

1 April 2022

Manager, Accident Compensation Policy
Ministry of Business, Innovation & Employment
Wellington

By email: ACregs@mbie.govt.nz

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

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the *Proposed amendments to the Accident Compensation (Review Costs and Appeals) Regulations 2002* discussion paper (**Discussion Paper**).

1.2 The Discussion Paper proposes to reform the Accident Compensation (Review Costs and Appeals) Regulations 2002 (**Regulations**) by reducing the costs categories from 14 to four. This proposal seeks to improve claimants' access to justice by:

- (a) allowing increased flexibility for reviewers when awarding costs; and
- (b) providing clarity for claimants by setting new increased maximum limits for each category.

1.3 The Law Society commends the aim of the proposals to improve claimants' access to justice, but submits that the maximum limit in each category should be further increased to effect meaningful change. This submission makes several recommendations to help achieve this objective.

1.4 This submission has been prepared with the assistance of the Law Society's Accident Compensation Committee.¹

2 General observations

2.1 The Law Society has previously provided feedback on various inflation adjustment increases to scale costs awards made under the Regulations.² That submission noted that further increases to costs awards relating to medical evidence and legal representation would "very

¹ More information regarding the Committee is available on the Law Society's website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/accident-compensation-committee/>.

² See the Law Society's submission dated 31 October 2016, on MBIE's *Consultation on Changes to the Injury Prevention (Review Costs and Appeals) Regulations 2002* discussion document (2016). A copy is appended to this submission.

likely contribute to resolving disputes at an earlier stage, thus minimising the number of appeals to the District Court” and “potentially reduce the number of self-represented litigants”.³

- 2.2 This feedback remains relevant to the current proposals, and in particular, the proposed increase in maximum costs available for Application Costs and Representation Costs. We therefore invite officials to consider the issues highlighted in our previous submission in conjunction with this feedback. A copy of the Law Society’s 2016 submission is attached.

3 Objectives for the Regulations

Do you agree with the presented objectives (Q1)? Are there alternative objectives that should be considered to help shape the discussion (Q2)?

- 3.1 The Law Society agrees that the objectives represent a realistic assessment of the current problems of regulated costs under Part 5 of the Accident Compensation Act 2001 (**Act**).
- 3.2 The Law Society submits that the objective of improving access to justice must include access to culturally appropriate assistance for claimants. This would, for example, enable Māori claimants to seek reimbursements for costs which may be incurred when seeking cultural support during the dispute resolution process. We understand that ACC has, in the past, appointed Pae Arahi (Māori cultural advisors who liaised with the Māori community and the ACC branches in their area and ensured Māori claimants felt safe and seen in the dispute resolution process).⁴ ACC does not currently provide any such support, so it may be appropriate to consider reimbursing claimants who receive this type of support via other (external) avenues.⁵ This approach would be consistent with ACC’s Whāia Te Tika and its obligations under Te Tiriti o Waitangi.

4 Proposed changes to the Regulations

What do you think about the proposed cost categories (Q3)?

- 4.1 The Law Society supports the initiative to streamline regulated costs. Legally represented claimants will generally seek to recover costs associated with lodgement, preparation, case conference attendance and disbursements, and these costs would now be recovered under the proposed new ‘application costs’ and ‘representation costs’ categories.
- 4.2 The Law Society supports the Discussion Paper’s recognition that the current recovery rates for medical reports present a barrier to claimants’ access to justice, and the proposal to increase the costs recoverable in respect of these reports. This proposal will significantly improve claimants’ ability to meaningfully challenge decisions made by ACC.

³ Above n 2, paragraph 8.

⁴ Controller and Auditor-General Accident Compensation Corporation: Case Management of Rehabilitation and Compensation (Office of the Auditor-General, April 2004) at [2.49].

⁵ The Law Society acknowledges that the Regulations currently provide for costs awards in respect of expenses incurred when bringing a “support person such as whānau support” (Schedule 1 of the Regulations). However, it is unclear whether the costs of obtaining other forms of culturally appropriate assistance fall within the scope of these Regulations.

Do you agree with the proposed categories (Q4)? Are there any other alternative options for grouping the cost categories that could be used (Q5)?

- 4.3 We agree with the proposed categories. However, we note that a further category may be required if a level of reimbursement for ADR costs are to be included in the Regulations (as contemplated in chapter 7 of the Discussion Paper, and as discussed in paragraphs 10.6 to 10.8 of this submission).

5 Category 1 – Application Costs

Should Application Costs remain separate from Representation Costs (Q6)?

- 5.1 The Law Society considers that application costs should remain separate from representation costs. Lawyers are required to complete numerous administrative steps before an application can be made under section 135 of the Act. These tasks are time-consuming and do not simply involve a lawyer completing a review application form upon receiving instructions from their client.

Do you agree with the proposed increase in maximum costs awardable for Application Costs (Q7)?

- 5.2 The Law Society disagrees. The costs involved with lodging an application are significantly higher than the proposed maximum. For example, it generally requires taking instructions, completing the review application form, preparing correspondence, and putting together supporting documents. Lawyers will generally be required to complete all these tasks to ensure they discharge their professional obligations to the client.⁶

6 Category 2 – Representation Costs

Based on the options provided in this document, what is your preferred option? One maximum limit for all representatives or sliding scale based on complexity and/or time and, qualification of the representative (Q8)?

- 6.1 The Law Society supports a sliding scale based on complexity and time (option 2.2 in the Discussion Paper). Some practitioners have noted that ACC will disclose only those documents it considers are relevant to a review, rather than the claimant's complete file (and we understand this may be due to time and resourcing constraints). This means the full circumstances surrounding a decision may be missed, and matters which appear to be simple are in fact far more complex. The Regulations should therefore provide flexibility to account for additional information which may be disclosed over time, and which affects the complexity of a review.
- 6.2 Scaled costs also reflect the additional costs and professional obligations borne by lawyers and better reflect the choice of representation available to claimants.

Do you have any other suggested options or groupings to categorise Representation Costs (Q9)?

- 6.3 Practitioners have observed that the claim files provided by ACC as part of the disclosure for a review hearing are often poorly put together, include multiple copies of the same

⁶ Schedule of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

document, or are unnecessarily complex. As a result, claimants have to bear the (sometimes significant) costs associated with reviewing these files and extracting information that is needed to support their claim. Representation costs should therefore account for the costs that may be incurred in undertaking this work.

- 6.4 Representation costs should also account for the size of the disclosure, which can add to the time burden, and consequently, the representation costs incurred by the claimant.

Is there any information to support or reject the distinction that is made between lawyers and advocates in option 2.2 (Q10)?

- 6.5 ACC advocates are not qualified or practising lawyers but are able to represent claimants in review hearings. The training, qualifications and conduct of these non-lawyer advocates, who often act for vulnerable claimants, is not regulated. More importantly, no formal complaint procedures exist to address the quality of advocacy services and any alleged unprofessional behaviour and/or misconduct. On this basis, the Law Society supports the distinction that is made between lawyers and advocates in option 2.2.

Do the proposed new rates reflected in Option 2.2 reflect appropriate market rates for lawyers and advocates (Q11)?

- 6.6 The Law Society does not consider that the proposed new rates reflect appropriate market rates for the following reasons:

- (a) Lawyers often require up to 10 hours to complete a 'simple' review (i.e. from first contact with the claimant to closing the file).
- (b) Reviews which involve advocates and lawyers are often more complex. Even the simplest of cases tend to feature conflicting medical information, points of law, previous injuries (which often require additional disclosure), and the need for additional medical information.
- (c) Representation on more complex cases also involves reading through complex medical opinions, medical practitioners' notes, lengthy ACC case notes and a variety of other documents, all of which are time-consuming.
- (d) Lawyers have indicated that the proposed hourly rate of \$220 per hour is well below the hourly rates that are currently used to calculate costs.⁷ As a result, there is an immediate gap between the amount that is charged to a client, and the amount that would be reimbursed by ACC.

- 6.7 We therefore propose that these rates are further increased as follows:

- (a) The hourly rate that is used to calculate the minimum and maximum costs awards should be increased so that it more closely reflects current charge-out rates. The Law Society would be happy to collate and provide data relating to current charge-out rates, if that would assist.

⁷ See, for example, information available on the Law Society's website which shows that the proposed hourly rate falls below the average hourly charge-out rates which were used in 2016 (and will have since increased): <https://www.lawsociety.org.nz/news/lawtalk/issue-893/charge-out-rates-information-released/>.

- (b) The maximum costs awardable for legal representation should be based on an estimate that a complex review requires, on average, 20 hours of legal work (rather than 12 hours, as noted in the Discussion Paper).⁸

Do you agree with the proposed new maximum costs awardable for Representation costs (Q12)?

- 6.8 The Law Society disagrees with the new maximum costs awardable under both proposed options. The proposed costs are a significant improvement, but do not go far enough to reflect the costs incurred when representing a client in a complex claim. We appreciate that regulated costs are not intended to cover the full cost of a review, however, we believe they should reflect a higher proportion the actual costs which are incurred, particularly in relation to complex claims.
- 6.9 The Discussion Paper notes that the proposed new rates are intended to attract more lawyers to the Accident Compensation jurisdiction and consequently increase claimants' access to justice.⁹ For the reasons set out in paragraphs 6.6 and 6.7 above, the Law Society does not consider the proposed new rates are sufficient to achieve that objective. However, we acknowledge that this is an important first step towards achieving that objective and improving claimants' access to justice.

Do you think the proposed changes will increase access to justice (and therefore improve outcomes) for claimants (Q13)?

- 6.10 The proposed changes are an initial step towards improving claimants' access to justice. However, as noted above at paragraphs 6.6 to 6.9 above, further increases in maximum limits are required to encourage more lawyers to practice in this field and to have a meaningful impact on access to justice.

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) (Q14)?

- 6.11 A page count of non-duplicated disclosure would be helpful in determining the complexity of a review as it indicates the length of a claim and the complexity of the relevant issues.¹⁰ It could also be helpful to consider the health of the claimant and whether they have, for example, any learning difficulties, brain injuries, serious disabilities or mental injuries (as these factors are considered to be relevant to the complexity of a claim for the purpose of granting legal aid).

⁸ Discussion Paper at page 19.

⁹ Discussion Paper at paragraph 49.

¹⁰ A page-count could also assist in determining the length of time required to read through the relevant material. For example, a 300-page disclosure would require five hours of reading, at a page per minute.

7 Category 3 – Medical and other reports

Currently, the medical reports categories can be used for multiple reports. Is there any information to suggest the capped approach is inappropriate (Q15)?

- 7.1 No. We believe the capped approach is appropriate as it provides flexibility, allowing for complexity and multiple reports.

Do you think the proposed new rates will increase access to medical reports (and therefore access to justice) for claimants (Q16)?

- 7.2 Practitioners have observed that many claimants currently have to choose between instructing a lawyer and obtaining a medical report because they cannot afford to pay for both services. The proposed new rates will increase the ability to be reimbursed for medical reports, and therefore the likelihood of a claimant obtaining one.

Do you think removing the distinction between registered specialist reports and other reports will improve claimant's access to reports (Q18)?

- 7.3 The evidence required to establish each varies from claim to claim. Claimants will have a greater choice as to the type of evidence they can obtain to support their claim if the distinction between registered specialist reports and other reports is removed, improving access to justice.

8 Category 4 – other expenses

Do you think the new rates will increase access to in-person reviews for rural communities (Q19)? How can 'Other Expenses' (Category 4) be improved to enhance support for rural communities (Q20)?

- 8.1 Practitioners report that claimants do not often seek costs for travel because of the low mileage rate. Therefore, we do not consider that an increase in the maximum award will have a significant impact on rural communities' access to in-person reviews in the absence of a corresponding increase to the mileage rate.
- 8.2 We also consider that the Regulations should continue to allow costs awards for any loss of wages and travel costs that are incurred when attending a hearing.

Do you agree with the proposed new maximum costs awardable for Other Expenses (Q21)?

- 8.3 The Law Society agrees.

9 Additional considerations

Are there any other costs, benefits, or unintended consequences of the proposed changes that have not been considered in this document (Q25)? Do you think MBIE should conduct regular reviews of the maximum cost caps in the regulations (Q26)?

- 9.1 The Law Society encourages officials to consider including provisions relating to costs awards for alternative dispute resolution (**ADR**) in the regulations (for the reasons set out in paragraphs 10.1 and 10.5 to 10.7 below). We submit this work should be undertaken as part of MBIE's current review of the Regulations.

- 9.2 We also consider that MBIE should conduct regular reviews of the maximum cost caps in the regulations.

10 Alternative Dispute Resolution

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 (Q28)?

- 10.1 ADR can produce satisfactory outcomes for claimants (particularly where it involves collaborative meetings, relies on new medical opinions, and results in a new entitlement decision being made). These outcomes are akin to obtaining a quashed decision and directions obtained by way of a review hearing. ADR also enables claimants to achieve what could be achieved by attending a review hearing but within a much shorter timeframe and with minimum front-end costs.¹¹ ADR is therefore an important alternative to a review hearing.
- 10.2 That said, practitioners report that a claimant's decision to use ADR will generally depend on the advice provided by their representative. Claimants will generally be persuaded to attempt ADR if their representative is skilled in ADR and understands the framework in which ACC can apply its discretion to reimburse costs incurred in undertaking ADR. A change to the regulated timeframes is therefore unlikely to influence a claimant's decision to pursue ADR.
- 10.3 The Discussion Paper notes that ACC is concerned about the current interaction between ADR and external reviews, and in particular, the administrative burden placed on ACC when a review is lodged while ADR is underway.¹² We are unclear as to the context of this comment, as review applications generally precede ADR.¹³ We acknowledge that there may be an administrative burden on ACC where it is required to prepare the claim file for review while ADR is underway. However, a clearly organised file is a key requirement for a successful ADR outcome, and the principles of natural justice require ACC to disclose all information that is relevant to the claim (including the claim file) when seeking to resolve a matter by ADR.

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 (Q29)?

- 10.4 Practitioners have observed that the agreements reached during ADR often require as much work at the end of the process as they do before and during the ADR event. As a result, practitioners are left out of pocket where work is undertaken after ADR, and this work falls outside the scope of what is covered by the legal aid grant for the review hearing (in cases where the client is legally aided).

¹¹ ADR imposes less front-end costs on claimants, who are otherwise required to pay for specialist appointments and then await reimbursement when the reviewing hearing takes place.

¹² Discussion paper at paragraph 72.

¹³ We understand that ACC would not normally be engaged in ADR when a review application is lodged. In some cases, practitioners request ADR in the review applications, or ACC offers ADR upon receipt of a review application. In other cases, new information may be provided after a review application is lodged, which indicate that ADR may be an avenue that is worth pursuing.

10.5 The Discussion Paper notes that MBIE is “interested in understanding the impact of ADR on the wider dispute resolution process for ACC claimants” and this includes “understanding any costs involved for those undertaking ADR”.¹⁴ The Law Society believes ADR plays a significant role in facilitating and improving access to justice, and welcomes MBIE’s interest in recognising ADR as an effective avenue for resolving disputes. We would therefore be happy to provide a more specific breakdown of the various costs associated with undertaking ADR if that would of assistance to officials.

If a level of reimbursement for costs was to be included for ADR in the Regulations, what should be taken into consideration (Q30)?

10.6 ADR is often quicker, involves lower cost and stress than the review process, and is generally easier for claimants to understand. The Law Society would welcome regulations which provide for the reimbursement of ADR costs. These regulations should address costs incurred during the ADR process as well as any work undertaken thereafter to finalise any agreements that are reached during the ADR process.

10.7 If a level of reimbursement for costs was to be included in the Regulations, we also suggest including an additional objective for the Regulations to specifically address ADR and to support claimants to pursue ADR.

Would the inclusion of a level of reimbursement for ADR costs change your position on undertaking ADR in comparison to an external review (Q31)?

10.8 The Law Society submits that the inclusion of a level of reimbursement for ADR costs would encourage more claimants to pursue ADR.

10.9 Please feel free to get in touch with me via the Law Society’s Law Reform & Advocacy Advisor, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz), if you have any questions, or if further discussion would assist.

Nāku noa, nā



Herman Visagie
Vice-President

Encl: Law Society’s submission on *Consultation on Changes to the Injury Prevention (Review Costs and Appeals) Regulations 2002* MBIE discussion paper (31 October 2016).

¹⁴ Discussion Paper at paragraph 76.

31 October 2016

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Consultation on changes to the Injury Prevention (Review Costs and Appeals) Regulations 2002

Introduction

1. The New Zealand Law Society welcomes the opportunity to comment on the Ministry of Business, Innovation and Employment's discussion document *Consultation on Changes to the Injury Prevention (Review Costs and Appeals) Regulations 2002* (discussion document). The discussion document seeks views on an inflation adjustment of 14.9% in the scale of costs awards made under the Injury Prevention (Review Costs and Appeals) Regulations 2002 (Regulations) for costs incurred in ACC statutory reviews.

General Comments

2. The discussion document notes that prescribed costs under the Regulations are no longer in line with inflation and do not provide adequate support for ACC claimants, particularly in more complex cases. A 14.9% increase in scale costs is proposed, to "ensure that the Regulations make a meaningful contribution to clients to access the statutory dispute resolution processes".¹
3. The Law Society welcomes the proposed increase, as an initial step in improving ACC claimants' access to justice. However, an inflation adjustment increase of 14.9% is insufficient to provide adequate support for claimants. The recent *Independent Review of the Acclaim Otago (Inc) July 2015 Report into Accident Compensation Dispute Resolution Processes* (Independent Review) recommended that review costs should be increased "and more than by just inflation".² The Law Society agrees.
4. The Independent Review made the following observations:³

Many [submitters] said that preparation costs – particularly if a lawyer or advocate was representing the claimant – were so inadequate that many claimants were denied competent representation as a result. They could not afford the shortfall between actual legal costs and

¹ Discussion document, page 1.

² *Independent Review of the Acclaim Otago (Inc) July 2015 Report into Accident Compensation Dispute Resolution Processes*, Miriam Dean QC, 26 May 2016 (released publicly on 20 September 2016), at page 32.

³ *Ibid.*

the amount recovered (by regulation). And the review was left in no doubt that for many claimants their ability to persist with a review often came down to their own lawyer or advocate's commitment not to abandon them despite the risk of non-recovery of that shortfall (or their time in general).

It is appropriate that review costs are increased – and more than by just inflation. The Ministry should also take into account recommendations for change to the review process, including that there is no one-size-fits-all review. One option is to allow the reviewer come flexibility for additional costs where a particularly complex matter has demanded significant preparation (gathering evidence, preparing submissions and obtaining specialist reports) and potentially a hearing of a day or more. Regulations currently provide \$175 for a second hour and any later hours at \$14 per 15 minutes (or \$56 an hour).

Increased costs will, of course, fall on ACC. But review numbers should drop significantly if ACC really gets behind its new alternative dispute resolution processes, while more robust review decisions will result in fewer District Court appeals (where costs are much greater).

5. The discussion document acknowledges that the concerns about prescribed costs providing inadequate support for clients, especially in more complex cases, are valid.⁴
6. While the current proposal is limited to an inflation adjustment, the discussion document notes that there are likely to be further, more substantive changes to the regulations:⁵

“Work is underway to better understand the nature and extent of the issues and to inform assessment for substantive changes to the regulations.”
7. The Law Society agrees that further work on the Regulations is required and would welcome the opportunity to assist with that work.
8. It is clearly beneficial for meritorious appeals to be investigated and resolved to the fullest extent possible at the Review stage. Increasing costs awards under the Regulations for medical evidence and legal representation to a more realistic level would very likely contribute to resolving disputes at an earlier stage, thus minimising the number of appeals to the District Court. It could also potentially reduce the number of self-represented litigants.

Responses to consultation questions

Question 1: *What do you think of the current scale of regulated costs, bearing in mind that it is not intended to cover the full cost in a review? Are there particular areas where increased support is necessary? Do you have any data that will help us to establish the extent of the shortfall more clearly?*

9. As the Independent Review made clear, the current scale of regulated costs is insufficient, even when taking into account that the scale is not intended to cover the full costs of a review. The amount available for legal representation and medical evidence under the Regulations is far below the actual costs incurred. ACC practitioners advise that it is common for ACC cases to involve very complex medical evidence and ACC files in excess of 2,000

⁴ Pages 1 and 2.

⁵ Page 2.

pages of documentation. In practical terms, the costs available under the Regulations often cover only a minimal amount of work on the claimant's case. The level of legal aid available is also insufficient.

10. With regard to medical evidence costs, the Independent Review cited a range of medical report costs.⁶ The Law Society understands that the cost of medical reports is often substantially higher than the figures quoted in the Independent Review. For example, a comprehensive psychiatric assessment for a complex case is approximately \$5,000, and an occupational medical assessment averages between \$1,600 and \$4,000.
11. ACC frequently refers the medical evidence adduced by claimants to its own medical advisers. The claimant has the right of reply but as the prescribed costs under the Regulations are minimal, in many cases it is not feasible to get a further report, leaving the reviewer with conflicting evidence.
12. This has been somewhat ameliorated recently by the decision of *Anderson v Accident Compensation Corporation* where Judge Powell held at [70] that:

“Quite clearly, the maximum award must relate to each report prepared rather than the maximum that the specialist is entitled to with regard to the totality of their involvement in a review.”⁷
13. The situation is however still problematic at the appeal stage. It has become commonplace in elective surgery appeals for ACC to adduce further medical evidence at appeal upon receipt of submissions being filed (often when the appellant has not filed further medical evidence).
14. The Law Society understands that ACC employs many medical professionals, who are able to provide advice at short notice. Clinical Advisory Panel (“CAP”) members, Branch Medical Advisors (“BMAs”) and Branch Advisors Psychologists (“BAPs”) are often in full time employment by ACC. By contrast, claimants are often forced to rely on their treating practitioners to assist them. There is no full time panel available to provide advice for claimants in accident compensation cases.
15. Increasing prescribed costs for medical evidence under the Regulations would go some way to remedying this inequality of arms and would enable medical professionals to be properly remunerated for their expertise and time. This may also have the effect of encouraging medical professionals to assist claimants with ACC cases, thus minimising some of the difficulties claimants face in obtaining medical evidence.
16. Another significant cost (not provided for by the Regulations or by legal aid) is travel to obtain medical assessments associated with the hearing. The Law Society understands that the majority of available specialists are located in the main centres of Auckland, Christchurch

⁶ Note 2 above, at page 32: “The review was given a range of report costs. ... for example, ... a report by a psychiatrist costs \$1,200 to \$2,500; ... and \$1,500 to \$2,000 for a neuropsychology report.”

⁷ [2016] NZACC 164.

and Wellington. Claimants in rural areas are often unable to afford to travel to medical assessments.

Question 2: *Do you agree with the objectives identified here?*

17. As noted at paragraph 6 above, increasing the prescribed costs under the Regulations for medical evidence and legal representation is likely to contribute to the resolution of disputes at an earlier stage, thus reducing the number of appeals to the District Court. It is clearly beneficial for meritorious appeals to be investigated and if possible resolved at the review stage.
18. The Law Society acknowledges that the Regulations are not intended to be full reimbursement, and that some costs will need to be borne by claimants. Nevertheless, for the reasons outlined above, the proposed inflation-based increase of 14.9%, whilst welcome, is insufficient.

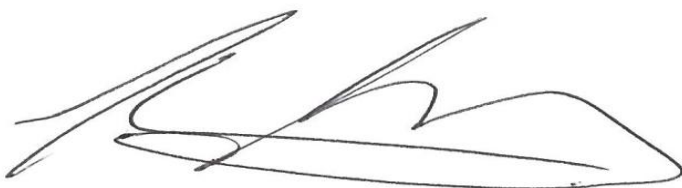
Question 3: *Is there another option(s) you would like to suggest? Are there any other changes needed?*

19. The Independent Review proposed that cases subject to review could be categorised (“tracked”) according to complexity.⁸ There is merit in considering a similar type of streamlining for costs awards, with justification for higher amounts of legal costs being awarded in complex cases (for example, treatment injury claims, vocational independence decisions and decisions where the claimant has been on weekly compensation for a number of years).

Conclusion

20. This submission has been prepared with the assistance of the Law Society’s ACC committee. If you wish to discuss this further please contact the convenor, Don Rennie, via the committee secretary, Jo Holland, at jo.holland@lawsociety.org.nz / 04 463 2967.

Yours faithfully



Kathryn Beck
President

⁸ Note 2, at page 29.