

I am writing with a late submission on the ACC review costs regulations.

My submission is as follows:

1. I am writing to support the submission and evidence made by Warren Forster in his capacity as a researcher and a Barrister. I endorse his demonstrable experience derived from a range of perspectives in practice in ACC disputes. I submit he has unparalleled knowledge on the policy, law and operational history of the ACC scheme, as well as a history of long standing constructive engagement with policy officials and Ministers. Our work has been mentioned twice in oral debates in the House of Representatives by MPs and it has also been commented on favourably by leading experts including Geoffrey Palmer and Kenneth Keith.
2. I am a current member of the ACC + MBIE scheme advisory panel, was a core researcher in the projects referred to by Warren, engaged closely with Miriam Dean, and currently specialise in the intersection of law, public policy, human rights and digital technologies as director and co-founder at [Brainbox](#).
3. I emphasise Warren's points on how MBIE responds to the presence or absence of evidence in setting the costs regime. MBIE must not set policy based on speculation when evidence is available. If MBIE has any concerns about the available evidence, it should seek a discussion about those concerns. If those concerns remain, they should be explicitly stated so they can be fairly scrutinised. This is the appropriate course of action, rather than rejecting evidence out of hand. I emphasise the importance of constructive discussion to add context to the available evidence. There is ample context in this system that cannot be appreciated by people disconnected from previous policy interventions in this area, or without close involvement in it.
4. I emphasise Warren's points that the dispute resolution scheme must operate as part of an overall quality assurance measure for corporation decision-making, in a situation where ACC holds enormous power over claimants' lives, and in a situation where trust and confidence in ACC - especially among marginalised groups (including tangata whenua) - is extremely low. MBIE ought to take account of frequent public concern and media coverage about operational conduct by ACC and its staff in managing the scheme. A strong dispute resolution process is an invaluable tool for enhancing public trust and confidence.
5. I emphasise that, if a decision is made to implement a regime which fails to reflect the real costs of representation at review, then this can only be taken as a conscious decision to externalise the costs of quality assurance onto the public. I refer you to [key reports attached to our 2017 research](#) at appendices 1, 5, 6, 8, 14 and 16, as well as the [performance improvement framework review](#), the [Auditor-General's report into ACC complaints](#), and the [Trapsky report](#). These illustrate that there are longstanding historical issues that have either persisted, or cropped up anew after being resolved, across the history of the scheme.
6. If MBIE decides to externalise any cost onto the community, it ought to consider that these costs are being externalised onto people who have diagnosed medical conditions, whether or not they are covered by ACC, and are predominantly people with disabilities as defined by the Convention on the Rights of People with Disabilities ("CRPD").
7. I note that the CRPD defines disability as an interaction between impairments (injuries) and systems that amplify the effect of those impairments on individuals. MBIE must strive to create a system that does not amplify the effects of individuals' impairments. Adequate compensation for representation is a crucial component of that dispute resolution system. Access to advocacy (whether expert advocacy or not) is an essential component of a system of reasonable accommodations.

8. I emphasise that MBIE and ACC must consider their respective roles as members of the executive branch with a perceived interest in the outcome of ACC disputes and the strength of the overall dispute resolution process. MBIE ought to be aware that public perception will be that it is intentionally designing the review costs regulations in order to advantage ACC in defending its claims management decisions. MBIE should be aware that the delay in implementing this review costs regime is already perceived as having been a decision to disadvantage claimants and assist ACC.
9. ACC claimants frequently become aggrieved at the perceived and substantive injustice of the ACC system and the dispute resolution system. Having access to high quality representation is an important part of creating a trusted advisor who can explain ACC's decision to that person and help them to come to terms with it.
10. This sense of grievance felt by ACC claimants must be taken seriously because of its impact on recovery, on the community, on ACC staff, on people in the dispute resolution system, and wider policy investigations into strengthening social cohesion. MBIE must take public perception of the dispute resolution system into account in setting these regulations if it wants people to think the system is fair. Taking steps to help people think the scheme is fair is a legitimate public policy objective.
11. I advise MBIE to strongly consider the way that effective representation makes for more efficient dispute resolution, and also adds to the parties' perception of the quality of the adjudication involved. In that sense, incentivising high quality representation rather than self-advocacy has strong policy merits for the wider operation of the scheme.
12. I urge MBIE to take a consistent approach to deferring to the judgement and qualifications of reviewers. MBIE faces a powerful temptation to cap potential payments under the dispute resolution scheme conservatively, because of a perception that unjustified or unsubstantiated costs awards may be made. This is an inconsistent approach to trust in the judgement of reviewers. Reviewers are asked to adjudicate medico-legal claims that have binding legal consequences and value in the hundreds of thousands of dollars (millions if outstanding claims liability is considered). If MBIE takes the position that reviewers are capable of making substantive judgements on disputes, then they must also trust reviewers to exercise careful discretion in making decisions about costs, rather than capping payments at an unjustifiably low rate in ways that will produce perverse outcomes.

Thank you for the opportunity to make this submission. Please confirm this has been added to the submissions, or let me know any other steps that may be required. I am happy to have a conversation about this further.

Kind regards

Tom

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Tom Barraclough

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www.brainbox.institute/projects

[Organise a meeting with me](#)

Privacy of natural persons