

Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Bill

Government Bill

As reported from the Education and Workforce Committee

Commentary

Recommendation

The Education and Workforce Committee has examined the Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Bill and recommends unani- mously that it be passed. We recommend all amendments unanimously.

Introduction

This bill would amend the Accident Compensation Act 2001. Its main change would be to extend cover in the Accident Compensation Scheme to maternal birth injuries that have similar features to other injuries that are already covered by the Scheme. Maternal birth injuries are not currently covered. This bill is intended to provide more equitable cover and more clarity for claimants, and better give effect to the policy intent of the Act.

The five other policy changes the bill would make are:

- clarifying the test for work-related gradual process, disease, or infection cover and restoring the more claimant-friendly test that applied before 2010
- requiring that occupational assessors must consider (rather than may consider) pre-incapacity earnings when undertaking occupational assessments
- reducing the threshold for injury-related hearing loss cover from 6% hearing loss to 5%
- increasing the size of the Accident Compensation Corporation's board by one to enable broader representation

- making it clear that, if a claimant was assisted to die under the End of Life Choice Act 2019, their dependants would not be disentitled from any fatal injury entitlements under the Accident Compensation Scheme.

The bill would also make several technical changes, as outlined in its explanatory note.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We have no issues regarding the legislation's design to bring to the attention of the House.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Additional maternal birth injuries

Clause 6 of the bill would insert new section 25(1)(f) into the Act. The new subsection would extend the definition of "accident" to include "an application of a force or resistance internal to the human body at any time from the onset of labour to the completion of delivery that results in an injury described in Schedule 3A to a person who gives birth."

Schedule 2 of the bill would insert Schedule 3A into the Act. New Schedule 3A lists maternal birth injuries that would be covered by the scheme. In addition to those listed, we believe the following injuries should also be covered:

- obstetric anal sphincter injury tears and urethral tears
- anterior wall and posterior wall prolapses
- post-partum uterine inversion
- coccyx fracture or dislocation
- pubic ramus fracture
- symphysis pubis capsule or ligament tear.

Obstetric anal sphincter injury tears and urethral tears

The bill as introduced would cover "labial, vaginal, vulval, clitoral, cervical, rectal, and perineal tears". It was initially thought that the general term "perineal tears" would cover obstetric anal sphincter injury tears and urethral tears. However, we believe the intended scope of coverage with respect to tears should be expanded. We therefore recommend amending proposed Schedule 3A to replace the above wording with "obstetric anal sphincter injury tears or tears to the perineum, labia, vagina, vulva, clitoris, cervix, rectum, anus or urethra".

Anterior wall, posterior wall, and uterine prolapses

Anterior wall and posterior wall prolapses were not included in the bill as introduced. They were omitted because they were considered to be injuries caused by other injuries that were on the list (and therefore covered as a consequential injury). However, experts have confirmed that some prolapses can be caused by the forces of childbirth. We therefore recommend amending proposed Schedule 3A to replace “uterine prolapse” with “anterior wall prolapse, posterior wall prolapse, or uterine prolapse.”

Post-partum uterine inversion

We recommend adding “post-partum uterine inversion” to the list of covered injuries. Experts have confirmed that this injury can be caused by the forces of childbirth. While it is usually resolved at the time of birth by health professionals, we believe it should be included in the list for completeness. This is in case it results in a consequential injury, and to acknowledge that health professionals may not be present at all births.

Coccyx fracture or dislocation, pubic ramus fracture, and symphysis pubis capsule or ligament tear

We recommend adding “coccyx fracture or dislocation”, “pubic ramus fracture”, and “symphysis pubis capsule or ligament tear” to the list of injuries that would be covered. Experts have confirmed that these can be caused by the forces of childbirth. We therefore believe that they should be covered.

Formal review of listed maternal birth injuries

The bill as introduced does not require the list of maternal birth injuries to be reviewed in the future. We believe that providing cover for specific, listed injuries necessitates a formal review clause to ensure appropriate and comprehensive coverage.

We recommend inserting section 25A into the Act. This section would require a formal review of new Schedule 3A that must:

- commence as soon as practicable after the bill had been operating for 3 years
- include the Minister for ACC consulting with appropriate parties
- include the Minister for ACC reporting to the House as to whether amendments to Schedule 3A were needed.

Concluding remarks

We thank every submitter on this bill. In particular, we thank all those who shared their personal experiences of maternal birth injuries. Your contributions were valuable in informing our consideration.

We have opened a briefing into Accident Compensation Scheme cover for maternal birth injuries. We hope to see this briefing reinstated in the 54th Parliament by the Education and Workforce Committee. We strongly urge the next committee to exam-

ine whether the list of maternal injuries needs to be expanded or modified in some way to improve cover.

We believe that this briefing—together with the provision for a formal review and regulatory stewardship of the Scheme by the Ministry of Business, Innovation and Employment—would provide appropriate ongoing oversight of this issue. This briefing will give the committee the opportunity to review cover for maternal birth injuries, and the way the bill is working in practice, before the formal ministerial review, which would start three years after the bill has been enacted.

Green Party of Aotearoa New Zealand differing view

The Green Party of Aotearoa New Zealand supports the extension of the Accident Compensation Scheme to cover more birth injuries and will support this bill. However, we remain disappointed at the limitations of this reform, and the model chosen to extend cover for birth injuries.

Firstly, we thank the many submitters who shared their stories of birth injuries and trauma in support of change. The bravery of these submitters moved many committee members and shows why it is so important that we do better by whānau.

That is why it is particularly disappointing that this legislation does not take the opportunity to go further.

The Green Party would prefer to see cover expanded by including the following:

- birth injuries sustained before the Act comes into force, where these have an ongoing impact (i.e. the damage has not healed and health care is still required to address the effects)
- a general category of birth injuries, rather than a closed list approach
- mental injury due to a traumatic birth, whether or not there is also a physical injury (for example, due to post-partum haemorrhage or an emergency Caesarean section)
- injuries to the baby, whether or not this meets the threshold of treatment injury (for example, due to oxygen deprivation).

These are addressed in turn below. We also provide comments on other matters addressed in the bill, and specific areas where we support stronger reforms.

Care for those already injured

The legislation will not be retrospective. It is galling that birthing parents who are currently experiencing pain and trauma are left without support through this bill, and that all who courageously shared their stories will not get any benefit from expanded cover. Many may only be able to access services if they can afford private treatment and may find themselves stretched financially paying for ongoing treatment. The reason for this limit in cover appears to be a decision by the Government to curb costs.

General category for birth injuries

The Green Party believe the most effective way to modernise Accident Compensation and address the imbalance in coverage would have been to provide a general provision cover for birth injuries, rather than an restrictive list. We are particularly concerned that the list approach:

- does not cover all birth injuries
- is inconsistent with a Te Ao Māori world-view of health, as it is not whole-person or whānau-centred
- will create more bureaucracy and potential for disempowerment as different health practitioners use different language to refer to different injuries, and as individuals experiencing symptoms such as incontinence may not be aware they also have an underlying injury that could be covered
- risks losing the potential benefits of ACC investigation and monitoring of injuries that are partially caused by medical error in providing treatment and partially caused by the processes of birth
- exacerbates existing problems with the approach to treatment injuries by focusing narrowly on cause, rather than focusing on the impact of an injury on the person experiencing it.

Creating a restrictive list of covered birth injuries treats them as if they are novel injuries. In contrast, when the Government extended Accident Compensation cover to twists and sprains in 2005, they added these categories without the need for a specific list of what types of twists and sprains would be covered. Even gradual process injuries and diseases listed in Schedule 2 can be added to by section 30 of the Act. The Green Party shares the view of submitters that choosing a novel approach to birth injuries embeds—rather than eliminates—sexism in the legislation, by failing to recognise the potential range of physical injuries attributable to childbirth.

Mental injury

The committee heard from submitters who had experienced significant mental trauma as a result of birth. Despite this, there is no recommendation to provide coverage for mental injury when this occurs without a physical injury.

The leading cause of maternal death is suicide, from which wāhine Māori are three times as likely to die. Almost half of our birthing parents experience distress as a result of the birth. This is a call for action.

Birth can be life-threatening and involve traumatic medical emergency. Conditions such as post-partum haemorrhage, unplanned Caesarean births, or being airlifted to hospital can cause significant psychological distress. The Green Party believes many people would see that as just as worthy of coverage as mental injury arising from a physical injury or arising in the course of someone's work.

Ensuring that ACC covers mental trauma after birth, regardless of whether it is linked to a physical injury on the list, would strengthen our mental health system and enable whānau to get additional help with caring and home duties at a critical time. We

believe this would have significant benefit in the long term for parent/child attachment, as well as maternal and whānau wellbeing. It would also better represent and enable a Te Ao Māori world-view in the delivery of accident compensation.

The Green Party also believes the existing mental health boundaries in the Accident Compensation Act should be revised. The coverage requirement that a mental injury occurs as a result of a physical injury, or through the affected person's job, or as a result of a treatment failure, entrenches boundaries that run contrary to modern understandings of psychology. This has caused significant inequity in recent years, such as through failure to provide ACC cover to survivors of the mosque terror attack who were not physically injured, but live with post-traumatic stress disorder.

Injuries to babies

We are also disappointed that again 'cost' has ruled out coverage of injuries to babies. We acknowledge that the legislation already provides cover for babies with injuries arising from treatment injuries. The problem with this is the difficulty proving a treatment injury, particularly in the context of fast decisions being made in under-resourced hospitals. We heard from one submitter who told us that it was basically a full-time job for several years to get coverage for his son for a birth treatment injury. This drives unacceptable inequities with massive impact.

Cost

There is a \$1 billion annual pay-out difference between men and women from ACC. The costs of this bill are estimated to be around \$25m per annum. The costs to women with significant existing injuries that are untreated has never been recorded and is not considered within this legislation. By failing to listen to calls of submitters that the bill needed to go further, the Government is signalling that they're not serious about addressing gender equity with ACC. When ACC is currently paying out about \$1 billion a year more to men than to women, we believe the decision to not provide any retrospective cover fails to understand or address the extent of gender inequity within the system.

Te Ao Māori

As ACC Futures Coalition pointed out, the "Māori experience of ACC consistently involves patterns of systemic and substantive under-representation in a range of services and Māori report that they experience institutional racism in their engagements with the scheme, yet there is nothing in the Accident Compensation Act that commits the Corporation to honouring Te Tiriti."

Submitters called for the legislation to take a Te Ao Māori view of birth injuries, and others raised concerns about the lack of engagement with Māori undermining the Crown's obligations to te Tiriti o Waitangi. The New Zealand Human Rights Commission recommended implementing a te Tiriti and human rights-based approach to the extension of maternal birth injury cover.

Officials agreed that taking a Te Ao Māori world-view, and the principles of te Tiriti o Waitangi, are relevant to the new maternal birth injury provisions in this bill. How-

ever, they told us they will mostly be relevant to how these provisions are implemented, rather than how the legislation itself is designed. While the Green Party is pleased to hear that there will be a focus on implementation, we do not believe it could fully compensate for failure to consider a Te Ao Māori approach when designing the scope of the legislation.

Other reforms

Beyond matters relating to maternal injuries the Green Party is pleased to hear further legislative reforms are coming this term. Again however, we note our disappointment with the scale and nature of the reforms. If these are an indication of the Government's ambition it will probably not lead to much actual change.

Hearing loss threshold

Prior to 2010, there was an Accord to assess workplace hearing loss and then—to limit costs—a threshold of 6% hearing loss was introduced. Rather than remove that threshold, the Government has chosen to reduce it to 5%. Nowhere else in the legislation is a threshold of disability required to access compensation or treatment. We have been told that “People with mild hearing loss tend to experience difficulties only when they need to hear in noisy environments, but hearing aid performance is least satisfactory in the presence of background noise. This is particularly so for people with mild hearing loss whose need for natural sound quality negates some technical features designed to assist in noise.” Yet we understand this statement is not true for modern hearing aids, as engineering improvements in design have improved the ability to screen background noise and introduced other technological features such as Bluetooth connections.

Burden of proof for work related claims

The Green Party welcomes the intent of the bill to adjust the burden of proof required for claimants to attribute a work-related cause to certain injuries. While the amended definition is a step forward, we share the concern of several submitters, including the unions and ACC Futures, that the process defined by this section of the Act is overly onerous. The Act as currently worded has the effect of denying compensation and rehabilitation to workers with genuinely work-related injuries. This will not be fully resolved by the amendment in the bill, and workers and their whānau will continue to bear the cost of this decision.

Appendix

Committee process

The Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Bill was referred to the committee on 14 December 2021. We invited the Minister for ACC to make the first oral submission on the bill. She did so on 2 March 2022.

We called for submissions on the bill with a closing date of 12 February 2022. We received and considered 794 written submissions from interested groups and individuals. We heard oral evidence from 46 submitters at hearings held via videoconference.

We received advice on the bill from the Ministry of Business, Innovation and Employment and the Accident Compensation Corporation. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

Committee membership

Marja Lubeck (Chairperson)

Chris Baillie

Camilla Belich

Jan Logie

Jo Luxton

Ibrahim Omer

Angela Roberts

Penny Simmonds

Erica Stanford

Sarah Pallett, Toni Severin, and Hon Michael Woodhouse participated in our consideration of this bill.

**Accident Compensation (Maternal Birth Injury and
Other Matters) Amendment Bill**

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Carmel Sepuloni

Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Bill

Government Bill

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Part 2

Consequential amendments to regulations

*Amendment to Accident Compensation (Definitions) Regulations
2019*

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*Amendment to Injury Prevention, Rehabilitation, and
Compensation (Interest Rate for Late Payment of Levies)
Regulations 2002*

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Schedule 1	7
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New Part 3 inserted into Schedule 1AA

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New Schedule 3A inserted

The Parliament of New Zealand enacts as follows:

1	Title This Act is the Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Act 2021 .	
2	Commencement	5
(1)	Sections 6 and 17 come into force on 1 October 2022 .	
(2)	Sections 12 and 21 come into force on 1 July 2023 .	
(3)	The rest of this Act comes into force 30 days after the date on which it receives the Royal assent.	
3	Principal Act This Act amends the Accident Compensation Act 2001.	10

Part 1

Amendments to principal Act

4	Section 6 amended (Interpretation)	
(1)	In section 6(1), replace the definition of medical practitioner with: medical practitioner means a medical practitioner of a type defined in regulations made under this Act	15
(2)	In section 6(1), definition of moped , replace “Transport (Vehicle and Driver Registration and Licensing) Act 1986” with “Land Transport Act 1998”.	

- (3) In section 6(1), definition of **motorcycle**, replace “Transport (Vehicle and Driver Registration and Licensing) Act 1986” with “Land Transport Act 1998”.

5 Section 17 amended (Ordinarily resident in New Zealand)

After section 17(5), insert:

- (6) In this section,— 5
- child**, in relation to—~~a any person described referred to in subsection (1)(a)~~
~~(1)(b)(i) or (ii) or (4)(a),—~~
- (a) means a child who, at the date of that child’s injury,— 10
- (i) was aged under 18, or was aged under 21 and was in full-time study at a place of education; and
- (ii) either— 15
- (A) was that person’s natural or adopted child; or
- (B) would ordinarily have been regarded as that person’s child because they were the child of that person’s spouse or partner, and that person acted as their parent; and
- (b) does not include an other dependant of that person
- other dependant**, in relation to—~~a any person described referred to in subsection (1)(a)~~
~~(1)(b)(i) or (ii) or (4)(a), means a dependant who, at the date of that dependant’s injury,—~~
- (a) was financially dependent on that person because of the dependant’s mental or physical condition; and 20
- (b) was not that person’s spouse, partner, or child.

6 Section 25 amended (Accident)

- (1) After section 25(1)(e), insert: 25
- (f) an application of a force or resistance internal to the human body at any time from the onset of labour to the completion of delivery that results in an injury described in **Schedule 3A** to a person who gives birth.
- (2) After section 25(2), insert:
- (2A) Subsection (2)(a) does not apply to an accident of the kind described in ~~subsection (1)(f)~~ **subsection (1)(f)**. 30

6A New section 25A inserted (Review of operation of Schedule 3A)

After section 25, insert:

25A Review of operation of Schedule 3A

- (1) As soon as practicable after the expiry of the period of 3 years beginning on the commencement of the Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Act 2021, the Minister must,— 35

- (a) for the purpose of determining whether any amendments to **Schedule 3A** are necessary or desirable, review the operation of **Schedule 3A** in relation to **section 25(1)(f)** since the date of that commencement; and
- (b) prepare a report of the review that includes recommendations on whether any amendments to **Schedule 3A** are necessary or desirable; and 5
- (c) present a copy of the report to the House of Representatives.
- (2) In preparing the report, the Minister must consult the parties the Minister thinks appropriate.
- 7 Section 26 amended (Personal injury)** 10
In section 26(1A), replace “6%” with “5%”.
- 8 Section 30 amended (Personal injury caused by work-related gradual process, disease, or infection)**
- (1) After section 30(1), insert:
- (1A) Subsection (1)(c) is subject to ~~subsection (2A)~~ **subsection (2A)**. 15
- (2) Repeal section 30(2)(b)(ii).
- (3) Replace section 30(2)(c) with:
- (c) that, if the particular property or characteristic is present in both the person’s employment tasks or environment and non-employment activities or environment, it is more likely that the person’s personal injury was caused as a result of the employment tasks or environment rather than the non-employment activities or environment. 20
- (4) After section 30(2), insert:
- (2A) However, even if it is established that a claimant’s personal injury was caused in the circumstances described in subsection (2), the Corporation may decline the claim if the Corporation establishes that the risk of suffering the personal injury is not significantly greater for persons who— 25
- (a) perform the employment task than it is for persons who do not perform it; or
- (b) are employed in that type of environment than it is for persons who are not. 30
- 9 Section 91 amended (Conduct of initial occupational assessment)**
In section 91(1A), replace “may” with “must”.
- 10 Section 119 amended (Disentitlement for wilfully self-inflicted personal injuries and suicide)** 35
After section 119(3), insert:

- (4) Subsection (1) does not apply if the death was the result of assisted dying in accordance with the End of Life Choice Act 2019.
- 11 Section 173 amended (Estimation of levy)**
In section 173(2)(a), after “at the rate prescribed by regulations”, insert “or the rate as calculated by the method prescribed by regulations”. 5
- 12 Section 250 amended (Penalties and interest due to Corporation in respect of unpaid levies)**
In section 250(1), delete “that is 30 days”.
- 13 Section 267 amended (Board of Corporation)**
In section 267(1), replace “8” with “9”. 10
- 14 Section 329 amended (Regulations relating to levies)**
After section 329(1)(h), insert:
(ha) prescribing the rate of interest payable on any amount exceeding \$1,000 under section 173(2)(a) or the method by which the rate is to be calculated: 15
- 15 Schedule 1AA amended**
In Schedule 1AA,—
(a) insert the Part set out in **Schedule 1** of this Act as the last Part; and
(b) make all necessary consequential amendments.
- 16 Schedule 1 amended** 20
(1) In Schedule 1, clause 25(1A), replace “may” with “must”.
(2) In Schedule 1, after clause 31, insert:
- 31A Use of employment income information in determining earnings**
(1) The Corporation, for the purposes of calculating a claimant’s earnings for any period under this Part, may take into account the claimant’s most recent pre-incapacity employment income information available from the Inland Revenue Department. 25
(2) ~~Subsection (1)~~ **Subclause 1** applies even if that information does not relate to the period immediately before the claimant’s incapacity commenced.
(3) ~~Subsections (1) and (2)~~ **Subclauses 1 and 2** do not affect a claimant’s right under section 134 to apply for a review of the Corporation’s decision as to the amount payable to the claimant for weekly compensation, based on their actual earnings. 30
(4) In this Part, **employment income information** has the same meaning as in section 3(1) of the Tax Administration Act 1994. 35

- (3) In Schedule 1, after clause 49(6), insert:
- (7) In clause 51(2), **earnings** does not include payments of weekly compensation and weekly income compensation under the Veterans' Support Act 2014.

17 New Schedule 3A inserted

After Schedule 3, insert the **Schedule 3A** set out in **Schedule 2** of this Act. 5

Part 2

Consequential amendments to regulations

Amendment to Accident Compensation (Definitions) Regulations 2019

18 Principal regulations

Section 19 amends the Accident Compensation (Definitions) Regulations 2019. 10

19 Regulation 3 amended (Interpretation)

In regulation 3(1), insert in its appropriate alphabetical order:

medical practitioner means a health practitioner who—

- (a) is, or is deemed to be, registered with the Medical Council of New Zealand continued by section 114(1)(a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of medicine; and 15
- (b) holds a current practising certificate

Amendment to Injury Prevention, Rehabilitation, and Compensation (Interest Rate for Late Payment of Levies) Regulations 2002 20

20 Principal regulations

Section 21 amends the Injury Prevention, Rehabilitation, and Compensation (Interest Rate for Late Payment of Levies) Regulations 2002.

21 Regulation 3 amended (Interest rate for late payment of levies) 25

In regulation 3(a), replace “date that is 30 days” with “day”.

Schedule 1
New Part 3 inserted into Schedule 1AA

s 15

Part 3	
Provisions relating to Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Act 2021	5
8 Interpretation	
In this Part, amendment Act means the Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Act 2021 .	
9 Assessment of vocational independence	10
An assessment of a claimant's vocational independence that has been commenced, but not determined, before the commencement of this clause must, on or after that commencement, be considered and determined as if sections 9 and 16(1) of the amendment Act had not been enacted.	
10 Claims for personal injury including hearing loss that have been lodged but not decided	15
(1) This clause applies if, before the commencement of this clause,—	
(a) a person has suffered a personal injury that includes any degree of hearing loss caused by a personal injury described in section 20(2); and	
(b) the person has lodged a claim with the Corporation under section 48 in respect of the personal injury; and	20
(c) the Corporation has not made a decision on the claim.	
(2) On or after the commencement of this clause, the Corporation must make a decision on the claim as if section 7 of the amendment Act had not been enacted.	25
11 Claims for personal injury caused by work-related gradual process, disease, or infection that have been lodged but not decided	
(1) This clause applies if, before the commencement of this clause,—	
(a) a person has suffered a personal injury caused by work-related gradual process, disease, or infection described in section 30; and	30
(b) the person has lodged a claim with the Corporation under section 48 in respect of the personal injury; and	
(c) the Corporation has not made a decision on the claim.	

- (2) On or after the commencement of this clause, the Corporation must make a decision on the claim as if **section 8** of the amendment Act had not been enacted.

Schedule 2
New Schedule 3A inserted

s 17

Schedule 3A
Maternal birth injuries

5

s 25(1)(f)

Birth injuries

Anterior wall prolapse, posterior wall prolapse, or uterine prolapse

Coccyx fracture or dislocation

Labial, vaginal, vulval, clitoral, cervical, rectal, and perineal tears

Levator avulsion

Obstetric anal sphincter injury tears or tears to the perineum, labia, vagina, vulva, clitoris, cervix, rectum, anus, or urethra

Obstetric fistula (including vesicovaginal, colovaginal, and ureterovaginal)

Obstetric haematoma of pelvis

Post-partum uterine inversion

Pubic ramus fracture

Pudendal neuropathy

Ruptured uterus during labour

Symphysis pubis capsule or ligament tear

Uterine prolapse

Legislative history

7 December 2021

Introduction (Bill 103–1)

14 December 2021

First reading and referral to Education and Workforce
Committee