National Council of Women of New Zealand
Te Kaunihera Wahine o Aotearoa

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MAKING EQUALITY REALITY

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S22.03

Submission to the Education and Workforce Committee on the Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Bill 103—1

Introduction

1. The National Council of Women of New Zealand, Te Kaunihera Wahine o Aotearoa (NCWNZ) is an umbrella group representing over 200 organisations affiliated at either national level or to one of our 14 branches. In addition, about 450 people are individual members. Collectively our reach is over 450,000 with many of our membership organisations representing all genders. NCWNZ's vision is a gender equal New Zealand and research shows we will be better off socially and economically if we are gender equal. Through research, discussion and action, NCWNZ in partnership with others, seeks to realise its vision of gender equality because it is a basic human right.
2. This submission has been prepared by the NCWNZ Safety Health and Wellbeing Action Hub and the Parliamentary Watch Committee.
3. NCWNZ welcomes this Bill and the opportunity to submit on proposed legislation of great importance to mothers, parents, children and whānau.

Executive Summary

4. NCWNZ strongly supports the aims of the Bill to provide more equitable coverage for injuries covered by the Accident Compensation Scheme (ACC), to provide greater clarity for claimants, and to better give effect to the policy intent of the Accident Compensation Act 2001.
5. The Bill aligns with long standing NCWNZ policy in support of free and equal access to financial and rehabilitative services provided through ACC.
6. We consider the list of specified injuries is broad, though not exhaustive, covering some rare injuries as well as the most common which are tears. However, NCWNZ is concerned about the current sole focus of ACC on cause of injury. There is genuine worry that such a narrow focus will perpetuate the prolonged, stressful and inequitable outcomes experienced by many current claimants to ACC. Our concern is further heightened given the complexity and range of injuries relating to childbirth, and lack of

professional consensus relating to causation of injury during childbirth. The methods by which ACC assesses such claims also gives cause for disquiet.

7. We consider that the Bill is a missed opportunity to begin to move from the principle of compensation on the basis of causation of injury to the basis of degree of incapacity regardless of diagnosis. The current sole focus on causation can lead to long, complex "battles" between claimants and ACC, and to unjustified inequities in outcomes, a situation we wish to see avoided for women with birth injuries, and indeed, other claimants.
8. NCWNZ supports parents and others advocating for an extension of cover to include babies injured during birth and delivery (not already covered). We believe it is the next logical and obvious step in developing an ACC Scheme which is truly equitable.
9. NCWNZ also wishes to raise the wider issue of the continuing systemic and major injustice of the level of financial and other support for disability based on cause of disability instead of the level of need. This remains a glaring discrepancy in our health and social support system, and we urge the Committee to recommend to Government to undertake the policy and economic analysis to rectify this as a matter of priority.

Recommendations

10. The Committee take the opportunity to recommend that compensation for birth injury is based on level of incapacity not on specific cause of incapacity, as a fundamental step towards an ACC system based on need not causation of injury.
11. As a first, interim step, the Bill be amended to cover all obstetric injuries to mothers and babies during the birthing process (Option 2B).
12. The cover should be extended to include psychological injury relating to childbirth.
13. That the Bill extend ACC cover to babies who are injured during birth and delivery (who are not already covered under the treatment injury provision).
14. The Committee recommend that the Government give priority to addressing the continuing systemic and major injustice of the level of financial and other support for disability based on cause of disability instead of level of need.

General comments

15. Our submission focuses on the provisions in the Bill to extend ACC cover to a specified list of maternal birth injuries that have the same characteristics as injuries that are already covered. We welcome this long overdue initiative. The list of specified injuries is broad though not exhaustive, covering some rare injuries as well as the most common which are tears, that in some cases can have long-term serious consequences if not treated quickly and appropriately.
16. NCWNZ remains concerned about the current sole focus of ACC on cause of injury, the complexity and lack of professional consensus on causation of injury during childbirth,

and the way ACC assesses such birth injury claims. We fear the prolonged, stressful and inequitable outcomes experienced by many current claimants to ACC will be perpetuated.

17. We are disappointed that the Bill is a missed opportunity to begin to move from the principle of compensation on the basis of causation of injury to compensation on the basis of degree of incapacity regardless of diagnosis. The current sole focus on causation can lead to long, complex "battles" between claimants and ACC, and to unjustified inequities in outcomes, a situation we wish to see avoided for women with birth injuries, and indeed, other claimants.

18. Many of the specified injuries are results of natural process or inadequate midwifery or obstetric practice. Rather than focus on retrospective causation of injury, the country's maternity services must have a prospective focus on providing an exemplary level of care for individual mothers and babies. It is for this reason that NCWNZ has advocated, in its submission on the Pae Ora Healthy Futures Bill, for a national Maternal Health Strategy to address the current highly variable provision and delivery of antenatal and maternity care services between regions and between different populations of women in Aotearoa New Zealand.

19. NCWNZ remains concerned about the current sole focus of ACC on cause of injury, the complexity and lack of professional consensus on causation of injury during childbirth, and the way ACC assesses such birth injury claims. We fear the prolonged, stressful, and inequitable outcomes experienced by many current claimants to ACC will be perpetuated.

20. NCWNZ supports parents and others advocating for this extension of cover and believe it is the next logical and obvious step in developing an ACC Scheme which is truly equitable.

21. The proposed Bill raises the wider issue of the continuing systemic and major injustice of the level of financial and other support for disability depending on cause of disability rather than level of need. This remains a glaring discrepancy in our health and social support system, and we urge the Committee to recommend to Government that this serious injustice be rectified as a matter of urgency.

International Human Rights Obligations

Obligations under CEDAW

22. We disagree with the statement in the Disclosure Document[1] accompanying the Bill that the legislation does not give effect to New Zealand action in relation to an international treaty. Aotearoa New Zealand is signatory to the Convention on the

[1] Departmental Disclosure Statement: Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Bill. 2021. http://disclosure.legislation.govt.nz/assets/disclosures/bill-government-2021-103.pdf

Elimination of All Forms of Discrimination against Women[2]. Instead, we are pleased to note that the Bill removes an element of discrimination against women on the basis of their reproductive role and supports in particular Article 12 which states:

> *States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.*

Te Tiriti

23. Neither the Act nor this amending Bill make reference to Te Tiriti. Wāhine Māori and their babies should receive treatment and support which is equitable and culturally safe and this should be explicitly stated in the legislation.

Specific issues and related clauses

Clause 6 Section 25 amended (Accident)-

Schedule 2 New Schedule 3A inserted (Maternal birth injuries)

24. We note that the list is comprehensive (broad, but not exhaustive) and was agreed with a limited number of clinical experts. We note that the list does not include psychological trauma or injury. Support services for this type of injury related to birth are severely lacking and challenging to access and should be included.

25. We assume the intention is that the specified list will result in speedy and non-contentious decisions relating to ACC cover and that there will not be lengthy disputes between injured women, clinicians and ACC.

26. However, we are concerned that assessment by cause, using this list, is likely to result in disputes and litigation. We are aware that there is little consensus between midwives, doctors and specialists in defining "normal" in relation to outcomes of childbirth. There is also ongoing debate about such fundamentals as the time when labour begins and what constitutes prolonged labour. Without consensus between the professions on these fundamentals, we have concerns about assessment and agreement on the specified list of birth injuries.

27. The examples given in the Explanatory Note are not reassuring.

28. Example 3

> *During delivery, an episiotomy is not performed, despite it being clinically appropriate to do so. The birthing parent suffers tearing. This injury may meet the test for cover as either a personal injury caused by accident under section 25(1) or a treatment injury under section 32.*

Several questions arise from two points of potential dispute here:

1. What is "clinically appropriate" and who makes that determination?, and

[2] United Nations. 1979. Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979. https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx

2. Why would this scenario be considered an “accident” not a “treatment injury” given that a conscious decision was made to withhold treatment?

29. Example 4

An epidural is given to a birthing parent during labour and causes nerve damage. This injury may meet the test for cover as a treatment injury under section 32.

This is a rare event and would require a thorough anaesthetic review, but this is a treatment injury by definition as a treatment was given and an injury was caused. It is difficult to see how this example is interpreted as a “may meet the test”, and not a “definitely meets the test” unless some other undisclosed event had occurred.

Further examples of the difficulties

30. According to the Ministry of Health, a ‘standard primipara’ is a woman expected to have an uncomplicated pregnancy; intervention and complication rates for such women should be low ... we consider approximately 15 percent of women giving birth in New Zealand to be standard primiparae[3]. The data clearly shows that for a first birth, up to 85% of women will either have a tear or an episiotomy[4]. Such data highlight both the need for, and the difficulty of providing, a definition of “normal”.

31. The Ministry also reports that from 2009 to 2017 medical intervention in childbirth increased with a statistically significant increase in the proportion of standard primiparae who had an instrumental vaginal birth, caesarean section, an induction of labour, an episiotomy without third- or fourth-degree perineal tear, a third- or fourth-degree tear and no episiotomy, an episiotomy and a third- or fourth-degree tear[5].

32. Assessing a cervical tear may be complex as there could be an argument for attributing prior cervical damage as the cause of a subsequent preterm birth. This could bring about a claim for life-long ACC support because of the sometimes severe consequences of prematurity.

33. Another example is a ruptured uterus during labour. This may occur spontaneously both in normal labour (in women who have given birth before) or after caesarean section, in women who have had many children, and in obstructed labour where care has not followed accepted guidelines. ACC would need to establish that there had been a true rupture as distinct from a previous caesarean scar which had split open. A lower segment rupture can tear into other structures and can harm the foetus. How ACC would deal with this will likely depend on whether it is deemed there is a treatment injury.

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[3] NZ Ministry of Health. 2019. *New Zealand Maternity Clinical Indicators 2017* p. 20 https://www.health.govt.nz/system/files/documents/publications/new-zealand-maternity-clinical-indicators-2017-jul19.pdf

[4] Kettle C, Tohill S. 2008. Perineal care. *BMJ Clinical Evidence*, 24 Sep 2008: 1401.

[5] NZ. Ministry of Health. Op. cit. p. 21

34. We fear that there will be long and costly litigation related to the types of situations described above, reinforcing current discrimination and leaving angry, stressed and dissatisfied mothers, parents and whānau dealing with long, drawn-out grievances.

Psychological injury

35. While psychological injury relating to physical injury is mentioned in the legislation, psychological injury can occur independent of physical injury.

36. Psychological injury can be as debilitating as physical injury and those who suffer mental injury due to birth require coverage under the scheme. One study[6] shows that the childbirth experience was traumatic for 34% of the participants who reported symptoms that included posttraumatic stress disorder, feelings of powerlessness, and trait anxiety.

37. Another study[7] aimed to determine the incidence of acute trauma symptoms and posttraumatic stress disorder in women as a result of their labour and birth experiences, and to identify factors that contributed to the women's psychological distress. One in three women (33%) identified a traumatic birthing event and reported the presence of at least three trauma symptoms. Twenty-eight women (5.6%) met DSM-IV criteria for acute posttraumatic stress disorder. The level of obstetric intervention experienced during childbirth and the perception of inadequate intrapartum care during labour were consistently associated with the development of acute trauma symptoms.

Extension to cover all birth injuries – RIS Option 2(B)

38. As stated above, NCWNZ wishes to see a shift from the principle of compensation on the basis of causation of injury to compensation on the basis of degree of incapacity regardless of diagnosis.

39. We note the rejection of Option (2B) in the Regulatory Impact Statement[8] which would have extended cover to all injuries that meet a definition of obstetric injury in the Accident Compensation Act 2001, for example, mechanical trauma caused by labour and delivery (i.e., do not specify the injury types which may be covered as a result).

40. This option requires more discussion and refinement e.g. all labour by definition causes “mechanical trauma”, but NCWNZ would support this option as a progressive interim measure.

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[6] Soet J, Brack G, Dilorio C. 2003) Prevalence and Predictors of Women's Experience of Psychological Trauma During Childbirth. *Birth*, 30(1): 36-46

[7] Creedy D, Shochet I, Horsfall J. 2001. Childbirth and the Development of Acute Trauma Symptoms: Incidence and Contributing Factors. *Birth,* 27(2): 104-11

[8] Ministry of Business, Innovation and Employment (MBIE). 2021. *Regulatory Impact Statement: Extending the Accident Compensation Scheme Cover to Obstetric Injuries*. https://www.mbie.govt.nz/dmsdocument/17157-regulatory-impact-statement-extending-the-accident-compensation-scheme-cover-to-obstetric-injuries-proactiverelease-pdf

41. While proposed New Schedule 3A covers a range of injuries, it is finite, and the risk remains that, with the omission of Option (2B) some birthing injuries to women and babies will not be covered within the current parameters of the Bill. NCWNZ wishes to see this remedied, and for the Bill to be extended to cover all obstetric injuries to mothers and babies during the birthing process

Assessing claims and disputes

42. An additional concern of NCWNZ relates to the initiation of a claim. Who is responsible for initiating the claim? Is it the Lead Maternity Carer, who tells the woman what has occurred, and lodges the claim on the mother's behalf/the claim is automatically lodged; or does it rely on a "wait and see" approach, and where a problem is later identified, a review takes place? The application process needs to be streamlined so that it does not place a burden on parents at a time when they may be under severe physical and psychological stress.

43. Currently, ACC seeks expert advice for assessing claims and appeals against rejection of claims. As noted above, there are differing opinions between professionals on treatment injuries that can result in two different outcomes from assessing the same injury. One expert advisor may not challenge the rejection of a claim, while in another similar case, the expert advisor may challenge and effect a different outcome. Such cases where professional differences arise are exacerbated when lawyers and their expert advisors become involved, and the result can be long, costly and partisan disputes.

44. We are concerned, in the cases without clinical consensus, that ACC will be unable to determine fairness and equity in assessment of claims for incapacity.

Clause 13 Section 267 amended (Board of Corporation)

45. We note that there will be an additional place on the ACC Board to extend access to expert advice. NCWNZ expects the additional person would be an expert across the fields of midwifery, obstetrics, and gynaecology.

The Wider Context – addressing systemic discrimination and inequity

Extending cover to all injured and disabled babies

46. At present injuries to babies resulting in very severe conditions like neuro encephalopathy are covered, but not some others which also have lifelong consequences. Official advice in the Regulatory Impact Statement accompanying the Bill acknowledges: *The injuries suffered by babies during childbirth tend to have different characteristics to those suffered by their birthing parents but can be caused by the same forces of labour and delivery acting on their bodies*.

47. We also note the comment in the Regulatory Impact Statement: We are aware that there has been advocacy for ACC to cover babies who are injured during birth and delivery (who are not already covered under the treatment injury provision).

48. NCWNZ supports parents and others advocating for this extension of cover and believe it is the next logical and obvious step in developing an ACC Scheme which is truly equitable.

49. Birth itself causes a minority of the total disabilities suffered by children as they grow up. Only 10% of cerebral palsy can be ascribed to a birth event (birth asphyxia from intrapartum acidaemia)[9]. That means the cause of most cerebral palsy is either before labour begins or in the postnatal period (e.g., meningitis picked up in neonatal unt or spontaneous brain bleed). All injured and disabled babies should be treated the same, based on the principle that all such clinical outcomes, whatever the cause, should be treated the same.

Equity for all disabled people

50. The proposed Bill raises the wider issue of the continuing systemic and major injustice of the level of financial and other support for disability depending on cause of disability rather than level of need. This remains a glaring discrepancy in our health and social support system, and we urge the Committee to recommend to Government that this serious injustice be rectified as a matter of urgency.

Conclusions

51. NCWNZ welcomes this Bill but has concerns that the specified list of birth injuries perpetuates the focus on causation and will give rise to disputes and litigation that are detrimental to women and other claimants. When assessing and awarding compensation for birth-related injuries, we urge a shift of focus from causation to level of incapacity and need. With this change the Bill would be a first step towards addressing other anomalies in the ACC, health and social support system relating to mothers and babies injured during birth and delivery. This change of focus would also address the wider injustice of Government support being determined by cause rather than need, for disabled people.

52. We would be pleased to make an oral submission to the Committee.

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[9] For example: Paneth N, Hong T, Korzeniewski S. 2006. The descriptive epidemiology of cerebral palsy. *Clinics in Perinatology*, 33(2): 251-267