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REPORT OF THE NATIONAL COMMITTEE OF INQUIRY INTO COMPENSATION AND REHABILITATION IN AUSTRALIA†

For the past decade it has been all too easy for torts teachers glibly to cite Professor Fleming's aphorism that "the law of torts is part of the system of social security"[1] without going on to consider what precisely that statement does, or ought to, imply. The defects of the response of the common law to the scale of losses caused by personal injuries have been documented time and again; but the more positive and creative thought required to produce and discuss viable alternatives has rarely been displayed. Professor Atiyah[2] took some pains to describe the general operation of the Welfare State in the U.K. with respect to industrial injuries and sickness benefit, but even his pioneering work made no great effort to consider the principles that a social security system ought to apply to the problems of compensation for injury or sickness. Only Professor Street[3] and Professor Ison[4] have made conscientious efforts to consider the basis of a scheme which might replace the torts system, and even then Professor Street was content to confine himself to very general criteria rather than to formulate specific proposals. It is against this background of academic neglect that one must pay tribute to the work done by Government bodies in recent years in New Zealand[5] and in Tasmania[6]; and now to the Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia. This last Report takes added significance from the fact that a National Compensation Bill[7] based squarely on its recommendations has already been introduced in Parliament.

The essential features of the Report are the decisions taken by the Committee to recommend the abolition of the present system of compensating accident victims by means of the common law of torts, the Workmen's Compensation Acts and the Criminal Injuries Compensation Act and to replace it with a system of National Compensation. The new system will cover all injuries, including all those outside the present system altogether, and indeed provide cover in cases which are now outside the provisions of the Social Services Act. The terms of reference of the Committee were extended so as to cover cases of incapacity caused by congenital defects and by sickness as well as by injury—as innovation which takes the scope of the report well beyond that of the Royal Commission of Inquiry into Personal Injury in New Zealand[8]; though since the sick may be brought into the scheme later than the

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† Australian Government Printing Service, 1974. Vol. I, II, and Compendium; 407, 181 and 280 pp.; $6.50, $3.15 and $3.25.

1. J. G. Fleming, *An Introduction to the Law of Torts* (Oxford University Press, 1967), 1.
2. P. S. Atiyah, *Accidents, Compensation and the Law* (Weidenfeld and Nicolson, 1970).
3. D. W. Elliott and Harry Street, *Road Accidents* (Penguin Books Ltd., 1968), cn.9.
4. T. G. Ison, *The Forensic Lottery* (Staples Press, 1967).
5. Report of the Royal Commission of Inquiry into Personal Injury in New Zealand, *Compensation for Personal Injury in New Zealand* (Government Printer, Wellington, 1967).
6. Report of the Law Reform Committee of Tasmania, *Recommendations for the establishment of a no-fault system of compensation for motor vehicles victims* (1972).
7. National Compensation Bill, 1974.
8. Commonly known as the *Woodhouse Report*, 1967.

injured it was necessary for the Committee to face the difficult task of fixing a dividing line between them. The novel and valuable proposal made is to make use of the Internatinal Classification of Diseases published by the World Health Organisation and to provide that the scheme should cover cases falling within the classifications of Accidents, Poisoning and Violence (External Cause). This may lead to a long statute, but it does avoid most of the barren demarcation disputes to which general formulae have invariably given rise.

The benefits proposed by the new scheme are based on the average weekly earnings of the victim—for the four weeks prior to the accident in the case of the first month from the date of the incapacity commencing, and the twelve months prior to it thereafter, except in special cases where a five-year period may be used. The rate of benefit in cases of total incapacity is to be at 85% of the earnings as calculated, with no means test applied, though benefits are not payable during the first week of incapacity (in the case of sickness they are not to be payable for three weeks from the commencement of the incapacity, though the last payment of sickness benefit will include a retrospective payment for the second and third weeks). Earnings-related systems face special difficulties in the case of persons not earning or in training at the time of their suffering incapacity; the Committee has produced creative and innovative proposals in recommending that a fair assessment of the amount of weekly earnings may be made in the case of persons injured between the ages of 15 and 26, and in recommending that notional earnings of $50 per week be attributed to persons not earning at the date of their incapacity (so that small children and housewives will be covered, as well as communards). It should be noticed that one effect of this proposal will be that sickness benefits under the Social Services Act will, in effect, be increased from a maximum of $31 to a minimum of $42.50 per week for a single persons, though it will not be payable for the first week of incapacity (as at present). Earnings related benefits will be paid at 85% of average weekly earnings to people earning up to $500 per week; higher income earners than that will rceive benefits on the basis that they are earning $500 per week. Benefits payable to widows will depend on whether or not the widow has dependants or is over fifty-five (Class A), or not (Class B). In either case a lump sum of $1,000 is payable immediately; in the case of Class A widows benefit is payable at the rate of 60% of the rate her husband would have received had he been totally incapacitated, and is payable for life or until remarriage (when she is entitled to a lump sum payment equal to the benefits she has received during the preceding year or since her husband's death, whichever is shorter); in the case of a Class B widows periodic payments last only for a year. Periodic payments are on notional minimum earnings of $100 per week when actual earnings were below this figure. Separate provision is made for children and other dependants of a deceased earner; and some women who had lived in *de facto* relationships with a deceased earner are treated as widows. The difficult problems posed by permanent partial incapacities have been approached afresh and a new solution proposed; the extent of incapacity should be assessed on a 5% graduated scale as set out in the "Guides to the Evaluation of Permanent Impairment" published by the American Medical Association, and the payment assessed by taking that proportion of 85% of the average weekly earnings index. Benefits payable for total incapacity will be increased from time to time so as to take some account of inflation.

This has been an oversimplified account of only two aspects of the scheme, and obviously there are many detailed proposals as to persons who ought to

be excluded from its operation, its date of commencement, provisions for varying awards, the administration of the scheme and so on. But this gives a broad outline of the most important aspects of the compensation side of the scheme and is sufficient to indicate both its breadth and the spirit of creativity and innovation which the Committee brought to its task. Nor does the preceding account attempt to cover anying in Volume II of the Report on Safety and Rehabilitation, though both the Committee and the Government say that they think it the more important of the two. And it is appropriate to say here that the Draft Bill appended to the Report is especially valuable in coming to an assessment of what the specific recommendations of the Committee are intended to achieve.

The terms of reference of the Committee stated plainly that the Australian Government had already decided in principle to establish a National Rehabilitation and Compensation Scheme covering every person who had suffered a personal injury; the terms of reference were subsequently extended to persons suffering incapacity by reason of sickness or congenital defects. They also included a specific reference to the question: "whether rights under the scheme should be in substitution for all or any rights now existing"; and one of the questions upon which the Committee specifically sought submissions was: "the practicability of a comprehensive and self-sufficient national scheme . . . which would supplant existing remedies—(i) by having the practical effect of rendering them superfluous; or (ii) directly by legislation." Although in rejecting submissions that the common law remedies should be allowed to co-exist with the new scheme the Committee adopted the second of these and abandoned the first, it is fair to say that these two possibilities seem to have been connected in the minds of the members of the Committee and they saw it as essential that the levels of compensation offered by their scheme should in general at least match those offered to a successful litigant at common law or under the Workmen's Compensation Acts in cases in which the different schemes overlap if public acceptance of their proposals was to be obtained. This affected both the way in which the Committee commented on how effectively the existing remedies would be replaced if their proposals were implemented and its discussion of the principles of the basis of a modern social security system. This review will therefore comment briefly upon these two central aspects of the Report, though it will also touch on the proposals for the administration of the scheme and its financing. If these comments seem critical the reviewer should at least make it clear that he is generally in favour of central government authorities assuming much greater responsibility for the financial well-being of the sick and injured; he agrees that effective rehabilitation demands the removal of the fault system; and he is in entire support of the view that the questions of rehabilitation and safety dealt with in Volume II of the Report are of greatest importance. It should also be emphasised that a scheme which is designed to cover all the sick and injured members of the population of working age, and which therefore deals with persons otherwise covered only by Criminal Injuries legislation and the Social Services Act; and which is not concerned with such matters as contributory negligence reducing the level of benefits for which a person is eligible ought not necessarily to be condemned because it may reduce the benefits which may be obtained in some cases when it is so evidently increases those to which many others may be entitled.

Nevertheless, it is as well to be explicit in assessing what it is that is being surrendered for the new benefits; and although at various points in the Report

specific points are mentioned they are not brought together with this in view. It is also desirable to see the basis upon which it is claimed that in cases of grave incapacity the victim may be better off than he would be under the present system, even if the provisions for protecting the award against inflation are not taken into account. To take these in turn: the principal persons adversely affected by the proposals will be those who lose earnings for a week or less and who have exhausted any sick leave to which they may be entitled in their employment (who may at present in appropriate cases obtain redress under the common law and under the Workmen's Compensation Act); persons who are presently enabled to obtain compensation of 100% of their average weekly earnings under the Workmen's Compensation Act 1971-73 (S.A.) and who may obtain only 83% of them under the new scheme; and women who are under fifty-five and have no dependants at the time they are widowed. Different reasons are advanced for each of these proposals; in the case of the exclusion of persons injured for less than a week the Committee refers to the desirability of maintaining and extending sick pay schemes financed by employers[9], the need to encourage personal initiative to bear small troubles and the heavy costs and administrative burdens which would otherwise fall on the scheme; in that of the reduction of the cases where 100% benefit is payable now to the fact that the recipient is better off when not working than he would be if he returned to work, that the benefit will ultimately be payable as of right, promptly and, if necessary, for many years with no maximum sum beyond which payments may not go, and again to the need for encouraging personal initiatives; and in that of the widow under fifty-five without dependants it is said that: "there surely must be every reason of self-interest and self-respect" for such women to resume employment. All this would be a great deal more convincing if in the first case the Committee had made the point that those with low earnings may find the loss of even a day or two of income harder to bear than a person on a higher income may find loss of income for a fortnight and tried to assess how many people with low incomes would be excluded from benefits to which they are now entitled and could only lose with hardship (there are no tables or figures given on either point, though it is said that most beneficiaries of the scheme would be low earners[10], such figures as are given suggest that the rule would exclude half the victims of injury or sickness[11], and one of the recommendations of the Interim Report of the Commission of Inquiry into Poverty[12] was that the seven-day waiting period for sickness and unemployment benefits be abolished); if in the second case it had noticed that many of the workers who are now entitled to 100% compensation are earning less than the average wage and may similarly find themselves in need if there is any loss of earnings at all; and if in the third case there was some reference to the possibility that a woman, especially one in her thirties or forties, may find employment at a remuneration sufficient to maintain her life style impossible to obtain (and may find any employment difficult to obtain) and is likely to have prejudiced

9. In South Australia ten days sick leave is provided for by s.80 of the Industrial Conciliation and Arbitration Act, 1972, for full-time employees; other employees are unlikely to have the benefit of similar provisions, as are the self-employed.
10. National Inquiry into Compensation and Rehabilitation, *Compendium*, para. 101 (p.232).
11. *Id.*, table 27, 33; *cf.* table 40, 86. Table 39 (at 85, read in conjunction with Table 15, at 62) seems to support this conclusion.
12. *Poverty in Australia* (Australian Government Publishing Service, March 1974), Recommendation 9, at 7. For an even more comprehensive list of benefits to be forgone, see a letter from the Labour Council of N.S.W. read by Mr. Lloyd, M.H.R. (Hansard, House of Representatives, 24th Oct., 1974, 2840-2).

her career prospects greatly if she has been away from the work force for a considerable time. Moreover, if there is any substance in the first two points listed above the proposed delay of three weeks before any sickness benefit is paid is even more likely to lead to misery. Without any discussion of these factors the impression that under the guise of social security some of the most deserving of society's victims are being left worse off is hard to avoid; yet this failure to deal with the social consequences of particular recommendations is typical of the Report and constitutes one of is major weaknesses.

The second area left to take the brunt of the recommendations does so largely by omission; damage for pain and suffering, loss of amenity and loss of expectation of life are excluded from the Report; and the rejection of the machinery of a Schedule of the kind now used in the Workmen's Compensation Act in dealing with permanent partial incapacity shows again a distaste for non-pecuniary losses. In the light of all this it is surprising to find a single isolated paragraph in the Report which says simply: "There is a need to provide for cosmetic impairments of real significance" by a lump sum payment of up to $10,000. It may never have been very clear what it was that non-pecuniary damages were intended to provide compensation for and it is highly probable that a system of social security should not provide money to people for reasons other than to enable them to support themselves at whatever level is deemed approprite; and it is clear enough that the assessment of non-pecuniary damages is likely to lead to difficulty and the use of relatively expensive procedures unless the amount is limited to a conventional sum. This again renders the inclusion of a provision on a fairly generous scale for something described as a "cosmetic impairment" or disfigurement puzzling and inconsistent with the general thrust of the report. It may perhaps be argued that non-pecuniary losses might be an area reserved for a genuine fault system, provided that it is statutorily provided that only relatively low conventional sums may be awarded. Persons who have been injured do tend to think of themselves as having suffered a loss going beyond their financial losses; and the impulse towards non-pecuniary damages is particularly strong in South Australia which is not merely the only State which provides for damages by way of *solatium* but has recently proposed to increase the value of such awards[13].

The third point which may be made in this general area is that the examples which are intended to show that the compensation offered by the new scheme matches or improves upon common law standards are not wholly convincing and, indeed, point to a matter which is of some significance for the scheme viewed both as a replacement for existing compensation systems and as an integral part of a social security system. The Report explains how the periodic payments of the scheme have been commuted into a notional lump sum for the purposes of the comparison. It appears that the calculation has been done on the assumption that the funds are invested, though the capital declines generally to zero at 65[14]. But the common law damages are given simply as the lump sum awarded—which is only likely to be fair for a minority of cases in which substantial damages are awarded[15]. Moreover, the Report makes the point that the calculations have been done on the basis that the victim will live up to the age of sixty-five without reference to mortality.

13. Wrongs Act Amendment Act, 1974.
14. Vol. I, Appendix 4, 345-346.
15. They are likely to be invested, too.

Now obviously the common law damages have been discounted so as to take certain contingencies into account, among them that of earlier mortality, so the figures are not wholly comparable. But perhaps more importantly the common law figures will probably have been discounted too so as to take into account the possibility of periods of recession and unemployment, and so on. This is, of course, a hopelessly imprecise thing to try to do; so the new scheme does not make the attempt and simply assumes that the average weekly earnings of the victim during the twelve months before injury or sickness are a proper measure against which to measure the victim's loss for the rest of his working life. (The use of 85% of average weekly earnings to fix the level of benefits is to allow for costs not incurred by the incapacitated and to provide for incentives for a return to work, and the reduction from 100% may be ignored for the purposes of a discussion about contingencies). Now it is often noticed that this may be unfair in the case of a person in hierarchical employment with secure prospects of promotion (or, indeed, in the case of the brilliant student who has yet to make his way in his chosen profession). But it is also true that there are some occupations, including mining and occupations of a manual sort, where earning capacity is much higher when a man is at his strongest and most energetic and tends to decline with age. It was for this reason that the earnings to which the Labour Party in the U.K. proposed to relate pensions in its ill-fated 1969 plan[16] were to be looked at over the whole of a man's working life rather than at his retirement[17]. Then the purpose of the proposal was to ensure that payments were not too low; but in the case of injury to, say, a miner in his twenties the implication is that to relate his compensation for nearly forty years to his earnings at the date of the injury may well leave him better off than his contemporaries who are still working from the time he reaches about forty until they all come to sixty-five. The point is that the average earnings in the twelve months before injury or sickness may or may not be a proper measure of a person's losses over a normal working lifetime, and to take it uncritically may well be to commit the scheme either to over or to under compensation in particular types of case. This point will be considered in the context of social security principles later; but for the present it should be noticed that the adoption of the machinery of earnings-related periodic payments as the basis of the scheme may make for administrative simplicity and for ease of adjustment to certain sorts of contingency such as the death of the victim, a change in the extent of his incapacity, or the remarriage of a widow, but it is almost certainly as inaccurate as the common law has ever been in its choice of the base against which to assess actual losses.

The second major area of comment must be that of how the Report and the scheme it advocates should be seen in the context of social services generally. The report clearly sees its recommendations as a model for social services benefits of other kinds; in advocating earnings-related as opposed to flat-rate benefits it asserts that: "there will be great advantage if an organic and integrated structure can be given to social welfare services in Australia", and among the considerations it expresses as relevant to the question of determining a suitable administrative structure for the scheme are the "need

16. National Superannuation and Social Insurance, *Proposals for Earnings Related Social Security* (Cmnd. 3883, H.M.S.O. 1969). See also: Social Insurance, *Proposals for Earnings Related Short Term and Invalidity Benefits* (Cmnd. 4124, H.M.S.O. 1969).

17. Cmnd. 3883, para. 66: Cmnd. 4424 (which also provided for limited earnings-related benefits) is limited to short-term benefits (para. 21).

for policy planning and central direction over the whole area of social welfare and health" and that "the compensation scheme will overwhelm present social security programmes". All this may well be open to misunderstanding: the need for "integration" may apply only to rehabilitation and safety provisions, or to common tribunals dealing with many kinds of social security benefits. But if it does not, and the inferences to be drawn indicate greater ambition on the part of the Committee, some obvious points need to be made. First, even if all applications for sickness and unemployment benefits, and invalid and widows pensions are combined they amount to scarcely thirty per cent of the applications for age pensions and allowances supplementary to them, not to mention maternity allowances, the four million cases of child allowances, funeral benefits and so on[18]. The scheme adopted by the Report may make for many more difficult decisions than these others (though if it does so the Committee's hopes for simple and cheap administration will be in part frustrated), but the addition of cases now covered by tort law and workmen's compensation is unlikely to "overwhelm" them. Secondly, if it is thought that the benefits proposed by the scheme may be in any way used as a model elsewhere in the social services system, it should be said at once that the Royal Commission on Social Security in New Zealand[19], which reported in 1972 and devoted much more time than either the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand or the National Committee of Inquiry in Australia to the foundation principles of what a social welfare scheme should aim to achieve rejected the notion of earnings-related benefits as a basis for operation except for short-term unemployment benefits. It went on to explain the New Zealand Accident Compensation Act[20] should be regarded as a compensation scheme designed to replace existing and less efficient machinery[21] and thus having a function very different from that of social security which it saw as "to ensure that all members of the community have income sufficient to reach an adequate living standard"[22], defining "adequacy" in terms enabling people to feel a sense of "participation in" and "belonging to" the community[23]. The reasons for this, which are not mentioned in the Report, are worth looking at, as are some of the points contained in the so-called "Crossman Plan" for modifying the U.K. social security system so as to make provision for an earnings-related component[24]. These are especially important because they are limitations which are generally accepted by the Interim Report of the Committee of Inquiry into National Superannuation[25] in its tentative model for a plan with an earnings-related component; but it is worth noticing that that Report also proposed a model for a scheme based on flat rate benefits and left the choice between them open for further discussion and consideration.

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18. These figures are taken from *Final Report of the Committee on Administrative Discretions* (Australian Government Publishing Service, October 1975), para .56.
19. *Report of the Royal Commission of Inquiry into Social Security in New Zealand* (Government Printer, Wellington, March 1972), ch. 18, paras. 7-51.
20. Accident Compensation Act 1972; Accident Compensation Act Amendment Act, 1973, and Accident Compensation Amendment Act (No. 2), 1973. Reprinted with amendments incorporated 1st April, 1974.
21. *Loc. cit.* ch. 18, paras. 63-90, esp. ch. 71.
22. *Id.*, ch. 18, para. 72.
23. *Id.*, ch. 3, esp. para. 42.
24. *Loc. cit.*, n.16 *supra, esp.* paras. 30, 31.
25. *Interim Report of the Committee of Inquiry into National Superannuation in Australia* (Australian Government Publishing Service, June 1974), 12,170.

The Australian Committee argued for earnings-related benefits principally on the ground that social services benefits based on a flat rate principle treated similar cases unequally; a poor man who became incapacitated from work might lose little, while a richer man might lose a lot. Alternatively the point was put that the flat rate system prefers those with lesser losses to those whose losses are great. It is at this point that polemic takes over the Report and no attempt is made to present the other side of the case. It is not mentioned that the poor man may need to have almost 100% compensation to maintain the barest esentials of life, while the richer man may be able to afford to lose rather more. To the argument based on fairness the Royal Commission in New Zealand produced three answers[26] that are relevant to the scheme proposed for Australia. First, that there is no guarantee that there is fairness in the income differentials that exist within society. Second, that loss of earnings are a crude measure of need since they are only a crude measure of the standard of living obtained, since they take no account of family responsibilities which may vary over a life cycle. Thirdly, the earnings scheme proposed by the Committee allows for compensation up to $26,000 p.a. In order to pay for protection on this scale the earner is, in effect, compelled to provide the funds for a form of compulsory personal insurance. He may wish to do this; or he may, if given the choice, prefer to be compelled to maintain an income of about half this so as to pay for the education of his children in the way he thinks best while he is still healthy, or pay off a mortgage more quickly, and so on. Why should he be compelled to finance the scheme on the off-chance of getting very extensive benefits he would not choose to have?

The second of these points relates to that made earlier in this review about the unreliability of earnings-related benefits as a measuring base for an assessment of real loss and real need. To some extent the points made by the New Zealand Royal Commission are met by the principle that benefits are taxable; but the potential capriciousness of the scheme may be seen by taking the hypothesis that the scheme came into operation in 1971 and one is considering the fates of two car salesmen, real estate agents, builders or the like injured in October 1973 and October 1974 respectively. All these cases may be so extreme as to bring a "special cases" formula into effect, but the points made earlier about the economic fortunes of miners as against public servants or academics do not seem to be so. What perhaps they emphasise is that to assess a lifetime of loss on the basis of twelve months earnings immediately prior to an accident or sickness may not be entirely fair or reasonable in itself, though the formula may be perfectly adequate for the limited period during which workmen's compensation is paid. There the relationship between past performance and probable loss is much clearer than it is over a long period. And though obviously sickness and unemployment benefits must move together there is some curiosity in maintaining a person at the level of his *last* job, which may have been unusually good or bad for him. The third point was met with in the U.K. with the proposal that compulsory earnings related benefits (at least for age pensions, though short-term benefits were treated no more favourably) should extend only to one and a half time the average wage, leaving further provision to the

26. *Loc. cit.*, n.19 *supra*, ch. 18, paras. 34-43.

individual himself[27]. It is suggested that either this principle, or the more complex proposals set out in the Interim Report of the Committee of Inquiry into National Superannuation[28], may well ltad to more acceptable approaches to the general question of appropriate levels for compulsory benefits, at any rate in the case of long-term incapacity; they are certainly, in the eyes of this reviewer, preferable to the Committee's recommendation if one wishes to go beyond the area of injury, sickness and unemployment to age pensions. But this point also raises a question about the financing of the scheme, which will be developed later; here it is sufficient to say that the financing system proposed by the Report, which is based on levies on employment and on an impost on petrol, means that there is probably no way in which it can be guaranteed that the well off person will have to contribute less to the scheme, even if he is given less than the maximum cover proposed by the Committee. For this reason it is fair that, if the particular financing method is adopted, the maximum cover should be high; but this in turn casts some doubt on the overall concept embodied in the scheme.

A further point ought to be made about the Committe's proposals. The Committee, faced with the question of how to treat cases of permanent partial incapacity (a problem which Ison justly described as "one of the most vexing difficulties of any system of sickness and injury compensation")[29] produced the innovative idea of relating the degree of incapacity not to any actual earnings or to the earning capacity of the individual, but to the average weekly wage. It points out that to relate the degree of incapacity to the earning capacity of a person in a well-paid job often overcompensates him, since the particular physical incapacity often does not affect his earnings performance (an accountant can afford to lose a leg, though a builder cannot); that to base compensation on actual loss of earnings would constitute a disincentive to rehabilitation and make administration more difficult and expensive; and that the administration of a California-style scheme, which tries to relate physical incapacity of different kinds to particular occupations, would also be difficult, and therefore expensive, to administer. It therefore rejects an earnings related scheme as appropriate to this area on the grounds of overcompensation and rejects attempts to measure loss accurately on grounds of administrative convenience and expense. Accepting this, one then finds the Committee arguing that it is a good thing that persons earning less than the average wage when they had their accident will be paid compensation on the basis of a rate of earnings that they had never themselves obtained. This is also perhaps unobjectionable and, indeed, shows a concern lacking elsewhere in the Report for the problems of the poorest members of the community. But it is surely an abuse of a "compensation" scheme, and gives a rôle in the scheme to the redistribution of wealth in the community as an end in itself that adds a new, and highly controversial, aspect to the notion of social security.

One last point is necessary. The Committee is rightly concerned that the social security system should treat similar cases in the same way, and its anxiety to ensure this was one of the reasons for its terms of reference being

27. Cmnd. 3883, n.16, *supra*, paras 55, 64. Cmnd. 4124, n.16, *supra*, para. 19. It is, of course, true that personal insurance against incapacity is much less common than are occupational pension schemes; and that compulsory third party insurance makes the same choice of level of compensation as the proposed Australian National Compensation scheme.

28. *Loc. cit.*, n.25 *supra*, 174-177.

29. *Loc. cit.*, n.4 *supra*, 62.

extended to cover sickness as well as injury. But for a time, at least, if its proposals are implemented, a person who loses his employment because of sickness will be better off than one who loses it because his employer finds himself compelled to lay off staff. In a period of full employment this may not matter much; in a recession it is very important indeed. In any event a change will occur in the present position of equality of treatment, and this is not desirable. The Committee, of course, would wish to change unemployment benefits to bring them into line with its proposals for sickness and injury (though presumably with the qualification that, since sick pay schemes do not cover retrenchments, payments should in future begin immediately); but, perhaps fortunately, it did not have any responsibility for examining the financial implications of that suggestion. The same criticisms apply to other areas in which the social security system presently treats different classes of people with similar problems equally: for instance, the "widow's" pension is payable to deserted wives, divorced women, or women whose husbands are in mental hospitals or prisons on the same terms as it is payable to widows[30]. All these other classes of women will be treated much worse than widows if the scheme is implemented as it stands; yet they include some of the members of the community who are in the direst need and poverty. (Fatherless families rank high among those in poverty in Australia, as the Interim Report of the Australian Government's Commission of Inquiry into Poverty makes clear)[31]. One is left, then, with an uneasy feeling that despite its good intentions the Report, if implemented, may distort the whole thrust of the social security programme rather than bring about its co-ordination; and that in the course of so doing may in fact adversely affect those in the greatest need, either by removing present benefits from them or by diverting resources away from them. It is especially disquieting that no investigation of this aspect of the matter has been made by the Government before its introduction of the Bill designed to implement the Report; perhaps comments on that Bill should be sought from the various Committees inquiring into poverty and national superannuation, as well as from Departments concerned with the aims and financing of the social services programme before it is proceeded with further.

Although a great deal more might be written about various aspects of the Report only two other matters will be touched upon — those of administration and finance. So far as administration of the compensation scheme is concerned the Committee opted for a central benefits and compensation Department of the Public Service, which would ultimately take over superannuation and, perhaps, other social security benefits. Applications should be dealt with within the Department, and be subjected to Departmental review by senior officers before communication of any decision to the applicant if the initial decision is to reject an application. Thereafter the unsuccessful applicant has a right of appeal to an independent tribunal composed of a lawyer, a medical practitioner and a third person; the tribunals would be established as part of the Attorney-General's Department, operate in each capital only and be prepared to be peripatetic, and proceedings before them should be informal. Although economy of operation of the scheme is stressed at every point, as is the need for its integration with other schemes, the Committee rightly considered the scheme too difficult and important to individuals to be entrusted wholly to the new Department, or to the Department of Social

30. Social Services Act 1947-1974 (Aust.), s.59(1).
31. *Loc. cit.*, n.12 *supra*, 9-10 (Tables 3 and 4).

Security, and therefore rejected the recommendation of the Final Report of the Committee on Administrative Discretions[32] that there should be no review of decisions on social security matters other than through the Ombudsman[33]. Still, this decision gives rise to three comments. First, it provides a further demonstration of how much the new scheme distorts present notions of what social security is and how it should be administered. Second, having rejected the recommendation that there should be no appeal, it ignores the rest of the recommendations of the Committee on Administrative Discretions, which are based on the premise that there should be an end to the creation of new tribunals and suggests that if there is a need for review of social security decisions it should be through the General Administrative Tribunal that it proposed[34]. In fact it would have been very easy to correlate the independent compensation tribunal and the General Administrative Tribunal. Thirdly, the Committee on Administrative Discretions suggested a separate Medical Appeals for dealing with purely medical questions which might arise in the course of dealing with cases under existing legislation, including the Social Security Act[35]. In the United Kingdom the industrial injuries legislation provides for separate appeals on medical matters to a medical assessment committee rather than to the local appeals tribunal[36]. Medical assessment of injuries and incapacity is at the very heart of the proposed compensation scheme, and many of the determinations are likely to be difficult (for example the A.M.A. tables of relative impairment which doctors are required to use in assessing permanent partial incapacity operate on 5% steps. Accurate assessment of the 85% degree of incapacity required for eligibility for an invalid pension under the Social Services Act has often proved difficult; and in 1966 a U.K. Committee on the Assessment of Disablement[37] rejected a scale of incapacity based on 5% steps on the ground *inter alia*, that "the majority of pensionable conditions assessed at 20% and Disablement[37] rejected a scale of incapacity based on 5% steps on the ground, with the exactitude required by 5% steps."). It would, therefore, have been valuable had the Committee given its reasons for preferring the single tribunal, especially as the disadvantages that occasionally occur in the U.K. because the industrial legislation is confined to work injuries would not occur under a more general scheme[38].

It should be added that the Draft Bill appended at the end of the Report, which has been faithfully followed by the Bill introduced into Parliament, does not guarantee the independence of the proposed tribunal from the Department of Compensation at all, since it merely says that appointments to it are to be made by the Governor-General, presumably on the advice of the Minister who is to decide how many Appeal Tribunals are necessary and who may make acting appointments personally. But it is nowhere said who is the Minister with these powers. It should be said, too, that an appeal on a point of law will lie to the Commonwealth Superior Court.

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32. *Loc. cit.*, n.18 *supra.*
33. *Id.*, paras. 65-69.
34. *Id.*, paras. 72; 122 ff.
35. *Id.*, paras. 166 ff.
36. H. Street, *Justice in the Welfare State* (Hamlyn Lecture series, Stevens, 1968), 11-32 and P. S. Atiyah, *loc. cit.*, n.2 *supra,* 379-386, provide general accounts.
37. *Report of the Committee on the Assessment of the Disabled* (Cmnd. 2847, H.M.S.O. 1965), para. 17.
38. See, e.g., *R.* v. *Deputy Industrial Injuries Commissioner* [1967] 1 A.C. 752, *R.* v. *National Insurance Commissioner ex p. Hudson* [1969] 2 W.L.R. 639.

The last aspect of the Report which must surely require scrutiny if its proposals are to be implemented is that of its general economic implications. This reviewer makes no pretence at expertise in the field of economics, and most of the points which follow are raised merely because it seems necessary that someone should analyse them seriously, since the Committee did not often give them even passing attention. The basic attitude of the Committee to matters such as the abolition of the means test and the cost of an earnings related scheme seems to have been that Australia is a rich country and can afford to spend more on social services, and that so far as the scheme they are principally concerned with is concerned the savings to be gained from doing away with the expensive administrative processes of the present scheme and the abolition of trivial and wasteful benefits that are now provided, together with the removal of the requirements of adequate reserve funds that a funded scheme requires but a pay-as-you-go scheme does not, will offset very considerably the costs resulting from the increased range and scale of benefits they propose. Without quarrelling with the figures produced for the Committee one may note two points: first, that they exclude medical expenses as inappropriate to the Compensation scheme and leave these to the National Health scheme (which may be fair, but must affect the validity of the figures produced to show the comparative costs of the two schemes), and second, that they rely on administrative procedures costing no more than 3% of the value of benefits distributed, which may well be a considerable underestimate given the increased difficulties to which the assessment of injuries, incapacities and earnings may give rise, the number of matters which call for exceptional treatment (e.g. special problems relating to the assessment of weekly earnings, the notional earnings to be attributed to students under 26 (31 in the Bill before Parliament), cases in which a person earning more than the average weekly wage suffers permanent partial incapacity, and so on), the decision to adopt a scale of relative impairment based on 5% steps, the discretionary lump sum payment for cosmetic disfigurement, and the provision of a scheme of Appeals Tribunals with the possibility of appeal to a court. But this is perhaps mere quibbling against three other points. First, the Report recommends that the scheme be financed by a 2% national compensation, levy or salaries and wages, to be paid by employers, by a 2% levy on the earnings of the self-employed, and by a 10% excise tax on petrol. (It should be noted that this probably underestimates the cost to an employer, who is required to bear the extra costs of work injuries for the first week of their duration under the guise of sick pay). The object is to ensure that the "user pays" and that employers and motorists, relieved of compulsory workmen's compensation and third party insurance, should continue to pay for a compensation scheme. Whether the impact of these imposts would be felt equally and fairly across the community is a matter the Report does not consider. Lawyers have been content to say that "the community pays" if manufacturers have to increase prices because of increased premiums, if petrol is increased in price or if taxes are raised, or that 'the user shall pay' so as to justify the imposition of costs on a particular group, without enquiring as to whether the same members of the community take the same share of the burdens according to the particular method adopted for financing a scheme, or whether the consumer has any choice about what he will use, and the extent to which he will use it. It is hard to predict what the consequences of the proposed levy on employers will be, though perhaps it may be supposed that in some low-risk areas it will have something of the impact that Select Employment Tax had in the U.K.; certainly the

Committee does not even try to guess at the possible consequences, still less assess them. There is no attempt at the kind of analysis which distinguishes the discussion of the impact of 'payroll taxes' in the Interim Report of the Committee of Inquiry into National Superannuation in Australia and which led that Committee to condemn payroll taxes as ultimately regressive[39]. The 2% levy on the self-employed, which is wholly novel, will presumably strike small businesses especially hard, and they are already in economic difficulties. The 10% excise on petrol would be a form of regressive taxation that would fall more harshly on the rural population than the urban and have consequences for the transport industries that might or might not be desirable or fair. Again, the questions were not raised, still less discussed by the Committee. It is noteworthy that this part of the Report has not yet been accepted by the Government; the Bill implementing the Report contained no provisions for its financing when it was introduced, Mr. Bowen saying in introducing the Second Reading that this matter was being left to the Treasurer for further consideration[40].

This point in itself is disturbing, since it leaves many questions for consideration. Australia has never accepted the principle of social insurance that is fundamental in Britain, and it is presumably unlikely to accept it now[41]. Yet when Britain proposed earnings related supplements to flat rate earnings it did so on the basis that both contributions and benefits were graduated; and this made it relatively easy to impose limits of benefit linked to the average wage without unfairness[42]. The New Zealand Royal Commission on Social Security rejected the concept of social insurance, but seemed to accept the possibility of a scheme financed by general taxation but with a similarly limited ceiling on benefits[43]. This would seem to raise social issues of some importance, and it is a matter for concern that the Bill was introduced into Parliament in a form in which it is hard to know what the social issues that it raises really are. It must be said, however, that the Report offered quite inadequate guidance to the Government on the whole question of the financing of the scheme; and is embarrassingly naive when read against the sophisticated analysis of the Interim Report of the Commission of Inquiry into National Superannuation[44].

Two more general maters occur to the reviewer. First, the change from funded schemes to pay as you go schemes must have a general impact on the economy, since presumably funds are invested and pay as you go schemes do not allow for investment. The Report does not inquire as to how much is invested or where it is invested, and whether the loss of such a sort of investment is likely to have any significant impact on business generally. It seems unlikely that it would, and it may be that the required rate of benefits for any scheme would necessitate abandonment of this incidental feature of the present scheme; but the question might at least have been asked. Second, the Report, perhaps because of its terms of reference, never concerns itself with any question of priorities: is it right that the effort to transform social security should be made in the area of sickness and injury when it is not known what the proposals for national superannuation are? or that the blood

39. *Loc. cit.*, n.25 *supra*, 90-94, 158-163, Appendix B.
40. Hansard (house of Representatives), 3rd Oct., 1974, 2155-2159, 2156.
41. Though see *loc. cit.*, n.25 *supra*, 169-179.
42. *Loc. cit.*, n.16 *supra*, ch. 2., esp. para. 29.
43. *Loc. cit.*, n.19 *supra*, ch. 18, esp. para. 31.
44. *Loc. cit.*, n.25 *supra*, esp. ch. 5, ch. 8.

of the workers and the carnage of the roads be given privileged treatment while poor primary and secondary education ensures the retention of large earnings differentials? One should not blame the Committee too much for this, though one would wish to have seen the Government pay more obvious consideration to it in introducing the Bill. But the Committee, in its eagerness to do away with the existing system, is much too ready to dismiss out of hand what it describes as "the argument of limited funds"[45] — a point which is underlined by its views on the ultimate form of the system of social security. And again. on all these matters the Report stands in marked and embarrassing contrast to the careful and concerned discussion of the Committee of Inquiry into National Superannuation[46].

In summary, then Mr. Bowen, in introducing the National Compensation Bill, describing the Report as "scholarly and challenging". It is certainly challenging, but the Committee has sacrificed the criteria of scholarship for those of polemic all too frequently. In the result what has emerged is a proposal which has creative potential and is innovative in its extension of cover to sickness, the way it treats non-earners, in providing for updating to give protection against inflation, in its treatment of widows. Its principal defects are a failure to try to assess the adverse, as well as the desirable, social effects of its proposals and to look at the economic implications of them for society generally. It is not without significance that in its only reference to the Commission of Inquiry into Poverty in Australia the Report dismisses a comment emphasising the need for selective assistance to the social services as unduly pessimistic and unrealistic[47]. The Committee simply did not ask itself the questions that a person concerned about the incidence of poverty in Australia would have asked about the effects of its proposals to remove existing benefits; still less did it make any genuine attempt to assess the impact of its proposals and the torch of prophecy it claimed to bear for the future integrated development of the social welfare system on other areas of social security; and it did not seriously question at any stage the validity of earnings in the previous twelve months as a base against which to measure loss nor its overall impact on principles of social security. Uultimately it is all too easy to say that what has emerged is a plan designed to protect best the middle classes in an affluent society without proper regard for the poor and the disadvantaged (whose existence the Report scarcely acknowledges). This is the more unfortunate since it is clearly not intended; and stems from the insensitive applications of two premises upon which the Committee placed great store: first, that the expense and inefficiency of the present ramshackle 'system' are such that the case for replacing it is overwhelming, and that the replacement scheme should not be based on principles of compensation so different from those embodied in that system as to offer justification for criticism based on the abolition of existing valuable rights, and secondly, that a compensation system should concentrate on providing redress for people whose losses are relatively long term and quantitatively fairly large. Each of these premises may be seen as generally proper and desirable; but the Report tends to treat them as dogmatic truths and consequently does not go on to consider whether their unyielding application may have adverse and unjustifiable effects on persons other than the proposed beneficiaries of the new scheme. The Report, then, contains a

45. See especially Vol. I, 100-101. But see too paras. 230-232 and paras. 250-252.
46. *Loc. cit.*, n. 25 *supra, passim*, esp. in chs. 1, 5, 6, 8 and 9.
47. Para. 242.

valuable proposal which, after perhaps a great deal of serious consideration and modification, may eventually be turned into one suitable for implementation by legislation. The most distressing thing about it is the decision of the Government to adopt the Draft Bill appended to the Report virtually *in toto* and to introduce it in Parliament before making any serious effort to identify the areas in which further examination is called for.

A reviewer is duty bound to make one or two other points. Firstly, this review has not extended to Volume II of the Report, nor (like the Report itself) has it made any attempt to assess the difficult problems arising from finding the appropriate constitutional basis upon which its proposals might be implemented. These exclusions are based on the reviewer's incompetence to evaluate those areas, and not on any disrespect for them. Secondly, the first two Volumes of the Report are attractively printed on good quality paper. But at $9.65 between them ($12.90 if the Compendium is included) it is an expensive business to learn of the future of social welfare. Moreover, when one has paid $6.40 for a paperback book (Vol. I) one is aggrieved if it falls to pieces the first time it is used, as was this reviewer's experience. The Australian Government Publishing Service should look to more effective binding for its products if public debate and discussion on substantial Government Papers is to be encouraged.