

Request to the Auditor-General
for an investigation into the
NZ Accident Compensation Corporation Sensitive Claims Unit

Gordon Waugh, October 2011

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Dear Auditor-General,

REQUEST FOR INVESTIGATION

This letter is a request for an independent investigation to be made under the Public Audit Act 2001. The investigation sought concerns the Accident Compensation Corporation, which is designated as a Public Entity in accordance with s.5 of the Public Audit Act, and as a Crown Entity under the Crown Entities Act 2004 s.7, Schedule 1, and therefore appears to be within the ambit of your Office.

Since the early 1990's, and under the provisions of the Injury Prevention, Rehabilitation, and Compensation Act 2001 (IPRCA) and its earlier variants, ACC has accepted tens of thousands of sensitive claims (mental injury caused by sexual abuse) at a cost to the taxpayer of hundreds of millions of dollars. The main thrust of this request lies in the several concerns outlined below, that in the administration of sensitive claims, ACC has consistently and routinely :

- a. Misappropriated and/or misapplied taxpayer funds for treatment, monetary compensation and related costs, by failing to comply with the inherent requirement specified in IPRCA s.21 for credible evidence that a claimed mental injury was caused by a criminal sexual offence.
- b. Failed to ensure its sensitive claims policies and practices are evidence-based, scientifically reliable, ethical and safe, and thereby applies much less rigorous and lower standard of evidence to mental injuries in sensitive claims than it does to physical injuries resulting from accidents.
- c. Mised Parliament and the public of New Zealand by publishing unscientific and unreliable information about sexual abuse and its alleged effects, and also by failing to maintain and publish full and accurate statistical data in respect of sensitive claim numbers, their costs and related data.

The attached Annexes A, B and C discuss the detail involved in the above matters.

Sincerely,

Gordon Waugh

ANNEX A: THE LEGISLATION

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INTRODUCTION

The Legislation

The Injury Prevention, Rehabilitation, and Compensation Act 2001 (IPRCA), s.21, provides cover for mental injury caused by criminal sexual offences, while s.27 defines “mental injury”. Claims made under s.21 are termed “sensitive claims” and are administered by ACC’s Sensitive Claims Unit. Earlier versions of the Act had similar provisions and requirements.

There are two main evidential legs in sensitive claims. The first leg is formed by evidence of the criminal sexual offence, and the second leg by evidence that a mental injury exists (as defined by s.27) which was caused by the alleged offence. Acceptance of sensitive claims requires credible evidence for both legs. This Annex (Annex A) discusses the first of these, being the criminality aspects, while Annex B discusses the second, being the mental injury aspects.

Main Concerns

The main concerns addressed in this Annex are that in respect of sensitive claims, ACC routinely fails to comply with the requirement for credible evidence of both criminal sexual offence and consequential mental injury, which appear to be mandatory specifications inherent in s.21. As a result of this failure, ACC wrongly accepted tens of thousands of sensitive claims at a cost to the taxpayer of hundreds of millions of dollars. ACC also appears to have aided and abetted counsellors and claimants in the commission of offences under s.228(b) of the Crimes Act 1961 (dishonestly using a document for pecuniary gain) and in the concealment of serious crimes.

Liberal Interpretation

ACC has taken a remarkably liberal interpretation of s.21 of the legislation, by which credible evidence of the alleged crime is not mandatory, a claimant is not required to identify an alleged offender and is not required to prove that a claimed mental injury exists and was caused by the alleged crime.

ACC applies markedly more stringent and rigorous standards of evidence to claims for physical injuries resulting from accidents.

Assurances

The taxpayer, who foots the bill for ACC and for the cost of sensitive claims, is entitled to reasonable certainty and assurances :

- a. That claimants did in fact experience criminal sexual offences,
- b. That claimants were mentally injured by those offences, and
- c. That ACC’s administration of sensitive claims fully complies with the legislation.

Consequences

Those assurances are absent from ACC's sensitive claims policies and practices. This Annex concludes that in many sensitive claims, ACC fails to comply with the requirement of s.21 to determine that criminal sexual offences occurred. The cost to the taxpayer of this mismanagement has been enormous, and since the early 1990's, its dimensions are measured in hundreds of millions of dollars and tens of thousands of sensitive claims. It represents an unwarranted wastage of public and corporate resources and profligate wastage of taxpayer funds. Taken all together, ACC's failures could amount to malfeasance.

INJURY PREVENTION, REHABILITATION, AND COMPENSATION ACT 2001

Main Purpose of ACC Scheme

A main purpose of the ACC Scheme is to provide cover for rehabilitation and compensation for physical injuries resulting from accidents, funded by levies on payrolls, vehicle registrations etc. ACC was latterly (circa 1987) entrusted by Government with the responsibility for providing cover for mental injuries caused by criminal sexual offences – these claims are paid from taxpayer funds, not by levies.

Special Treatment

The legislation singles out crimes of a sexual nature for special treatment. It is understood that mental injury or trauma which might accrue from other crimes is not covered. ACC is poorly-equipped to deal with mental health issues, to the point of incompetency. That it was entrusted by Government to administer sensitive claims has always been controversial.

Section 21

Claims made under s.21 are termed "sensitive claims" and are administered by ACC's Sensitive Claims Unit.

Section 21 of the Act provides cover for mental injury caused by certain criminal acts:

(1) A person has cover for a personal injury that is a mental injury if—

(a) he or she suffers the mental injury inside or outside New Zealand on or after 1 April 2002; and

(b) the mental injury is caused by an act performed by another person; and

(c) the act is of a kind described in subsection (2).

(2) Subsection (1)(c) applies to an act that—

(a) is performed on, with, or in relation to the person; and

(b) is performed—

(i) in New Zealand; or

(ii) outside New Zealand on, with, or in relation to a person who is ordinarily

resident in New Zealand when the act is performed; and

(c) is within the description of an offence listed in Schedule 3.

(3) For the purposes of this section, it is irrelevant whether or not the person is ordinarily resident in New Zealand on the date on which he or she suffers the mental injury.

(4) Section 36 describes how the date referred to in subsection (3) is determined.

(5) For the purposes of this section, it is irrelevant that—

(a) No person can be, or has been, charged with or convicted of the offence; or

(b) the alleged offender is incapable of forming criminal intent.

Section 27

For the purposes of this Act, “*mental injury*” is defined in s.27 as being “*a clinically significant behavioural, cognitive, or psychological dysfunction*”.

Confirmation of Requirements

As expressed by its title, s.21 concerns mental injury caused by criminal sexual offences. Such offences are defined by sub-section (2)(c) as being within the description of an offence listed in Schedule 3 – which are crimes of a sexual nature in accordance with the Crimes Act 1961.

An ACC Press Release of 16 October 2009 asserted that:

“By law, ACC can only accept sensitive claims from those diagnosed with a mental injury resulting from the sexual abuse they’ve suffered.”

EVIDENCE IN SENSITIVE CLAIMS

The First Evidential Leg

The first evidential leg of a sensitive claim is that ACC must be satisfied that the claimant experienced a criminal sexual offence. The legislation, at s-s.(5), does not require the alleged offence to be reported to the Police, or the alleged offender to be charged or convicted. It is understood that s-s(5) was included because the ACC Scheme is a “no-fault” one.

ACC has chosen to liberally interpret s-s(5) to also mean a claimant is not required to identify an alleged offender, and any evidence which opposes a claimant’s allegations, from an alleged offender or other source, is to be excluded from its evidence-gathering process.

Parliamentary Questions & Answers

The following Parliamentary Questions and Answers indicate the attitudes of ACC to evidence of the alleged offence and its reliance on assessments or estimates of mental injury.

5582 (2003). Dr Muriel Newman to the **Minister for ACC** (5 June 2003):

Is evidence of sexual abuse needed to establish a sexual abuse claims with ACC if so, what is the nature of evidence that is needed; if not, why not?

Hon Ruth Dyson (Minister for ACC) replied:

Evidence from a treatment provider is required for sexual abuse claims. Evidence is provided to ACC by the treatment provider that either lodges the claim, or provides subsequent information to ACC via a 'Cover Determination Report'. The treatment provider may be a General Practitioner, a DSAC (Doctors for Sexual Abuse Care), or a counsellor. A report is submitted by the provider to ACC that outlines the sexual abuse that has occurred. This report is signed by the claimant and the treatment provider. Information in the report includes descriptions of the event or events, when, where and the frequency of the event or events, and details of the perpetrator, such as age, gender and relationship to the claimant (the name of the perpetrator is not asked for in the report).

My Comment: Hon Ruth Dyson's statement that "Evidence from a treatment provider is required for sexual abuse claims" is untenable. In the absence of an external investigation and corroboration, a treatment provider cannot provide evidence. As the source of the information provided in many of the cases is the uncorroborated, untested narrative of the claimant, the treatment provider can do no more than give ACC hearsay information. The "outline of the sexual abuse that has occurred" is a presumption that the claimant narrative is genuine and credible. Signatures of the claimant and the counsellor do not substantiate claimant allegations.

6391 (2003). Dr Muriel Newman to the **Minister for ACC** (3 July 2003):

In cases in which ACC clients did not have their allegations tested and proven in court, and in the absence of external evidence or corroboration during the counselling process, what information, methods, criteria and standards of proof do ACC-approved counsellors use to conclude that a client was, or was likely to have been, sexually abused ?

Hon Ruth Dyson (Minister for ACC) replied:

To establish that sexual abuse has occurred for the purposes of cover, the Corporation requires an ACC approved counsellor to provide their clinical opinion that sexual abuse has occurred, and that the abuse falls within the definition of an offence as listed in Schedule 3 of the Injury Prevention, Rehabilitation, and Compensation (IRPC) Act 2001. The counsellor must then also attest that the claimant has suffered a mental injury as a result of sexual abuse before cover is extended. In the absence of such attestation (or other external evidence or corroboration), a claim for cover under the sensitive claims provisions of the IPRC Act 2001 would not be accepted.

My Comment: It is misleading to claim that "...the Corporation requires an ACC approved counsellor to provide their clinical opinion that sexual abuse has occurred,.....".

Determination of whether criminal sexual offences occurred depends upon credible evidence, not a counsellor's clinical opinion. In the absence of such evidence it is not possible to deduce, from clinical observations or opinions alone, that sexual abuse occurred and was the cause of a claimant's psychological condition.

6948 (2003). Dr Muriel Newman to the Minister for ACC (17 July 2003):

Is it correct that ACC uses subjective methods of decision-making for sexual abuse claims based on unverified reports from its counsellors, whereas in claims for other forms of accident or injury it demands robust proof of injury from mainstream health professionals and specialists; if so, why?

Hon Ruth Dyson (Minister for ACC) replied: No

My Comment: For the reasons given in her response to **6391 (2003)** above, Hon Ruth Dyson's response is incorrect. In the absence of credible evidence of alleged criminal sexual offences, the nature of a clinical opinion is entirely subjective.

Inconsistent Evidential Standards

A comparison between sensitive claims for mental injuries and claims for physical injuries due to motor vehicle, work or sports accidents reveals a different standard of evidence. In motor vehicle, work and sports accidents (for example) ACC must first be satisfied that an accident occurred and that it caused physical injuries. ACC places rigorous demands on claimants to provide evidence their injury was a direct result of the accident, and not one which could be attributed (for example) to age or disease-related degeneration or a pre-existing condition or similar.

Conversely, in the many tens of thousands of sensitive claims it has accepted, ACC has not applied the same level of evidential rigour. Sensitive claims are based on allegations of criminal sexual offences which purportedly cause mental injuries. ACC has not made it mandatory for claimants to provide credible evidence that criminal sexual offences occurred. Nor has it insisted on proof that a claimed mental injury was caused by the alleged sexual abuse, and was not due to some other pre-existing condition or trauma in the claimant's life.

ACC has no reasonable justification to administer cover decisions for mental injuries in sensitive claims differently to accident claims for physical injuries, but has created significant differences through its own policies and practices.

Pre-Existing Conditions

ACC acknowledged in its Annual Report of 1995, Page 21, the difficulty in separating the probable causes of mental conditions:

“ACC funds counselling, along with other entitlements, for the psychological effects of sexual abuse incidents for which the claimant has cover. Separating the effects of the particular sexual abuse incident from the psychological effects of other trauma and events in the claimant's life is becoming an increasing problem.

The Corporation is finding itself increasingly in the position of funding counselling and other entitlements for individuals with psychological problems which cannot be identified clearly as resulting from only the sexual abuse incident which has cover under the scheme.”

Convictions & Claims

Complainants who pursued criminal cases through the Courts do not necessarily also submit sensitive claims to ACC. The number of those complainants who also submitted sensitive claims to ACC would be difficult to determine retrospectively, but it is a bald fact that the tens of thousands of claims accepted by ACC far exceed the number of complainants in Court cases.

Thus, it is normally the case that many sensitive claims are based on untested claimant narratives and their allegations of sexual abuse, pointing directly to an inconsistency of evidential standards. It is concluded that ACC has failed to apply consistent evidential standards to accidental physical injuries and to sensitive claim mental injuries.

BALANCE OF PROBABILITIES

Common Meaning

ACC claims to use a Balance of Probabilities process to determine whether criminal sexual offences occurred (or were likely to have occurred). The foundations of the Balance of Probabilities equation are well known.

The common meaning of this evidential standard is that a Court is satisfied an event occurred if it is considered that, on the evidence, the occurrence of the event was more likely than not. The Court, and the decision, benefit from examination of information and evidence from several sources. To ensure dependable decisions are made, all of the evidence in its broad context should be made available to the body deciding the balance, be it trial judge, jury, tribunal or other. It is axiomatic that a balance cannot be reached by considering just one aspect of the evidential spectrum.

Subjectivity

In sensitive claims, claimants are not required to report offences to the Police. Charges against, or conviction of, the alleged offender are not required. ACC excludes evidence opposing a claimant's allegations which might be available from the alleged offender or similar sources. Its policies and practices give the clear impression that the untested claimant narrative is always preferred as being reliable, valid and sufficient. Such a lopsided, biased and subjective process prevents ACC from proper application of the Balance of Probabilities equation. As well, it sets aside logic and the principles of natural justice and fairness.

ACC's Interpretations

Indeed, a former Chief Executive of ACC (Mr Garry Wilson) illustrated ACC's interpretation when he wrote in November 1998 that :

- a. *"....what happens in Police and Court processes is no concern of ACC, and such matters are irrelevant."*
- b. *"....if the alleged abuser is found to be not guilty through the Court system it will not necessarily affect the decision the Corporation has made."*
- c. *"....the identity of the abuser is irrelevant to the Corporation."*
- d. *".....in cases of sexual abuse, the fact that an alleged abuser disputes elements of a claim is unlikely to be relevant to ACC's decision making process."*

Wilson also wrote *".....the burden of proof required to get a conviction through the Courts is far greater than that expected of ACC to determine cover under the Act."* The logic of Wilson's opinions is at best dubious. It was never explained who expected ACC to apply that very low level. The level does not appear to be imposed upon it from an external agency.

Collection of Evidence

In relation to gathering evidence and information about a sensitive claim, ACC has expressed its view that:

"Section 21 of the Accident Compensation Act 2001 details cover for mental injury caused by certain criminal acts. In particular, section 21(5) outlines that cover for mental injury is available irrespective of whether any person has been charged with the relevant offence or whether the alleged offender was capable of forming criminal intent. There is no need to lodge a complaint with the police, although it is presumed that ACC would require some evidence of the sexual abuse. However, the Corporation must be satisfied that a criminal offence has occurred."

In gathering information about a sexual abuse event, it seeks detailed information for the purposes of determining cover for mental injury including:

- i. Date of event*
- ii. Relationship between client and perpetrator(s) if any*
- iii. Age of client at the time*
- iv. Age of perpetrator(s)*
- v. Gender of Perpetrator:*
- vi. Frequency of event*
- vii. Town/city where event occurred*
- viii. Description of event(s)"*

However, those details do not yield evidence that a criminal sexual offence occurred. They merely reinforce aspects of a claimant's narrative and untested allegations. It is necessary to repeat here that ACC relies very heavily on the mistaken belief that the cause of a mental injury can be deduced from claimant narratives and behaviour.

ACC appears to misunderstand and misapply the Balance of Probabilities function and has chosen to set the bar for evidence of criminality at an indefensibly low level.

Because ACC does not have access to the whole (or even a majority) of the evidence, it cannot properly apply a Balance of Probabilities standard. Without testable evidence about both sides of an allegation, it is unrealistic of ACC to expect to reach a balance - simply put, there is nothing to balance.

NO-FAULT STATUS

Separation of Functions

It appears at first glance that Parliament decided – presumably on the basis of the “no-fault” philosophy - that there should be no relationship between the criminal process and the functions of ACC. Parliament apparently sought to preserve that separation and the “no fault” status by inserting sub-section (5) into s.21 of the Act, which states:

*“For the purposes of this section, it is irrelevant that—
(a) No person can be, or has been, charged with or convicted of the offence”.*

Identification of Alleged Offender

But that specification does not appear in any way to preclude identification of the alleged offender. Identification of an alleged offender within the ACC process is not part of the criminal process and therefore does not breach the “no fault” principle. That identification is not a mechanism for apportioning blame, but rather, it forms part of the essential task of collecting enough testable evidence to reach a sensible Balance of Probabilities. It makes cover decisions more accurate.

The interpretation that claimants are not required to identify alleged offenders is a convenient one for ACC and counsellors, because it removes the need for them to obtain opposing evidence from the alleged offender and other sources, and to then comprehensively test claimant versions of events.

Secrecy

Sensitive claims are administered in a virtually secret fashion. Claimants are permitted to make allegations of horrendous crimes without naming the alleged offender, and without facing a formal justification process. It is fundamentally wrong that many alleged offenders do not even know that a sensitive claim involving them has been lodged. ACC appears to have adopted the attitude that the alleged offender has no rights, is not permitted to know whether a claim has been lodged, or know the nature and details of a claimant’s allegations. Unless an alleged offender is made aware of the claim and the details, he/she is denied the protection of the Privacy Act.

As an observation, it would seem that in the interests of natural justice, an alleged offender has a clear right to be advised of the nature and content of the allegations and have opportunities to submit evidence which opposes a claimant’s version of events.

Notwithstanding the provisions of the Privacy Act, the Bill of Rights s.9 (NZBR 1990) provides the right not to be subjected to torture or cruel treatment: *“Everyone has the right not to be subjected to*

torture or to cruel, degrading, or disproportionately severe treatment or punishment.” Being prevented from mounting a defence against allegations of criminal sexual offending could be considered cruel and degrading treatment.

Contrary to ACC’s opinion, gathering evidence from alleged offenders or other sources does not disturb the “no fault” principle of the Scheme. Gathering evidence is not about apportioning blame, but about ensuring that claims are fact-based, and that claimants receive the treatment and compensation to which they are entitled.

CRIMES BY CLAIM PARTICIPANTS

Concealing Crimes

Concealing a crime is itself a crime. Claims covered by s.21 are inherently allegations of criminal sexual offences. By providing cover for sex abuse claimants, ACC is acknowledging it believes that serious criminal offending has occurred. By the nature of their occupation, counsellors also claim to have detailed knowledge of such crimes. Various authors have opined that counsellors are witnesses to crimes, for example, Dr Kim McGregor in her book *Warriors of Truth (McGregor K. Warriors of Truth: Adult Survivors Healing from Child Sexual Abuse, 1994, University of Otago Press, Dunedin. pp 192)*. ACC, counsellors and claimants have a legal obligation to advise Police when they know of criminal sexual offending. ACC’s publication *Guidelines for Therapists Working with Adult Survivors of Sexual Abuse 2001* states on its Page 16, “*The therapist is asked to bear witness to a crime, therefore the therapist must affirm a position of solidarity with the [client].*”

Using Documents for Pecuniary Gain

Part 10 of the Crimes Act 1961: Crimes against rights of property : s.228(b) makes it an offence to dishonestly use a document for pecuniary gain. In the absence of credible evidence of criminal sexual offences and/or proof that mental injuries were caused by such offences, it is intentionally deceitful of counsellors and claimants to submit documentation to ACC for fees, monetary compensation, treatment, Independence Allowance or other valuable considerations. In the light of CA s.228(b) they appear to commit the offence of dishonestly using documents for pecuniary gain. ACC abets this deceit and is therefore also culpable.

CONCLUSIONS

Reasonable Understanding

A reasonable person would understand from s.21 that for sensitive claims to be accepted by ACC, credible evidence of criminal sexual offences is mandatory. Its performance in accepting tens of thousands of sensitive claims clearly implies ACC was in possession of such evidence.

ACC Failures

It is concluded from the above examination that ACC has failed to comply with the requirement of IPRC Act s.21 for credible evidence of criminal sexual offences and consequential mental injury in sensitive claims. It has failed to make provision of such evidence mandatory. In many cases ACC does not have credible evidence. Its misapplication of the Balance of Probabilities process, together with an indefensibly low level of evidence, results in inappropriate decisions.

Misappropriation

As a consequence, ACC appears to have misappropriated and/or misapplied taxpayer funds for treatment, monetary compensation and related costs, by failing to comply with the requirement specified in s.21 for credible evidence of criminal sexual offences which caused claimed mental injuries in sensitive claims.

Recommendation

Through misinterpretation and mismanagement, ACC appears to have indulged in an unwarranted wastage of its own corporate resources and profligate wastage of taxpayer funds. It is therefore recommended that the Auditor-General investigate ACC's performance in relation to legislative aspects of sensitive claims.

ANNEX B: POLICY & PRACTICE

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INTRODUCTION

Legislation

In accordance with s.21 and s.27 of the Accident Prevention and Rehabilitation Insurance Act 2001, ACC provides cover for claimants who allege they were mentally injured by criminal sexual offences. These are called Sensitive Claims and are administered by ACC's Sensitive Claims Unit.

ACC's principal legislative obligations when deciding cover for sensitive claims are to assure itself (and the taxpayer) that claimants experienced criminal sexual offences and exhibit clinically significant behavioural, cognitive, or psychological dysfunctions caused by the offence.

The legislative and criminality aspects were examined in Annex A. Annex B examines whether the mental injury aspects of ACC's sensitive claims policies and practices are scientifically reliable, evidence-based, ethical and safe.

Scientific Perspective

Put in proper perspective, no scientific evidence has yet been found to show that sexual abuse causes any specific psychiatric, psychological or behavioural condition or symptoms.

However, ACC bases its policy and practice on research conducted by Massey University which claims that sexual abuse causes hundreds of "*effects*". Indisputably, none of these "*effects*" are specific to sexual abuse and all of them have myriad possible causes.

Outcomes

The main concerns discussed in this Annex are that since the early 1990's, ACC's has accepted tens of thousands of sensitive claims on the false premises that in the absence of credible evidence of criminal sexual offences, current claimant behaviour alone can safely be attributed to such offences, and that sexual abuse always causes mental injury.

ACC's inability to distinguish between science and social constructs about sexual abuse, has resulted in sensitive claims policies and practices which are unscientific, unethical, unproven and confused. Contrary to its assertion, its policies and practices are not "*evidence based*".

EVIDENCE OF MENTAL INJURY

The Second Evidential Leg

To comply with s.21, ACC must be satisfied that a claimant exhibits dysfunctions described in s.27, and that they are caused by criminal sexual offences. Section 27 of the Act provides that: “*Mental injury means a clinically significant behavioural, cognitive, or psychological dysfunction.*” Information about this forms the second evidential leg in respect of sensitive claims.

Scientific Principles

It is a principle of science that effect follows cause. In the absence of credible evidence of criminal sexual offences or reliable markers of sexual abuse, neither ACC nor counsellors can know whether a claimant actually, or was likely to have, experienced a criminal sexual offence. It follows that in such cases, they cannot know whether any mental injury was caused by the alleged criminal offence or by some other factor.

A clear distinction must be drawn between ACC’s reliance on social constructs, assumptions and beliefs, and the accepted definitions and realities of “*syndromes*” and “*symptoms*”. The term “*syndrome*” is defined in the *New Shorter Oxford English Dictionary* as: “*a group of symptoms or pathological signs which consistently occur together, especially with an (originally) unknown cause*” (3 ed, Clarendon Press, Oxford, 1993). When syndromes and their causal factors have been established, it is then ethical and safe to retrospectively identify a cause from a set of symptoms.

Despite many decades of research, no evidence has yet been found to show that sexual abuse causes any specific psychiatric, psychological or behavioural conditions or symptoms. It is an error to conclude from claimant behaviour alone, that the cause of that behaviour is in fact sexual abuse.

Symptom is defined by the Shorter Oxford Dictionary as “*a (bodily or mental) phenomenon, circumstance, or change of condition arising from and accompanying a disease or affection and constituting an indication or evidence of it; a characteristic sign of some particular disease.*”

Effect is synonymous with symptom, in that it is correlated with cause and defined as “*Something caused or produced; a result, consequence, causation.*”

Current evidence does not support the concept that sexual abuse produces recognizable symptoms, or that sexual abuse always causes mental injury.

Policy Stance

It has always been a highly controversial matter that ACC was entrusted by Government to process sensitive claims, especially so when all of the evidence about each case is seldom fully known to ACC. It is widely held that ACC is not the appropriate or best channel to manage victims of sexual abuse. A consequence of ACC’s ineptitude in this matter is shown by its policy move from a position in 1999 of saying “*there are no sets of symptoms specific to sexual abuse*” to an opposite extreme in 2008, where it now claims to know of “*more than 700 effects of sexual abuse*”.

ATTEMPTED PERFORMANCE IMPROVEMENT

Research

In an attempt to improve its performance in the area of sensitive claims, ACC in 2004 commissioned Massey University to conduct research to develop diagnosis and treatment guidelines regarding mental injury in people who have experienced sexual abuse. It is understood to have cost some \$800,000 and taken four years to complete.

Technical Reports

This research produced a series of Technical Reports. Their titles are listed below, and the Reports are available at the website http://whatumanawa.massey.ac.nz/reports/tech_reports.htm

Technical Report 1: An annotated bibliography of New Zealand (Working Paper 2) literature on sexual abuse

Technical Report 2a: Archival file analysis: Report for a random sample of archived sensitive claims that received counselling

Technical Report 2b: Archival file analysis: Report for files with a large number of counselling hours

Technical Report 3: Consumer focus group and key informant interviews (pilot report)

Technical Report 4a: Mapping the hypothesised effects of childhood sexual abuse: A coherent framework from childhood to adulthood

Technical Report 4b: Profiling: Patterns of effects following childhood sexual abuse in adulthood

Technical Report 5a: Three waves of childhood sexual abuse research: (Literature Review 1) Effects and assessment in adulthood

Technical Report 5b: Sexual assault in adulthood: Effects, assessment (Literature Review 2) and treatment

Technical Report 5c: The nature, assessment, and treatment of the (Literature Review 3) psycho-social consequences of sexual abuse for children and adolescents: A critical review of the literature

Technical Report 5d: Treatment of adult survivors of childhood sexual (Literature Review 4) abuse

Technical Report 6: Effects of therapy with people who have been sexually abused: A meta-analysis

Technical Report 7: Practitioner focus group and key informant interviews

Technical Report 8: Practitioner survey: Respondent profile & Practitioner Survey: Section B and Section D

Technical Report 9: A review of progress and outcome measures: Use with sensitive claims clients in Aotearoa/New Zealand

Research Aims

The research was divided into four overall objectives:

- (1) Identifying symptoms attributed to sexual abuse as a causal variable;
- (2) Assessing the different therapeutic modalities for treating the sequelae of sexual abuse;
- (3) Identifying, assessing, and measuring the recovery process for those who have been sexually abused; and
- (4) The development of best practice guidelines for sexual abuse treatment.

Aim No 1

There are no scientifically accepted or reliable symptoms of sexual abuse. However, in pursuit of Aim No 1, the Massey researchers claim to have identified and reviewed more than 700 effects of sexual abuse, which they claimed to have initially extracted from the literature on symptomatology, from assessment tools, and from consultation with experienced New Zealand practitioners and researchers.

Rudimentary Errors

A very disturbing aspect of this research was that much of the literature used (see Technical Reports 1, 5a, 5b, 5c and 5d) is based on seriously flawed methodology which led to unreliable conclusions. Many of the sources appear to be retrospective studies and surveys which relied upon untested, uncorroborated self-reported abuse events by respondents. These studies and surveys were then used to assess or estimate prevalence, incidence, and the like. A common theme is the unsubstantiated belief by numerous authors that sexual abuse is widely under reported.

An elementary error is the apparent lack of recorded credible evidence that all the respondents in the surveys and studies were in fact sexually abused and were mentally injured by that abuse. As well, some studies and surveys had limited respondent populations, or conversely, very poor response rates to surveys. That quality of literature commonly fails to distinguish between fact and assumption; between historical truth and metaphor; or between cause and association. Their credibility and reliability are at best dubious.

Another major deficiency in the literature is that mental injuries claimed by respondents were not all verified to result from sexual abuse, and were apparently not separated from the effects of other trauma in the respondent's life. The reported or claimed mental injuries cannot therefore be properly attributed to sexual abuse as the causal factor.

The 700 Effects

It is reiterated that effect is synonymous with symptom in that it is correlated with cause and means *"Something caused or produced; a result, consequence, causation."* Current evidence does not support the concept that sexual abuse produces specific or recognizable symptoms. However, in Technical Report No 4a, the Massey researchers claim to have identified and reviewed *"more than 700 effects of sexual abuse."* They stated that *".....no one effect on its own is a reliable indicator of*

sexual abuse.” The researchers described these effects as (for example) “*hypothesised effects*”, “*estimations of potential effects*”, “*effects likely to follow*”, “*effects thought to follow ...*”.

They also claimed a “*vast array of emotional, behavioural, social, cognitive, physical, and environmental effects*” but also say that “*no single effect can be a trustworthy indicator of sexual abuse.*”

ACC has reinforced its reliance on those unscientific assumptions and guesswork by stating:

“While the research and development of the guideline was funded and supported by ACC, the views and/or conclusions in the guideline are those of the author. ACC is confident that the research commissioned was undertaken using an independent rigorous process, as well as international peer review, and supports the methodologies employed.”

The 700 effects of sexual abuse were initially extracted from published literature on symptomology, from assessment tools and from consultation with experienced New Zealand practitioners and researchers. Please refer to page 100 of the 'Sexual Abuse and Mental Injury: Practice Guidelines for Aotearoa New Zealand' (Massey Guidelines).”

Aim No 2

For the reason that “*the sequelae of sexual abuse*” used by the researchers are entirely dependent on first having verifiable evidence that sexual abuse actually did occur, Aim No 2 is self-defeating. Verifiable evidence that abuse occurred is often absent. Massey researchers wrongly assumed and believed the literature is valid, but much of it is not.

Aim No 4

For convenience, the researchers limited their considerations of the effects to what they believed to be the most common 203 (103 for childhood sexual abuse and 100 for adults) as listed on its Pages 55 – 58 of Report No 4a.

To satisfy Aim No 4, the research was adopted and disseminated by ACC and culminated in the publication of *Sexual Abuse and Mental Injury: Practice Guidelines for Aotearoa New Zealand*, 2008. This document contains serious flaws.

Although the researchers failed to list the remaining 500 or so items, their identification of the “*more than 700*” suggests they were separately identifiable as effects. ACC said it was “*unable to provide the requested complete list of the more than 700 effects of sexual abuse as it does not exist.*”

Effect Clusters

Massey researchers categorically stated that “*.....no one effect on its own is a reliable indicator of sexual abuse.*” and further state that effects never occur in isolation. Page 15 of Technical Report No 4a specifies that effects appear as effect clusters. It limits effect clusters to a maximum of seven items per group. Inclusion in the specification of “*single item groups are permitted*” is therefore inconsistent and is a basic error.

Obviously, no single effect can be repeated inside any one cluster, but any particular effect can be repeated in many separate clusters. For example, the effect called depression can appear only once in any particular cluster, but may appear in none, any or many clusters.

Fatality

If the research theory is correct, the number of separate effect clusters which any claimant could be expected to present can be calculated from basic Combinations and Permutations formulae and in broad terms the result is measured in billions and trillions of clusters. It follows that any one claimant would be able to present with any, some, many or all of that immense array of possible effect clusters.

Similarly, it could be expected that to cope with this vast range of clusters, ACC and counsellors would be competent to know, understand, recognise and administer them, however, that would be a practical impossibility.

It should be noted that the researchers selected the most common 200 effects. Taking the remaining (and unidentified) 500 or more items into the equations would seriously exacerbate this already extreme situation, and result in astronomical numbers of combinations and permutations. These matters alone are sufficient to destroy any credibility the research may have had.

Another Fatality

The more-than-700 alleged effects of sexual abuse represent an extensive spectrum of human behaviour, but the behaviours which are not indicative of sexual abuse were not categorised. Thus, it is convenient for ACC, counsellors and the Massey researchers to assume that almost any behaviour is a result of sexual abuse. However, that is untenable.

Yet another fatal flaw in the research is that none of the claimed hundreds of effects are in fact specific to sexual abuse. Indisputably, every one of those claimed effects has myriad possible causes. A simple test of that statement is to attempt to define all the possible causes (for example) of the very common behaviours of depression or low self-esteem.

CONFUSED, INCONCLUSIVE, INDECISIVE THINKING

Social History

Since the mid-1980s, much focus on the field of sexual abuse trauma was brought to bear in political, social, therapeutic and feminist circles. That development gave rise to the belief-systems, assumptions and unqualified observations, assessments and estimates made by what is colloquially known as “The Sex Abuse Industry”. It was essentially biased guesswork, often called psychobabble or pop psychology, which endeavoured to define and explain the perceived sequelae of sexual abuse. Little of it was right or helpful. In fact, much of it was entirely misleading, but those notions and their underlying beliefs and assumptions are still extensively used today.

Unpredictability of Abuse Outcomes

It is widely accepted that any effects of sexual abuse which may appear are idiosyncratic and therefore unpredictable. But Aim No 1 above required the researchers to identify symptoms attributed to sexual abuse.

In direct contradiction of Aim No 1, the following comments drawn from the Massey Technical Reports reinforce the idiosyncratic, variable and unpredictable nature of outcomes of psychological trauma, and particularly show that no certainty exists as to any symptoms, indicators or effects of sexual abuse.

The Technical Reports are peppered with words and phrases which clearly illustrate the uncertainties, the influence of belief and assumption, and the lack of scientific rigour in their work. Some examples are:

- * *Contemporary researchfocuses on the identification of co-occurring effects of abnormal behaviour, distorted cognitions, and markers of psychopathology at any point during the life span.*
- * *....an analysis of effects provides researchers with a scheme for understanding or interpreting the variability of the effects*
- * *.....how effect patterns change across the lifespan*
- * *This dynamic and changing evolution of symptoms over time is termed symptomatic pathways*
- * *Confounding factors experienced by the individual prior to, during, and post-CSA or SA, are also likely to impact considerably on a person's symptomatic pathway*
- * *Although parsimonious conceptualisations enable estimations of potential effects that may occur post-CSA or SA at any point in time, current models lack explanatory power as to how these effects may be inter-linked or indeed, how they can be attributed to the traumatic event.*
- * *Differing representations of effects following CSA and SA across groups of multi-disciplinary practitioners may therefore lead to diverse and contrasting opinions about clients' needs and selection of effective interventions.*
- * *The aim of this research is to organise the domain of hypothesised effects*
- * *this detailed and standardised procedure is believed to aid diagnosis and ensure greater accuracy in tailoring intervention to address the changing needs of the client.*
- * *comprehensively summarises the hypothesised effects of CSA and SA*
- * *An item pool of over 700 items represented the effects hypothesised to follow CSA or SA*
- * *Subsequently, 103 initial effects likely to follow the experience of CSA or SA as seen in children were combined in an item deck named Sexual Abuse Symptoms–Children (SAS-C).*
- * *In addition, 100 effects thought to follow CSA or SA in adulthood are summarised*
- * *To map the domain of effects likely to follow CSA and SA, two groups of participants were enlisted.*
- * *Each cluster is limited to a maximum of seven items per group; single item groups are permitted.*

- * *.....in the newly developed composite map, Generalised Procrustes and property fitting analyses revealed the dimensional or structural resemblances shared by the domain of the hypothesised effects in childhood and in adulthood*

- [My comment: Procrustes Analysis is understood as a method for matching two multidimensional objects so as to match them (by stretching and rotation) as closely as possible. Procrustes (of Greek mythology), it is said, made people fit his bed by stretching their limbs or cutting them off, so the body (in this case being the range of data) is deliberately distorted to always fit his bed. The data is thus not in pristine condition, and the make-fit process appears to be inappropriate for the work being undertaken.]

- * *“This led to a large number of effects (initially more than 700) being identified and reviewed. The number of effects for children, adolescents, and adults were finally reduced to approximately 200.”*

- * *Principle 5: Effects notes the vast array of emotional, behavioural, social, cognitive, physical, and environmental effects of sexual abuse for children, adolescents, and adults.*

- * *...there is a complex professional matter buried in the assumption that sexual abuse causes harm.*

- * *...a plethora of conceptualizations which endeavoured to define and explain sequelae of sexual abuse.*

- * *...there are also many individuals who do not show significantly problematic long-term effects.*

- * *There is a range of effects that are interrelated depending on abuse-related and other variables. No single effect can be seen as a trustworthy indicator of sexual abuse. Since effects never occur in isolation, it is useful to consider them in terms of what effects are more likely to co-occur.*

- * *The next aim included understanding what effects appear simultaneously (effect clusters) and how these clusters interrelate.*

- * *It is acknowledged that the emerging clusters and interrelationships from the New Zealand participants are somewhat different from traditional diagnostic systems. However, effects reflecting various disorders commonly reported to follow sexual abuse were included in the research. In the New Zealand sample, these traditionally organised effects were not considered to cluster.*

- * *The range of effects demonstrates why no single effect can be a trustworthy indicator of sexual abuse.*

- * *Effects of sexual abuse can be discontinuous*

- * *Variability in effects over time or the re-emergence of maladaptive functioning can be triggered by situations in which a person can feel vulnerable.*

ACC Preference

Descriptions used throughout the Massey University research clearly illustrate the uncertainty, confusion, lack of credible evidence about the effects of sexual abuse, and lack of scientific rigour in the work. The above samples strongly reinforce the viewpoint that the research conducted on behalf of ACC is of little, if any value.

Bluntly put, it appears that ACC prefers to rely on myths, assumptions and beliefs rather than credible science. This is emphasised by ACC's October 2009 Press Release which said :

“These guidelines represent a significant landmark in the treatment of mental injury resulting from sexual abuse, because they're developed by New Zealanders for New Zealanders; are evidence-based; and the product of four years' extensive research and consultation.”

INSUPPORTABLE CLAIMS AND MISINFORMATION

Background

Since the 1980s, those who claim to be sex abuse experts and advocates have been responsible for disseminating unscientific, unproven, unethical and unsafe misinformation about sexual abuse. Prime examples of these misadventures include:

- * Recovered Repressed Memories,
- * Dissociative Identity Disorder (DID) [formerly known as Multiple Personality Disorder],
- * Satanic Ritual Abuse,
- * The so-called “statistical” data showing “*As many as 1 in 3 girls, and 1 in 6 boys*”, will be raped or otherwise sexually abused by age 16,
- * The claim that “*Only 10% of rapes are ever reported*”, and;
- * The claim that “*Most victims never disclose their abuse to anyone*”.

Deconstructing Claims About Rape

Some claims about rape are readily demolished with basic arithmetic and common sense. As an example, it is claimed that “*Only 10% of rapes are reported, and of those only 10% go to Court, and of those only 10% get convicted.*” Actual numbers can be calculated from Ministry of Justice Reports which show that during the 1980's and 1990's the number of people convicted of rape in New Zealand was typically about 110 each year. (Note: About 2000, MoJ changed its reporting basis to record the number of charges, instead of the number of defendants prosecuted and/or convicted.)

If the “*10% claim*” was to be believed, simple arithmetic suggests that some 110,000 rapes occur each year. If indeed it was also true that “*Most victims never disclose their abuse to anyone*”, the numbers could be expected to at least double to a total of more than 220,000 rapes per year.

If it really is true that 90% of rapes are unreported and that most victims never disclose their abuse to anyone, then those events cannot be known by advocates or anyone else. Their estimates of unreported crimes are therefore without value.

Assumptions About Sexual Abuse

In the absence of scientifically reliable symptoms specific to sexual abuse, ACC bases its sensitive claim policies and practices on beliefs and assumptions which reflect the misinformation and misconceptions held by counsellors and advocates. Some common assumptions include:

- Sexual abuse always causes mental injury;
- In the absence of credible evidence or independent corroboration, previous experience of criminal sexual offences can be retrospectively determined from current behaviour;
- Current psychological problems, in those who relate histories of sexual abuse, will have been caused by that abuse.

FLAWED POLICY & PRACTICE

Policy Reversal

The confusion amongst ACC and counsellors about sexual abuse is illustrated by conflicting policy stances. A former Clinical Advisor – Sensitive Claims (Mr Eric Medcalf) wrote on 26 October 1999:

“There are no sets of psychological or behavioural symptoms that are specific to sexual abuse. Any symptoms identified by the counsellor, in combination with a description by the claimant of events detailed in the legislation (the Crimes Act sections detailed in Schedule 3) may form the basis of an accepted claim. The psychological symptoms must be consistent with the events described.”

ACC further stated that *“The test of causation is whether the sexual abuse event(s) is a material or substantial cause of the mental injury.”* That statement is logically unsound - without evidence of the offence, it is not feasible to draw a conclusion as to the cause of the injury.

Aim No 1 of the Massey research objective was *“to identify symptoms attributed to sexual abuse”*. Resulting from that research, ACC moved from a position in 1999 of saying *“there are no sets of symptoms specific to sexual abuse”* to an opposite extreme in 2008, where it now claims to know of *“more than 700 effects”* and therefore billions of *“effect clusters”* able to be presented by any one claimant.

Gathering Evidence

ACC normally obtains information about sexual abuse cases from counsellors and claimants. In the absence of credible markers of sexual abuse (for example, a conviction, an admission), they not only believe untested claimant narratives are inherently reliable, but also lean heavily on their supposed diagnoses of clinically significant behavioural, cognitive, or psychological dysfunctions.

But counsellors do not have the skills, resources or authority to conduct external investigations to

corroborate claimant narratives. A basic error made in many sensitive claim cases is that ACC and counsellors appear unable to distinguish between allegation and fact, and cause and association. Sensitive claims are often accepted mainly on the basis of the untested, uncorroborated narrative presented by the claimant, combined with the self-reported, assessed or allegedly observed behaviour of the claimant.

Details Sought

ACC has expressed its view on gathering claimant information as:

“In gathering information about a sexual abuse event, it [ACC] seeks detailed information for the purposes of determining cover for mental injury including:

- i. Date of event*
- ii. Relationship between client and perpetrator(s) if any*
- iii. Age of client at the time*
- iv. Age of perpetrator(s)*
- v. Gender of Perpetrator:*
- vi. Frequency of event*
- vii. Town/city where event occurred*
- viii. Description of event(s)”*

Yet another fatality is that although those details might reinforce aspects of claimant narratives and untested allegations, they do not yield credible (or any) evidence that a criminal sexual offence actually occurred or was likely to have occurred.

Belief, Trust & Assumption

It is a tenet of counselling that clients should not be disbelieved, no matter how incredible their narratives might be, for to disbelieve a client would destroy the essential element of trust in a counsellor/client relationship. ACC and counsellors rely on the belief that claimant narratives are reliable, but they are seldom tested for credibility or accuracy.

The assumption that sexual abuse always causes mental injury is not substantiated by current evidence. It is a misconception on which ACC relies heavily - as is illustrated by the fact it has wrongly accepted tens of thousands of sensitive claims in the absence of credible evidence of either (or both) criminal sexual offences or mental injury. Obviously, every one of those accepted claims was deemed by ACC to involve both criminal sexual offending and consequential mental injury.

When diagnoses involve the assumption of automatic mental injury, and the belief that untested claimant narratives are factual and reliable, such diagnostic results are neither credible nor sufficiently accurate to comply with s.21 of the Act.

Example of Diagnostic Incompetence

The “*Diagnostic and Statistical Manual of Mental Disorders*” Fourth Edition (DSM-IV) is currently accepted as a primary reference for mental disorders. ACC has chosen this as its preferred diagnostic tool for use in sensitive claims.

Diagnostic criteria for PTSD include a history of exposure to a traumatic event meeting two criteria and symptoms from each of three symptom clusters: intrusive recollections, avoidant/numbing

symptoms, and hyper-arousal symptoms. A fifth criterion concerns duration of symptoms and a sixth assesses functioning.

The most profound criterion is the stressor event, defined as the person being exposed to a traumatic event in which both of the following have been present:

- * *“The person has experienced, witnessed, or been confronted with an event or events that involve actual or threatened death or serious injury, or a threat to the physical integrity of oneself or others.*
- * *The person's response involved intense fear, helplessness, or horror.”*

PTSD is defined as a disorder that arises after a specific set of traumatic stressors. It cannot exist in a vacuum, but requires a definitive and identifiable causal event. For a diagnosis of PTSD to be valid, the diagnostician must have accurate knowledge of the specific traumatic event.

In the majority of sensitive claims, it is highly unlikely that counsellors could have indisputable (or even reliable) knowledge of the primary stressor event (the claimed criminal sexual offence) sufficient to trigger a valid diagnosis of PTSD.

Proliferation of PTSD Diagnoses

ACC says that PTSD is a medical diagnosis which requires specific training and qualifications. Although counsellors say there are few amongst their number who are qualified to diagnose PTSD, it is the most common DSM-IV diagnosis given to sexual abuse claimants.

As an example, *Technical Report 2: Archival File Analysis* analysed 125 cases of claimants who had received ACC counselling between 1 January 2003 and 30 October 2004 (a 22 month period), being 3.24% of the total number of 3,857 claimants. It found that the primary diagnosis in 74% of the sample was Post Traumatic Stress Disorder (PTSD).

Effectively, a diagnosis of PTSD is a statement that a counsellor had credible evidence of the stressor event, in other words, that the claimant did in fact experience a criminal sexual offence. Unless the counsellor can substantiate that, such diagnoses are invalid and unreliable.

Effects of Unrelated Trauma

In its Annual Report for 1995, (Page 21) ACC commented:

“ACC funds counselling, along with other entitlements, for the psychological effects of sexual abuse incidents for which the claimant has cover. Separating the effects of the particular sexual abuse incident from the psychological effects of other trauma and events in the claimant's life is becoming an increasing problem.

The Corporation is finding itself increasingly in the position of funding counselling and other entitlements for individuals with psychological problems which cannot be identified clearly as resulting from only the sexual abuse incident which has cover under the scheme.”

The Act requires the injury to have been caused by the offence. Taxpayers are entitled to reasonable certainty that the claimant is not making a sensitive claim for a mental injury which may be due to some cause other than sexual abuse. Nevertheless, claimants and counsellors submit sensitive claims based on hearsay, inadequate investigation and lack of credible evidence. ACC is aware that it funds treatment for conditions and behaviours which are not related to sexual abuse.

CONCLUSIONS

Main Findings

This Annex reveals and demonstrates that ACC sensitive claims policies and practices rest on flawed research, beliefs, opinions and assumptions, instead of a foundation of evidence-based, scientifically reliable, ethical and safe knowledge and procedures.

By employing such defective methodology, ACC has failed to comply with the basic requirement of s.21 of the Act to ensure in sensitive claims that cover is provided only for those mental injuries which can be shown to have been caused by criminal sexual offences.

A consequence of these failures is that ACC indefensibly applies much lower evidential standards to mental injuries in sensitive claims than it does to physical injuries in accident claims.

Furthermore, ACC has misled Parliament and the public of New Zealand by publishing unscientific and unreliable information about sexual abuse and its alleged effects.

Recommendation

ACC's defaults in the above matters have resulted in unwarranted wastage of its own corporate resources and profligate wastage of taxpayer funds, through the wrongful acceptance of tens of thousands of sensitive claims, at a cost of hundreds of millions of dollars. Taken together, these failures could amount to malfeasance. It is therefore recommended that the Auditor-General investigate all the matters in this Annex.

ANNEX C: CLAIM NUMBERS & COSTS

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INTRODUCTION

Purpose

The purpose of this Annex is to reveal the deficiencies, unreliability and inaccuracies of ACC's reporting of sensitive claims and indicate the difficulties in obtaining accurate data. It also illustrates the huge number of claims accepted by ACC since the early 1990's and the hundreds of millions of dollars it spent on sensitive claims.

GENERAL BACKGROUND

Reasonable Public Expectation

The public has a reasonable expectation that ACC, as a Public Entity, will routinely publish reliable statistics on its activities, results and costs in timely and accurate reports. In the matter of reporting the activities of ACC's Sensitive Claims Unit, that expectation is not met.

Acknowledged Deficiencies

ACC has in the past acknowledged deficiencies in its reporting. As far back as the Corporation's Annual Report 1996, it was stated (Page 28):

“Work has also begun on developing a database for sensitive claims which will improve the Unit's [Sensitive Claims Unit] ability to provide statistics and management information about these claims.”

ACC should be able to provide reliable, unambiguous data.

Comparison

By way of comparison, the Ministry of Justice (MoJ) publishes annual reports on Court statistics, giving data on prosecutions, convictions and sentencing across all crime categories. About 2000, MoJ changed its method to report numbers of charges, rather than numbers of individuals involved. Defendants often face multiple charges and since that change, numbers of individuals can only be estimated, not measured. However, in the 1980's and 1990's, data on numbers of individuals were published. For crimes of a sexual nature measured as a proportion of total crime, or per capita, the numbers do not appear to have varied greatly since then.

From those aged MoJ statistics, it appears that the average number of individuals convicted of all sexual crimes was about 690 each year. In the 5-year period 1993 to 1997, while Courts convicted a total of about 3,450 people for sexual crimes, ACC accepted approximately 58,000 new sensitive claims, averaging more than 11,600 per year. These basic facts suggest a lack of rigour in the ACC process.

Lump Sum Payments

At the peak of this phenomenon, ACC reported it was receiving new claims at the rate of some 500 per week. Virtually automatic lump-sum compensation payments were being made to successful claimants, reportedly at a typical rate of \$10,000 or more per claimed incident of abuse. A cost “blow out” occurred.

The (then) National Government enacted new legislation in 1992, which also cancelled the lump-sum payments. When the ensuing transition period ended, (initially supposed to be about 30 June 1996) the number of new claims began to rapidly fall. The money dried up and so did a lot of the claims.

Under the new legislation, those abused before 1974, when the compensation scheme was first introduced, were also able to apply for help with counselling. The changes also meant that anyone who was abused after 1 July 1992 could not apply for a lump sum of up to \$27,000 but the corporation would pay towards the costs of counselling on a “case by case” basis. The date when they first saw a doctor about the abuse is deemed to be the date of the abuse. At that time, payments to counsellors ranged from \$56 to \$78 an hour.

ACC's Financial Problems

ACC's financial problems with sensitive claims were so bad that a spokesperson for ACC (Mr Alan Seay) was reported in the *Dominion* on 22 January 1997 as saying:

“We don't really know what it costs but we do know that it is a huge amount of money.”

Proof of Sexual Abuse

It has now become common practice for ACC to pay compensation for sensitive claims based on 80% of claimant income at the time of the alleged abuse, as though the claimed mental injury was the same as a physical injury. Some claimants are paid hugely generous sums on this basis. Heather Roy MP correctly commented (see NZPA Article Published in the NZ Herald, 11 June 2004, below) *“The real crux of the matter is people no longer have to prove that they were sexually abused.”*

COLLECTION OF DATA

Gleaning Data

Although ACC began publishing data on its website, it was obvious that some reports were inaccurate and/or incomplete.

Accordingly, it has been extremely difficult, if not impossible, to accurately quantify the real number of new claims, a breakdown of the costs, the claim rejection rate and other important data. But such data should be readily and automatically available to the public.

Data on New Claims and Costs has been gleaned from a wide variety of sources, which include various Ministers of ACC, ACC Annual Reports, and responses to Questions to ACC, to Parliamentary Questions, and to Official Information Act requests.

Data Published by News Media

Data on sexual abuse claims has been obtained at various times by news media using the provisions of the Official Information Act and has been placed in the public domain. A short selection of relevant items is shown below. The articles are representative only and are necessarily abridged in this Annex.

New Zealand Herald, October 1992.

Sexual abuse boosts compo claims.

Sexual abuse victims have been applying for help from the Accident Rehabilitation and Compensation Insurance Corporation at the rate of up to 500 a week.

About 6000 abuse claims were lodged with the corporation in the three months to September. This massive surge compares with a total of 2173 claims in the year to June 1991 and 1075 claims in the preceding 12 months.

Sunday Star-Times, early 1993.

ACC pays \$20m to sex abuse claimants.

Almost \$20 million was paid out to sexual abuse claimants by the Accident Compensation Corporation in 1992.

Figures to late December [1992] show payments were made to 2173 people – making the average payout just under \$10,000. The 1992 sexual abuse compensation of \$19.9 million is a huge rise on previous years, when sex abuse claims were lumped in with others under a general heading of “pain and suffering, loss of enjoyment of life.”

In this group, payouts were made in 1991 to 1075 claimants totalling \$9.7 million; in 1990, \$6 million to 667 claimants; 1989 \$4.1 million to 445 people and 1988, \$1.9 million to 221.

New Zealand Herald, 19 August 1995

\$830m lump-sum compo rush.

A rush to pick up lump-sum compensation cost ACC more than \$830 million in the past few years. Nearly 110,000 claims were paid out since the lump-sum payment was abolished in the 1992 ARCI Act and claimants with injuries prior to 1 July 1992 were allowed to register claims during a 3-year transitional period.

\$151,661,123 was paid out for loss of bodily function and \$681,213,727 for loss of enjoyment of life.

NZ Herald, 25 April 1996.

Woman coerced to have sex 17 times will get up to \$170,000

Wellington - A woman who was coerced by her psychologist into having sex with him 17 times will get up to \$170,000 in accident compensation.

In a landmark decision, an Accident Compensation Appeal Authority adjudicator, Mr Peter Cartwright, has allowed the woman's appeal against an ACC decision that all of the sexual abuse was a single act, entitling her to a maximum \$10,000 lump-sum payout.

Mr Cartwright ruled “Each of the 17 separate incidents identified by the appellant should be treated as personal injuries by accident.”

The Dominion, 22 January 1997

Increasing cost of sex abuse claims concerns ACC

ACC says it has no data on the costs of compensating victims of sexual abuse, despite nearly 20,000 active claims and big concerns about the increasing amount of money spent on them.

In its annual report, ACC singles out the continued high volume of increasing costs of sexual abuse claims as a big concern.

During the year ended 30 June 1996 there were 9982 sensitive claims lodged, compared with 11,750 the previous year and 10,800 in 1993-94.

The Sensitive Claims Unit had 19,130 active claims in 1995-96, the report said.

“Last year the corporation noted with concern increasing costs in compensation for these claims, mostly in providing counselling for claimants. This trend has continued and erodes the cost reduction gained through the removal of lump sum compensation from the scheme.”

Asked for actual costs, corporation spokesman Alan Seay said the ACC computer was not capable of identifying and costing sexual abuse claims.

“The system was set up for people who fall off ladders and that sort of thing so our codings do not cover sensitive claims,” Mr Seay said. “*We don’t really know what it costs but we do know that it is a huge amount of money.*”

Mr Seay said there had been a big jump in the number of sexual abuse counsellors accredited as ACC providers over the past two or three years, with numbers rising from about 300 to 1000.

The corporation attributes the increase to the September 31 cut-off date for lump sum payments, increased knowledge of payments available to victims and a growing awareness and acceptability of seeking help.

NZ Herald, 10 January 1998

Minimal payout for sex abuse overturned (by James Gardiner)

A 17-year-old woman is in line for \$60,000 compensation after successfully challenging an ACC ruling that more than 400 incidents of sexual abuse she suffered constituted a single injury by accident.

The NZ Herald, Tuesday 15 June 1999

Sex Cases

More people suffering the psychological effects of sexual abuse will be able to claim accident compensation from next month as the grounds for claims have been expanded.

Of the 61,219 claims lodged with the ACC since 1992 in relation to sex crimes, 40,790 received compensation.

NZPA Article Published in the NZ Herald, 11 June 2004

Two sexual abuse victims getting \$73,000 a year from ACC.

Some sexual abuse claimants are getting more than \$1400 a week in ongoing compensation from ACC, or a gross annual income of \$73,000.

Two claimants receive compensation of \$1418 each week, and 10 are on more than \$60,500 a year.

One claimant had a payment of more than \$153,000 in backdated compensation approved by the Accident Compensation Corporation, answers to written parliamentary questions by Act list MP Heather Roy reveal.

Another was compensated \$100,002 in backdated weekly payments, and nine backdated compensation payments have topped \$40,000 since 2000.

Weekly compensation payments are based on 80 per cent of a claimant's taxable liable earnings, said ACC spokesman Fraser Folster.

That indicates that those drawing the top two compensation amounts once had jobs paying \$92,000 a year.

"ACC does not provide cover and entitlements for sexual abuse per se, but for mental injury arising from sexual abuse," Mr Folster said. "The diagnosis of mental injury is based on clinical medical evidence [such as] an x-ray indicating internal damage to organs or bones."

ACC used accredited health providers to determine whether a claimant had suffered mental injury arising from sexual abuse, he said.

Mrs Roy said it was hard to believe that somebody suffering severe mental injury resulting from sexual abuse could have held down a high-paying job.

"You have to be functioning at a pretty high level to earn that sort of money, and to be suddenly struck down is hard to comprehend," she said. "That's not to say it doesn't happen. I'm sure it does. *"The real crux of the matter is people no longer have to prove that they were sexually abused."*

ACC annual payouts to sex abuse claimants have soared by more than \$9 million in the past three years.

ACC paid out \$27,231,652 to claimants in the year ending last October, compared with \$17,951,300 for the same period in 2001.

Mr Folster would not provide general background about those topping the compensation payment lists, citing privacy considerations.

He said people who suffered mental injury from sexual abuse came from "every segment or demographic" of society.

In April 2002 the Government introduced lump-sum payments of up to \$100,000 for sex abuse claims, prompting predictions from Opposition MPs that costs would rise. At the time a Christchurch law firm launched a campaign to attract new ACC clients. Mrs Roy said lump-sum payments did claimants no favours, as they became dependent on the state.

"When you're paying lump sums of the magnitude of \$153,007, there is no incentive for anyone to move off that sort of income." - NZPA

Dominion Post April 28 2003

Claims for sex abuse soaring
by Fran Tyler

Floodgates are set to open on thousands of compensation claims for alleged sex abuse that could each cost ACC up to \$100,000.

More than 12,000 people have lodged "sensitive claims" – for sexual abuse – in the past two years in a flurry of claims that began after publicity the Government was reintroducing lump-sum payments.

As many as 5744 of those – claims accepted since 2002 – might be considered for lump-sum compensation worth up to \$100,000, regardless of whether police had investigated the alleged assaults.

In 2001, Christchurch law firm Wakefield Associates sent out fliers about the then-planned law change. By February 2002 the number of claims had increased five-fold – from an average of 100 a week to 500.

The scheme came into effect with the introduction of the Injury Prevention and Rehabilitation and Compensation Act on April 1, 2002. No one has so far received the bulk payment, but five have cleared the obstacles to be considered. And for thousands of others it might now just be a matter of time.

The lump-sum payments are only considered once a claimant's condition has stabilised – when ACC has evidence that the injury will not improve in the following 12 months, with or without treatment.

Claimants had to undergo counselling and treatment before they could be assessed for lump-sum compensation. And the time is ticking down for other claimants who refused treatment, who have a two-year wait before ACC will assess their claims.

ACT NZ, which opposed the scheme at the time, said yesterday the increase in claims and potential for lump-sum payouts should be a concern.

Other Data

According to the conglomeration of data gleaned from a range of sources, data on new claims from 1988 appears to be as in Table 1:

Table 1: Overview

Apparent number of new claims and their costs.

| FY 1 July - 30 June 19XX | Number of New Claims | Cost of Claims | Comments |
|--------------------------|----------------------|----------------|----------------------------|
| - 30 June 1988 | 221 | \$1.9M | |
| - 30 June 1989 | 445 | \$4.1M | |
| - 30 June 1990 | 667 | \$6.0M | |
| - 30 June 1991 | 1075 | \$9.7M | |
| - 30 June 1992 | 2173 | \$19.9M | |
| - 30 June 1993 | 13,000 | \$43,547,000 | \$37M lump-sums |
| - 30 June 1994 | 10,800 | \$24,130,000 | \$16M lump-sums |
| - 30 June 1995 | 10,589 | \$12,434,851 | |
| - 30 June 1996 | 11,585 | \$11,242,426 | 19,170 "Ongoing Claims |
| - 30 June 1997 | 12,036 | \$12,915,655 | End of Lump Sum Payments ? |
| - 30 June 1998 | 7,236 | \$15M | |
| - 30 June 1999 | 3,493 | \$12.6M | 13,379 Ongoing Claims |
| - 30 June 2000 | 3,670 | \$13.5M | 13,469 Ongoing Claims |
| - 30 June 2001 | 4,289 | \$14.69M | 14,028 Ongoing Claims |
| - 30 June 2002 | 5,782 | \$23.056M | 16,300 Ongoing Claims |
| - 30 June 2003 | 5,249 | \$33.104M | 17,214 Ongoing Claims |
| - 30 June 2004 | 4,147 | \$46.137M | 17,228 Ongoing Claims |
| - 30 June 2005 | 4,143 | \$43.282M | 16,940 Ongoing Claims |
| - 30 June 2006 | 3,387 | \$44.845M | 16,522 Ongoing Claims |
| - 30 June 2007 | 4,118 | \$46.326M | 17,715 Ongoing Claims |
| - 30 June 2008 | 3,928 | \$47.515M | 18,339 Ongoing Claims |
| - 30 June 2009 | | | |
| - 30 June 2010 | | | |
| Approximate Totals | 112,033 | \$485.925M | |

CORRESPONDENCE WITH ACC

The matter of incorrect data was raised with ACC by letter of 29 April 2009. ACC confirmed that website data for the period 1998 – 2008 were wrong, and provided corrected data for the decade 1 July 1998 – 30 June 2008. [Note: This is the letter referred to in the Column Headings in the Table 2 below as “2009 ACC’s OIA Letter”]

After the 2011 version of ACC’s website was published, the matter was again discussed in letters of 21 and 24 June 2011. Quote (from my letter to ACC of 21 June 2011):

By letter of 29 April 2009, ACC’s Official Information Act office confirmed that website data for the period 1998 – 2008 were wrong, and provided corrected data for the decade 1 July 1998 – 30 June 2008.

The Table below gives a composite and comparative view of the reported number of accepted new sensitive claims, by year from 1988, and demonstrates serious deficiencies in the data.

While I have not included data on *Active Claims* and *Costs* for those years, data on them is also incorrect. I refer you particularly to the 2008 and 2011 website reports.

In respect of the Table of New Claims below, please note:

- a. The column headed *Original Data* is data published in various reports (eg ACC’s Annual Reports to Parliament, contemporaneous newspaper reports based on data obtained under the OIA, and letters from various Ministers for ACC). Most of it is likely to be accurate.
- b. The columns headed 2001, 2002 and 2004 show the data published on ACC’s website in those three sample years. The retrospective 2001 Report on years 1995 – 2000 is hugely different from those in reports made earlier (cp Original Data column). The variance is measured in thousands, and the later figures are half or less than the originals. Its unreliable data flows across into later Reports, which are therefore of doubtful accuracy.
- c. The column for 2008 shows the incorrect data which I queried with the Minister for ACC.
- d. The column headed 2009 contains corrected data which ACC subsequently supplied to me in April 2009.
- e. Despite the data given in the OIA letter, and the promise to correct the website, the column headed 2011 gives palpably wrong information.
- f. No explanation has ever been given as to why data for the years 1995 to 2000 have been so drastically reduced when being reported on the 2001 (and later) website versions.
- g. Data shown in ***bold italics*** [in Table 2 below] is that which I understand to be seriously wrong.

Table 2: Reported Claim Numbers

Reports of Accepted New Sensitive Claims 1988 – 2008.

| | | 2001 | 2002 | 2004 | 2008 | 2009 | 2011 |
|---------------------------|------------------|-------------------|-------------------|-------------------|-------------------|------------------------|------------------------------|
| FY 1 July - 30 June | Original data | Website Report | Website Report | Website Report | Website Report | ACC's OIA Letter | Current Website Report |
| 1988 | 221 | | | | | | |
| 1989 | 445 | | | | | | |
| 1990 | 667 | | | | | | |
| 1991 | 1,075 | | | | | | |
| 1992 | 2,173 | | | | | | |
| 1993 | 13,000 | | | | | | |
| 1994 | 10,800 | | | | | | |
| 1995 | 10,589 | 5,081 | 7,496 | 7,340 | | | |
| 1996 | 11,585 | 4,642 | 6,105 | 5,963 | | | |
| 1997 | 12,036 | 3,760 | 4,997 | 4,911 | | | |
| 1998 | 8,362 | 3,155 | 4,109 | 4,016 | | | |
| 1999 | 7,236 | 3,493 | 4,023 | 3,928 | 186 | 4,382 | |
| 2000 | 7,971 | 3,670 | 4,251 | 4,159 | 241 | 4,517 | 195 |
| 2001 | 4,400 | 4,289 | 4,635 | 4,471 | 249 | 4,921 | 281 |
| 2002 | | | 5,317 | 4,885 | 256 | 5,782 | 309 |
| 2003 | | | | 4,557 | 198 | 5,249 | 282 |
| 2004 | | | | 3,956 | 185 | 4,147 | 274 |
| 2005 | | | | | 165 | 4,143 | 309 |
| 2006 | | | | | 095 | 3,687 | 165 |
| 2007 | | | | | 136 | 4,118 | 193 |
| 2008 | | | | | 127 | 3,928 | 284 |
| Totals | 90,560 | 28,090 | 40,933 | 48,186 | 1,838 | 44,874 | 2,292 |
| Averages | 6,469 | 4,013 | 5,117 | 4,818 | 184 | 4,487 | 254 |

ACC's Response

ACC's Official Information Act response to this matter was by letter of 12 August 2011 in which ACC advised:

Quote:

*“Previously, there were inconsistencies in reporting the information and the link to this information was removed. However, users who retained links to the original pages could still access the information. The pages have since been removed and are no longer available. ****See Additional Comment at end....*****

Entitlement Claims (Compensation or Rehabilitation Claims) are claims that require additional assistance on top of medical treatment. Compensation and support for returning to independence may also been required. A claim is deemed an entitlement claim if it is assessed for or has received Weekly Compensation, Death benefits,

social rehabilitation, vocational rehabilitation or Support for Independence. Please note, counselling is considered treatment and, therefore, claims with only counselling are not entitlement claims.

Sensitive claim numbers are not static and data continually changes. Historical figures change each time they are produced because:

- Claims can change a cover decision status, e.g. from decline to accept or from held to accept.*
- Changes to the classification of sensitive claims. Every time the sensitive claim numbers are produced they are based on the current set of claims marked as sensitive. At any time a claim may be identified as a sensitive claim and added to the pool or inversely [sic] removed from the pool which may be some time after the date of lodgement.*

The information ACC provided to you in 2009, and what was reported in earlier website reports, reflected the total number of sensitive claims lodged. As advised above, there were inconsistencies in reporting the information previously, therefore, ACC changed the definition to reflect only sensitive claims that have entitlements. This ultimately affected the figures reported for previous periods.”

Unquote.

EFFECTS OF ACC’S RESPONSE

Website Errors

A recent inspection of ACC’s website showed that data for various years had been significantly altered. For the 10-year period to 2009, some 44,000 claims had been reduced to about 2,300. The reports varied according to which year an ACC website report was published.

Unsatisfactory Response

ACC’s responses are unsatisfactory and create a most peculiar and unusual circumstance. It is normal and accepted practice for administrations to eschew retrospective application of changes to policy and practice. According to its response, ACC changed the definition to reflect only sensitive claims that have entitlements. It has apparently made significant retrospective adjustments by making the previous 10-year period fit its new definition.

ACC’s newly-struck definition says “*A claim is deemed an entitlement claim if it is assessed for or has received Weekly Compensation, Death benefits, social rehabilitation, vocational rehabilitation or Support for Independence. It makes the point that “counselling is considered treatment and, therefore, claims with only counselling are not entitlement claims”*. If counselling is not an entitlement, ACC should now be required to justify why it provides counselling to many thousands of claimants.

Drastic Reduction of Reported Claims

The task of applying the change retrospectively to a decades-worth of claim data must have involved reviewing, re-assessing and re-classifying approximately 44,874 claims - a very substantial and costly workload. ACC appears to have gone to extraordinary lengths to review so many cases, so far back into history. Questions which should be addressed include determining the number of hours used to do the work, its cost, and justification for such effort and expense. By this procedural change, ACC apparently attempts to justify changing thousands of claims to a few hundreds for the period 1999 to 2008. It is disingenuous of it to say that those 43,000 or so claimants received no entitlements and had no more than counselling, or to expect the public to believe that in 2006, there were just 95 new claims.

Misleading the Public

Because ACC means to publish on its website only those few claims which it now deems "*entitlement claims*", the public will be denied knowledge of how many claims are actually submitted and/or accepted. Similarly, the costs will be misreported on its website. The public is being misled.

It could be wrongly concluded from such misinformation that the small number of new claims shown on its current website (averaging 254 per year) are a genuine measure of the level of sexual abuse in the community, and the average cost of reported claims (about \$44M per year) exceeds \$170,000 per claim.

Expectations in Public Reporting

ACC has an obligation to provide timely and accurate reports on its activities and costs. The taxpayer is entitled – at the very least - to know on a yearly basis:

- a. how many claims were submitted,
- b. how many claims were accepted,
- c. how much ACC spent on counselling services (including psychotherapy, psychology and psychiatry)
- d. how much was spent on compensation and other payments, incidentals and services,
- e. the number and classification of people registered to provide services to ACC for sexual abuse claims and treatment,
- f. the cost of operating ACC's Sensitive Claims Unit, its staffing levels and staff qualifications.

SUMMARY

Deficiencies in Reporting

This Annex illustrates and underscores the deficiencies, unreliability and inaccuracy of ACC's sensitive claims reporting. ACC has in the past acknowledged those facts, but its past and present reporting systems for sensitive claims remain badly deficient. By a wide margin, ACC's reporting standards fail to meet ordinary and reasonable expectations of reporting by a public entity.

Misinformation

It is therefore concluded that ACC has misled Parliament and the public of New Zealand by failing to maintain and publish full and accurate statistical data in respect of sensitive claim numbers, their costs and related data.

Author's Additional Comment

ACC wrote on 12 August 2011 that "*Previously, there were inconsistencies in reporting the information and the link to this information was removed. However, users who retained links to the original pages could still access the information. **The pages have since been removed and are no longer available.***"

Removing the incorrect website pages has neatly removed the evidence that they were wrong and also changed their definition. That is very convenient for them. However, I have copies of some or all of those pages. G.W.