Cook Islands Occupational Safety and Health National Reform

Issues Paper

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Shaw Idea Pty Ltd

Please respond to this Issues Paper.

Send your response to andrea@shawidea.com.au or send a hard copy to INTAFF office, marked: *Attention: OSH Reform Project*.

Please make sure you send your response by 24 August 2018.

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Introduction

Purpose

This paper sets out the key issues related to achieving the aims of the Cook Islands Occupational Safety and Health (OSH) National Reform Project. It will be distributed to anyone interested in the OSH National Reform Project and provides the background information to inform submissions and public consultation about the reforms, particularly through the Future Inquiry Workshop to be held on 9 August 2018.

Objectives of the project

The outcomes of this project will raise the standards of OSH across the Cook Islands. This will be achieved by reviewing and drafting OSH, workers' compensation (WC) and employers' liability insurance (ELI) legislation. To complete this task, the project will:

- Analyse the current state of OSH, WC and ELI in the Cook Islands;
- Draft a set of integrated policies for OSH, WC and ELI;
- Prepare drafting instructions for OSH, WC and ELI legislation;
- Provide training and capacity building for staff in the Labour and Consumer Division of the Ministry of Internal Affairs, contributing to the sustainable development of the Division; and
- Collaborate with the Media Campaign Technical Advisor.

Overview

This paper consists of the following sections:

1. Approach – setting out key features of the approach we are using for the project.
2. Legislative framework – summarising the existing OSH, WC, ELI and related legislation in the Cook Islands, as well as relevant human rights frameworks, treaties and international conventions that apply to the Cook Islands.
3. Economic and social analysis – analysing the economic and social impact of implementing effective legislation for OSH, WC and ELI. It provides a basic cost benefit analysis of reforming the existing legislation and principles for assessing different approaches to reform.
4. OSH issues – detailing the requirements of relevant International Labour Organisation (ILO) standards for OSH and setting out different legislative options for how the Cook Islands could meet these.
5. WC and ELI issues – detailing how the current system deals with the basic features of a workers' compensation system, the requirements of relevant ILO standards and issues for a new system.
6. Key questions – summarizing the questions posed throughout this Issues Paper and inviting written submissions in response by 24 August 2018.

1. Approach

Introduction

Key features of the approach we are taking to conduct the project are described in this section.

An improvement orientation

The project aims to improve OSH and workers' compensation regulation in the Cook Islands in line with the nation's international commitments (e.g. ILO conventions) and to achieve contemporary good regulatory practice. We will continue to consult widely during the review, so that our findings are based on the experiences of all stakeholders about the issues. We encourage all stakeholders to identify the opportunities this reform presents. Rather than revisiting past problems, our work is focused on the future.

Consultation and participation

Research evidence and our experience demonstrate that how OSH strategies are developed and implemented is at least as important as what they involve. Strategies to improve OSH and workers' compensation regulation in the Cook Islands will be much more effective if they are developed and implemented in a way that embodies the values and norms that are associated with high OSH performance, particularly participation.

We invite all stakeholders to participate in this project by responding to this issues paper by 24 August 2018. Instructions for responding are provided in the final section.

We will conduct a one-day workshop on 9 August, to discuss and debate the issues raised in this issues paper. Participants will be selected from stakeholder groups through Expressions of Interest. Please contact INTAFF if you would like to receive the call for Expressions of Interest. We hope that this timing will maximise the participation of stakeholders from the Pa Enua.

Capacity building for staff in the Labour and Consumer Division

We are incorporating capacity building throughout our work. The Labour and Consumer Division in the Ministry of Internal Affairs has been and will continue to work closely with us so that on-the-job skills transfer can occur. We will examine how the organisational capacity of the Ministry might be strengthened in the course of our work. In particular, we are taking a three-pronged approach to capacity building: incorporating training, preparing formal systems and establishing organisational arrangements. This will continue throughout the project.

2. Legislative Framework

The recent ILO review of the Cook Islands' existing legislative framework for OSH, WC, and ELI concluded that it is not adequate to achieve ILO standards or to support contemporary approaches to preventing and dealing with occupational ill-health. This section sets out the main issues with the current legislation, also specifying the relevant human rights frameworks, treaties and international conventions that apply to the Cook Islands.

International Human Rights Law and Conventions

Even though the Cook Islands is not a member of the United Nations (UN) in its own right, in 1992 the UN granted the Cook Islands the right to join certain UN treaties. Subsequently, the Cook Islands has joined three of the core UN human rights treaties: the Convention on the Rights of the Child (CRC) in 1997, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) in 2006 and the Convention on the Rights of Persons with Disabilities (CRPD) also in 2006.

These three treaties build on the International Covenant on Civil and Political Rights 1966 (ICCPR). Joining the three consequent treaties implies that the Cook Islands has accepted the fundamental treaty which New Zealand ratified when it was responsible for Cook Islands foreign affairs (even though New Zealand did not purport to extend its ratification to the Cook Islands). The ICCPR is the globally accepted international standard that sets out the basic human rights principles representing customary international law which underpins health and safety laws. In particular, the ICCPR requires that the rights to life and to bodily integrity must be protected by states. This in turn means that adequate health and safety laws are required by international human rights law, together with adequate enforcement mechanisms.

Various cases have interpreted these provisions and have led to three main propositions: (i) there must be adequate laws to regulate situations in which life or injury may be at risk, so as to provide standards designed to protect life and bodily integrity; (ii) there must be adequate enforcement of those laws; and (iii) in situations in which state officials know or ought to know that there is a real and immediate risk to life or bodily integrity, the state must take reasonable steps to deal with that risk.

This approach has been applied in a number of relevant cases, including in the context of responding to the known risks of asbestos. For example, in *Brincat and Others v Malta* (ECHR, 2014), it was found that the failure to offer adequate protections to workers using asbestos breached their right to life. In this context, it was noted that the government, in part through its membership of the World Health Organisation and the International Labour Organisation, was aware of the need for proper standards as from the early 1970s.

The CRPD entails particular obligations and gives effect to the three core human rights conventions - the Universal Declaration of Human Rights 1948, the ICCPR and the International Covenant on Economic, Social and Cultural Rights 1966 – in the context of people with disabilities. A disability as a result of a work injury would mean that a person is covered directly by the CRPD. This would entail that they have rights to health and rehabilitation, and hence there must be adequate care offered to those who are injured at work.

In summary, the duty to protect life requires health and safety law that is adequate to protect life and bodily integrity, requires enforcement of the law and hence resources for that purpose, and requires adequate responses to known risks.

Employment Relations Act 2012

The Employment Relations Act 2012 (ERA) is an omnibus piece of legislation that seeks to update all of the Cook Islands' labour laws to be consistent with relevant ILO standards. Part 7 (Health, Welfare and Safety in Employment) deals specifically with OSH. It includes 6 provisions:

- 70 Employers' and employees' duties
- 71 Procedure following accidents
- 72 Register of accidents
- 73 Dangerous machinery and occupations
- 74 Inspector may serve requisitions on employers
- 75 Review of requisition.

Part 8 (General Administration) includes powers and obligations for inspectors under the Act that apply to their role with respect to OSH.

The ERA introduces a contemporary approach to assigning duties and powers, e.g. by specifying that the employer:

> *must take all reasonably practicable steps to maintain a safe and healthy working environment for the employer's employees* (70(1)).

However, the ERA does not provide a comprehensive approach to OSH regulation. It does not include basic principles for how employers and employees might fulfil their duties (e.g. prevention based on the hierarchy of control or mechanisms for employees to raise OSH issues with their employer), nor does it provide a clear and comprehensive approach to enforcement. The powers granted to inspectors are limited and do not enable a contemporary approach to enforcement. Some of the provisions rely upon Regulations that were never developed, e.g. Provision 73 relies upon definitions of "dangerous machinery" and "hazardous occupations" that were to be prescribed in Regulations that do not exist.

This lack of clarity and comprehensiveness has meant that Cook Islands workers and businesses have not been able to rely on the ERA to provide clear guidance on their OSH responsibilities and rights. In particular, employers lack guidance on what counts as "reasonably practicable steps" in the context of the Cook Islands. Without a regulatory system designed to meet the specific needs of the Cook Islands, many of those consulted reported that they fear the imposition of overly complicated and bureaucratic systems that may be used in countries like Australia and New Zealand. This Issues Paper sets out options for what a Cook Islands approach to OSH regulation could look like.

Workers Compensation Ordinance 1964

The Workers Compensation Ordinance 1964 (WCO) is a piece of pre-independence legislation enacted by the then Legislative Assembly on 1 October 1964 and was assented to on behalf of the New Zealand Governor General by the then Resident Commissioner of the Cook Islands, A.O. (Olly) Dare, on 25 January 1965.

An 'Explanatory Note' to the WCO indicates that it was regarded as a somewhat limited, preliminary, step with the expectation that it would be given more comprehensive form over time, stating:

> *The bill as prepared allows for the introduction of workers compensation and, for this reason, its coverage was not as comprehensive as might be expected. However, it is envisaged that such amendments as will be necessary will be placed before this Assembly from time to time.*

This expectation has not occurred and, over the ensuing half century, the WCO has only been amended on four occasions, each time making relatively minor changes. The result is that the Cook Islands workers' compensation scheme has essentially remained in a state of hibernation for half a century. Indeed, some of the provisions are still expressed in New Zealand pounds.[1] There has been no attempt to provide any increase in the level of benefits in more than four decades, leaving the value and adequacy of these benefits in a parlous state. The coverage of occupational diseases is less than most jurisdictions had achieved by the 1930s. In almost all respects, the scheme is displaying the effects of age.

It is unsurprising that, in the wide-ranging consultations preceding this Issues Paper, everybody agreed that the law required revision. Nobody has attempted to defend this situation of neglect or argued for a retention of the status quo.

[1] These include sections 11(5) in relation to deemed earnings of apprentices; 15(2) in relation to the penalty where an employer fails to report the death of a worker; 16(9) in relation to the maximum reimbursement to a worker for medical treatment not arranged by their employer; and penalty provisions in sections 16(9), 28(5), 34(2), 35(1) and 36.

Employers Liability Insurance Regulations 1965

While the WCO sets out the basis for coverage, the benefit structure and other features of the workers' compensation scheme, the instrument for premium rate setting and collection is the Employers Liability Insurance Regulations 1965 (ELIR). These regulations promulgated in 1965 have only been updated once (in 1973).

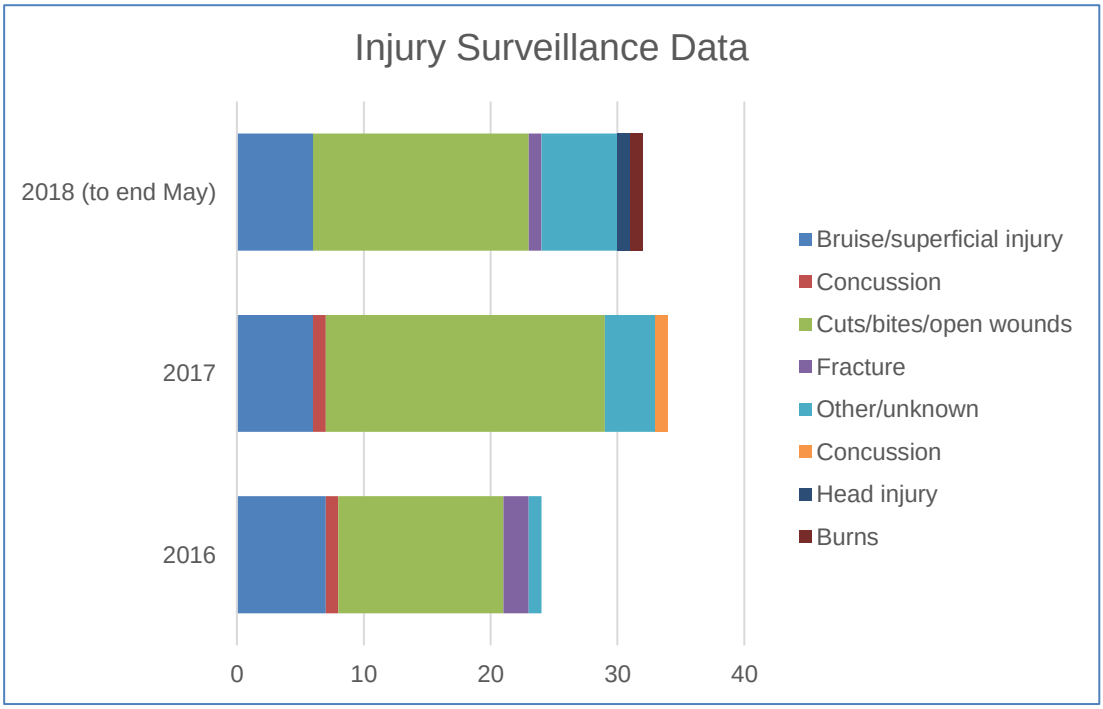
The ELIR provides the conduit by which workers' compensation insurance premiums reach the Workers Compensation Fund. In 1995/96, at a time of major economic crisis in the Cook Islands, the Cook Islands Government accessed funds held in the Workers Compensation Fund for other government purposes associated with the Economic Reform Plan. This has had ongoing consequences decades later.

3. Economic and social analysis

Poor control over occupational injuries and disease results in significant costs and creates social damage. Given the scale of the potential economic and social costs of poor OSH, the benefits of the proposed reform package are considerable. Implementing effective legislation for OSH, WC and ELI is likely to create economic and social benefits for the Cook Islands.

The burden of occupational injury and disease in the Cook Islands

Given the existing weak regulatory environment, it is not surprising that accurate data on the prevalence of occupational ill health is unavailable. Recent improvements in collecting injury surveillance data have meant that the reported numbers of work-related injuries have increased significantly this year. By the end of May 2018, the number of reported work-related injuries so far for 2018 (32) almost matched the total for 2017 (34), itself a 42% increase on the numbers for 2016 (24). This is almost certainly the result of improved reporting and does not mark a dramatic deterioration in working conditions in the Cook Islands. The following graph provides the work-related injuries data from the Ministry of Health injury surveillance database.



Interestingly, none of these reported injuries relate to musculo-skeletal disorders, which are the majority of all occupational injuries elsewhere in the world. It seems likely that such injuries were not recorded as work-related – it is most unlikely that Cook Islands workers are immune to musculo-skeletal disorders!

Indeed, it is certain that these figures greatly underestimate the incidence of occupational injuries and diseases in the Cook Islands. In 2006, the

ILO joined with Tampere University in Finland to produce global estimates of occupational injuries (Hämäläinen et al 2006). This paper estimated that the Cook Islands has one occupational fatality each year as a result of traumatic injuries. Given the general rule of thumb that for every work-related death as a result of an accident, there are another 10 deaths as a result of work-related diseases (Dorman 2012:15), it is possible that eleven (11) Cook Islanders die each year as a result of their work.

Hämäläinen et al's estimates of occupational injuries are much higher than recorded in the Ministry of Health's injury surveillance data base. Even allowing that the rates in the Cook Islands were much lower than elsewhere in the Western Pacific, this analysis concluded that the number of occupational accidents that resulted in three or more days absence from work was between 359 and 682 (average 520) each year, with a rate per 100,000 workers of 8679, much lower than other countries in the region[2]. Even taking the lower estimate, this is still more than ten times the rate recorded by the Ministry of Health. Using the labour force figures from the 2011 Cook Islands census, this means that between 4.75% and 9.03% of the Cook Islands labour force may experience an occupational injury serious enough to cause 3 or more days absence from work each year. The number of workers who experience a work-related disease is likely to be even higher than this, as previously explained.

In particular, the contribution of poor working conditions to the incidence of non-communicable diseases (NCDs) is extremely difficult to quantify. NCDs are diseases such as cardio-vascular disease, diabetes, mental illnesses and cancers that are usually the result of a range of causes, including environmental, genetic and social factors. The link between workplace exposure to specific carcinogens such as lead or asbestos and subsequent ill-health is well-accepted. However, many other hazardous substances are associated with various chronic and fatal diseases, e.g. exposure to diesel particulates and increased risk of cardiovascular disease. Similarly, poor work organisation causing psychosocial risks, such as long hours, bullying and stress, are risk factors for cardiovascular disease and illness (LaMontange et al 2006).

As this brief review suggests, the burden of occupational ill-health in the Cook Islands is not well-understood and is almost certainly much higher than currently recognized. With increasing levels of employment in higher risk industries such as construction and infrastructure, it is likely that the estimates from 2006 provide a conservative estimate of occupational ill-health in 2018.

Costs of poor OSH

The ILO estimates that the global economic burden of poor OSH practices is 4 per cent of global Gross Domestic Product each year (Takala et al 2014: 329). Because of the weaknesses of the existing regulatory framework, it is most unlikely that this burden is less in the Cook Islands. This figure represents over $NZ16.5 million each year,

[2] Fiji: 15431; Kiribati: 20785. The authors explain the Cook Islands' lower rate as a result of labour market structure and natural environment.

based on MFEM's estimated 2016 GDP of $NZ413,717,000. This is more than the budget allocation for the Ministry of Health in the Cook Islands' 2017/18 budget ($16.3 million).

The ILO's estimated cost of poor OSH only includes direct costs such as lost working time, workers' compensation, interruption of production, and medical expenses. It does not include the much greater indirect costs such as temporary replacement costs, staff turnover, equipment damage, expenses associated with domestic support for injured workers, and productivity reductions.

Evidence from around the world clearly shows that the indirect costs of workplace injury and illness overwhelmingly exceed the direct workers' compensation/employers' liability costs. A study by Andreoni for the International Labour Office which summarized earlier international studies found that the ratio of direct compensation costs to the indirect (non-compensation) costs of injury and illness ranged from between 1:1.58 to as high as 1:20 with a median figure of 1:4. A Queensland study by Mangan found that the non-compensation costs of industrial accidents in Queensland were at least six times greater than the compensation costs. An Access Economics report for the New Zealand Government estimated that indirect costs represent more than 80% of the total cost of occupational disease and injury in New Zealand (Access Economics 2006).

Thus, it is not unreasonable to estimate that the economic cost of poor OSH in the Cook Islands is at least $NZ16.5 million each year. Lessening this financial burden on the Cook Islands' economy is clearly a worthwhile investment.

Social costs of poor OSH

As well as financial costs, poor OSH results in social costs. Many of these social costs cannot be quantified in dollar terms, but increase the burden on families, communities and the social safety net. In a culture like the Cook Islands, with a strong family focus and close community links, these social costs are likely to be distributed widely across the society. Indeed, throughout our initial consultations, we were told several anecdotal stories about how families and communities in the Cook Islands have coped with occupational ill-health in the absence of a robust regulatory system.

The social costs include:

- Strain on families and relationships as a result of having to look after an injured worker, including having to do without the domestic contribution of an injured worker, such as shopping, cooking, home maintenance, child care etc.
- Loss of the social contribution of injured workers, e.g. loss of voluntary work in churches and sporting groups.
- Pain and suffering experienced by injured workers and their families resulting in loss of quality of life.

- Loss of career prospects due to temporary or permanent absence from the workplace.
- Lifestyle changes required because of impairment and loss of income.

Intangible costs are also borne by employers: numerous studies around the world show that unsafe workplaces are also less harmonious and that frequent cases of occupational ill-health result in poorer working relationships and thus less discretionary effort from a workforce (see European Commission 2011, Access Economics 2006 and Dorman 2012 for examples).

Clearly, the scale of the social burden of occupational ill-health in the Cook Islands cannot be reliably quantified, but improving the OSH and workers' compensation system in the Cook Islands will definitely reduce it.

Distribution of costs

Studies around the world have demonstrated that the costs of occupational ill-health are not distributed equally. New Zealand data suggests that the community bears the greatest economic burden (48%), with employees bearing 46% and employers only 6% of the cost of occupational ill-health (Access Economics, 2006: 76). The figures are only marginally different in Australia, where employees bear 49%, the community 47% and employers 3% of the cost of occupational ill-health (ASCC, 2009). Any legislative reform process must ensure that the cost burden of occupational ill-health is more equitably distributed.

Qualitative cost-benefit analysis

Conducting detailed and quantified cost benefit analyses of legislative interventions is challenging in any economy-wide setting (see Access Economics 2009). In the Cook Islands, in the absence of reliable data, this is even more fraught. While it is not possible to quantify the costs and benefits in detail, the following description includes the relevant items, based on the method set out in Blewett et al 2006.

Table 1

Costs	Benefits
Changes to workplaces and equipment to improve risk controls	Reduced occupational ill-health (injuries, diseases and death) as a result of improved prevention
Costs of training for employees and employers regarding the new system	Greater clarity in legal obligations for meeting duty of care
Costs of communicating and promoting the new legislative framework	Reduced costs of replacing staff (temporarily or permanently)
Costs of greater engagement with the Labour Inspectorate (e.g. workplace time for inspections)	Improved productivity and efficiency from less disruption to production and better work systems
More realistic workers' compensation premiums	Lower expenses to the health system from reduced ill-health

Costs	Benefits
	Reduced costs of equipment maintenance and replacement
	Improved service delivery as a result of greater discretionary effort
	More attractive labour market that can retain workers

As this table suggests, many of the costs associated with legislative reform are likely to be incurred in the immediate future, while the benefits are likely to be realised over a longer time frame. On the other hand, Australian experience demonstrates that improvements in the incidence of occupational ill-health can be achieved relatively quickly with sustained and effective interventions. Between 2011 (the first year of national legislative reform) and 2016, the serious claims rate (a week or more absence from work) in Australia decreased from 12.5 per 1000 employees to 9.3, a 25.6% reduction. Between 2015 and 2016, there was a 7% improvement. Such improvements will be difficult to monitor in the Cook Islands because of the lack of reliable data on the existing incidence of occupational ill-health.

Details of the costs that will be incurred by legislative reform depend upon the nature of the reform. However, given the existing legal obligation to provide safe and healthy workplaces so far as reasonably practicable, any costs for workplace modifications would arguably not be a consequence of new OSH legislation but of meeting existing obligations. Indeed, through providing greater clarity in what this obligation means, the cost to workplaces may well be reduced through legislative reform. The major likely new cost will be more realistic workers' compensation premiums. This increased cost may more equitably distribute the cost burden of occupational ill-health and also provide an incentive to address the causes of occupational ill-health, thus leading to greater economic and social benefits for the Cook Islands.

A more detailed cost-benefit analysis will be provided as part of the Regulatory Impact Statement to be submitted along with the Legislative Drafting Instructions.

Conclusion

This overview of the economic and social context for the OSH reform program suggests the following four principles for reform. The approach adopted by the Cook Islands must be:

1. Fair, leading to greater equity in sharing the costs of occupational ill-health.
2. Comprehensive, ensuring that all workers and enterprises have the benefit of improved OSH and workers' compensation regulation.
3. Prevention-oriented, focussing attention on how to prevent occupational ill-health, not just treat and compensate.

4. Sustainable, ensuring that the legislative system can fund the required entitlements without damaging the Cook Islands' economy.

Questions

1. What other costs and benefits of OSH reform can you identify?
2. How much will OSH reform cost your business or workplace?
3. How much will OSH reform benefit your business or workplace?
4. What other reform principles should be adopted?

4. OSH Issues

In order to fulfil the four reform principles, OSH legislation needs to deal with the following issues:

- Legislative forms and processes for OSH;
- Duties and rights in relation to OSH;
- Enforcement of the law;
- Workplace consultation arrangements;
- Collecting and using OSH data; and
- Accessing professional advice.

The ILO's framework for OSH, contained within a number of ILO Conventions, Recommendations and Protocols, sets out minimum standards to address these issues. As a member of the ILO, OSH legislation in the Cook Islands should be consistent with these standards, but must reflect the Cook Islands' specific social, economic and cultural context.

This section sets out the relevant standards and, where appropriate, offers different options for how the Cook Islands could achieve the requirements for consideration. We have focused on the ILO standards that deal with the overall governance of OSH, not the standards that deal with specific risks. The relevant standards are:

- C081 – Labour Inspection Convention, 1947 and R081 – Labour Inspection Recommendation, 1947;
- C155 – Occupational Safety and Health Convention, 1981; R164 - Occupational Safety and Health Recommendation, 1981 and P155 – Protocol of 2002 to the Occupational Safety and Health Convention, 1981;
- C161 – Occupational Health Services Convention, 1985 and R171 – Occupational Health Services Recommendation, 1985; and
- C187 – Promotional Framework for Occupational Safety and Health Convention, 2006 and R197 – Promotional Framework for Occupational Safety and Health Recommendation, 2006

Legislative forms and processes for OSH

In order to regulate OSH, the government will determine what kinds of legislative forms and processes will be used. C155 and R164 do not specify what particular forms should be used, suggesting "regulations, codes of practice or other suitable provisions" (R164 4a). Usually, in common law jurisdictions like the Cook Islands, the legal hierarchy is as follows:

- **An Act of Parliament** (e.g. an OSH Act), which is the primary legal foundation, setting out the overall legal requirements for OSH. Such an act will be the outcome of the current reform project.
- **Regulations**, which provide further detail on how to apply the general requirements of the OSH Act, e.g. in relation to specific hazards or workplace circumstances. Breaches of Regulations are evidence of breaches of the overarching Act.
- **Codes of Practice**, which provide specific practical guidance on how to meet the obligations of Regulations and the Act. Following the advice of a Code of Practice would normally be taken as evidence of compliance with the relevant Regulations and Act. Using a different method to meet the same obligations is also possible, however – failing to follow a Code of Practice does not in itself provide evidence of a breach of the law.

Many jurisdictions also provide general guidance and information products that advise on how to achieve good practice and meet legal obligations. These do not have formal legal standing, but contribute to the body of knowledge about how to control workplace risks.

We suggest that this is a suitable model to follow for the Cook Islands. The overarching Act of Parliament should contain general legal standards that set the framework and enabling context for OSH in the Cook Islands, including OSH duties. Regulations should be used to provide specific requirements for specific hazards and workplace circumstances. This would allow regulations to be developed progressively over time, as priorities emerge and resources become available. Similarly, Codes of Practice could be developed to accompany Regulations as they are promulgated. In the meantime, information products could be used to encourage and support improved standards (see the discussion on enforcement below).

R164 (4) also includes the requirement for reviews of the law and this is common practice around the world. Regular reviews are important to ensure that the legislation remains relevant as industry needs and employment patterns change. We propose including a review period in the new OSH law. Five years may be a suitable interval, long enough to give the new laws an opportunity to have impact. Of course, implementation of the law should be monitored throughout this period to ensure that any unintended negative consequences can be addressed promptly.

Questions

5. To what extent would this framework for OSH legislation work in the Cook Islands?

6. How frequently should the Cook Islands Government review the OSH Act?

Definitions and coverage

Article 3 of C155 provides the following definitions:

> *(a) the term "branches of economic activity" covers all branches in which workers are employed, including the public service;*
>
> *(b) the term "workers" covers all employed persons, including public employees;*
>
> *(c) the term "workplace" covers all places where workers need to be or to go by reason of their work and which are under the direct or indirect control of the employer;*
>
> *(d) the term "regulations" covers all provisions given force of law by the competent authority or authorities;*
>
> *(e) the term "health", in relation to work, indicates not merely the absence of disease or infirmity; it also includes the physical and mental element affecting health which are directly related to safety and hygiene at work.*

Interestingly, C155 does not provide a definition of employer.

We propose that definitions should be included which clarify the coverage of the OSH Act to take in:

- All kinds of employment relationships, including subcontracting, temporary employment, casual employment, employment as a volunteer or intern, and employment of foreign workers;
- Anyone who has control over a workplace, whether as an employer or not;
- The essential aspect of health for the operation of the Act, including mental as well as physical health.

Other definitions that clarify terms used in the Act should also be provided.

Question

7. What definitions should be included in the OSH Act?

Objectives of the law

While the relevant ILO conventions do not specify a requirement for this, including objectives for legislation is standard practice in the Cook Islands. We propose that the objectives for the OSH Act should cover:

- Preventing occupational ill-health as the prime purpose of the law;
- Eliminating risks in workplaces as the primary strategy to prevent occupational ill-health;
- Promoting cooperation between and the involvement of employers, workers, their representatives and experts in identifying, assessing and controlling risks and in developing OSH standards; and
- Promoting continuous improvement in OSH standards throughout the Cook Islands.

These objectives are consistent with the relevant ILO standards.

Question

8. What objectives should be included in the OSH Act?

National arrangements

C187 (4) requires "a national tripartite advisory body, or bodies, addressing occupational safety and health issues". The Cook Islands Tripartite Labour Advisory Council has been fulfilling this function in relation to all employment-related issues. We suggest that this should continue and that this role should be formally reflected in the new OSH Act.

Question

9. How should the role of the Tripartite Labour Advisory Council in relation to OSH be reflected in the OSH Act?

Duties and rights in relation to OSH

The Employment Relations Act 2012 includes duties for employers and employees in article 70:

> *(1) An employer must take all reasonably practicable steps to maintain a safe and healthy working environment for the employer's employees.*
>
> *(2) An employee must take all reasonably practicable steps to ensure their safety while at work and that no action or inaction of the employee while at work causes harm to any other person.*

These duties reflect those included in C155, but do not go far enough to cover all of those whose actions or inaction can impact on OSH. They also do not provide much specificity, particularly for employers' duties.

Employers' duties

As well as the overarching duty to take all reasonably practicable steps to provide a working environment that is safe and healthy, we propose including specific duties that set out and clarify the following aspects of an employers' duties, namely the duties to, so far as reasonably practicable:

- Control the risks to health and safety in the workplace, including those associated with the working environment, chemical and biological substances, plant and tools, work organisation and processes, and working equipment, based on eliminating risks wherever possible. This would encompass controlling workplace risks that are associated with a full range of diseases, including NCDs, not just injury risks.
- Provide adequate personal protective clothing and equipment as a last resort where reasonably practicable risk control measures are not available.

- Obtain advice, assistance and services from suitably qualified professionals about OSH issues about which the employer does not have sufficient knowledge or expertise.
- Provide adequate education, training and supervision to workers (including providing education and training in appropriate languages) so that they can fulfil their work duties without risk to themselves or others.
- Provide information to workers in appropriate languages about the OSH arrangements at the workplace and what workers should do to contribute to OSH.
- Provide adequate measures to deal with accidents and emergencies, including first aid, investigations and record keeping.
- Report to INTAFF about workplace incidents.
- Consult with workers and their representatives about OSH, including consultation about the OSH consequences of any proposed workplace changes in advance of finalizing changes.
- Consult with and coordinate with others who have control or influence over the workplace (e.g. when there are a number of subcontractors on a building site).
- Monitor working conditions to ensure that risks are prevented and controlled if they cannot be prevented.
- Ensure that people other than employees are not exposed to risks as a result of the work, e.g. customers, clients, visitors and passers-by.

Questions

10. How much detail should be included in the OSH Act about employers' duties?

11. What should be included in the OSH Act as employers' duties?

Senior Officer duties

CEOs and other senior managers have a critical role in managing OSH. Leadership from the top is an essential component of effective OSH management in any workplace. There may be value in specifying the particular responsibilities of these Senior Officers. This could take the form of a duty to exercise due diligence to ensure that the organisation they control meets its duty of care. This might include, for example, the responsibility to satisfy themselves that the workplaces over which they have management authority are, so far as reasonably practicable, safe and without risks to health.

Questions

12. How should the role of Senior Officers be defined in the OSH Act?

13. What special duties should Senior Officers have under the OSH Act?

Self-employed duties

Given the prevalence of small businesses in the Cook Islands, it may be worthwhile to include a specific duty for self-employed businesses. This could simply state that a self-employed person must ensure, so far as reasonably practicable, that others are not exposed to OSH risks as a result of their business.

Question

14. What duties should self-employed people have under the OSH Act?

Suppliers duties

Those who supply equipment, goods and services to workplaces also have a critical role in preventing occupational injuries and diseases. It is much better and more efficient to stop hazards entering workplaces in the first place. For example, it is much better to make sure that equipment is properly guarded before it is installed. Considering the OSH issues while a workplace is being designed will eliminate risks before the workplace is even built. Making sure that cancer-causing substances are not supplied eliminates the risk of occupational cancers.

The OSH Act could include a duty on those who supply workplaces to ensure that the equipment, goods or services that they provide are, so far as reasonably practicable, safe and without risks to health. Such a duty should also require suppliers to provide all relevant information to the workplace on the intended purpose and the safe and proper use of the goods, services, substances etc.

Question

15. What special duties should suppliers have under the OSH Act?

Employees duties

As well as the obligation to take reasonable care to ensure their own and others' safety, employees' duties should include the responsibilities to:

- Cooperate with their employer in OSH management
- Not intentionally or recklessly interfere with OSH equipment or strategies
- Use protective equipment and devices provided properly in accordance with the training provided.
- Report any hazards or risks that they observe to their immediate supervisor.
- Participate in consultative arrangements.

The OSH Act should also acknowledge employees' common law right to refuse to do work that they reasonably believe represents a serious and immediate danger to their own or others' health or safety.

Question

16. What should be included in the OSH Act as employees' duties?

Duties of others with influence over a workplace

Employers are not always in complete control over a workplace, e.g. when they rent or share premises with others. There may be value in specifying in the Act that anyone who has influence over the condition of a workplace also has a duty so far as reasonably practicable to ensure that the workplace (including access ways) is safe and without risks to health.

Question

17. What special duties should others with influence over a workplace have under the OSH Act?

Enforcement of the law

C155 (9) requires that OSH laws are enforced by "an adequate and appropriate system of inspection". This system must include "adequate penalties" for violations.

Models of enforcement

Enforcement aims to achieve improvements in OSH outcomes by requiring compliance and deterring non-compliance with relevant OSH legislation. The ways in which a regulator enforces relevant legislation contributes to the achievement of OSH outcomes. Enforcement, however, is not necessarily a straightforward process or an isolated event—it is a process of negotiation between duty holders and inspectors.

The outcome of enforcement, compliance by duty holders, is not necessarily straightforward. It is difficult to measure and what constitutes compliance will change as technology, management approaches, state of knowledge, and industry achievements change. It will be different in different circumstances, for example what is reasonably practicable in terms of compliance by a small shop may be quite different to compliance by a large hotel.

For all these reasons, modern OSH regulators must develop sophisticated and nuanced approaches to enforcement, able to respond appropriately to the range of enforcement contexts and based on sound evidence about what works. At the same time, those with legal responsibilities need a consistent approach from the inspectorate – the same situation should be dealt with in the same way regardless of which inspector deals with it. This requires clear policy and well-executed procedures across an inspectorate.

Evidence from around the world reinforces the value of an approach to enforcement that combines strategies for compliance (persuade) with strategies that focus on accountability and deterrence (punish) – such combined strategies are more likely to have impact.

This is a particular challenge in the Cook Islands because of the current and long-standing absence of clear standards and expectations and understandably low levels of enforcement. Thus, a key principle of any enforcement strategy in this environment must be a focus on building knowledge, skills and capacity in Cook Islands' workplaces in order to facilitate compliance in the first instance prior to any planned strategy to use coercive legislative powers to enforce those standards.

The key to improving safety and health standards in workplaces at this stage will be to empower workplaces to identify hazards and to control risks in a proactive way rather than relying on the intervention and presence of government inspectors to be the only catalyst for knowledge, understanding and improvement. A focus on "persuade" strategies is likely to have more success as an initial approach.

This will necessarily involve a staged approach to providing information and guidance to employers about their responsibilities and accepted standards of safety and health and to workers about what is required and what they are entitled to expect in their workplace.

Enforcement tools

At the same time, the OSH Act must include clear powers and enforcement tools for inspectors so that they can use accountability and deterrence ("punish") strategies in particular circumstances. The powers currently available to inspectors under the Employment Relations Act 2012 do not meet the basic ILO standards.

C081 (12) includes the following inspectorate powers that should be available to inspectors under the OSH Act:

> *(a) to enter freely and without previous notice at any hour of the day or night any workplace liable to inspection;*
>
> *(b) to enter by day any premises which they may have reasonable cause to believe to be liable to inspection; and*
>
> *(c) to carry out any examination, test or enquiry which they may consider necessary in order to satisfy themselves that the legal provisions are being strictly observed, and in particular--*
>
> > *(i) to interrogate, alone or in the presence of witnesses, the employer or the staff of the undertaking on any matters concerning the application of the legal provisions;*
> >
> > *(ii) to require the production of any books, registers or other documents the keeping of which is prescribed by national laws or regulations relating to conditions of work, in order to see that they are in conformity with the legal provisions, and to copy such documents or make extracts from them;*
> >
> > *(iii) to enforce the posting of notices required by the legal provisions;*
> >
> > *(iv) to take or remove for purposes of analysis samples of materials and substances used or handled, subject to the employer or his representative being notified of any samples or substances taken or removed for such purpose.*

These powers should be reflected in the new OSH Act.

The Employment Relations Act 2012 only provides inspectors with one enforcement tool: issuing a requisition *if an inspector has reasonable grounds to believe that an employer is not complying with a provision of the Act or the Regulations relating to health, welfare and safety* (74). This does not provide an inspector with the range of tools needed as part of a comprehensive enforcement strategy, e.g. the power to deal with an imminent threat to health and safety. The enforcement tools available to inspectors and the government could include:

- Improvement notices, requiring a duty holder to undertake a specific action by a specific time (e.g. to take action to remedy a risk, to provide particular equipment or training).
- Prohibition notices, prohibiting certain activities until particular steps are taken (e.g. prohibiting the use of a machine until a guard is installed).
- Infringement notices (similar to on the spot fines), for specific breaches of the law.
- Prosecution for particular breaches of the Act, e.g. failing to comply with an inspector's notice, or discriminating against employees for taking action to address OSH issues.
- Enforceable undertakings as an alternative to prosecution.

Questions

18. What kind of inspection system would work in the Cook Islands?

19. What kinds of enforcement tools should be available to inspectors and the government?

Offences and penalties

The OSH Act could set out a hierarchy of offences, to make clear what kinds of offences are considered most serious and appropriate for prosecution. In other words, different offences under the OSH Act could be treated differently and face different penalties. For example, anyone who recklessly and knowingly risks the lives of others because of their actions or inactions could face more serious charges than someone who failed to comply with an improvement notice. Obstructing an inspector in their work could be treated as a serious offence, to signal that the role of the inspector is critical to achieving the objectives of the Act. We propose that there could be 3 categories of offence – from most to least serious – attracting different penalties.

The maximum penalties for violations of the OSH provisions under the current Employment Relations Act 2012 are very low: $1,000 for an individual, otherwise $5,000. Article 9 of C155 requires that the *enforcement system shall provide for adequate penalties for violations of the laws and regulations*. Clearly, fines at that level cannot be considered adequate penalties in terms of either specific or general deterrence.

Consistent with more recent Cook Islands laws, we advocate that penalties should be expressed in penalty units and that the quantity of penalty units should vary with the category of the offence.[3] More serious offences should, of course, attract higher penalty units. As well as fines, imprisonment could be included as an option for the most serious offences. It should also be possible for a prosecution to result in an order for a duty holder to take specific actions to address the breach.

Questions

20. What categories of offences should be defined?

21. What kinds of penalties should be included in OSH laws?

Review of enforcement actions

In order to maintain confidence in the enforcement system, it is essential that a review mechanism exists. Under the Employment Relations Act 2012 (75), employers can seek to have the Secretary of INTAFF review a requisition issued by an inspector. No mechanism is provided for a request for review by another person affected by the decisions of the inspector such as an employee. The only further review opportunity provided under the current law is appeal to the Supreme Court. The opportunity for a further independent review should be considered. The new Act could set up the following process:

- Specified categories of persons who are affected by the inspector's decision should have a mechanism to seek review
- Internal review by the INTAFF Secretary for any notice or enforcement decision that the affected person is dissatisfied about.
- If the applicant for review is not satisfied by the outcome of this internal review, the matter could be referred to an independent tribunal.
- If the applicant is not satisfied with the outcome of the independent review, then an appeal to the Supreme Court would still be available.

Establishing an independent tribunal to deal with employment-related disagreements may be of value across a range of inspectorate functions. In particular, it could deal with the range of OSH, WC and ELI matters (see discussion below). The terms of reference and staffing of such a tribunal would need to be defined in the OSH Act, but should include the right to obtain expert advice where necessary.

Question

22. How should enforcement actions be reviewed?

[3] The use of penalty units provides for changes to the level of fines by an administrative change to the value of a penalty unit rather than a need to respond to changing circumstances by amendment to the Act itself.

Workplace consultation arrangements

Establishing arrangements for employee engagement in OSH in workplaces is a key requirement of the ILO standards, which the Employment Relations Act 2012 fails to achieve. Article 20 of C155 states that: *Co-operation between management and workers and/or their representatives within the undertaking shall be an essential element of organisational and other measures taken in pursuance of … this Convention.* Article 12 of R164 suggests to this end that measures to achieve this should consider appointing workers' safety delegates, workers' safety and health committees, and/or of joint safety and health committees.

This is for good reasons: the existence of an effective system of worker representation is one of the most consistent findings of research into the factors that create safe and healthy workplaces. As well as this important contribution, employee representation is also a reflection of a worker's right to have a say over their own OSH. It is also a recognition that no inspectorate can possibly be in all workplaces at all times, so a way to encourage effective local scrutiny is necessary.

Safety and health representatives (SHRs)

The opportunity for workers to elect a person to represent them on OSH matters is a key component of any effective workplace consultative arrangement.

The mechanisms for electing Safety and Health Representatives (SHRs) could be defined in the OSH Act, including how to define an "electorate" for SHRs and how such elections should be undertaken. Consistent with the requirements of ILO standards, SHRs should have the following rights and powers in relation to the workers they represent:

- To have the time and resources they need to properly fulfil their representative functions.
- To meet and consult with the workers they represent and to access the relevant parts of the workplace during working hours.
- To be given access to all relevant information about OSH matters.
- To be consulted about any relevant matters that impact on OSH, particularly planned changes to the workplace.
- To contribute to decisions about OSH.
- To contact inspectors and accompany them in the relevant parts of the workplace.
- To have the right to obtain advice to support them in their role.
- To issue "Provisional Improvement Notices" to their employer in order to draw attention to particular OSH problems.
- To instruct that work should cease when there is an immediate and serious threat to health and safety.

Most importantly, SHRs should be protected from discrimination or dismissal as a result of fulfilling this role - such offences should be categorised as serious by the OSH Act.

Question

23. How could the role of Safety and Health Representative be operationalised in the Cook Islands?

Roving safety and health representatives

Workers in small workplaces face particular barriers to gaining effective representative structures in OSH. They often feel vulnerable when making reports of hazards and incidents and are often concerned that taking a stand over OSH issues can have negative consequences for their ongoing employment, rightly or wrongly. This can be a specific problem in family-owned businesses, where sometimes a worker might have to make a report to a more senior member of their own family. This is a particular challenge in the Cook Islands.

There is considerable international evidence that the use of 'roving' safety and health representatives (RSHRs) in such circumstances has considerable benefits. RSHRs are defined as safety and health representatives who are elected to cover a number of workplaces without a direct employment relationship in all of them. For example, all of the employees from the shops in a shopping centre could together elect one of them to be the SHR for the whole shopping centre. Such an arrangement would reduce the risk of negative employment consequences and would provide the elected representative with the opportunity to develop and apply skills in OSH.

Question

24. How could the role of Roving Safety and Health Representative be operationalised in the Cook Islands?

OSH committees

Joint worker-management committees provide a useful forum for dealing with OSH matters. Through meeting regularly, these committees can foster good communication about OSH issues and can be the key mechanism for consultation about OSH matters and workplace changes. However, effective OSH committees require resourcing and strong participation. Without the right participation from management and the workforce, OSH committees can become ineffective, and not contribute to good decision-making.

Question

25. How could the role of OSH Committees be operationalised in the Cook Islands?

Collecting and using OSH data

Reliable, comprehensive and timely data is an important support to good decision-making about OSH. In workplaces, knowing where incidents are occurring helps identify where risks exist, even if injuries and

diseases have not yet resulted. For the whole nation, data about the extent of occupational ill-health and the nature of serious incidents helps to prioritise inspectorate attention and the provision of specific guidance and information as well as determine what kinds of regulations should be developed.

Register of accidents

The Employment Relations Act 2012 already requires employers to keep a Register of Accidents, but suitable guidance as to the form this should take has not yet been provided. This obligation should also exist in the new OSH Act, but clear guidance should be developed. In particular, employers should use the Register of Accidents to monitor and respond to emerging OSH issues. The Register of Accidents should be made available to inspectors when they visit workplaces.

Question

26. What form should a Register of Accidents take?

Reporting serious incidents

So that INTAFF can appropriately respond, employers should be required to report serious incidents to INTAFF as soon as they become aware of the incident. This could include:

- Fatalities at a workplace or as a result of work.
- Incidents which result in serious injuries, which should be defined, e.g. requiring immediate medical treatment or requiring admission to hospital as an in-patient.
- Failure of a significant item of plant (even if no injuries resulted).
- Collapse of an excavation or part of a building (even if no injuries resulted).
- An explosion or fire or leakage of a substance (including dangerous goods).

The site where a serious incident has occurred should not be disturbed until an inspector has been able to examine the site so that the inspector can investigate the causes of the incident or has otherwise given permission for some action to be taken. Of course, if the site must be disturbed in order to prevent further harm, this should be done immediately.

Questions

27. How should serious incidents be defined in the OSH Act?

28. How should serious incidents be notified to INTAFF?

Collecting and using data nationally

P155 includes the requirement for governments to publish annual statistics of *occupational accidents, occupational diseases and, as appropriate, dangerous occurrences and commuting accidents* (6). As

stated above, this is clearly an important support to effective regulatory interventions. While the injury surveillance system in the Cook Islands has improved considerably over recent years, the approach to data gathering is still not thorough or sophisticated.

Improvements in the workers' compensation system will certainly contribute to improved data on occupational ill-health, but there may be value in developing a coordinated approach with the Ministry of Health to collect information about work-related ill-health whether or not it results in a workers' compensation claim. This will be an important tool for monitoring and evaluating the impact of OSH reform.

Question

29. How could INTAFF and the Ministry of Health collect more reliable and comprehensive data about the incidence of occupational ill-health and dangerous occurrences?

Accessing professional advice

Expert advice and support can be critical to implementing effective risk controls. Above, we suggested that the employers' duties in the new OSH Act should include the obligation to obtain professional advice. Similarly, INTAFF itself will need access to quality professional advice in relation to technical issues. This may be challenging in the Cook Islands context where the size of the economy may not support a private market for advisors.

One of the ILO conventions, C161, deals with establishing Occupational Health Services, which may provide one avenue to address this challenge. Occupational Health Services are professional services that advise workplaces on OSH issues, particularly on how to prevent occupational ill-health. They are professionally staffed with relevant specialists, such as OSH officers, occupational hygienists, ergonomists as well as health professionals such as occupational nurses.

INTAFF and the Ministry of Health could together investigate the feasibility of establishing an Occupational Health Service as a joint venture. This service could also provide support to the workers' compensation system as well as advising on prevention. In addition to providing technical advice to INTAFF, the services could be available to workplaces on a fee for service basis. A core staff could be employed full time, e.g. an occupational nurse, and a generalist OSH adviser, with more specialized professionals called in for short term contracts to undertake specific projects, e.g. an occupational hygienist to monitor particular hazardous substances exposures.

Questions

30. How can duty holders and INTAFF access professional OSH advice?

31. How could an Occupational Health Service work in the Cook Islands?

5. Workers' Compensation and Employers Liability Insurance Issues

Major Elements of Workers' Compensation Design

Workers' compensation schemes need to address the central issues of:

- **who** is covered by the scheme;
- **when** such persons are covered;
- **for what** they are covered; and
- **how** they are covered.

The process of identifying and operationalising these central questions is fundamentally related to a further set of issues, in particular:

- the administrative (claims determination) arrangements;
- how disputes are to be resolved;
- how the system is financed; and
- what governance arrangements should be in place.

The answers to these questions are not fixed and immutable. They vary between different national systems and, even within national systems, they have varied over time.

The task for this Issues Paper is to provide a platform for discussion about how these features of a workers' compensation system may be best expressed in arrangements that are right for the Cook Islands in the second decade of the twenty first century.

As with OSH, because the Cook Islands is a member of the ILO, such a discussion must take place within the overarching framework of ILO labour standards, in this case primarily the Employment Injury Benefits Convention, 1964 (C121) (EIBC). However, this ILO framework only sets out minimum standards: how these standards are reached or attained by a nation in its domestic legislation is a matter for its own discernment through its Parliamentary processes.

This discussion is about a framework and set of arrangements for dealing with the consequences of work injury and illness. Contextually, however, this exists within a wider universe of trauma, mortality and morbidity from other sources, for instance the consequences of motor vehicle accidents. Such a wider universe is beyond the scope of this project and this Issues Paper. However, considering the matter of compensation for occupational disability could possibly inform later consideration of how to deal with these other sources of mortality and morbidity.

Approach to Issues

The approach taken in this part of the Issues Paper is to briefly deal with each of the major elements of workers' compensation design listed above in the following manner. First, it provides an overview of the principal

features that workers' compensation schemes have developed to deal with the particular design element under discussion. Secondly, the section outlines the minimum standards in relation to this particular element mandated by the ILO in the EIBC to the extent that they are addressed in this Convention. Thirdly, the section discusses how these matters are dealt with under the current Workers Compensation Ordinance 1964 and/or the Employers Liability Insurance Regulations. Finally, we provide a list of questions for consideration and feedback.

Coverage of Workers

The starting point for delineating coverage in almost all workers' compensation schemes lies with the common law distinction between a contract of service (denoting an employee) and a contract for services (denoting an independent contractor). In most statutes, the definition of "worker" is aligned with the common law contract of employment, often using the terminology of "a contract of service or apprenticeship".

From this starting point, many workers' compensation statutes have provisions to extend coverage to persons whose occupational status does not fit easily within the bounds of a traditional contract of employment (such as taxi drivers). As well, such statutes may extend coverage to persons who are engaged in what are regarded as socially desirable, but voluntary (or nominally remunerated), activities such as volunteer fire fighters or disaster relief workers. Many, if not most, of these volunteers are engaged in such activities alongside or outside their normal paid employment. A major reason for coverage is that an injury sustained in their voluntary role may disable that person from undertaking their paid employment and this coverage can protect the economic and other losses that may entail from that fact.

As well as augmentation of coverage, many workers' compensation statutes also have provisions that exclude such coverage to designated groups that would otherwise be covered by the statute as workers. This is now largely seen as undesirable but there is provision under the ILO EIBC to do so, at least in certain areas.

Some employers formally re-designate an employment relationship as one of contracting in order to free them from many of the obligations placed upon them, both at common law and under statute, including obligations relating to sick leave, annual and long-service leave, superannuation and workers' compensation. While the formal designation of the relationship may have changed from that of 'employee' to that of 'contractor', the substance or essence of the relationship may be largely unchanged; that is, the so-called 'contractor' will often be working exclusively or predominantly for the one person or organisation. This is a major concern for many contemporary workers' compensation schemes.

ILO Principles

Article 4.1 of the Employment Injury Benefits Convention, 1964 (EIBC) states that:

National legislation concerning employment injury benefits shall protect all employees, including apprentices, in the public and private sectors, including co-operatives, and, in respect of the death of the breadwinner, prescribed categories of beneficiaries.

This is a broadly-based formulation, but one that is subject to the qualifications in Article 4.2 that a member state may make exceptions to coverage with respect to:

(a) persons whose employment is of a casual nature and who are employed otherwise than for the purpose of the employer's trade or business;
(b) out-workers;
(c) members of the employer's family living in his house, in respect of their work for him;
(d) other categories of employees, which shall not exceed in number 10 per cent of all employees other than those excluded under clauses (a) to (c).

WCO 1964 - Primary Coverage Definition

The WCO (section 2) defines a "worker" as a person who has

entered into or works under a contract of service or apprenticeship with an employer whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing.

This is a typical coverage definition that can be found, in almost identical words, in many workers' compensation statutes.

The WCO diverges significantly from other workers' compensation statutes by including a range of exemptions from this broad statement of coverage immediately following this coverage definition.

Exemptions from Coverage

(a) a member of an employer's family or a guardian or ward of the employer

This is an extremely widely drawn exclusion and more extensive than comparable legislation in other parts of the world. The reach can be seen by the broad definition of "member of an employer's family" in the WCO which is expressed as meaning "wife, husband, mother, father, son, daughter, brother, sister, grand-father, grand-mother, step-father, step-mother, grandson, granddaughter, step-son, step-daughter, half-brother, half-sister, legally adopted son, legally adopted daughter, illegitimate son or grandson, illegitimate daughter or grand-daughter, parent or grand-parent of illegitimate child, brothers and sisters of illegitimate persons whether by same father or mother."

The Cook Islands are characterised by dense family and social networks. If properly enforced, this provision would potentially leave a considerable percentage of small businesses beyond the protective coverage of workers' compensation.

(b) any person employed or rendering service in accordance with Native or Cook Islands customs

This exemption relates to the complex issue of social relations in the Cook Islands, particularly regarding land tenure, and the obligations regarding payment or service, including labour, ('atinga') to the ariki or other land owners (mataiaopo, rangatira or komono) (Crocombe, 1961: pp 115 – 116, 177, 180, 218 and 221). Its importance has diminished over the more than half century since the WCO was enacted. On Rarotonga it is now of largely symbolic significance and it appears to have a degree of contemporary relevance only on the islands of Pukapuka, Nassau, Mitiaro, Manuae and Palmerston (Arnold, 2018).

(c) any person employed in plantation work for an employer who regularly employs three or less employees in any year

This exemption is, like that relating to members of an employer's family, potentially of wide compass. It is stated in terms of a plantation owner employer who *regularly* employs three or less employees in any year. It means that such an employer, who maintains a small workforce on general care of the plantation during the year, can have an unlimited number of workers engaged during the harvest period and not have any workers' compensation liability in respect of any work-related injuries and disease that occur, both at harvest time and otherwise during the year.

It should perhaps also be noted that the WCO was enacted by the pre-Independence Legislative Assembly which was constituted by 22 elected members and four appointed officials. Many of these members were plantation owners or had plantation interests. Debate on the WCO was dominated (over half of the Hansard report) by two European members, Julian Dashwood, the flamboyant English writer, with business interests (including plantation interest through his wife) on Mauke and R.W. Rapley, who, in addition to ownership of a taxi fleet, was a successful plantation owner.

(d) a person whose employment is of a casual nature not included in the First Schedule and who is employed otherwise than for the purposes of the employer's trade or business, not being a person employed for the purposes of any game or recreation and engaged or paid through a club

This is a significant provision. If one strips away the reference to the First Schedule and the employment in recreational activities, it essentially expresses a not uncommon exemption in workers' compensation legislation and one that is endorsed by Article 4.2(a) of the ILO's EIBC. However, the reference to the First Schedule is an interesting one in that, while being an exclusionary provision, it also sets up a range of casual activities that can be encompassed within workers' compensation coverage. These activities, in the somewhat convoluted language of the First Schedule, are:

- the making of any excavation in which on any one day of the preceding twelve months explosives have been used, or whose depth from its highest to its lowest point exceeds twenty feet;
- the cutting of standing timber including the cutting of scrub and clearing land of stumps and logs;
- the construction or demolition of any building or of any structure which is ten feet or more in height from its lowest to its highest point;
- the manufacture or handling or use of any explosives;
- the charge or use of any machinery in motion and driven by steam or other mechanical power;
- the driving of any vehicle including a tractor drawn or propelled by horse-power or mechanical power;
- domestic service in which the employment or engagement is for a period of not less than fourteen days;
- pearl diving;
- ship-loading and lightering of passengers and cargo;
- any occupation in which a worker incurs a risk of falling any distance exceeding twelve feet; and
- spraying with toxic sprays.

(e) Any class or persons whom the [Queen's Representative] may, by notice in the Cook Islands Gazette declare not to be workers for the purpose of this Ordinance

It appears that there has been no use of this provision over the history of the WCO to exempt coverage of any other class of workers.

Questions

32. What should be the legal test for employment coverage for workers' compensation in the Cook Islands?

33. What exclusions to coverage, if any, should exist and why?

34. What forms of work activity that do not readily fit within the notion of a contract of employment should be given deemed coverage?

35. Which types of voluntary workers engaged in socially desirable activities should be afforded deemed coverage? To which organisations should this apply (eg Cook Islands Civil Society Organisation, Cook Islands Red Cross)?

Coverage of Conditions

There has been no more complex, or litigated, area of workers' compensation law than the arrangements for dealing with occupational injury and illness. While workers' compensation schemes have relatively little trouble dealing with cases of traumatic injury as a result of accidents, they have always struggled with the coverage of occupational disease. The early workers' compensation statutes around the British Empire (and later Commonwealth) adopted the formulation of "personal

injury by accident". The "by accident" component of this formulation had the effect of excluding diseases contracted by gradual process such as lead poisoning and the requirement to legislate for specific measures to accommodate disease conditions. In particular, the difficulties associated with long latency periods between exposure to a particular substance and the onset of a particular disease has led to measures such as disease schedules. These list specific diseases and relate them to the work exposures that would lead to a presumption that the disease is work-related.

Industrial deafness has often required specific recognition due to conflicting views among the judiciary as to whether this is in fact a disease or an injury. Similarly, modern schemes have required the development of legislative provisions that can ensure that there is coverage of mental injury as well as physical injury. As well, many schemes have enacted provisions that allow coverage for what is sometimes called a 'secondary disability', where the employment conditions result in an aggravation, deterioration, exacerbation or recurrence of a pre-existing injury or disease.

Such problems are especially the case with non-communicable diseases (NCDs), such as cardio-vascular disease, diabetes, mental illnesses and many cancers. These often chronic conditions usually result from multiple risks factors, including genetic, lifestyle and environmental conditions, not to mention the underpinning element of a person's socio-economic status. Poor work organisation (e.g. fatigue, stress, bullying) and exposure to hazardous substances are work-related risk factors for NCDs that are evident across the entire working population. In rare cases, such as asbestos-related diseases, a direct link can be made between an individual's working history and their subsequent development of disease. Such rare examples are usually (and should be) listed in disease schedules. In almost all cases, however, it is impossible to draw a direct link between a specific work-related risk factor that can be identified across an entire workplace and a specific disease case in an individual. As a result, workers' compensation schemes have found difficulty in establishing a work connection sufficient to meet the 'arising out of and in the course of employment' test in the light of the range of other causal factors. Consequently, workers' compensation for NCDs is quite uncommon. This does not diminish an employer's responsibility to control the workplace risks associated with NCDs under OSH legislation (see earlier sections).

ILO Principles

In relation to occupational injuries, the ILO EIBC requires, in Article 7.1, that each Member prescribe a definition of "industrial accident".

With respect to occupational diseases, the EIBC, sets out, in Schedule 1 to the Convention, a list of 29 occupational disease in one column and, in a corresponding second column, the nature of work exposure that will give rise to a presumption that the disease is work related.

Article 8 of the EIBC provides Members with three options in relation to dealing with occupational diseases within their domestic legislation. These options are to:

> *(a) prescribe a list of diseases, comprising at least the diseases enumerated in Schedule I to this Convention, which shall be regarded as occupational diseases under prescribed conditions; or*
>
> *(b) include in its legislation a general definition of occupational diseases broad enough to cover at least the diseases enumerated in Schedule I to this Convention; or*
>
> *(c) prescribe a list of diseases in conformity with clause (a), complemented by a general definition of occupational diseases or by other provisions for establishing the occupational origin of diseases not so listed or manifesting themselves under conditions different from those prescribed.*

WCO 1964 – Coverage of Conditions

The WCO has no definition of "injury" or "disease" and, accordingly, there is no statutory guidance as to what is encompassed by these terms.

Without any such guidance, an employer's liability for compensation for death or incapacity is simply expressed in section 5(1) of the Ordinance in terms of "*personal injury by accident* arising out of and in the course of the employment".

There appears to be little which rides on the distinction between "injury" and "personal injury" apart from a delineation between injury to the physical person of an individual as against damage to his or her property or even an artificial aid or prosthesis (*McCawley v Storey* (1948) SR (NSW) 474).

More significant is the "by accident" requirement. As mentioned earlier, this formulation led to conditions of gradual process being excluded from coverage. A response to this issue is addressed, in an extremely limited form, in section 10 of the WCO.

Section 10 is the section dealing with compensation for occupational diseases, but the only occupational diseases that are specifically covered by this measure are the seven conditions stated in section 10(6), namely anthrax, lead poisoning, mercury poisoning, phosphorous poisoning, arsenic poisoning, silicosis, X-ray radiation and any other diseases that may be declared under the Ordinance. There does not appear to have been any expansion of this limited list by declaration.

For other diseases, the remedy specified in section 10(7) is to seek to recover compensation by way of "personal injury by accident within the meaning of this Ordinance". By definition, this is essentially precluded in the case of most diseases which are either of gradual onset or not associated with a trauma event. Even in jurisdictions that do not have the "by accident" requirement in terms of liability, the "disease-injury" question (where a disease can also be characterised as an injury) has

spawned a large body of complex litigation around often obtuse questions.

The upshot is that the range of occupational diseases covered under the WCO is extremely limited, indeed even more limited than that provided for under the ILO's *Workmen's Compensation (Occupational Diseases) Convention* of 1934. There is a huge number of glaring omissions. Perhaps no omission is more significant than the failure to recognise any of the range of asbestos-related diseases (including pleural plaques, asbestosis, asbestos-induced lung cancer and mesothelioma) that represent, in almost every country, a major component of the burden of occupational disease.

There are other issues with the structure of section 10 that are dealt with below.

Questions

36. How should "injury" and "disease" be defined?

37. How should secondary disability be included?

38. How should coverage of occupational diseases be dealt with?

Coverage of Circumstances

Workers' compensation is an aetiologically-based system in that it is concerned with 'work-related' injury and illness. The early workers' compensation systems adopted the dual requirement of an injury "arising out of and in the course of employment" as a condition precedent for entitlement to benefits. Over time many jurisdictions, including all Australian schemes, have substituted the disjunctive "or" for the conjunctive "and" in this requirement so that the test is that of an injury "arising out of or in the course of employment". This change provides a more liberal basis for workers' entitlements in having only to satisfy either a causal connection ("arising out of") or a temporal relationship ("in the course of") between the injury and employment rather than both.

However this primary entitlement provision is expressed, most jurisdictions have provisions that provide greater clarity and guidance as to the boundaries of what is within or outside the ambit of this term. For instance, it is common for statutes to include (or exclude) journey or commuting injuries, namely defining whether injuries incurred while travelling to and from work are included in this coverage. There is a similar issue in regard to coverage with respect to what are often called 'recess' claims. These are injuries that occur within the overall course of a working day while the worker is undertaking a break from their formal work, for instance during a lunch break.

ILO Principles

Article 7.1 of the ILO EIBC provides that each Member shall prescribe a definition of 'industrial accident' including the conditions under which a commuting accident is considered to be an industrial accident."

WCO 1964 – Coverage of Circumstances

The primary liability section in the WCO is expressed in the traditional terms of the dual requirement of an injury "arising out of and in the course of employment". There does not appear to be any (at least reported) case law on the interpretation of this primary liability section.

Questions

39. What test of work-relatedness should be included?

40. How should coverage of journey or commuting injuries be dealt with?

41. How should coverage of recess injuries be dealt with?

Exclusions and Limitations

It has become standard across schemes to provide that certain behaviours constitute a disentitlement to compensation. One such situation is where an incapacity or death results from a deliberate self-injury. Another situation, in relation to serious and wilful misconduct, originally constituted a complete bar to recovery, but, for most of the twentieth century and beyond, this disentitlement does not operate where the injury results in death or serious and permanent disablement.

ILO Principles

Article 22 of the ILO EIBC sets out the conditions under which compensation benefits may be suspended. These situations are:

> *(a) as long as the person concerned is absent from the territory of the Member;*
> *(b) as long as the person concerned is maintained at public expense or at the expense of a social security institution or service;*
> *(c) where the person concerned has made a fraudulent claim;*
> *(d) where the employment injury has been caused by a criminal offence committed by the person concerned;*
> *(e) where the employment injury has been caused by voluntary intoxication or by the serious and wilful misconduct of the person concerned;*
> *(f) where the person concerned, without good cause, neglects to make use of the medical care and allied benefits or the rehabilitation services placed at his disposal, or fails to comply with rules prescribed for verifying the occurrence or continuance of the contingency or for the conduct of beneficiaries; and*
> *(g) as long as the surviving spouse is living with another person as spouse.*

WCO 1964 - Exclusions

The WCO adopts the traditional disentitlements in relation to deliberately self-inflicted injury and serious and wilful misconduct in terms common with most other statutes. Similarly, the exclusion from coverage in the case of a false representation as to a former or pre-existing condition is not uncommon in workers' compensation schemes.

Beyond these standard disentitlements, there are a number of areas where the WCO does depart from what is now commonly accepted practice in

relation to particular disentitlements or restrictions upon ongoing receipt of benefits, particularly periodical payments.

- **Waiting Period**: The first is the provision in section 5(1)(a) that an employer has no liability "in respect of any injury which does not incapacitate the worker for a period of at least four days from earning full wages at the work at which he was employed". Outside of the North America, the general practice of workers' compensation schemes is to provide compensation from the first day of incapacity.

  While it is noted that Article 9.3 of the ILO EIBC does allow a Member to prescribe that an incapacity benefit need not be paid for the first three days of incapacity, this is seen as being an exceptional measure rather than as a norm. Where a Member avails itself of this waiting period for incapacity benefits it is required to justify the reasons for availing itself of this provision in the Member's reports to the ILO.

- **Consequence of Relocation:** A second area where the WCO departs from conventional practice is in section 9(4) of the Ordinance which provides that, where a worker who is in receipt of periodical payments intends to leave the neighbourhood in which he was employed for the purposes of residing elsewhere, the worker is required to give notice to their employer. The consequence of a failure to give such notice is set out in section 9(5) in terms of a forfeiture of an entitlement to periodical payments during any period of absence. If the period of absence exceeds six months, the worker forfeits an entitlement to any benefits under the Ordinance.

  While it is not uncommon for workers' compensation legislation to restrict the continuation of benefits where a worker leaves the country, something that is sanctioned under the ILO EIBC, this provision is drawn in extremely restrictive terms. Its wording is in terms of leaving a 'neighbourhood' to reside 'elsewhere'. These are extremely vague terms which, on face value, could encompass a move from Rarotonga to Aitutaki or, on a strict reading, even to different sides of Rarotonga. While, in practice, it is unlikely to be administered in such a restrictive and capricious fashion, it does seem to be a measure that is difficult to defend in its present form.

  One response would be to widen the basis for restriction of benefits to that sanctioned by Article 22(a) of the EIBC mentioned in the previous section of this Paper. However, even here, there may need to be considerable caution, particularly in the situation of the Cook Islands. For instance, given the limitations of the Cook Islands public health system to provide complex surgery and like services, it is quite common for such procedures to be undertaken in New Zealand. Accordingly, if there is a desire to have a limitation akin to that set out in Article 22(a), the legal wording would need to be carefully crafted in order to avoid unintended consequences.

- **Restrictions on Occupational Disease Claims:** Section 10(1) of the WCO attempts to overcome the major issue with the "personal injury by accident" element in the primary entitlement provision in section 5(1) in relation to occupational disease. It provides that, with respect to the seven specified diseases in section 10(6), where a worker contracts one of these diseases within the twelve months prior to the date of disablement, and it is established that the disease was employment related, compensation is payable as if it was a personal injury by accident arising out of and in the course of the worker's employment. The problem is that, even with these seven specified diseases, latency periods of more than a year can operate. For instance, one of the specified diseases is mercury poisoning where, evidence from the Minamata mercury poisoning outbreaks in Japan shows in situations of low-level chronic exposure to mercury, there can be latency periods of up to 15 years (Weiss et al, 2002).

  Similarly, pursuant to section 10(2), there is a bar to a worker claiming compensation from an employer in relation to one of these occupational diseases where the incapacity begins or death occurs after a worker has ceased to be employed in this disease inducing employment. There is an exception to the operation of this provision where the worker's death is preceded by a period of incapacity. Again, the operation of this provision flies in the face of epidemiological knowledge around the process of exposure, the contraction of a disease and the manifestation of symptoms of that disease.

Questions

42. When should entitlement to compensation commence?

43. What restrictions, if any, should operate in relation to (a) entitlement to workers' compensation benefits generally and (b) ongoing receipt of periodical benefits and on what basis?

Geographic Coverage

In the interpretation section of the WCO, section 2, there is a definition of "Cook Islands" as meaning "the Cook Islands as defined in Part I of the Cook Islands Amendment Act 1957." This actually appears to be a reference to Schedule 1 to this 1957 enactment that sets out a series of six boundary lines enclosing the Cook Islands from intersecting parallels of latitude and meridians of longitude (ranging between 23rd degree and 8th degree south latitude and 156th degree and 170th degree west longitude).

While paradoxically there seems to be no substantive provision in the WCO that needs to call in the interpretative aid of this definition, there may be a case for defining geographic coverage in a new workers' compensation statute. Given the changes that have occurred since 1964, it might be appropriate to define such geographic coverage in terms of the Cook Islands Exclusive Economic Zone (EEZ). This alignment with the EEZ (which has outer points of between 5° 51' 10.5" and 25° 16'

37.5" south latitude and 154° 48' 20.2" and 168° 31' 25" west longitude) takes on greater weight in the light of possible future economic activity in the Cook Islands such as deep-sea mining and the work of the Seabed Minerals Authority.

Questions

44. What definition of geographic coverage of "the Cook Islands" should be used?

Range of Benefits

Statutory benefits under workers' compensation regimes are of four main types:

(a) **medical and like benefits** to meet the cost of health needs caused by the work injury or illness. These may include the costs of medical and allied health (for instance physiotherapy) services, pharmaceutical supplies, aids and appliances and rehabilitation expenses.
(b) **income replacement benefits** that serve to replace a proportion of the injured person's wages lost because of incapacity to work.
(c) **permanent disability benefits** that compensate the injured person for the permanent non-economic losses sustained because of the injury.
(d) **death benefits** in the form of funeral expenses and of payments that are made to the dependants of a deceased worker.

ILO Principles

The four main benefit types outlined in the previous section are encompassed in specific Articles of the ILO EIBC.

Article 10.1 sets out the range of medical care and allied services that need to be available in cases of occupation injury and disease as being:

- general practitioner and specialist in-patient and out-patient care, including domiciliary visiting;
- dental care;
- nursing care at home or in hospital or other medical institutions;
- maintenance in hospitals, convalescent homes, sanatoria or other medical institutions;
- dental, pharmaceutical and other medical or surgical supplies, including prosthetic appliances kept in repair and renewed as necessary, and eyeglasses;
- the care furnished by members of such other professions as may at any time be legally recognised as allied to the medical profession, under the supervision of a medical or dental practitioner.

It is also stipulated that, wherever possible, there should be a capacity at the place of work to undertake both emergency treatment of serious

accidents and ongoing follow-up treatment of more minor injuries while the person is at work.

The form in which income replacement benefits and permanent disability benefits are dealt with – in terms of whether they should be paid on a periodical basis or can be a lump sum – is set out in Articles 13, 14 and 15 of the EIBC. As the treatment of both benefit types in these Articles is very similar, they can usefully be dealt with together, as set out in Table 2 below.

Table 2: ILO Form of Payment for Different Benefit Types

Form of Incapacity or Disablement	Article	How Should This Benefit be Paid	Exception as Provided in Article 15.2
Temporary or Initial Loss of Earning Capacity	13	Periodical Payment	No Exception
Total and Likely to be Permanent Loss of Earning Capacity	14.2	Periodical Payment	In exceptional circumstances, and with the agreement of the injured person, may be converted into a lump sum corresponding to the actuarially assessed value of the periodic benefits. May apply where the administering authority of the scheme has reason to believe a lump sum will be utilised in a manner that is particularly advantageous for the injured person.
Substantial and Likely to be Permanent Partial Loss of Earning Capacity	14.3	Periodical Payment	
Likely to be Permanent Partial Loss of Earning Capacity which is not Substantial	14.4	Periodical Payment or Lump Sum	
Total and Likely to be Permanent Loss of Function	14.2	Periodical Payment	In exceptional circumstances, and with the agreement of the

Form of Incapacity or Disablement	Article	How Should This Benefit be Paid	Exception as Provided in Article 15.2
Substantial and Likely to be Permanent Partial Loss of Function	14.3	Periodical Payment	injured person, may be converted into a lump sum corresponding to the actuarially assessed value of the periodic benefits. May apply where the administering authority of the scheme has reason to believe a lump sum will be utilised in a manner that is particularly advantageous for the injured person
Likely to be Permanent Partial Loss of Function which is not Substantial	14.4	Periodical Payment or Lump Sum	

- **Death Benefits:** Article 18.1 of the EIBC mandates the payment of death benefits, in the form of a periodical payment to a widow, a disabled and dependent widower and dependent children of a deceased worker, while under Article 18.2 a funeral benefit should be provided at a prescribed rate that is not less than the normal cost of a funeral in the Member state.
- **Eligibility:** Article 9.2 of the EIBC makes clear that eligibility for benefits may not be made subject to the length of employment, to the duration of insurance or to the payment of contributions, subject to a proviso that a period of exposure may be prescribed for occupational disease.

WCO 1964 - Benefits

- **Medical and like benefits:** The WCO does not make specific provision for the payment of medical and like benefits. However, in section 16(9) where it is provided that where the employer has not, at the employer's expense, made suitable arrangements for medical or surgical attendance for the injured worker, the worker is entitled, in addition to their other statutory entitlements, "to a sum equal to the reasonable expenses incurred by him for medical or surgical attendance in respect of his injury, but not exceeding twelve pounds."

  Formerly, it was provided (in section 6(c) of the Ordinance as originally enacted) that, where a deceased worker left no dependants, the applicable compensation (presumably payable to the worker's estate) should include the "reasonable expenses of medical attendance on the deceased worker". However, when the original section 6 was repealed in 1977 and a new section 6 substituted, this payment provision was not re-enacted.

- **Incapacity benefits:** The structure of the WCO in relation to entitlement to benefits for loss of earnings is in terms of a distinction between "total incapacity" and "partial incapacity", both of which are defined in the interpretation section (section 2), together with the operation of a Table of Injuries that is contained in the Second Schedule to the Ordinance.

  The definition of "total incapacity" is in terms of an incapacity, either of a temporary or permanent nature, that incapacitates a worker for any employment of which the worker was capable of undertaking at the time of the accident. That of "partial incapacity" recognises two situations. The first is that of temporary partial incapacity where injury, for a temporary period, reduces the earning capacity of the worker in the employment that the worker was engaged in at the time. The second is that of permanent partial incapacity where the impact of the injury is of an ongoing nature and, as a result, acts to reduce the worker's earning capacity in every form of employment of which they were capable of undertaking at the time of the injury.

  The interaction with the Table of Injuries in the Second Schedule to the WCO is that the Table provides a translation of a particular loss (including loss of use) into a percentage of incapacity. So, for instance, a loss (or loss of use) of an arm at the shoulder is translated into a deemed 60 percent degree of incapacity. The structure of the Table in the WCO is typical of those in schemes of the 1950s and 1960s, being overwhelmingly anatomical in nature, concentrating on a loss (including loss of use) of limbs and parts of limbs down to individual phalanges. However, even by the standards of the day, the Second Schedule to the WCO is less comprehensive in coverage than similar provisions of the day in other jurisdictions, including the 'Compensation for Specified Injuries' Table of the New Zealand Workers' Compensation Act 1956 or the 'Table Referred To' of the Workers Compensation Act 1958 in Victoria, Australia.

  Increasingly, jurisdictions have been moving to a more comprehensive form of coverage of the range of losses that can occur as the result of occupational injury or illness. The dominant approach that has been adopted is that of replacing the 'Table of Maims' with a measure of whole person impairment, most commonly using the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, now in its sixth edition, or a local variant of these Guides. While this approach provides an overwhelmingly greater coverage of impairments, it does require a body of medical practitioners who are knowledgeable and proficient in the mechanics of the Guides (including dealing with multiple impairments) and the general operationalisation of this process to determine actual benefit payment amounts.

- **Death Benefits:** Death benefits are dealt with in section 6 of the WCO. Various features relating to these payments are discussed below.

Questions

45. What range of benefits should be provided?

46. In what circumstances, if any, should there be a role for lump sums in the provision of incapacity benefits?

47. How should permanent disability benefits be assessed, eg in terms of an updated Table of Maims or by a more comprehensive coverage of impairments similar to the AMA Guides?

Level of Benefits

The area of scheme benefit levels represents the major terrain in which the social mandate of the workers' compensation system to provide a fair and equitable replacement of the various losses (both economic and non-economic) rubs up against the economic mandate of a sustainable and affordable scheme. As with many areas of workers' compensation this is not fixed and invariable. If a society sees a need to expand the level of benefits, both in terms of the level of income replacement adopted and in terms of the duration that benefits are paid, then what is regarded as affordable also concomitantly changes.

Regardless of how a community reaches consensus about a fair and affordable benefit, one way in which protection can be given to prevent its erosion is to index the level of benefits in line with wage or price inflation.

ILO Principles

Schedule II to the EIBC sets out the minimum level of benefits that should apply for three categories of benefit type, by reference to a percentage of the previous earnings of a "standard beneficiary". This is set out in Table 3 below.

Table 3: Schedule II to the EIBC – Periodical Payments to Standard Beneficiaries

Category	Standard Beneficiary	Percentage
Temporary or initial incapacity for work	Man with wife and two children	60
Total loss of earning capacity or corresponding loss of faculty	Man with wife and two children	60
Death of breadwinner	Widow with two children	50

This overall schema is further developed in Articles 19 and 20 of the EIBC. The minimum payments relate to the percentage of the total of previous earnings and the amount of any family allowances payable (Article 19.1). Article 19 goes into further detail as to how the calculation should be conducted in relation to a person in the position of a "skilled manual male employee" and Article 20 does similarly for a person in the position of an "ordinary adult male labourer".

Article 21 provides that the total and partial incapacity benefit rates and those for death benefits should be reviewed and increased following substantial changes in the general level of earnings where these result from substantial changes in the cost of living.

WCO 1964 – Level of Benefits

Nowhere is the situation of legislative neglect of the WCO, in terms of the failure to update its provisions, thrown into sharper relief than in the level of benefits provided under the Ordinance.

The WCO distinguishes between payments for permanent total incapacity, for permanent partial incapacity benefits and those for temporary incapacity.

- **Permanent total incapacity:** For this benefit type, the WCO, as enacted, provided the compensation payable as a sum equal to 36 months earnings or £1,000, whichever was the lesser.[4] It further provided that in no case could the payment be less than £250. This minimum payment amount was increased to $750 in 1974[5] and to $1,250 in 1977.[6] The current situation is therefore that the permanent total incapacity payment is a sum equal to 36 months earnings subject to a minimum payment amount of $1,250.
- **Permanent Partial Incapacity:** There are two routes for permanent partial incapacity payments. The first is in relation to an injury which is specified in the Table of Injuries in the Second Schedule to the WCO [see above]. In this case the compensation relates to the deemed percentage of loss of earning capacity as is assigned to that particular injury.

  Where it is a case of an injury that is not specified in the Table of Injuries, the calculation is in terms of percentage of the compensation that would have been payable in the case of permanent total incapacity as is proportionate to the loss of earning capacity permanently caused by the injury. Where an accident causes multiple injuries, there is an aggregation of benefit amounts. However, the total of such aggregated amounts cannot exceed the amount of permanent total incapacity benefits.

- **Temporary incapacity:** Section 9 of the WCO specifies that benefits for temporary incapacity (whether total or partial) can be made by way of periodical payments or by a lump sum calculated with regard to the probable duration and probable changes in the degree of incapacity. Whereas in most schemes such periodical incapacity benefits are paid on a regular cycle (usually weekly or fortnightly), section 9(1) provides that the payment interval is something that may be agreed upon or as ordered by the High Court.

[4] By section 3 of the *Workers' Compensation Amendment Act 1969*, this became simply 36 months earnings with the removal of alternative lesser amount of £1,000.
[5] By section 4 of the *Workers' Compensation Ordinance Amendment Act 1973-74*, with effect from 1 January 1974.
[6] By section 3 of the *Workers' Compensation Ordinance Amendment Act 1977*, with effect from 1 April 1977.

As originally enacted, the periodical payments rate was stipulated in terms of two thirds of the difference between the weekly earnings the worker was earning at the time of the accident and weekly earnings the worker is earning or is capable of earning in some suitable employment or business after the accident. The proportional replacement rate has been increased twice over the history of the Ordinance. First, in 1974[7], the rate was raised from two thirds to four fifths of the earnings difference and, in 1977[8], this rate was increased to one of five sixths of the difference.

Also as originally enacted, there was a cap on periodical payments at £8 per week, but that this cap was removed in 1969.[9] This left in place an overall cap upon the total amount of temporary incapacity benefits that can be received, either by way of periodical payments or a lump sum benefit, by providing that this overall total cannot exceed the amounts that would be payable in the case of permanent total incapacity or permanent partial incapacity.

- **Death benefits:** The approach to death benefits is primarily dealt with in section 6 of the WCO and largely mirrors that taken in relation to permanent total incapacity benefits. In the case where a deceased worker left dependants wholly dependent on their earnings, the section, as originally enacted, provided for a payment sum equal to 30 months' earnings or £750, whichever was the lesser.[10] Again, similar to the approach to permanent total incapacity, it was provided that in no case could the payment be less than £250. This minimum payment amount was increased to $750 in 1974.[11] Where there was nobody wholly dependent upon the worker's earnings, but persons partly dependent, it was provided that there should be an agreement with those dependants for a compensation amount up to but not exceeding the total for persons wholly dependent. Where there was not an agreement, the High Court could determine an amount that was reasonable and proportionate to the losses of the dependants.

  The original section 6 was repealed in 1977[12] and the current section 6 substituted. This follows a similar approach to its predecessor provision, but in a more simplified form. There is no distinction made between dependants who are wholly or partially dependent and no mention made in this section as to the process by which payments

[7] By section 5 of the *Workers' Compensation Ordinance Amendment Act 1973-74*, with effect from 1 January 1974.
[8] By section 4 of the *Workers' Compensation Ordinance Amendment Act 1977*, with effect from 1 April 1977.
[9] By section 4 of the *Workers' Compensation Amendment Act 1969*.
[10] As with permanent total incapacity benefits the prescribed limitation amount was removed in 1969; section 2(a) of the *Workers' Compensation Amendment Act 1969*.
[11] By section 3 of the *Workers' Compensation Ordinance Amendment Act 1973-74*, with effect from 1 January 1974.
[12] By section 2 of the *Workers' Compensation Ordinance Amendment Act 1977*, with effect from 1 April 1977.

should be apportioned between dependants.[13] It did however increase the level of payments.

The present section 6 simply stipulates that where a worker leaves any dependant the amount of compensation shall be a sum equal to 48 months' earnings, providing that in no case shall this compensation amount be less than $1,250.

The amount of the death benefits received, however, are lessened (under both the original and substituted sections) by the amount of any incapacity benefits that the now deceased worker may have received in relation to the injury which are to be deducted from any sums paid as death benefits.

Where the worker leaves no dependants, the original section 6 required the employer to pay both the reasonable expenses of the worker's burial and the reasonable expenses of medical attendance on the deceased worker. Under the substituted section 6 only the reasonable expenses of burial are referred to in this regard.

Collateral Source Issues

As originally enacted, section 9(2) of the WCO provided that in fixing the amount of periodical payments the High Court shall have regard to any permanent allowance or benefit which the worker was in receipt from the employer during the incapacity. This approach was quickly reversed with the repeal of this provision[14] and the enactment of a new section 9A.[15] This new section provides that in assessing compensation no account is to be taken of:

- any money accruing to the claimant in respect of any life or accident insurance policy effected by the claimant or any other person;
- (in relation to a dependant's death benefit claim), any gain to the dependant or to the deceased worker's estate that is consequent on the death of the deceased worker; and
- any money payable by or to a friendly society or other organisation.

Questions

48. How should the level and duration of benefits be determined?

49. How should indexation of benefits be dealt with?

Injury Notification

Injury notification involves the process of making a record of an injury that has occurred either by the injured worker or someone acting on that worker's behalf. In most jurisdictions there is a requirement of a prior

[13] This is dealt with in section 13 of the WCO.
[14] By the *Cook Islands Workers Compensation Ordinance Amendment Act 1965*, section 3
[15] By the *Cook Islands Workers Compensation Ordinance Amendment Act 1965*, section 4

notification of the injury in order for a claim for compensation to be maintained. However, there is usually a recognition that there are many reasons why such a notification may not have occurred and that there a range of circumstances where a failure to notify should not prove a barrier to maintaining a claim.

One of the issues that has come up repeatedly in our consultations to date has been that large numbers of workplace injuries do not result in a workers' compensation claim even where the prerequisites for such a claim, including disablement for more than four days, exist. In part there appear to be cultural issues involved, including a person not wanting to inconvenience or offend their employer, who well may be a relative. However, in some instances, such a lack of claiming behaviour may also result from a lack of awareness as to the existence of a workers' compensation remedy or, where there is such understanding, from a lack of knowledge as to how to lodge a claim.

In some jurisdictions there is a statutory requirement for an employer to display in their workplace, in a place readily accessible at all reasonable times to a worker employed at the workplace, a notice providing summary information that can assist a worker in making a claim where they may have suffered a work-related injury.

Similarly, in most jurisdictions, there is a statutory requirement for an employer to keep a register of injuries in relation to injuries that have occurred in or are associated with that workplace, coupled with a requirement for entering the particulars of a workplace injury as soon as is reasonably practicable after becoming aware such an injury.

WCO 1964 – Injury Notification

Section 14(1) of the WCO sets out two prerequisite conditions in order for a claim for compensation to be maintained, namely:

i. that notice of the accident has been given as soon as practicable after its happening and before the worker has voluntarily left the employment in which they were injured; and

ii. that the application for compensation has been made within six months from the occurrence of the accident causing the injury or, in the case of death, within six months from the time of death.

Section 14(2) however goes on to provides that both these bars to recovery can be waived in specific circumstances. The first is that a defect or inaccuracy in the notice of accident will not prevent recovery in a range of circumstances, including where the employer was not prejudiced in their defence of the claim by such defect or inaccuracy or that the defect or inaccuracy was occasioned by mistake or other reasonable cause. However, this qualification to the general bar to recovery is expressed only to operate in relation to a defect or inaccuracy in an actual notice and does not have application where there is no notice of accident at all.

Secondly, in relation to the requirement of lodging an application for compensation within six months of injury or death, lodging a claim outside of this period will not be barred from recovery if the failure to lodge within the prescribed time period was occasioned by mistake or other reasonable cause.

Section 14(2) states that notice in respect of an injury under this Ordinance shall be given as prescribed. Such a process was effected by regulation 13 of the Employers' Liability Insurance Regulations 1965 with the prescribed notice appearing as Form 3 of the First Schedule to the 1965 Regulations. However, this process resulted in a strange mutation. Section 14(1) of the WCO makes clear that the notice is to be given by or on behalf of the worker. However, regulation 13(1) states that the employer shall as soon as practicable give this notice and Form 3 is headed 'Employers' Report of Accident'. This change may have resulted from a confusion with section 15 of the WCO which places the responsibility on the employer to report the death of a worker.

Questions

50. How should employers be required to inform their workers about their entitlement to workers compensation?

51. In what circumstances should it be possible to maintain a claim for compensation even if a notice of accident or injury has not been provided?

52. In what circumstances should it be possible to recover compensation even if the claim was not lodged within the prescribed period?

Claims Determination and Management

Quality claims determination is an essential element of any well-performing workers' compensation scheme. It is a focal point within the workers' compensation system for delivering the social mandate of the scheme. For this to be achieved as effectively as possible requires a framework which clearly sets out the rights, responsibilities and accountabilities of the various key participants within the scheme. Important in this respect is the clear articulation of tight, but achievable, time frames for the chain of actions that are required in order that workers who have made a compensation claim are not left in limbo and can be paid their proper entitlements in a timely fashion.

In well-performing schemes, it has been long recognised that this area is as much, or more, about claims management as it is about simple claims determination. This requires the active, but compassionate, management of claims in a way that maximises the possibilities for early (but not too early) return to work in ways that mean that this return to work is durable in nature.

The development of an effective approach to claims management takes time, and an investment in training and other human resources, in order

to produce and retain a body of competent and experienced claims managers. In the Cook Islands, the enactment of a new workers' compensation statute may provide the platform to begin this journey, together with the development of other features (including the skills of allied health professionals) that may provide the foundations of a rehabilitation and return-to-work focused workers' compensation scheme.

WCO 1964 – Claims Determination and Management

The WCO sets out a series of prescribed steps that must follow from the furnishing by the worker of a notice accident. These are set out in Table 4 below.

Table 4: Encapsulated Summary of the Claims Determination Process under the WCO

Steps	Sanction or Consequence for Non-compliance
Within three days from the time of the notice, the employer shall arrange for the worker to be examined by a medical practitioner at the employer's expense	None specified
Provided that the time and place arrangements for the examination are reasonable, and the worker is in a sufficiently fit state, the worker is required to attend this examination.	Non-attendance results in the worker's right to compensation being suspended until such an examination takes place and, if the non-compliance persists beyond 15 days from the scheduled date of examination, there is a forfeiture of the right to compensation unless the High Court is satisfied that there was reasonable cause for such failure
Requirement for a worker to submit themselves for treatment by a medical officer, without personal expense, where required by the employer or insurer.	Where non-compliance with this form of direction or disregard of the instructions of the medical officer leads, upon proof that such failure or disregard was (a) unreasonable and (b) resulted in an aggravation of the injury, the nature of the injury and period of incapacity resulting from it are deemed to be of the same nature and duration as might reasonably have been expected if the failure or disregard had not occurred. Where the injury leads to death, where it is proved that the failure or disregard caused the death, then no compensation is payable.

Steps	Sanction or Consequence for Non-compliance
The insurer has 14 days from the receipt of the notice of accident to agree, in writing, with the worker as to the amount of compensation to be paid.	No sanction on the insurer and the worker is left to apply to the High Court to enforce their claim to compensation.

While this set of arrangements embodies a highly asymmetrical framework of rights and responsibilities, it has remained a totally theoretical construct with no concrete application in practice. An examination of over fifty workers' compensation claims, stretching over two decades, shows that the process set out in the WCO, and summarised in Table 4, was not ever followed in practice in a single case. It is therefore not productive to provide further discussion or critique of these measures.

What would be productive and useful would be feedback from interested parties as to the set of rights, responsibilities and accountabilities of key participants in a new workers' compensation scheme that would underpin both its fairness and effectiveness in the areas of claims determination and claims management.

For instance, in some schemes there are provisions requiring an employer to lodge a claim with the insurer within a specified period (for instance five days) of receiving it from the worker and for the insurer to make a determination on that claim within a specified period (for instance 28 days) from receiving it from the employer. In this latter case, the sanction for the insurer not making a decision upon liability within the prescribed period (subject to an ability to extend this time frame in tightly restricted circumstances) is that the claim is deemed to be accepted.

Questions

53. What should be the time period within which an employer must forward a claim for compensation received from a worker to the insurer?

54. What should be the time period within which an insurer must make a decision about liability of a lodged claim?

Dispute Resolution

The essence of dispute resolution in a workers' compensation system is that it provides a framework in which disputes at all levels of the system (from initial entitlement to benefits, ongoing eligibility for benefits, employer disputes about premium classification and other matters) can be dealt with expeditiously, inexpensively and at a level appropriate to matter under dispute.

As such it should provide a continuum of arrangements, involving processes from mediation through to arbitration, so that, ideally, only irresolvable complex matters and questions of law need to be resolved by a judicial body of the nature of the High Court.

In order for there to be high quality and consistent decision making, and the development and retention of a body of decision makers with high levels of knowledge and expertise, many systems have established a specialist tribunal to deal with workers' compensation disputes at all levels of dispute complexity. In smaller jurisdictions, where there may not be the volume of workers' compensation cases and disputes as to justify a single subject matter tribunal, there can operate a tribunal that can determine a wider range of labour issues. As described above, such a tribunal could also be involved in determining OSH issues.

WCO 1964 – Dispute Resolution

In the current Cook Islands workers' compensation system, all contested matters can only be determined in the High Court of the Cook Islands. The WCO also specifically provides for a role for the High Court in a wide range of areas including, pursuant to section 19 of the Ordinance, to review any periodical payment made under the WCO on the application of either the insurer or the worker.

However, more importantly, there are an extraordinarily wide range of administrative or quasi-administrative matters, which, on their face, can only legally be undertaken by the High Court. This is most starkly shown in the provisions determining the distribution of compensation in section 13 of the WCO. This involves:

- death benefit compensation being paid to the Court which then decides upon the basis of apportioning these benefits among the dependants of the deceased worker;
- permanent total incapacity benefits, permanent partial incapacity benefits, and lump sum benefits for temporary incapacity or payable under the provision dealing with occupational disease being directed to be paid to the Court which then directs the payment to the person entitled to it, or is otherwise dealt with in such manner as the Court thinks fit;
- any other compensation payable under the Ordinance may be paid to the worker or to the Court and, where paid to the Court, is then paid by the Court to the person entitled to it.

While a blind eye appears to have been turned to many of these requirements, they highlight the need for alternative arrangements in any new workers' compensation statute.

Question

55. What range of dispute resolution mechanisms and/or arrangements should be established to deal with WC issues?

Funding Arrangements

Around the world there are enormous variations in the funding arrangements that underpin the systems operating in a particular country for compensating work-related disability. In much of the world, these arrangements constitute part of an overall social insurance system.

With workers' compensation schemes, many are financed by a monopoly state fund, while others involve a number of competing private insurers. Added to this are arrangements in many jurisdictions to allow some employers with the requisite size and financial capacity to self-insure their workers' compensation liabilities.

This does not exhaust the range of variant possibilities. In Germany, for example, the system is underpinned by a number of industry funds while in Sweden there is a scheme that provides an add-on to the general social insurance arrangements.

Premium Setting Methodology

In most schemes prior to the 1980s, premium setting methodology was centred upon occupational classifications of activities. This produced a very large number of classificatory categories, few of which were large enough to enable credible risk rating for insurance purposes. This system also produced incentives for misclassification as a means of gaming the system.

In response to these weaknesses, most schemes have moved to an industry-based approach usually based on the International Standard Industrial Classification of All Economic Activities (ISIC) or an ISIC variant such as the Australia and New Zealand Standard Industrial Classification (ANZSIC), jointly developed by the Australian Bureau of Statistics and Statistics New Zealand. Under this approach, an employer is classified to the industry group that best reflects their predominant area of activity. The premium or levy rate applicable to that classification is applied to the employer's total leviable remuneration (essentially payroll) regardless of the fact that this may encompass a variety of occupational groups and consequently different levels of risk.

WCO and ELIR – General Framework

The framework of employers' liability insurance is set out in Part II of the WCO and much of the detail is set out in the ELIR. Along with the overwhelming majority of schemes around the world, it is compulsory for an employer to insure against their liability to pay compensation under the Ordinance. It is mandatory that the contract of insurance is made with the 'insurer' which is defined to be the Treasurer of the Cook Islands acting on behalf of the Cook Islands Legislative Assembly.

Under section 29 of the WCO, the Treasurer of the Cook Islands is required to pay the premiums and levies imposed under the Ordinance into a separate account known as the Workers Compensation Fund.

The ELIR requires an employer to provide a statement of wages to the insurer. A quirk of the Cook Islands system is that this act of delivering the statement of wages by itself triggers the protective mechanism of completing a contract of insurance without the concomitant requirement of actually paying a premium. It is a rare case of having your cake and

eating it too. It is a course of action that has been taken by a considerable number of employers in the Cook Islands in recent times, ostensibly in protest against the actions taken by then Government of the Cook Islands in 1995/96 in relation to the Workers Compensation Fund.

Premium Rates and Methodology

The relevant premium rates are authorised by Regulation 8 of the ELIR and are set out in the Second Schedule to the ELIR. The initial rates, and the premium methodology surrounding them, were set in 1965. They have only been updated once, in 1973, with effect from 1 April 1974. The schedule involves 44 classifications which is a strange amalgam of occupational and industry classifications.

By any standard this system is archaic and the classification system borders on the highly quixotic and eccentric. For instance, there is one classification for electricity supply, whereas that of 'Theatres and Dancehalls' has four subcategories by occupational type, differentiating in terms of risk and premium between caretakers, entertainers, projectionists and ticket sellers and doorkeepers. Bread bakers are subdivided into bakeries that are diesel fired, wood fired or have electric ovens.

Criticism has been directed toward the rate differential between particular classifications. There has been a suggestion that the rate for Crown Employees (excluding Island Council employees) at 0.1 per cent of wages is artificially low, although it has to be said that this same rate also applies to teachers, photographers, radio station announcers and ticket sellers and doorkeepers in theatres and dancehalls. Indeed, an even lower rate of 0.075 percent of wages applies to both architects and clergymen.

There is unanimous agreement that these archaic arrangements need to be totally overhauled. As there is no credible data and an obsolete classificatory framework, a new premium system will need to be built from the ground up utilising the ISIC framework or some variant such as ANZSIC.

Insurance Framework

The size of the Cook Islands working population operates as a constraint on the possible alternatives that are available in terms of insurance underwriting. This is not a new issue; indeed, it was one that was addressed at the beginning of the scheme.

In the course of moving the first reading of the Cook Islands Workers Compensation Bill 1964, the then Treasurer stated:

> *Inquiries were made some years ago and none of the insurance companies at that time were interested in undertaking workers compensation insurance in the Cook Islands. One insurance company recently expressed some interest, but if there was only one insurance company undertaking workers compensation insurance in the Cook Islands, it would give that company a monopoly. The amount of business available would not be sufficient to induce other companies to enter the field so that*

> *employees [sic] would be put in the position of paying whatever premiums that insurance company chose to fix. I think that until such time that two or more insurance companies show an interest in handling workers compensation in the Cook Islands, it would be better for this Government to control the insurance by appointing the Treasurer as insurer* (Cook Islands, 1964: 514).

During the course of our consultations in May and June this year, we were informed that there had been one, and possibly two, explorations of moving from the current situation of the Treasurer as insurer to a privately underwritten market. It would appear that the private insurer/s who made this exploration decided that the market was too small to warrant taking this initiative further.

Question

56. What classificatory system should be used for the new premium-setting system?

57. What system should be in place to collect premiums and ensure that all employers pay their premiums?

Governance Arrangements

Governance issues arise at all levels of any system. In relation to workers' compensation schemes, there are perhaps two special areas, both of which are of relevance to the Cook Islands, that merit special attention. The first concerns the most appropriate Government ministry to be accorded the overall oversight of the operations of the workers' compensation scheme while the second focuses on the specific oversight and protection of the Workers Compensation Fund.

General oversight

In most schemes the two major contenders for the general oversight of the workers' compensation system have been the Finance ministry (by whatever formal name it is actually described) on the one hand and the Labour Ministry, however named, on the other. This is not surprising. Workers' compensation is a form of social protection for workers and therefore sits easily within a ministry that has the oversight and/or administration of other areas of social protection and labour standards, including occupational health and safety, minimum wages and like matters.

On the other hand, workers' compensation is a form of insurance which brings with it a range of issues relating to the determination of premium methodology, the mechanics of premium collection, the actuarial determination of necessary reserves and the proper investment of the income of the workers' compensation fund. From this lens, workers' compensation just as easily fits within a finance ministry.

At one level, there does not seem to be any special significance as to which 'house' the oversight of workers' compensation resides. However, in some jurisdictions there has been a conscious preference for

locating the administration of the workers' compensation system in the finance ministry, primarily on the grounds of efficiency and effectiveness of administration, particular in relation to collection of premiums. This is based upon the increasing diversity and complexity of economic structures and operations in the modern (uberised and gig) economy. Consequently, it is felt that the finance ministry, which has responsibility for the collection of employer taxes (eg payroll taxes) and levies for other purposes, is best placed to deal with the emerging challenges in the effective collection of workers' compensation premiums or levies.

Specific oversight

In many, if not most, larger workers' compensation jurisdictions, the oversight of the day to day operations, including the financial aspects, of the scheme is vested in a statutory corporation or similar entity. In some jurisdictions the board of management of the statutory corporation is composed of persons with specialist skills (legal, financial, actuarial etc), (specialist board). However, in many others, this board of management is overwhelmingly comprised of representatives from the three major stakeholder groups (employers, workers and government) (stakeholder board).

However, even in smaller countries, there are examples of a range of institutions and bodies that are governed by boards of management corresponding to a stakeholder board model or adopting an amalgam of the stakeholder and specialist board approaches.

Administration of the WCO and the Workers Compensation Fund

The WCO, as originally enacted, provided that the "Resident Commissioner[16] may from time to time appoint such persons being members of the Cook Islands Public Service as he thinks fit to administer this Ordinance." In 1966 the *Cook Islands Ordinances Amendment Act 1966* placed the administration of the WCO with the Minister of Labour and Employment. This situation appears to have continued until section 6 of the *Workers' Compensation Ordinance Amendment Act 1973-74* gave this administration to the Minister of Financial Services with effect from 1 January 1974. Subsequently this administrative responsibility has been allocated to the Ministry of Internal Affairs.

During the consultation period for this review (in May and June this year) an issue that was constantly raised was that of the action by the then Cook Islands Government, in 1995/96, to access funds held in the Workers Compensation Fund for the use of other government purposes associated with the Economic Reform Plan.

At that time the Workers Compensation Fund was simply a sub-account within the general Public Accounts. This was a situation that prevailed until 22 January 1997 when a separate account was set up with the Westpac Banking Corporation under the name of the 'Workers Compensation Fund'. As has been mentioned at the beginning of this

[16] In the current printed version of the WCO the term 'Resident Commissioner' has been replaced by that of '[High Commissioner]'. There does not seem to be any update to the Queen's Representative.

paper, notwithstanding the fact that the Government has insisted that the previously appropriated funds have been restored to the Fund, this has either been disputed by some and/or a demand that there be a further augmentation in relation to foregone interest.

While these events lie in the past, there may be greater confidence, particularly by employers, in the integrity and proper governance of the scheme if the Workers Compensation Fund, or its equivalent in a new scheme was provided with oversight by a board of management or board of trustees.

Questions

58. Where should ministerial oversight of the Cook Islands workers' compensation scheme reside: with the Ministry of Internal Affairs or the Ministry of Finance and Economic Management?

59. What, if any, model of oversight should be adopted for a new Workers Compensation Fund, or its equivalent: a stakeholder board model, a specialist board model or an amalgam of these two approaches?

60. What should be the functions of the governance body (e.g. review investment strategy of the fund)?

6. Questions to guide submissions

This paper has set out the key issues related to achieving the aims of the Cook Islands Occupational Safety and Health (OSH) National Reform Project. It provides the background information to inform submissions and public consultation about the reforms, particularly through the Future Inquiry Workshop to be held on 9 August 2018.

The following questions are provided to guide your response to this issues paper. You can choose to answer any of these questions or give any other responses to the issues raised in this paper.

Your views are important!

Please provide your submission by the close of business on 24 August 2018. Send them via email to andrea@shawidea.com.au or deliver them in hard copy to INTAFF, marked: *Attention: OSH Reform Project*.

In responding to these issues, please consider the four reform principles:

1. Fairness, leading to greater equity in sharing the costs of occupational ill-health.
2. Comprehensiveness, ensuring that all workers and enterprises have the benefit of improved OSH and workers' compensation regulation.
3. Prevention, focussing attention on how to prevent occupational ill-health, not just treat and compensate.
4. Sustainability, ensuring that the legislative system can fund the required entitlements without damaging the Cook Islands' economy.

Economic and social context

Poor control over occupational injuries and disease results in significant costs and creates social damage. Given the scale of the potential economic and social costs of poor OSH, the benefits of the proposed reform package are considerable. Implementing effective legislation for OSH, WC and ELI is likely to create economic and social benefits for the Cook Islands.

Questions

1. What costs and benefits of OSH reform can you identify?
2. How much will OSH reform cost your business or workplace?
3. How much will OSH reform benefit your business or workplace?
4. What other reform principles should be adopted?

Occupational Safety and Health

OSH legislation needs to deal with the following issues:

Legislative forms and processes

5. To what extent would the framework for OSH legislation of Acts, Regulations and Codes of Practice work in the Cook Islands?
6. How frequently should the Cook Islands Government review the OSH Act?
7. What definitions should be included in the OSH Act?
8. What objectives should be included in the OSH Act?
9. How should the role of the Tripartite Labour Advisory Council in relation to OSH be reflected in the OSH Act?

Duties and rights

10. How much detail should be included in the OSH Act about employers' duties?
11. What should be included in the OSH Act as employers' duties?
12. How should the role of Senior Officers be defined in the OSH Act?
13. What special duties should Senior Officers have under the OSH Act?
14. What duties should self-employed people have under the OSH Act?
15. What special duties should suppliers have under the OSH Act?
16. What should be included in the OSH Act as employees' duties?
17. What special duties should others with influence over a workplace have under the OSH Act?

Enforcement of the law

18. What kind of inspection system would work in the Cook Islands?
19. What kinds of enforcement tools should be available to inspectors and the government?
20. What categories of offences should be defined?
21. What kinds of penalties should be included in OSH laws?
22. How should enforcement actions be reviewed?

Workplace consultation arrangements

23. How could the role of Safety and Health Representative be operationalised in the Cook Islands?
24. How could the role of Roving Safety and Health Representative be operationalised in the Cook Islands?
25. How could the role of OSH Committees be operationalised in the Cook Islands?

Collecting and using OSH data	26. What form should a Register of Accidents take?
	27. How should serious incidents be defined in the OSH Act?
	28. How should serious incidents be notified to INTAFF?
	29. How could INTAFF and the Ministry of Health collect more reliable and comprehensive data about the incidence of occupational ill-health and dangerous occurrences?
Accessing professional advice	30. How can duty holders and INTAFF access professional OSH advice?
	31. How could an Occupational Health Service work in the Cook Islands?
Workers compensation	Workers' compensation schemes need to address the following issues
Coverage of workers	32. What should be the legal test for employment coverage for workers' compensation in the Cook Islands?
	33. What exclusions to coverage, if any, should exist and why?
	34. What forms of work activity that do not readily fit within the notion of a contract of employment should be given deemed coverage?
	35. Which types of voluntary workers engaged in socially desirable activities should be afforded deemed coverage? To which organisations should this apply (eg Cook Islands Civil Society Organisation, Cook Islands Red Cross)?
Coverage of conditions	36. How should "injury" and "disease" be defined?
	37. How should secondary disability be included?
	38. How should coverage of occupational diseases be dealt with?
Coverage of circumstances	39. What test of work-relatedness should be included?
	40. How should coverage of journey or commuting injuries be dealt with?
	41. How should coverage of recess injuries be dealt with?
Exclusions and limitations	42. When should entitlement to compensation commence?
	43. What restrictions, if any, should operate in relation to (a) entitlement to workers' compensation benefits generally and (b) ongoing receipt of periodical benefits and on what basis?
Geographic coverage	44. What definition of geographic coverage of "the Cook Islands" should be used?

Range of benefits	45. What range of benefits should be provided?
	46. In what circumstances, if any, should there be a role for lump sums in the provision of incapacity benefits?
	47. How should permanent disability benefits be assessed, eg in terms of an updated Table of Maims or by a more comprehensive coverage of impairments similar to the AMA Guides?
Level of benefits	48. How should the level and duration of benefits be determined?
	49. How should indexation of benefits be dealt with?
Injury notification	50. How should employers be required to inform their workers about their entitlement to workers compensation?
	51. In what circumstances should it be possible to maintain a claim for compensation even if a notice of accident or injury has not been provided?
	52. In what circumstances should it be possible to recover compensation even if the claim was not lodged within the prescribed period?
Claims determination and management	53. What should be the time period within which an employer must forward a claim for compensation received from a worker to the insurer?
	54. What should be the time period within which an insurer must make a decision about liability of a lodged claim?
Dispute resolution	55. What range of dispute resolution mechanisms and/or arrangements should be established to deal with WC issues?
Funding arrangements	56. What classificatory system should be used for the new premium-setting system?
	57. What system should be in place to collect premiums and ensure that all employers pay their premiums?
Governance arrangements	58. Where should ministerial oversight of the Cook Islands workers' compensation scheme reside: with the Ministry of Internal Affairs or the Ministry of Finance and Economic Management?
	59. What, if any, model of oversight should be adopted for a new Workers Compensation Fund, or its equivalent: a stakeholder board model, a specialist board model or an amalgam of these two approaches?
	60. What should be the functions of the governance body (e.g. review investment strategy of the fund)?

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