



## COVERSHEET

<b>Minister</b>	Hon Carmel Sepuloni	<b>Portfolio</b>	ACC
<b>Title of Cabinet paper</b>	Proposals for the 2021 Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Bill	<b>Date to be published</b>	27 September 2021

<b>List of documents that have been proactively released</b>		
<b>Date</b>	<b>Title</b>	<b>Author</b>
14 May 2021	Briefing 2021-3677: End of Life Choice Act interactions with the Accident Compensation Act	Ministry of Business, Innovation and Employment
23 June 2021	Briefing 2021-4251: Extending Accident Compensation Scheme cover to obstetric injuries	Ministry of Business, Innovation and Employment
2 July 2021	Briefing 2021-4379: Accident Compensation (Work-Related Injury and Other Matters) Amendment Bill 2021: Final Proposals for your Approval	Ministry of Business, Innovation and Employment
27 July 2021	Briefing 2122-0183: List of Obstetric Injuries	Ministry of Business, Innovation and Employment

### **Information redacted**

### **YES/NO**

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reasons of protecting the confidentiality of advice to Government, free and frank opinions, and privacy of natural persons.



## BRIEFING

### End of Life Choice Act interactions with the Accident Compensation Act

<b>Date:</b>	14 May 2021	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-3677

Action sought		
	Action sought	Deadline
Hon Carmel Sepuloni Minister for ACC	<p><b>Note</b> that a potential anomaly in how the EOLC Act interacts with one of the disentitlement provisions in the AC Act has been identified</p> <p><b>Note</b> that ACC has identified a potential operational interpretation, which would not result in disentitlement for an assisted death.</p> <p><b>Note</b> that although ACC's operational response provides a solution, it would be appropriate to ensure legislative certainty.</p> <p><b>Indicate</b> your preferred option for ensuring legislative certainty around this issue.</p>	21 May 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Hayden Fenwick	Manager, Accident Compensation Policy	04 896 5479	Privacy of natural persons	✓
Emily Pearse	Principal Advisor, Accident Compensation Policy	Privacy of natural persons	n/a	

The following departments/agencies have been consulted
The Accident Compensation Corporation and the Ministry of Health

Minister's office to complete:

- |   |  |
|---|--|
| <input type="checkbox"/> Approved             | <input type="checkbox"/> Declined            |
| <input type="checkbox"/> Noted                | <input type="checkbox"/> Needs change        |
| <input type="checkbox"/> Seen                 | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn           |

Comments



# BRIEFING

## End of Life Choice Act interactions with the Accident Compensation Act

<b>Date:</b>	14 May 2021	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-3677

### Purpose

To provide an update on the interaction between the Accident Compensation Act 2001 (the AC Act) and the End of Life Choice Act 2019 (EOLC Act), and seek your preference for ensuring legislative certainty around this issue.

### Executive summary

Following the 2020 Election, the Accident Compensation Corporation (ACC) signalled in their Briefing to the Incoming Minister (BIM) that there was potentially an anomaly in how the EOLC Act interacts with one of the disentitlement provision in the AC Act.

The issue surrounds a person who has a terminal condition that is covered by the Accident Compensation Scheme (the AC Scheme) and chooses an assisted death under the EOLC Act. Although their condition would be covered by the AC Scheme, there has been some concern that upon a claimant's death their dependants would not be entitled to fatal injury entitlements.

While the Accident Compensation Corporation (ACC) has identified a potential operational interpretation of the AC Act, which would not result in disentitlement for an assisted death, a legislative amendment is recommended to ensure legislative certainty.

### Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** that a draft Cabinet paper titled 'Implementing the End of Life Choice Act and providing for assisted dying services' is currently being circulated by the Minister of Health for Ministerial consultation  
*Noted*
- b **Note** that a potential anomaly in how the EOLC Act interacts with one of the disentitlement provisions in the AC Act has been identified  
*Noted*
- c **Note** that the potential cohort of claimants this may affect is likely to be very small  
*Noted*
- d **Note** that while ACC has identified a potential operational interpretation of the AC Act, which would not result in disentitlement for an assisted death, a legislative amendment is recommended to enhance legislative certainty  
*Noted*

e **Indicate** your preference for amending either the AC Act or the EOLC Act to ensure legislative certainty around this issue

	✓ Preferred
<b>Option 1</b> Amend the AC Act through the upcoming 2021 Accident Compensation Act Amendment Bill <b>[MBIE recommended]</b>	
<b>Option 2</b> Request the Ministry of Health includes this issue as part of the review of the End of Life Choice Act 2019 (likely to be in 2024) <b>[ACC recommended]</b>	

f **Note** that the risk of challenges to ACC's operational interpretation of the AC Act is deemed to be low

*Noted*

g Confidential advice to Government

h **Refer** a copy of this briefing to Minister for Health

Confidential advice to Government

*Referred*



Hayden Fenwick  
**Manager, Accident Compensation Policy**  
 Workplace, Relations & Safety Policy MBIE

*14/05/21*

Hon Carmel Sepuloni  
**Minister for ACC**

*..... / ..... / .....*



## Background

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1. Following the 2020 Election, ACC signalled in their BIM that there was potentially an anomaly in how the EOLC Act interacts with the disentitlement provision in the AC Act.
2. The issue surrounds a person who has a terminal condition that is covered by the AC Scheme and chooses an assisted death under the EOLC Act. Although their condition would be covered by the AC Scheme, there has been some concern that upon a claimant's death their dependants would not be entitled to fatal injury entitlements. This can include a contribution to funeral costs, one-off payments and compensation for loss of income.
3. While the potential cohort of claimants that this could affect is likely to be very small, it would understandably cause distress for the dependants of the deceased if they were disentitled from entitlements available under the AC Scheme.

## EOLC Act

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4. The EOLC Act comes into force on 7 November 2021. The EOLC Act establishes the arrangements needed to enable assisted dying in New Zealand, including the eligibility criteria for people to receive assisted dying, the process that people seeking assisted dying need to follow, entities to support and oversee the provision of assisted dying, and safeguards to ensure that people only receive assisted dying where they meet the criteria.
5. The Ministry of Health (MoH) is responsible for administering the EOLC Act and implementing a system that allows for the provision of assisted dying for eligible people.
6. Section 35 of the EOLC Act provides that "a person who dies as a result of assisted dying, is **for the purposes of any life insurance contract, or any other contract**
  - a. taken to have died as if assisted dying has not been provided; and
  - b. taken to have died from the terminal illness referred to in section 5(1)(c) from which they suffered."
7. This means that a person who dies as a result of assisted dying is taken to have died from the terminal illness from which they suffered, but only for the purpose of a life insurance or other **contract**.

## AC Scheme Disentitlement for wilfully self-inflicted personal injury and suicide

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8. Section 119(1) of the AC Act provides that "the Corporation **must not** provide any entitlements under Schedule 1 for any of the following:
  - (a) a personal injury that a claimant wilfully inflicts on himself or herself, or, with intent to injure himself or herself, causes to be inflicted upon himself or herself
  - (b) the death of a claimant due to an injury inflicted in the circumstances described in paragraph (a)
  - (c) **the death of a claimant due to suicide.**"
9. Since section 119(1) of the AC Act is a statutory disentitlement, and not a contractual one, section 35 of the EOLC Act as drafted arguably does not apply. This potentially means that the dependants of a person who dies as a result of assisted dying would remain disentitled from receiving fatal injury entitlements under the AC Act.

10. The clause that became section 35 of the EOLC Act was intended to prevent assisted dying from having any effect on any entitlements, not only contractual ones. However, the wording was narrowed by the Justice Committee<sup>1</sup>, with no apparent recognition that the narrowing would have any effect on statutory entitlements.

## Operational implications for the AC Scheme

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11. It is both the Ministry of Business, Innovation and Employment (MBIE) and ACC's interpretation that Parliament intended section 119 of the AC Act to provide for two quite separate scenarios or categories:
1. where a person intends to take their own life<sup>2</sup>
  2. where a person deliberately injures themselves, where death may be an outcome but was not the intention<sup>3</sup>.
12. This means that in practice, ACC will only determine a death was the result of suicide (for the purpose of ACC cover) if this is confirmed by a coroner on a claimant's death certificate. Conversely, if a coroner finds a claimant's death was not due to suicide, ACC would not make a contrary finding.
13. As part of the enactment of the EOLC Act, amendments were made to the Coroners Act 2006 to provide that an inquiry by a coroner is not to be opened where a death is the result of assisted dying under the EOLC Act, whereas it would usually be opened where a death is self-inflicted. This means that once the EOLC Act commences, coroners will be unable to make a suicide finding where a death results from assisted dying.
14. In practice, this means that section 119(1) will not be applied by ACC to deny entitlements once the EOLC Act commences. This is because:
- a death through EOLC would not be processed within the criteria in section 119(1)(a) and (b) (because these criteria relate to a person who deliberately injures themselves, where death was not the intention)
  - section 119(1)(c) disentitlement would only apply in the case of a coroner's finding of suicide, and a death under EOLC would not be reported as a suicide by a coroner under the Coroners Act 2006.
15. Free and frank opinions
16. Although the operational response is a credible solution, it would be appropriate to ensure legislative certainty.

## Options for ensuring legislative certainty

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17. Free and frank opinions

<sup>1</sup> <https://www.legislation.govt.nz/bill/member/2017/0269/10.0/d12559880e2.html>

<sup>2</sup> section 119(c) of the AC Act.

<sup>3</sup> section 119(a) and (b) of the AC Act.

18. Given this, a number of alternative options have been considered to enhance legislative certainty, ensuring claimants are not disentitled for an assisted death.

**Option 1: 2021 AC Act Amendment Bill [MBIE recommended]**

19. An amendment Bill for the AC Act is currently being developed, and is likely to include a range of topics. This issue could be included as part of this process, and would ensure the issue is addressed as quickly as possible following the commencement of the EOLC Act.
20. Given ACC's proposed operational interpretation of the legislation and the discretion that ACC will have over this issue, MBIE considered it would be preferable to enhance legislative certainty sooner rather than later.
21. The Amendment Bill would provide this, with a Bill expected to be introduced later this year, and commence in mid-2022 (2021-1656 refers)<sup>4</sup>.

Free and frank opinions

Confidential advice to Government

**Option 2: Request MoH include this issue as part of review of the operation of the EOLC Act [ACC recommended]**

26. Under the EOLC Act, MoH is required to undertake a review of the operations of the EOLC Act<sup>6</sup> and consider whether any amendments are required within three years of its commencement. Given this, MoH is required to undertake a review before November 2024.
27. Requesting that MoH include this issue as part of the review process would allow the EOLC Act to be amended to ensure there are no instances of unintentional disenfranchisement. ACC view this as a more suitable long-term solution than the AC Act amendment.
28. Given the time between the commencement of the EOLC Act and the review of its operation, there is a risk that there could be a challenge to decisions made by ACC on this issue during this time. However, as indicated in paragraphs (11) – (16), the risk of this is likely to be low.

<sup>4</sup> Subject to Parliamentary Council Office and drafting.

<sup>5</sup> section 28(1)(c) of the VS Act.

<sup>6</sup> section 30 of the EOLC Act.

## Next steps

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29. Officials are available to discuss this paper with you.
30. A draft Cabinet paper titled *Implementing the End of Life Choice Act and providing for assisted dying services* is currently being circulated by the Minister of Health for Ministerial consultation. This may provide an opportunity for you to highlight the interaction issues with your Ministerial colleagues. Confidential advice to Government  
Confidential advice to Government  
It may be prudent to raise this issue with your colleagues.
31. Should you wish, material to support discussions with your colleagues (such as talking points) can be provided.





# BRIEFING

## Accident Compensation (Work-Related Injury and Other Matters) Amendment Bill 2021: Final Proposals for your Approval

<b>Date:</b>	2 July 2021	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-4379

Action sought		
	Action sought	Deadline
Hon Carmel Sepuloni <b>Minister for ACC</b>	<ol style="list-style-type: none"> <li><b>Agree</b> to the policy proposals in this briefing</li> <li><b>Agree</b> to include these policy proposals in the 2021 Accident Compensation (Work Related Injury and Other Matters) Amendment Bill</li> <li><b>Agree</b> to also include seven technical proposals in the 2021 Accident Compensation (Work Related Injury and Other Matters) Amendment Bill</li> </ol>	<b>7 July 2021</b>
	<ol style="list-style-type: none"> <li><b>Provide</b> comments (if any) on the attached draft Cabinet paper by 2 August 2021</li> </ol>	<b>2 August 2021</b>
	<ol style="list-style-type: none"> <li><b>Approve</b> the lodgement of the attached draft Cabinet paper on 4 August 2021 for the Cabinet Social Wellbeing Committee meeting on Thursday 11 August 2021</li> </ol>	<b>3 August 2021</b>

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Hayden Fenwick	Manager, Accident Compensation	04 896 5479	Privacy of natural persons	✓
Kayleigh Wiltshire	Senior Policy Advisor	Privacy of natural persons		
Arwen Norrish	Policy Advisor	Privacy of natural persons		

The following departments/agencies have been consulted
ACC

Minister's office to complete:

- |   |  |
|---|--|
| <input type="checkbox"/> Approved             | <input type="checkbox"/> Declined            |
| <input type="checkbox"/> Noted                | <input type="checkbox"/> Needs change        |
| <input type="checkbox"/> Seen                 | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn           |

**Comments**



## BRIEFING

### Accident Compensation (Work-Related Injury and Other Matters) Amendment Bill 2021: Final Proposals for your Approval

<b>Date:</b>	2 July 2021	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-4379

#### Purpose

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This paper seeks:

- your agreement to the final low cost policy proposals for inclusion in the 2021 Accident Compensation (Work-Related Injury and Other Matters) Amendment Bill (the 2021 Amendment Bill), and
- your approval for officials to lodge the attached draft Cabinet paper (subject to your comments) for the Cabinet Social Wellbeing Committee (SWC) meeting on 11 August 2021.

#### Executive summary

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You have agreed to include the following policy items in the 2021 Amendment Bill:

- expanding the AC Scheme to cover obstetric injuries [Briefing 2021-4251 refers]
- amending the *Accident Compensation Act 2001* (the AC Act) to clarify that people who choose assisted dying are not disentitled from the cover of the AC Scheme [Briefing 2021-3677 refers]
- changing the threshold for injury-related hearing loss cover from 6 per cent to 5 per cent [Briefing 2021-3989 refers].

This briefing provides you with our advice on the additional proposals for inclusion in the 2021 Amendment Bill. The policy proposals begin to implement low-cost Labour Party ACC manifesto commitments, and are relatively non-controversial with minimal financial implications to both Government and levy payers. Key stakeholders were consulted on the policy proposals during the targeted consultation the Ministry of Business, Innovation and Employment (MBIE) undertook in March 2021. None signalled that they do not support these proposals. The technical proposals will improve the clarity and general usability of the AC Act: four of these have received Cabinet approval, and three were approved by the previous Minister for ACC.

Subject to your decisions on this briefing, we have provided you with a draft Cabinet paper (attached as **Annex One**) for your comment. Subject to your approval, this Cabinet paper can be lodged on 4 August 2021 for the Cabinet SWC meeting on 11 August 2021.

#### Recommended action

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The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** that Cabinet has approved Confidential advice to Government [REDACTED]
- the 2021 Accident Compensation (Work-Related Injury and Other Matters) Amendment Bill, with a Parliamentary Counsel Office (PCO) category priority of 4 (to be referred to Select Committee in the year)

- Confidential advice to Government

b **Note** that you have agreed to include the following policy items in the 2021 Accident Compensation (Work-Related Injury and Other Matters) Amendment Bill:

- expanding the AC Scheme to cover obstetric injuries [Briefing 2021-4251 refers]
- amending the *Accident Compensation Act 2011* (the AC Act) to clarify that people who choose assisted dying are not disentitled from the cover of the AC Scheme [Briefing 2021-3677 refers]
- reducing the threshold for injury-related hearing loss cover from 6 per cent to 5 per cent [Briefing 2021-3989 refers]

*Noted*

c **Agree** to the following policy proposals, which are:

1. move the evidential burden of proof in the section 30 test back to being on ACC and clarify that the test looks at work tasks or environments, not occupations per se

*Agree / Disagree*

2. require occupational assessors to consider pre-incapacity earnings when undertaking occupational assessments

*Agree/Disagree*

3. increase the size of the ACC Board from no more than eight members to no more than nine

*Agree/Disagree*

d **Agree** to include the following proposals in the 2021 Accident Compensation (Work-Related Injury and Other Matters) Amendment Bill:

Policy proposals

1. move the evidential burden of proof in the section 30 test back to being on ACC and clarify that the test looks at work tasks or environments, not occupations per se

*Agree/Disagree*

2. require occupational assessors to consider pre-incapacity earnings when undertaking occupational assessments

*Agree/Disagree*

3. increase the size of the ACC Board from no more than eight members to no more than nine

*Agree/Disagree*

Technical proposals

4. move the definition of 'medical practitioner' to the *Accident Compensation (Definitions) Regulations 2019*

*Agree/Disagree*

5. update the definitions of 'other dependant' and 'child' to improve clarity of the AC Act

*Agree/Disagree*

6. enable a method to be set in regulations for the rate of interest for levy overpayments on interim assessments

*Agree/Disagree*

7. enable ACC to use the latest employer filing to Inland Revenue (IR) when determining a client's weekly compensation

*Agree/Disagree*

8. align ACC's penalty rules with IR's rules, by charging the one percent monthly interest rate from the date a levy invoice is due, rather than 30 days after the payment is due

*Agree/Disagree*

9. exclude *Veterans' Support Act 2014* weekly compensation top-ups from abatement against ACC's weekly compensation payments

*Agree/Disagree*

10. align the definitions of 'moped' and 'motorcycle' in the AC Act with the definitions in the *Land Transport Act 1998* to ensure legal clarity

*Agree/Disagree*

Next Steps

- e **Note** the timeframe and key milestones for the 2021 Accident Compensation (Work-Related Injury and Other Matters) Amendment Bill

*Noted*

- f **Approve** the lodgement of the attached Cabinet paper for the Cabinet Social Wellbeing Committee meeting on 11 August 2021

*Approve/Not Approve*

- g Confidential advice to Government



Hayden Fenwick  
**Manager, Accident Compensation Policy**  
Labour, Science and Enterprise MBE  
2 July 2021

Hon Carmel Sepuloni  
**Minister for ACC**

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## Background

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1. In December 2020, MBIE briefed you on the ACC portfolio legislative reform work programme [Briefing 2021-1656 refers]. Confidential advice to Government [REDACTED] You indicated that you wished to advance legislative changes in 2021 for items that can be progressed relatively quickly. Confidential advice to Government [REDACTED]
2. Confidential advice to Government [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
3. In June 2021, you have agreed to the following policy proposals for inclusion in the 2021 Amendment Bill. These are:
  - expanding the AC Scheme to cover obstetric injuries [Briefing 2021-4251 refers]
  - amending the AC Act to clarify that people who choose assisted dying are not disentitled from the AC Scheme cover [Briefing 2021-3677 refers]
  - changing the threshold for injury-related hearing loss cover from 6 per cent to 5 per cent [Briefing 2021-3989 refers].
4. Confidential advice to Government [REDACTED] we have also identified several additional proposals that can be included as the first tranche of the reforms in the 2021 Bill, as they are fully developed and can be progressed quickly subject to your approval. The policy proposals begin to implement low-cost Labour Party ACC manifesto commitments, and are relatively non-controversial with minimal financial implications to both Government and levy payers. The technical proposals will improve the clarity and general usability of the AC Act.

## Criteria for assessing the policy proposals

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5. We used MBIE's regulatory stewardship fitness-for-purpose criteria to assess the recommended proposals. The criteria are:
  - **Fairness and accountability:** consistency with the core purpose and principles of the Accident Compensation Scheme (the AC Scheme), equity within the AC Scheme, and ensuring that disparities between the AC Scheme and health and welfare systems are not worsened
  - **Effectiveness:** positive impacts on injury prevention and claimant outcomes (such as rehabilitation)
  - **Efficiency:** administrative impacts for the AC Scheme, efficiency of administration, and resource allocation across system boundaries and financial sustainability
  - **Resilience:** future-proofing the AC Scheme, flexibility and enduring change
6. An assessment summarising how the proposals and the alternatives performed against the criteria outlined above is attached in **Annex Two**.

## These policy proposals begin to deliver on Manifesto commitments

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7. These policy proposals, set out in **Table 1** below, were previously proposed to you as items for inclusion in the upcoming Regulatory Systems Bill No.4 (RSB4) [Briefing 2021-1656 refers].



8. With the exception of changes to the Board size, these proposals deliver on manifesto commitments, and are discussed further below.

**Table 1: Policy proposals recommended for inclusion in the 2021 Amendment Bill**

Policy proposals	Manifesto Commitment?
1. Section 30 test for work-related gradual process, disease, or infection	Yes
2. Pre-incapacity earnings in occupational assessments	Yes
3. Board membership	No

**Clarify the section 30 test for work-related gradual process, disease, or infection cover**

*Changes were made in 2010 to the three-step test for gradual process claims*

9. The AC Act provides cover for work-related gradual process, disease, or infection. These are “gradual onset” personal injuries caused by exposure to a work task or environment. There are two pathways to cover for gradual process injuries; either under a list of specific occupational diseases in Schedule 2 of the AC Act, or through the three-step test in section 30(2). To receive cover under the three-step test, a claimant must have performed a work task, or have been employed in a work environment, that caused or contributed to their personal injury.
10. The three-step test was changed in 2010 with the aim of reducing the number of accepted claims. The previous test (the 2008 test, which was a loosening of the test in the 2001 Act) was considered to have made the AC Scheme more costly, as ACC could be accepting claims for conditions that were more likely to have a non-work cause. ACC had to establish that the work task/environment did not place the claimant at significantly greater risk of developing their injury. A comparison of the 2008 and 2010 provisions is in **Table 2**.

**Table 2: Legislative changes to the three-step test**

	2008	2010	Impact of the 2010 changes
<b>Step One</b>	'A person's employment task or environment has a property or characteristic that caused, or contributed to the cause of, personal injury.'		No change between the two versions of the test.
<b>Step Two</b>	'if the particular property or characteristic is present in both the person's employment tasks or environment and non-employment activities or environment, <b>it is more likely that the person's personal injury was caused as a result of the employment tasks or environment</b> rather than the non-employment activities or environment.'	'... the particular property or characteristic ... <b>is not found to any material extent in the non-employment activities or environment</b> of the person'	The <b>2008</b> test focused on whether the injury was more likely caused by work than non-work activities.  The <b>2010</b> test focused on there being no material exposure from non-work activities.
<b>Step Three</b>	'... <b>the Corporation may decline the claim if the Corporation establishes that the risk of suffering the personal injury is not significantly greater</b> for persons who –  (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.'	'... <b>the risk of suffering the personal injury—</b>  <b>(i) is significantly greater</b> for persons who perform the employment task than for persons who do not perform it; or  <b>(ii) is significantly greater</b> for persons who are employed in that type of environment than for persons who are not.'	The <b>2008</b> test required ACC to actively disprove that the injury risk is significantly greater for people within the occupation than the general population.  The <b>2010</b> test triggers an obligation for ACC to investigate whether the risk is significantly greater for persons who are employed in that type of environment than for persons who are not.

*These changes did not practically tighten eligibility, because of ACC's claim investigation obligations under the AC Act*

11. The evidential burden of proof was moved from ACC to the claimant with the 2010 changes. However, regardless of where the evidential burden of proof lies, ACC is required under section 57(2) of the AC Act to investigate gradual process claims to the extent that is reasonably necessary. Under the three-step test, this includes investigating whether a claimant is at significantly greater risk of sustaining an injury in their employment. This means that the 2010 change did not affect the obligation on ACC to investigate a claim, and did not require claimants to undertake this investigation.
12. Instead, the 2010 change affected how ACC weighs and considers evidence, using a balance of probabilities test. Under the 2010 settings, ACC needs to establish that there **is** a significantly greater risk of suffering a gradual process injury in the person's work environment or in performing the person's work task (on the balance of probabilities) in order to accept a claim. Under the 2008 settings, ACC needed to establish that there **was not** a significantly greater risk (on the balance of probabilities) in order to decline a claim.

*However, these changes may have created a perception that obtaining cover was harder*

13. In practice, where conditions are known and understood, the outcomes of these balance of probabilities assessments are likely to be the same. ACC provided information in 2009 that demonstrated it was not able to identify any claims accepted under the 2008 provisions that would not have been accepted under the previous provisions (the same as those re-introduced in 2010). However, if a new condition is identified where ACC does not have an established basis of knowledge, it is possible that the 2008 provisions could result in different outcomes. This potential impact is based on the possibility of a new condition or type of workplace exposure, so cannot be quantified.
14. There are concerns amongst stakeholder groups, including the New Zealand Professional Firefighters Union and Sawmill Workers Against Poisons, that gradual process cover under the AC Scheme is unfair. Both have raised concerns that it is difficult to obtain cover for occupational illnesses given the evidential requirements and the need to satisfy the cover test.
15. There is no evidence that shows the test disadvantages claimants in general, or these occupations specifically. However, stakeholder concerns do highlight that the legislation lacks transparency on how ACC evaluates claims, and might discourage legitimate claimants from coming forward.

*We recommend returning to the 2008 settings for step two and step three, and clarifying the task- and environment-based nature of the cover test*

16. We recommend returning to the 2008 settings for steps two and three, as this will make it clear that the evidential burden of proof is on ACC by requiring ACC to:
  - establish that the injury risk is not significantly greater for persons in a particular environment or performing a particular task
  - consider non-work and work exposure based on whether the work-related cause is more likely.
17. We also recommend clarifying that ACC's assessment of gradual process claims must focus on a claimant's employment tasks and environments (i.e. the causes of illness), as distinct from their specific occupations. This is consistent with established interpretation and case law. Clarifying this in the AC Act will provide greater transparency on how claimants' exposures are considered, and better enable claimants' access to ACC.
18. These amendments would enhance stakeholder confidence in decision fairness. We have considered alternative options which are detailed in **Annex Two, Table 1**.

### **Require occupational assessors to consider pre-incapacity earnings when undertaking occupational assessments**

19. The requirement for consideration of pre-incapacity earnings in occupational assessments was changed from 'must' to 'may' in 2010. ACC provides vocational rehabilitation to help claimants maintain employment, obtain employment, or become ready for work following an injury. ACC uses occupational and medical assessments to identify the types of work that may be appropriate for the claimant and determine if a claimant is vocationally independent.
20. Vocational independence is achieved when a claimant is assessed as being able to engage in work to which they are suited by reason of their training, experience, or education, and they can work for 30 hours per week or more. Once vocationally independent, a claimant will no longer receive weekly compensation and vocational rehabilitation services.
21. Prior to the 2010 amendments, the AC Act provided that: 'in considering the suitability of the types of work [...] the occupational assessor **must** take into account, among other things, the claimant's earnings before the claimant's incapacity'. In 2010, the word 'must' was changed

to 'may' to make it easier for ACC to decide that a claimant had reached vocational independence. This was considered as a cost containment opportunity [SOC (09) 65 refers].

22. The change to 'may' means that currently it is not mandatory for occupational assessors to take into account a claimant's pre-incapacity earnings when determining suitable work types (and if suitable work is available).

*This change created a perception that vocational rehabilitation may not fairly consider pre-incapacity earnings*

23. Although the 2010 change could enable assessors not to take account of earnings before incapacity, occupational assessors have continued to consider pre-incapacity earnings, and justify any decision not to use those pre-incapacity earnings when advising on suitable job types. This provides a more robust and sustainable basis for rehabilitation decisions, including where decisions are disputed.

*We recommend that you revert back to the pre-2010 test, making pre-incapacity earnings a mandatory consideration*

24. We recommend requiring occupational assessors to consider a claimant's pre-incapacity earnings when determining vocational independence because it would provide legislative and public assurance that ACC is providing fair access to compensation.
25. This option is consistent with ACC's existing operational practice, would be easy to implement and unlikely to incur any cost impact. We have considered alternative options, which are detailed in **Annex Two, Table 2**.

## **Increase the size of the ACC Board from no more than eight members to no more than nine**

*The ACC Board currently has eight members*

26. Under the AC Act, ACC's Board is limited to no more than eight members. You have the responsibility of making appointments to the Board under the *Crown Entities Act 2004*. Your most recent Board appointments in February 2021 were Bella Takiari-Brame, Pat Bowler and Dr Helen Nott.
27. It is important for the Board to have a variety of skills and diversity, given the range of ACC's functions and its role as a Crown Entity to be responsive to Māori as an expression of the Crown's commitment to the Treaty of Waitangi, and New Zealand's role as a signatory to the United Nations Declaration of Indigenous Rights.

*The cap of eight members restricts the ability to appoint a more diverse Board*

28. The cap of eight Board members reduces the ability to develop and maintain key skills and Scheme experience when transitioning between ACC Board members. The cap also increases the difficulty in ensuring appropriate diversity considerations are met.

*We recommend increasing the Board size to improve your ability to appoint a more diverse and representative Board*

29. We recommend increasing the ACC Board from no more than eight members, to no more than nine. This will provide you with increased flexibility to appoint a diverse and representative Board. This will benefit the community, as it will allow for more diversity among members and provide better representation of specialists and stakeholders.

## **Technical proposals to be included in the 2021 Amendment Bill**

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30. We also recommend several technical proposals for inclusion in the 2021 Amendment Bill, which were previously set for inclusion in the *Regulatory Systems (Immigration and Workforce) Amendment Bill (No. 3)* ("RSB3") and in *Regulatory Systems Amendment Bill*

(No. 4) (“RSB4”). They are no longer in the RSB3 and RSB4 as a result of your discussion with officials requesting all proposed changes to the AC Scheme are progressed through a single legislative vehicle.

31. The previous Minister for ACC agreed to the RSB4 items [Briefing 1739 19-20 refers]. **Table 3** below sets out these items.

**Table 3: Previous RSB4 items (Approved by previous Minister for ACC)**

Proposed change	Rationale
1. Move the definition of ‘medical practitioner’ to the <i>Accident Compensation (Definitions) Regulations 2019</i> .	Cabinet previously noted that the definition of ‘medical practitioner’ was not moved to the Definitions Regulations at the time of its implementation [LEG-19-MIN-0109 refers]. Substituting the definition of ‘medical practitioner’ in the Act with a cross-reference to a definition in the Regulations will allow the definition to be more easily updated in future via regulations.
2. Update the definitions of ‘child’ and ‘other dependant’.	<p>The existing definitions of ‘child’ and ‘other dependant’ were introduced in the Act in the context of fatal injury claims and relate to ‘deceased claimants’. However, they are used elsewhere in the AC Act outside of this context. The <i>Accident Compensation Amendment Act 2019</i> extended coverage to the spouses/partners and dependents of employees posted overseas. Prior to this Amendment Act, coverage in the AC Act was only explicitly provided for the employee who was posted overseas.</p> <p>The existing definitions of ‘child’ and ‘other dependant’ are incompatible with this change, as the existing definitions do not cover a ‘child’ or ‘other dependent’ of an employee who was posted overseas. Updating the definitions will fix this problem, as well as providing clarity to a treatment injury provision (section 32(7) of the AC Act) that refers to ‘child’ in the context of a claimant passing an infection in the course of treatment onto family members. This proposal is expected to carry negligible financial implications.</p>
3. Enable regulations to prescribe a method for setting the rate of interest for levy overpayments on interim assessments.	<p>The AC Act currently provides the ability to set a rate for this payment. The rate is currently set at 6 per cent per annum in the <i>Accident Compensation (Work Account Levies) Regulations 2019</i>.</p> <p>Amending the AC Act to enable regulations to prescribe a method for setting the credit interest rate would mean that the rate could change to reflect different circumstances, without amending the Work Account Regulations, making the process more efficient.</p>

32. Cabinet approved the remaining technical proposals (previous RSB3 items) on 24 July 2019 [DEV-19-MIN-0190 refers]. These proposals are detailed in **Table 4**.
33. On 5 May 2021, Cabinet noted that these proposals had received Ministerial agreement to be removed from RSB3 [Briefing 2021-1809 refers] and included in its own upcoming amendment Bill [DEV-21-SUB-0088 refers]. Subject to your approval, these can also be included in the 2021 Amendment Bill.



**Table 4: Previous RSB3 items (approved by Cabinet)**

Proposed change	Rationale
1. Enable ACC to use the latest employer filing to Inland Revenue (IR) when determining a client's weekly compensation.	ACC is shifting to using payment information from Inland Revenue to calculate weekly compensation, but the last earnings paid to a claimant will not always be available from Inland Revenue. Clarifying that ACC can use the most recent employer filings to calculate weekly compensation will address this issue.
2. Align ACC's penalty rules with IR's rules, by charging the one percent monthly interest rate from the date a levy invoice is due, rather than 30 days after the payment is due.	ACC currently applies penalties if a payment is not received one month after the due date. This does not align with the normal practice of charging a penalty on the day after a payment is due (e.g. in the <i>Tax Administration Act 1994</i> ). ACC legislation currently incentivises levy payers to delay payment until one month after an invoice is due and this is a common practice among many large employers.  This proposed change will result in up to \$350 million of levies being paid up to a month earlier than is currently the case, and subsequently an increase in investment income (the exact level of the increase will depend on the investment returns at the time).
3. Exclude <i>Veterans' Support Act 2014</i> (the VS Act) weekly compensation top-up from abatement against ACC's weekly compensation payments.	As VS Act payments are classified as 'earnings' under the AC Act, ACC is required to abate these against ACC weekly compensation payments. This reduces the amount of weekly compensation paid by ACC, so Veterans' Affairs is then required, under the VS Act, to top-up payments again. The weekly compensation costs therefore shift to Veterans' Affairs.  This does not reflect the policy intent of receiving weekly compensation from both agencies. This proposal will address this issue and better give effect to the policy intent.
4. Align the definitions of 'moped' and 'motorcycle' in the AC Act with the definitions in the <i>Land Transport Act 1998</i> (the LTA) to ensure legal clarity	During the drafting of the <i>Accident Compensation (Motor Vehicle Account Levies) Regulations 2019</i> , the definitions of moped and motorcycle in the AC Act were found to refer to the repealed <i>Transport (Vehicle and Driver Registration and Licensing) Act 1986</i> . This was potentially problematic for the definition of 'moped' as there was a significant difference between this definition and the definition in the LTA used for collection purposes by the New Zealand Transport Agency.  This proposed technical change will provide greater legal certainty.

## Consultation

34. We have consulted and worked closely with ACC in developing this briefing paper.
35. We have also sought, through a targeted consultation, views from these external stakeholders on the policy proposals included in this briefing: ACC Futures Coalition (ACC Futures), the New Zealand Council of Trade Unions, Business NZ, New Zealand Professional Firefighters Union and Sawmill Workers Against Poisons Union. None of these stakeholders have signalled that they do not support the proposals.

## Next steps

### *Timeframes for the 2021 Bill*

36. We have attached for your comment a draft Cabinet paper in **Annex One**, which would seek approval for the amendments outlined in this Briefing. Subject to your comments and approval, we can lodge the Cabinet paper on 4 August 2021 for the Cabinet SWC meeting 11 August 2021. This will ensure sufficient time for consultation with your Ministerial colleagues. **Table 5** below outlines the proposed timeframe and provisional key milestones

for progressing the 2021 Amendment Bill. This is subject to Cabinet schedules and decisions, and the Parliamentary Counsel Office.

**Table 5: Timeframe and key milestones (subject to your approval)**

Next Step	Date
Receiving your decision on the briefing and the draft Cabinet paper	5 July 2021
Ministerial consultation starts	9 July 2021
Ministerial consultation ends	2 August 2021
Subject to your approval, Cabinet paper lodged	4 August 2021
SWC	11 August 2021
Date on which final drafting instructions will be sent to the Parliamentary Counsel Office	12 August 2021
Date by which the Bill will be provided to the Ministry of Justice (or the Crown Law Office if applicable) for an assessment of the consistency with the <i>New Zealand Bill of Rights Act 1990</i>	Late November 2021
Dates on which the Bill will be before LEG and Cabinet for approval for introduction	December 2021
Date requested for introduction of the Bill	December 2021
Date of report back from select committee	April 2022
Date of enactment	July 2022
Date of commencement	July/August 2022

37. Officials are available to discuss this briefing with you; we will arrange an appropriate time with your office.

## Annexes

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**Annex One:** Draft Cabinet Paper

**Annex Two:** Assessment of Proposals against Criteria

**Annex One: Draft Cabinet Paper**

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## Annex Two: Assessment of Proposals against Criteria

Table 1: Section 30 test for work-related gradual process, disease or infection cover

Option	Fairness and Accountability	Effectiveness	Efficiency	Resilience
<b>Option 1: Status quo</b>	<b>0</b> Perception of unfairness for claimants to access the AC Scheme, but there is no evidence that the current section 30 test disadvantages claimants.	<b>0</b> Neutral, because in practice, 2010 amendments have not changed outcomes for claimants.	<b>0</b> Neutral, as ACC already has an obligation to investigate claims to the extent reasonably necessary.	<b>0</b> Neutral, as there is no evidence that the current section 30 test disadvantages claimants.
<b>Option 2: Move the evidential burden of proof back to ACC and clarify that the injury is related to a work task, rather than occupation (the proposal)</b>	<b>+</b> Corrects the perception issue will increase transparency, which will better ensure accountability.	<b>0</b> No change identified, because ACC's investigation would remain the same.  May increase claimants' satisfaction by addressing the current perception issue.	<b>0</b> No change, because ACC's operation would remain the same.	<b>+</b> The changes will provide greater transparency in legislation, without incurring additional costs. This will provide certainty in legislation for future claims and could increase stakeholder confidence in ACC's process for future claims.
<b>Option 3: A provision in primary legislation requiring ACC to publish guidance on gradual process</b>	<b>0</b> Not as effective as option 2, because the wording of section 30 would remain the same. The perception issue may still remain.	<b>0</b> No change, because ACC's operation would remain the same, and no change would be made to section 30.	<b>0</b> No change, because ACC's operation would remain the same.	<b>0</b> No change, as it would be the same as option 1.

**Table 2: Consideration of pre-incapacity earnings during occupational assessments**

Option	Fairness and Accountability	Effectiveness	Efficiency	Resilience
<p><b>Option 1: Status quo</b></p>	<p style="text-align: center;"><b>0</b></p> <p>Perception that ACC is not providing fair access to compensation to claimants if their pre-incapacity earnings are not a mandatory consideration by occupational assessors.</p>	<p style="text-align: center;"><b>0</b></p> <p>Neutral, because in practice, the 2010 amendment has not resulted in changes to ACC’s operation.</p>	<p style="text-align: center;"><b>0</b></p> <p>Neutral, as the 2010 amendment has not changed ACC’s practice.</p> <p>Claimants’ pre-incapacity earnings have been considered when they are assessed for full rehabilitation.</p>	<p style="text-align: center;"><b>0</b></p> <p>Neutral, as there is no evidence that the current setting disadvantages claimants.</p>
<p><b>Option 2: Return to pre-2010 where occupational assessors “must” consider pre-incapacity earnings (the proposal)</b></p>	<p style="text-align: center;"><b>+</b></p> <p>Corrects this perception issue will increase transparency, and therefore accountability.</p>	<p style="text-align: center;"><b>0</b></p> <p>No change, because ACC’s operation would remain the same.</p> <p>May increase claimants’ satisfaction by addressing the current perception issue.</p>	<p style="text-align: center;"><b>0</b></p> <p>This option would be easy to implement and unlikely to incur any cost impact, as in practice, ACC’s operational practice would remain the same.</p>	<p style="text-align: center;"><b>+</b></p> <p>This will result in greater clarity for claimants. This is likely an enduring change and a clearer set of rules will better future-proof the AC Scheme.</p>



**Table 3: The size of the ACC Board**

Option	Fairness and Accountability	Effectiveness	Efficiency	Resilience
<b>Option 1: Status quo</b>	Neutral. <b>0</b>	Neutral. <b>0</b>	Neutral. <b>0</b>	Neutral. <b>0</b>
<b>Option 2: Increase the Board from no more than eight members, to no more than nine (the proposal)</b>	<b>+</b> Expected to provide better accountability through a bigger governing body.	<b>+</b> A diverse and representative Board would benefit the community, as it would allow for more diversity among members and provide better representation of specialists and stakeholders.	<b>+</b> Benefit in efficiency of administration as the additional board member may bring in more skills and expertise.  Minor financial implication, such as Board fee and administrative cost (e.g. travel cost of the extra Board member).	<b>+</b> Expected to increase the skills and experience of the board to ensure better governance and the resilience of the Scheme.



## BRIEFING

### List of Obstetric Injuries

<b>Date:</b>	27 July 2021	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2122-0183

Action sought		
	Action sought	Deadline
Hon Carmel Sepuloni <b>Minister for ACC</b>	<b>Agree</b> to include the list of obstetric injuries in the 2021 Accident Compensation Amendment Bill  <b>Forward</b> this briefing to the Minister of Finance	29 July 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Hayden Fenwick	Manager, Accident Compensation Policy	04 896 5479	Privacy of natural persons	✓
Bridget Duley	Principal Policy Advisor, Accident Compensation Policy	Privacy of natural persons		
Kayleigh Wiltshire	Senior Policy Advisor, Accident Compensation Policy	Privacy of natural persons		

The following departments/agencies have been consulted
Accident Compensation Corporation, The Treasury, Ministry of Health

**Minister's office to complete:**

- |   |  |
|---|--|
| <input type="checkbox"/> Approved             | <input type="checkbox"/> Declined            |
| <input type="checkbox"/> Noted                | <input type="checkbox"/> Needs change        |
| <input type="checkbox"/> Seen                 | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn           |

**Comments**



# BRIEFING

## List of Obstetric Injuries

<b>Date:</b>	23 July 2021	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2122-0183

### Purpose

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To seek your agreement to include a list of obstetric injuries, developed through a targeted consultation with medical experts, in the proposed 2021 Accident Compensation Amendment Bill.

### Executive summary

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You received advice [2021-4251 refers] on extending Accident Compensation Scheme (AC Scheme) cover to some obstetric injuries. You agreed to extend cover to a specified list of injuries and directed officials to consult with medical experts to develop the list.

We have now undertaken a consultation process with medical experts and developed a list of obstetric injuries which we recommend including in the 2021 Accident Compensation Act Amendment Bill (the 2021 Amendment Bill). This list meets the agreed scope for injuries caused to birthing parents as a result of mechanical trauma during labour and delivery.

The medical experts also raised risks of expanding cover to obstetric injuries under the AC Scheme, including that our dataset informing our costs could be indicating lower numbers than actual cases in the community, meaning our costs continue to be uncertain. The experts also believe that there are likely many mental injuries resulting from birth injuries that we have no visibility of. They are concerned there is unmet mental health provision in the Health system, for obstetric injuries and more widely, but there is no available data on this. Also, there is a potential lack of pelvic physiotherapy workforce to meet the demand for entitlements, and risks of shifts of pressure on surgeons and other parts of the maternity workforce.

We have also included refined cost implications of the birth injury proposal since the last briefing [2021-4251 refers], in particular the split between the Earners' and Non-Earners' portion of the costs based on Paid Parental Leave data from Inland Revenue.

If you agree to the proposed list of obstetric injuries, this will be included as part of a revised version of the Cabinet paper seeking approval for the 2021 Amendment Bill for your consideration. The Cabinet paper is required to be lodged by 10am on 4 August 2021, for consideration at the Cabinet Social Wellbeing Committee (SWC) on 11 August 2021.

### Recommended action

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The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** that you directed officials to conduct targeted consultation with medical experts to inform the list of covered obstetric injuries to include in the 2021 Accident Compensation Amendment Bill

*Noted*

- b **Agree** to seek Cabinet approval to extend Accident Compensation Scheme cover for obstetric injuries by including the following definition and list of injuries in the 2021 Accident Compensation Amendment Bill (noting the actual wording could change through the drafting process and be further refined through the select committee process):
- a. **Definition:** *“the mechanical trauma caused by labour and delivery resulting in an acute obstetric injury suffered by the birthing parent as described in the list...”*
  - b. Levator avulsion
  - c. Uterine prolapse
  - d. Obstetric fistula (includes vesico-vaginal, colo-vaginal and uretero-vaginal)
  - e. Labial, vaginal, vulval, clitoral, cervical, rectal and perineal tears
  - f. Ruptured uterus during labour
  - g. Obstetric haematoma of pelvis
  - h. Pudendal neuropathy

*Agree / Disagree*

- c **Note** that subject to b, these changes will be included in the 2021 Amendment Bill Cabinet paper, for consideration at SWC on 11 August 2021

*Noted*

- d **Note** that we have refined the cost implications of this proposal since we last briefed you [2021-4251 refers], in particular we have revised the Earners’ and Non-Earners’ portion of the cost estimate based on updated Paid Parental Leave data from Inland Revenue

*Noted*

- e **Note** that we now project up to 50 percent of the cost will support non-earners, which amounts to \$13 million per year, up from \$6-7 million per year (being sought as a pre-commitment against the Budget 2022 operating allowance in the 2021 Amendment Bill Cabinet paper)

*Noted*

- f **Note** that the following risks were also highlighted through the targeted consultation with medical experts:

- a. our data of injured birth parents could be too low in comparison to what is seen in practice, therefore costs could be significantly underestimated (particularly in relation to consequential mental injury)
- b. unmet need of mental health injuries and potential lack of pelvic physiotherapists and wider maternity workforce (including surgeons) to meet the demand for AC Scheme cover

*Noted*

- g Free and frank opinions
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

h **Forward** this briefing to the Minister of Finance, given the proposal's updated financial implications and the potential need for a Budget 2022 pre-commitment

*Forward / Do not forward*



Hayden Fenwick  
**Manager, Accident Compensation Policy**  
Labour, Science and Enterprise, MBIE

23 / 07 / 2021

Hon Carmel Sepuloni  
**Minister for ACC**

..... / ..... / .....

## Background

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1. You have previously received advice [2021-4251 refers] on extending AC Scheme cover for obstetric injuries. You agreed to extend cover to a specified list of obstetric injuries caused to birthing parents during labour and delivery. In response to that advice, you directed officials to conduct targeted consultation with medical experts<sup>1</sup> to inform further advice on what injuries to include in the list.
2. This briefing recommends a definition and list of injuries to include in the proposed 2021 Amendment Bill to extend AC Scheme cover to certain obstetric injuries.
3. This briefing also highlights risks raised by experts, including the unmet need of mental health injuries and potential lack of pelvic physiotherapists and wider maternity workforce (including surgeons) to meet the demand for AC Scheme cover. We have also revised the Non-Earners' and Earners' portion of the cost estimate based on updated Paid Parental Leave data from Inland Revenue.

## Consultation with medical experts refined the list of obstetric injuries

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4. We met with three medical experts, most of whom were advisory representatives that ACC engaged with to develop and review their updated guidance on cover for perineal tears and treatment injuries.
5. When discussing which injuries to include, we provided the following scope to medical experts:
  - a. obstetric injuries which have similar characteristics as injuries already covered and,
  - b. injuries resulting from mechanical trauma caused to birthing parents during labour delivery.
6. The key areas of discussion were on what injuries are caused by the mechanical forces of labour and delivery, what clinical terminology to use for the list, what an average injury case looks like and the workforce implications of extending AC Scheme cover. From these discussions, we developed a list using language that is commonly used in practice to make it clearer for health professionals to apply.

### ***A definition and list of injuries would follow existing descriptions of accidents already covered under the AC Act...***

7. We recommend defining the scope of obstetric injuries and including a list of obstetric injuries in the *Accident Compensation Act (2001)* (the AC Act). The definition could highlight the cause of the injury with the following wording: *"the mechanical trauma caused by labour and delivery resulting in an acute obstetric injury suffered by the birthing parent as described in the list..."*
8. In addition to this definition, we recommend including a list of injuries in the Act set out in **Table 1** below.

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<sup>1</sup> Privacy of natural persons

**Table 1: List of Obstetric Injuries**

<ul style="list-style-type: none"><li>• Levator avulsion</li><li>• Uterine prolapse</li><li>• Obstetric fistula (includes vesico-vaginal, colo-vaginal and uretero-vaginal)</li><li>• Labial, vaginal, vulval, clitoral, cervical, rectal and perineal tears</li><li>• Ruptured uterus during labour</li><li>• Obstetric haematoma of pelvis</li><li>• Pudendal neuropathy</li></ul>
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***...and the list would support fairness and equity of cover while balancing the sustainability of the AC Scheme***

9. In developing this list, we have considered the sustainability of the AC Scheme along with fairness and equity of cover. The recommended list of injuries is limited to those caused by the mechanical forces for delivery and labour, and have the same characteristics as other injuries covered as accidents in the AC Scheme (such as tearing and bruising). This proposed list would enable an estimated additional 17,000-18,000 claims for women per year.
10. The experts helped us determine which injuries are *caused* by the mechanical force acting on the body, a key criteria to be considered an accident. This aligns with the objective of supporting fairness and equity of cover in the AC Scheme, as the injuries would share similar characteristics to injuries with existing cover. As a result of this discussion, we have excluded injuries that do not have a direct causative link to labour and delivery.
11. As with any covered injury by the AC Scheme, there may be consequential injuries and whether they will be covered will depend on a causal link. In this case, we have not included most prolapses, as these could be covered anyway as a result of the acute injury (e.g. levator avulsion) being on the list.
12. The largest fiscal risks associated with the proposed cover of obstetric injuries which could have implications for the sustainability of the AC Scheme are the unknown scale of:
  - a. **Consequential injuries**, e.g. prolapses, because there are many contributing factors and it would be difficult to determine if these were caused by childbirth or another contributing factor. While ACC could exclude many of those that happen later in life, because many risk factors contribute to a prolapse (such as aging), it is likely these decisions will be contested and could end up becoming a new pressure point for the AC Scheme.
  - b. **Mental injury resulting from any of the listed injuries** that will also have cover. We do not know the extent of this, however medical experts raised the issue of unmet need in this area.
13. We considered including a time limit to the cover to avoid these risks (e.g. only covering consequential injuries which occurred within a year of the birth), but do not recommend this. This would significantly diverge from how the AC Act provides cover for all other personal injuries caused by accidents. As we are introducing this cover to support fairness and equity of cover, this would not align with that objective as a time limit would be significantly more restrictive.



## Financial implications

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### ***The costs will be met by the Earners' and Non-Earners' accounts, which have levy and Budget implications***

14. As advised previously [2021-4251 refers], you are seeking a Budget 2022 pre-commitment in the 2021 Amendment Bill Cabinet paper to fund the Non-Earners' portion of this proposal. We previously advised you that, based on the available data, 25 per cent of the cost would support non-earners, which amounted to \$6-7 million per year.
15. We now estimate up to 50 per cent of the cost will support non-earners, at a cost of \$13 million per year. This is based on the number of working females in the reproductive age range and updated Paid Parental Leave figures. We have updated our estimates of the division between Earners and Non-Earners portions to be that 50-60 per cent of the costs will support Earners and 40-50 percent Non-Earners.

## Risks

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16. In the targeted consultation, experts raised several risks which we highlight below. We also reiterate the risk that expanding AC Scheme cover to these injuries creates pressure points for further Scheme expansion.

### ***The costs of extending AC Scheme cover to obstetric injuries could be higher than the current estimates due to lacking an accurate picture of demand***

17. In the previous briefing [2021-4251 refers] we highlighted that the cost estimates of extending AC Scheme cover are uncertain, but gave Ministers a sense of their likely order of magnitude.
18. The experts considered the national dataset we used to inform our previous costings, of 30 per cent of birthing parents having perineal trauma from vaginal delivery, was too low. They suggested that, in their experience, it was closer to 85 per cent of births, aligning with international studies<sup>2</sup>.
19. However, experts broadly agreed with our scale of injured parents who would require ongoing support. Data from the Ministry of Health (MoH) indicated that between two and three per cent of vaginal births result in severe injuries (third and fourth degree perineal tears). Experts considered a slightly higher estimate of five per cent that result in severe injuries. All experts agreed that of those severely injured, an estimated five per cent (around 160 injuries per year) would have long term implications which would prevent them from returning to work<sup>3</sup>.
20. By including this list of physical injuries, any mental injuries which are a result of that injury would also be covered. There are unknown costs regarding the level of support required for mental injuries resulting from obstetric injuries. One expert advised that psychosexual counselling is rarely required, but this resource is scarce in New Zealand.
21. There is also an unknown level of unmet need for mental health support more widely in the public health system and expanding AC Scheme cover will not necessarily result in sufficient support to parents experiencing mental injuries.

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<sup>2</sup> Frohlich, J. Kettle, C. 2015: *Perineal Care*. BMJ Clinical Evidence, 2015:1401

<sup>3</sup> This is using the total number of births as 65,000, based on previous information of 55,000-65,000 total births per year. MoH have advised that specifically, the number of vaginal births per year is lower at around 42,000, reducing the number of severe injuries causing long-term implications to be around 60 per year.

***There is potentially an insufficient number of pelvic physios to meet the demand for cover***

22. All of the experts raised concern of a lack of pelvic physiotherapists to support the expanded AC Scheme cover, particularly as specialist post-partum pelvic physiotherapy training is only available in Australia. However, pelvic physiotherapy would predominantly be required for the small percentage of those parents with severe perineal trauma.
23. Experts also highlighted that a risk of expanding AC Scheme cover for these injuries is that providers are incentivised to recommend more expensive surgeries to the pelvic region instead of pelvic physiotherapy, which is likely to be more effective. This is a known issue in other areas of ACC, which will need to be managed by setting clear guidelines for the industry to apply to the cover decisions, as well as good clinical oversight.

***The expansion of AC Scheme cover to obstetric injuries*** Free and frank opinions

24. During our discussions about which injuries are *caused* by the mechanical forces of labour and delivery acting on the body, it has become clearer that the rationale for excluding cover for injuries suffered by children during childbirth could be difficult to defend. Some injuries to children are caused by the same forces of labour and delivery acting on their bodies. While our previous advice highlighted this risk [2021-4251 refers], we bring it to your attention again here because in developing the list of covered obstetric injuries, it has become more apparent that the boundary between those injuries that are and are not covered could be seen as arbitrary, and harder to defend.
25. Once cover is expanded to obstetric injuries caused to the mother, Free and frank opinions
26. As advised previously, providing a list of covered injuries and a scoping definition, rather than only a definition, to some degree mitigates the risk of coverage being unintentionally expanded by the courts. Also, the general public will not necessarily consider injuries suffered by children and their parents during childbirth in the same way. Some of the most severe injuries suffered by children have different characteristics to injuries suffered by birthing parents, even though they are both caused by the forces of labour and delivery. A layperson is more likely to think of an incident that results in the tearing of a person's body as an *accident* compared to a brain injury due to a lack of oxygen at birth.

## **Next steps**

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27. Officials are available to discuss this briefing with you.
28. On 11 August 2021, you will take a paper to SWC seeking approval for the policy proposals [2021-4379 refers] for inclusion in the 2021 Accident Compensation Amendment Bill.
29. Pending your decision on this recommended list of injuries, we will provide you with a final version of the Cabinet paper to lodge by 10am on 4 August 2021.

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<sup>4</sup> In New Zealand, it is estimated that between 50 and 70 babies per year have moderate to severe brain injury at birth due to hypoxic-ischemic encephalopathy. See <https://www.hrc.govt.nz/making-a-difference/impact-stories/saving-babies-around-world>



## BRIEFING

### Extending Accident Compensation Scheme cover to obstetric injuries

<b>Date:</b>	23 June 2021	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-4251

Action sought		
	Action sought	Deadline
Hon Carmel Sepuloni <b>Minister for ACC</b>	<p><b>Agree</b> that AC Scheme cover is extended to some obstetric injuries</p> <p><b>Indicate</b> your preferred option for adding obstetric injuries into the Accident Compensation Act</p> <p><b>Forward</b> this briefing to the Minister of Finance</p>	25 June 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Hayden Fenwick	Manager, Accident Compensation Policy	04 896 5479	Privacy of natural persons	✓
Bridget Duley	Principal Policy Advisor, Accident Compensation Policy		Privacy of natural persons	

The following departments/agencies have been consulted
Accident Compensation Corporation, Ministry of Health, The Treasury

Minister's office to complete:

- |   |  |
|---|--|
| <input type="checkbox"/> Approved             | <input type="checkbox"/> Declined            |
| <input type="checkbox"/> Noted                | <input type="checkbox"/> Needs change        |
| <input type="checkbox"/> Seen                 | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn           |

Comments



# BRIEFING

## Extending Accident Compensation Scheme cover to obstetric injuries

<b>Date:</b>	23 June 2021	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-4251

### Purpose

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This briefing recommends Accident Compensation Scheme (AC Scheme) cover is extended to some obstetric injuries by treating them as accidents.

If you choose to proceed, your preferred option will go into a Cabinet paper seeking approval for its inclusion in the Accident Compensation (Work Related Injury and Other Matters) Amendment Bill 2021, set to be introduced in December 2021.

### Executive summary

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You have asked for advice on achieving a gender rebalancing of access to the AC Scheme, with cover for some obstetric injuries being considered as a first step (in particular severe perineal tears).

While there are a number of drivers causing AC Scheme gender differences, the AC Scheme's focus on accident-related injuries is a key factor. New Zealand's workforce is still highly segregated by gender, and male dominated types of work (such as building and construction) are those where people are more likely to suffer physical injuries caused by accidents.

Achieving a gender rebalancing of access to the AC Scheme by extending cover to some obstetric injuries is a good first step, as obstetric injuries have similar features to injuries already covered that men are more likely to receive cover for (such as tearing, bruising, inflammation, and twisting). A relatively straightforward amendment to the *Accident Compensation Act 2001* (AC Act) is to add obstetric injuries, caused by mechanical forces acting on the body, to the existing cover category: *personal injury caused by accident*. This could add between 17,000 and 18,000 new claims from women per year.

AC Scheme cover would make a positive difference to people suffering injuries during childbirth. The main benefits of AC Scheme cover would be more timely access to surgeries and pelvic physiotherapy.

Due to a lack of reliable data in this area, estimates of the cost of extending AC Scheme cover are uncertain, but provide Ministers with a sense of their likely order of magnitude. We estimate the lifetime cost for one year of injuries to be at least between \$2 million and \$25 million (although costs could exceed this), depending on the option you choose, with 75% of the cost supporting earners and 25% supporting non-earners. The earners portion of this proposal would need to be funded from levies (in the 2024 levy round), and the non-earners' portion would require additional funding from the Crown (potentially between \$6-7 million per year). Given the timing of the

Accident Compensation (Work Related Injury and Other Matters) Amendment Bill 2021, a Budget 2022 pre-commitment will likely be required for the non-earners' portion.

The extension would create new cover boundaries. This means disparities would still be apparent between the AC Scheme and the health and welfare systems. This is likely where future pressure to expand the AC Scheme further will come from. In particular, there is already a strong lobby to extend AC Scheme cover to children that suffer injuries during pregnancy and childbirth, including some lifelong disabilities, such as those caused by hypoxia. The lifetime cost for one year of injuries for this group could be between \$375 million and \$525 million.

We present four options for adding obstetric injuries to the cover category *personal injury caused by accident* in the AC Act. We recommend option 1b: extending cover to a specified list of obstetric injuries caused to birthing parents during labour and delivery. The benefits are greater clarity for claimants and health professionals about what will be covered, costs are easier to quantify and manage, and limited risk cover will unintentionally be extended to the foetus and other conditions. However, there is a risk some injuries that meet the policy rationale of having similar features to injuries already covered will be excluded from the list of covered injuries (most likely for injuries that are rare).

If you choose this option, we will provide further advice on what injuries to include in the list, following targeted consultation with clinical experts.

We do not recommend covering third and fourth degree perineal tears only (option 1a) as this could arbitrarily exclude very similar injuries caused from the same forces acting on the body as perineal tears. This could undermine the policy rationale of extending cover to injuries with similar features to injuries already covered under the AC Scheme.

Options 2 and 3 (not recommended) would provide AC Scheme cover for injuries that meet a legal definition of obstetric injury or allow for obstetric injuries to be covered under an existing definition. These options are not recommended because significant clinical judgement is required to decide what injuries meet the definitions and therefore are (and are not) covered. Any ambiguity in meaning risks inconsistency and decisions reaching the courts.

We also do not recommend providing blanket cover for all third and fourth degree perineal tears as treatment injuries regardless of cause. Perineal tears are most commonly not caused by treatment but the birthing process itself, and therefore do not meet the treatment injury test. Regardless of which option you choose, some obstetric injuries would still be covered as treatment injuries in the same way they are now.

An alternative option, not presented in this advice, is to provide more funding to support maternity services through the welfare, health and disability systems.

Once you have made a decision, we will revise the draft Cabinet paper for you to consider within the next week.

## Recommended action

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The Ministry of Business, Innovation and Employment recommends that you:


- a **Note** that there are gender differences in access to Accident Compensation Scheme cover and entitlements caused by a number of drivers, including a core Scheme design feature of focusing on accident-related injuries

*Noted*

- b **Note** that, if your objective is to rebalance gendered access to the AC Scheme, obstetric injuries are a good place to focus:

- as some obstetric injuries have many similar features to injuries already covered that men are more likely to receive cover for, and
- AC Scheme entitlements will improve the support available to people suffering these injuries

*Noted*

- c Confidential advice to Government
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- d **Note** that extending cover to some obstetric injuries will create new Scheme boundaries, which will likely encourage lobbying for further Scheme expansion, including to children who suffer injuries during childbirth

*Noted*

- e **Agree** that AC Scheme cover is extended to some obstetric injuries (that are not treatment injuries) by adding them to the Accident Compensation Act 2001 under the existing cover category: personal injury caused by accident

*Agree / Disagree*

- f **Note** that, if you agree to recommendation e, the current treatment injury provisions will still apply to some obstetric injuries and the treatment injury legislation will remain unchanged

*Noted*

If you agree to recommendation e:

- g **Indicate** your preference for adding obstetric injuries into the Accident Compensation Act 2001 under the cover category: personal injury caused by accident (select one)

		✓ Preferred
<b>Option 1</b> Extend cover to a specified list of obstetric injuries caused to birthing parents during labour and delivery	<b>Option 1a</b> Third and fourth degree perineal tears only (costing at least \$2 million per year)	
	<b>Option 1b</b> a list of obstetric injuries (eg all perineal tears, obstetric fistulae, pelvic organ prolapse) (costing at least \$25 million per year) <b>[Recommended]</b>	
<b>Option 2</b> Extend cover to all injuries that meet a definition of obstetric injury in the AC Act eg, mechanical trauma caused by labour and delivery (costing at least \$25 million per year)		
<b>Option 3</b> Define foetuses as a 'force external to the body', so all injuries caused by the foetus to the birthing parent during labour and delivery would be considered accidents under the Act (costing at least \$25 million per year)		

If you agree to option 1b:

- h **Direct** officials to consult with clinical experts on options for lists of covered injuries  
*Agree / Disagree*
- i **Note** that due to a lack of reliable data, estimates of the cost of extending AC Scheme cover are uncertain, but provide Ministers with a sense of their likely order of magnitude  
*Noted*
- j **Note** that we estimate 75% of the cost will support earners and 25% will support non-earners, which will be funded by levies and the Crown (taxpayers) respectively  
*Noted*
- k **Note** that the levy funded portion of the costs would be included in the next levy round in 2024  
*Noted*
- l **Note** that the Crown funded portion of the costs will likely need to be sought as a Budget 2022 pre-commitment (around \$6-7 million per year), if this proposal is implemented in the 2021 Accident Compensation Amendment Bill (due to be introduced in December 2021)  
*Noted*
- m **Forward** this briefing to the Minister of Finance, given the proposal's financial implications and the potential need for a Budget 2022 pre-commitment  
*Forward / Do not forward*



n **Agree** that the new cover will take effect on and after the date the Accident Compensation (Work Related Injury and Other Matters) Amendment Bill 2021 is enacted, in accordance with Cabinet's Legislation Guidelines (2018 edition).

**Agree / Disagree**

A handwritten signature in blue ink, appearing to read 'H. C. Fenwick', is written over a light blue horizontal line.


Hayden Fenwick  
**Manager, Accident Compensation Policy**  
Labour, Science and Enterprise, MBE

.23. / .06. / .2021.

Hon Carmel Sepuloni  
**Minister for ACC**  
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## Background

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1. You have previously received advice from ACC [GOV-10264 and GOV-010455 refers] highlighting gender differences in AC Scheme cover and entitlements. In particular, the data shows that women have slightly fewer injuries covered by the Scheme than men (48% compared to 52% of accepted claims respectively), and each claim costs the AC Scheme about a third less on average in entitlements.
2. You have asked for advice on achieving a gender rebalancing of access to the AC Scheme, with cover for some obstetric injuries being considered as a first step (in particular severe perineal tears, as highlighted in recent media coverage). We have therefore focused this advice on rebalancing take up of AC Scheme 'cover' rather than 'entitlements' along gender lines<sup>1</sup>. Confidential advice to Government  

3. This briefing sets out options and advice for extending AC Scheme cover to some obstetric injuries. We define 'obstetric' as the care and treatment of women in childbirth and during the period before and after birth.
4. When assessing options for extending cover, we considered the following criteria:
  - a. Equity – the extent to which the change rebalances the AC Scheme's access, and addresses existing inequities within the AC Scheme and across the social support system
  - b. Coherence – the extent to which the change shifts the illness/accident boundary and works within the structure of the AC Act, and creates exceptions and precedents that could undermine the AC Scheme's primary purpose in the longer term
  - c. Financial sustainability – the impact of the change on levy and tax payers, and financial durability
  - d. Administrative efficiency – how easy/complex is the change to implement.

## Obstetric injuries are a good place to focus to achieve a gender rebalance

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***While there are a number of drivers causing AC Scheme gender differences, the AC Scheme's focus on accident-related injuries is a key factor***

5. The focus on *personal injury caused by accidents*, a core design feature of the AC Scheme, is known to drive gender differences in take up of AC Scheme cover. This is because New Zealand's labour market is still highly segregated by gender, meaning that male and female workers tend to perform different types of work.
6. Male dominated types of work (such as building and construction) are those where people are more likely to suffer physical injuries caused by accidents. Whereas, female dominated types of work (such as teaching, caregiving, healthcare, and administration) are those where people are more likely to suffer mental injuries resulting from bullying, harassment,

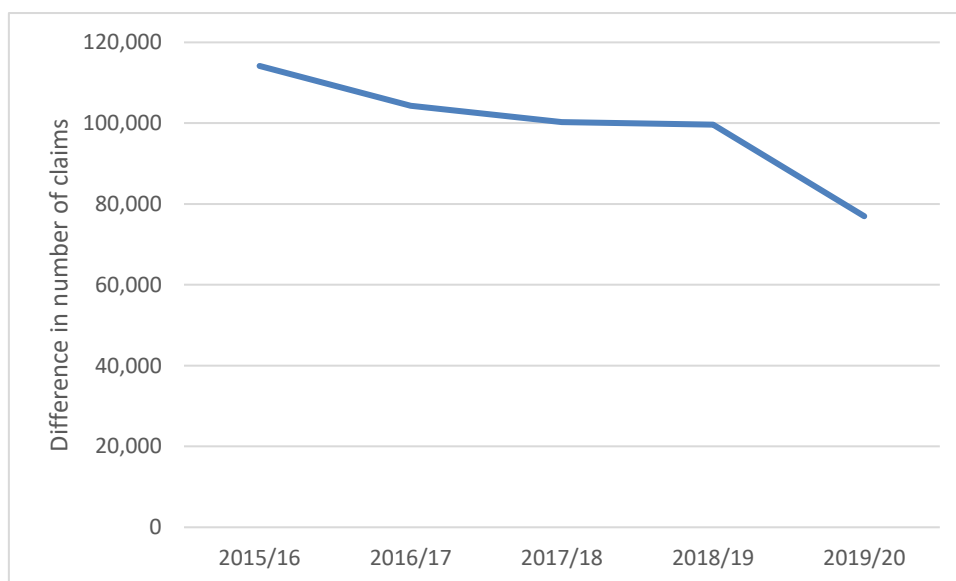
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<sup>1</sup> The causes of gender differences in the cost of AC Scheme entitlements are likely varied, ranging from the severity of injuries to the gender pay gap. We have not looked into these causes in this advice, but rebalancing would likely raise complex questions about the AC Scheme's underlying funding model – whereby levy setting balances a number of principles such as user pays and risk based pricing, and risk and cost sharing across society.

occupational violence, workload stress and care fatigue, which tend not to be eligible for AC Scheme cover (unless they are caused by a single event)<sup>2</sup>.

7. Some long-term trends will potentially shift the gender balance of AC Scheme cover. Over time the workforce is becoming less segregated by gender, and workplaces are becoming less prone to accidents. In recent years, the difference between the number of accepted claims from men and women has been steadily declining. Figure 1 shows a declining trends with a difference of around 114,000 claims in 2015/16 to a difference of around 77,000 claims in 2019/20 (out of a total of around 2 million claims per year). In 'cover' terms, the take-up of AC Scheme cover is slowly rebalancing along gender lines.

**Figure 1: Difference in number of accepted claims from men and women**



***A comprehensive gender rebalancing of AC Scheme cover would likely require significant and complex change to the Scheme***

8. A comprehensive gender rebalancing could include looking at extending cover to injuries people are more likely to suffer from typically female-dominated occupations (such as teaching, caregiving, healthcare and administration). For example, cumulative mental health injuries, which would involve a significant expansion of existing work-related mental injury cover. This would be a departure from past mental injury expansions to the AC Scheme, which have been carefully considered to ensure they remain accident-related and balance the interests of ACC levy payers.
9. Any AC Scheme expansion to injuries that are not caused by accidents would be a significant and complex change to the current purpose of the Scheme. There would likely be significant impact on levy payers, particularly employers that are currently considered low risk, would see their risk ratings and levies increase.

***Extending cover to include some obstetric injuries as accidents is a less complex way of achieving a gender rebalancing of the AC Scheme***

10. Obstetric injuries already have many similar features (such as tearing, bruising, inflammation, and twisting) to injuries men are more likely to suffer from, already covered by the AC Scheme. From a layperson's perspective, it is difficult to see why an incident that results in

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<sup>2</sup> Duncan, D. 2019: *Invisible consequences: The health hazards of "women's work" in New Zealand*. VUW Law Review, 50(2), 341–358.

the tearing of a person's body is not already a *personal injury caused by accident*. This distinguishes injuries like perineal tears from other conditions of gestation and childbirth, such as pre-eclampsia and gestational diabetes.

11. Extending cover to include these obstetric injuries as *personal injury caused by accidents* is a less complex way of rebalancing the AC Scheme more equally along gender lines.
12. ACC covers about 2 million claims each year – about 48% from women. Extending cover to obstetric injuries could add between 17,000 and 18,000 new covered claims from women per year<sup>3</sup>.
13. However, extending cover will create new boundaries between those covered and not covered, which would create new disparities and encourage lobbying for further AC Scheme expansion. In particular, there is a vocal group advocating for AC Scheme cover to be extended to children that suffer injuries during gestation and/or childbirth, including some lifelong disabilities, such as those caused by hypoxia<sup>4</sup> during birth (noting that some of these cases are covered as treatment injuries). Free and frank opinions

***Obstetric injuries (not caused by treatment) are currently not covered because the foetus is legally considered to be a force internal to the human body***

14. Obstetric injuries are currently not covered as they don't meet the definition of *accident* in the AC Act. Unlike other injuries resulting from forces acting on the body, obstetric injuries are not considered to be "the application of a force (including gravity), or resistance, external to the human body"<sup>5</sup>. This is because, until a foetus is born, it is legally considered to be internal to the human body.
15. The legal concept of the foetus being internal to the birthing parent until the child is born has been tested a number of times in the courts<sup>6</sup>. While the courts have had different views on whether the foetus can be viewed as a separate 'person', there is agreement that, for the purposes of deciding whether the child or birthing parent are entitled to AC Scheme cover, the forces being applied to the foetus and parent during birth are *internal* to the parent's body.

***A small number of obstetric injuries can be treatment injuries***

16. Obstetric injuries resulting from treatment provided, or the failure to provide treatment, are entitled to AC Scheme cover. As with all treatment injuries, these are relatively complex for ACC to manage as significant clinical judgement is required to decide if an obstetric injury is *caused* by treatment, or whether the injury is the "ordinary consequence" of treatment and

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<sup>3</sup> Based on the number of injuries recorded when people are discharged from publicly funded hospitals in the Ministry of Health's National Minimum Dataset (using 26 codes from the International Classification of Diseases that relate to labour and delivery).

<sup>4</sup> Hypoxia occurs when a baby receives inadequate oxygen to its brain before, during, or after birth. The condition can lead to brain injury and, may progress into a permanent disorder, such as cerebral palsy, cognitive deficiencies, or hypoxic-ischemic encephalopathy (HIE).

<sup>5</sup> The definition of accident in the AC Act includes: the application of a force external to the body, sudden movement of the body to avoid an external force, a twisting movement of the body, ingestion or inhalation of a substance (other than microorganisms) on a specific occasion, burns or exposure to radiation, absorption of chemicals through the skin, and exposure to extremes of temperature or environment.

<sup>6</sup> For example, see *Deshan Sam v ACC* [2008] HC485-829 and *Harrild v Director of Proceedings* [2003] NZCA 125.

the birthing process (because childbirth is naturally risky). Treatment injury claims can take months to process.

17. In 2020, ACC clarified its approach to providing cover for severe perineal tears as treatment injuries because it noticed the number of claims it was receiving and accepting varied across the country. ACC's practice being ambiguous or imprecise can result in the eligibility criteria being applied inconsistently by health professionals and ACC case managers across the country.
18. After review, ACC discovered that some claims were accepted into the AC Scheme that should not have been. It issued new guidance to clarify and explain the eligibility criteria and approach. This has improved the consistency of ACC's decision-making across the country, and has resulted in a drop in the number of perineal tear injury claims being accepted (from between 21 and 51 per month to less than five per month). Cover is now accepted where there has been a failure to provide treatment (such as an episiotomy, which is a surgical incision to the perineum to enlarge the vaginal opening during childbirth), or treatment has not been appropriately performed. The number of accepted perineal tear treatment injury claims are likely to remain low.
19. Regardless of whether you agree to extend AC Scheme cover to some obstetric injuries, there will still be some obstetric injuries that will be treatment injuries, as is the case now. This would not change under any of the options presented in this advice, although we may see fewer treatment injury claims if there is another route into the AC Scheme, as health professionals would be incentivised to use less complex and quicker claims processes. There are benefits to treatment injury claims being lodged as they can highlight where things are going wrong in the health system and provide opportunities for intervention. ACC will need to put systems in place to ensure obstetric treatment injuries are identified for risk of harm and injury prevention purposes.

## **Obstetric injuries are common, with perineal tears being the most common**

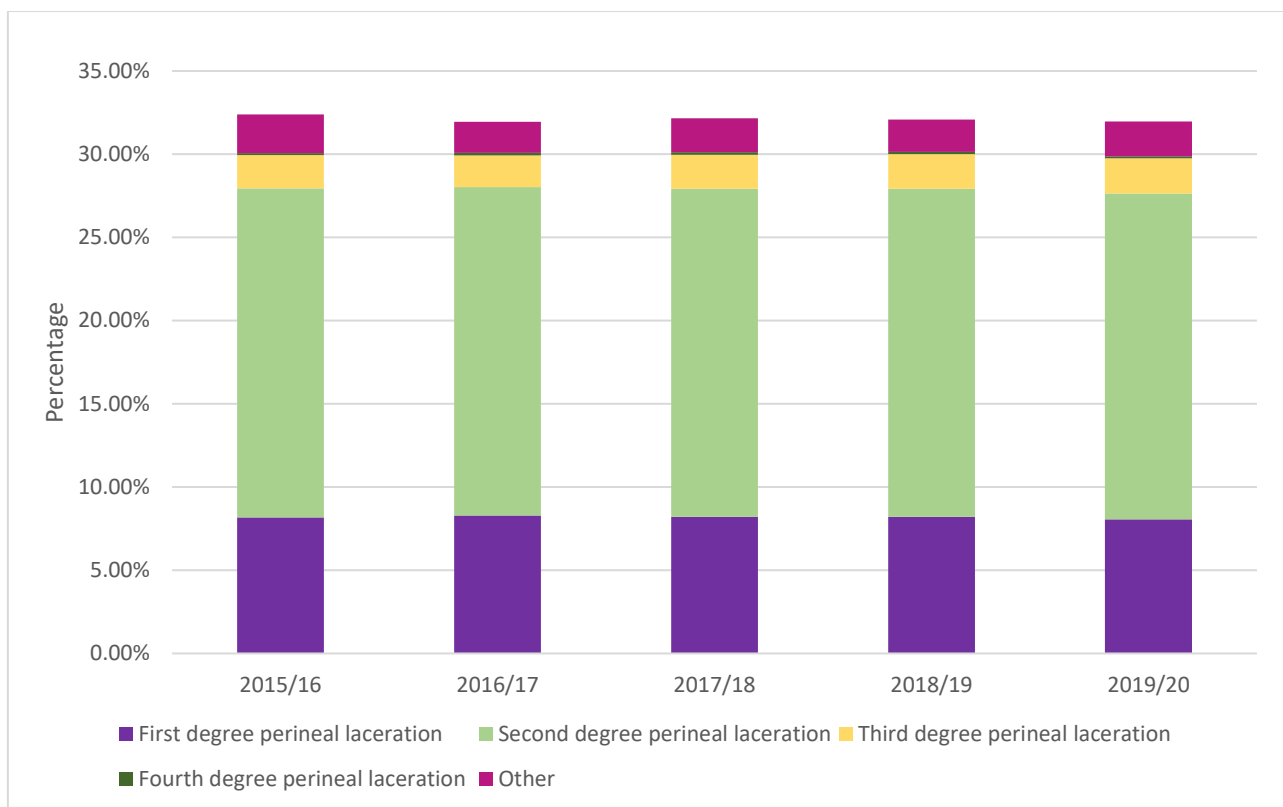
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20. We have based our analysis on data from 26 codes from the International Classification of Diseases that relate to labour and delivery from the Ministry of Health's National Minimum Dataset which records information when people are discharged from publicly funded hospitals. This data does not include home and private births (homebirths make up four to five percent of births).
21. This data shows just over 30% of publicly funded hospital births in New Zealand result in obstetric injuries, the vast majority of these being perineal tears<sup>7</sup>. Overall there are between about 17,000 and 18,000 injuries each year out of about 55,000 to 65,000 births.

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<sup>7</sup> Perineal tears are coded as lacerations, however, we have referred to them as tears throughout this briefing.

**Figure 2: Percentage of births coded with perineal lacerations and other injuries<sup>8</sup>**



22. The majority of perineal tears are first and second degree. Between two and three percent of vaginal births result in third and fourth degree perineal tears.
23. Clinicians expect the number of injuries to gradually increase as the risk factors for perineal tears become more prevalent, such as parents having children later in life and other lifestyle factors<sup>9</sup>.

## **AC Scheme cover would make a positive difference to people suffering obstetric injuries**

### ***Most support for obstetric injuries is currently provided through the health system***

24. In New Zealand, universal access to primary and secondary maternity care is provided through the public health system. The main support for people with obstetric injuries is access to surgeries and physiotherapy. Access is rationed according to need.
25. The welfare system provides limited income support for some people who suffer ongoing disability as a result of obstetric injuries. Support includes the supported living payment, disability allowance, and accommodation supplement. However, eligibility is income-tested based on an individual or couple's income, leaving many parents ineligible. This would likely mean those parents working prior to childbirth, and then finding themselves unable to return

<sup>8</sup> The data represents injury codes as a percentage of births, not individuals discharged, as we are unable to total the number of discharges for any injury because a single discharge could have more than one clinical code reported.

<sup>9</sup> The International Centre for Allied Health Evidence. 2019: *Factors Related to Perineal Tear Occurrence Through Childbirth*. An Evidence Based Review prepared for The Accident Compensation Corporation, Wellington, New Zealand.

to work, experience a significant drop in income as a result of their injuries. We expect the numbers of people finding themselves in this situation to be very low as most people sufficiently recover from their childbirth injuries to be able to return to work.

26. Some birthing parents may be eligible for the Community Services Card, which means people pay less on some health services and prescriptions.

***The main advantages of AC Scheme cover for obstetric injuries would be more timely access to surgeries and access to pelvic physiotherapy***

27. In contrast to the health and welfare systems, people with AC Scheme cover receive certain support on an entitlement basis. This can include hospital, primary and secondary care, weekly compensation proportionate to lost earnings (if the claimant is an earner), assistance with transport to treatment and purchasing pharmaceuticals, and support to return to work.
28. In practice, the vast majority of claim costs for severe perineal tears go towards treatments such as surgeries and contributions towards private pelvic physiotherapy. Only four percent of the total cost of accepted claims in the past two years has arisen from weekly compensation for lost earnings.
29. The main advantages, therefore, of AC Scheme cover for a severe perineal tear is access to surgeries on an entitlement basis (which can be provided by public or private providers, and may therefore involve shorter wait times, even for those who would be eligible for surgery through the health system) and access to pelvic physiotherapy.
30. For those few very severe cases where people are incapacitated for the longer term, the additional benefits of AC Scheme cover would be access to non-means-tested weekly compensation, home help, and rehabilitation.

***Extending AC Scheme cover to obstetric injuries, however, will not address existing system disparities***

31. Disparities in support exist across the AC Scheme and welfare, health and disability systems. Differences exist because these systems and the AC Scheme serve different purposes. The welfare, health and disability systems provide needs-based services to ensure a base standard of care for everyone with eligibility often being means-tested. Whereas, the AC Scheme is a no-fault scheme providing entitlements for personal injury, which in return New Zealanders give up the right to sue for damages.
32. These differences mean the AC Scheme is able to provide greater access to support for people with injuries than other rationed services. Extending AC Scheme cover to include new injuries will move the boundary between those covered and not covered. There will still be disparities across the different systems.
33. An alternative option, not presented in this advice, is to provide more funding to support maternity services through the welfare, health and disability systems.

***We recommend extending cover to a specified list of obstetric injuries caused to birthing parents during labour and delivery***

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34. We present four options for incorporating cover for obstetric injuries into the AC Act. A full analysis of the options is set out in Annex One.



35. All of these options extend cover to obstetric injuries by adding them to the existing cover category: *personal injury caused by accident*. We have not included any options that would extend AC Scheme cover to any injuries regardless of cause, as this would be a fundamental departure from the AC Scheme's core purpose of providing compensation for accidents.
36. The AC Act currently lists six kinds of occurrences as meeting the definition of *accident* in section 25. Options one and two would involve adding obstetric injuries as another 'occurrence' to this list. Option three would involve broadening the interpretation of the first 'occurrence' already on the list to include obstetric injuries (ie, the application of a force (including gravity), or resistance, external to the human body).
37. Also, all of the options presented only include injuries that occur during and as a result of labour and delivery. We have excluded the period before and after the labour and delivery period, therefore injures resulting from ectopic pregnancies and miscarriages would not be covered. The options also restrict cover to injuries resulting from 'mechanical trauma' only, which means injuries resulting from a force to the body only (ie, the forces from labour and delivery). This is because these are the injuries with the features most similar to injuries already covered under the cover category: *personal injury caused by accident*.

Option	Comments
<p><u>Option 1:</u> Extend cover to a specified list of obstetric injuries caused to birthing parents during labour and delivery:</p> <p>Option 1a: third and fourth degree perineal tears only</p> <p>Option 1b: a list of obstetric injuries (eg all perineal tears, obstetric fistulae, pelvic organ prolapse)</p> <p><b><u>RECOMMENDED</u></b></p>	<p>Ministers would have choices to make the list of covered injuries narrow or more comprehensive.</p> <p>The narrower the cover, the more arbitrary it could be perceived eg, if only third and fourth degree perineal tears are given cover but not other obstetric injuries with similar features (such as tearing), it could seem cover is not based on a sound policy rationale. If cover decisions are perceived as arbitrary, it could impact confidence in the AC Scheme, and be difficult to defend boundaries in the long term.</p> <p>However, a specified list of covered injuries reduces the need for clinical judgement by those implementing the AC Act (ACC, health professionals, and the courts). This means cover decisions tend to be more consistently applied and the cost impacts are more predictable and controllable.</p>
<p><u>Option 2:</u> Extend cover to all injuries that meet a definition of obstetric injury in the AC Act eg, mechanical trauma caused by labour and delivery (ie, do not specify the injury types which may be covered as a result)</p>	<p>This option is intended to cover broadly similar injuries as option 1b, but interpreting what is and is not covered would be left to those implementing the AC Act (ACC, health professionals and the courts).</p> <p>Significant clinical judgement would be required to implement this option, which means there would be scope for people to interpret the cover in different ways, and could end up being decided in the courts.</p> <p>However, there would be less risk that some injuries are arbitrarily excluded from the cover, even though they meet the policy rationale for cover (ie, these are likely injuries that are rare).</p> <p>The boundary in cover between the birthing parent and child could be more difficult to defend if the definition is too broad or loose, and the courts could expand coverage.</p>

<p>Option 3: Define foetuses as a 'force external to the body', so all injuries caused by the foetus to the birthing parent during labour and delivery would be considered <i>accidents</i> under the AC Act</p>	<p>This option is also intended to cover broadly similar injuries as option 1b, but like option 2, interpreting what is and is not covered would be left to those implementing the AC Act.</p> <p>This option would provide comprehensive cover for the injuries suffered by the birthing parent during childbirth, but significant clinical judgement would be required to determine whether certain injuries are covered.</p> <p>This may create unintended consequences for the legal status of the foetus in terms of cover, raising the question of whether babies injured during childbirth should also be covered by the AC Scheme.</p> <p>Difficulties may arise in determining at what gestational age a foetus can be considered to exert forces on the body of the birthing parent, with possible consequences for the range of injuries covered.</p>
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***The option of treating all third and fourth degree perineal tears as treatment injuries has not been included in this analysis***

38. Treating all third and fourth degree perineal tears as treatment injuries is not recommended as it would create a problematic precedent in an already complex part of the AC Act that is often being tested in the courts. Treatment injuries should only be considered for cover if they are the result of *treatment*, and are not an "ordinary consequence" of treatment.
39. If third and fourth degree perineal tears were automatically considered to be treatment injuries, perineal tears, which affect large numbers of people, would be characterised as not being an "ordinary consequence" of childbirth, with potential impacts for how "ordinary consequence" is understood in relation to treatment injury more generally.

***On balance we recommend option 1b - extending cover to a specified list of obstetric injuries caused to birthing parents during labour and delivery***

40. The benefits of this approach are:
  - a. clarity for claimants and health professionals about what will be covered
  - b. costs are easier to quantify and manage
  - c. ACC is familiar with the approach, and there is a well-established process already in use
  - d. there is limited risk that cover will unintentionally be extended to the foetus and other conditions.
41. However, there is a risk some injuries will be arbitrarily excluded, although the list can be periodically reviewed to ensure it is up to date. Also, highlighting specific injuries in a list makes the cover boundary more explicit, emphasising those injuries not covered even more.
42. You would have the choice to make the list of covered injuries relatively narrow or more comprehensive. If you choose this option, we will provide further advice on what injuries to include in the list following targeted consultation with clinical experts. We would use the clinical expert advisory representatives ACC engaged with to develop and review the updated guidance on cover for perineal tears and treatment injuries.

43. The targeted consultation would focus on:
- a. What mechanical injuries to the birth parent result from the forces of labour and delivery as opposed to other causes? (ie, where should the boundary be?)
  - b. What is the correct clinical terminology and categorisation?
44. The targeted consultation would not canvas the experts' views on the policy you select. They would have the opportunity to comment on the policy along with everyone else during the select committee process.
45. Our advice back to you on what injuries to include in the list would also consider the impact on levy/tax-payers, the sustainability of the AC Scheme, and equity and fairness.
46. We do not recommend covering third and fourth degree perineal tears only (option 1a) as this could arbitrarily exclude very similar injuries caused from the same mechanical forces acting on the body (although we may recommend a relatively narrow list of obstetric injuries are covered).

***When would cover for obstetric injuries begin?***

47. If you agree to extend AC Scheme cover to some obstetric injuries, we recommend cover is given to injuries occurring on and after the date the Bill commences because:
- a. this is consistent with Cabinet's Legislation Guidelines (2018 edition), which state that legislation should have prospective, not retrospective effect (although there are recognised exceptions to this principle). The policy does not meet the Guidelines' criteria for retrospective legislation, which includes addressing a previous error in legislation and addressing a matter essential to public safety. This is a new policy seeking to expand cover, rather than addressing previous errors.
  - b. this is consistent with the AC Scheme's principle of intergenerational equity. The AC Scheme has a broadly user-pays funding model, whereby levies are set to reflect the level of entitlements that are available under the AC Scheme at a particular point. If people claim cover for injuries incurred before the period covered by levies, these costs are unfairly falling on current and future levy payers
  - c. there is precedent for this approach already in the AC Act (the 2008 introduction of cover for work-related mental injury (s21B) was from the date the Bill was enacted).

48. Privacy of natural persons

49. Providing retrospective cover is possible, but would open the AC Scheme up to financial exposure as we do not have good data on the long term impacts of obstetric injuries. It would also set a precedent for any future expansions of cover to be retrospectively applied, which would be both costly and against the AC Scheme's principles.

Privacy of natural persons

## Financial implications

***Due to a lack of reliable data in this area, estimates of the cost of extending AC Scheme cover are uncertain, but give Ministers a sense of their likely order of magnitude***

50. We project the lifetime cost for one year of injuries from all perineal tears to be at least \$25 million.
51. If you choose to cover only third and fourth degree perineal tears, we project the cost for one year of injuries to be at least \$2 million.
52. The options set out in this advice are therefore costed as follows:

Option	Cost per year
<u>Option 1:</u> Extend cover to a specified list of obstetric injuries caused to birthing parents during labour and delivery:  Option 1a: third and fourth degree perineal tears only  Option 1b: a list of obstetric injuries <b><u>RECOMMENDED</u></b>	  At least \$2 million  At least \$25 million
<u>Option 2:</u> Extend cover to all injuries that meet a definition of obstetric injury in the AC Act	At least \$25 million
<u>Option 3:</u> Define foetuses as a 'force external to the body'	At least \$25 million

53. These estimates likely underestimate the true costs as we have based our costs on data from the Ministry of Health for hospital-based births (between 17,000 and 18,000 injuries out of 55,000 to 65,000 births each year). The number of injuries could be higher as international research indicates an injury rate of up to 85% of births<sup>11</sup>.
54. In addition, there will likely be cost impacts associated with other injuries that require ongoing surgical and non-surgical treatment and rehabilitation, and/or those where women suffer consequential mental trauma.
55. Also, if you choose to cover only third and fourth degree perineal tears, there will be an incentive for clinicians to grade second degree perineal tears as third degree tears if it means their clients will receive ACC cover. This is a well-reported behavioural response in the Scheme when clinical thresholds are set.
56. The costs of treating these injuries have been based on past successful ACC treatment injury claims. These claims draw on a small sample (about 1,500 claims over the past five years), and therefore may not reflect the same profile of all cases. For this reason, we have only included the costs of perineal tears at this stage.
57. Also, we have assumed the future birth rate and injury rate will remain the same, and there is negligible difference in rates between earners and non-earners, whereas this may not be the case. Further analysis is required to refine this.
58. We have assumed there will be no retrospective assessment or reimbursement for past injuries.

<sup>11</sup> Frohlich, J. Kettle, C. 2015: *Perineal Care*. BMJ Clinical Evidence, 2015:1401.

***The costs will be met by the Earners and Non-Earners accounts, which have levy and Budget implications***

59. We estimate 75% of the costs will support earners and 25% non-earners based on the number of working females in the reproductive age range.
60. The earners portion will need to be funded from levies, and the non-earners portion will need new funding from the Crown.
61. Given consultation on the current levy round is about to begin, the earners portion of this proposal would need to be included in the next levy round in three years (consultation commencing in 2024), as ACC can only consult on the levy cost of existing Scheme settings. In the interim, ACC would pay for entitlements from its existing fund. The benefit of this approach is that ACC would have good data on the costs of covering obstetric injuries when it does include this proposal in next levy round (applying from the 2025/26 financial year).
62. The non-earners portion of this proposal would need new funding from the Crown (taxpayers). Given the timing of the Accident Compensation (Work Related Injury and Other Matters) Amendment Bill 2021, a Budget 2022 pre-commitment, possibly for \$6-7 million per year, will likely be required.
63. Given the possible need for a Budget 2022 pre-commitment, we recommend this briefing is forwarded to the Minister of Finance.

***The cost of expanding the AC Scheme to babies that suffer injuries during birth would be significant***

64. As discussed earlier, extending cover to parents that suffer injuries during childbirth will create a new boundary with children that suffer injuries during gestation and/or childbirth.
65. If further cover expansion to this group was implemented, the lifetime cost of each case ranges from between \$1 million and \$40 million (an average of \$7.5 million). If we assume there are between 50 and 70 babies born per year with hypoxic-ischemic encephalopathy<sup>12</sup>, the lifetime cost for one year of injuries would be between \$375 million and \$525 million each year (not including those already covered as treatment injuries).

## **Next steps**

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66. In August 2021, you will take a paper to Cabinet seeking approval to the policy proposals for inclusion in the 2021 Accident Compensation Amendment Bill, including your preferred option for extending AC Scheme cover to obstetric injuries (if any).
67. Once you have made a decision, we will revise the draft Cabinet paper for you to consider within the next week.
68. If you agree to option 1b, we will undertake targeted consultation over the next two weeks. This could occur concurrently with Ministerial consultation on the draft Cabinet paper.
69. We have also begun the necessary regulatory impact analysis to accompany this proposal through Cabinet. We will provide you with a Regulatory Impact Statement for this proposal in July.

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<sup>12</sup> See <https://www.hrc.govt.nz/making-a-difference/impact-stories/saving-babies-around-world>.

**Annexes**

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Annex One: Analysis of options to extend AC Scheme cover to obstetric injuries

## Annex One: Analysis of options to extend AC Scheme cover to obstetric injuries

The options presented in this advice for expanding cover have been assessed against the following objectives:

- Equity – the extent to which the change rebalances the AC Scheme’s access, and addresses existing inequities within the AC Scheme (and across the social support system)
- Coherence – the extent to which the change shifts the illness/accident boundary and works within the structure of the AC Act, and creates exceptions and precedents that could undermine the AC Scheme’s primary purpose in the longer term
- Financial sustainability – the impact of the change on levy and tax payers, and financial durability
- Administrative efficiency – how easy/complex is the change to implement.

Note: impacts in *italics* are unique to one or two options. The remainder are the same for all options, but to varying degrees. This helps highlight the key differences between the options.

Option	Equity	Coherence	Financial sustainability	Administrative efficiency
<p><u>Option 1</u>: Extend cover to a specified list of obstetric injuries caused to birthing parents during labour and delivery:</p> <p>Option 1a: third and fourth degree perineal tears only</p> <p>Option 1b: a list of obstetric injuries (eg all perineal tears, obstetric fistulae, pelvic organ prolapse) <b>(recommended)</b></p>	<p><b>+</b></p> <p>Obstetric injuries, with features similar to injuries already covered under the AC Scheme, are equally covered</p>	<p><b>0</b></p> <p>Works within the structure of the AC Act <i>But new cover boundaries with injuries not on the schedule</i> Clinicians may be incentivised to lodge Personal Injuries Caused by Accident claims, instead of Treatment Injury claims. This may limit ACC’s visibility of trends and reduce opportunities to prevent further treatment injury</p>	<p><b>0</b></p> <p><i>Costs likely to remain relatively contained and predictable</i> But new boundaries will encourage lobbying for further Scheme expansion</p>	<p><b>+</b></p> <p><i>Claims would be quicker and simpler to process</i> <i>Clear boundary means less ambiguity for treatment providers and claimants</i></p>



<p><u>Option 2:</u> Extend cover to all injuries that meet the definition of obstetric injury in the AC Act eg, mechanical trauma caused by labour and delivery (ie, do not specify the injury types which may be covered as a result)</p>	<p style="text-align: center;"><b>+</b></p> <p>Obstetric injuries, with features similar to injuries already covered under the AC Scheme, are equally covered</p>	<p style="text-align: center;"><b>-</b></p> <p>Works within the structure of the AC Act <i>But significant judgement required to determine cover</i></p> <p>Clinicians may be incentivised to lodge Personal Injuries Caused by Accident claims, instead of Treatment Injury claims</p>	<p style="text-align: center;"><b>-</b></p> <p><i>Risk costs could escalate if cover is interpreted more broadly than envisaged</i></p> <p><i>But still contained to labour and delivery, and the known injuries are unlikely to change much over time</i></p> <p>New boundaries will encourage lobbying for further AC Scheme expansion</p>	<p style="text-align: center;"><b>+</b></p> <p>ACC has the systems in place to process new claims</p> <p><i>But cover boundary more ambiguous</i></p> <p><i>May need to be tested through the courts</i></p>
<p><u>Option 3:</u> Define foetuses as a ‘force external to the body’, so all injuries caused by the foetus to the birthing parent during labour and delivery would be considered <i>accidents</i> under the AC Act</p>	<p style="text-align: center;"><b>+</b></p> <p>Obstetric injuries, with features similar to injuries already covered under the AC Scheme, are equally covered</p>	<p style="text-align: center;"><b>--</b></p> <p>Works within the structure of the AC Act <i>But risks a broader interpretation to also include injuries to the birthing parent throughout the pregnancy, and the child</i></p> <p>Clinicians may be incentivised to lodge Personal Injuries Caused by Accident claims, instead of Treatment Injury claims</p>	<p style="text-align: center;"><b>--</b></p> <p><i>Risk costs could significantly escalate if cover is interpreted more broadly than envisaged</i></p> <p>New boundaries will encourage lobbying for further AC Scheme expansion</p>	<p style="text-align: center;"><b>+</b></p> <p>ACC has the systems in place to process new claims</p> <p><i>But cover boundary more ambiguous</i></p> <p><i>May need to be tested through the courts</i></p>

**Key:**

- ++** much better than doing nothing/the status quo
- +** better than doing nothing/the status quo
- 0** about the same as doing nothing/the status quo

- worse than doing nothing/the status quo
- much worse than doing nothing/the status quo

