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Submission form: Proposed amendments to the Accident Compensation (Review Costs and Appeals) Regulations 2002

The Ministry of Business, Innovation and Employment (MBIE) would like your feedback on proposals on updating the Accident Compensation (Review Costs and Appeals) Regulations 2002. Please provide your feedback by **5pm, on 28 March 2022**.

When completing this submission form, please provide comments, evidence, and any data that may aid your submission. Your feedback provides valuable information and informs decisions about the proposals.

We appreciate your time and effort taken to respond to this consultation.

Instructions

To make a submission you will need to:

1. Fill out your name, email address, phone number and organisation.
2. Fill out your responses to the discussion document questions. You can answer any or all of these questions in the [discussion document](#). Where possible, please provide us with evidence to support your views. Examples can include references to independent research or facts and figures.
3. If your submission has any confidential information:
 - i. Please state this in the email accompanying your submission, and set out clearly which parts you consider should be withheld and the grounds under the Official Information Act 1982 (Official Information Act) that you believe apply. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act.
 - ii. Indicate this on the front of your submission (e.g. the first page header may state "In Confidence"). Any confidential information should be clearly marked within the text of your submission (preferably as Microsoft Word comments).
 - iii. Note that submissions are subject to the Official Information Act and may, therefore, be released in part or full. The Privacy Act 1993 also applies.

How to submit this form

4. Submit your feedback:

i. As a Microsoft Word document by email to ACregs@mbie.govt.nz with subject line:
Consultation: Review Costs Regulations

ii. By mailing your submission to:

The Manager, Accident Compensation Policy
Ministry of Business, Innovation and Employment
PO Box 1473

Wellington 6140
New Zealand

Submitter information

Submitter information

MBIE would appreciate if you would provide some information about yourself. If you choose to provide information in the section below it will be used to help MBIE understand the impact of our proposals on different occupational groups. Any information you provide will be stored securely.

Your name, email address, phone number and organisation

Name:

Megan Williams

Email address:

Privacy of natural persons

Phone number:

Organisation:

Community Law Centres o Aotearoa

- The Privacy Act 1993 applies to submissions. Please tick the box if you do **not** wish your name or other personal information to be included in any information about submissions that MBIE may publish.
- MBIE may upload submissions or a summary of submissions received to MBIE's website at www.mbie.govt.nz. If you do **not** want your submission or a summary of your submission to be placed on our website, please tick the box and type an explanation below:

I do not want my submission placed on MBIE's website because... [insert reasoning here]

Please check if your submission contains confidential information

- I would like my submission (or identifiable parts of my submission) to be kept confidential, and **have stated** my reasons and ground under section 9 of the Official Information Act that I believe apply, for consideration by MBIE.

Submitter information

Submission on Proposed Updates to the Accident Compensation (Review Costs and Appeals) Regulations 2002

Community Law Centres o Aotearoa, 28 March 2022

Community Law Centres o Aotearoa ('**CLCA**') is the national organisation for the Community Law network. Twenty-four Community Law Centres ('**CLCs**') work out of over 140 locations across Aotearoa to provide free legal help to those who are unable to pay for a private lawyer and do not have access to legal aid. As well as around 250 staff, CLCs' services are boosted by over 1,200 volunteer lawyers who run legal advice clinics and deliver free assistance.

Many of our CLCs provide advice, assistance, and advocacy to people as they engage with the ACC system and assist clients to apply for a review of ACC's decision on their claim, with some of our CLCs providing specialist ACC advice clinics. Our CLCs advised on 663 ACC matters over the 12-month period from 18 March 2021 until 18 March 2022. Representation at reviews and appeals is provided by both Community Law lawyers and advocates. Community Law clients are often awarded costs for representation, these costs awards assist our CLCs in continuing to provide representation at both review and appeal level.

These submissions have been prepared with the assistance of Southland Community Law Centre and Community Law Canterbury, both centres have long-established specialist ACC advocacy services with some lawyers and advocates managing 40 plus cases at any one time.

We welcome any further discussion regarding the matters raised below.

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Questions on the proposed objectives

1. Do you agree with the presented objectives?

Yes No Not Sure

2. Are there alternative objectives that should be considered to help shape the discussion? (please provide detail on any alternative objectives you consider relevant)

Overall the feedback from our CLCs was that this review is long overdue and there has been a need to look at the issue of costs for some time.

Generally, our CLCs agreed with the specific objectives but there were also concerns.

We are concerned at the reference to section 3 of the Accident Compensation Act 2001 (**'the Act'**) as mandating 'fair rather than full compensation' in relation to costs. The reference to 'fair compensation' in section 3 relates to compensation for loss from injury rather than costs awards. It is important to maintain the distinction between compensation for injury and reimbursement for costs incurred. In relation to costs we submit that it is appropriate refer to the costs principle, a reasonable contribution to costs, which usually represents a two thirds contribution towards actual reasonable costs. Relevant examples are the award of costs in the Employment Court (clause 19, Schedule 3 of the Employment Relations Act 2000) and the District Court (Rule 14.2 of the District Court Rules). There is nothing in the discussion document that justifies a move away from the costs principle and we think that the concept of fair compensation in relation to **injury** has been confused with the widely-accepted approach towards reasonable costs in civil jurisdictions.

We are surprised that the objectives do not include any other reference to the purposes of the Act. We submit that the overriding objective should be the purpose of the Act under s 3 –

"to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community".

This, in essence, requires access to justice for claimants. The Act is a piece of law that will touch the lives of every New Zealander at some stage in their life. It is important that access to justice is a paramount consideration, as the scheme has mostly removed the ability/common law right for private action for personal injury. Increasing costs, and regularly reviewing these, is one mechanism that will help to reduce those barriers in accessing justice for personal injury.

We also note our concern at the strong focus on discouraging frivolous and excessive litigation. If frivolous and excessive litigation is a significant problem, it would have been helpful if the consultation document could have outlined more evidence about this issue. We consider that a more appropriate objective is 'to encourage skilled and experienced advocates and lawyers to enter into this area of legal work, and retention of said lawyers and advocates'.

Questions on the proposed cost categories

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3. What do you think about the proposed cost categories?

Generally, we agree with the proposed categories but we think they have neglected a few important considerations, namely the significant time and cost that is involved in:

- Reviewing a case-file before an application for review is made
- Instructing specialists – which involves completing a detailed file-note and submitting relevant questions
- Case conference costs, either as a separate category or as a sub-category within representation costs.

4. Do you agree with the proposed categories?

Yes No Not Sure

Why/ why not?

See above answer

5. Are there any other alternative options for grouping the cost categories that could be used? Please provide supporting information.

As outlined above we submit that there should be a category to cover the cost of reviewing a file before an application for review is made. Our CLCs noted that reviewing a case file for a 'simple' claim can take 4-6 hours. A review of a complex claim can take up to 12 hours. This cost could be built into the representation or application costs category, or could be provided for under a separate costs category.

There is also a need for a separate category to cover the cost of instructing a specialist, which takes an average of 3 hours as a file note of the case must be prepared along with drafting specific questions for the specialist to address. Our lawyers and advocates noted that this is a separate cost under legal aid and that it is appropriate to include a similar category for review-related costs.

Further our CLCs noted that this consultation document makes no reference to case management requirements and recommended that case conference costs either be a separate category or be a sub-category of representation costs. This is common throughout costs jurisdictions. It is particularly important to specify this category as it will be relevant in situations where a case conference leads to a claim going to ADR rather than review.

Questions on Category 1 – Application costs

6. Should Application Costs (Category 1) remain separate from Representation Costs (Category 2)?

Yes No Not sure

Why/ why not?

We agree that it should remain separate to allow for the reimbursement of self-represented claimants. However, we note that the amount of \$150 is insufficient to cover the cost of lawyers and advocates submitting an application because of the time required to review a case file, as mentioned above.

We also note that our concern at the comments about frivolous claims and the lack of related evidence

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in the consultation document. This should not be used as a justification to keep this cost so low. We do not think that an increase of \$16 will lead to an increase in frivolous claims and we note that mechanisms already exist to expunge frivolous claims.

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7. Do you agree with the proposed increase in maximum costs awardable for Application Costs? (please circle or highlight your response)

Strongly Disagree
Disagree
Neither
Agree
Strongly Agree

Questions on Category 2 – Representation costs

8. Based on the options provided in this document, what is your preferred option? (please circle or highlight your response)

2.1 One maximum limit for all representatives

OR

2.2 **Sliding scale based on complexity and/or time and, qualification of the representative.**

We agree that there should be a sliding scale to take into account the complexity of cases but consider that the model proposed is too simplistic. It risks disadvantaging experienced and qualified advocates by grouping them with those that have little to no experience. Our CLCs observed that there are significant issues relating to services provided by inexperienced advocates but that this cannot be addressed simply by capping the costs that can be awarded. While outside of the scope of this consultation our CLCs noted that the need for regulation of advocates is a matter that ought to be addressed.

We note that advocates employed by CLCs are subject to the same Ministry of Justice supervision standards that apply to lawyers and accordingly their work also incurs regulatory costs. Community Law advocates and lawyers regularly provide representation at reviews of complex cases and are awarded costs. Accordingly, we submit that the scale should allow a reviewer more flexibility to award higher costs for complex cases, including those where a Community Law advocate represents claimants.

We agree that there should be incentives for experienced lawyers to enter this area of work. However, we are not convinced that the higher amounts will be a sufficient incentive.

Please provide the reasons for your view

9. Do you have any other suggested options or groupings to categorise Representation Costs (Category 2)?

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We agree that there should be a sliding scale to allow for the complexity of cases and qualification of the representative but submit that the scale should provide more flexibility to reviewers to use their discretion to award higher costs for complex cases to both lawyers and advocates. A reviewer should have the ability to award costs higher than the \$1320 cap for advocates where the specifics of the case merit such an award.

10. Is there any information to support or reject the distinction that is made between lawyers and advocates (Option 2.2)?

We submit that the distinction between lawyers and advocates is more nuanced than what is outlined in the consultation paper. We agree that lawyers do have additional regulatory costs and that these should be taken into account. However, we are not convinced that this justifies a difference of 50% of the costs that can be awarded, particularly in relation to complex cases.

We note that some experienced advocates are former lawyers, have worked as independent reviewers or have a medical background.

As noted above there are ACC advocates employed by Community Law centres who are subject to supervision standards imposed by the Ministry of Justice, including the requirement that work is supervised by a lawyer qualified to practice on their own account. Accordingly, Community Law centres incur regulatory costs for work undertaken by advocates.

We note that the proposal for the 50% rate is based on the *ACC v Carey* decision. This case specifically relates to how costs can be awarded in the District Court where legal representation is commonplace and representation by a non-legal advocate is relatively rare. However, in the ACC review context representation by advocates is more common. In our submission, *ACC v Carey* is particularly relevant at [96] in relation to guiding reviewers into how to award costs including:

- The skills and qualifications of the advocate or lawyer
- Did the advocate or lawyer assist the reviewer in reaching a decision?
- Did the advocate or lawyer facilitate a prompt and efficient review?
- The complexity of the review
- The amount of work reasonably involved.

11. Do the proposed new rates reflected in Option 2.2 reflect appropriate market rates for lawyers and advocates?

Yes No Not sure

If not, is there any information that can be shared to inform this discussion.

We do not believe that these rates are accurate, particularly for lawyers. While we think the hourly rate of \$220 is appropriate, we do not agree with the estimation of 12 hours of representation, and we query how this amount was reached. Our CLCs noted that occasionally, ACC instructs a private lawyer to represent them in reviews of complex cases. It would be instructive to look at how many hours are spent preparing for a review by lawyers instructed by ACC.

Our lawyers and advocates estimate that they spend 20 to 60 hours on a complex file. Most straightforward 'simple' cases would require at least, and often more than, 12 hours preparation.

There are other matters to be taken into consideration in relation to complex cases, particularly from a Community Law perspective. Community Law capacity is a limited resource. When our CLCs take an ACC matter, this must be done by a lawyer or advocate that has expertise in the area. This comes at an opportunity cost to other work, which, in many cases, would take less time. Our CLC lawyers and advocates do not practice solely in the area of ACC, due to demand for other areas of law as well.

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Most of the ACC files that CLCs provide representation for are quite complex. Complex files are often characterised by the complexity of the legal issue, complexity of the injury, needs of the client or the amount of evidence that is involved. Many clients with complex cases also have higher access needs, and this adds time to the services provided by advocates and lawyers. We also know that the current average time for an ACC Review to be resolved is around 200 days.

Accordingly, we submit that the hourly rate of \$220 be retained but the estimated hours for a complex case be increased.

Currently there is a small pool of lawyers undertaking representation at the ACC review level. We do not think that the proposed increases are sufficient to incentivise more private lawyers into practise. We are mindful of the considerable supervision requirements of junior and intermediate lawyers which also incur costs in terms of requiring a supervising lawyers' time.

Some of our CLCs noted that they receive client referrals from private law firms where clients cannot afford legal fees. We note that some lawyers provide the surplus of time pro bono or charge the client a higher fee with only a small portion able to be recouped through costs awards.

12. Do you agree with the proposed new maximum costs awardable for Representation costs (both options)? (please circle or highlight your response)

Strongly Disagree
Disagree – we do not think this amount is high enough as we think that the number of hours required for complex cases has been significantly underestimated.
Neither
Agree
Strongly Agree

13. Do you think the proposed changes will increase access to justice (and therefore improve outcomes) for claimants?

Yes No Not sure

If not, why not?

As outlined above, our concern is that the costs proposed are not sufficient to incentivise more private lawyers to undertake ACC legal work.

We also do not want to incentivise unqualified advocates to undertake ACC advocacy work as this will impede access to justice.

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14. Is there any evidence/data or precedence that could be used to determine the complexity of a review (i.e. which cases should sit in which categories (ie A or B))?

We agree with the examples listed in Table 7 and with reference to section 57 of the AC Act.

We would also include cases that span multiple pieces of legislation, sometimes the 1982, 1998 and 2001 Acts are all relevant to a claim. In some cases, an earlier Act governs eligibility while a later Act applies to entitlements. Such cases should be considered complex.

Other indications that a case is complex is where external clinical advice has been sought or where there is more than one medical report required. One of our CLCs was involved in a review where 12 medical reports were required. Please also see our comments at question 11 in relation to complexity of cases.

Questions on Category 3 – Medical and Other Report costs

15. Currently, the medical reports categories can be used for multiple reports. Is there any information to suggest the capped approach is inappropriate? Please provide supporting information.

Our CLCs observed that generally the cost of medical reports is set at the capped limit of what ACC will cover. Accordingly, we expect that the cost of reports will rise to meet any new capped limits. Some specialist reports are well above the capped limit and can be up to \$5000.

16. Do you think the proposed new rates will increase access to medical reports (and therefore access to justice) for claimants?

Yes No Not sure

Please explain your view.

Generally, our lawyers and advocates were supportive of the new costs for reports although they felt that the costs fell slightly short of what is required. We are concerned for those who will require reports in excess of the capped amounts. This is most often in relation to reports for mental injury or occupational assessments. Occupational assessments are often required in situations where people are experiencing the most financial strain, generally when a client's weekly payments have been stopped. Often these people are receiving no income or are on a benefit and cannot afford the cost of a specialist report. In these situations, clients can apply for legal aid to cover this cost, but they incur a debt in doing so and capped rates means that the full amount of the report is not reimbursed.

Our CLCs commented that where a report by a registered specialist leads to ACC's decision being overturned then the full amount of the report should be refunded, even if this is over the allowable amount.

In some cases, our CLCs have covered the cost of reports, through donations that have been provided for that particular purpose.

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17. Do you agree with the proposed new maximum costs awardable for Medical and Other Report Costs? (please circle or highlight your response)

Strongly Disagree
Disagree
Neither
Agree
Strongly Agree

18. Do you think removing the distinction between registered specialist reports and other reports will improve claimant's access to reports?

Yes No Not sure

Please explain your view.

We are concerned at ACC's reliance on reports by people who are unqualified to comment on the client's medical issue. It is imperative that ACC use specialists with relevant qualifications and expertise, rather than the onus being on clients to pay for experts to address and correct reports where ACC has engaged someone who is unqualified to comment.

Our lawyers and advocates noted that 'other' reports (those not by registered specialists) may be given less weight by the reviewer. When it comes to causation the burden of proof is on the applicant and a report by someone who is not a registered specialist risks being viewed as insufficient.

Questions on Category 4 – Other expenses

19. Do you think the new rates will increase access to in-person reviews for rural communities?

Yes No Not sure

Why/ why not?

While we generally agree with the proposed increases for travel and childcare costs, we do not agree that access will be improved for rural communities, because in some areas ACC no longer provides in-person reviews at all, e.g. Southland. In many rural areas of Southland cell-phone and internet coverage is so limited clients need to travel to Gore or Invercargill just to participate in an online review.

20. How can 'Other Expenses' (Category 4) be improved to enhance support for rural communities?

Please provide supporting information.

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The same descriptors from the current regulations, Schedule 1 of the Accident Compensation (Review Costs and Appeals) Regulations 2002, relating to the costs of travel, childcare, whānau support, time off work etc should apply. We submit that the mileage costs must be in line with IRD mileage costs, currently the mileage allowance is less than 50% of the IRD mileage rate.

The actual reasonable costs of the claimants must be looked at. For example, the travel time for a claimant travelling from Te Anau to Invercargill for a review would be 5 hours, excluding the actual review time. When the review time is included, the whole day has been taken up. They may need to pay for childcare for two children for that time as well as taking time off work. These costs need to be reviewed regularly to take increasing petrol costs and inflation into account.

21. Do you agree with the proposed new maximum costs awardable for Other Expenses? (please circle or highlight your response)

Strongly Disagree
Disagree
Neither
Agree – general agreement but regular review is required to ensure that they are sufficient for rural claimants.
Strongly Agree

Questions on the overall proposed changes to the Regulations

22. Are there any other costs, benefits, or unintended consequences of the proposed changes that have not been considered in this document?

Our CLCs are concerned that ACC is using an out of date version of the AMA guidelines (the American Medical Association Guidelines to the Evaluation of Permanent Impairment), rather than the updated guidelines. We submit that this review ought to consider the use of the updated AMA guidelines and that this is a particularly relevant in relation to ensuring access to justice.

23. Do you think MBIE should conduct regular reviews of the maximum cost caps in the regulations?

Yes No Not sure

24. Do you have any comments on the alternative approaches considered?

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[insert response here]

Proposed updates to the Accident Compensation (Review Costs and Appeals) Regulations 2002

Questions on Alternative Dispute Resolution (ADR)

25. If the regulated timeframes are extended while clients are engaged in ADR, what effect do you think it will have on claimant's decisions to use ADR and the external review process? Please provide supporting information.

Our CLCs noted that the main impediment to accessing ADR is ACC refusing the claimants request for conciliation. Our CLCs expressed their frustration with ACC refusing to refer claimants to ADR.

The main delays experienced by our lawyers and advocates is where ACC is slow in passing claimants files to the independent reviewer. Often files are not passed to the independent reviewer within the 3 month timeframe or are referred shortly before the 3 month timeframe is up.

26. Have you incurred costs as a result of undertaking ADR? What are these and did it impact on decisions to proceed with an external review?

[insert response here]

27. If a level of reimbursement for costs was to be included for ADR in the Regulations, what should be taken into consideration?

It is important to take into account that a significant amount of preparation is still required for ADR.

It would be appropriate for costs to include:

- case conference attendance
- preparation costs
- attendance at ADR
- any medical reports obtained prior to ADR

28. Would the inclusion of a level of reimbursement for ADR costs change your position on undertaking ADR in comparison to an external review?

As noted above the main difficulty with accessing ADR is not in relation to what costs may be awarded, it is the refusal of ACC to refer claimants to conciliation that it is our main difficulty.