitation, real compensation, and administrative efficiency. These principles have been subsequently endorsed as still relevant by the *1988 Law Commission Report*<sup>27</sup> and *Report of the Royal Commission on Social Policy*.<sup>28</sup>

The Bill departs from the original principles but does not explicitly identify what new principles are now considered to underlie the scheme. There is no "purposes" or "objectives" clause in the Bill. The only indication of the Bill's objectives is in the long title, namely:

An Act to establish an insurance-based scheme to rehabilitate and compensate in an equitable and financially affordable manner those persons who suffer personal injury.

In *A Fairer Scheme* a number of different principles and objectives were used to justify different policy choices, which taken together were not consistent. At different times the no-fault principle appeared to have priority over the concept of penalising for misconduct, but not always.<sup>29</sup>

The concept of "insurance" now appears to be a fundamental concept underlying the scheme. It is clear that the concepts or ideals of community responsibility and comprehensive entitlement have been abandoned, even as ideals. The very concept of insurance has gender implications - certainly its effects mean that it is not value-free. Its basis is that those who contribute to the scheme in direct financial terms are those who deserve to contribute from it. An accident compensation scheme which is insurance based ignores the value of, and thus devalues, those who contribute to society in other ways, for example through caring for children.

The change in philosophical direction from "community responsibility" to "insurance" - with its gender implications - should be made clear and debated. To the extent that the scheme is now an "insurance" one, it is a very dubious one. Who, for example, would contribute voluntarily to a private sector insurance scheme where the returns were unknown, or it was clear from the outset that if a person was forced to stop contributing through unplanned-for unemployment, there would be no way to reap any return on the person's investment in the scheme? What spouse would contribute to life

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27 Law Commission Report No 4 *Personal Injury: Prevention and Recovery. Report on the Accident Compensation Scheme* (1988).

28 Above n4, 14.

29 For example, where it is suggested that conduct could give rise to disqualification for some benefits, see the discussion on registration of motor vehicles, above n11, 35.

insurance knowing that in the event of their death the surviving spouse and family would only benefit if and until the youngest child reached the age of seven?

*B Need for the Principle of Gender neutrality*

Because of the lack of awareness of the kinds of harms women suffer, it would be helpful for legislators, policy makers, administrators and the general public to be reminded that gender neutrality should be an aim of an accident compensation scheme. Acknowledgement of this principle in an "objectives" or "purposes" clause could ensure that specific provisions gave effect to it and influence the interpretation of the enacted legislation.

The principle of gender-neutrality would need to be clearly defined. A suggestion for such a definition is: a compensation scheme is gender-neutral when it takes account to an equal extent of the kinds of harms suffered by both men and women - which may not be the same - and which compensates them to an equal extent, in ways which need not be the same - in relation to benefits, treatment and rehabilitation costs, and compensation for loss of earning potential both now and in the future.

*C Specific Recommendations:*

*1 Lump sum payments*

Lump sum payments should not be abolished unless adequate alternative means are found for compensating non-earners. Such alternatives could include more liberal provisions under the heading of vocational rehabilitation or social rehabilitation - as noted above, clause 28 does not at present include funding for child care. Perhaps more appropriately, injured non-earners could be compensated by a realistically set "independence allowance". At present, clause 50 restricts this to \$40 per week for persons with a disability of 100 percent, and "shall be at such lesser graduated rates as are set by regulations made under this Act in respect of those persons with lesser degrees of disability" - clause 50(4). Even the maximum amount of \$40 is not going to buy much child care for the woman who has broken a leg and has two pre-schoolers. In addition she will not be entitled to any allowance until 13 weeks after the date on which the injury occurs.

There may be still occasions when a lump sum payment is the appropriate form of assistance, in which case the legislation should allow for commutation of benefits. Specific consideration should be given to the needs of sexually abused people who at present are able to claim lump sum payments for pain and suffering.

The Ministry of Women's Affairs states that:<sup>30</sup>

Funds gained in this way [lump sum payments] were often used for rehabilitation, for example to secure a house, to move to a safer locality, to provide safer transport in the

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<sup>30</sup> Above n22, 5.

form of a motor vehicle and so on. As lump sum payments will no longer be available, it is important that such rehabilitative assistance should be available through the ACC alongside items of assistance for physical injury such as wheel chairs ....

## 2 *Mental injury*

As mental injury can have very real effects in terms of a person's ability to live a full life, I believe that this should continue to be compensatable. Although the assessment of mental injury for claims purposes is complex, some help could be given by the preparation of guidelines, as is proposed for physical injury. I believe that the standard could be as suggested by the Law Commission: "significant" or "lasting" mental distress/injury.<sup>31</sup>

## 3 *Death benefits*

Any test for dependency and the criteria for eligibility for death benefits should take into account the possibility that a non-earning spouse of a deceased spouse may not necessarily be able to resume full-time employment when her youngest child reaches the age of seven. Additional facts of relevance to eligibility could include: where there is more than one child; where one or more children have special needs, for example, intellectual handicap; or where the dependent is a sick or disabled adult.

## 4 *Vocational and social rehabilitation.*

In order to attain a greater measure of gender neutrality the benefits available under social rehabilitation should be broadened and vocational rehabilitation be extended to non-earners.

## 5 *Payment of public health costs*

More realistic public input would be possible if the regulations intended to cover the payment of public health costs were to be drafted immediately and made available for public submissions. Such regulations should ensure equal treatment of earners and non-earners.

## 6 *Compensation for loss of potential earnings*

The original proposal in *A Fairer Scheme* should be reinstated, and provision be made in the Bill for compensation for loss of potential earnings for those out of the paid workforce. Eligibility should extend to any person who has been in the paid workforce. Compensation could in some instances take the form of one or more of: vocational rehabilitation, social rehabilitation, and/or the independence allowance.

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31 Above n28, 64.

## XII FUNDING FOR SUGGESTED CHANGES TO THE PROPOSALS

Most of the recommendations suggested above to implement a greater degree of gender neutrality and to redress the inequalities between earners and non-earners would increase costs for some specific benefits. I believe other policy choices can be taken so as to afford them. Any suggested amendments to the Accident Rehabilitation and Compensation Insurance Bill must take account of fiscal constraints, but to accept as necessary some elements of the proposed financial structure of the scheme is to accept premises which are value-laden and gender-biased.

"Premiums" can be set at a slightly higher rate to provide for the availability of cover for mental injuries, and more generous death benefits. The most difficult issue in terms of the scheme as structured in the Bill is compensation for non-earners.

Policy options include:

### 1 Modifying some benefits other than those targeted

An example would be to lower the maximum amount that could be paid by way of earnings-related compensation. The rate at which this is set is very significant for the overall costs of earnings related compensation. The Bill opts for the present level of \$1,179 per week, although the Working Party had recommended a maximum of the average wage. (This recommendation had not been accepted in *A Fairer Scheme*).

### 2 Increasing the amount of money funding the scheme

The Bill envisages a more complex funding arrangement than currently exists. As well as being funded by employers, levies, and the taxpayer, it is proposed that employees also pay a premium - to be collected in the same way as ordinary taxation.

If the scheme is now to be regarded as a form of insurance, it would be usual to base premiums on experience. *A Fairer Scheme* states that the government intention is for premiums for non-work injury to be risk-related. The Bill provides (clause 115) that "Regulations made under this Act may establish a system for the experience rating of persons liable to pay earner's premium which may include no claims bonuses, increased premiums, or claim thresholds." It is not reasonable to assume that such regulations will be prepared. They would be likely in any case to disadvantage those earners whose employment is discontinuous but transfer in and out of employment for such reasons as child-care responsibilities. In the meantime, premiums are to consist of a flat-rate percentage on earnings.

There are two ways of implementing experience ratings immediately, both much fairer than the present flat-rate proposal.

### 1 Higher premiums for men than women

The dramatic differences between male and female accident rates would seem to fully justify different experience ratings for men and women. The differences would justify



men paying either twice or three times as much as women in their earner premiums, depending on how much weight was given to work-related costs.

The difficulty with this concept, in terms of the scheme as presently envisaged, is that each source of funding - whether employer levy, employee premiums, or motor-vehicle levy - is meant to be self-contained. This is made clear in the provisions relating to the different "accounts" - "Earner Account", "Nonearner Account" etc (see clauses 107 and 112). Funds derived from one source, such as the workplace, cannot be used to fund compensation for accidents occurring in another environment such as the home - that is, there is no possibility for cross-subsidisation. The combination of no cross-subsidisation and no experience rating means that earning women will, through their low accident rates, subsidise the compensation paid to earning men having accidents in the workplace; while an earning woman cannot subsidise the compensation payable to a non-earning woman having an accident in the home - or to herself when she is out of the workforce.

In stark terms, women can subsidise men, but women cannot subsidise other women.

It could be considered that this very lack of cross-subsidisation between aspects of the scheme will in this context be an example of very harmful gender-discrimination.

What are the alternatives?

- (a) That there is no cross-subsidisation between aspects of the scheme, and that female earners pay a lesser premium than men in direct relation to their work-injury claims as a group. While this would mean a measure of equity vis-à-vis male and female employees, it would not provide additional funding for compensation for non-earners.
- (b) That we allow cross-subsidisation between aspects of the scheme. An objection to this possibility is that the earner could oppose his or her premiums being set at a level superfluous to the requirements for compensating earners. A counter-argument could be that subsidisation is going to occur under the scheme anyway, that is, female earners will subsidise male earners, although this is not explicit because males and females are not separately identified.
- (b) That the scheme "subsidises" the non-earner to a greater extent through general taxation. If the Earners Account was allowed to subsidise the Non-earners Account, as suggested above, it could be argued that this is tantamount to treating the basis of the scheme as one of general taxation rather than insurance. While this is true, it begs the fundamental question of whether New Zealanders would prefer a more comprehensive scheme, incorporating a measure of equity for both earners and non-earners, and funded to a greater proportion by general taxation; or whether a more narrowly based insurance scheme, basically benefiting earners and funded by "premiums", is preferred.

A more general scheme, incorporating the Woodhouse ideals of community responsibility and comprehensive entitlement, implicitly acknowledges that the basis of community responsibility is the fact that we all are mutually inter-dependent, all benefit from the contributions of others whether or not those contributions are financial in nature, and all at some stage of our lives are more in need of assistance than others - whether through illness, accident, age or redundancy.

- 2 A special levy on organisations representative of high-risk activities, namely sport.

*A Fairer Scheme* states that the option of charging sports clubs was rejected on the grounds of administrative complexity (and resulting costs) and fairness. It could be considered unfair not to address this major accident area and that sporting organisations should have a responsibility, and do have the capacity, to encourage safer practices among their members.

The only area where this would be unfair is in relation to the non-organised sports such as jogging or fishing, but this would be a relatively minor form of unfairness compared with not recognising the major and predictable costs placed on the scheme by all sporting activities.

If the present structure of separate accounts is maintained, such funds could be directed to the non-earners account.

### XIII THE CONCEPT OF "GENDER NEUTRALITY" IN FEMINIST LEGAL THEORY

It has been argued that the provisions in the Accident Rehabilitation and Compensation Bill be measured against the test of gender neutrality, and that the principle of gender neutrality be explicitly incorporated in the new legislation.

For some feminist legal theorists, the concept of gender neutrality is not without its problems, because of the part it plays in debates about whether proposals for reform should focus on the similarities or the differences between men and women. As Frances Olsen says:<sup>32</sup>

Feminist theorists seem to be obsessed by the question of whether women should emphasize their similarity to men or their differences from men.

For the purposes of law, she says:<sup>33</sup>

this obsession with sameness and difference has taken the form of a debate between formal equality for women and substantive equality for women - or between so-called "equal treatment" and so-called "special treatment".

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32 "From False Paternalism to False Equality" (1986) 84 Mich LR 1518.

33 Above n 32.

Catharine MacKinnon describes the "equal treatment" approach as being termed "gender neutrality doctrinally and the single standard philosophically".<sup>34</sup>

The debate over whether formal or substantive equality is the better approach is played out in a number of contexts, for example, in relation to maternity leave employment provisions, protective labour legislation, and the issue of statutory rape. Wendy Williams feels that "[i]f we can't have it both ways, we need to think carefully about which way we want to have it";<sup>35</sup> and she suggests that the equality approach is preferable. She considers that the "special treatment" approach can mean that women are treated less favourably. Experience with protective labour legislation, for example, shows that it can turn out to be a double-edged sword, and can be used as a barrier for women in some areas of employment.

Other writers consider that formal equality can amount to pseudo-neutrality, and that "formal equality can perpetuate inequality in actual practice".<sup>36</sup> Such writers would consider that there are real differences between men and women, and that law should recognise this.

It is also felt that "[t]he fundamental objection to the equal treatment approach is that is inevitably accepts the male norms...".<sup>37</sup> Furthermore, the equal treatment approach falsely assumes that men are treated equally under policies or laws embodying it, whereas in reality men gain a unequal advantage: "virtually every quality that distinguishes men from women is already affirmatively compensated in this society".<sup>38</sup>

Several writers now propose that this debate between formal and substantive equality, or "gender neutrality" and special treatment, is unhelpful; and that in any case both approaches are premised on what MacKinnon calls the "differences" concept - that is the extent to which women are or are not like men. MacKinnon proposes an alternative: "[t]he dominance approach which recognises gender as a hierarchy and sets out to abolish that hierarchy".<sup>39</sup> As MacKinnon says: "In this shift of paradigms, equality propositions become ... propositions of power and powerlessness".<sup>40</sup> She describes the goal of this approach as being:<sup>41</sup>

... not to make legal categories trace and trap the way things are. It is not to make rules that fit reality. It is critical of reality.

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34 C Mackinnon *Feminism Unmodified* (Harvard, Cambridge, 1987) 33.

35 "The Equality Crisis: Some Reflections on Culture, Courts, and Feminism" (1982) 7 *Women's Rights Law Reporter* 175, 196.

36 Frances Olsen "Statutory Rape: A Feminist Critique of Rights Analysis" (1984) 63 *Texas ULR* 387, 397.

37 Lucinda Finley "Transcending Equality Theory: A Way out of the Maternity and Workplace Debate" (1986) 86 *Columbia LR* 1118, 1147.

38 Above n34, 36.

39 Frances Olsen "Feminist Theory in Grand Style" (1989) 89 *Columbia LR* 1147, 1153.

40 Above n34, 44.

41 Above n34, 40.

Is then support of the concept of gender neutrality an example of falling into the trap of "the way things are"? MacKinnon believes that:<sup>42</sup>

the state will appear most relentless in imposing the male point of view when it comes closest to achieving its highest formal criterion of distanced aperspectivity.

Although the power of MacKinnon's radical vision is unchallengeable, for the purposes of developing a workable accident compensation scheme, the approach suggested by Nadine Taub is preferable. She suggests what she considers to be a synthesis of the "differences" approach and the inequality or dominance approach:<sup>43</sup>

Since a differences approach involves the comparison of the purpose or objective to be accomplished with the sex-related means chosen to accomplish it, the purpose or objective of the challenged scheme must always be identified. The inequality approach can inform that identification process.

Taub believes that MacKinnon's inequality approach helps us to look more clearly at the rules formulated in a male-dominated society, and to formulate "truly neutral rules".<sup>44</sup>

While MacKinnon would certainly not agree that the formulation of truly neutral rules is in fact possible, Taub's approach of examining the effects of legal provisions and then developing rules capable of meeting as many needs and values as possible is very helpful. This approach is applied here to this approach to the issue of accident compensation.

In the suggestions for changes to the Accident Rehabilitation and Compensation Insurance Bill outlined in this paper, it is recognised that women are not the same as men. As a group, women tend more than men to be non-earners, and tend far more than men to suffer the effects of violent and sexual crimes. The scheme should accommodate this, but it would not be appropriate to do so by means of special treatment for women, identified as such. A substantial number of men are also non-earners, and at least some suffer violent/sexual crime. The group differences between women and men can easily, and appropriately, be dealt with by means of proposals which recognise the harms that both groups tend to suffer most of.

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42 "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" (1983) 8 *Signs: Journal of Women in Law and Culture* 635, 658.

43 "Sexual Harassment of Working Women: A Review" (1980) 80 *Columbia LR* 1686, 1693.

44 Above n43,1694.

Feminist issues can be looked at in terms of which strategies best serve which ends. As Olsen says on this general issue:<sup>45</sup>

In the nineteenth century, as today, the choice between equal treatment and different treatment for women could not be made in the abstract, but only in context, case by case.

The anticipated "end" in this case of an accident compensation scheme is relatively unambitious, a small step in redressing the inequalities between men and women. In the words of the Ministry of Women's Affairs submission on *A Fairer Scheme*, all that is being proposed is a scheme that works as well for women as it does for men.<sup>46</sup>

The recommendations for changes to the scheme do not have as their objective the ending of the fact of gender hierarchy, or the sexual subordination of women by men. Proposals for change that strike more directly at such issues, such as pornography, are more obvious candidates for a clear MacKinnon approach.

It is, however, necessary to examine what is meant by such terms as "neutrality" and "equality". Both terms have been used in many different ways - equality can mean, for example, simply a lack of formal discrimination, or it can mean equality of opportunity, impact, "welfare, results, resources, and consideration of interests".<sup>47</sup> The examination of what the terms mean in any given context is helpful both in order to analyse their gender, and in deciding what we want them to mean. In Lacey's words:<sup>48</sup>

Only by reconstructing the notion of equality can we gradually escape the problem of equality as comparative with a male-defined norm. This project of recapturing normative concepts and reworking them from a feminist perspective has always been one of the most important projects facing feminism.

At first sight, the proposal that men pay higher premiums in the new scheme might seem like "special treatment" in favour of women. It certainly does mean putting in legislation "the truly forbidden word, the truly obscene word 'woman'".<sup>49</sup> The proposal could be seen as a way of redressing the dominance of men by women, as expressed through their violence towards them, by ensuring they contribute towards the cost of their financial compensation. Also, the defensive reaction that most men would be likely to have to this proposal, which would not be accounted for only by monetary concerns, would be an indication of a "MacKinnon" type flavour to the suggestion.

It would be both justifiable, and an example of the "recapturing and reworking of normative concepts", to see this proposal as an application of the the principle of gender

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45 Above n33, 1522.

46 Above n22, 1.

47 Nicola Lacey "Legislation against Sex Discrimination: Questions from a Feminist Perspective" (1987) 14 *Journal of Law and Society* 411, 414.

48 Above n 47, 419.

49 Catharine MacKinnon in "Feminist Discourse, Moral Values, and the Law - a Conversation" (1985) 34 *Buffalo LR* 11, 34.

neutrality. Men should pay more because they cost more. In this context the concepts of neutrality and equality simply mean equality of inputs and outputs.

#### **XIV CONCLUSION: QUESTIONS OF FAIRNESS AND HEALTH**

The proposals in the Accident Rehabilitation and Compensation Insurance Bill will render the present scheme far less fair. The original objectives of the scheme were equitable, but would now under these proposals be dramatically modified so as to reflect and buttress increased inequalities in our society. The changes will increase the disadvantages that women in the home already experience under the present scheme, while now making use of earning women to subsidise the accidents of their male work-mates.

The changes suggested to the Bill's provisions involve a re-think of what kind of accident compensation scheme New Zealanders want. In analysing the proposed changes, we should not be blinded by neutral-seeming concepts such as "insurance". The concept is neither value-free nor gender-neutral. Basing the scheme on this principle rather than the original one of community responsibility, as partially funded by general taxation, generates a number of internal inconsistencies within the Bill.

On the one hand, if this were truly an insurance scheme, and not compulsory, who would buy into it? On the other hand, the label of "insurance" disguises the extent to which subsidisation will inevitably occur between men and women. To that extent the scheme is not truly transparent. A more comprehensive scheme, one that is clearer about its objectives, may as well as being fairer be more logical in not having to pretend to being other than what it is.

The proposals for change in this paper would only mean that women would not further be disadvantaged. There does not seem much possibility at present of pressing for more fundamental changes which would make the scheme truly gender-neutral and "fair". In the long-term, however, thought should be given to how to remove the fundamental biases of the scheme. The scheme could achieve equal treatment for the sexes by such measures as adequate compensation for non-earners; equal treatment of all forms of incapacity, particularly accidents and illness, and perhaps general disability, however derived; and the enactment of such measures as pay equity.

A second long-term aim would be to work towards what was originally conceived as being an underlying health objective of the scheme, that of accident prevention. Even if the all biases in the scheme were removed, men would still receive more compensation for accidents because of their higher accident rates. To effectively prevent such accidents, for their sake and for the sake of those they harm, attention should be paid to the fundamental causes of the differences in accident rates between men and women.

As the present high accident rates of males, particularly young males, are the result of aggressive, risk-taking behaviour, it is clear that accident rates are one outcome of the traditional male sexual role. Accident prevention therefore requires not only informational and legislative measures, but thought and commitment to change our

fundamental assumptions and values concerning what it is to be male, and what it is to be female.

**XV SUMMARY OF RECOMMENDATIONS ON THE ACCIDENT REHABILITATION AND COMPENSATION INSURANCE BILL.**

- 1 That the principles and objectives of the Accident Rehabilitation and Compensation Insurance Bill be clearly identified.
- 2 That the "insurance" concept in the Bill be rejected and replaced by the concepts of community responsibility and comprehensive entitlement.
- 3 That gender neutrality be a central principle of the Bill.
- 4 That lump sum payments be continued until adequate means are found to compensate and rehabilitate non-earners who have accidents.
- 5 That such compensation recognise and adequately compensate the economic and social costs of an accident for those with responsibilities for child-care or other dependants.
- 6 That compensation for non-earners could be partially fulfilled by a broader range of benefits available under the headings of "social rehabilitation", the "independence allowance" and vocational rehabilitation, and/or compensation for loss of potential earnings.
- 7 That there be provision for commutation of these benefits in appropriate cases.
- 8 That specific consideration be given to the needs of sexually abused people who at present are able to claim lump sum payments for pain and suffering.
- 9 That the accident compensation scheme continue to recognise mental injury, whether or not accompanied by physical injury.
- 10 That tests for dependency and criteria for eligibility for death benefits take into account all facts relevant to whether the surviving spouse is able to resume full-time profitable employment.
- 11 That the benefits available under the heading of social rehabilitation be broadened.
- 12 That vocational rehabilitation be available to non-earners.
- 13 That the regulations intended to cover the payment of public health costs be drafted immediately, made available for public submissions in conjunction with the Bill, and discussed together by the Committee to which the Bill is referred.
- 14 That the regulations ensure equal treatment of earners and non-earners with regards to the payment of public health care costs.

- 15 That provision be made in the Bill for compensation for loss of potential earnings for those out of the paid workforce. Eligibility should extend to any person who has been in the paid workforce. Compensation could in some instances take the form of one or more of: vocational rehabilitation, social rehabilitation, and/or the independence allowance.
- 16 That alternatives to the policy options expressed in the Bill be considered so as to provide for a greater degree of gender neutrality
- 17 That the benefits, and the effects, of lowering the maximum amount payable by way of earnings-related compensation be examined - for example the effect of a \$1,000 maximum.
- 18 That female employees pay lower premiums than male employees.
- 19 That the Non-earners Account be subsidised to a greater extent than presently envisaged by general taxation to provide for fairer compensation to non-earners.
- 20 That the concept of a special levy on organisations representative of high-risk activities such as sport be considered.