# Submission of Acclaim Otago (Inc)
# Review Costs and Appeal Regulations

1. We are a disabled persons organisation based in Dunedin, New Zealand. Acclaim Otago (Inc) is a support group and a collective voice of people disabled by injury. We were formed in 2003. We have been raising these very issues for over a decade and now is the time for the MBIE officials and the Minister to address these.

## Our journey before the consultation document was released

2. In 2010, we raised issues with the Office of Disability Issues.[1] This included access to justice which is article 13 of the United Nations Convention on the Rights of Persons with Disabilities. The article provides for "effective access to justice." We said:

> From a legal point of view, disabled people do have full rights of access to justice in New Zealand. However in the context of ACC and its privative provisions, a claimant is often unable to gain either effective representation or effective remedies and access to justice is denied.

3. In relation to the review process, and in particular costs, we submitted:

> **Further Financial Disparity – Costs Awarded in Reviews**
>
> Another key element influencing claimants' access to justice is the limited level of costs available to claimants under the review system. To restrict assistance in preparing often very complex cases involving substantial documentation over periods as long as 20-30 years to only two hours preparation time is a fallacy. The effect of the limit on costs awarded means that even where reasonably brought, a claimant will often have to fund litigation that would otherwise be funded by the opposing side under a judicial system. ACC has no limit on expenditure, and often spends $10,000 or more on a medical report, yet even if a claimant is successful at review, the most that can be awarded for a medical specialist's input is $915, even if multiple reports are required. As a further effect of this, ACC law is one of the least profitable areas available to legal practitioners, and because of this clients often go unrepresented, either because:
>
> > A) They cannot afford a battle they could otherwise afford under a higher court system, due to the limits on costs available
> > B) There are no advocates available to take their case, because the legislation creates a financial disincentive against lawyers gaining expertise in that area

[1]The section on Access to Justice is included in Annex A, but full report is available here: https://acclaimotago.org/wp-content/uploads/2014/07/Acclaim-Otago-for-ODI-Final.pdf at pages 7-13.

4. We recommended seven steps be taken to address this, including:

    a. Trying to increase legal representation of injured people in dealing with ACC.
    b. An independent review system, or allowing claimants direct access to the court system, and
    c. Eliminating the cost barriers at review level because of their negative effects on claimants' access to justice.

5. This submission was ignored, so in 2013 we applied for and received a Shadow Report Award from the New Zealand Law Foundation to produce a shadow report to the United Nations Committee on the Rights of Persons with Disabilities (UNCRPD).

6. We undertook this work and produced a report[2] about the issues people face with ACC. We again raised access to justice. We raised five questions for the United Nations to ask the New Zealand Government about these issues. These were:

> Q1. What steps is the New Zealand Government taking to ensure proper funding for injured people to gain access to justice?
>
> Q2. What steps is the New Zealand Government taking to increase the supply of legal representation for injured people?
>
> Q3. What steps is the New Zealand Government taking to ensure procedural fairness and reliable evidentiary procedures are observed in ACC dispute resolution?
>
> Q4. What steps is the New Zealand Government taking to allow serious complaints against ACC staff members to be escalated and given external oversight?
>
> Q5. What steps is the New Zealand Government taking to ensure that procedural defects in ACC dispute resolution are recorded and resolved on a system-wide level

7. In our interim report, we explained[3]:

> 38. There is disparity in funding medical evidence and legal representation for reviews. ACC fully funds their lawyers, staff, and medical evidence from the pool of money collected from levies and from investments. There is no limit to what ACC can spend in obtaining reports and/or paying lawyers to argue their case...
>
> 40. Injured peoples' costs are limited by regulation to $935 for an expert medical report, $467 for any other sort of expert report and $350 for a legal expert to prepare their case. This has an effect on the market for medical evidence to be prepared on behalf of injured persons (see discussion below at article 17)
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> 41. The New Zealand Parliament is well aware that this creates a barrier to Access to Justice and these set rates have been slowly increased by a succession of

[2] The relevant sections are included at Annex B, but the full report is available here: https://acclaimotago.org/wp-content/uploads/2014/07/Report_to_UN.pdf

[3] https://acclaimotago.org/wp-content/uploads/2014/07/Report_to_UN.pdf at [38] – [43].

> Regulation Review Committees who have sought information on, and considered this regulation. These increases have been ad hoc and do not reflect market rates.
>
> 42. In April 2008, the Department of Labour (the government department responsible for administering ACC) conducted a review of the Review Costs and Appeal Regulations. All but one submitter to this review recommended that the current limits on costs that can be awarded be removed. Most recommended instead that a Reviewer be given the discretion to award reasonable costs.
>
> 43. The Minister ignored the recommendations of both the submitters and the Department of Labour officials. The regulatory limits remain.
>
> [footnotes omitted]

8. The United Nations asked the New Zealand Government to respond to a question in the list of issues. The New Zealand Government denied access to justice was a problem.

9. We then did a survey of injured people to produce evidence of this issue.[4] 85% of respondents believe that the ACC dispute resolution process does not provide access to justice. The systemic breaches of the CRPD identified in the interim report were confirmed. The summary in relation to funding for disputes included the following key points:

> **SUMMARY OF SURVEY DATA**
> Nearly all PwDI believe ACC makes decisions that are wrong. Nearly all want to obtain independent representation and dispute the decision, but the following factors prevent PwDI exercising their rights.
>
> **PwDI pre-dispute situation:** Because of their injury, PwDI are heavily in debt (to community and commercial lenders) before ACC makes its adverse decision. PwDI do not have the ability to pay for representation at the time they receive their adverse decision.
>
> **Private market for representing PwDI:** The long-term effect of the existing funding model (in place since 1992) is market failure, which has resulted in significant barriers for PwDI to privately obtain access to justice.
>
> **Costs awarded pursuant to regulations:** A maximum costs award made in accordance with the law is not adequate to provide access to justice. There are three problems:
>
> (i) timing of the payment (costs are not available until 6-12 months after they are incurred),
> (ii) amount of the payment (the maximum amount is 12.5-30% of the actual cost of the process), and
> (iii) the award not being made (most PwDI disputing ACC's decision had not received a cost award). ACC has discretion to oppose an award of costs, and often do.
>
> **Effect of failure of the legal market:** The effect of the failure of the legal market in the ACC jurisdiction is widespread. It is very difficult for PwDI to obtain representation. The market is not competitive. There is a lack of development of expertise. There is not a pool of qualified and experienced barristers to appoint as judges, so judges are appointed from outside of the jurisdiction, however the Government is finding it difficult to attract judges from other jurisdictions.

[4] See Annex C, the full report is available here: https://acclaimotago.org/wp-content/uploads/2014/08/ACCLAIM-Otago-Survey-Data-for-UNCRPD-Aug-2014.pdf

10. We explained this in our shadow report and recommended that the New Zealand Government:

> reassesses the regulated Review costs system and rates for legal aid after proper consultation with injured people and their representatives, with a requirement that "reasonable" be interpreted in accordance with the CRPD and allowing for full indemnity costs to be awarded against ACC where appropriate;

11. The UN made recommendations to the Government:[5]

> The Committee notes that in New Zealand persons who acquire a disability through injury only have recourse to compensation via the Accident Compensation Corporation. The Committee notes that persons who have suffered injuries are concerned over the lack of access to justice in pursuing their claims. There is concern over the limited amount of legal aid funding which is available and over the exercise of the discretions to award legal costs. There is also concern that the Accident Compensation Corporation machinery lacks a human rights focus.
>
> The Committee recommends that the State party examine the processes for assessing compensation by the Accident Compensation Corporation to ensure that adequate legal aid is available and that its processes are fully accessible to all claimants, and finally to ensure that this mechanism has a human rights focus.

12. The Government's response[6] was:

> This recommendation is accepted to the extent that legal aid is available to all persons who cannot afford a lawyer and are seeking to challenge, through a review, court or tribunal, a decision made by the Accident Compensation Corporation (ACC).
>
> Subject to other Government priorities, consideration will be given to a review of regulations governing costs/expenses for review hearings.

13. In 2015, Acclaim Otago and the University of Otago published "Understanding the Problem."[7] This identified four main barriers to access to justice:

    a. Being Heard,
    b. Access to Medical Evidence,
    c. Access to Representation,
    d. Access to the Law.

14. This was then subject to an independent review by Miriam Dean QC.[8] The independent review concluded that there were significant barriers to access to justice.

15. In 2018, the UN asked the Government to explain:

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[5] http://acclaimotago.org/wp-content/uploads/2014/07/INT_CRPD_COC_NZL_18384_E.doc

[6] http://www.mbie.govt.nz/info-services/business/intellectual-property/copyright/marrakesh-treaty/consultation/new-zealand-government-response-to-the-un-committee-on-the-rights-of-persons-with-disabilities-concluding-observations-june-2015.docx

[7] https://acclaimotago.org/wp-content/uploads/2015/07/Understanding-the-problem-Access-to-Justice-and-ACC-appeals-9-July-2015.pdf

[8] https://acclaimotago.org/wp-content/uploads/independent-review.pdf

> (a) Measures taken to review the processes for assessing compensation by the Accident Compensation Corporation to ensure that adequate legal aid is available and the processes are fully accessible to all claimants, and to ensure that the mechanism has a human rights-based approach

16. The Government's answer was:

> All claimants are entitled to apply for a review of Accident Compensation Corporation (ACC) decisions on cover and entitlements. Following a review decision, there is a right of appeal to the courts. There is no charge to a claimant to apply for a review of an ACC decision, and claimants may be awarded costs... ACC has introduced changes to its dispute resolution process to improve service delivery and promote early resolution of issues. A free, independent navigation service is scheduled to begin by mid-2019. The service is expected to help 4,400 clients per year to navigate its processes when they want to challenge, or better understand, a decision ACC has clear expectations around accessibility for this service, especially to Māori, disabled people and those with language or literacy needs.
>
> The Accident Compensation Act 2001 (the ACC Act) sets out principles for reviewers to: act independently, comply with the principles of natural justice and exercise due diligence in decision-making.

17. We note that despite the direction from the UN to consult with representatives of injured people, and the work Acclaim Otago has done for over a decade on this very issue, we only became aware of this consultation by chance when Warren Forster, a researcher who we have a long standing relationship with, approached us last week to enquire if we were doing a submission.

## Questions 1 and 2: Objectives

18. The objective must be **providing <u>effective access to justice</u> for people**.

19. As can be seen, we have spent over a decade raising these issues. The time for improving, or making something adequate is well behind us. A meaningful contribution fails to make any difference if the person does not have the resources to make their own contribution. In 2014, we produced the evidence of this. People are already in debt to commercial and community lenders before they start this process because they have been injured and most have lost at least 20% of their income, and many have lost 100%.

20. The government is required by international law to provide effective access to justice. These must be the words used.

## Questions 3- 5: Categories

21. The application costs are only ever paid if you have an advocate or a lawyer so category 1 and 2 should be combined for representation. There must be a category for evidence and one for 'other' which includes travel and support people for example family members, cultural support, or access support.

## Questions 6 - 7: Application

22. This generally arises when a person seeks representation. This often takes 2 or more hours. We strongly disagree that the increase to $150 is enough. This should be in the vicinity of $300-$600.

## Questions 8-13: Represenation

23. There should be a sliding scale. At the top would be senior lawyers, then junior lawyers, then formal advocate and then family members providing advocacy. These could be set at percentages of lawyer rate, for example 75% for advocates and 50% for informal advocates.

24. The new rates do not reflect appropriate market rates for lawyers and advocates. When we undertook the survey, the average costs were $2000-$4000. That was eight years ago. The costs would have increased by now. A complex case would be five to ten times this ($10,000 to $20,000).

25. The rates should be set to allow most cases to be funded within the cap and the remaining to have a process for exceptional case fees. We have already shared the results from our survey with MBIE officials.

26. Three factors should be used to set the cap that will apply in each case: the representative, the type of case and the work tasks undertaken by the representative. These caps need to be three to five times higher ($7,500 to $12,500) if they are going to include 90% of cases (with the final 10% of cases subject to a separate exceptional case process).

27. We have reviewed the proposal put forward by Warren Forster. We agree with his submission on representation and support the guidelines approach he suggests at Appendix 1 of his submission. Acclaim would be willing to be involved in this type of committee.

28. Finally, we note that for over a decade we have been raising the issues with the effect of these policy decision on the market for legal services. If this is not addressed in a structured, systemic way to allow new people to enter the market for legal services, this will fail completely.

29. We strongly disagree that the proposed new maximums set out in the consultation document will meet the objectives of the legislation. Whilst they will improve access to justice, it will not be in a meaningful way and setting the rates at the levels proposed by MBIE will simply not result in effective access to justice for injured people.

30. We would be happy to be involved in a group to set guidelines for complexity.

## Medical and other reports: Questions 15-18

31. It is not clear if the capped approach would be limited to a total of $4,150, regardless of how many reports and the cost of these to injured people. If this is the intention, then this is entirely inappropriate. This used to be the approach taken by ACC and we raised this with the UN. The New Zealand courts have made it clear that it is per report.

32. The cost is calculated based on one report which costs 7.5 hours at $550 per hour. This estimate in MBIE's proposal is only a guess. Many of our members spend significantly more and some reports can cost over $10,000. Some cases involve multiple reports.

33. In nearly every case where medical evidence is provided, ACC produces more medical evidence which then needs to be taken back to the specialist.

34. At the moment, an example is that the cost of a specialist writing three reports is capped at $3272. Three specialists could be involved in the case and the total that is available would be $9,817. Other reports (for example an occupational assessor) could also be included and the total is well over $10,000. It is wrong for MBIE to provide policy advice to the minister that will result in this backwards step.

35. We strongly disagree with the proposed rate if it is intended to be a cap on all reports and submit it is an appropriate rate per report.

36. The proposed new rates will not, in and of themselves, provide access to medical evidence. Whilst they will increase the costs for some reports, they cap this in an unfair way and are only available months after the cost has been spent. Most injured people cannot carry this cost for 3-6 months. Most injured people simply don't know where to start in obtaining expert evidence.

37. We have reviewed the proposal put forward by Warren Forster. We agree with his submission on medical evidence and support the establishment of the expert evidence trust approach he suggests at Appendix 2 of his submission and would be willing to be involved assisting with the establishment of this.

## Other costs: Questions 19-22

38. We strongly agree that costs should be increased to $1,500 for other costs and this could include travel, accommodation, cultural or access support services, interpreters or anything else.

39. We strongly disagree with leaving the rate for travel at 29c/km. Both AA and IRD set the rate to cover costs associated with the use of a motor vehicle (such as petrol, insurance, wear and tear etc) at 79c/km. We understand that this is reviewed each year on 1 April and will undoubtably increase. It should increase through a guideline committee or be referenced in the law to increase in accordance with the rate set by the IRD.

# Overall proposed changes: Questions 19-22

### The proposed changes will not be effective

40. These are the questions we asked in 2014.

> Q1. What steps is the New Zealand Government taking to ensure proper funding for injured people to gain access to justice?
>
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>
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41. The proposed changes will not ensure proper funding for injured people to gain access to justice.

42. The proposed changes will not increase the supply of legal representation for injured people because they are set so low.

43. The proposed changes will not overcome the barrier of access to medical evidence.

44. The proposed changes will not result in a systemic approach to learning from issues that arise.

### Regular review of regulations

45. The review costs and appeals regulations must be reviewed regularly. This should be done to address inflation and other factors. Again, this could be done by committee for example the proposed guideline committee.

# Overall proposed changes: Questions 19-22

46. We support and endorse the proposal at diagram 2 to proceed directly to ADR unless there is a good reason not to. Even when review applications are lodged, cases should proceed to ADR unless there is a good reason not to. This is the approach in other systems.

47. Our members have used the consensus-based practice of Talk – Meet – Resolve and have found this particularly effective and a good experience.

48. The only problem people face is accessing the service and getting ACC to agree. This remains a barrier. It has existed for years and many injured people go the whole way through the review process unaware of Talk – Meet – Resolve. ACC say they offer it to everyone but in our experience either people are not understanding the offer, or the offer is not actually being made as a matter of course. Certainly many of the people who seek our support are unaware of this option. ACC seem to be acting as a gatekeeper and making it difficult to access this service.

49. Costs for ADR need to be set at the same rate as review in order to provide people a real choice and to allow them to use the service effectively.

## Comment on the ACC Review Process

50. Problems continue with delays in the review process. It now takes more than 6 months from a review application to getting the decision and then even longer to get the costs paid. This was meant to be addressed by having competing review providers but this process still hasn't been fixed. If people can't get it sorted through consensus, they need timely access to an adjudicative process. The tenancy tribunal is administrated by the Ministry of Justice and often takes less than a month to decide cases.

51. In 2017 the Labour Party set out the following policy:[1]

> Consider the future of the review jurisdiction, including the impact of privatisation of the current service, and whether the jurisdiction should now be placed under the umbrella of the Ministry of Justice.

52. It seems like now is the time for the Government to address this.

## Conclusion – Submission of Acclaim Otago

53. Acclaim Otago raised these issues in several fora over a decade ago. To date people disabled by injury's experiences have been ignored. Reports and evidence we have provided have been ignored. The questions asked by the UNCRPD about these issues have been ignored. We find it incredibly frustrating to continually be the 'canary in the coalmine' only to be ignored. The issues around Review Costs and Appeal Regulations have been well and truly documented and it is high time something is actually done about fixing this very obvious barrier to justice.

Dr Denise Powell
President
Acclaim Otago (Inc)
28/3/2022

[1] https://acclaimotago.org/wp-content/uploads/ACC_Policy.pdf

# From The Perspective Of People Injured By Accident

## Submissions to the First New Zealand Report on Implementing the United Nations Convention on The Rights of Persons with Disabilities

A report prepared for Acclaim Otago by
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**December 2010**

## *Article 13 – Access to Justice*

### ***Summary of Response***

From a legal point of view, disabled people do have full rights of access to justice in New Zealand. However in the context of ACC and its privative provisions, a claimant is often unable to gain either effective representation or effective remedies and access to justice is denied.

### ***Comment on Paragraph 127 of Draft Report***

#### *Overview of ACC Review Process*

The scheme contains a limited dispute resolution process, administered by Dispute Resolution Services Ltd. This involves complaints against ACC for breaches of claimants rights, or ACC's obligations, a review of ACC's decision about a code complaint, or a review of ACC's decision on cover or entitlements. Only review decisions about cover or entitlements can be appealed to the District Court. Apart from following this route, claimants are statutorily barred from accessing the courts.[1] S 317 prevents people suing for personal injury. S 133(5) prevents courts and tribunals from hearing cases involving the scheme. If ACC doesn't make a decision and sweeps the matter under the carpet, there is no jurisdiction to hear the review and no access to justice.[2] In addition, there is no right of final appeal to the Supreme Court.[3]

#### *Code of Claimant's Rights*

The Code of Claimant's Rights came into force 1st February 2003 and applies to anyone providing treatment on behalf of, or authorised by, ACC. It seeks to provide claimants with a set of fundamental rights in their dealings with ACC.

The fundamental problem with this Code is that, until 2009, reviewers refused to accept

[1] Section 133(5) Accident Compensation Act

[2] Van Helmond [2006] NZACC 298

[3] Section 163 Accident Compensation Act

that it applied to assessors (as non-treating health-practitioners) meaning that assessors cannot be held accountable for their conduct. Even then, the 2009 decision was only made when a reviewer was confronted with two documents from the Health and Disability Commission and ACC both alleging that remedies under the Code lay with the other party.

Although this was a substantial step in facilitating claimants' access to justice, the progress is hampered because the review tribunal is not a court of record, and so does not bind other reviewers. This means that reviewers can still claim that the Code does not apply to assessors and decline jurisdiction despite the 2009 decision.

In addition, there is a statutory bar to appealing decisions made pursuant to the Code, even on matters of law, jurisdiction or available remedies.[4] This means that effectively, the Code does not guarantee claimant rights unless the reviewer thinks it should. A company wholly owned by ACC employs the reviewers. ACC has given interest free loans totalling millions of dollars to this company.

### *"Intersecting Forms Of Disadvantage" – Financial Control Over Claimants*

A claimant's reliance on ACC for income further compounds the problem of access to justice when the only way to challenge ACC's decision is through legal action. A person who loses their weekly entitlements, and is unable to work, cannot realistically expect to be able to appeal a reviewer's decision when the corporation they seek to challenge has removed their only source of income. This problem is compounded further when it is considered that Dispute Resolution Services Ltd is wholly owned by ACC.

It is accepted that monetary constraints will always limit access to justice in modern society, however when the entity you seek remedy against controls your income, it is submitted that these monetary constraints take on a wholly different character.

Another "intersecting form of disadvantage" faced by claimants is the attitude of the corporation towards perceived "bludgers". In multiple cases, a longstanding battle with ACC results in a deadlock of sorts. Despite established medical evidence, ACC refuses to believe that the claimant is truly injured. This leads them to refuse every request made to them by that claimant; even where ACC have admitted fault (e.g. admitting fault in

[4] S 149(3) Accident Compensation Act

failure to properly pay weekly compensation) or a review decision has directed ACC to do something. ACC deliberately flouts the limited rights accorded to the claimant under the ACC scheme because of their own perception, contrary to medical evidence. This discrimination negatively impacts the day-to-day life of the claimant. This attitude also compounds the financial difficulties that ACC is already able to inflict on a claimant. Again, when faced with a delay of years during which time no income will be forthcoming, claimants' access to justice is often useless in a practical sense.

*Further Financial Disparity – Costs Awarded in Reviews*

Another key element influencing claimants' access to justice is the limited level of costs available to claimants under the review system.[5] To restrict assistance in preparing often very complex cases involving substantial documentation over periods as long as 20-30 years to only two hours preparation time is a fallacy. The effect of the limit on costs awarded means that even where reasonably brought, a claimant will often have to fund litigation that would otherwise be funded by the opposing side under a judicial system. ACC has no limit on expenditure, and often spends $10,000 or more on a medical report, yet even if a claimant is successful at review, the most that can be awarded for a medical specialist's input is $915, even if multiple reports are required. As a further effect of this, ACC law is one of the least profitable areas available to legal practitioners, and because of this clients often go unrepresented, either because:

A) They cannot afford a battle they could otherwise afford under a higher court system, due to the limits on costs available

B) There are no advocates available to take their case, because the legislation creates a financial disincentive against lawyers gaining expertise in that area.

*Systemic Delay*

In light of the previous paragraph, it is also important to note that there is a current estimated delay several years in appeals to the court system, with approximately 1500 cases waiting. This becomes serious when ACC has stopped weekly compensation, and a claimant has no income on which to survive. The cost of delay is significant. Without a hint of exaggeration, houses are repossessed and relationships fail, children lose their parents and victory in the end can be hollow. In many cases, this has induced claimants to

[5] Injury Prevention, Rehabilitation, and Compensation (Review Costs and Appeals) Regulations

accede to the requests of the corporation, usually at the expense of a right guaranteed under the convention such as arbitrary breaches of privacy.

***Comment on Paragraph 128 of Draft Report***

It is submitted that although courthouses have been made accessible, this is useless when ACC will refuse to provide the wheelchair, or fund the footwear required to facilitate a complainant's access.

***Comment on Paragraph 131 of Draft Report***

Drawing comparisons between ACC claimants and people in compulsory care may provide an insight into the flaws of the ACC process.

Whilst the report states that people under compulsory care have statutorily-implemented protection, judicial oversight, court representation and a right to legal advice as safeguards of their rights, this position can be starkly contrasted with that of an ACC claimant.

*Statutorily Implemented Protection*

ACC claimants have access to a Code of Claimants' Rights, however as previous discussion makes clear this is a largely ineffective remedy, that is either ignored or barely acknowledged through the ACC review system. As will be discussed later, legislation such as the Privacy Act 1993 can be easily skirted through the ACC system, providing no safeguards to a claimant's privacy.

*Judicial Oversight*

ACC claimants have no right of direct access to the courts due to the statutory privative provisions. Access to the courts is through Dispute Resolution Services Ltd in the ACC review process. Dispute Resolution Services Ltd is wholly owned by ACC. Furthermore, any appeals to the District Court for judicial oversight are made de novo and no new evidence is considered without the leave of the court. Any procedural defects in the

review process cannot be remedied as the court is only interested in the substantive merit of the case, not procedure. It may also be of note that the same three judges are the only ones to routinely consider ACC cases. Furthermore, as previously discussed ACC has substantial financial control over claimants by their ability to cancel weekly entitlements. This heavily affects the ability of a claimant to seek legal representation. In addition, the limits on costs that can be awarded at review level mean that ACC law is financially unviable for many lawyers, and so there is a severe lack of advocates in the area.

*The Right to Legal Advice*

As previously discussed, there is a severe shortage of advocates in the ACC jurisdiction, mostly because of the lack of financial viability due to the limits on costs available. Many lawyers are shallowly trained in the ACC jurisdiction for this reason. In addition, ACC's financial control over claimants makes the possibility of hiring an advocate remote. There is no compulsory training in ACC disputes resolution, although law schools teach an overview of the scheme.

When these safeguards are further considered in light of the 5-year delay in hearing appeals, the practical ability of a claimant to make use of these bare safeguards is negligible.

***Conclusion: Article 13 Access to justice***

Whilst it is agreed that disabled people have full rights of access to justice, it is submitted that this account of the state of affairs is misleading. The report should be amended to reflect the substantial difficulties that people disabled by injury face in gaining access to justice in the context of the ACC system.

*Access To Justice Issues for People Disabled By Injury*

- Claimants have no right of direct access to the court system.
- Access to the court system is through the Review Tribunal.
- The review tribunal is owned by ACC.
- Reviewers are not bound by decisions of the review tribunal, and appeals are *de novo*, meaning no procedural issues can be resolved, even by an appeal.

- Despite determining a claimant's legal rights that have significant impact on that claimant's quality of life, very few reviewers have legal training or an in-depth understanding of ACC policy and legislation.
- ACC has the ability to withhold weekly compensation during the review process, potentially removing the claimant's sole income.
- The backlog of cases in the District Court mean there could be a 5 year delay in a claimant's case being heard.
- Limits on costs mean less advocates, and higher personal cost to claimant.
- The emotional and physical cost to an injured claimant of fighting ACC take a significant toll on people already suffering from injury.

*Recommended Amendment to Report*

ACC claimants as disabled people have poor access to justice in New Zealand. Claimants do not have direct access to the court system, and access is gained through a wholly-owned subsidiary of ACC. Claimants have difficulty in finding legal representation due to systemic flaws in ACC. Due to the way that appeals are heard from the review system, there is no opportunity to remedy procedural defects that occur in reviews. Reviewers are not bound by decisions of the review tribunal, and this means that the law is inconsistently applied between claimants. There is also a lack of transparency in the review process that means these issues are not readily identifiable. ACC may also have substantial financial control over claimants taking action against ACC, due to their ability to stop weekly entitlements being paid to the claimant.

*Recommended Course of Action*

Before the next report to the UN a review should be conducted of ACC's compliance with Article 13 of the convention with a view to improving claimants' access to justice. Our suggestions include a particular focus on the following:

1. Trying to increase legal representation of injured people in dealing with ACC.
2. An independent review system, or allowing claimants direct access to the court system.
3. Reviewing how procedural defects can be corrected in the review process, potentially by making the review tribunal a court of record.

4. Protecting a claimant's financial position from being exploited by ACC during the justice process.
5. Increasing training of advocates and judges in the ACC jurisdiction to decrease the backlog in cases waiting to be heard.
6. Eliminating the cost barriers at review level because of their negative effects on claimants' access to justice.
7. Ensuring top-level decision makers within ACC should be required to have a knowledge or experience of the particular needs of people disabled by injury, in order to consider the social impacts of decisions.

Acclaim Otago (Inc)

**ADOPTING ISSUES:**

**An INTERIM REPORT to the UNITED NATIONS COMMITTEE on the CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES to be considered by the PRE-SESSIONAL WORKING GROUP to the 12th SESSION**

**(28 February 2014)**

Consensus list of issues at appendix 1.
Endorsements of parties listed at appendix 2.

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# *ARTICLE 13: ACCESS TO JUSTICE*

## RECOMMENDED QUESTIONS FOR THE LIST OF ISSUES

**Q1.** What steps is the New Zealand Government taking to ensure proper funding for injured people to gain access to justice?

**Q2.** What steps is the New Zealand Government taking to increase the supply of legal representation for injured people?

**Q3.** What steps is the New Zealand Government taking to ensure procedural fairness and reliable evidentiary procedures are observed in ACC dispute resolution?

**Q4.** What steps is the New Zealand Government taking to allow serious complaints against ACC staff members to be escalated and given external oversight?

**Q5.** What steps is the New Zealand Government taking to ensure that procedural defects in ACC dispute resolution are recorded and resolved on a system-wide level?

*Article 13 – Access to Justice*

**Relevant Background**

30. There is a distinction to be drawn between "access to law" and "access to justice". This distinction will be addressed at the conclusion of this section.

31. Access to justice for injured people is limited by statute to the review and appeal process set out at Part 5 of the Accident Compensation Act. Part 5 requires a "review" and then allows for an "appeal" to the District Court. Appeal decisions of the District Court can only be appealed further to the High Court on a question of law. A final appeal is available to the Court of Appeal, but there is a statutory bar to appealing to New Zealand's highest court, the Supreme Court.[22] Findings of fact, such as those made in relation to medical evidence, cannot be appealed beyond the District Court.

32. There are three ways to access the review process:

    i. the first is when ACC makes a "decision" on cover and entitlements;

    ii. the second is where there has been a delay in processing a claim for entitlements; and

    iii. the third is when ACC makes a decision about a complaint under the Code of Claimants' Rights.[23]

[22] Accident Compensation Act 2001, s 163(4).
[23] The Code of Claimants' Rights was legislated in 2003 to provide for a gap in Claimants' ability to hold ACC staff members into account for their actions.

33. Fairway Resolution, the organisation contracted to manage ACC's obligations under Part 5 of the Accident Compensation Act, processes about 10,000 ACC disputes every year.[24]

34. The review process is meant to be an informal hearing, whereby an independent person ("a reviewer") puts aside ACC's decision, and ACC's policy, and makes the decision afresh by following the statute. There are commonly discrepancies between ACC's policy and the precise wording of its governing legislation. These differences in interpretation can be crucial, for example in determining the extent of a claimant's obligations under section 72 of the Act. ACC has a discretionary power under section 117(3) to cease entitlements to a person if it decides that someone has not met those obligations.

35. After the hearing, the reviewer makes a decision on the substantive dispute, and on "costs" of the process. The costs that can be awarded by a reviewer to an injured person are limited by regulation.[25] These limits include limiting preparation for review to 2 hours, and limiting costs for travel to $153. There are no direct legislative limits on what ACC can spend on obtaining medical evidence or lawyers to support their decisions at review.

36. Once the reviewer has made a decision, there is a right of appeal to the District Court if the review related to (i) a decision, or (ii) a delay in processing a claim for entitlements. This is a *de novo* appeal so procedural problems, including those to do with the admission of relevant evidence or the conduct of the review hearing, are ignored by the Court on appeal.[26]

[24] Dispute Resolution Services Limited Annual Report (2010), page 17; the number changes every year, it was rising in the years to 2010, but seems to have settled or even dropped slightly. This does not include reviews that are lodged with ACC but not continued to Fairway (formerly known as DRSL).
[25] Injury Prevention, Rehabilitation and Compensation (Review Costs and Appeals) Regulation 2002.
[26] See for example *Langdon v ACC* [2007] NZACC 6 at [13].

**Barriers to accessing justice through the review and appeal process**

37. Issues with accessing justice can be broken down into funding, access and procedural issues.

*Funding*

38. There is disparity in funding medical evidence and legal representation for reviews. ACC fully funds their lawyers, staff, and medical evidence from the pool of money collected from levies and from investments. There is no limit to what ACC can spend in obtaining reports and/or paying lawyers to argue their case.

39. Weekly compensation for lost wages is calculated at 80% of a person's pre-injury earnings. Where it appears likely that a person will be entitled to weekly compensation for an extended period, this represents a significant future fiscal liability to ACC. If ACC prioritises reducing monetary outflows from the scheme, in financial terms, it may be cheaper to litigate extensively a claim than pay that claim for its anticipated lifetime. This has a further effect of reducing ACC's outstanding claims liability, meaning that the scheme becomes closer to reaching its stated aim of being fully funded in the near future.

40. Injured peoples' costs are limited by regulation to $935 for an expert medical report, $467 for any other sort of expert report and $350 for a legal expert to prepare their case. This has an effect on the market for medical evidence to be prepared on behalf of injured persons (see discussion below at article 17).

41. The New Zealand Parliament is well aware that this creates a barrier to Access to Justice and these set rates have been slowly increased by a succession of Regulation Review Committees who have sought information on, and considered this regulation.[27] These increases have been *ad hoc* and do not reflect market rates.

42. In April 2008, the Department of Labour (the government department responsible for administering ACC) conducted a review of the Review Costs and Appeal Regulations. All but one submitter to this review recommended that the current limits on costs that can be awarded be removed.[28] Most recommended instead that a Reviewer be given the discretion to award reasonable costs.

43. The Minister ignored the recommendations of both the submitters and the Department of Labour officials. The regulatory limits remain.

44. The state report records that "The government Legal Aid scheme funds legal representation and other assistance to people who would otherwise be unable to afford it."[29] It is correct that the government's legal services agency has discretion to fund representation; however, this is a loan, which the person has to pay back. Legal Aid commonly registers a *caveat* over a recipient's house until Legal Aid has been repaid. The amount that Legal Aid can contribute according to governing legislation does not allow an injured person to fund proper representation.

[27] Report of the Regulations Review Committee Complaints relating to Accident Insurance (Review Costs and Appeals) Regulations 1999, 1999 AJHR I.16W; Activities Report of the Regulations Review Committee 2002, RI.16B at pages 18 and 19; at page 12; Activities Report of the Regulations Review Committee 2003, I.16D Activities of the Regulations Review Committee in 2009 Report of the Regulations Review Committee, I.16E at Annex E. Amendments were made in 2008 and 2010.
[28] Ministerial Briefing Document released by the Department of Labour in response to an Official Information Act request dated 11 September 2008.
[29] State report at page 20, paragraph 76.

45. In 2012, Legal Aid was limited in ACC Reviews and Appeals by the Ministry of Justice.[30] The fixed fees for legal representation are $980 for a review hearing and $810 for an appeal ($1080 if the lawyer was not involved in the review hearing). The Ministry acknowledged the small number of Legal Aid providers in this jurisdiction and noted that setting these low rates would further limit the number of Legal Aid providers who do this work. Lawyers who act for clients who are granted Legal Aid, must not charge the client any other fees and any costs awarded to the client in the hearing are paid to the Legal Aid office.

46. Most experienced lawyers in this jurisdiction charge rates between $200 and $350 per hour and therefore the amount allowed by Legal Aid provides for only 3-4 hours work.

47. People with disabilities, particularly complex mental and physical conditions caused by personal injuries and years of pain, sometimes (for many reasons) require more time to prepare. It is important that their experience with justice include being properly heard. Fixing the amount of time available does not allow for this.

48. In addition, ACC cases are complex. They involve complicated legislation that has evolved over the scheme's lifetime. Some cases entail twenty years or more of dispute, thousands of documents, and it often takes 10-15 times the amount of work allowed for by the scheme. There is no flexibility in the legislation to allow the circumstances to be considered.

[30] New fee framework for civil (ACC) Legal Aid providers, Ministry of Justice, April 2012.

*Effect on the market for legal services for injured people*

49. The impact of the ACC scheme is that New Zealand has had forty years without litigation for personal injury. There is a very small pool of specialists, and the limited costs awarded for success and Legal Aid, has significantly reduced the number of people who can provide specialist legal services to injured New Zealanders in a way that is financially viable. These limitations directly push legal practitioners out of the market for legal services for people with disabilities.

50. Most ACC law specialists are towards the end of their careers and it is concerning that, there is no career path for younger people to become involved in this field. The law schools in New Zealand have not had a dedicated ACC law course, instead it is taught as part of the law of torts, and the Law Society does not have a dedicated ACC course to encourage practitioners to learn more about this field.

51. These limitations on the supply of legal services mean that in practice, there is severely limited access to justice for injured New Zealanders and, as practitioners retire or leave the field, this will get worse. The state report does not acknowledge this despite clear submissions to the contrary.

52. Tens of thousands of adverse decisions are made by ACC each year. Each of these decisions carries a right to review that decision. Approximately 10,000 of these become formal disputes and only a handful of people are in the market providing legal services to these people.

53. Ministry of Justice statistics[31] show that over 50% of appeals involving lawyers are successful, but only around 20% of self-represented litigants are successful. Experience and anecdotal evidence would suggest that there is an even bigger divide in review hearings, although ACC claims that there is no system-wide data regarding the relationship between issues in dispute, representation, review hearings, decisions and outcomes.

54. Issues of funding that prevent access to justice mean that a situation exists whereby, even where litigants are successful, the majority of challenges to ACC's decision-making will fail. Beyond this, many decisions will simply not be challenged. On a system-wide level, these barriers to access to justice therefore represent savings to the scheme and give the appearance that ACC's decision-making is sound.

55. There is also an effect on the legal market in other areas that overlap with ACC. In the field of criminal law, both prosecutors and defence lawyers involved in investigations and prosecutions for fraud do not understand the ACC system upon which the criminal allegations are founded. People facing prosecution are not able to provide an effective defence because of lack of understanding. More must be done to educate the criminal bar about ACC legislation.

56. The privative provisions that should prevent a court sitting in a criminal capacity from making decisions on a person's ACC-related injuries and entitlements[32] are never invoked. Rather than referring

[31] New fee framework for civil (ACC) Legal Aid providers, Ministry of Justice, April 2012.
[32] Accident Compensation Act 2001, s 133(5).

the matters subject to the ACC system back to ACC for a proper decision, the opposite occurs, and a criminal court proceeds through the trial process without resolving the central matter of ACC entitlement until after the person is convicted.

57. When ACC alleges fraud in criminal court, it is reasonable to assume that ACC has decided that a person is not entitled. When claimants have sought to argue this in the past, the reviewer and district court judges "decline" jurisdiction.[33]

58. Similarly, many employment law and industrial relations disputes involve accidents and injuries to workers. The removal of lawyers from the personal injury system has reduced the number of employment law experts who understand that system.

*Procedural problems with access to justice*

59. At review hearings, claimants give an oath and must swear to tell the truth. The ACC representative asks them questions but the injured person (or their representative) has no opportunity to ask any questions of ACC staff.

60. ACC staff are not sworn to tell the truth, and their credibility is assumed. In the course of their submissions, they often give significant verbal evidence that effectively goes unchallenged, acting as both legal representative and witness. At times, the sworn evidence of an injured person is ignored because it is different to what ACC staff said at the hearing, or ACC documents produced by the staff member.

[33] *Gibson v ACC* [2012] NZACC 259 at [3] and [12]-[15].

61. At times, there are issues with ACC staff either deliberately misleading a reviewer, or omitting to provide full and proper information to the reviewer. There is no remedy available when this occurs and reviewers commonly take ACC staff at their word, even when strong assertions are made regarding their behaviour. Complaints lodged pursuant to the Code of Claimants' Rights[34] are ignored as being a separate matter to the substantive issue at hand, and are not investigated by ACC. Further, injured persons cannot sue ACC in tort regarding the management of their case.[35]

62. Review decisions of Code Complaints, including decisions to decline to investigate, cannot be appealed to the Court system.[36]

**Case Study A**

Ms Orange was injured when she fell from a roof in 2000. At the time, she was an ambulance officer. Formerly a very strong woman, holding a 4th dan black belt in Karate, she suffered labral tearing in her hip and shoulder. This went undiagnosed for nearly a decade during which she developed a serious pain syndrome and depression. During this period, Ms Orange continued to volunteer for the ambulance service. ACC was aware of this, but it was not recorded on ACC's medical certificates. The ACC case manager arranged for private investigators to investigate Ms Orange's case by alleging that she saw her "carrying a child" and "pushing a trolley" around a supermarket. ACC was not properly managing the case, they did not know that her labrum was torn and claimed not to know about the voluntary activities with the ambulance despite evidence showing they had been informed and approved. Despite receiving medical advice that Ms Orange was suicidal, the ACC case manager did not send Ms Orange to be assessed for mental injury because, according to internal correspondence, there would be "issues with the fraud investigation" if Ms Orange was found to have mental injury. Finally, after

[34] The Code is set out in the Annex to the state report at page 19, paragraphs 22 and 23.
[35] *Pearce v ACC* (1991) 5 PRNZ 297; *Chalecki v ARCIC* HC Greymouth AP 29/01 10 October 2001; *Robinson v ARCIC* HC CIV 2001-404-2274 [31 Oct 2003]; *Naysmith and Naysmith v ACC* HC WHA Civ 2004-488-627 [20 June 2005] at [82]-[84] takes a slightly different view and suggests it might be possible in negligence, but not for breach of statutory duty.
[36] Accident Compensation Act, s 149(3), *Sinclair v ACC* [2013] NZACC 262 at [4].

two review applications were lodged, ACC sent Ms Orange to be assessed for mental injury cover, but only provided the assessor with a fraction of the medical evidence showing depressive symptoms before the fraud investigation had begun. **ACC then decided not to provide any help and support on the grounds that Ms Orange's mental injuries were caused by their fraud investigation, rather than her injuries**. At the review hearing, ACC was directed by the reviewer to provide her with *all* of the pre-fraud investigation medical evidence. ACC told the reviewer that they had provided all relevant information and, despite Ms Orange giving the reviewer a list of further documents that had not been provided by ACC, the reviewer accepted that ACC had provided everything. The reviewer directed ACC to give the documents that they gave to the reviewer to the medical assessor. Ms Orange complained under the Code of Claimants Rights that ACC should give all of the relevant medical evidence to the reviewer and cannot lie to the reviewer and then rely on their wrongdoing. ACC declined to investigate the breach of Ms Orange's rights. After that, the reviewer declined to direct ACC to investigate the breach of Ms Orange's rights saying there was no jurisdiction to complain because all ACC did was follow the reviewer's direction. Ms Orange appealed the decision to the District Court and although Ms Orange accepted that the Court could not hear the substantive appeal, she asked that the Court direct that the breach of her rights be properly investigated. The Court found it did not have jurisdiction to do so because it cannot hear anything that relates to the Code of Claimants' rights.

63. The time available for a review hearing is usually limited to one hour. Some cases involve 1000 pages of medical evidence and a thirty-year history, some of which is likely to be disputed. Setting cases down for one hour denies people the right to be heard. A situation exists where ACC can drag out the hearing with issues or information that is legally irrelevant. This ensures that the matter cannot be concluded in the time allowed, and ACC have additional time to prepare and/or obtain further expert opinion which disadvantages the injured person. Whilst experienced legal experts know that they can request additional time at the point that the

hearing is set down to be heard (and sometimes it is provided), most people are self-represented and do not know they can request more time.

64. There is no doctrine of precedent among review decisions, and consistency is lacking amongst reviewers. Review decisions are not publically available. Five reviews involving the same issue can be heard by five different reviewers with five different results. This is particularly the case where the matter at issue is whether either of the parties have acted "reasonably" – an inherently imprecise and value-laden standard. Appeals to the District Court are treated as *de novo* rehearings so procedural matters from a review hearing cannot be considered.

65. ACC attends a large number of review hearings by teleconference. This reduces the claimant's experience, creates miscommunications and misunderstandings, and makes the claimant feel that their case is not important. Where the issue under dispute may often be explained by neglect or oversight, this simply compounds a claimant's feelings of neglect and disrespect.

66. ACC staff commonly prepare their own submissions to review. ACC staff do not receive adequate legal training and are under pressure from immense workloads. Submissions often include irrelevant and prejudicial content that amounts to the staff member both giving evidence whilst not sworn, as well as presenting the case without the same professional accountability held by a legal professional.[37] It increases the possibility that reviewers will take account of irrelevant considerations. The staff member's remuneration and continued employment is linked in part to their

[37] Lawyers and Conveyancers Act; Lawyers and Conveyancers Act (Lawyers: conduct and client care) Rules 2008.

performance in managing the claim. Successful reviews of a case manager's decision impact negatively on the impression of their performance. Serious conflicts of interest exist, but reviewers refuse to hear submissions on this.

67. There are no firm safeguards of procedural or administrative fairness built into the statutory dispute resolution process. Rather than specific controls, the Act merely makes a general requirement that reviewers be independent and conforms to the principles of natural justice. If a person disputes whether a reviewer has met those requirements, there is no authority or process to facilitate the resolution of that dispute. Access to the Courts to seek oversight and accountability are denied and all appeals disregard any objections based on fairness because of their *de novo* nature.

**Case Study B:** Jo had a case set for a review hearing with a particular reviewer. Jo became aware that the reviewer had sent an email to her employer demonstrating bias against Jo. Jo produced the email to the reviewer and said that, because of the perception of bias, the reviewer should step down and let the matter be dealt with independently. The reviewer refused to step down so Jo left in protest. The reviewer continued with the case, without Jo and she decided against Jo.

68. The admissibility of evidence during the review and appeal process is not governed by the Evidence Act 2006, which applies to other Courts in New Zealand. Whilst this allows for flexibility in the process, which can facilitate access to justice, it also removes important safeguards around the reliability of evidence and removes the ability of an injured person to test or challenge that evidence. This often works to a claimant's disadvantage. In addition a review officer does not have the power to call witnesses (such as medical assessors or ACC staff) to be cross-examined on disputed

facts in a way that would ordinarily be a commonplace aspect of procedural justice.

69. The safeguards in the Evidence Act 2006 that have been developed over centuries of common law history to ensure procedural justice are specifically excluded from application to people disputing ACC.

**Case Study C.** Mr Black is a 23-year-old farmer who suffered a serious motor vehicle accident and is living with paraplegia at C7. He wanted to move out of hospital back home to the farm on the outskirts of town with his partner. To do this, $20,000 in housing modification was required to make the bathroom and kitchen accessible. ACC delayed making a decision, so Mr Black lodged a review about the delay. Mr Black attended mediation with ACC, and ACC did not do what they said they were going to do. Mr Black sought professional advice. Another review application was lodged regarding the delay. ACC again asked for mediation. At the mediation, the matter was not settled, but ACC agreed to let the matter proceed to review. In the week before the review ACC issued a decision not to fund the modifications, and then claimed that the review for delay, lacked jurisdiction, because a decision had now been made. Yet another review had to be lodged and the process started all over again. Finally, 18 months after Mr Black was discharged from hospital, he could finally leave his flat in the city and go home. Unfortunately, by this stage, his mental health and his relationship with his partner had deteriorated significantly. He had incurred over $5,000 in legal fees, and despite being entirely correct and having three sets of costs awards under the regulations, he was still over $3,000 out of pocket.

70. Judicial review is available to claimants, however judicial review applications are hampered by the ACC legislation's privative provisions. These require that any dispute around ACC is resolved under the statutory dispute resolution process. The Court's response in an application for judicial review is that the person has to show that the matter cannot be resolved through the statutory dispute process before judicial review is available.

71. The availability of judicial review must be seen in light of the access to justice issues outlined in discussion of article 13 (above), including funding, availability of expert counsel, and access to medical evidence.

**Substantive Justice**

72. Whilst the review and appeal process provides access to the law, there is a significant difference between access to the law and access to justice. There are serious and important questions about whether the accident compensation scheme's entitlements, even when correctly provided to injured people in accordance with the law, are actually providing justice.

73. Unfortunately, given New Zealand's constitutional structure, there is no national institution that can be used to hold Parliament to account. As the following excerpts from accident compensation judgments show, the role of the court is to administer the law Parliament has made.

**Case D:** "The Courts in New Zealand properly see their role in administering the accident compensation scheme to faithfully implement the law that Parliament has made. Regardless of whether it provides fairness (or justice) for injured people. … whilst the application of the relevant statutory provisions has brought about a less than favourable result for this appellant, the Court is not able to address any perceived unfairness within the parameters of the statutory provisions which it must apply…"[38]

**Case E**: "The Court cannot apply a spin to what Parliament has expressed in order to avoid what it may regard as being unfair… it has been legislated for reasons beyond the concept of fairness to individual claimants."[39]

[38] *Faulkner v Accident Compensation Corporation* [2006] NZACC 295.
[39] *Fox v Accident Compensation Corporation* [2006] NZACC 47 at [21] and [24].

**Case F:** "Whether a broad discretion to allow for possible unfairness in individual cases is appropriate is a question for Parliament. The court cannot ameliorate any perceived inequity which results from a situation which Parliament has clearly legislated for."[40]

**Case G:** "It is of course the case that the legislative policy is not to be undermined by an ungenerous or niggardly approach and a broad, rather than restrictive, interpretation is necessary. But where, as here, the meaning of the statutory provisions can be interpreted only in one direction, despite understandable notions of what might be "fair" in an individual case, the remedy if there is to be one has to be provided by Parliament. "Injury" and "incapacity" (to work) are not the same thing and do not necessarily occur contemporaneously, but nevertheless, "incapacity" has to be determined by the Corporation pursuant to the statutory test as confined by the provisions of s 103."[41]

74. Injured people have made various governments and Parliaments aware of injustice. A person who is disabled by accident, who may currently have no means of financial support, is not in a position to enter the political process and lobby Parliament with complex submissions regarding legislative amendment.

**An example of substantive injustice – persons abused in state care**

75. One example of how the statutory scheme can achieve injustice can be clearly identified by examining the case of a person who is disabled because of abuse, which they suffered as a child in state care.

76. In 2003, the Court of Appeal held that sexual abuse victims had the right to sue the Department of Social Welfare if they suffered abuse because of the state's involvement in their living arrangements in

[40] *Milne v Accident Compensation Corporation* [2007] NZACC 140 at [16].
[41] *Vandy v Accident Compensation Corporation* [2011] 2 NZLR 131 at [24].

childhood.[42] Parliament responded by extending cover under the ACC scheme for all those whose legal proceedings had not yet been determined, but these people lost their right to sue in return for cover under the scheme.[43]

77. Unfortunately, this group is now left with cover under the statutory provision, but limited support from ACC because they were not working when they were injured. In deciding the case, the High Court said: [44]

> The outcomes under the present Act are unquestionably anomalous. It was not suggested otherwise before me. No Judge could frame common law duties in so inconsistent and erratic a fashion. Nor could insurers achieve such outcomes in an informed market. But cover under the Act is the product of careful and crystalline drafting by legislators. The meaning and effect of the statutory words in issue is quite clear.

78. The High Court, by following proper statutory interpretation principles and enforcing what is purported to be Parliament's intention, has put the ball firmly back into the government's court. In the three years since the first High Court judgment on this matter raised the clear injustice, Parliament has been silent. Vulnerable New Zealanders who have injuries caused by the negligence of the state are left with empty cover, no financial support, no entitlement to vocational rehabilitation and an unenforceable social contract that has no value in law and no value politically.

[42] *S v Attorney-General* [2003] 3 NZLR 450 (CA) and *W* v *Attorney-General* (2003) unreported, *CA 227/02* 15 July 2003.
[43] Accident Compensation Act s 21A(1)(b) and (5); for explanation see *A v Roman Catholic Archdiocese of Wellington* [2008] NZCA 49, [2008] 3 NZLR 289 at [60]-[61].
[44] *Murray v ACC* [2013] NZHC 2967 at [69].

79. Stepping back and considering this issue at an abstract level, the Judiciary has said that a group of people injured by the actions of the Executive branch of government had the right to sue the state in common law for personal injury. Parliament then removed their right to sue the Executive and made a policy decision to extend the application of the ACC scheme (in doing so, limiting its own common law liability). Later the Executive branch that implemented the policy proceeded with an appeal to the High Court and was successful. The effect of this was to deny those who have cover under the scheme any compensation for pecuniary loss they suffered. This group of people went from having nothing, to being able to sue the government, to having compensation under the scheme, to having no compensation.

80. This is the possible effect of having a government unchecked by the courts and law that does not consider the rights of persons with disabilities in making its decisions.

Acclaim Otago (Inc)

# CRYING FOR HELP FROM THE SHADOWS:

## The real situation in New Zealand

**A summary of survey data for presentation to the UNITED NATIONS COMMITTEE on the CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES to be considered at the 12th SESSION**

**(4 AUGUST 2014)**


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# *ADEQUATE FUNDING*

## SUMMARY OF SURVEY DATA

Nearly all PwDI believe ACC makes decisions that are wrong. Nearly all want to obtain independent representation and dispute the decision, but the following factors prevent PwDI exercising their rights.

**PwDI pre-dispute situation:** Because of their injury, PwDI are heavily in debt (to community and commercial lenders) before ACC makes its adverse decision. PwDI do not have the ability to pay for representation at the time they receive their adverse decision.

**Private market for representing PwDI:** The long-term effect of the existing funding model (in place since 1992) is market failure, which has resulted in significant barriers for PwDI to privately obtain access to justice.

**Legal Aid:** Legal aid does not provide access to justice. There are three major problems with legal aid: (i) the amount of the award is not adequate (15-40% of the actual cost), (ii) it is very difficult to obtain representation given limited legal aid providers, and (iii) it is a loan which the person has to repay, which is likely to be difficult if they lose their dispute.

**Costs awarded pursuant to regulations**: A maximum costs award made in accordance with the law is not adequate to provide access to justice. There are three problems: (i) timing of the payment (costs are not available until 6-12 months after they are incurred), (ii) amount of the payment (the maximum amount is 12.5-30% of the actual cost of the process), and (iii) the award not being made (most PwDI disputing ACC's decision had not received a cost award). ACC has discretion to oppose an award of costs, and often do.

**Effect of failure of the legal market:** The effect of the failure of the legal market in the ACC jurisdiction is widespread. It is very difficult for PwDI to obtain representation. The market is not competitive. There is a lack of development of expertise. There is not a pool of qualified and experienced barristers to appoint as judges, so judges are appointed from outside of the jurisdiction, however the Government is finding it difficult to attract judges from other jurisdictions.

## THE LAW RELEVANT TO ADEQUATE FUNDING

### Legal context for considering adequate funding

The most common way of gaining legal services in New Zealand involves a private contract, with up-front payment of a principal amount by a client into a trust account, and a fee calculated according to the number of hours worked and an hourly rate. This is the traditional idea of legal services. The PwDI enters into a legal marketplace where there are lawyers and advocates competing over their business. Consumers of legal services are protected, and the state's role is to regulate this market through a professional code of conduct and client care for lawyers[13] and ethical and fiduciary obligations to a client. Importantly, these government protections only apply once a person has instructed a lawyer. There is no specific regulation whatsoever for advocates, which can be problematic, while at the same time being crucial in facilitating low cost specialist legal representation.

Nearly all practitioners in this field operate on an hourly rate and require payment up-front. To charge a conditional fee, that is only payable upon winning the dispute, simply transfers the cost burden onto the legal representative. The market for legal representation in ACC disputes has failed. While there are many PwDI who wish to challenge ACC decisions, and lots of ACC decisions to challenge, PwDI are unable to fund these challenges. This constricts demand in the market for legal services, and means running a specialist practice is seldom financially viable. This is a situation caused by chronic underfunding for decades. It is a result of deliberate policy decisions to restrict funding to this field by setting the regulated amount so low. The Government has rejected efforts to address this inadequate funding.[14]

There are two mechanisms provided by the state – legal aid and costs awards – that the state claims to provide access to justice for PwDI. Neither of these actually has this effect.

### Legal Aid

Legal Aid is a system where the Government steps into the market and sets the price for legal representation and provides this as a loan to the PwDI, which they must payback over time.

[13] Lawyers and Conveyancers Act 2006, Rules of conduct and client care.
[14] See Interim report, p 14-15, at paragraphs 42-48.

The lawyer is not allowed to charge the client anything in addition to the set rate. As set out in the Interim report, this rate is very low and survey data indicates it is difficult to obtain a specialist lawyer who will take a case on legal aid. In Auckland, where approximately a third of New Zealand's population lives, there is not a single legal aid provider, who regularly takes ACC cases.

**Costs awarded**

In every legal jurisdiction, an award of costs has at least two related roles: one is to compensate the successful litigant and the other is to control the behaviour of the parties to ensure that settlement is reached where appropriate. The general rule in New Zealand is that costs should cushion the parties, but if the circumstances (including behaviour of the parties) warrant it, full "indemnity" costs can be awarded. This often happens where parties run a case that is without merit. In the ACC jurisdiction, the level of costs awarded is limited by regulation. The rates that can be awarded fulfil neither of the two functions of a cost award. The amounts available are:

| | | |
|---|---|---|
| i) | two hours preparation to maximum of | $350, |
| ii) | attendance (almost always limited to 1 hour) | $175, |
| iii) | lodging of the application | $117. |

The amount for legal representation is therefore limited to approximately $650. This neither compensates the injured person, nor deters ACC from making adverse decisions that are wrong.

**Government's Response**

The Government's response claims that funding in the form of costs is available and "usually" awarded. The Government has not acknowledged any of the objections raised by Acclaim Otago in its interim report about the amount of funding, or the financial position of people with disabilities that limits access to justice. They have not acknowledged the long-term effect of the market for legal representation for PwDI, nor how the law, including legal aid, operates in a way to reduce access to justice.

**The problem with the Government Response**

The Government's response does nothing to reflect the situation in New Zealand. The law operates in a way that denies access to justice on both an individual level and a systemic level. The Convention puts a duty on the state to provide a system that ensures access to justice, rather than simply providing minimum rights.

## SURVEY DATA: ADEQUATE FUNDING

### Peoples' experiences

Nearly all (*89%*) respondents thought that ACC had made a decision that was wrong or incorrect. Nearly all (*92%*) knew that they could review ACC's decision. Most respondents (*83%*) who had received a decision from ACC that they thought was wrong, applied to review that decision.

*What were PwDI's financial situation after ACC's decision to stop compensation*

Of those who received compensation, most respondents (*75%*) had their weekly compensation stopped and most of this group (*57%*) were then without any other source of income. Those who had income mainly received it from WINZ.[15] Of those who did not receive WINZ support, either their partner or spouse works (*67%*), meaning they are ineligible, or they didn't know they could receive WINZ support (*33%*).

Nearly all (*90%*) respondents said that challenging ACC's decision would be a significant impact on their financial position. Of this group, most respondents (*80%*) strongly agreed (when given the option to "agree" or "strongly agree").

*Length of process*

Respondents indicated that the entire review process, from obtaining the adverse decision to ACC complying with the review decision, takes around a year. This is a long time to be without any income, and planning for a year with no or reduced income has a significant effect on peoples' ability to cope.

### Direct barriers against reviewing ACC's decision exist

The reasons given by people who did not apply for review were: didn't have the energy (*44%*); didn't have the money (*36%*); thought ACC's decision was correct (*36%*); didn't know I could (*25%*); was told by ACC I wouldn't win (*17%*); received legal advice that I wouldn't win (*8%*); couldn't be bothered (*6%*).

[15] Work and Income New Zealand is the statutory organisation that administers the Social Security Act. WINZ support is not usually available if partner or spouse works.

PwDI's experiences highlight these problems.

> I was suicidal and unable to fight. (R12)
>
> [I was] told by ACC that it was not really a decision so it did not qualify for review. (R28)
>
> [I was] told by medical experts that it would delay my ability to heal because of the stress. (R 34)

The complexity of the situation involving multiple injuries cannot be underestimated.

> I never applied for money, I wanted the therapy for the sexual assault that led to mental injury which I received. I received some physiotherapy for my arm, but not anymore because the injury cannot be fixed. I wish I could get assistance that would relieve the pain and make it easier to live with even if it can't be cured. Perhaps this is something I could apply for review for. I have never thought about questioning this and I don't have the energy to chase it up. (R 28)

**Obtaining representation**

The survey gathered data to identify the true cost of obtaining representation. The data shows that the cost of obtaining representation is significantly more than the funding available through legal aid, an award of costs, or other funding mechanisms. Very few (*less than 1%*) of the respondents who went through the review process did so without representation because they *did not want a lawyer or advocate*. Barriers to obtaining representation are; cost, not knowing or being misled into believing that they did not need representation, and inability to find representation. These structural barriers show why so many people cannot obtain representation and must be addressed.

*Experience of respondents who obtained representation*

Of those who challenged one or more of ACC's decisions, *70%* had reviewed between one and three decisions, but a significant number (*9%*) had reviewed more than 10 decisions. *80%* had hired a lawyer or advocate, of which *83%* had hired an ACC specialist lawyer or advocate.

Most (*76%*) people had never been granted legal aid to review (or appeal) a decision. The barriers to obtaining legal aid include people who: did not know they could apply (*53%*); did not meet the eligibility criteria (*40%*); or couldn't find a lawyer who did legal aid. Of

those who were granted legal aid, it was mostly *(66%)* granted as a loan that people had to repay.

Of those who hired a lawyer or advocate, most (*55%*) thought they would have less than $2,000 available in total to spend. 17% of respondents estimated they had $0 to spend on legal representation. Interestingly, a relatively large number of respondents (*21%*) didn't think about their budget for legal services. Lawyers and advocates generally indicated it would cost a significantly higher amount than people had available to spend.

Of those who paid for a lawyer or advocate, and knew how much their lawyers or advocates charged per hour, the hourly rates are indicated below. The median and mode hourly rate was $200-$300.

(i) less than $50 (6%),
(ii) $51-$100 (*8%*),
(iii) $101-$200 (*27%*),
(iv) $201-$300 (*36%*),
(v) $301-$400 (*15%*),
(vi) more than $401 (*8%*).

Of those who paid for a lawyer or advocate, the total cost for their lawyer or advocate for the review hearing was as follows. The median and mode amount charged were $2000-$4000.

(i) less than $100 (1%),
(ii) $101-$1000 (*27%*),
(iii) $1001-$2000 (*17%*),
(iv) $2001-$4000 (*28%*),
(v) $4001-$6001 (*11%*),
(vi) $6001-$8000 (*5%*),
(vii) more than $8000 (12%).

When asked if they felt that having a lawyer or advocate made a difference to their case. Most (*72%*) felt it made their case better, some (*21%)* felt it made no difference and a small percentage (*7%*) felt it made their case worse.

ACC seldom (*11%*) offered to settle the case prior to the hearing.

*Experience of those who reviewed the decision but did not get legal representation*

Of the group who reviewed ACC's decision but did not obtain representation (*20% of respondents*), the reasons for not obtaining a representative were: it was too expensive (*71%*), they thought they would not need representation (*43%*),[16] they couldn't find a representative (*16%*), and because they didn't want a lawyer or an advocate (*4%*). Of this group who were unrepresented, most (*79%*) said that if finance was not an obstacle, they would hire a lawyer or an advocate, some (*15%*) said they would not and few (*6%*) did not know what they would do if they had another dispute.

PwDI explained why they did not get a representative as:

> I trusted too much. (R2)
>
> I wasn't aware that I could get an advocate to assist me. (R5)
>
> Only allowed one support person and not allowed legal representation. (R7)
>
> I was not made aware by ACC case manager that at the Dispute Resolution Interview that I would be 'up against' a lawyer and [ACC's] legal team. I didn't know there were advocates to assist me, until it was too late. It was a horrible experience (R14).

This raises the issue of having PwDI "up against" a professional representative (either a lawyer or an ACC staff member who has repeatedly attended hearings). ACC and DRSL (now Fairway) were telling PwDI that it is an informal process and representation is not necessary, whilst ACC is in fact instructing lawyers.

*Costs awarded by the reviewer*

Less than half (*47%*) of the respondents who had been to review, received a costs award from the reviewer, the remainder (*53%*) had not. Of those awarded costs, nearly all (*85%*) said it was not enough to cover their actual costs.

[16] The standard advice from ACC and the organisation that manages the review process suggests that it is an informal process and you do not need a lawyer or advocate.