

Vocational Independence: outcomes for ACC claimants

A follow up study of 160 claimants who have been deemed
vocationally independent by ACC and case law analysis of the
vocational independence process.



Commissioned by the Department of Labour

Hazel Armstrong and Rob Laurs

Wellington, New Zealand

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HAZEL ARMSTRONG LAW
BARRISTERS & SOLICITORS



Massey University



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FOREWORD

For the past decade, the ACC has performed assessments of capacity for work (or, as it's now known, 'vocational independence') for long-term recipients of weekly compensation whose injuries have healed, or stabilized, and who are unable to return to their pre-injury employment. There are several problems with the relevant legislation and the implementation of these assessments, and the research presented in this report is an important step forward in identifying – and, one hopes, rectifying – these shortcomings.

Despite its focus on rehabilitation, the legislation governing ACC does not necessarily require that the Corporation endeavour to restore the long-term claimant to an occupation of an economic and social status similar to that enjoyed before the injury. The obligation to retrain is only very minimal, and the outcomes for claimants, such as those whose cases are considered in this research, can be an unwelcome reduction in economic productivity and job satisfaction. This is not in keeping with the vision of 'complete rehabilitation' set out in 1967 by the architect of the ACC scheme, Sir Owen Woodhouse. Nor does it sit well with government's goals of up-skilling the workforce, addressing skills shortages, 'social development' and enhanced economic productivity.

Work-capacity assessment can never be an exact science. But ACC and (as the legal analysis in this report reveals) the courts now rely too heavily on the opinion of a single physician to determine whether the claimant is fit to perform certain occupations. There is no concern for observing actual outcomes. In other words, ACC is not required to follow the former claimant up to see whether jobs in those occupations identified by the assessor are actually available in the local market, or whether the claimant actually performs such a job efficiently and safely in the event of finding such employment. There is little 'real-world' validation underpinning the process at all.

The basic flaws in the legislation are, first, that it sets a low standard for actual rehabilitation outcomes, and, secondly, that it uses work-capacity assessment for a purpose for which it is ill-suited – namely, for legitimizing the termination of weekly compensation.

Lawyers Hazel Armstrong and Rob Laurs are to be commended for initiating this research into case law and into individual claimants' experiences. Such outcome evaluation should have been required of ACC from the outset. The present results are an important step forward, though, and I trust that this report will be read and carefully considered by all those with an interest in post-injury rehabilitation. It's time we started to think about the retraining of injured workers as an economic and social opportunity.

Grant Duncan, PhD
Massey University Albany

INTRODUCTION

The Department of Labour contracted lawyers Hazel Armstrong and Rob Laurs to provide an analysis of case law (including review decisions issued by Disputes Resolution Services Limited – ‘DRSL’) regarding the vocational independence process for injured workers under the Injury Prevention, Rehabilitation, and Compensation Act 2001 (‘IPRC Act 2001’) and the Accident Insurance Act 1998 (‘AI Act 1998’).

The research team also conducted follow-up interviews of a sample-set of 160 claimants involved in the vocational independence process. These 160 claimants had challenged ACC’s decision to deem them vocationally independent at review and/or appeal.

The research team were also contracted to provide recommendations to specifically address any recurrent issues arising from the research.

EXECUTIVE SUMMARY

In 1974, New Zealanders waived their right to sue for compensatory damages for negligence causing personal injury, in return for comprehensive coverage of all injuries through a statutory scheme. The accident compensation scheme is administered by a Crown Entity, the Accident Compensation Corporation ('ACC').

ACC funds treatment, social and vocational rehabilitation with the objective of restoring a claimant's health, independence, and participation. ACC compensates the injured worker at 80% of their pre-injury earnings until the claimant can return to work or ACC deems the claimant 'vocationally independent' of the scheme.

Vocational rehabilitation is geared towards assisting an injured worker to maintain their employment or, if this is not possible, ACC can assist the worker obtain employment in another job. Since 1992, the statutory scheme has allowed ACC to assess an injured worker's ability to work. Under the current Act, this assessment process establishes whether a worker has the capacity to work at least 35 hours per week in a job matched to their education, training and experience. If so, ACC deems the injured worker to be vocationally independent and they lose entitlement to weekly compensation after 3 months.

The case law analysis ('the research') examines the efficacy of the vocational independence process for injured workers. The research entailed both legal analysis as well as fieldwork which comprised interviews with 160 claimants ('the sample-set') who had been deemed vocationally independent by ACC.

All the sample-set had legally challenged ACC's vocational independence decision at review and/or in the District Court. However, the research showed that the vocational independence process is virtually legally unassailable – only 16% of our sample-set were successful at review or appeal. It is harder to overturn a vocational independence decision than other decisions made by ACC. The High Court has ruled that the statutory regime that surrounds the vocational independence process limits the ability of ACC to exercise any discretion and that ACC, Reviewers and the Courts alike, are obliged to accept the findings of ACC's assessors.

In spite of the high threshold required to legally overturn an ACC vocational independence decision at review or appeal, only a small minority of the sample-set achieved vocational independence in reality. That is, they were able to return to and sustain work of 35 hours or more in the jobs identified by the ACC assessors.

Two of the key findings were that the ACC-contracted assessors are not required to verify the injured workers' education, training and experience through

observation at work or participation in work trials. Furthermore, there is no requirement to test for the injured workers' computing, literacy and numeracy skills or cognitive ability. These assessments do not provide an accurate picture of a claimant's ability.

Secondly, the Act precludes consideration by assessors of labour market realities when determining job options. Skills acquired by a claimant pre-injury – even 5, 10 or 15 years earlier – are deemed to be applicable and current to today's labour market. The availability of the job and its viability are irrelevant.¹ The researchers also had concerns about the completeness of the work detail sheets that are used by the assessors.

The findings show that although a small minority of the sample-set went into Vocational Independence jobs, just over half of our sample-set who were rendered vocationally independent, and whose weekly compensation was suspended by ACC, returned to some form of work; either part time or full time².

The significant majority of those claimants who did find work experienced an income reduction upon their re-integration into the workforce. Other workers in our sample-set who were deemed to be vocationally independent shifted on to benefits (mainly Invalid's Benefits and Unemployment Benefits).

The longer the duration spent on weekly compensation prior to being assessed as vocationally independent, the greater the income reduction whether they were re-integrated into the workforce or shifted on to a benefit. This finding is consistent with research conducted by Crichton *et al* - Returning to Work from Injury: Longitudinal Evidence on Employment and Earnings (August 2005)

This would appear to be one of the first research projects that endeavours to follow up claimants after they have been declared vocationally independent. Hence it is valuable as a means of tracking vocational independence outcomes from the claimant's point of view once weekly compensation has ceased.

Although the research was restricted to the vocational independence process which occurs at the end of the rehabilitation offered by ACC, it became apparent that the claimants perceived that the rehabilitation received prior to them being deemed vocationally independent was incomplete.

¹ section 108 (2) (b) IPRC Act 2001

² The research team categorised Full-time work as 35 hours per week or more. Part-time work was categorised as less than 35 hours per week. The research team categorised Vocational Independence jobs as those identified by the ACC assessors.

AUTHORS

Hazel Armstrong and Rob Laurs are lawyers for a Wellington law firm – Hazel Armstrong Law.

Hazel Armstrong Law specialises in personal injury litigation (ACC law), employment law, Occupational Health and Safety, occupational disease, vocational rehabilitation and retraining, and employment-related education.

Hazel Armstrong is an author of Brookers *Personal Injury in New Zealand*, and Chairperson of the Government Advisory Panel on occupational disease. She is a member of the New Zealand Law Society Committee on ACC.

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PROJECT OVERVIEW

Hazel Armstrong and Rob Laurs have undertaken a review and analysis of case law (including review decisions issued by Dispute Resolution Services Limited – ‘DRSL’) regarding vocational rehabilitation for injured workers under the Injury Prevention, Rehabilitation and Compensation Act 2001 (‘IPRC Act 2001’) and the Accident Insurance Act 1998 (‘AI Act 1998’).

The review has generated:

- an insight into the outcomes for claimants who have been made vocationally independent;
- an assessment of whether the changes between the AI Act 1998 and the IPRC Act 2001 resulted in a more positive outcome for claimants;
- information about recurrent issues that arise regarding the work rehabilitation assessment process (‘WRAP’) under the AI Act 1998 and the vocational independence process under the IPRC Act 2001; and
- recommendations to specifically address any recurrent issues and for improvements to the vocational independence process generally.

This Report is in four parts:

- PART ONE – an introduction to the legislative background of vocational independence;
- PART TWO – a review and analysis of case law relevant to vocational independence;
- PART THREE – claimant interviews concerning vocational independence outcomes; and
- PART FOUR – recommendations.

Fit with Department Of Labour’s Return to Sustainable Earnings Project (‘RTSE’)

The Department of Labour (‘DOL’) has advised as follows:

The purpose of the Department of Labour’s (‘DOL’) Return to Sustainable Earnings (‘RTSE’) project is to group together work towards improving understandings of labour market outcomes for injured people. Work undertaken to date assists DOL to understand broadly the age, gender, ethnicity, and number of people who do not achieve vocational outcomes under current legislation. DOL also has information regarding the effects of suffering an injury on monthly incomes following a period of receiving earnings-related compensation.

This research seeks to further inform the RTSE project by providing a more in-depth analysis of the vocational independence process and outcomes for claimants.

FIT WITH CRICHTON ET AL RESEARCH (August 2005)

Sarah Crichton, Steven Stillman and Dean Hyslop were commissioned by Statistics New Zealand to undertake research on the employment and earnings outcomes of individuals (injured workers and beneficiaries). This research is part of the Linked Employer-Employee Dataset (LEED) Research Programme. LEED data is sourced from IRD, which records income data for employers and employees. LEED provides a unique source of information on individuals' employment histories and incorporates information on recipients of weekly compensation and benefits.

The study found that those individuals who receive weekly compensation for three+ months experience lower employment rates and average earnings after compensation compared to individuals who spend less than three months on weekly compensation prior to its cessation. After weekly compensation ceases, workers who have longer spells on weekly compensation experience lower employment rates and reduced average earnings.

The case law review provides the qualitative analysis that supports the findings in the Crichton et al research.

ACKNOWLEDGEMENTS

The Participants

Dr Grant Duncan (Massey University – Albany)

Peter Larking (ACC)

Chris Bennett (ACC)

Jo Mildenhall – Interviewer

Maire Dwyer – Economist

Linn Murphy (DOL)

Rebecca Keown (DOL)

Jo Burton (DOL)

Linda Richardson (DOL)

Craig Brown (DOL)

James Newell – Statistician (MERA)

Paul King (DRSL)

CASES CITED

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Carnahan v ACC 26/6/02, Judge Beattie, DC Dunedin 176/02
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Ewart v ACC 18/2/02, Judge Beattie, DC Napier 51/02
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Knight v ACC 31/5/02, Judge Beattie, DC Napier 149/02
Liddell v ACC 7/9/00, Judge Middleton, DC Wellington 235/2000
Lovini v ACC 1/5/02, Judge Beattie, DC Huntly 119/02
Manning v ACC 28/3/03, Judge Beattie, DC Wellington 51/2003
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O'Donnell v ACC 21/5/02, Judge Willy, DC Wellington 139/02
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Ramsay v ACC 12/12/02, Judge John Hansen, HC Dunedin, AP412/14/02
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Reeves v ACC 11/12/02, Judge Beattie, DC Dunedin 343/02
Smith v ACC 6/9/04, Judge Ongley, DC Nelson 266/04
Sparrow v ACC 8/3/02, Judge Beattie, DC Wellington 74/2002
Speedy v ACC 15/8/03, Judge Cadenhead, DC Wellington 189/2003
Weir v ACC 18/8/04, Judge Miller, HC Wellington CIV 2003-485-1921

LIST OF ABBREVIATIONS USED IN THE TEXT

Prefixes

ACC	Accident Compensation Corporation
AI	Accident Insurance Act 1998
ARCI	Accident, Rehabilitation and Compensation Insurance Act 1992
CA	Court of Appeal
DC	District Court
DOL	Department of Labour
DRSL	Dispute Resolution Services Limited
FT	Full-time
HC	High Court
IMA	Initial Medical Assessment
IOA	Initial Occupational Assessment
IPRC	Injury Prevention, Rehabilitation and Compensation Act 2001
IRP	Individual Rehabilitation Plan
MA	Medical Assessor
MERA	Monitoring & Evaluation Research Associates Limited
MSD	Ministry of Social Development
NZCTU	New Zealand Council of Trade Unions
NZSCO	New Zealand Standard Classification of Occupations
OA	Occupational Assessor
PT	Part-time
RTSE	Return to Sustainable Earnings
VI	Vocational Independence
VIMA	Vocational Independence Medical Assessment
VIOA	Vocational Independence Occupational Assessment
WC	Weekly Compensation
W&I	Work and Income New Zealand
WCAP	Work Capacity Assessment Process
WRAP	Work Rehabilitation Assessment Process

PART ONE



PART ONE of the research provides an overview of the development and implementation of the vocational independence process under its guise of “work capacity” testing under the 1992 Act, the “work rehabilitation” assessment process under the 1998 Act and “vocational independence” under the current legislation.

LEGISLATIVE BACKGROUND TO VOCATIONAL INDEPENDENCE

According to the ACC scheme, a claimant can receive income-related weekly compensation to the level of 80% of their pre-injury earnings.

Eligibility to weekly compensation depends on:

- (1) The claimant having cover for their personal injury; and
- (2) the claimant is incapacitated ie. being unable because of his/her personal injury to engage in the employment in which he/she was employed when he/she suffered the personal injury; and
- (3) the claimant has not yet been deemed vocationally independent; and
- (4) the claimant is either:
 - (a) an earner at the time of the injury; or
 - (b) on unpaid parental leave ; or
 - (c) had purchased weekly compensation cover; or
 - (d) had ceased to be an employee but falls within the limited criteria set out in clause 43 of schedule 1 and is therefore deemed to be an earner;

A claimant can be an earner in employment if he/she is self-employed or is an employee. A person is in employment during periods of paid leave eg. bereavement, sick or annual leave. However this does not include paid leave on the termination of employment.

All of our sample-set comprise people who met the above criteria.

A claimant will immediately lose their entitlement to weekly compensation when they are able to return to their pre-injury employment.

A claimant can also lose their entitlement to weekly compensation, after three months notice, if they are deemed to be vocationally independent, that is, they have been found capable of undertaking a job for 35 or more hours per week.

In principle, a claimant cannot be made vocationally independent into their pre-injury employment. Authority for this proposition can be found in the cases of *Chesterman* 7/8/01, Judge Beattie, DC Wellington (213/01) and *Churchill* 20/2/03, Judge Beattie DC Wellington (22/03).

Accident Rehabilitation and Compensation Insurance Act 1992 ('ARCI' Act)

Under the Accident Rehabilitation and Compensation Insurance ('ARCI') Act 1992, provision was made for assessing the ability of long-term claimants to return to the workforce based on capacity to work. In 1996, the Act was amended to allow for work capacity assessment based on the claimant's capacity to engage in work for which he or she was suited by reason of education, experience, or training. ACC's Work Capacity Assessment Procedure ('WCAP') was introduced in November 1997 following a direction from the Government to assess the 30,000 claimants who had been receiving earnings-related compensation for longer than 12 months.

Under WCAP, recipients of earnings-related compensation who had completed a rehabilitation programme underwent an occupational assessment to determine suitable jobs in relation to their experience, education, and training. These claimants then underwent a medical assessment to determine which of these suitable jobs were medically sustainable for 30 hours or more per week. Claimants who were found to have a capacity for work under the WCAP test would lose their earnings-related compensation after 3 months.

Accident Insurance Act 1998 ('AI Act') and AI Amendment Act 2000

The WCAP provisions for testing work capacity were carried over under the Accident Insurance (AI) Act 1998. A policy decision was taken, following the election of the Labour Government in November 1999, to rename the work capacity test the Work Rehabilitation Assessment Process (WRAP). This change recognised ACC's greater focus on rehabilitation. At this time, a policy decision was also taken to assess capacity for work against the threshold of 35 hours per week.

The Government passed the AI Amendment Act in 2000, which carried over the key provisions relating to WRAP from the AI Act 1998.

Injury Prevention, Rehabilitation, and Compensation Act 2001 ('IPRC Act')

On 1 April 2002, the IPRC Act 2001 came into force. The legislative change redefined rehabilitation to mean a process of active change and support with the goal to restoring to the maximum practicable extent, a claimant's health, independence, and participation. The IPRC Act 2001 replaced the WRAP process under the AI Act 1998 with the new Vocational Independence (VI) process. Provisions were continued for work capacity to be assessed (via the VI process). The Act also introduced a purpose statement.

The purpose statement in section 3 (c) provides that the goal of rehabilitation is to achieve an appropriate quality of life through the provision of entitlements that restores to the maximum extent practicable a claimant's health, independence and participation. Vocational independence assessments are undertaken to ensure that comprehensive vocational rehabilitation (as identified in the IRP) has been completed and that it has focussed on claimant needs and addressed any injury-related barriers to enable the claimant to maintain employment or regain or acquire vocational independence. Specifically, vocational rehabilitation focuses on claimants' needs and supports a return to work.

It would appear that the Government's objective under the IPRC Act 2001 was to use the VI process as a rehabilitation tool, rather than as a means of removing a claimant's entitlement to weekly compensation. The Act introduced the initial occupational and initial medical assessments at the beginning of the rehabilitation process. These assessments identify suitable types of work (given the claimant's education, experience and training) that are medically sustainable for the claimant to perform.

The findings of the initial assessments are used as a basis for the claimant's Individual Rehabilitation Plan (IRP) and also become the reference point of any subsequent vocational independence assessment at the completion of rehabilitation. Once all interventions on the IRP have been completed, the claimant then undergoes further occupational and medical assessments to determine whether he/she has a capacity to work for 35 hours or more per week (the IPRC Act 2001 reconfirmed the policy decision to raise the threshold from 30 hours per week under the Accident Insurance Act 1998). If the claimant is found to have vocational independence, ACC issues a decision indicating that the claimant will receive weekly compensation for a further 13 weeks before transferring off the ACC scheme.

Provisions, under the ARCI Act 1992, the AI Act 1998 and the IPRC Act 2001, enabled claimants to request an independent review of any ACC decision with which they disagreed. A Reviewer employed by Dispute Resolution Services Limited (DRSL) currently conducts these reviews and issues a decision within 28 days of the hearing. Prior to 1 July 1999, when DRSL became incorporated, a division within ACC carried out these reviews. Claimants have a right of appeal to the District Court if they disagree with DRSL's decision.

The table below summarises the major changes between the 1998 Act and the 2001 Act. These changes are explained in the commentary.

AI Act 1998	AI Amendment Act 2000	IPRC Act 2001
WCAP	WRAP	VI
30 hours per week	Policy decision taken to increase threshold to 35 hours per week	35 hours or more per week
		IOA + IMA introduced
		IOA + IMA incorporated into IRP
IRPs are not reviewable decisions	IRPs are not reviewable decisions	IRPs are reviewable decisions
"Rehabilitation" – means assistance that aims to help a person who has suffered a personal injury regain, or acquire, or use the skills necessary for that degree of mental, physical, social and vocational function that will enable the person to lead as normal a life as possible, having regard to the consequences of the person's personal injury		Definition/outcome for rehabilitation has changed. "Rehabilitation" – (a) means a process of active change and support with the goal of restoring, to the extent provided under section 70, a claimant's health, independence, and participation; and (b) comprises treatment, social rehabilitation, and vocational rehabilitation
Only injury-related factors taken into account	Only injury-related factors taken into account	Non-injury-related factors taken into account but do not determine outcome of vocational independence.
Occupational and medical assessments determine capacity to work	Occupational and medical assessments determine capacity to work	Rehabilitation completed before VIOA and VIMA commences

THE IPRC ACT 2001 VOCATIONAL INDEPENDENCE FRAMEWORK

Vocational Independence (VI)

35-hour a week threshold

Vocational independence in the IPRC Act 2001 is defined under s6 as:

Vocational independence, in relation to a claimant, means the claimant's capacity, as determined under section 107, to engage in work –

- (a) for which he or she is suited by reason of experience, education, or training, or any combination of those things; and
- (b) for 35 hours or more a week.

The Case Law Review findings suggest that the change from the 30 hour to 35 hour per week threshold has had no practical effect on the outcome for the claimant.

ACC may assess the vocational independence of any claimant who is eligible for weekly compensation or entitled to receive weekly compensation. The purpose of this vocational independence assessment has a different focus from assessments under previous legislation, with more emphasis placed on ensuring vocational rehabilitation is provided (as identified in the claimant's IRP).

Section 107 prescribes the means for determining vocational independence: -

Section 107 Corporation to determine vocational independence

- (1) The Corporation may determine the vocational independence of –
 - (a) a claimant who is receiving weekly compensation:
 - (b) a claimant who may have an entitlement to weekly compensation.
- (2) The Corporation determines a claimant's vocational independence by requiring the claimant to participate in an assessment carried out –
 - (a) for the purpose in subsection (3); and
 - (b) in accordance with sections 108 to 110 and clauses 24 to 29 of Schedule 1; and
 - (c) at the Corporation's expense.
- (3) The purpose of the assessment is to ensure that comprehensive vocational rehabilitation, as identified in a claimant's individual rehabilitation plan, has been completed and that it has focused on the claimant's needs, and addressed any injury-related barriers, to enable the claimant –
 - (a) to maintain or obtain employment; or
 - (b) to regain or acquire vocational independence.

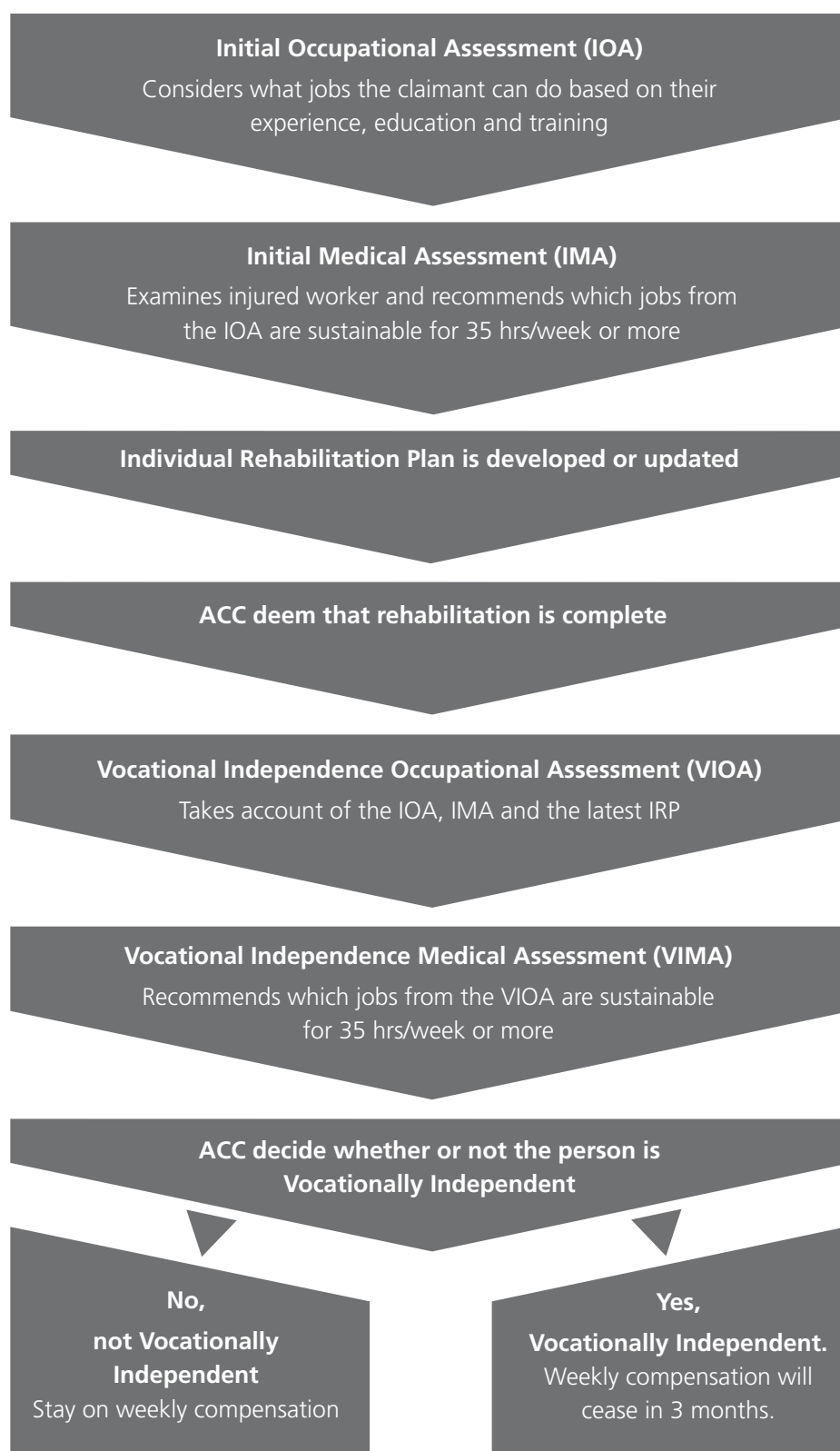
Initial Assessments

The following text boxes describe the initial assessment stages as well as the Individual Rehabilitation Plan.

Initial Occupational Assessment (IOA)	<p>The IPRC Act 2001 provides for initial assessments and vocational independence assessments.</p> <p>The initial occupational assessment considers the claimant's training, education and experience. In so doing, the occupational assessors are not required to verify literacy, numeracy, computing skills, cognitive and organisational skills.</p> <ul style="list-style-type: none">• It identifies suitable types of work for the claimant based on their education, experience and training.• The tasks associated with each type of work are explained in a work type detail sheet.¹ <p>The initial occupational assessor can make recommendations for further rehabilitation.</p>
Initial Medical Assessment (IMA)	<p>The initial medical assessor examines the injured worker to see what jobs identified in the IOA are medically sustainable for 35 hours a week or more. The medical assessor's ('MA') job knowledge is based on the information in the work details sheets.</p> <p>This assessment generates a report that lists what jobs, identified in the IOA, the injured worker can sustain for 35 hours a week or more.</p> <p>The initial medical assessor can make recommendations for further rehabilitation.</p>
Individual Rehabilitation Plan (IRP)	<p>All claimants, receiving weekly compensation, are required to have an IRP if their rehabilitation is likely to take longer than 13 weeks. IRPs are negotiated with the claimant and may include input from employers, the claimant's doctor and family.</p> <p>IRPs are signed off by the claimant and their case manager</p>

1. A sample work type detail sheet is included at Appendix Five. This has been sourced from http://www.acc.co.nz/wcm001/idcplg?IdcService=SS_GET_PAGE&ssDocName=WCMZ002941&ssSourceNodeId=3913

The purpose of the vocational independence assessment is outlined in s107 (3). This flow-chart illustrates the steps a claimant must go through during the VI process



The Vocational Independence Assessments

After the completion of the initial assessments and the rehabilitation programme, the claimant undergoes vocational independence assessments.

Section 109 sets out when a claimant's vocational independence is to be assessed.

109 When claimant's vocational independence to be assessed

- (1) The Corporation may determine the claimant's vocational independence at such reasonable intervals as the Corporation considers appropriate.
- (2) However, the Corporation must determine the claimant's vocational independence again if -
 - (a) the Corporation has previously determined that the claimant had
 - (i) vocational independence under this section; or
 - (ii) a capacity for work under section 89 of the Accident Insurance Act 1998; or
 - (iii) a capacity for work under section 51 of the Accident Rehabilitation and Compensation Insurance Act 1992; and
 - (b) the Corporation believes, or has reasonable grounds for believing, that the claimant's vocational independence or capacity for work may have deteriorated due to the injuries that were assessed in the previous vocational independence or capacity for work assessment.
- (3) The claimant may give the Corporation information to assist the Corporation to reach a belief under subsection (2) (b).

The Vocational Independence Occupational Assessment

Vocational Independence Occupational Assessment (VIOA)	<p>The Vocational Independence Occupational Assessment is based on the previous assessments (IOA and IMA) and takes account of any other rehabilitation e.g. work ready programme, work trial.</p> <p>s108 (2) <i>The purpose of an occupational assessment is to:</i></p> <p><i>(a) consider the progress and outcomes of vocational rehabilitation carried out under the claimant's IRP; and</i></p> <p><i>(b) consider whether the types of work (whether available for not) identified in the claimants individual rehabilitation plan are still suitable for the claimant because they match the skills that the claimant has gained through education, training or experience.</i></p>
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This assessment generates a report listing jobs that are "suitable" for the injured person. Section 108(2)(b) allows the assessor to select a work type for the claimant, whether the type of work is available or not. This may lead to choices of work which, from the claimants point of view, are not suitable.

The Act makes no reference to the VI assessor being required to be “appointed”, “approved”, “contracted”, or “accredited” by ACC. Clause 24 of schedule 1 requires that ACC arrange for the assessment to be undertaken by an assessor who ACC considers has appropriate qualifications. However, in practice, ACC provides claimants with a list of contracted assessors. From this list, the claimant is asked to select an assessor. If a claimant were to choose a person, who has comparable qualifications, to those on ACC’s list, ACC can reject the claimant’s suggestion and make the referral to the ACC contracted assessor. If the claimant were to refuse to attend the assessment on the grounds that the claimant was not satisfied with the choice of assessor, ACC would be able to suspend entitlement to weekly compensation. This element of compulsion to attend the ACC selected assessor appears to leave the claimant with a sense of powerlessness and lack of control over the process.

Under section 6 of the IPRC Act 2001, which defines the scope of an ACC decision, it is apparent that a claimant is unable to review ACC’s selection of assessor.

Clause 25 stipulates that an occupational assessor undertaking an occupational assessment must –

- take into account information provided by the Corporation and the claimant; and
- consider the individual rehabilitation plan prepared for the claimant and review the vocational rehabilitation carried out under the plan; and
- discuss with the claimant all the types of work that the assessor identifies as suitable for the claimant; and
- consider any comments the claimant makes to the assessor about those types of work.

Clause 26 provides that the Occupational assessor must prepare and provide to ACC a report on the occupational assessment specifying –

- the claimant’s work experience; and
- the claimant’s education, including any incomplete formal qualifications; and
- any work-related training in which the claimant has participated; and
- all skills that the assessor has reasonably identified the claimant as having; and
- the vocational rehabilitation that the claimant has received under the individual rehabilitation plan or in any other way; and
- the outcome of the vocational rehabilitation; and
- all types of work reasonably identified as suitable for the claimant; and
- in relation to each type of work, the requirements of that type of work, including any environmental modifications that the assessor identifies as necessary to enable the claimant to function safely in that type of work.

The legislation does not refer to any particular occupational database to which occupational assessors are to have recourse. To ensure consistency across assessments, the ACC has developed work detail sheets as assessment tools. These work detail sheets assume significance, as both the occupational and medical assessors use them as base documents for their assessments. The education, training and experience of the claimant are matched against the work detail sheet and, in turn, the medical assessor considers the claimant's ability to work for 35 hours a week in the jobs as described by the work detail sheets.

The work detail sheets are assumed to be an accurate description of the tasks, environment and training requirements required to fulfil the position. It does not matter if the work detail sheets describe a job that is not listed on the NZ Standard Classification of Occupations database¹.

It is important to note that clauses 25 and 26 of Schedule 1, which address the conduct and report of the occupational assessor, do not require the assessor to specifically identify a claimant's current skill-set at the time of assessment. The effect of this is that the assessor is permitted to consider any education, experience and training acquired during the course of the claimant's life, irrespective of its currency and relevance to today's labour market.

For example, a 40 year-old claimant can have the education, experience and training they acquired as a 20 year-old assessed as if they were the claimant's currently transferable skills. For the purposes of an occupational assessment, then, the sum total of a claimant's education, experience and training is assessed and the occupational assessor is permitted to isolate and identify certain transferable skills possessed by a claimant in the past, as if they were still current. Thus outmoded skills or forgotten skills are considered as being current.

This situation could be easily rectified if the occupational assessors were required to verify current education, experience and training as a mandatory requirement of occupational assessments.² The occupational assessors could be required to undertake standardised literacy, numeracy, and where necessary computing and cognitive skill assessments.

¹ The occupational assessment uses the New Zealand Standard Classification of Occupations 1999 (NZSCO) as the reference for types of work. The NZSCO is available on Statistics New Zealand's website: <http://www.stats.govt.nz>.

² For example, in select European jurisdictions, notably Switzerland and Germany, a claimant's current work capacity and transferable skills are assessed in simulated work environments to give the assessor the most accurate depiction of a claimant's work ability.

The Vocational Independence Medical Assessment

Vocational Independence Medical Assessment (VIMA)	<p>The Vocational Independence Medical Assessment looks at the jobs and work detail sheets from the VIOA and examines the injured worker. Based on the information in the work details sheets, the medical assessor decides which jobs the injured worker could sustain for 35 hours or more a week.</p> <p>s 108 (3) <i>The purpose of a medical assessment is to provide an opinion for the Corporation as to whether, having regard to the claimant's personal injury, the claimant has the capacity to undertake any type of work identified in the occupational assessment and reflected in the claimant's individual rehabilitation plan.</i></p>
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This assessment generates a report that lists which jobs the injured worker is suited to and can sustain for more than 35 hours a week.

Clause 27 of Schedule 1 prescribes the qualifications required of a medical assessor.

- (1) A medical assessment must be undertaken by a medical practitioner who is described in subclause (2) or subclause (3).
- (2) A medical practitioner who provides general medical services must also –
 - (a) have an interest, and proven work experience, in disability management in the workplace or in occupational rehabilitation; and
 - (b) have at least 5 years experience in general practice; and
 - (c) meet at least 1 of the following criteria:
 - (i) be a Fellow of the Royal New Zealand College of General Practitioners or hold an equivalent qualification;
 - (ii) be undertaking training towards becoming a Fellow of the Royal New Zealand College of General Practitioners or holding an equivalent qualification;
 - (iii) have undertaken relevant advanced training.
- (3) A person who does not provide general medical services must also –
 - (a) have an interest, and proven work experience, in disability management in the workplace or in occupational rehabilitation; and
 - (b) be a member of a recognised college.

The claimant is unable, in reality, to select their own medical assessor. Unlike clause 24, the applicable clause for ACC's selection of occupational assessor, clause 27 sets out in detail the qualifications for the VI medical assessor. Even so, ACC follows the same procedure as for selecting a VI occupational assessor. The claimant is given a list of contracted medical assessors and is asked to select an assessor from the list provided. If the claimant were to choose a medical assessor possessing the qualifications set out in clause 27 but not on ACC's list, ACC can override the suggestion and refer the claimant to ACC's choice of assessor.

This decision would not be reviewable, as the choice of assessor is regarded as an administrative decision. Were the claimant to refuse to go to ACC's chosen medical assessor, ACC could suspend entitlement to weekly compensation on the grounds of an unreasonable refusal to comply with a requirement of the Act.¹

The researchers do not believe that Parliament intended to deny claimants the right to choose their own medical assessor provided that he/she possesses the appropriate qualifications specified in clause 27 of schedule 1. Nor do the researchers believe that Parliament intended that the choice of assessors would fall out of the jurisdiction of reviewable decisions.

Clause 28 requires that a medical assessor undertaking a medical assessment must take into account –

1. (a) information provided to the assessor by the Corporation; and
(b) any individual rehabilitation plan for the claimant; and
(c) any of the following medical reports provided to the assessor:
 - (i) medical reports requested by the Corporation before the IRP was prepared;
 - (ii) medical reports received during the claimant's rehabilitation; and
- (d) the report of the occupational assessor under clause 26; and
(e) the medical assessor's clinical examination of the claimant; and
(f) any other information or comments that the claimant requests the medical assessor to take into account and that the medical assessor decides are relevant.
2. The Corporation must provide to a medical assessor all information the Corporation has that is relevant to a medical assessment.

Clause 29 sets out the criteria for the preparation of a medical assessment. The medical assessor must provide to the Corporation a report on the medical assessment specifying –

1. (a) relevant details about the claimant, including details of the claimant's injury; and
(b) relevant details about the clinical examination of the claimant undertaken by the assessor, including the methods used and the assessor's findings from the examination; and
(c) the results of any additional assessments of the claimant's condition; and
(d) the assessor's opinion of the claimant's vocational independence in relation to each of the types of work identified in the occupational assessor's report; and
(e) any comments made by the claimant to the assessor relating to the claimant's injury and vocational independence in relation to each of the types of work identified in the occupational assessor's report.
2. The report must also identify any conditions that –
 - (a) prevent the claimant from having vocational independence; and
 - (b) are not related to the claimant's injury.
- (3) The Corporation must provide a copy of the report to the claimant.

¹ section 117 Corporation may suspend, cancel or decline entitlements.

Transferable skills

The education, training and experience of the claimant are summarised by the occupational assessor and provided to the medical assessor and they must assume that these assessments are accurate and up-to-date. If the occupational assessor says that the claimant can undertake work that requires concentration, organisational skills and multi-tasking then the medical assessor must assume that these competencies have been identified and assessed by the occupational assessor. However, the effects of the claimant's injury and their medication may have compromised these cognitive and motor functions and the assessment of these cognitive competencies may be better undertaken by the medical assessor.

Responsibility for undertaking assessments of concentration, organisational skills and multi-tasking is not currently assigned to either the occupational or the medical assessor and consequently these skills are rarely, if ever, assessed.

Where work types require cognitive ability then this competency should be assessed at either the occupational or medical assessment stages.

Medical Sustainability

In order for ACC to deem a claimant vocationally independent, the medical assessor must first give an opinion as to whether a job option is medically sustainable, by assessing whether the claimant can undertake the nominated job option/s for 35 hours or more per week.

The opinion of medical sustainability is made on the basis of a single clinical examination conducted by the medical assessor with reference to the claimant's medical history. Thus, the medical assessor only obtains a 'snapshot' of a claimant's physical tolerance before issuing their medical assessment.

Claimants commonly reported that consideration of whether they had the physical capability to sustain 35 hours per week of work was not given sufficient weight during the medical assessment. The researchers note that there is no requirement in law requiring medical assessors to observe the claimant performing simulated work tasks for an extended period of time. Nor is there any requirement that work trials be used to verify the hours of work that a claimant is deemed capable of working.

We note that a single presentation is unlikely to be sufficient to make a robust assessment as to whether a job option is medically sustainable.

Only one job required

Current operational policy is for case managers to identify more than one job option for claimants who cannot return to pre-incapacity employment, if possible. However, a number of the cases that went to review resulted in several job options being struck out, but, as only one job is required to be identified by law, a claimant can still be made vocationally independent even when a review has shown flaws in one or more of the other job options identified by the assessors.

The research team considers that if more than one job option is required as a prerequisite for VI (the researchers suggest a minimum of three) there would be greater surety that the claimant is capable of performing meaningful and realistic work.

More than one job option would reduce the likelihood of a claimant being unable to work in the solitary, nominated job option for reasons of:

- labour market unavailability;
- medical un-sustainability;
- geographical reasons; or
- the unrealistic nature of the job

VOCATIONAL INDEPENDENCE DECISION

ACC issues a decision based on the assessors' findings.

ACC accepts the assessors' findings about whether the injured worker is vocationally independent.	<p>Once all the assessments are complete, ACC is bound to accept the assessors' findings and make a decision on whether or not the injured worker is Vocationally Independent. That is, can the person work in one of the jobs listed by the Occupational Assessor for 35 hours a week or more?</p> <p>If No,</p> <p>The injured worker will stay on weekly compensation.</p> <p>If Yes,</p> <p>The injured worker's compensation will cease three months after ACC issues its decision. The injured worker is still entitled to other entitlements under their claim e.g. treatment like physiotherapy.</p>
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PART TWO

A REVIEW AND ANALYSIS OF CASE LAW RELATING TO VOCATIONAL INDEPENDENCE



Research focus and objective

The purpose of this stage of PART TWO is the analysis of DRSL review decisions and Court judgments to:

- identify any issues in relation to the WRAP process under the AI Act 1998 and the vocational independence process under the IPRC Act 2001;
- record outcomes at review and/or appeal;
- track the injured workers progress through either the WRAP or the VI procedure; and
- develop recommendations

One hundred and sixty claimants who had undergone vocational rehabilitation under either the AI Act 1998 or the IPRC Act 2001 were interviewed by the research team. The methodology of the research is contained in Part Three. All these claimants had litigated against the ACC and their cases had proceeded to either a DRSL review hearing or to the District Court (and in one case; the High Court and Court of Appeal).

Research limitations

Because the ACC does not routinely follow-up on the employment status of claimants once they are deemed vocationally independent the only tracking mechanism for determining the employment status of these claimants was through asking them directly in the form of a telephone interview. This research focused on claimants who had litigated against ACC's decisions to find them vocationally independent – this variable makes the sample-set inherently biased. However, the claimants' actions of litigating these ACC decisions suggest there are systematic shortcomings in the vocational independence process, which the researchers felt was a legitimate concern to address. It must be emphasised that the sample-set represented a minority of all ACC claimants who undergo vocational rehabilitation but this group is still statistically significant.

ACC advised us that there would be logistical difficulties in retrieving review decisions for participants whose cases were heard when the ARCI 1992 was in force. This proved to be the case and it was not possible to source review or appeal decisions for any cases predating the AI Act 1998.

This meant that our case law review consisted entirely of review decisions and appeal decisions which were decided pursuant to the AI Act 1998 and the IPRC Act 2001.

Summary of case law review

Of the one hundred and sixty interview subjects, the research team were only able to source seventy-seven decisions (at review or appeal level) for analysis. ACC and DRSL were able to locate fifty-eight review decisions from their archives and database. The research team obtained nineteen appeal decisions – eighteen District Court and one High Court decision – from the Brookers database and the Wellington High Court library.¹

These seventy-seven decisions became the sample-set for the case law review and analysis.

The significant majority concerned vocational independence decisions (or WRAP decisions under previous legislation.) These decisions, if upheld, result in the claimant having their weekly compensation suspended 3 months after the date of decision. The seriousness of the consequences led these claimants to seek a review and/or appeal.

All seventy-seven cases were heard between 2000 and 2005. The yearly breakdown is as follows:

2000	2001	2002	2003	2004	2005
1	1	32	20	9	14

Breakdown by Act

The cases were categorised according to which Act the WRAP/VI decision was heard under – although the claimant involved may have been granted cover for their personal injury under an earlier statute.

Thirty-three cases were heard under the AI Act and forty-four under the IPRC Act 2001.

Successful Cases

Cases were classified as successful if the outcome of the review or Court hearing resulted in ACC's decision being quashed. Twelve cases resulted in ACC's decision being overturned. These twelve successful cases comprised nine cases at review and three at the District Court.

Therefore, 16% of the injured workers, included in the available sample-set, were successful in overturning ACC's decision that they were vocationally independent, at review.

¹ The **Ramsay** decision is considered to be one case for the purposes of the Case Law Review despite going to the District Court three times, the High Court three times and the Court of Appeal once. The researchers have counted **Ramsay** as a High Court decision because Judge John Hansen's influential judgment (**Ramsay v Accident Insurance Corporation**, 12/12/02, Judge John Hansen, HC Dunedin, AP 412-14-02) promulgates the 'Ramsay principles', which have informed vocational independence jurisprudence.

The national average of quashed ACC decisions is 23% – this figure relates to ACC decisions on any matters that were overturned at review.¹

Sixty-five cases resulted in ACC's decision being upheld, therefore the applicant/appellant's submission was dismissed.

These sixty-five cases that upheld ACC's decision comprised forty-nine at review, fifteen at the District Court and one at the High Court.

Representation

Forty appellants were represented by advocates or counsel and thirty-seven were unrepresented. Therefore, 52% of the available sample-set were represented by counsel or advocates.

This compares to a national average of 38% of claimants who were represented at review.² Ten out of the twelve successful cases involved represented claimants.

Based on the research findings, represented claimants have a significantly greater chance of success than those who are unrepresented.

Non-Vocational Independence Decisions

The sample-set did not entirely comprise vocational independence decisions.

Other decisions concerned:

- ACC's refusal to retrain a claimant in a 16-week course of massage therapy (1)
- ACC's refusal to retrain a claimant as a financial advisor (1)
- ACC's refusal to provide English language training for a claimant with English as a second language (1)
- ACC's refusal to undertake a reassessment of injury/treatment needs following deterioration of injury (1)
- ACC's refusal to fund a lap top computer (1)
- ACC's refusal to provide machinery (1)
- the validity of a review application (1)
- the reviewability of an IRP (2)

¹ Statistics obtained from DRSL, 25th August 2006. See Appendix Five: 'Outcomes: Represented vs Unrepresented applicants'.

² As above.

CASE LAW REVIEW AND ANALYSIS

The principle themes that emerge from the case law review are grouped under the following headings:

- **The Ramsay principles**
- **Assessor Findings (Occupational/Medical)**
- **Operational Themes**
- **Pain as a consequence of injury**
- **The Status of the IRP**



THE RAMSAY PRINCIPLES

The High Court judgment delivered by John Hansen J in **Ramsay** AP412/14/02 ('**Ramsay**') is currently the leading common law authority on vocational independence. As such, the precedent established in **Ramsay** has loomed large over subsequent vocational independence cases including the majority of the cases included in our sample-set, which were decided subsequent to Ramsay.

Consequence of Ramsay

The 2002 High Court decision remains good law and Ramsay has been directly cited in 60% of the case law decisions (24 out of 40 decisions) that were decided after Hon Justice John Hansen had handed down his decision.

Following **Ramsay**, therefore, it remains very difficult, if not impossible, for an applicant/appellant to succeed in overturning a vocational independence decision, except in the following situations:

- where the medical assessor ('MA') is not properly qualified under clause 27 of Schedule 1;
- where the MA had failed to take into account matters that he must take into account under clause 28 of Schedule 1;
- where the report failed to contain some of the information required to contain under clause 29 of Schedule 1; or
- where there is clear and cogent evidence showing that the assessor was wrong and consequently ACC's decision is wrong.

Consequently, if the vocational independence procedure is undertaken correctly and a claimant is deemed to be vocationally independent, unless the applicant/appellant's case falls within the narrow spectrum of those situations described above, Review officers and the District Court consider themselves bound to follow **Ramsay** and dismiss any applications to have ACC's decision quashed.

Ramsay – legal background

Ramsay was heard under the AI Act 1998, but has been applied consistently by the District Court in relation to similar provisions under the IPRC Act 2001.

Ramsay had a complex legal gestation despite, on its face, involving a fairly typical vocational independence scenario.

The factual background is as follows:

The appellant was a plumber who sustained a back injury in 1989. The injury curtailed his ability to work and he began to receive weekly compensation.

The appellant's capacity to work was assessed under ss 93 to 100 of the 1998 Act. These assessments included reports by Dr Talwar, a specialist in occupational medicine, who determined that the appellant was fit to work in five occupations for 30 hours or more per week.

On the basis of Dr Talwar's medical opinion, ACC deemed that the appellant had capacity for work and advised him in a decision letter that compensation payments would be terminated from 3 May 2000 ('ACC's decision').

The appellant then presented to an orthopaedic surgeon, Mr Hodgson, who reassessed his work capacity in May and October 2000. On both occasions, Mr Hodgson concluded that, given the ongoing effects of the appellant's injury, he could not medically sustain any of the five identified job options for 30 hours or more per week.

The appellant then sought a review of ACC's decision.

The convoluted case history is detailed below:

The Review officer upheld ACC's decision and found that the appellant had capacity to work in five job options: Manager, Basic Clerical, Sales, Hardware Sales and Real Estate Sales. This review decision was issued on 21st July 2000.

The appellant appealed the review decision to the Wellington District Court. Judge Barber issued an interim decision on 6th March 2001 and directed ACC to obtain a further medical assessment from a third appropriately-qualified medical specialist. Judge Barber then adjourned the hearing. ***Ramsay v Accident Rehabilitation and Compensation Insurance Corporation, 6/3/01, Judge Barber, DC Wellington (46/2001)***

The appellant did not take the opportunity to seek a further medical assessment and instead applied for leave to appeal to the High Court.

The District Court appeal was subsequently re-opened and Judge Barber dismissed the appellant's case on 24th October 2001. ***Ramsay v Accident Rehabilitation and Compensation Insurance Corporation, 24/10/01, Judge Barber, DC Wellington (298/2001)***

The appellant's application for leave to appeal to the High Court against Judge Barber's substantive decision of 24th October 2001 was then heard by Judge Middleton. Judge Middleton declined leave to appeal to the High Court on 8th May 2002. *Ramsay v Accident Compensation Corporation*, 8/5/02, Judge Middleton, DC Wellington (122/02)

The appellant then applied for special leave to appeal to the High Court against both of Judge Barber's 2001 decisions. This application was heard by Judge John Hansen in the Dunedin High Court. Judge John Hansen decided to hear the appeal on its merits but ultimately refused to grant special leave. Nevertheless, the *dicta* raised in Judge John Hansen's judgment has assumed significance in the context of this case law review and as such warrants close consideration. *Ramsay v Accident Insurance Corporation*, 12/12/02, Judge John Hansen, HC Dunedin (AP412/14/02)

The appellant then applied to have Judge Barber's decisions of 6th March 2001 and 24th October 2001 judicially reviewed. Judge Goddard, in the Wellington High Court, dismissed this appeal on the 9th March 2004. *Ramsay v Wellington District Court & Anor*, 9/3/04, Judge Goddard, HC Wellington (CIV-2003-485-1568)

The appellant then appealed to the Court of Appeal against Judge Goddard's decision. The Court of Appeal found that the appellant was statutorily barred from seeking judicial review remedies and rejected his appeal. *Ramsay v Wellington District Court*, 4/8/05, (CA47/04)

Earlier this year, the appellant attempted to revive the case by applying for a recall of Judge John Hansen's judgment under the High Court rules. Judge John Hansen refused the application for recall. *Ramsay v Accident Insurance Corporation*, 30/6/06, Judge John Hansen. HC Dunedin. (CIV 2005-412-000795)

Despite the fact that the **Ramsay** case progressed to the Court of Appeal, the highest forum in which the substantive merits of the case (as opposed to procedural matters, ie. recourse to judicial review remedies) were considered remains Judge John Hansen's enunciation of the law in the Dunedin High Court. As such, this case law review will consider how Judge John Hansen's judgment has been interpreted and implemented by DRSL review officers and District Court judges.

It should be noted that as **Ramsay** stands it is binding law as dictated by a High Court judge.

The only means by which **Ramsay** can be challenged are;

- (1) through further litigation and a High Court or Court of Appeal judgment, which distinguishes or overturns **Ramsay** or
- (2) legislative change to the IPRC Act 2001.

Ramsay – Judge John Hansen’s judgment (AP412/14/02)

The case hinged on whether the Corporation was correct in preferring the medical assessment of Dr Talwar, the appointed medical assessor, to the contrary medical opinion of Mr Hodgson, sought in support of the appellant’s case.

It is important to note that, in this particular case, Mr Hodgson was not qualified under s98 of the AI Act 1998 to undertake a medical assessment. This fact alone should have been singularly determinative.

Judge John Hansen uses the following terminology to describe assessors; “approved”, “appointed” and “accredited”. This terminology has the potential to be misleading. In practice, ACC may appoint assessors from a list of contracted or accredited assessors; however, the law only requires that assessors meet the statutory criteria to undertake assessments.

The arguments – Mr Sara for the appellant

Mr Sara, advanced *inter alia* the following arguments:

- *it was an error of law for Judge Barber to find that he could not prefer the evidence of Mr Hodgson over Dr Talwar as there was nothing in the Act that requires the Corporation to accept the assessor’s opinion;*
- *if the High Court allowed the medical assessor’s opinion to prevail, in accordance with cases such as **Liddell** (235/2000), the medical assessor would be elevated to a position of pre-eminence amongst their peers, with the effect that their opinions would become unassailable; and*
- *this could lead to a “closed shop of ACC appointed assessors”.*

At paragraph [20] of the judgment, Mr Sara submitted that Judge Barber’s approach in the District Court was to find that, if Dr Talwar had followed the assessment procedures correctly then Judge Barber was bound to accept Dr Talwar’s opinion, ‘unless it so violated notions of common sense as to be termed “unreal”’.

At paragraph [21], Mr Sara asserted that Judge Barber gave pre-eminence to process over the result:

[Mr Sara] said this effectively makes the medical assessor the decision-maker, whereas s101(d) of the Act states the assessor is to provide an opinion of the insured’s capacity for work for each of the types of employment identified in the occupational assessor’s report. The determination is then made by the respondent, pursuant to s89. Nowhere does the Act state the respondent is bound to accept the opinion of the medical assessor.

Furthermore, Mr Sara cited the District Court case of **Powell** (62/2002), in which Judge Willy stated *inter alia* in response to the submission that the decision of the accredited medical assessor must prevail:

- *to construe the process in this way would render otiose the right of review of a medical assessors work capacity decision except in those cases where the process is flawed or there is some ‘glaring error’ in the doctor’s assessment. There is no overt hint of this in the legislation;*

- ...I see no reason why an independent medical specialist, furnished with all of the relevant information available to the accredited specialist, cannot express an equally valid opinion of the particular person's physical ability to perform for 30 hours per week, or not, any of the jobs identified by the vocational assessor...; and
- The fact of accreditation is an administrative procedure sanctioned by the legislation. No doubt the Respondent is always careful to ensure that only suitably qualified doctors are accredited, but that is not to say a doctor who is not accredited, merely by that fact alone, is disqualified from giving an opinion on the claimant's physical ability to perform, or not, categories of work.

Mr Sara also cited Judge Willy's comment in relation to Judge Fisher's reasoning in **Kenyon v ACC** (19/12/01, Fisher J, HC Wellington AP258/00):

- If that is the correct approach then it must be open to non accredited but suitably qualified doctor [sic] to make a valid assessment of the physical or mental state of an application. For what it is worth, that is the way I approached the matter in **Gardner v ACC** (22/2002) where I preferred the views of an experienced non-accredited psychiatrist to those of an accredited medical assessor who had no relevant psychiatric qualification or experience.¹

Mr Sara's central contention was that Judge Barber was wrong to conclude that he was bound to accept Dr Talwar's findings, in the absence of any errors, and to prefer Dr Talwar's opinion over that of Mr Hodgson.

The arguments – Mr Hlavac for the respondent

Mr Hlavac, cited **Liddell v ACC** (235/2000), at page 10, where Middleton J states:

The Court has held in many decisions in relation to this issue that unless there is a serious divergence of opinions between properly accredited assessors, then the Court must accept the assessments of the duly appointed assessor.

Mr Hlavac submitted that the following principles could be extracted from this line of cases:

- (a) That the Court will not readily interfere with occupational and medical assessments completed as part of the work capacity process.
- (b) Situations where the Court may interfere with such assessments will include where a diagnosis is shown to be flawed, or where the procedure adopted is shown to be defective.
- (c) In other cases the Court will require clear and cogent reasons to set aside an occupational or medical assessment completed as part of the work capacity process.

Mr Hlavac pointed out, in paragraph [40], that a medical assessment can only be conducted by a registered medical practitioner who meets the criteria laid down by s98.

¹ Judge Willy's comment relates to Judge Fisher's approach in **Kenyon v ACC** (19/12/01, Fisher J, HC Wellington AP258/00) where Judge Fisher expressed the view that ACC must take its victim as it finds him.

Mr Hlavac submitted that provided the assessment is carried out in accordance, and in compliance, with s98 to s100, then the respondent is bound by the opinion expressed by the medical assessor under s100 (1) (d).

He also asserted that the Act does not allow ACC any form of discretion in this area. In other words, there is no provision for ACC to consider an opinion other than that of the appointed medical assessor in determining whether or not the insured has the capacity for work.

At paragraph [45], Mr Hlavac notes that the Act provides for further subsequent assessments to determine capacity for work if ACC believes, or should reasonably believe, the capacity for work may have deteriorated since a previous determination.¹

Although, the Court does not have the discretion to go behind the opinions of medical assessors, Mr Hlavac identified a number of areas where the Court could disregard the opinion of the medical assessor. Mr Hlavac gave the following examples, at paragraph [49]:

- where the medical assessor was not properly qualified under s98;
- where the medical assessor had failed to take into account matters that he must take into account under that section; or
- where the report failed to contain some of the information required to contain under s100 of the Act.

Mr Hlavac's final submission (as reported in the judgment) was that it would be contrary to Parliament's intention to allow a work capacity assessment to be disregarded because the Court, or ACC, preferred the contrary opinion of another medical practitioner, unqualified in terms of s98, over the appointed assessor.

The decision – Judge John Hansen

Judge John Hansen took the view that the Act does not provide any discretion for either the ACC or the Court to go behind the assessments.

At paragraph [52], he commented:

...Once the respondent determines to require an insured to undergo the process determining capacity for work, it seems to me, on the clear wording of the provision, both parties are bound by that process. The scheme of the Act does not envisage a process where the respondent gathers in evidence and reaches a decision by balancing that evidence...There will be situations where the respondent and the Court can go behind the assessment, but they will be quite limited and fall into the types of category referred to by Mr Hlavac.

His Honour then went on to state:

[53] In my view, s89 does not leave a discretion with the insurer to determine capacity after receiving the report from the medical assessor. What it provides is that an insurer can decide to require an insured to be assessed to determine the capacity for work. Once that decision is exercised by the insurer the provisions of the following sections come into play, and all parties are bound by them.

¹ Section 109 (b) of the IPRC Act 2001

[54] *I concur in Mr Hlavac's submission that something more is needed to set aside a determination that an insured has a capacity for work other than an opinion from another medical professional not qualified under s98. What is required is evidence in which the Court, or the respondent, could say the opinion reached was wrong, and consequently the insurer's decision was wrong.*

Judge John Hansen remarked that it was unfortunate that, Judge Barber used the terminology that he was "bound" by the medical assessor's view.

His Honour concluded:

In my view, the appellant has not shown the decision is wrong, or that there is cogent evidence to the contrary.

Judge John Hansen stated that on the substantive appeal he would have dismissed the appeal and, accordingly, special leave was refused.

The Ramsay principles – interpretation and implementation

Subsequent review decisions and District Court decisions have extracted principles from the judgment.

It is not clear whether Judge John Hansen intended his judgment to be an articulation of principles that would define vocational independence jurisprudence, however, this is how it has been interpreted by both review officers and District Court judges.

The following quotations from decisions in the sample-set illustrate the weight afforded by review officers to **Ramsay**:

"The starting point in terms of case law is the decision of Hansen J in **Ramsay** (High Court, Dunedin, AP 412/14/02)".

"The leading case concerning vocational independence assessments was the decision of the High Court in **Ramsay** (AP 414/14/02)".

"Cases from appeal to District Court and High Court (case law) are used as precedent cases. Case law gives guidance to Reviewers on how the legislation is to be applied correctly. Prior to use of the term "vocational independence" the same process under the two previous Acts was called "work capacity". There are numerous decisions from the Courts which outline how this legislation (work capacity/vocational independence) is to be applied. A high level authority is the High Court decision **Ramsay** (CIV 2003/485/1568).

In **Ramsay**, it was held that if there are assessments undertaken by correctly qualified assessors – unless there is convincing medical evidence that the assessments are flawed – then a case cannot succeed.

I have researched the latest appeal decisions to see if there has been any change since the decision of **Ramsay**. I could find no such High Court decisions. That alone means that Mr R cannot succeed, as High Court decisions take precedence over District Court decisions.

However, for Mr R's awareness I have also researched the latest District Court appeal decisions on vocational independence. The latest four District Court decisions I could find confirm the approach taken in **Ramsay**. These

cases are **Reed** (227/2004), **Smith** (266/2004), **Kempster** (291/2004) and **Blackburn** (301/2004)".

District Court judges are bound by Judge John Hansen's decision and it is in this Court that the **Ramsay** principles have been expounded.

In **Gregory** (166/2004) – which was included in the sample-set – Judge Cadenhead commented:

"[65] After considering that legislation Hansen J (at paragraphs 50-52) thought that the principles to be extracted from this legislation are:

- (i) Section 89 allows the respondent, at its discretion, to have an insured assessed to determine the capacity to work.
- (ii) Once the respondent determines to exercise that right, then the assessment must be carried out in accordance with the provisions of s93 to s100.
- (iii) Section 98 states that a medical assessment can only be undertaken by a registered medical practitioner who holds vocational registration under the Medical Practitioner's Act 1955, and is described in ss(2) and ss(3) of that section.
- (iv) Another medical opinion can be placed before the medical assessor and considered in terms of s99. Indeed, the medical assessor is required to take that opinion into account.
- (v) Once the respondent determines to require an insured to undergo the process determining capacity to work then from a clear wording of the provision both parties are bound by that process. The scheme of the Act does not envisage a process where the respondent gathers in evidence and reaches a decision by balancing that evidence: that role is given by the legislation to the medical assessor. Parliament has determined the proper way for such persons to consider all relevant matters is in terms of s99. Parliament has provided for no other method of assessment, and it is certainly not open on the statutory provisions for the work capacity assessment to be disregarded, because the Court, or the respondent, preferred a contrary view of another medical opinion.
- (vi) There may be situations where the respondent and the Court can go behind the assessment, but they will be quite limited. These cases may occur where the medical assessor was not properly qualified under s98; had failed to take into account matters that he must take into account under that section; or where the report failed to contain some of the information required to contain under s100 of the Act.
- (vii) At the end of the day what is required is evidence on which the Court, or the respondent, could say the opinion reached was wrong, and consequently the insurer's decision was wrong.
- (viii) Once the initial onus of establishing the requirements of work capacity procedure has been discharged, it is for the appellant to show that the respondent's decision that she had capacity for work was wrong."

These principles were cited with approval in three further District Court cases: **Manning** (51/2003), **Speedy** (189/2003) and **Oram** (121/2004), which were included in the case law review.

In summary, the Ramsay principles are:

- once ACC exercises its right to assess WRAP/VI then both parties are bound by that process;
- it is not ACC's role to balance the evidence in reaching its decision;
- the legislation gives that role to the assessors, ie. the ACC and therefore Reviewers and the Courts only have the discretion to go behind the opinion of the assessor in limited situations;
- situations where the assessors' findings can be challenged are limited;
- this could include where the assessor failed to take relevant information into account; and
- simply an alternative opinion from another medical professional, not qualified under the legislation, is insufficient to prove that the assessor was misdirected or the assessment was flawed.

ASSESSOR FINDINGS: OCCUPATIONAL ASSESSMENTS

If the assessors' findings are deemed to be flawed on either a factual or a procedural basis, then these flaws will vitiate their findings.

Only three cases out of the sample-set succeeded on appeal on the ground of flawed findings.

Of these only one, **Oliver** (14/04), resulted in ACC's decision being quashed based on the flawed findings of the Occupational Assessor (the other two decisions were quashed because of flaws found in the VIMAs).

In **Oliver** (14/04), His Honour, Judge Cadenhead, set aside the Occupational assessor's findings and ruled that:

"This decision is based entirely on the suitability of the jobs nominated and does not preclude a further investigation of job suitability in terms of the appellant's capacity".

This case demonstrated the willingness of a Judge to look beyond the assessor's recommendation and draw his own opinion based on the evidence presented to him.

Reviewers have also had reference to judge-made law, which has ruled that job options that do not correspond to the education, training and skills of the claimant should be discounted.

In one of the cases reviewed, the Reviewer struck out two of the positions because he followed the reasoning in **Graham** (137/03) wherein His Honour Judge Cadenhead stated:

"in keeping with the spirit of the legislation the identification of job options should be realistic and should have some relationship to the education, training and skills of the claimant."

This case also cited **Knight** (149/02) wherein Judge Beattie noted:

“this Court has previously expressed its concern that in some cases where an insured has had or obtained little skill outside the particular skill of their pre-accident employment and has in reality no skills other than normal life skills, they have nevertheless been foisted off into an entry level position because it meets their rudimentary skills rather than giving any consideration as to whether there is a match between the person and the proposed employment position.

In the above case, the claimant was unable to read maps or keep records, therefore he could not realistically be a tow truck operator.

The case law review confirms that assessor findings are difficult to overturn.

Whilst the absurdity of the so-called ‘legless tapdancer’ scenario may have been mostly phased out – situations still arise, evinced by the above examples, of decisions which appear to depart from a grounding in reality. The researchers note that the ACC scheme is not set up to rehabilitate the sick as well as the injured. We also note the small, but significant stream of ACC claimants that are declared to be ‘vocationally independent’ moving onto the welfare system as identified by Crichton et al (2005). However, we note the inefficiency and costs it creates for New Zealand society in having one system to address injury when both injury and illness present simultaneously.

ASSESSOR FINDINGS: MEDICAL ASSESSMENTS

Medical assessors (at both the initial and vocational independence stage) are provided with the Occupational Assessor’s findings, from which they must decide whether or not any of these job options are medically sustainable for the claimant to perform for 35 hours or more.



The medical assessment they generate, however, has far-reaching consequences, as they often result in the claimant being deemed vocationally independent, with the effect that weekly compensation ceases. Currently, in the absence of material flaws, the ACC only considers the opinion of the contracted medical assessor to the exclusion of countervailing medical opinion.

To paraphrase Mr Sara’s apposite quote: the medical assessors have been elevated to a pre-eminent position amongst their peers and their opinions have been cloaked with unassailable authority.¹

The practical effect of this is that the medical assessors are assumed to be correct, unless proven otherwise. The procurement of countervailing medical opinion by the applicant/appellant is not usually sufficient to overturn this presumption, even when from an equally (or better) qualified specialist.

¹ In paragraph [5] of Powell (62/2002), Judge AAP Willy records Mr Sara’s submission that there is nothing in the legislation which requires the Court (or a Reviewer) to accept an opinion given by an accredited medical assessor as conclusive, as in Mr Sara’s opinion to do so would “...elevate the medical assessors to a pre-eminent position among their peers and cloak their opinions with unassailable authority”. Mr Sara advances this line of argument again in Ramsay (AP412/14/02).

A common ground for a review or appeal decision upholding ACC's decision is expressed in this finding from the case review.

The Reviewer found in one of the sample-set's reviews:

I find no clear and cogent evidence that the Medical Assessor failed to take into account some particular aspect of the job description or some particular aspect of Mr Js' injuries in finding an ability to work in these positions.

The medical assessors do not have to follow other opinions.

In **Chapman** (60/04), Judge Hole, was quoted by the Reviewer mentioned above:

"It is worth noting that, if a medical assessor is not entitled to draw his own conclusions as to the medical condition of an insured, then there is little point in having a medical assessor. I accept that it is important that he have regard to the opinions of other medical specialists. Indeed, he is required to do so, pursuant to s 100 (1) (c). However, he is not required to slavishly adhere to the opinions expressed in other Medical Assessments if he disagrees with them".

Nor is the appellant's own experience taken into account, the research found in the above review decision from the sample-set:

"Without contrary specialist evidence, the claimant's own view of the assessments and that of her GP cannot carry the day."

Ewart (51/2000) is oft-cited, amongst the review decisions in the available sample-set, as authority for the proposition that an appellant's self-analysis of their assessments cannot carry the day. This reinforces the researchers' view that applicants/appellants need to be better informed as to the evidentiary standard required at review and appeal in order to displace the onus of proof.

Non-injury conditions

Although non-injury conditions are to be identified by the medical assessor, there is no provision requiring that these be given any weight during an assessment of vocational independence.¹

Judge Beattie's dictum in **Heppleston** (79/02) is germane. His Honour states that:

[If non-accident injuries were considered] I find that the purpose of the Act to provide compensation for injury would be thwarted and instead compensation would be provided for reasons other than for personal injury by accident for which cover had been granted. In those circumstances it would amount to a de facto sickness/invalids/unemployment benefit.

Whilst Judge Beattie raises a legitimate concern, the practical setting aside of non-injury related factors does not always marry with a judicial desire to avoid unrealistic outcomes.

However, in terms of realism and common sense, the Courts have observed that they do not want to endorse decisions that part company from the real world.

¹ Schedule 1, Clause 29 of the IPRC Act 2001

The District Court decision of **Alsig v ACC** (54/01) involved a man in his late 50s with an injured knee and other non-injury conditions such as replaced hips and a heart ailment. The appellant was assessed as having a capacity to work as a fitness trainer and his weekly compensation ceased. Despite being found vocationally independent, he was actually incapable of finding work as a fitness trainer and was forced onto an Invalid's Benefit.

In the High Court judgment, **Kenyon v ACC** (258/00), Judge Fisher was inclined to the view that non-injury conditions had to be taken into consideration in assessing work capacity although he did not have to decide the point. His Honour thought that to decide otherwise would be *"to part company with the real world"*.

The sample set for this study included these 3 cases which illustrate the outcome for claimants when non injury factors are disregarded during the vocational independence process:

- a former self employed builder with a left leg amputation injured his right knee; he also suffered nerve palsy in his upper limb, a collapsed lung and opiate dependency. Even though the DRSL Reviewer was not clear that Mr I had all the training and experience required for the eight job options identified which included – property manager, hostel manager, administration manager, sales assistant, handyperson/ builder, caretaker, property salesperson, community services worker – he was found to be vocationally independent in all eight job options because there were no material flaws in the assessments. After weekly compensation ceased, he went initially onto the Sickness Benefit and is now on the Invalid's Benefit
- a former freezing worker who had a back and neck injury then suffered a stroke, with the result that his right side flared up with use. The Reviewer commented: *"it is also worth noting that while Mr E has had a stroke any disability in respect of that condition must be put to one side. In respect of the assessment of his vocational independence, it is only his accident-related restrictions which may be taken into account"* and *"Although Mr E had not consistently worked for 35 hours or more in his work trial, that was not determinative."* He was deemed vocationally independent as a sales assistant-light duties, stock clerk, transport clerk, record and filing clerk and telemarketer. Unable to find work in these positions, he went onto the Sickness Benefit.
- a 64 year-old laminator who was 11 months away from retirement was deemed vocationally independent and instructed to seek work as a community worker, sales assistant and a technical representative. The Reviewer found no material flaws in the assessments and would not accept Mr R's evidence that he was not computer literate. During the 11 months to retirement he sought work but no employer was prepared to take him on due to his injury and age. He went onto the Invalid's Benefit and then, upon retirement, onto Superannuation.

Flawed findings of medical assessors

As established in **Ramsay**, a material flaw in the medical assessment process is sufficient to invalidate the medical assessor's findings. This situation rarely occurs in practice; however, it does not necessarily follow that, just because there are no flaws in the medical assessment process, a claimant who is made vocationally independent will find themselves in sustainable employment.

In considering the occupational assessor's findings, the medical assessor must look at the general duties of the job and is not permitted to make their own refinements on the activities and functions identified by the occupational assessor.

The sample-set included several cases in which the medical assessors' findings were held to be fatally flawed, including:

- a medical assessor certified that Ms A had the necessary skills for the job with the qualification that she would need to arrange assistance to perform some of the job tasks, for example, keyboarding. The Review Officer found – following **Reeves** (343/02) – that the medical assessor was not allowed to limit or qualify the functions and activities identified in the medical assessment in some way as to enable the person to undertake it;
- the medical assessor stated that Ms T, who had a back injury, could work with as a Kohanga Reo teacher but not with young children as this would involve bending and lifting. Working with young children is an integral job task of a Kohanga Reo teacher, therefore the Review Officer found that the medical assessor had misdirected himself; and
- the medical assessor failed to take into account a deteriorating condition and the need for further surgery in a case where Mr S had ongoing treatment needs.

A medical assessment may also be rendered flawed if the medical assessors fail to have regard for the opinions of other medical assessors as required under s 100(1)(c).

As discussed above, of the three successful District Court appeals in the sample-set, two succeeded on the basis that the Medical Assessor's findings were flawed.

It is important to note that the judgments in both **Powell** (62/2002) and **Reeves** (343/2002) were handed down prior to the **Ramsay** decision. **Reeves** in fact predated the **Ramsay** judgment by one day.

In **Powell**, Judge Willy said at para [30]:

Given those inconsistencies [between medical findings], the different treatment of the occupational categories and the preponderance of specialist and non-specialist opinions, I am persuaded, on the balance of probabilities, that the medical assessment relied on by the respondent are flawed. They do not support a conclusion that the appellant is able to work in any of the job categories for 30 hours per week.

To the contrary I am satisfied that the evidence establishes in a "clear and cogent" way that the appellant has made a determined effort to rehabilitate

herself and is capable of working no more than 15 hours per week. There is no evidence that she is malingering to stay on her weekly compensation.

In **Reeves**, Judge Beattie stated at para [28]:

The [Medical] Assessor has misconstrued his task and the matters on which he was required to assess, namely the appellant's capacity for work for each of the types of employment identified in the Occupational Assessor's report.

However, in the absence of any material or factual flaws the medical assessments will stand as documents that are virtually beyond legal challenge.

OPERATIONAL THEMES

Claimants Handbook

Just over half of the claimants in the available sample-set were represented by counsel or advocates.

However, although 10 of the 12 successful cases involved representation, the lower-than-average success ratio for vocational independence decisions amongst the case law review decisions suggests a need for claimants to be better informed about the review/appeal process.¹

Claimants are not necessarily aware how the ACC law is implemented. The analysis of the 77 cases shows that only 12 (16%) were successful at either review or appeal.

The claimant must persuade the Reviewer/Court that on the balance of probabilities the vocational independence decision was wrong in fact or law, or both. That is, the claimant has to discharge the onus of proof. Claimants may not be aware that the onus of proof weighs on them when they enter into litigation.

The research team submit that a Claimants Handbook could be devised to provide guidelines as to how the law is implemented in the area of vocational independence for use by claimants and their representatives. The handbook could provide a step-by-step guide through the initial occupational and medical assessments, the individual rehabilitation plan and the vocational independence occupational and vocational independence medical assessments. It should also include information about a claimant's rights and their right to seek representation. The handbook should notify claimants that, should they seek to challenge an ACC decision, the onus of proof will fall on them to disprove ACC's decision.

At present, claimants are advised of the review process on ACC's web site.²



¹ 16% of the cases in the sample-set were successful as opposed to DRSL's national average of 23%

² The link for 'Asking for a Review' on ACC's website is: http://www.acc.co.nz/wcm001/idcplg?IdcService=SS_GET_PAGE&ssDocName=wcm001121&ssSourceNodeid=3894

The information provided on the website implies that the process is fairly informal, for example:

“Don’t feel nervous

Don’t feel nervous about attending a hearing. The Reviewer’s job is to get all the information – it is not a court. You get a full chance to have your say. You can bring a supporter or lawyer.

The Reviewer manages the hearing, which is generally informal. All the information that was used by ACC to make the original decision can be made available before or during the hearing. This information is confidential and can only be used for the review hearing. Each party has the chance to have a say and ask questions. Review hearings are tape-recorded, to provide a record in case there are any later hearings.”

Claimants would be better informed if they were directed to DRSL’s website which has a more thorough explanation of the process, or if they were provided with a handbook which explains the kind of evidence that is required to discharge the onus of proof.

Integration with the Labour Market

Under section 108(2) (b), occupational assessors currently consider all types of work, whether they are available or not in the NZ labour market. This has led to claimants being rendered vocationally independent in positions in which there are few labour market vacancies.

The outcomes for claimants could be enhanced if occupational assessors were required by the legislation to guide injured workers and ACC towards rehabilitation and retraining options that directly address local labour market conditions.

Reassessment following deterioration of injury

Section 109 (2) (b) of the IPRC Act 2001 provides: ¹

109 When claimant’s vocational independence to be assessed

...

- (2) However, the Corporation must determine the claimant’s vocational independence again if –

...

- (b) the Corporation believes, or has reasonable grounds for believing, that the claimant’s vocational independence or capacity for work may have deteriorated due to the injuries that were assessed in the previous vocational independence or capacity for work assessment.

Therefore, in each case, if ACC has grounds to believe that a claimant’s vocational independence may have deteriorated due to their covered injuries, then they can reassess the claimant’s vocational independence. The onus is on the appellant to satisfy the Reviewer or the Court that there is reasonable evidence of deterioration in work capacity/vocational independence since the previous determination.

Only two cases in the sample-set dealt with reassessment following a deterioration of the claimant’s covered injury.

¹ Section 89 (5) (b) of the AI Act 1998

In each case, the applicant contended that they were no longer vocationally independent and in each case their applications for review were unsuccessful.

One of these review decisions cited **Sparrow** (74/2002), in which Judge Beattie stated (at paragraph 14):

With that as the starting point, the issue must be whether or not there has been a deterioration in his capacity for work since the previous determination. That question, I find, is a question of fact which requires consideration of the medical evidence and it is that question which in the first instance must be looked at by the respondent when the matter was raised as it was by the appellant's request to have weekly compensation be reinstated...

It is worth noting that, while the option of reassessment is open to ACC, it was not exercised in the above cases. The researchers consider that this may indicate that the threshold set by ACC for a reassessment is set too high or that processes for determining whether reassessment is appropriate are not routinely implemented.

PAIN AS A CONSEQUENCE OF INJURY

The case review found that the Courts have acknowledged a change in approach by assessors and ACC to "pain".

Earlier decisions, under the AI Act, such as **Horton** (136/01), show how the Courts regarded the weight that "pain" should be given by medical assessors.

His Honour, Judge Middleton said:

I accept that the only time when it is necessary for the medical assessor to consider the question of pain is when it represents a verifiable medical condition which would cause further harm to the appellant if required to return to work.

Earlier cases in the sample-set show that vocational independence decisions were only be overturned if the Reviewer thought that the job types would aggravate pain.

However, later cases show a change in the Court's approach. A decision to find a person vocationally independent, if based on an opinion that working for 35 hours or more a week would not aggravate the person's pain, may now render a decision flawed. The legal test now appears to be: do the current levels of pain experienced by the claimant permit them to work for 35 hours a week? Even if the work aggravates the pain somewhat, the claimant may be considered capable of performing the job provided pain levels are expected to be at least tolerable and not to interfere with job performance. Moreover, a focus on anatomical abnormalities is also seen as an incorrect approach. Pain is to be considered in its own right, in addition to physical impairment.

The cases of **Powell** (62/02) and **Murrihy** (111/01) were relied upon, while **Patterson** (159/02) and **Carnahan** (176/02) were also cited.

For example, in the review of Ms A – who had a chronic regional pain syndrome – the Review Officer stated:

*It is a requirement of the work capacity procedure that at the time of the medical assessment Ms A must have a capacity for work in the identified positions (see **Murrihy** (111/01)). It is my view that the comments of Dr M indicate that rather than having a capacity for work in the identified positions his opinion was that the positions identified were less likely to aggravate her pain. This in my view amounts to a material flaw in the assessment.*

The case review demonstrated that, where the claimant has chronic pain, the medical assessor must determine whether the person can perform that work task for 35 hours a week with the level of pain that they currently experience. In two cases that were overturned at review, the only reason that the medical assessor gave in support of the opinion that the claimant was fit for work was that the specified occupations would not aggravate or worsen the pain. In coming to these conclusions, the Reviewers were of the opinion that the medical assessor had applied the wrong test. The medical assessor should have asked whether the person could do the job with the level of pain they were experiencing, not whether the pain would worsen if they performed the job.

We recognise that we are legal researchers rather than medical experts, however, from a purely human perspective, we cannot contemplate other than to expect that pain must affect a person's ability to perform cognitive tasks while at work, particularly if it is continuous. We consider that medical assessors must consider the effect of pain on a person's ability to concentrate if the selected work type requires that competency.

THE STATUS OF THE INDIVIDUAL REHABILITATION PLAN ('IRP')

Two of the cases included in the sample-set involved the issue of whether an IRP was reviewable. In one it was held that, whilst an IRP was a reviewable decision, the substantive application was dismissed. In the other case, the review officer declined jurisdiction to hear the case.

The IPRC Act 2001 explicitly changed the status of the IRP.

Clause 34 of Schedule 1 of the AI Act 1998 had provided:

34 Review and appeal rights –

- (1) For the purposes of Part 6, in putting a plan to an insured for agreement, the insurer makes a decision.
- (2) The fact that an insured has agreed to a plan does not affect his or her rights to make a review application or bring an appeal under Part 6 with respect to the entitlements provided in the plan.

Paragraph 2 of this clause had been interpreted by the Courts as constraining paragraph 1. That is, while the IRP was a decision, it was not a decision which carried review rights unless it affected entitlements. This view had been aired by Judge Beattie in **Lovini** (119/02) and **Howard** (83/2004) and was cited with approval by Judge Middleton in **Burgess** (219/2003).

Whereas, clause 9 of Schedule 1 of the current Act establishes:

9 Disputes about plan

- (1) For the purposes of Part 5 of this Act, the Corporation makes a decision when –
 - (a) the claimant agrees to a plan; or
 - (b) the Corporation advises the claimant that a plan has been finalised.
- (2) The fact that a claimant has agreed to a plan does not affect his or her rights to make a review application under Part 5 of this Act with respect to the plan.

The effect of this subtle amendment is that an IRP is now a decision *for the purposes of Part 5 of this Act*. Section 134 in Part 5 states: *a claimant may apply to the Corporation for a review of any of its decisions on the claim*. In the words of a Reviewer in the one of the case law review decisions:

“Clause 9 (2) adds to, rather than restricts, Clause 9 (1) by saying that the fact that a claimant has signed the IRP does not affect his or her rights to make a review application *with respect to the plan*. Similarly the heading of clause 9 is *Disputes about the plan*. There can be no doubt that Parliament intended to effect a change when it reshaped that clause. Hence **Lovini**, **Burgess** and **Howard** are not binding precedents in relation to IRPs drawn up under the new statute”.

Although this is an important right for claimants, the case law review indicates that not many claimants are utilising this right at review or appeal. In other words, the legislative amendment does not appear to have made a material difference for claimants.

The highest authority on the reviewability of IRPs is the High Court decision of **Weir v ACC** 18/8/04, Miller J, HC Wellington CIV 2003-485-1921. His Honour Justice Miller concluded at paragraph [42] of this decision that the IRP is reviewable, not because there is an independent right of review in clause 9 but because it was a decision on the claim for the purposes of s 134 (1) (a).¹

Weir has been used by the Courts to draw distinctions between decisions (which give review rights) and administrative actions (which do not give review rights). Under the 1998 Act, judicial opinion was divided as to whether an IRP constituted a decision.

In **Howard** (267/02), the tendering of an IRP for signature and return was held not to be a decision within the closed definition in s13 of the 1998 Act. This judgment supported **Lovini** (119/02). However, in **O'Donnell** (139/02), Judge Willy ruled that the failure to advise that there were review rights attached to an IRP (cl 34 to Sch 1 of the 1998 Act) invalidated the work capacity procedure, which could only be commenced once rehabilitation had been completed under a proper rehabilitation plan.

Cases under the 1998 Act show a divergence of judicial decision about whether IRP's are reviewable decisions. A change to the IPRC Act and the **Weir** decision have brought greater certainty to this area of vocational independence jurisprudence and confirmed that IRP's are reviewable.

¹ section 134(1)(a) A claimant may apply to the Corporation for a review of any of its decisions on the claim.

SUMMARY: ANALYSIS OF CASE LAW REVIEW



While the Act does not provide for the elevation of the ACC-appointed assessors to a privileged status above those of equally-qualified independent assessors, the High Court decision of **Ramsay** has made the ACC appointed assessor's opinion almost insuperable. The researchers believe this consequence was unforeseen and the current application of the law cannot reflect the spirit of Parliament's intention.

The Act makes no reference to VI assessors being required to be "appointed", "approved", "contracted" or "accredited" by ACC before they can undertake a VI assessment.

Occupational assessors must be considered by the ACC to be appropriately qualified. The statute sets out the qualifications for medical assessors. In practice, ACC makes no distinction between the way they approach referrals to occupational or medical assessors. ACC provides claimants with a list of contracted assessors and the claimant then selects an assessor from this list.

Legally, it remains open for a claimant to select an alternative assessor – one not included on ACC's list of contracted assessors – but equally ACC can override this selection. This is not reviewable as it is deemed to be an administrative decision.

If the claimant refuses to attend the referral with the ACC-selected assessor, then ACC could suspend entitlement to weekly compensation on the grounds that the claimant unreasonably failed to comply with a requirement under the Act.

Where two equally qualified assessors present competing opinions there is no reason to vest the opinion of the ACC-contracted assessor with unassailable authority – it should be open to the claimant to have the merits of both opinions considered by ACC and subsequently by Review officers and, if the cases go to appeal, by Judges.

The current regime precludes this balancing exercise, by denying ACC the discretion to consider two opinions before it issues a vocational independence decision. This legislative shortcoming has been reflected in Judge Hansen's application of the law as it stands. At paragraph [52], Judge Hansen states:

"The scheme of the Act does not envisage a process where the respondent gathers in evidence and reaches a decision by balancing that evidence. That role is given by the legislation to the medical assessor".

And in paragraph [53], Judge Hansen goes on to say:

In my view, s89 does not leave a discretion with the insurer to determine capacity after receiving the report from the medical assessor. What it provides is that an insurer can decide to require an insured to be assessed to determine the capacity for work. Once that decision is exercised by the insurer the provisions of the following sections come into play, and all parties are bound by them.

Unfortunately, the curtailment of ACC's discretion can directly lead to an erosion of claimants' rights. If ACC has no discretion in determining a claimant's vocational independence, then the Court is unable to exercise any discretion either.

Furthermore, this lack of discretion seems contrary to the intent of s145 of the IPRC Act, which provides:

Section 145 Review decisions: substance

- (1) In making a decision on the review, the reviewer must –
 - (a) put aside the Corporation's decision and look at the matter afresh on the basis of the information provided at the review; and
 - (b) put aside the policy and procedure followed by the Corporation and decide the matter only on the basis of its substantive merits under this Act.

...

The Reviewer is directed by the legislation to put aside the Corporation's decision and look at the matter afresh – this implies that the Reviewer has the discretion to reconsider the matter when, in fact, unless there are material flaws in the assessment process, they are bound to accept the assessor's findings. This would seem to be an unintended consequence, as Parliament clearly anticipated that the Reviewer would be able to adjudicate on the substantive complaint raised by the applicant.

A vocational independence decision has serious consequences for a claimant. Weekly compensation ceases three months thereafter. Therefore if ACC is granted the discretion – by means of legislative amendment – to weigh up all the available evidence, provided by qualified assessors, the claimant would have the benefit of the most informed decision in relation to their vocational independence.

ACC could be afforded discretion by way of a provision stating that they can consider an alternative opinion from a qualified assessor, if sought by the claimant. This would allow the claimant a realistic and meaningful opportunity to challenge the findings of the assessor on the basis of an alternative expert opinion, before the contracted assessor's findings are enshrined in a decision. It would also allow ACC the benefit of two perspectives from which to assess the claimant's vocational independence or otherwise. ACC would be able to seek a further advice on the claimant's expert opinion. Furthermore, if the legislation provides ACC with discretionary powers to determine vocational independence,

then Review Officers and judges would be equipped with equivalent discretion with which to weigh up competing opinions.

Ramsay will stand formidably as the defining judgment on vocational independence unless it is overturned or distinguished at the High Court – or a higher forum – or until the law is rewritten to allow both the ACC and the review officers and the Courts the discretion to balance the merits of competing opinions before reaching a decision as to a claimant's vocational independence.

If the ACC and the Court are only permitted to go behind the assessments in a circumscribed range of situations, then, provided an assessment is not procedurally or factually flawed, it must stand. The sheer volume of litigation in this area, coupled with the findings of this Case Law review, indicate that, for some claimants, achieving vocational independence is illusory – despite being deemed vocationally independent, they do not work in a VI job for 35 hours per week. This information is set out in PART THREE of the research.

The case law review indicates that unrealistic outcomes for the claimant could be partly addressed if the legislation required:

- assessment of transferable cognitive skills;
- observation by medical assessors of claimant's performing simulated work tasks for an extended period of time;
- utilisation of work trials to verify hours of work that a claimant is capable of working;
- identification of a minimum of 3 job options;
- identification of rehabilitation and retraining that directly addresses local labour market conditions; and
- assessment of the impact that pain has on the claimant's ability to perform cognitive tasks.

PART THREE



CLAIMANT INTERVIEWS CONCERNING VOCATIONAL INDEPENDENCE OUTCOMES

One hundred and sixty (160) claimants were interviewed by the research team. This is the sample set for PART THREE of the research.

All seventy-seven (77) of the claimants who featured in PART TWO of the research were interviewed. An additional eighty-three (83) claimants were interviewed in order to ascertain the current (at time of interview) employment status of claimants who had been through the assessment procedures under the ARCI Act 1992, the AI Act 1998 and the IPRC Act 2001.

The sample set for PART THREE includes claimants who had been assessed for their:

- capacity to work (WCAP) under the ARCI Act (47 claimants);
- ability to work for 30/35 hours a week (WRAP) under the AI Act (59 claimants); and
- for vocational independence (VI) under the IPRC Act (54 claimants).

The research team was particularly interested in comparing vocational independence outcomes across the three Acts and the three assessment processes: WCAP, WRAP and VI.

The research team had anecdotal evidence that not all claimants who had been assessed for their vocational independence ended up working in the occupations that were identified by the assessors. Up until 2005, ACC did not routinely follow-up claimants after they had been deemed vocationally independent. Although the sample-set for PART THREE is a small one in statistical terms, it provides an indication of the range of outcomes for claimants after a vocational independence determination has been made by ACC.

The two key data-sets focused on were current employment statuses/vocational independence outcomes and income change. The research team wanted to test the finding of Crichton et al (August 2005) who reported that workers with long spells out of the workforce due to injury experienced an income reduction upon their return to work. The questionnaire therefore asked claimants to provide approximations of their pre-injury earnings and their post-injury earnings.¹

¹ Gross income was used as the index of earnings. In some cases, participants only provided information about weekly earnings. The research team extrapolated these weekly earnings into a yearly figure.

The participant questionnaire was also designed to collect a range of demographic data namely:

- Age (Current);
- Age at Accident;
- Gender;
- Ethnicity (Pakeha, Māori, Pacific, Asian, Other);
- Education Level;
- Household Income;
- Marital Status;
- Number and age of child/ren;
- Geographic area (including rural/urban); and
- Duration on weekly compensation

James Newell (MERA) and Craig Brown (DOL) analysed the data.

PART THREE will provide narrative and analysis of the statistics generated by the claimant interviews.

The methodology for the telephone interviews is set out in the APPENDICES.

Research Definitions

The following definitions were applied when dealing with the data relating to vocational independence outcomes.

Full-time work was classified as 35 hours work or more per week¹

Part-time work was classified as less than 35 hours work per week

A **VI job** was classified as a job that was identified by the occupational/medical assessors during the VI process, which the claimant ended up working in.²

A **non-VI job** was classified as a job that a claimant ended up working in, which was not identified by the occupational

Note all percentage figures have been rounded up or down to the nearest whole number.

Current status

Each claimant's current status could be categorised under one of the following headings:

- | | |
|-------------------------------------|----------------------------------|
| (1) Full-time work in a VI job; | (6) Superannuation; ³ |
| (2) Part-time work in a VI job; | (7) Weekly compensation; |
| (3) Full-time work in a non-VI job; | (8) Not working; |
| (4) Part-time work in a non-VI job; | (9) Studying; and |
| (5) Work and Income benefit; | (10) Not specified |

¹ 35 hours was considered the threshold for full-time work as that is the threshold for VI under the IPRC Act 2001. 30 hours was not considered as a benchmark for full-time work even though this was the criterion under the ARCI and AI Acts.

² VI job was the term employed by the research team, although it applied to jobs identified by assessors during the WCAP and WRAP processes as well during the VI process.

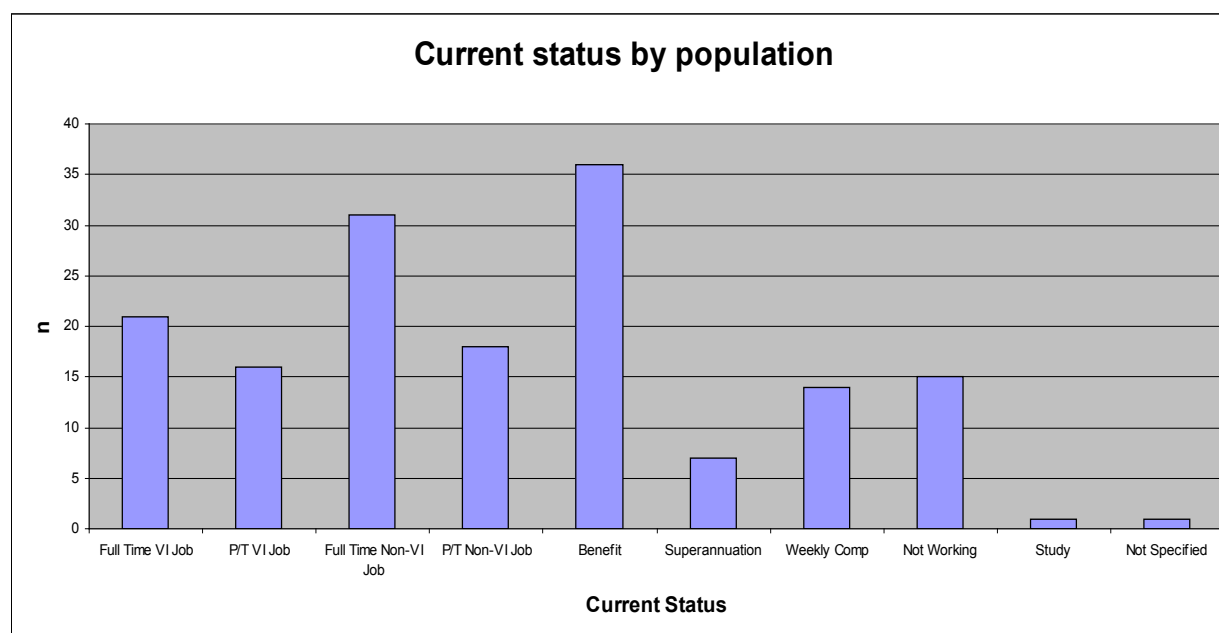
³ This category included superannuation and veteran's pension.

Current Status – Combined Acts

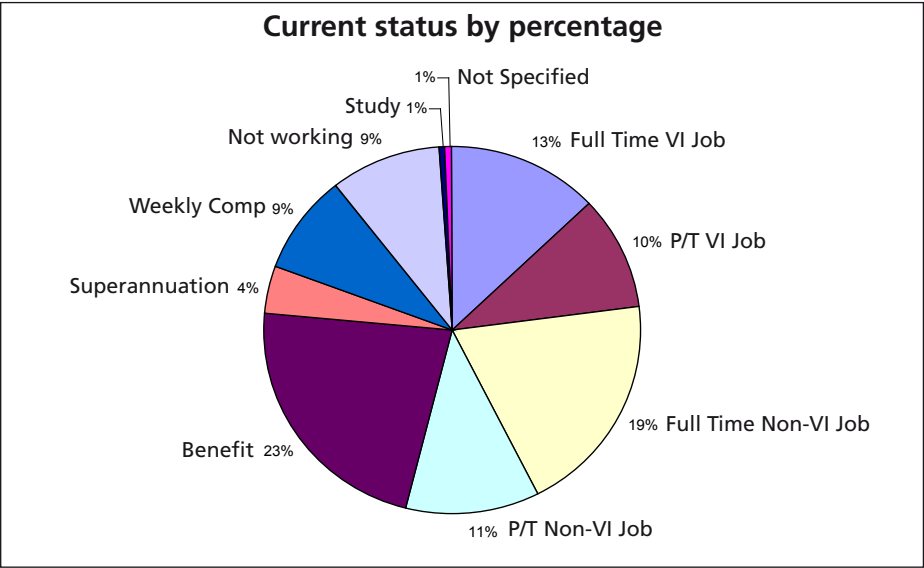
The table below illustrates the current status by Act as well for the total population:

Status	1992 Act	1998 Act	2001 Act	Totals	%
Full Time VI Job	3	10	8	21	13.13
P/T VI Job	5	5	6	16	10.00
Full Time Non-VI Job	15	9	7	31	19.38
P/T Non-VI Job	7	6	5	18	11.25
Benefit	6	16	14	36	22.50
Superannuation	5	2	0	7	4.38
Weekly Comp	0	3	11	14	8.75
Not Working	6	7	2	15	9.38
Study	0	0	1	1	0.63
Not Specified	0	1	0	1	0.63
TOTAL	47	59	54	160	100

The graph below illustrates current status by population (for Combined Acts):



The pie-chart below illustrates current status by percentage (for Combined Acts):



Working versus not-working

Eighty-six claimants or just over half of the sample-set (54%) – all of whom had been through the VI process (or its equivalent under earlier statutes) – were in some form of work, either full-time or part-time in either VI or non-VI jobs.

Seventy-four claimants (46%) were not working. These claimants experienced a variety of outcomes:

Benefit	Superannuation	Weekly Compensation	Not working	Studying	Not specified
36	7	14	15	1	1

Of the seventy-four claimants not currently working, sixty-seven were working-age, ie. they had not reached the age of entitlement to NZ Superannuation.

Vocational Independence Outcomes

Of the sample-set, twenty-one claimants (13%) were in full-time VI jobs. That is, they were working for 35 hours or more per week, in jobs that had been identified by the assessment process.

Sixteen claimants (10%) were in part-time VI jobs. That is, they were working for less than 35 hours per week, in jobs that had been identified by the assessment process.

The findings indicate that only twenty-one claimants could be considered to be vocationally independent according to the statutory definition of vocational independence.

Based on these findings it could be argued that the VI process only succeeded in 13% of the cases surveyed during the claimant interviews. However, it would take a more in-depth interview to establish the reasons for this outcome.

Non-Vocational Independence Outcomes

Of the sample-set, thirty-one claimants (19%) were in full-time non-VI jobs. That is, they were working for 35 hours or more per week, in jobs that had not been identified by the assessment process.

Eighteen claimants (11%) were in part-time non-VI jobs. That is, they were working for less than 35 hours per week, in jobs that had not been identified by the assessment process.

Vocational outcomes with respect to Occupational Assessments

The objective of the occupational assessment stage of the VI process (both the IOA and VIOA) is to match claimants with jobs that they are equipped to perform by virtue of their education, training and experience. This matching exercise is premised on the suitability of the job options to the claimant's education, training and experience. As noted, in PART TWO, there is no requirement that the claimant's current education, training and experience are assessed.

The VI outcomes demonstrate that only thirty-seven claimants worked in job types that had been identified by the occupational assessors.

Further research is required to establish why these claimants did not obtain the jobs identified in the vocational independence assessments..

Vocational outcomes with respect to Medical Assessments

The objective of the medical assessment is to provide an opinion as to whether the jobs identified by the occupational assessors are medically sustainable for the claimants to perform for 35 hours or more per week.

If fulltime work is taken as the bench mark for medical sustainability, then fifty two claimants or 32% of the sample set, ended up in medically sustainable occupations. This can be contrasted with the one-hundred and eight claimants that did not sustain 35 hours or more per week.

The IPRC Act does not require ACC to further assess the reasons why claimants did not sustain full-time workloads once they had left the scheme.

Current Status by Act

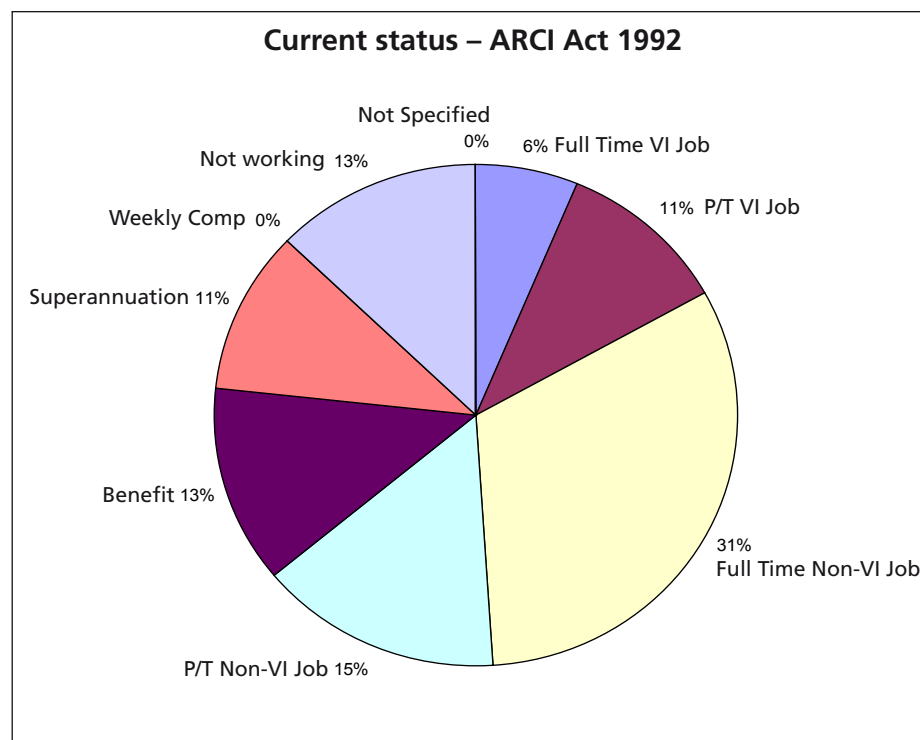
The research team tracked outcomes for claimants across the three sample populations for the ARCI Act 1992, the AI Act 1998 and the IPRC Act 2001.

The ARCI Act 1992

The table below illustrates the current status for the ARCI Act 1992 claimant population:

Status	Number	%
Full Time VI Job	3	6.38
P/T VI Job	5	10.64
Full Time Non-VI Job	15	31.91
P/T Non-VI Job	7	14.89
Benefit	6	12.77
Superannuation	5	10.64
Weekly Comp	0	0.00
Not Working	6	12.77
Not Specified	0	0.00
TOTAL	47	100

The pie-chart below illustrates current status by percentage for the ARCI Act 1992:



Thirty claimants were in some form of work, either part-time or full-time, either VI or non-VI. That is, 64% of the ARCI Act 1992 sample were in some form of work.

However, only three out of these thirty were in full-time VI jobs. In contrast, fifteen of these thirty claimants were working in full-time non-VI jobs.

Of the seventeen not working, twelve were still working-age.

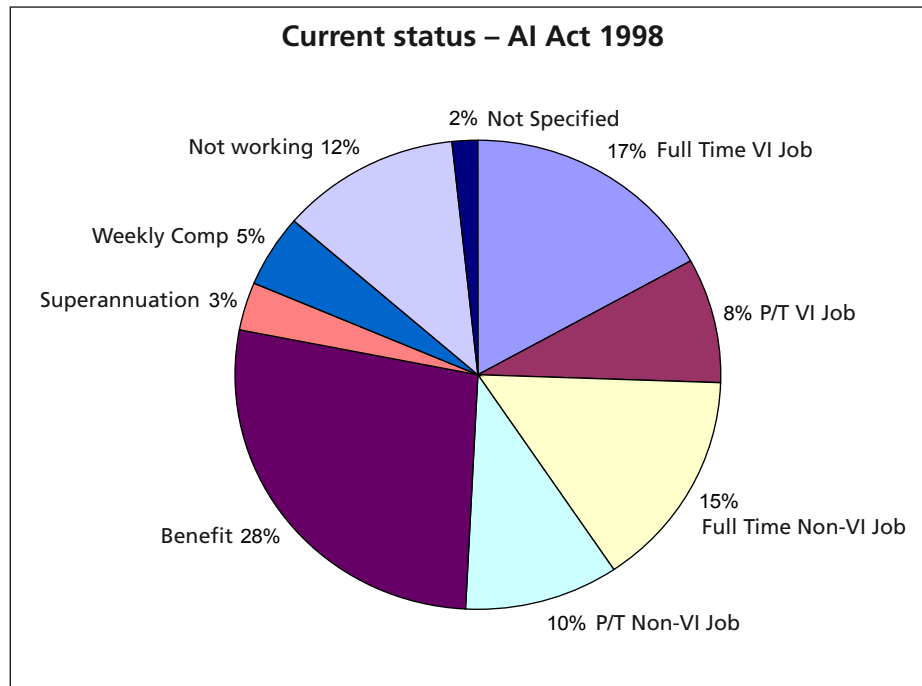
The ARCI Act 1992 sample comprised claimants who had been injured in the early 1990's or earlier. The comparatively high return to work rate could be explained by the length of time these particular claimants have had to rehabilitate and explore other vocational options, though these are largely in occupations not identified by the assessors.

The AI Act 1998

The table below illustrates the current status for the AI Act 1998 claimant population:

Status	Number	%
Full Time VI Job	10	16.95
P/T VI Job	5	8.47
Full Time Non-VI Job	9	15.25
P/T Non-VI Job	6	10.17
Benefit	16	27.12
Superannuation	2	3.39
Weekly Comp	3	5.08
Not Working	7	11.86
Not Specified	1	1.69
TOTAL	59	100

The pie-chart below illustrates current status by percentage for the AI Act 1998:



Thirty claimants were in some form of work, either part-time or full-time, either VI or non-VI. That is, 51% of the AI Act 1998 population were in some form of work.

Of these thirty claimants, there was an almost identical split between full-time VI and full-time non-VI outcomes and part-time VI and part-time non-VI outcomes.

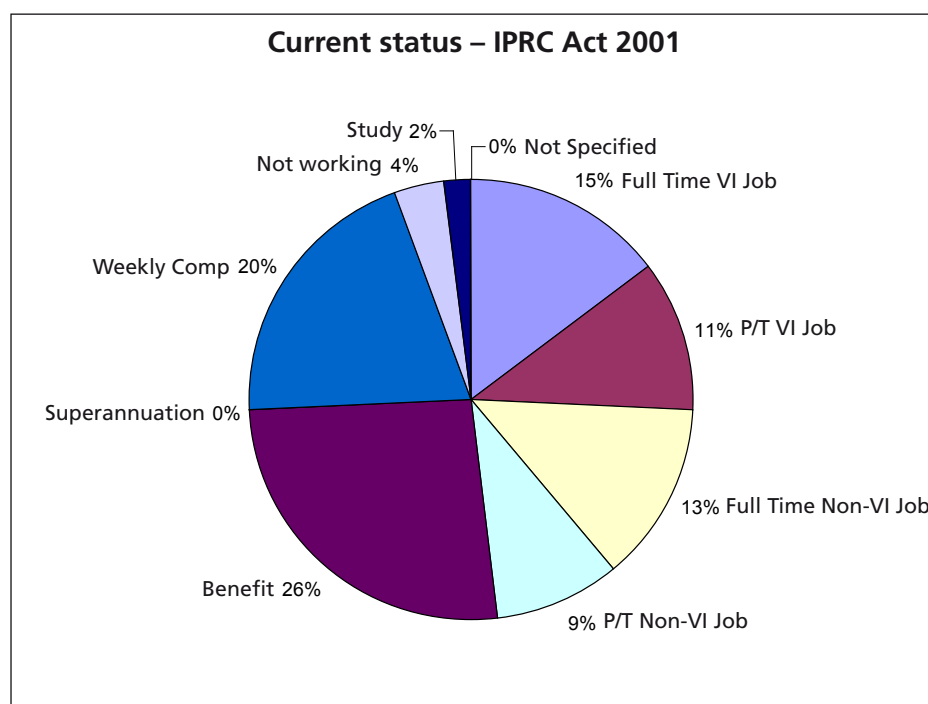
Sixteen claimants were in receipt of a Work and Income benefits. This accounted for 27% of the AI Act 1998 population. Benefit receipt was higher for AI Act 1998 claimants than for the sample-set as a whole (benefit receipt for the sample-set was 22.5%).

The IPRC Act 2001

The table below illustrates the current status for the IPRC Act 2001 sample:

Outcomes	Number	%
Full Time VI Job	8	14.81
P/T VI Job	6	11.11
Full Time Non-VI Job	7	12.96
P/T Non-VI Job	5	9.26
Benefit	14	25.93
Superannuation	0	0.00
Weekly Comp	11	20.37
Not Working	2	3.70
Study	1	1.85
Not Specified	0	0.00
TOTAL	54	100

The pie-chart below illustrates current status by percentage for the IPRC Act 2001:



As previously discussed in PART TWO, the IPRC Act made two substantial changes to the assessment procedure:

- (1) the IOA and IMA were introduced; and
- (2) the threshold for vocational independence was raised from 30 to 35 hours.

Even with these changes, it could be argued that the vocational independence process only succeeded in 15% of the IPRC Act 2001 cases. That is, only 15% of claimants went into full-time VI jobs. This figure is marginally higher than the outcome for the whole sample-set 13%, and is marginally lower than the figure for the AI Act 1998 – 17%.

Similar to the AI Act 1998 sample, there was a high proportion of beneficiaries amongst the IPRC Act 2001 claimants, ie. 26%.

There was also a high number of claimants in receipt of weekly compensation – 20%. This can be compared with the sample-set's overall figure of 9% of claimants on weekly compensation.

Income change

The research team also recorded the income change, if any, between a claimant's pre-injury and post-injury earnings.

The claimant interviews generated data on income change that provided some follow-up to complement Crichton *et al* (August 2005) (the 'Crichton study').

The Crichton study was part of the Linked Employer-Employee Dataset (LEED) Research Programme. LEED is able to measure an individual's employment status, benefit status and income before and after injury.

The Crichton study found *inter alia*:

- Individuals who receive 3 or more months of earnings compensation experience lower employment rates and average earnings after weekly compensation ends;
- The magnitude of these effects increases with injury duration;
- Longer duration injuries have a greater impact on women, older workers, workers with lower earnings or less of an employment history immediately prior to injury; and
- Many workers with longer duration injuries do not return to their pre-injury employer.¹

The research team's hypothesis was that the findings on income change would correspond to the Crichton study's findings.

¹ Crichton *et al*, Returning to Work from Injury: Longitudinal Evidence on Employment and Earnings (August 2005)

Income change – data

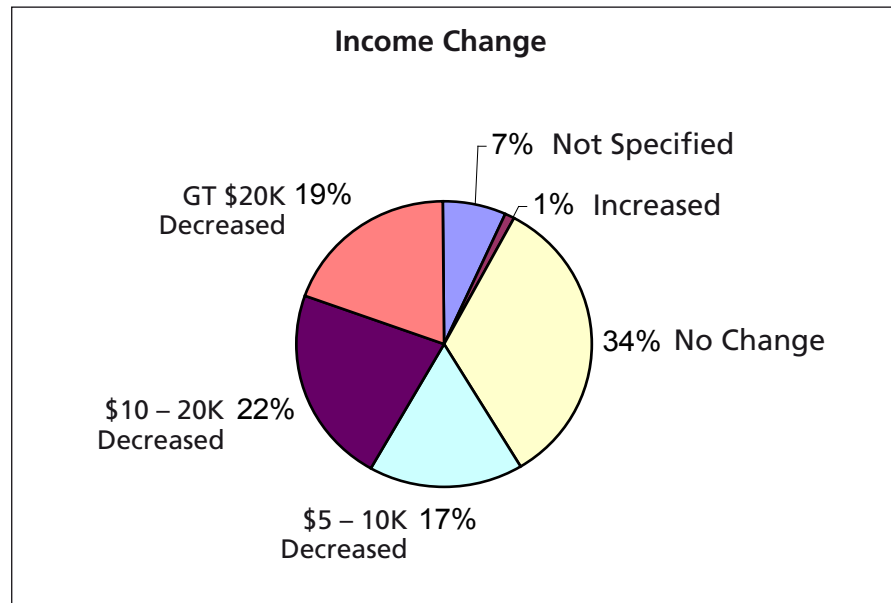
The table below illustrates income change by gender and by percentage of the total sample-set:

	Female	Male	Total (n)	Total (%)
Not Specified	3	8	11	6.9
Increased	0	2	2	1.3
No Change	20	33	53	33.1
\$5-10K decrease	13	14	27	16.9
\$10-20K decrease	11	25	36	22.5
x > \$20K decrease	5	26	31	19.4
Decrease SubTot	29	65	94	58.8

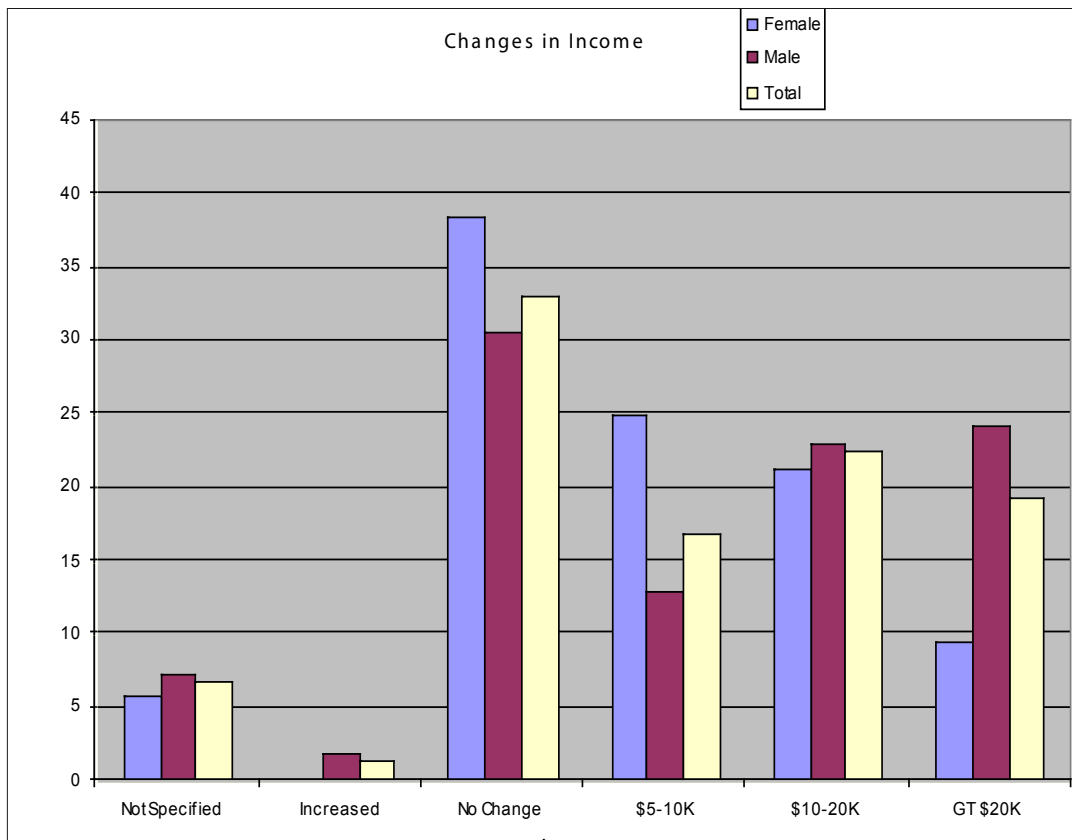
59% of the sample-set experienced an income reduction in nominal terms, that is these figures were not adjusted for inflation. Weekly compensation and superannuation were not considered to be indices of income reduction. There were only two instances in which claimants experienced an income increase after returning to work from injury.

These figures are consistent with the Crichton study's findings.

The pie-chart below illustrates income change for the total sample by percentage:



The graph below illustrates income change by gender and by total sample:



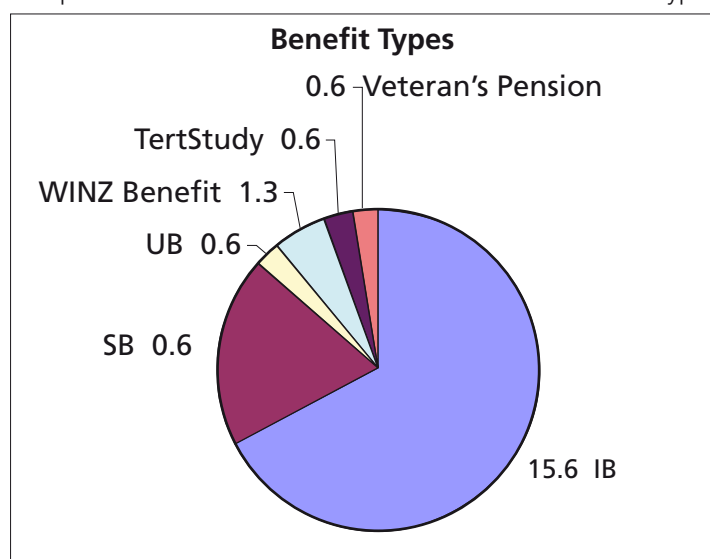
Benefit receipt

One of the primary reasons for claimants experiencing an income reduction was that they shifted on to Work and Income benefits. Other factors included claimants working in lesser-paying jobs, working reduced hours or not working at all.

The table below illustrates the income support status for those claimants who were not working:

Income Support Status	Female	Male	Total
Benefit			
IB	4	21	15.6
SB	3	4	4.4
UB	0	1	0.6
WINZ benefit	1	1	1.3
Superannuation	0	7	4.4
Studying	0	1	0.6
Veteran's pension	0	1	0.6
WC	6	8	8.8
Not specified	1	0	0.6
Not working	7	8	9.4
Benefit	8	28	22.5

The pie-chart below illustrates the breakdown of benefit types:



It is important to note that Work and Income had assessed thirty-two claimants as unfit to work by reason of illness or injury – these claimants were in receipt of Invalid's and Sickness Benefits. One claimant was in receipt of an Unemployment Benefit.

Longitudinal Research

The research team did not collect specific injury data and only focused on the claimant's covered injury. Therefore, the research team was not able to assess the impact that non-covered injuries or co-morbidities had on those claimants in the sample-set who did not return to work. This could be the subject of further research.

It should be noted that the findings recorded for each claimant, at time of interview, only represented a 'snapshot in time'. These snapshots occurred primarily after the cessation of weekly compensation, as only fourteen claimants were receiving weekly compensation at time of interview. Longitudinal research could reveal more complex patterns of engagement in employment on full-time or part-time hours and in VI or non-VI jobs. This could also be considered as a future research question.

PART FOUR

THEMES AND RECOMMENDATIONS AROUND VOCATIONAL INDEPENDENCE PROCESSES UNDER THE IPRC Act 2001



In Part Four the researchers reflect on the case law review and claimant interviews to draw out the main themes.

Themes and recommendations are proposed for consideration by the Department of Labour who commissioned the research.

1. The case law review has identified an unintended consequence with respect to the vocational independence provisions of the IPRC Act. The research shows that vocational independence decisions are virtually legally unassailable. The research team believes this was unintended by Parliament when it passed the IPRC Act 2001. The researchers consider the purpose of having review processes is so that decisions can be reviewed sensibly with due weight being given to any relevant evidence. We note that this is not currently the case in practice, and that the intent that decisions be open and transparent needs to be restored in law. Legislative reform is the only means of alleviating the effect of the High Court decision of **Ramsay**. Accordingly, the research team recommends that legislative amendment is required to permit ACC to exercise its discretion when making a decision that a person is vocationally independent.
2. There is a general theme around the independence of medical assessors and the ability of claimants to review their findings. The process for selecting medical assessors is currently carried out by the Corporation, with the result that the group of medical assessors is not seen by claimants as having independence. The research team recommends that:
 - Either provision needs to be made for the selection of assessors to be carried out independently of the Corporation; or
 - Provision needs to be made for claimants to be allowed to select their own occupational and medical assessors, provided they are duly-qualified.

3. There is a theme that for claimants who cannot return to their pre-injury vocations, the vocational assessments can be unrealistic with respect to the claimants work skills and their level of impairment and/or experience of pain. In terms of improving labour market outcomes for this group of claimants we recommend that:
- Legislative amendment is required to ensure that the assessment reflects the currency of a claimant's current education, training and experience, as the 'shelf life' of a person's past work skills and experience is, realistically, limited.
 - a significant number of people who were exited from the scheme returned to part time work rather than full time work. This signals that improvements in medical assessments are required with respect to sustainability of job options – particular emphasis needs to be placed on claimants requiring ongoing pain management.
 - This study found that most claimants went back to work after being declared vocationally independent (either part time or full time) but not in the vocations identified during the VI process. Current legislation does not require occupational assessors to identify vocations of similar status and earnings capacity as a claimant's pre-injury vocation, and within their local labour markets. The research team considers that legislative amendment is required to ensure occupational assessors consider labour market realities, the claimants pre-injury vocational status and income.
 - Some claimants found it difficult to accept that the IPRC Act allowed them to be declared vocationally independent in one vocation alone. We suspect that many concerns about vocational decisions are elevated to review and to the Courts because claimants do not have self-determination about the vocations they are retrained in. We recommend that this be remedied in legislation. One action that might be taken is to increase the minimum number of job options required for VI to three. Another action might be to provide for the claimant to have more involvement in identifying the options for retraining or return to work.
4. The case law review identified that the responsibility for assessing transferable cognitive skills needs to be more clearly assigned. This could be achieved either by combining the medical assessment and the occupational assessment into a multidisciplinary assessment, or the responsibility for assessing cognitive performance and skills needs to be explicitly assigned to the medical assessor, who is more appropriately positioned to make this assessment.

5. In addition to legislative amendment we recommend some operational improvements to the VI process:
 - The case law review identified that the work detail sheets which set out the tasks required for each vocation were lacking in accuracy as to the physical and cognitive tasks required for some occupations. We recommend that the work detail sheets be independently reviewed in that regard.
 - Verification of the injured worker's current skills should include an assessment of computing, literacy, numeracy skills at both the outset and completion of the VI process, as there were some claimants who had become vocationally independent in jobs which required those skills and which the claimants were found lacking in, in terms of the current labour market.
 - The research team found significant variability in the way assessments were being carried out. Standardised tools for these assessments need to be developed. The assessors who utilise these tools should receive training and supervision.
 - The team found that some claimants were of the view that they were not able to sustain the work that they were declared independent in for the full 35 hours per week. It would be prudent to develop methods that verify current ability to perform and sustain work tasks for 35 hours or more a week – such as work trials, or monitored simulated work environments. Sustainability should be defined in terms of an individual's return to work after VI to determine whether the employment is sustainable 6/12/24 months + after VI is achieved.
 - Co-ordination is needed with the DOL and MSD and the social partners to identify areas of skill shortage to develop retraining initiatives to address these.
6. Legislation does not give weight to non-injury factors that might prevent employment. This can mean that the VI assessment remains unrealistic vocationally. This study did not investigate the degree to which claimants' vocations are affected by non-injury factors. However, it is apparent that the IPRC Act is potentially set up for some labour market outcomes that are not useful to either the claimant or society. Further research is required to ascertain whether non-injury factors prevent claimants from obtaining employment after they have been made VI. We also recommend further policy and operational work on the welfare/ scheme interface in this regard.

7. We understand that ACC has recently developed systems for following-up claimants that have exited the scheme. This should continue. However, we consider that claimants whose injury situations actually deteriorate or whose injury related conditions threaten to worsen over time need to be monitored closely once they have exited the scheme in order to ascertain whether a reassessment of vocational independence is required.
8. We found that claimants are not generally aware of the legal complexities when participating in the vocational assessment and vocational independence processes or when reviewing VI decision. We recommend that claimants be better informed about their legal rights and responsibilities during this process. It is recommended that a Claimants handbook be developed.

APPENDICES

APPENDIX ONE: RESEARCH METHODOLOGY



A CLAIMANT INTERVIEWS

The research team's initial work focused primarily on fieldwork comprising of interviews with past or present ACC claimants.

The work undertaken on claimant interviews can be summarised under the following headings:

- Claimant questionnaire
- Information Sheet/Consent Form
- Ethical Application to ACC Ethics Committee
- Liaison with ACC
- Interviewer Briefing
- Claimant Identification
- Mail-Out
- Data Collation
- Sample Set
- Sample Selection
- Interviews
- Interview Summaries
- Data input
- Statistical Analysis

B CLAIMANT QUESTIONNAIRE

- 1 Rob Laurs developed a claimant questionnaire with the assistance of Jo Burton and Rebecca Keown from the Department of Labour and Dr Grant Duncan from Massey University (Auckland).
- 2 The questionnaire covers the following broad areas:
 - Current employment status (i.e. full-time or part-time employment or unemployed) and whether the claimant is employed in their pre-injury job with the same employer or with a different employer, or with the same employer but a different job, or with a different employer and a different job. The questionnaire also provides for inquiry into a claimant's occupation, the number of hours they work per week and earnings before and after injury;
 - **Claimant view of the rehabilitation process and whether it had a positive impact on their labour market outcome; and**
 - Retraining and whether the claimant was ever offered retraining at any stage of their rehabilitation by ACC or their employer.

- 3 The questionnaire also provides for the collection of a range of descriptive information about the respondents, including:
 - Age
 - Gender
 - Ethnicity (Pakeha, Māori, Pacific, Asian, Other)
 - Education Level
 - Household Income
 - Marital Status
 - Number and age of child/ren
 - Geographic area (including rural/urban)
 - 4 The Interviewer, Jo Mildenhall, conducted the interviews via telephone.
 - 5 A copy of the questionnaire is included at Appendix Two.
-

C INFORMATION SHEET/CONSENT FORM

- 1 Hazel Armstrong and Rob Laurs developed an information sheet and consent form with the assistance of Rebecca Keown and Jo Burton.
 - 2 The Information sheet explained in detail to prospective participants the parameters of the research and what their participation, if they consented to participate, would entail.
 - 3 The Information sheet explained that the research will be conducted independently of ACC and that the claimant's entitlements and cover would not be affected by any decision they made about participating in the research.
 - 4 The Consent form provided for claimants to consent to participate in the research.
 - 5 A copy of the information sheet and consent form is included at Appendix Three.
-

D ETHICAL APPLICATION TO ACC ETHICS COMMITTEE

- 1 Rob Laurs, with the assistance of Rebecca Keown and Jo Burton, applied for ethical approval to ACC's Ethics Committee on 7th September 2005.
 - 2 The application was submitted to ACC Ethics Committee along with the claimant questionnaire and the information sheet and consent form.
 - 3 The Ethics Committee met on 7th September 2005, with Rob Laurs, to consider the application.
 - 4 The application required minor revisions but ethical approval was granted.
-

E LIAISON WITH ACC

- 1 On the 29th September 2005, Hazel Armstrong and Rob Laurs met with Peter Larking, PhD Programme Manager – Research, Research and Corporate Services (ACC) and Chris Bennett, Senior Analyst – Operations Support Group (ACC) to discuss the compilation of the sample-set for the mail-out of information sheets and consent forms to prospective participants.

- 2 It was decided that a random sample should be compiled from all the claimants on ACC's database, who had undergone vocational rehabilitation under the IPRC Act – or the equivalent process under the AI Act or the ARCI Act – and had been to review or appeal.
- 3 Peter Larking advised that ACC would provide a cover letter, signed by Dr Keith McLea, General Manager – Research and Corporate Services to accompany the Information Sheet and Consent Form.
- 4 Peter Larking advised that ACC usually anticipate a 25% response rate from mail-outs and that in order to reach our target of 150 participants, 600 information sheets and consent forms would need to be mailed out.
- 5 Chris Bennett advised that it may be difficult to source review decisions for cases heard before 1999 as DRSL was only incorporated in 1999 and ACC did not have complete electronic records for cases heard under the ARCI Act 1992.
- 6 Peter Larking arranged for a complaints hot-line to be set up.
- 7 On 16th October 2005, Hazel Armstrong and Rob Laurs met with Peter Larking to finalise the wording of ACC's cover letter and the wording of the information sheet and consent form.

F INTERVIEWER BRIEFING

- 1 Because of a change in circumstances we had to employ a new Interviewer, Jo Mildenhall, in place of Merianne McArdell to conduct the claimant interviews.
- 2 Rob Laurs provided Jo Mildenhall with a project brief, which included notes on vocational rehabilitation.
- 3 Hazel Armstrong and Rob Laurs provided Jo Mildenhall with a digital tape recorder.

G CLAIMANT IDENTIFICATION

- 1 Peter Larking and Chris Bennett with the assistance of Mike Mercier, ACC Legal, compiled a random sample of claimants who had been through the vocational rehabilitation process and had been to review or appeal.
- 2 The names and addresses of these claimants were then included in the mailing-list.
- 3 The numbers of letters sent out per Act were as follows:
 - ARCI Act 1992: 125 letters, 2 of which were sent to claimants who went to appeal (ie. the rest of the letters went to claimants who only went to review);
 - AI Act 1998: 200 letters, 74 appeals; and
 - IPRC Act 2001: 200 letters, 41 appeals.

H MAIL-OUT

- 1 The first mail-out took place on the 7th November 2005.
- 2 This mail-out yielded 98 responses in the form of returned consent forms.
- 3 The second mail-out took place on Friday 9th December 2005.
- 4 This mail-out yielded 79 responses in the form of returned consent forms.

I DATA COLLATION

- 1 Peter Larking provided Rob Laurs with data fields relating to all the claimants who have provided consent.
- 2 Peter Larking and Chris Bennett sourced all the available review decisions from ACC archives and DRSL for participating claimants who went to review and 3 District Court cases. Rob Laurs also sourced District Court, High Court and Court of Appeal cases by reference to the Brookers on line data base.
3. The data collection showed that ACC's records of review decisions were incomplete this is partially explained by there being no electronic data collection, prior to DRSL's inception in 1999, by ACC.

J SAMPLE SELECTION

- 1 Jo Mildenhall began to interview claimants who had provided consent and a contact phone number in the week beginning 12th December 2005.

K INTERVIEWS

- 1 Jo Mildenhall interviewed 160 ACC claimants from a total pool of 177 who had provided consent and contact details.
- 2 Each interview was conducted by telephone and lasted for 45 minutes on average.

L INTERVIEW SUMMARIES

- 1 Jo Mildenhall prepared interview summaries of the 160 participants.

M DATA INPUT

- 1 Rob Laurs processed the information collected at the interview stage and input the data into spreadsheets under the following categories:
 - Claimant ID
 - Act
 - Gender
 - Age
 - Age @ Injury event
 - Ethnicity
 - Urban/Rural/Semi-rural
 - Occupation – pre-injury
 - Occupation – post-injury
 - Income drop
 - Current status

N STATISTICAL ANALYSIS

- 1 This raw data was then provided to Craig Brown, a Statistician from Department of Labour for statistical analysis on 7th November 2006.
- 2 A participant ID was assigned to each participant to ensure that they were anonymous.

- 3 Craig Brown provided a comprehensive statistical analysis of the data collated during the interview stage of the research.
- 4 The statistical analysis appears in PART THREE of the report.

APPENDIX TWO:

CLAIMANT QUESTIONNAIRE

(1) PERSONAL DETAILS

Claimant Name/Number:

Age:

Gender:

Ethnicity (Pakeha, Māori, Pacific, Asian, Other):

Education level:

(Highest Qualification)

Marital status:

Number and age of child/ren:

Region (Rural/Urban):

(2) LEGAL DETAILS

Q: When did you suffer your injury? What year was it?

Statute:

Q: When you challenged ACC's decision did you go to a review hearing with a review officer and your case manager?

Interviewer to note: Explain to claimant if they are unsure – The review hearing is an informal adjudication process conducted by a DRSL review officer.

Review/Court:

Interviewer to note: Explain to claimant, after your review hearing did you go to Court?

Held at:

Q: Where was your review/Court case held?

Interviewer to note:

Statute: (ARCI Act 1992/AI Act 1998/IPRC Act 2001)

Review/Court (District Court/High Court)

(3) OCCUPATIONAL DETAILS (PRE-INJURY)

Industry:

Q: What industry did you work in before you were injured?

Occupation:

Q: What was your job?

Income before tax (at time of injury):

Q: How much did you earn before tax?

_____ < \$19,000

\$20,000 – \$29,000

\$30,000 – \$39,000

\$40,000 – \$49,000

\$50,000 – \$59,000

\$60,000 – \$69,000

\$70,000 < _____

Interviewer to note: Claimant may only know weekly, take-home income so record details and then convert to yearly income.

Job Description:

Q: How would you describe your job?

Work Tasks:

Q: What did you do?

Workload (hours per week):

Q: How many hours did you work per week?

(4) INJURY DETAILS

Type of injury:

Q: What was your injury?

Q: How long were you off work and receiving weekly compensation from ACC?

Interviewer to note: Now, I'm going to ask you some questions about the rehabilitation process that ACC set up for you. After ACC had agreed to cover your injury, your case manager would have set up a meeting with an Occupational Assessor for an initial assessment. The Occupational Assessor would have identified some jobs that you would be able to do.

(5) VOCATIONAL REHABILITATION PROCESS

Interviewer to note: The Initial Occupational Assessment and Initial Medical Assessment are creatures of the IPRC Act 2001. There was no earlier equivalent under the ARCI Act 1992 and the AI Act 1998. If the claimant was assessed under the 1992 or 1998 Acts, skip the IOA and IMA questions.

Description of Vocational Rehabilitation:

• Initial Occupational Assessment

Q: What jobs did the Occupational Assessor say you could do?

Interviewer to note: If claimant unsure, explain that the Occupational Assessor would have identified jobs that the claimant could do and each job would have had a task sheet. The task sheet would list everything a person in that job would have to do.

Q: Did the job tasks sheets include everything that you would do in that job?

Q: Did you think you could have gotten one of those jobs?

In terms of:

- that job being available (Labour market availability); and
- that job making use of your transferable skills (Skill-matching)

Q: Did the Occupational Assessor test your literacy skills?

Interviewer to note: If claimant unsure, did the Occupational Assessor test your language, reading and writing skills?

Q: On a scale of 1 to 5 (where 1 = poor, 2 = below average, 3 = average, 4 = above average and 5 = excellent) how would you describe your level of literary skills:

- 1 – poor
- 2 – below average
- 3 – average
- 4 – above average
- 5 - excellent

Q: Did the Occupational Assessor test your numeracy skills?

Interviewer: If claimant unsure, did the Occupational Assessor test your maths and numbers skills?

Q: On a scale of 1 to 5 (where 1 = poor, 2 = below average, 3 = average, 4 = above average and 5 = excellent) how would you describe your level of numeracy skills:

- 1 – poor
- 2 – below average
- 3 – average
- 4 – above average
- 5 - excellent

- Q: Did the Occupational Assessor test your computing skills?
- Q: On a scale of 1 to 5 (where 1 = poor, 2 = below average, 3 = average, 4 = above average and 5 = excellent) how would you describe your level of computing skills:
- 1 – poor
 - 2 – below average
 - 3 – average
 - 4 – above average
 - 5 – excellent
- Q: What was the most useful advice the occupational assessor gave you in terms of getting a job?
- Q: What other information would have been useful for the occupational assessor to tell you?

Interviewer to note: After you went to see the Occupational Assessor to talk about what kind of jobs you could do, your case manager would have set up a meeting for an initial medical assessment. The Medical Assessor would have looked at the jobs the Occupational Assessor said you could do and would have decided whether you could do these jobs bearing in mind the effects of your injury.

- **Initial Medical Assessment ('IMA')**

- Q: Did the Medical Assessor think that the jobs identified in the Initial Occupational Assessment, were physically possible (given the extent of your injury and the ongoing effects of your injury)?
- Q: Given your injury, do you think you could do that job/those jobs?

Interviewer to note: Your case manager would have prepared a plan with you to outline the rehabilitation that would be provided to you to help you get better and back into work.

- **Individual Rehabilitation Plan ('IRP')**

- Q: What did the Individual Rehabilitation Plan offer? For example, what treatment – physiotherapy etc did the plan offer?
- Q: What was valuable about the Individual Rehabilitation Plan?

Interviewer to note: Your Individual Rehabilitation Plan would have talked about you getting vocational independence – in other words, getting well enough to go back to work. ACC would then have written a letter to you telling you that they wanted to carry out two more assessments to see whether you were able to go back to work.

The first of these assessments is called a Vocational Independence Occupational Assessment and would have been very similar to your Initial Occupational Assessment. The Assessor would have identified jobs that they thought you were able to do. The Assessor would also have looked at whether the jobs that had already been identified – in the Initial Occupational Assessment and the Initial Medical Assessment – were still possible options for you. The Assessor would also

have asked you about the type of rehabilitation you had been getting and how this had been working for you.

Interviewer to note: In 1996, the ARCI Act 1992 was amended to include work capacity assessments (WCAP). This involved a claimant undergoing both an occupational and a medical assessment. The WCAP process was retained by the AI Act 1998, but was renamed the Work Rehabilitation Assessment Process (WRAP). The IPRC Act 2001 replaced the WRAP process with the Vocational Independence Process (VI). Under the IPRC Act 2001, claimants undergo an initial Occupational and Medical Assessment and once they near the completion of their vocational rehabilitation, they are assessed again under the VIOA and VIMA.

• **Vocational Independence Occupational Assessment ('VIOA')**

- Q: Did the rehabilitation – provided by the Vocational Independence Occupational Assessment – help meet your needs?
- Q: Did the jobs identified in the Vocational Independence Occupational Assessment take into account the physical restrictions placed on you by your injury?
- Q: Did the job/s identified in the Vocational Independence Occupational Assessment make use of your transferable skills?

Interviewer to note: After you had been to the Vocational Independence Occupational Assessment, your case manager would have set up a meeting with a Vocational Independence Medical Assessor. This would have been very similar to your Initial Medical Assessment. The Medical Assessor would have decided whether or not you were physically able – given your injury – to carry out any of the jobs identified in the Occupational Assessment.

• **Vocational Independence Medical Assessment ('VIMA')**

- Q: Did the Medical Assessor think that you were physically able to work in any of the jobs identified in the Vocational Independence Occupational Assessment?
- Q: How many hours were you able to work? Was it full-time or part-time?
 - Do you have any other comments relating to your experiences of the Vocational Rehabilitation process?

Interviewer to note: After the Vocational Medical Assessment, ACC would have made a decision on whether you were vocationally independent – that is, whether you were fit enough to go back to work in a job for 35 or more hours a week. They would have written you a letter to say that your weekly compensation would be cut after 3 months.

(6) VOCATIONAL REHABILITATION PROCESS OUTCOMES

Interviewer to note: If claimant is unsure, explain that if they were found vocationally independent ACC would have determined that they were able to go back to work for more than 35 hours per week and that ACC would have sent them a notice, advising that their weekly compensation would be cut after 3 months.

- Q: After, the Vocational Independence Medical Assessment, were you found to be vocationally independent?
- Q: Did ACC write to you saying that your weekly compensation would be cut off after 3 months?
- Q: If you were found to be vocationally independent, what jobs did ACC say you could do?
- Q: Did you work in any of those jobs after ACC said you were able to?
- Q: Did you end up working in any job that the Vocational Independence Medical Assessment had said you were NOT fit for?
- Q: If so, for how many hours do you work/did you work?

(7) OCCUPATIONAL DETAILS (POST-VOCATIONAL REHABILITATION PROCESS)

• Current Employment Status

- Q: Do you have a job at the moment?

Interviewer to note: If the answer to this question is no, skip to sections 8 and 9.

- Do you work on a full-time or a part-time basis?
- How many hours per week do you work?

Industry:

- Q: What industry do you work in?

Occupation:

- Q: What is your job?

Income before tax (post- injury):

- Q: How much do you earn before tax?

< \$19,000

\$20,000 – \$29,000

\$30,000 – \$39,000

\$40,000 – \$49,000

\$50,000 – \$59,000

\$60,000 – \$69,000

> \$70,000

Interviewer to note: Claimant may only know weekly, take-home income so record details and then convert to yearly income.

Job Description:

Q: How would you describe your job?

Work Tasks:

Q: What did you do?

Workload (hours per week):

Q: How many hours did you work per week?

Q: Are you more satisfied with this job than you were with the job you had before your injury?

In terms of:

- The job being physically possible, given your injury and the ongoing effects of your injury:
- Job satisfaction:
- The job taking into account your experience/education/training:
- Level of earnings:
- Prospects for promotion:
- In your opinion, did the vocational rehabilitation process help you get a job?

(8) ACC

If currently unemployed:

Q: When did you last work?

Q: How long have you been in receipt of weekly compensation?

(9) WINZ BENEFITS

If currently unemployed:

Q: After leaving the work-force through injury did you, at any stage, go on to a WINZ benefit?

Q: How long have you been in receipt of that benefit?

APPENDIX THREE:

ACC Claimant Experiences of Vocational Rehabilitation

A Research Project

Information Sheet and Consent Form

Date – XX August 2005

Dear Research Participant –

We are a law firm that specialises in ACC litigation, and are conducting research, commissioned by the Department of Labour that involves past or present ACC claimants and their experiences of obtaining and maintaining employment after spending time out of the workforce through injury.

We are interested in getting some feedback from a claimant perspective on the rehabilitation they were offered by ACC and what impact this rehabilitation had upon the claimant obtaining and maintaining employment after they were able to return to work. We are also interested in comparing claimants' pre- and post-injury work and level of earnings.

[In addition, we would like to hear what kind of a role retraining played in the vocational rehabilitation process].

We invite you to take part. We are only interested in your experiences of the vocational rehabilitation process and of occupational retraining. We are not collecting any health information (other than the type and date of injury) and the personal information we are collecting is merely descriptive. Participant confidentiality is assured and no participant names will be used in the research analysis.

The research will be conducted independently of ACC and claimant entitlements and cover will not be affected by any decision you make to not participate and your current and future entitlements and cover will not be affected by any responses you give to the questions.

The research will be conducted via a telephone questionnaire, lasting approximately 15 minutes. The responses to this questionnaire will be recorded on tape and later transcribed into an electronic database for analysis. The tapes used to collect these stories will be wiped clean within one month of recording.

Please note –

- Participation in the survey is entirely voluntary.
- You are free to ask questions at any time and may withdraw at any time.
- Everything discussed and recorded is treated confidentially. Everything we store will be anonymous.
- Responses and associated information will be kept for 6 years.

If you have any questions regarding the research please ask your interviewer or facilitator. If you wish to contact the Researcher or the Department of Labour for further details please phone – ...

Consent

I have read and understood the above information. I give my consent for my responses and the participant information to be collected for the purposes of the research, and agree to take part in accord with the above statements.

Name _____

Signed _____

Date _____

APPENDIX FOUR:

Work Type Detail Sheet

Major Industry Group:	Clerks 4
Work Type Unit Group:	Office Clerks 4144
Description of Work Type:	Perform a variety of other clerical tasks related to personnel matters and operate a variety of office machinery.
Includes:	General Clerk; Office Machine Operator; Human Resources Clerk

41443 General Clerk	
Description:	
➤ Performs a variety of clerical tasks.	
Specialisations:	
May also be known as:	Accommodation Officer University Hostels, Clerical Assistant, Clerical Supervisor, Clerical Worker, General Clerk, General Office Clerk, Government Department Clerk, Junior Clerk, Local Body Clerk, Local Body Officer, Newspaper Clerk, Office Assistant, Office Clerk, Office Junior Clerk, Office Worker, Quality Controller of General Clerks, Railway Clerk, Recreation Clerk Officer, Research Assistant, Research Worker, Veterinary Clerk.
Related Occupations:	
Work Tasks may include any combination of the following:	
➤ May be responsible for any combination of the following: Examining incoming mail, preparing and sending replies for routine correspondence; Preparing, filing and collating documents in connection with departmental tasks, maintaining records and transferring data to appropriate record format; Receiving calls and directing to appropriate person or department; Receiving payments of accounts, processing accounts payable and issuing receipts; Completing official forms related to government returns, surveys and procedural requirements; Recording issue of equipment to staff.	
Work Environment:	
➤ Indoor office environment which may range from a large corporate-type head office down to a smaller sole-charge office.	
➤ Work predominantly at office desks, usually with a computer work station.	
➤ Usually work in adequately heated and ventilated spaces.	
➤ Wheelchair access should be available to most offices.	
Work Function/Activity:	
➤ Sedentary role. Constantly sitting at a work station carrying out a variety of both manual and computerised data entry/processing and word-processing tasks.	
➤ Also complete a variety of other clerical/reception type activities in addition to core tasks if working in smaller offices.	
➤ Operate printers, copiers and a range of other minor office equipment and refill paper trays and ink supplies.	
➤ Occasional standing and walking about the office will occur.	
➤ Stretching, twisting, climbing and more than very light lifting or carrying are unlikely to be required.	
➤ Repetitive arm, hand and finger movements (keyboarding and mouse) are constant for data-entry and data and word-processing tasks.	
➤ Use of minor office hand tools such as pens, calculators and staplers, as well as telephones will also be occasional to frequent.	
➤ Bending, squatting or crouching movements should be unnecessary.	
➤ Mental activities are likely to require a sound level of keyboarding, recording, organisation and communication skill.	
Further Comments:	
➤ Requires a sedentary physical demand and good cognitive functioning.	
➤ May need to sit for extended periods but with moderate flexibility of movement.	
Qualifications:	
➤ No formal qualifications required, but office administration skills certificate preferred.	

APPENDIX FIVE:

25 August 2006

Outcomes: Represented vs Unrepresented applicants

12 months ended 30/6/06: Review outcomes (Based on 3700 decisions)

Outcome	Represented applicants*	Unrepresented applicants	Total applicants	
	%	%	% 2005/06	% 2002/03
Dismiss	57	67	63	64
Quash	29	20	23	25
Modify	2	2	2	2
Other	12	11	12	9

*Approx 38% of applicants were represented

