Submission of Warren Forster to MBIE regarding review costs and appeals regulation

28 March 2022, Wellington, New Zealand

Foreword

> "it is hoped that those with experience and a high level of understanding of the AC jurisdiction will be adequately reimbursed"
>
> Policy Document[1]

Hope is not a strategy. Hope is a poor basis for making policy. As someone who may meet the test of "experience and a high level of understanding in the accident compensation system", I can unequivocally state that the proposed policy setting will not lead to appropriate reimbursement.

Further, the proposed costs regime will continue to do very little to encourage people into the market for legal services in order to build "experience and high level of understanding".

If the policy is implemented as proposed, the identified barriers that currently exist will continue and effective access to justice to injured people will be denied. The problems faced by people now are the result of deliberate policy decisions dating back to 1992. The only way to address these is by deliberate policy decisions. The recommendations set out below, if implemented are likely to address these and result in effective access to justice. Anything short will perpetuate the problems for generations to come.

Introduction

About the submitter

1. I am a lawyer, researcher, and company director. I have expertise in the ACC system in all these roles. This submission is prepared and presented to MBIE in my capacity as a lawyer and researcher. In order to limit any perceived conflicts of interest, I will limit my submissions on section 7 to my previous experience as a representative.

2. I am recognised as an expert in the Accident Compensation systems and access to justice[2]. My research has been relied upon by the Court in New Zealand[3] and the United Nations[4]. Much of this research has been funded with generous support from the New Zealand Law Foundation.

[1] https://www.mbie.govt.nz/dmsdocument/18852-review-costs-regulations-detailed-options-for-consultation page 7, para 20.
[2] See for example: *Daalman v ACC* [2020] NZHC 2695.
[3] See for example: *Dickson-Johansen v ACC* [2018] NZACC 36; *ACC v Carey* [2021] NZHC 748 at [82].
[4] Concluding observations UNCRPD 2014.

3. I also have the unique experience of being a family member,[5] then an advocate and then a practicing lawyer in this jurisdiction.[6]

4. I have previously made extensive submissions about the legislative system for review costs and appeals regulations in my role as leader of a research team. These have been previously published[7] they include results of a client survey in 2014 about legal costs. Many of these issues addressed in the submission remain today.

Executive Summary

5. In order to provide effective access to justice, I propose that three cost categories are set out in regulations: representation, evidence and other.

Representation

6. Representation costs must capped at a rate to cover 90% of cases with a new regulation 4(4) inserted to address exceptional cases over the cap.

7. The capped rates must be calculated taking into account the three fee factors:

i. **Hourly rates** set for type of representative, **informal representatives** (family/friends), **professional advocates** and **lawyers.**

ii. A **complexity level** based on characteristics of the dispute (simple, standard and complex).

iii. Allocated maximum hours for **specified tasks** (for each level of complexity) in the dispute resolution process.

8. These three fee factors should be set out in a guidelines that are created and reviewed by a guidelines committee. An example is set out at Appendix 1. The costs available if a lawyer at the top of the scale was engaged would be in the range of $7,000 to $10,000. The costs for a family member undertaking a standard case would be around $750. These would allow 90% of cases to be funded through the scale with an exceptional case fee approach available through a new proposed regulation 4(4).

Expert evidence

9. The proposed expert evidence rates are **appropriate for one report**. There must not be a regulatory cap on the **number of reports** inserted by stealth. Importantly, it must be acknowledged that increasing the expert rates is essential in allowing the medical evidence barrier to be removed, but it will not result in removing this barrier altogether.

10. Procedural reform is required to the process of obtaining evidence. It is proposed that an expert evidence trust be established (see Appendix 2). It is essential that the

[5] I became involved in this jurisdiction after a family member had an accident and represented her at review, and in an independent external review by Anthony Hughes-Johnson, QC.
[6] I was involved as an advocate between 2006 and 2014, then as a lawyer from 2014 onwards.
[7] https://acclaimotago.org/appendices/8.pdf

current process of regulatory reform allows for payments to this type of organisation to avoid the funding mechanism acting as a barrier.[8]

Other costs

11. The cap of $1,500 for other costs is appropriate, however the per km rate of 29c/km must be abandoned and replaced with a rate of 79c/km and set by reference to the IRD rate. To fail to do so will continue to deny access to justice for those in rural communities.

12. A clear policy decision will need to be made regarding whether cultural support, accessibility support and similar requirements are provided through "other costs" or through separate categories.[9]

Appendices to this submission

13. I attach at Appendix 1 a proposal to establish a committee to make guidelines on costs. At Appendix 2, I attach a proposal to establish an expert evidence trust to address the medical evidence issues. At Appendix 3 is a summary of data on time I spent on cases between 2014 and 2018 during my practice as a lawyer. Appendix 4 sets out the hours for representatives in Western Australia, and Appendix 5 sets out the AA calculations for running costs. Included at Appendix 6 are my submissions from 2016.

The process of awarding costs

14. The framework for an award of costs must be considered before any further steps are taken in assessing the regulatory proposal.

15. The process is set out at s 148 and requires:

a. The reviewer to determine whether costs are to be awarded on the basis that the review was successful (costs follow) or the applicant acted reasonably in applying for a review (which is the threshold for the reviewer to exercise discretion to award costs).

b. If costs are to be awarded, then the reviewer must decide the level of costs (up to the maximum set out in the regulations), and this must be based upon costs incurred which the claimant is liable to pay.

16. Importantly, any issues regarding representatives encouraging frivolous or vexatious cases, or advocates "with an axe to grind"[10] can be easily managed by the exercise of discretion by reviewers (or the Courts on appeal, and ACC can exercise its right of appeal in appropriate cases).

[8] The status quo is that the lawyer is liable to pay this fee immediately and pass the cost onto the client. Most clients will not be able to afford $4,000 in expert evidence and to carry this cost for 6-9 months. Most lawyers with a caseload of 50-100 cases cannot carry $200,000 to $400,000 in expert evidence costs. Changing the cap will not, in and of itself, remove this barrier.
[9] Required by standards 1 and 2 of the GCDR standards.
[10] See *ACC v Carey* [2021] NZHC 748 at [104]-[105].

17. Similarly, costs claimed must not exceed the actual costs incurred by the applicant.[11] The discussion document focuses on the categories and the maximum awards. Therefore, the maximum awards must be capable of dealing with the most complex cases and reviewers trusted to exercise their discretion.

18. A policy decision must be made at this stage about whether the costs are set at a maximum in which case they need to take into account the most complex cases seen in this jurisdiction, for example $25,000 - $40,000 in legal fees, or whether the regulated capped maximum is set for 90% of cases and a mechanism is incorporated into the regulations to address exceptional cases.

19. In a previous submission,[12] it was recommended to MBIE that a mechanism for complex cases be developed, for example by inserting regulation 4(4) along the following lines:

> The reviewer may award costs in excess of the cap on costs if satisfied that it would be manifestly inadequate or that it would impose undue hardship to the applicant to limit the award of costs having regard to the cost of any legal and medical expenses incurred by the claimant of that the claimant is liable to pay.
>
> or
>
> Notwithstanding rr 4(1) to (3) above, the reviewer may award up to the maximum of $10,000 for the costs of disbursements, representation and medical evidence if the reviewer is satisfied that it would be manifestly inadequate to follow the schedule or that undue hardship to the claimant would result.

20. I reiterate that if a process allowing for exceptional cases was not to be followed, then the cap on costs being awarded must be set 10 times higher than the current cap to allow for the most complex cases.

21. Regardless, discretion of awarding costs should be managed by reviewers. This submission proceeds on the basis that the proposed rates are for the 90% of cases and exceptional case process along the lines set out above is incorporated into the legislation. To provide some context at this early stage, the 90th percentile of review costs for clients in my practice as a lawyer (see appendix 3) was $6,900.

22. I note that awards of costs are subject to rights of appeal to the District Court (and High Court) and Parliament's intent was to provide judicial oversight of reviewers' exercise of discretion. Nothing should change from this perceptive as the legal system is well equipped to deal with costs issues.

The process of agreeing to costs

23. In reality, in most cases, the costs are not in fact determined by a reviewer (or a court on appeal) but agreed to between the person (or their representative) and ACC. I would estimate that determination of costs was only required in about 1/3 of the reviews

[11] This is largely referred to as the indemnity principle as is reflected in the accident compensation act at s 148 the Accident Compensation (Review Costs and Appeals) Regulation at regulation 4.
[12] See Submissions to MBIE in 2016, https://acclaimotago.org/appendices/8.pdf [97]-[99].

I undertook as a lawyer, and I can say with certainty that costs were always agreed in consensus-based work.

24. The clearer the process can be for agreeing to costs, the easier it will be for the parties (both ACC and claimants and their reps) to reach agreement. I consider a scale with specific tasks and time allocations be developed and used as a starting point.

Objectives stated in regulations

25. The establishment of a purpose provision to guide interpretation of the regulations has previously been recommended.[13] I am pleased to see this being adopted as objectives. A live question remains as to what this objective should be.

26. As was noted by Judge Powell (as he was then) in *Dickson-Johansen*[14]

> …recent research has confirmed that the complexity of the jurisdiction means legal representation is important to claimants, and, given a claimant cannot by definition obtain more than the statutory entitlement under the accident compensation regime even if successful, there is much merit in Mr Forster's submission that a successful claimant should not be out of pocket at the conclusion of the appeal process. Instead such an outcome would be antithetical to the purpose of the 2001 Act

27. Similarly, in *ACC v Carey*,[15] the High Court stated:

> Research has confirmed the complexity of the ACC jurisdiction and that representation is important to claimants. A claimant cannot obtain more than the statutory entitlement under the Accident Compensation regime even if successful, therefore a successful claimant should not be left out of pocket at the conclusion of the appeal process in which a non-legal advocate has provided assistance. Such an outcome would be antithetical to the purpose of the AC Act 2000 [sic]

28. When considering the development of regulations, particular care must be taken to ensure that the purpose of the act is achieved and a person is not left out of pocket, regardless of the legal status of their representative.

29. The central task of this process currently being undertaken by MBIE is to ensure that the regulatory system can operate in such a way that a person is not left out of pocket. This is a fundamental required for access to justice to be effective.

30. It is no exaggeration to say that if it was not for work undertaken on a pro-bono basis and not charged to clients, **the statutory purpose would never have been achieved** in any case I was involved in in all of the years I represented people in ACC disputes. Costs for representation were denied when I represented a member of my family. Costs were woefully inadequate and often opposed in my work as an advocate, and when I was a lawyer, they were around 15% of the actual costs[16].

31. As the High Court noted in *ACC v Carey*:[17]

[13] See , https://acclaimotago.org/appendices/8.pdf at paragraph 90.
[14] At [14].
[15] At [100]
[16] See Appendix 3 for an explanation of my experience as a lawyer.
[17] At [80].

> … "if a robust approach to costs is not undertaken, ACC – deliberately or unwittingly – externalises the financial burden of flawed decision-making processes onto claimants and the wider community" so obscuring the true cost for administering the scheme.

Officials are reminded that that it would likely be considered an error of law for officials to advise the Minister to make regulations that are inconsistent with the statutory purpose of the scheme. This is particularly so when officials have been provided with clear evidence that the proposed approach will not meet the objectives of the regulations, or meet New Zealand's obligations under the United Nations Convention on the Rights of Persons with Disabilities.

32. The comments at paragraph 20 of the consultation document suggest that officials have taken the position that regulations are not intended to cover a claimant's full cost but rather to provide a fair contribution. I submit this is flawed. The notion of 'contribution costs' has been repeatedly addressed in submissions to the Court, and the Court has repeatedly set out a consistent position that such an approach is inconsistent with the purpose of the act; giving consistent reasoning that a claimant should not be left out of pocket. This has been explained to MBIE previously.[18]

Questions 1 and 2 – the objectives of the regulations

33. It is recommended that the reference to "frivolous and vexatious" litigation be removed as this can be dealt with by the reviewer (or court on appeal). Further it is recommended that effective and efficient review process be removed and replaced with the administration of justice in this jurisdiction. Finally, transparency and consistency fall within best practice.[19]

34. For avoidance of doubt, I do not recommend any incorporation of the words "frivolous or vexatious" into legislation as this is likely to focus disputes [20]unnecessarily on these thresholds whereas the intention of managing unnecessary reviews can be dealt with by reviewers exercising their discretion or courts on appeal.

35. This tightens the objectives to providing effective access to justice and supporting the administration of justice. For avoidance of doubt, the requirement is effective access to justice, not "adequate access to justice".

Recommended objectives:

36. It is recommended that the objectives be amended to reflect the following.

(i) providing effective access to justice for claimants

(ii) meeting best practice in dispute resolution,[21] and

(iii) supporting the administration of justice in this jurisdiction.

[18] https://acclaimotago.org/appendices/8.pdf at [63]-[67].
[19] Government Centre for Dispute Resolution (GCDR) principles and best practice framework.
[20] https://www.mbie.govt.nz/dmsdocument/18852-review-costs-regulations-detailed-options-for-consultation, page 7, para 19.
[21] GCDR standards.

Proposed costs categories

Questions 3-5 Categories

37. I do not agree with the proposed categories as I consider that they should broadly separate representation costs from evidential costs and disbursements and other costs.

38. I recommend that the legislation provide for categories and mechanisms for increasing (for example in accordance with inflation adjustments) however the line items with categories be developed into guidelines by a rules committee which is established to set this. This committee would be administered by MBIE and include lawyers, advocates, claimant organisations, review providers, ACC staff. An example of possible line items, costs and time allocations is set out at Appendix 1.

39. I propose that the following three categories are created:

(i) Representation costs[22]

(ii) Evidential costs[23]

(iii) Other costs

Application costs

40. These should be included in representation costs. The allocation for this step should be set to the level to allow meaningful engagement between the claimant and the representative. This should allow an understanding to be gained of the possible merits of proceeding to review rather than simply the procedural step of lodging the review.

41. I recommend that the time allocation (within the category of representation costs) be set at 1 to 2 hours at the time cost set for representatives to undertake an initial consultation and lodge the review application).

42. The risk identified in the discussion document at paragraph 32 is easily managed by the reviewer exercising discretion with the right of appeal to the court. It is a fundamental principle that people have access to advice even if they have no legitimate claim in order to understand their rights and obligations. There should only be very rare circumstances that an award is not made if a person's claim with ACC has been declined.

Questions 6 and 7

43. I strongly agree that costs should increase for an application, however these should be a line item in representation costs and should reflect both the actual costs and the complexity of the case (see Appendix 1). By way of example, the costs of an initial consultation in relation to lodging a review application was 2.54 hours of lawyer time (appendix 3).

[22] For representation by an informal advocate (family member etc), professional advocate, and lawyer.
[23] For medical and other evidence.

Representation costs

44. Representation costs set out in the discussion document remain inadequate to achieve the stated objective of providing access to justice for claimants.

45. The discussion document sets out that 12 hours on average is enough for a complex review. Putting aside the hourly rate, 12 hours is appropriate for a standard case (based on simple, standard and complex) without the need to brief and review medical evidence (see Appendix 1). In my work as a lawyer (see Appendix 3), 65% of cases were billed at 12 hours or less of legal costs to the claimant.

46. This is woefully inadequate for complex cases. More than 20% of reviews I undertook as a lawyer took more than 18 hours of lawyers time.

Question 8 – Sliding scale

47. I recommend that a sliding scale be adopted which takes into account:

i. the type of representative,
ii. the complexity of the case,
iii. the time required for each task.

48. I propose the establishment of a guidelines committee, to develop and manage this process. This will ensure that as much consensus as possible is developed and maintained.

49. An example of what this might look like is set out at Appendix 1. This approach would see the following considerations:

(1) Representatives' hourly rates:[24]

i. informal (family/friend)[25]

ii. Formal advocate (for example non practicing lawyer, experienced professional advocate)[26]

iii. Lawyer (with practicing certificate)[27]

(2) Set line items **for specific tasks** that are clear and can easily be verified (set out in Appendix 1)

[24] Any issues about the appropriate level can be the subject of a discussion between the representative and the ACC representative and if necessary recorded at the case conference.
[25] Based on *ACC v Carey* (above) where are family member provided services.
[26] On the basis that non-lawyers provide services in this jurisdiction and are an important pillar of providing access to justice.
[27] Recognising the additional costs of developing skills and expertise and of maintaining a professional practice, and that these rates are significantly less than the rates in comparable jurisdictions overseas (See Annex 1 to Briefing to Minister dated 21 April 2021 [2021-3297].

i. Obtaining and reviewing files

ii. Briefing evidence

iii. Preparing for expert evidence

iv. Preparing submissions

v. Attending the hearing.

(3) A time allocation in hours for simple, standard and complex cases for each of those tasks. Cases can be easily assigned to these three categories based upon the type of decision subject to the review application, the type of review application.[28]

50. I recommend that in addition to the sliding scale being implemented to reflect the three variables of type of representative, the complexity of the case, and the specific tasks undertaken, an overall maximum should be applied. I recommend that this be set in the vicinity of $7,000 to $10,000 and adjusted by the committee in accordance with inflation. Again, this is a cap set by legislation which means it must be set at a level appropriate for 90% of cases with an exceptional case process.

51. I recognise that this approach was in fact set out in the original draft consultation paper on this in 2019. I also recognise that officials have advised the current minister that this approach was abandoned on the advice of MBIE's Regulatory Impact Analysis Review Panel because the paper would not comply if the District Court Rules process remained. Its reasons were apparently:

i. It would create a perception that the process used in the "ACC review tribunal were comparable with other courts", and
ii. the "prescriptiveness and complexity of this option did not align with the broader objectives of a more flexible approach".[29]

52. These concerns can be dealt with easily. What is proposed are specific guidelines for the Review process and the guidelines will clearly state that they are for the review process, for an example see Appendix 1 (and I note that the review process is not a tribunal), and as a guideline, they will not limit the discretion of a reviewer (or the Court). All costs regimes clearly state that the discretion lies with the decision maker on costs (as explained earlier).

53. The proposed approach with the steps in preparation for the review have been set out previously.[30] These are created specifically for the review process as a clear guide. They are proposed to be a guideline and do not represent a limit or stop the exercise of discretion by a reviewer.

[28] Any issues about complexity can be agreed to between the representative and ACC, and if necessary recorded at the case conference.
[29] Briefing 2021-2742, 8 April 2021.
[30] https://acclaimotago.org/appendices/8.pdf [100]-[109].

54. In the course of preparing these submissions, I became aware that this was proposed by the previous Minister in 2018/2019 and it was removed by MBIE in 2021.

The distinction between lawyers and advocates

Question 9

55. It is noted that the status quo is that the costs are so low that the distinction between lawyers and advocates for costs purposes is irrelevant as every charge? award exceeds the maximum award in costs and the distinction is irrelevant.

56. It is also noted that there is significant work required to become a practicing lawyer and maintain a practice. There is also a variety of skills and experience amongst advocates with many being highly skilled and experienced.[31]

57. If rates were to increase to an appropriate market rate, then the distinction could be appropriate.

58. I would recommend that the distinction be broken into three categories:

(1) Family members/informal representatives who previously were not considered "advocates" for purposes of costs, however following *ACC v Carey,* there can be no doubt that costs can be lawfully claimed by a family member. Following the approach set out in *Carey,* these might, for example be set at 50% of a junior lawyer rate.

(2) Formal advocates who would include people who are formally trained in law but who do not practice, people who act as professional advocates, and those who have the skills and experience to appropriately represent others. It must be recognised that the boundaries between formal and informal representation may need to be managed. These might, for example be set at 75% of an experienced lawyer rate.

(3) Practicing lawyers of a range of experience and expertise which would range from junior, experienced to senior lawyer.

59. One example is the Workcover system in Western Australia (see Cabinet Paper, Annex 1) where current rates[32] set in 2020 are:

(1) $224/hr[33] for registered agents (the equivalent of non-lawyer advocates)
(2) $341/hr[34] for junior counsel (less than 5 years)
(3) $448/hr[35] for senior counsel (more than 5 years practice on own account)

[31] Dickson Johansen, Carey.
[32] These are currently up for consultation and will be amended by new rates for 2022. This process occurs approximately every 2 years.
[33] Australian $209 converted to $224 New Zealand dollars at rate of $AU1 to $NZ1.07
[34] Australian $319 converted to $341 New Zealand dollars at rate of $AU1 to $NZ1.07
[35] Australian $418 converted to $448 New Zealand dollars at rate of $AU1 to $NZ1.07

60. It must also be noted that the scale setting out the hours in the Western Australian system was omitted by officials from the Cabinet paper. The actual scale setting out the hours (included as Appendix 4) is remarkably similar to the proposed approach set out at Appendix 1.

Question 10

61. It is recommended that this question would best be considered from the perspective of 3 types of representation. Informal representatives (*ACC v Carey*), formal representatives who are not practising lawyers, and practicing lawyers.

62. Having been both an advocate and a lawyer, I note from a practical perspective that my initial rate was less than $200/hour but as a lawyer, my hourly rate increased to $345/hour (2014-2018 rate) and if I were still practicing, this would now likely increase to at least $400/hour. It would be likely that practicing lawyers charge more per hour than advocates.

63. If the purpose of this provision is to allow peoples' costs to be recovered, then it follows that a higher hourly rate needs to be available for lawyers rates.

Proposed rates

Question 11 – do the proposed rates reflect appropriate market rates for lawyers and advocates?

64. The new proposed rates in the consultation document **do not** reflect the appropriate market rates either in terms of time allocated or hourly rate. These proposals reflect the continued approach of policy advise of supressing the market for legal services.

65. The history of legal costs at review under the ACC scheme has been previously outlined to MBIE.[36] A policy decision was made in the 1990s to supress the market for representation because of the mistaken view that representation was not needed at review. The effect of this policy decision continues to be seen today.

Evidence of the proportion of representation costs covered by the existing regime

66. Available evidence is consistent in the proportion of costs that are met by the existing costs regime:

(1) In 1999, review costs were between 13% and 36% of legal costs (legal costs for review were between $1,500 and $2,000).

(2) In 2011 and 2012, the amount paid to claimant representatives for review hearings was 21% of what ACC paid its lawyers for the same hearing (the market rate ACC paid its lawyers was $3,000).

[36] https://acclaimotago.org/appendices/8.pdf at [13] – [23].

(3) In 2014, the most comprehensive survey of claimants undertaken demonstrated that the contribution to representation costs to claimants was between 12.5% and 30% of the actual costs of the average review.

(4) I attach at appendix 3 an analysis of cases undertaken as a lawyer between 2014 and 2018. Of the cases where the client could afford to pay legal fees,[37] (n = 175) the average lawyers time taken for review was 12.83 hours (average cost of $4,426). The average payment of review costs for lawyers time during that period was $702. The review costs and appeals regulations covered 15.86% of the average market rate for representation at a review.

67. All of the available evidence points to the fact that the existing costs tariff set out in the regulations are 12.5% to 36% of actual client costs. For complex cases, this is even lower.

Evidence of the proportion of representation costs covered by the existing regime

68. Increasing the costs to the rates set out in Option 2.2 of the discussion paper would see standard case contribution ($1,320) reflect approximately half of the cost to the client of the simplest 10% of the reviews I undertook as a lawyer.

69. The complex case fee ($2,640) would cover the actual costs of the simplest 10% of cases and 2/3 of the costs of just over half of the reviews I did as a lawyer (53%).

70. Put simply, the proposal might work for the easy cases, but will be completely ineffective for nearly everything else.

71. If the contribution were capped at the proposed rate, the effect would be that the cost is borne by representatives, families and the community rather than the ACC system.

Officials purport that this data is not valid

72. Officials have attempted to undermine the data that has been supplied, for example the Cabinet paper, misleadingly stated:

> The independent review did not validate the claim that the review costs awarded were only 12.5%-30% of the actual costs of clients…

73. The independent review was not asked to consider evidence as to the true costs of representation. This was specifically excluded from the terms of reference (purportedly on the advice from MBIE staff) and against the recommendations of other stakeholders to that review.

74. It is specious for policy advisers to continue to rely upon the absence of something that is absent because they excluded it from the scope of the review, to demonstrate that lack of validity of the only existing dataset. It is also noted that ACC

[37] During this period, a significant amount of work was taken on a pro bono basis or where an agreement was reached with the client to only charge the amounts set out in the review costs and appeals regulations. These have been excluded from the analysis as they do not represent a market rate.

refused to provide the Independent Review with data on what ACC spends on reviews and appeals.

75. In 2016, the above data (except that in appendix 3) was set out for MBIE[38], and it was explained to MBIE that this is the best available evidence and MBIE was invited to undertake its own work in this space if this was not accepted. What we see with this current proposal is that the evidence has been ignored.

76. It is significantly concerning that no work has been done by MBIE to gather actual evidence.

77. The situation was recorded by the Court in *ACC v Carey* by reference to an earlier case where that court recorded being told: "if a robust approach to costs is not undertaken, ACC – deliberately or unwittingly – externalises the financial burden of flawed decision-making processes onto claimants and the wider community" so obscuring the true cost of administering the scheme.

78. In that case, the court was critical of a tariff approach and endorsed the approach taken by the District Court in *Dickson-Johansen v ACC*.

79. This approach from MBIE suffers from the same flaws as the tariff approach adopted by the court in 2008 and set aside by the court in *Dickson-Johansen* and *Carey*. All that is happening is the externalisation of the financial burden to claimants and the representative communities (see Appendix 3).

There is no evidence to explain why the original rate was set

80. The basis for the current rates seems to be a policy decision in 1992 to exclude lawyers. MBIE (and it predecessor DOL) has referred to Market Research conducted in 2002 but this has never been released. It appears that the 1992 rate has continued through to today.

81. Despite repeated requests for information as to how this rate was set, no information has been provided.

82. The inference I draw from the lack of availability of information was that no "market research" has ever been undertaken. The rate was arbitrability set at $65 for lodging a review in 1992 and the rate for preparation was set at double that ($130).[39] The cost of this policy decision to set the rates in such a way as to exclude representation and deny an effective market for legal services for injured people has been enormous and has been allowed to continue denying access to justice for the last three decades. This must change.

The proposed approach

83. Put simply, the range of costs proposed (including the maximum) only covers the actual costs of the simplest reviews and covers less than 25% of the costs of complex

[38] https://acclaimotago.org/appendices/8.pdf at [46] – [59]
[39] Accident Rehabilitation And Compensation Insurance (Review Costs) Regulations 1992 at regulation 3.

cases (ie, up to the 90th percentile). It would cover only a small percentage (ie, less than 9% of the costs) the most complex 10% of cases between the 90th and 100th percentile.

84. Taking this approach will simply provide an increase to the tariff approach that has been specifically rejected by the court.

85. If the proposed process was to cover 90% of reviews in Appendix 3, then the cap (combined with the exceptional case fees proposed at regulation 4(4)) would need to be $6,900.

86. If the objective of the regulation is to provide effective access to justice for claimants, then the proposals will do very little to achieve this objective.

Question 12 – I strongly disagree with the proposed new maximum

87. I strongly disagree with the proposed new maximum. It will not achieve the stated purpose of the regulatory reform. It does not meet the requirements of the GCDR standards, nor provide for any performance improvement for the system.

A cap in terms of hours

88. A policy decision must be made now about whether the new rate operates as a tariff and is applied in every case, regardless of how long it takes. This would technically allow the "swings and roundabouts" to be spread across an average caseload. If this were the case, then funding 12 hours per case could be a tariff as this is the average time for review.[40]

89. If 12 hours was to operate as a cap, then around half the cases at review (and 2/3 of the cases at conciliation)[41] would be above that cap and deny access to justice.

90. If a cap in terms of hours was followed, it would need to be set very high[42] and have an exceptional case fee process.

A cap in terms of total contribution

91. The proposed maximum of $2,640 would have covered the actual costs of 14% of the cases referred to in Appendix 3. It would represent 2/3 of the costs incurred in 63% of the cases in Appendix 3.

Question 13 – Will this improve access to justice?

92. The access to justice barriers are now well know and widely accepted. Despite reticence to accept these in 2014, access to representation and access to the law are now widely accepted as real issues.

[40] The courts have repeatedly counselled against this approach on the basis that tariffs are inappropriate.
[41] Appendix 3.
[42] To allow 40 hours for review and 80 hours for conciliation, see appendix 3.

93. The proposed changes will undoubtably "improve" access to justice but it will be ineffective and the changes will have little meaningful impact on individual cases and will not result in an effective market for representation for claimants.

94. The question should be framed as to whether the changes will improve access to justice in a meaningful way so as to actually provide effective access to justice.[43] The answer to this question is that the proposed changes will not result in effective access to justice.

95. Unless the fees are increased to provide for the average case in the $2,500 to $4,500 range and a maximum of $10,000, any increases will simply be window dressing on the access to justice debate and will not provide any meaningful change.

Question 14 – evidence/data or precedence to determine complexity

96. Data to determine the complexity of the review is available. It is recommended that the following could be considered

i. The type of claim (ACC holds this data)
ii. The type of decision (ie, the decision letter subject to the dispute)
iii. The type of review (ie, the code provided to the review)
iv. Whether external evidence is obtained
v. The issues brought to the review hearing
vi. The complexity agreed to by ACC and the representative (either directly or at the case conference)
vii. The complexity determined by the reviewer (either at the case conference or once the outcome has been determined).

97. Data on each of these would be available from ACC and/or the review providers. It is recommended that this task be assigned to the guidelines committee convened for this purpose as set out at Appendix 1.

98. To ensure ease of administration, it would be helpful if the guidelines committee were to set out a starting point for complexity scales of types of cases (simple, standard and complex) and this should be subject to confirmation at the case conference stage.

Medical evidence

99. The statements in the discussion document at paragraphs 55 to 59 are not clear. Some refer to the word "report" in the singular, some refer to "reports" in the plural. This distinction is important to interpretation. The current state is that the amount in regulations is a rate per report. The proposal is based upon a calculation of up to 7.5 hours at $550/hr. This is appropriate per report.

100. The Court has made it clear that when multiple reports are required, then multiple awards are appropriate.[44]

[43] Research has been published on this: The idea of access to justice.
[44] *Anderson v ACC* [2016] 164 at [78].

> Specifically, pursuant to the Injury Prevention, Rehabilitation, and Compensation (Review Costs and Appeals) Regulations 2002, "All relevant and reasonably necessary **reports** for applicant ... by any registered specialists" are entitled to a maximum award of $935.54. 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.

It would be completely inappropriate to limit this to one report per dispute as in many cases, multiple reports are required to address the actual injury (ie, surgeon's report) and the impact on this on a person's capacity to work (ie, a vocational independence assessment).

Question 15

101. For avoidance of doubt, $4,150 is an appropriate cap per report. It is not appropriate as a defined limit per dispute. If this is a per dispute limit, it would not allow medical evidence in complex cases where more than one report is necessary.

102. The only evidence one needs to consider is a complex ACC file. It is not uncommon that a file includes hundreds of pages of medical evidence and 15-20 reports. It is the antithesis of access to justice to publicly fund one party to a dispute to provide unlimited evidence and limit the other party to 1 or 2 reports. If the desire is to create a functioning system for independent medical evidence, any approach that caps this at one or two reports will fail.

103. Reviewers can exercise their discretion and judicial oversight by way of appeal is of course available.[45]

Question 16

104. The rate per report will increase access to medical reports (and therefore justice) however if this is capped, then this will simply become a tariff approach.

105. Limiting one side while providing an unlimited spend on medical evidence on the other side will not address this issue and will not be perceived by many stakeholder as addressing the issues. These points have been addressed in previous research.[46]

106. In addition, the proposal will not, in and of itself, address the medical evidence issue. A proposal to establish an expert evidence trust to overcome this barrier is set out at appendix 2.

107. A specific system for medical evidence is essential if barriers are to be overcome.

Question 17

108. If the proposal is to cap the per report cost to $4150 to allow an expert to spend 7.5 hours at $550 per hour and allow multiple reports to be funded (if considered reasonable by the reviewer) then I strongly agree with this.

[45] Accident Compensation Act 2001, Section 149.
[46] Solving the Problem, Appendix 3.

109. If the proposal is to cap the total cost per review to $4,150 then I strongly disagree with this. This will in fact be a retrograde step as at the moment, a person can obtain multiple reports from specialists (for example 4 specialist reports) and if it is reasonable to do so (ie, taking into account the facts of that particular case), and two other reports then that person would receive $5,181.48.

110. It is absurd from a policy perspective to design a system that will cap this at one report at $4,150.

Question 18

111. Removing the distinction and providing discretion for the reviewer will improve access to evidence.

Other expenses

Question 19

112. The rate for travel set by the IRD is 79c/km.[47] Another option is the AA rate of 78.25c/km.[48] The current rate for travel set out in the regulations is 29c/km.

113. The proposal to increase costs but not for private travel is the antithesis of the proposed objectives of creating effective access to justice and providing for rural communities.

114. It is interesting to consider the history of this provision.

i. When the reforms were put through in 1992, the Accident Rehabilitation and Compensation Insurance (Review Costs) Regulations 1992 was 50c/km (reg 5(3)).
ii. The 1998 reform saw this rate maintained at 50c/km (Accident Insurance (Review Costs and Appeals) Regulations 1999.
iii. The 2002 reform saw this maintained at 50c/km (Injury Prevention Rehabilitation and Compensation (Review Costs and Appeals) Regulations 2002).

115. Other regulations use the IRD rate.[49] Some like MSD and the jury system use an out-of-date rate set at 38c/km[50].

116. There is no principled reason why the rate should be allowed to remain at the prescribed level which is significantly below cost. The fact that other travel costs in the ACC system are also low simply highlights the need for MBIE to review those.

[47] https://www.ird.govt.nz/income-tax/income-tax-for-businesses-and-organisations/types-of-business-expenses/claiming-vehicle-expenses/kilometre-rates-2020-2021
[48] See Appendix 5, AA rates per km.
[49] Local Government Members (2021/22) Determination 2021, at 11.
[50] Jury Rules 1990.

Question 20

117. Increase the rate of travel to 79c/km. It must also be considered whether specific mention is required for cultural, access and other types of support, or peer support. This should not be confused with representation.

Question 21

118. I strongly agree that the new maximum be increased to $1,500.

Overall proposal

Question 22 – other costs, benefits, or unintended consequences

119. The proposed changes in the document will not be effective at delivering access to justice to injured people.

120. This submission recommends substantive changes in representation and expert evidence costs and processes in relation to these. It recommends:

i. the establishment of a guidelines committee
ii. the establishment of an independent expert evidence trust.

121. The concern that frivolous cases would arise can be managed by ACC refusing to agree to costs, or appealing decisions to award costs in what it perceived to be frivolous cases.

The need for systemic learning

122. Many of the claimants that I represented (starting with a member of my family and continuing through to the end of my practice as a representative) held strong (and sometimes very strong) views that systemic changes were required. This manifests in comments such as "I don't want this to happen to anyone else" and "I want to have my day in court so that they have to do something about this". This issue is part of the "being heard" barrier to access to justice.[51]

123. I would explain to people the reality of the situation:

i. that a review has no precedent value.
ii. that a day in court would be 18 months to 5 years away,
iii. that ACC's internal policy at the time was to consider itself bound only by High Court precedent and it was almost impossible to obtain judgement in the High Court or Court of Appeal[52]
iv. that it would cost tens of thousands in legal fees to get there,

[51] Understanding the problem.
[52] Less than 1% of appeals and 0.2% of reviews would get to the high court, it took 4-6 years and was by leave only. Once there, litigation tactics and Calderbank offers denied the impact of precedents.

v. and when you got there, ACC would force you to settle and rely on the precedent of the court below anyway.

124. I have put a lot of thought into how the need for people to raise systemic issues can be incorporated into legal processes that are designed to resolve issues at scale.

125. I was involved in the development and piloting of the GCDR standards. These require mechanisms to be created for systemic learning.[53] They also require mechanisms to be developed and implemented in relation to prevention.[54]

126. I note that in the development of the Tertiary Education Dispute Resolution Service has seen legislative attempts to deal with these issues.

127. It would be helpful if mechanisms were developed for the consensus-based processes and review processes that required the identification of systemic issues and reporting of these, in order to improve access to justice and transparency and protect against allegations being made that these processes "cover up" or "sweep under the carpet" issues that arise.

Question 23 – regular reviews

128. This was addressed previously.[55] Inflation adjustments are required. Previously, CPI has been used. With respect, this is the wrong measure for increasing both representative costs and expert evidence costs. Both should be set by reference to Labour Cost increases. The appropriate marker is LCI – professionals.[56]

129. I recommend Regulation 13 be inserted into regulations, requiring the guidelines committee to consider and report annually to the Minister on increases, including specific reference to LCI.

130. The guidelines group established through the approach at Appendix 1 is a useful vehicle to understand the effectiveness of the changes to regulations and to advise on further amendments.

Question 24 – Alternative approaches

131. The Western Australian approach, which is essential taking the District Court Rules and modifying them (as preferred by the previous minister and removed by MBIE from this proposal, purportedly on the advice of a quality assurance committee) should be preferred.

---

[53] GCDR standard 7.
[54] GCDR standard 7.
[55] https://acclaimotago.org/appendices/8.pdf at [91] – [96].
[56] See for example, https://www.stats.govt.nz/information-releases/labour-market-statistics-december-2021-quarter, table 2.2, marker SH31B9.

132. To avoid the issues raised by the quality assurance committee, I would recommend the approach outlined at Appendix 1 be adopted.

133. What is missing from the Cabinet Paper in relation to the Western Australian model is the time allocations. These are set out in appendix 4 and are very similar to those previously proposed[57] and are essentially the same approach as set out at Appendix 1.

134. There is a policy decision to be made as to whether the guidelines group needs to be formally put together by Ministerial appointment or whether this can simply be formed by MBIE, ACC or others for example as the medical issues working group which can simply advise MBIE to set a scale within the regulatory framework, however the composition and function of the group is important if it is going to be seen as legitimate by stakeholders.

135. The alternative approaches set out at paragraph 65 of the discussion document changes the discretion making power for the reviewers at s 148. In relation to these, I offer the following comments:

i. MBIE cannot advise the minster in this process to create regulations which are inconsistent with the primary legislation at s 148.
ii. It would be ultra vires for the Minister to make regulations inconsistent with s 148.
iii. The exercise of discretion is set out above at paragraph 15 et seq. This along with the right of appeal provide appropriate safeguards to protect ACC from unmeritorious, frivolous and excessive litigation. ACC can exercise this right if it feels it is appropriate to do so and develop case law (which has precedent effect) as the Court (unlike a review) by appeal to the appropriate court of record.
iv. To suggest there is precedent effect at review is an error of law. Option four is unlawful.

ADR – Questions 25 to 28[58]

136. The processes of resolving disputes can be broken into consensus-based (where the parties reach agreement) and adjudicative (where some else decides). In the ACC context, these used to be referred to as mediation (or ADR) and review. In this context, it is correct that the interaction between the ADR process and the review process has caused some concerns. Due to the perceived conflict of interest between my role with Talk – Meet – Resolve, I will limit my submission on this issue to my experience as a lawyer undertaking consensus-based resolution work, prior to my role with Talk – Meet – Resolve. I will refer to this work as consensus-based dispute resolution.

Question 25

In my practice as a lawyer, I found that I could achieve prompt resolution of disputes for my client in a person-centred way that gave them control of the outcomes. Because this could be done in a timely manner, it made little difference to the case whether or not a

[57] https://acclaimotago.org/appendices/8.pdf at [100]- [109].
[58] These are also listed as questions 28-31 as questions 22-24 are contained in Section 3 and also at Section 6.

review application was lodged. When it was lodged, it could be set for a hearing in the future. My experience is that the types of cases that might take 3-5 years to get through the review and appeal process, can be sorted out promptly through consensus-based resolution processes.

137. I am familiar with s 135A and s 328A. These provide for a regulation making power, however I note no regulations were ever made.

Question 26

138. In my practice as a lawyer[59], I regularly undertook consensus-based resolution work. Approximately half of the cases in the sample were resolved using consensus-based processes. The average (mean) amount of lawyer's time for these was 50% higher than for review.

139. The reasons for the increased time include:

i. **Multiple issues**: Consensus based processes are very likely to be complex or involve multiple issues. For example, many involve multiple injuries over multiple claims, issues related to the mental consequences of injuries, for which formal claims for cover have not been formally lodged.

ii. **Wider scope of dispute.** There is a requirement to prepare more widely. Generally the consensus-based processes were not limited to specific issues and instead could take a problem-solving approach. The consensus-based process is not strictly limited to the narrow issue framed by the "decision letter", but more on achieving the right outcome by starting at first principles and applying the act.

iii. **Need for full preparation.** Largely because of the two previous factors, there was a need to better prepare the client for the dispute as they needed to take an active role in resolution. This included explaining ACC's position and the law to the point that the client could reach an agreement with ACC on the day of the meeting, rather than relying on someone else deciding the dispute.

iv. **Being heard.** There was a need for the client to be heard and understood by ACC.

v. **Post meeting follow-up.** At times, there was often the need for post-meeting follow-up.

140. I would undertake consensus-based pathways to resolution. I found this very effective in resolving disputes and my clients really appreciated the chance to talk to ACC staff about their experiences.

[59] See Appendix 4

141. My experience as a representative was that nearly all cases that followed a consensus-based route would achieve resolution. In rare cases that did not, the issues in dispute were narrowed and the cases proceeded through the review process promptly.

142. My experience was that ACC would regularly contribute to the costs of ADR and often in a way that was more flexible than the review process.

Question 27 – considerations for costs

143. The following factors should be considered:

i. Data indicates it can take more representative time to effectively use an alternative dispute resolution process than a review process.

ii. The preparation can be significant, particularly preparing a client's case and preparing them to make an informed decision on the day (or soon after).

iii. The agreement-based nature of this process means that the parties are required to reach agreement on costs (rather than be decided), and it makes sense that this is done in the most efficient way possible.

iv. A holistic view can be taken to costs for ADR, however a framework/agreed approach will make this easier for ACC representative, claimant representatives and claimants.

v. The earlier in the consensus-based process that costs are addressed, the better. The opportunity exists for ACC and representatives (or claimants) to have this conversation at the point they agree to attend conciliation. The same opportunity exists during the talk stage, and again at the meeting. By taking this approach and using a scale, disputes about costs and time spent on this should be limited.

vi. The cases that do not resolve and continue onto review are far more straightforward and limited in the scope of the dispute because most of the issues have been canvassed at conciliation meaning the submissions can be focused on specific issues that are in dispute.

Conclusion

144. The regulatory approach as proposed by MBIE will fail. It is inconsistent with MBIE's own standards set by the Government Centre for Dispute Resolution. It is inconsistent with the Government obligations under the UNCRPD. It will not result in effective access to justice.

145. This submission set out an alternative approach, which, if adopted, will work. There is wide consensus for this type of approach. The question now is whether these points are taken seriously or simply ignored, as they have been for the past three decades.

APPENDIX 1 – Possible costs guidelines

Example of Guidelines for Representation costs which might be considered by a rules committee:

Hourly rates

Family member/informal representative:	up to $137/hour (50% of the junior lawyer rate)
Professional Advocate:	up to $225/hour (75% of an medium lawyer rate of $300 per hour)
Lawyer:	up to $250 (junior) to $400 (senior) per hour.

Time Allocations for Simple, Moderate and Complex	***(cap of hours)***		
Obtaining instructions, Initial interview and lodging review application:	1,	2,	4
Obtaining and reviewing files:	2,	5,	10
Legal research:	0.5,	1,	4
Briefing evidence from claimant:	0.5,	1,	3
Obtaining experts, briefing experts, documents for experts (per expert)	0,	2,	4
Briefing evidence in reply (per expert)	0,	0.5,	1
Drafting submissions	2,	4,	8
Submissions in reply including further legal research	0,	1,	4
Hearing time	0.5,	1,	2
Further submissions	1,	2,	4

APPENDIX 2 – Medical Evidence

Towards an agreement based expert evidence process: a proposal to develop, pilot and then trial an expert evidence process for dispute resolution

Proposal by Warren Forster‡ published in response to MBIE Consultation on the Review Costs and Appeals Regulations

28 March 2022

Overcoming the challenges of obtaining expert evidence

Background to medical evidence issues

It is https://talkmeetresolve.co.nz/about-us/our-agreementswell established that access to medical evidence is a barrier to access to justice for injured people in New Zealand. It is also clear that issues with medical evidence have created significant issues with administration of the scheme, reputational risk for ACC and frustration for injured New Zealanders. Issues around medical evidence continue to threaten trust and confidence in the ACC system.

Miriam Dean QC's review[60] of Acclaim Otago and University of Otago's 2015 report "Understanding the Problem"[61] resulted in the establishment of a medical issues working group. Unfortunately, this process concluded without success in removing access to medical evidence as a barrier to access to justice.[62]

Problem definition

The Accident Compensation legislation requires questions of fact to be determined by ACC. In many cases, ACC is required to investigate and consider medical evidence. This is essential to allow ACC to fulfil its statutory functions. It is also essential to the dispute resolution process. Issues have been raised that there is a perception that ACC has unfair dominance and control over the medical evidence process. The policy problem can be defined as:

> What is an effective and efficient way to obtain independent expert medical evidence to overcome the issues associated with ACC obtaining expert evidence in cases where disputes have arisen or are likely to arise?

‡ Warren Forster is an independent Barrister and Researcher. He is also a Director of Clayton and Associates Limited.

[60] https://www.mbie.govt.nz/assets/bb3b087c54/independent-review-acclaim-otago-july-2015-report-acc-dispute-resolution.pdf

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

[62] https://acclaimotago.org/appendices/3.pdf

Executive Summary

This is a proposal for stakeholders[63] to collaborate in developing, piloting and then trialling a process to support injured people and ACC to reach agreement on using a new specialised expert evidence service with an initial focus on medical evidence. The proposed mechanism to do this is an independent expert evidence trust.

Access to independent expert evidence remains a significant barrier to access to justice.[64] The vision of this proposal is to create a system that will allow stakeholders to work together to overcome the barrier of access to independent expert evidence. The aim is to work towards an agreement based expert evidence process.

The proposed roadmap forward is to:

i. develop a model agreeing on a process,

ii. pilot this model for 10 cases,

iii. trial and evaluate this model over 12 months, and

iv. meet with stakeholders and consider the next steps.

The vision is that an independent expert evidence service would improve the experience and add to the efficiency and effectiveness of dispute resolution processes across the sector.

Background to this Proposal

Disputes in the ACC system often involve medico-legal questions of causation. Recently, an alternative dispute resolution process[65] has established an effective, efficient, timely service with good experiences and outcomes for participants. In this process, it supports ACC and its clients to reach agreement.

This process often involves identification of the issues which need to be addressed and attempts to set out a process to resolve this. In some cases, the most certainty that can be included in the agreements is that ACC and the client will work together to agree on an assessor (or ACC will give the client the choice of assessor), and the questions to be asked, and that ACC will fund this. Issues can arise both during and after the meeting and agreement being reached that cause further dispute or delay or continue to undermine trust and confidence.

---

[63] Potentially stakeholders who may wish to engage include MBIE (ACC Policy team), ACC, Claimant organisations (for example Acclaim Otago), the New Zealand Law Society, Talk – Meet – Resolve, the Government Centre for Dispute Resolution, treatment provider organisations.

[64] Understanding the Problem (2014), Independent Review by Miriam Dean QC (2015) Solving the Problem (2017).

[65] Clayton and Associates Ltd (T/A Talk – Meet – Resolve) has a contract with ACC for the provision of dispute resolution services. Further information can be found at www.talkmeetresolve.co.nz. Its two directors are Matthew Clayton and Warren Forster who have both practiced as litigation lawyers and have both been involved in the dispute resolution space in various capacities for over a decade. The team of TMR conciliators include some the most experienced practitioners within the ACC dispute resolution system.

These issues can be overcome by the parties to a consensus based process reaching agreement to use an independent organisation to facilitate access to a contracted independent external assessor either directly or through a third party. A new independent trust would be established to administer the system.

This service could be used by agreement in appropriate cases where obtaining independent expert evidence could assist the parties to resolve the issues that are in dispute or are likely to become disputed.

The existing dispute resolution model currently considers the evidence on file, considers what the legal tests are, and then considers whether the evidence meets the legal test and if not, more evidence is required. A lot of the work has been done and the final step would be to create an accessible system for obtaining that evidence.

Various options are discussed below with the recommendation that a trial is developed where stakeholders agree to collaborate and develop a medical evidence process, pilot and trial this model over the next 12 months.

If the legislative system were to be reformed to either directly fund the costs or to fund the costs of medical evidence in the normal way as set out in the Accident Compensation (Review Costs and Appeals) Regulations, then this proposal could be developed further.

The service should be structured so that the independent trust funds the medical evidence on behalf of the client and recovers the cost of that medical evidence from ACC through the review costs and appeals regulation. This would allow the system to be developed without additional contractual and legislative processes, instead using the current established process providing there is commitment towards this collaborative process.

Stakeholders are invited to consider this proposal and discuss this further.

Introduction

About the consensus based process

Talk – Meet – Resolve is a consensus based dispute resolution service available in the ACC and the Tertiary Education Sector.[66] It's stated vision is to transform the way people experience disputes in Aotearoa[67]. It has been contracted to ACC to provide dispute resolution services since July 2019[68]. It provides timely service (average 20 working days) and participants are highly satisfied with the service.[69] The service is described as person-centred and designed with users in mind. It allows people to get to the heart of the issues in a timely manner, in an environment in which they feel comfortable with an independent expert[70] to assist.

[66] www.tedr.org.nz/
[67] www.talkmeetresolve.co.nz/about-us/our-vision
[68] www.talkmeetresolve.co.nz/about-us/our-agreements
[69] 98% of respondents are satisfied or higher and the strength of the satisfaction averages over 9/10 ("very satisfied") from a response rate each month of around 2/3 of the people who attend meetings.
[70] Independence and expertise is consistently rated 9/10.

Many of the disputes in the ACC system involve medical issues and questions of fact that require medical evidence to address statutory tests. The consensus based approach is to work with ACC and clients to identify if further evidence is required, and what this evidence must address. Sometimes the parties ask the conciliator to assist them in drafting questions and if so, this is done on a case by case basis.

About the proposed Independent Expert Evidence Trust

It is proposed to establish the Independent Expert Evidence Trust. Its role would be to administer the process of obtaining (including funding expert evidence) on the understanding that the cost up to the regulated amount would be reimbursed in accordance with that regulatory process.

It is proposed that the trust will have a diverse Trust Board of established and respected people within the wider medicolegal system, and will have its own administrative staff. Its policies and processes will be established in order to meet the legislative and policy requirements in relation to data and transparency.

When would this evidential process be available?

The proposed solution to the problem of obtaining evidence in the dispute resolution process is to create an independent evidential process. It must be recognised that in the first instance, ACC will still be required to undertake investigative functions in relation to its claims, and that clients can obtain their own medical evidence. What is proposed is a system to assist the parties to reach resolution where disputes arise over medical evidence or whether new evidence is required to address evidential issues which arise during the dispute resolution process.

This evidential process could be made available in all cases where ACC and the client agree to attend alternative dispute resolution. This will be available regardless of whether the dispute arises pre-decision, post decision and either before a review application has been lodged, after a review application has been lodged, or between review and appeal.

A collaborative approach to medical evidence

What is proposed is a framework be developed to assist ACC and clients to reach agreement on medical evidence issues. Such a system approach could be transformative in overcoming what have to date been significant barriers.

It must be recognised that historically many disputes have arisen when one party or another obtains expert evidence. This process can become adversarial and/or ACC's clients face barriers in accessing appropriate medical evidence. The adversarial nature of the review process and the issues with clients seeking a report in an unstructured manner also deters many experts from participating in this process as it is seen as a hassle. There are also issues with parties independently asking specialists different questions or providing different information to different assessors, or asking the questions to the an assessor without the recognised expertise to answer those questions. This often undermines the benefit of the evidence and results in an inefficient and costly process for all parties.

There is an opportunity for stakeholders to work together to transform the medical evidence process into a collaborative one.

The steps in the medical evidence process

Previous work has identified that there are 10 steps in a system of obtaining medical evidence.[71] Some of these steps relate to system design, others relate to how individual cases obtain medical evidence.

These issues often lead to the development of a dispute[72] when the client perceives that ACC has taken steps against the client's interests either in how the system is designed or how the individual cases progress through that system. Some of these steps require policy decisions to be made about how these can be resolved, and will require consultation at a system level. Others will require consultation or agreement in individual cases. It is recommended therefore that the development, piloting and trialling begins with an agreement based process.

Step 1 – Is an assessment necessary?

This is the first step. Sometimes ACC considers expert evidence is necessary and a client doesn't[73]. Sometimes it is the opposite[74].

The consensus based process can address both of these situations and assist ACC and its clients to understand what the statutory requirements are and why expert evidence is required in particular cases. This could be followed in individual cases if ACC and the client agree[75].

Step 2 – What type of assessor is required (qualifications and experience)?

There are often different views on what type of assessor is required and these often relate to the statutory tests on which evidence is required.

Again, a consensus based process can help ACC and clients understand what type of assessor would be best in terms of qualifications and experience in relation to the legal tests for the issues in dispute. This would also be done by agreement in each case.

Step 3 – Which assessors are in the pool of "assessors" for each type of issue?

This is important as the question is best resolved at a systemic level rather than in a case by case basis. The new trust could consult with ACC, client representatives and professional bodies to develop a pool of assessors. Ultimately to be considered independent, this process cannot be controlled by ACC or claimants and a decision must be made externally by the new trust after consultation has occurred. This process be based on the model for selecting the Health and Disability Commissioner's independent experts or experts in overseas based dispute resolution models.

---

[71] https://acclaimotago.org/appendices/3.pdf at 14.
[72] https://acclaimotago.org/wp-content/uploads/Solving-the-Problem-Public-Report.pdf at page 38.
[73] For example ACC can assess vocational independence from time to time and a client does not agree to be reassessed.
[74] For example when ACC considers sufficient investigation has been undertaken and a client disagrees.
[75] Conciliation is a consensual process and the parties can choose whether or not they want to agree to seek joint medical evidence.

Step 4 – Which individual assessor would provide an assessment in that individual case?

There are three approaches to consider here. The first involves a blind selection based upon availability (akin to a booking process) where assessors availability but not their identity is online and they can be selected based on availability. The second is where a choice of assessor is provided to the client. This would involve the available assessors for that timeslot being known and a person can choose or the parties consulted from that choice. The third is where there is a panel of assessors (for example five orthopaedic surgeons) and any three assessors may be available at any one time to form the panel.

Step 5 – What information will be provided to the assessor?

The guiding principle with information for the assessor is that all relevant information (including all relevant medical records) should be provided. Disputes in this context often arise where ACC and the client have different views on what is relevant. Consensus based proposes could address this at two different levels. At a system level, it may be possible to reach some consensus on this through discussions with assessors, ACC, client groups, and representatives about what relevant documents are required to address particular legislative tests. It is not suggested that this be binding on the ACC and its client in individual cases, but it may provide a starting point. At an individual case level, if the parties agree on a joint approach to medical evidence at an individual case meeting, they will be asked to reach agreement on this at the conciliation meeting.

Step 6 – What questions will be put to the assessor?

It is proposed that this step be addressed at a systemic level through consultation with ACC and client representatives . It would be expected that an agreed set of questions be put to assessors in common types of cases, which could be sent out in advance and then applied to individual cases.

The consensus based process provides conciliators who are independent experts. They have the skill and experience to implement this process and assist ACC and clients to reach agreement on questions to be put to assessors without the need for further internal processes. ACC staff involved are also skilled and experienced. Relevant internal delegations may be required to ensure that this meets ACC requirements, however this process will assist the timeliness of obtaining medical evidence.

Step 7 – What is the process for the assessment?

The final requirements from the perspective of ACC and its client is whether the assessment will take place on the papers or in person (a range of options depending upon the individual circumstances and the questions in envisaged). This would be agreed with the client and ACC at the consensus based meeting.

It is recommended that this assessment process is booked through an online booking tool for most cases with a manual booking system override. This is best agreed to at the meeting with a process for changing through a manual system. To implement this, the new trust with the provider(s) or expert evidence services to ensure that an effective and efficient system is available.

Step 8 – Monitoring and changing the assessment system

The process set out above is proposed to prevent disputes arising post assessment that often arise in a litigation process by reaching agreement prior to the assessment. Nonetheless, even with the best designed system, it must be recognised that from time to time it is likely that issues will arise from the assessment process or the reports. It is important to separate the administrative processes described above from the clinical process, the clinical reasoning and the outcomes of the assessments (reports etc).

The trust must take an interest in identifying issues which can be addressed to improve the client experience of this system, so data will be recorded in order to allow system learning to occur. Further, a system of peer review will be implemented to ensure a robust process.

Step 9 – What are the funding and contractual requirements?

This requires a number questions to be answered:

i) How will the costs of the medical assessments (payments to assessors) be met?
ii) How will the costs of developing and administering the system of expert evidence be met?
iii) How can the contracting and regulatory arrangements be structured to avoid the perception of bias developing?

It is proposed to create the regulatory settings as part of the current consultation of the Review costs and Appeals regulations. The trust will contract assessors (individually or collectively) to provide assessments. The new trust will seek the cost from the process in the same way as representatives could do.

It must be recognised that another option is that claimants pay the assessor and seek the costs back from ACC in accordance with the review costs and appeals regulation. However this will be administratively difficult, inefficient and uncertain as some clients cannot cover the costs of this and some assessors will not want to undertake assessments on that basis with this uncertainty. Another option is a joint process where ACC refers the person by agreement and pays for the assessor. This process can create delays and issues of independence, and the referral processes could be overcome by a direct relationship between the assessor and the new independent trust, who could also manage the supply and demand for this service.

It must also be acknowledged that significant costs will be incurred in developing, piloting and trialling the service. It must also be acknowledged that some consensus based meetings will require more preparation and more work in the meetings to ensure relevant information for the assessment are addressed and the correct questions are asked.

What is required to establish this service?

To establish an agreement based independent expert evidence services, the following must occur:

i) The legislative framework is created through regulations to allow this model to be developed.

ii) A decision made by stakeholders to develop this model, pilot it and then trial the service.

iii) A decision made on the funding and contracting arrangements in relation to operationalising and the ongoing operation of the model.

iv) The establishment of the Independent Expert Evidence Trust.

v) A process established for obtaining experts to be in the pool

vi) A system developed for transferring information between parties and the independent expert service.

vii) A process for reaching agreement on the questions required to address specified legal tests.

What would the user experience be once the system has been established?

Once the system has been established, the user experience will be that their case is processed in the normal manner by parties agreeing to attend conciliation and attempt to resolve the dispute. If, at the meeting, the parties agree that further medical evidence is required, then the following process will be triggered:

Additional steps in the process

i) Agreed questions addressing the particular legal tests as applied to the facts on this case will be drafted and recorded in the Resolution Agreement.

ii) The parties will reach agreement on the relevant information to be provided (if required this can be done with the assistance of the conciliator) and reference to this should be recorded in the resolution agreement.

iii) An assessment will be booked online (if possible) or an agreement is made on when this booking will be made.

iv) The resolution agreement will record any necessary arrangements. This will be the formal end of the consensus based process and the agreement will be provided to ACC and the client in the normal manner. This means that the conciliator's involvement in the conciliation comes to an end at this stage in the usual manner.

Additional post-agreement steps to implement agreement

v) The assessment occurs.

vi) The report is provided to ACC and the client. Consideration will need to made about how this is provided, however two options are:

a. the report is provided to one party (for example, ACC) who immediately provides it to the client (to avoid privacy issues or further disputes developing)

b. the report is provided simultaneously to the client and ACC by the Expert Evidence Trust.

vii) The client and ACC then consider their positions with regard to resolving any remaining dispute.

viii) The cost of the report is funded through the legislative mechanism.

Development, Piloting, Trialling and Rollout

A four stage approach for operationalising this model is recommended. Funding and timeframes will need to be considered for each stage.

Development

If agreement is reached to develop this evidence model, consultation will need to be undertaken with various stakeholders to develop the model further. It is expected that the model development will take two to three months from agreement to being ready to Pilot the model.

Significant investment is required in this process so that full consideration can be given to identify where potential disputes arise, how they can be avoided (and if they cannot be avoided), and how best to deal with them once they arise.

Piloting

Once the model has been developed, the model should be piloted for a period (for example two to three months) in order to test the system; during this phase a transformative evaluation will be undertaken. It is recommended that it be piloted with one or two types of cases, for example elective surgery claims for back or knee injuries.

As part of this, consideration must be given to examples of negative experiences (from ACC, from clients and from assessors and treatment providers) in order to improve the experience and design away as much dispute as possible.

Trialling the model

Once the model has been piloted, it is then proposed to trial it for a period of up to 12 months or a set number of cases (ie, 250 cases). This would provide a sufficient dataset for evaluation followed by roll out of the model.

Improving efficiency and effectiveness

Significant gains in effectiveness and efficiency in obtaining medical evidence would be possible using this process.

Given that a lot of the steps set out above are already covered in the existing conciliation system, the most efficient place to undertake this early neutral expert evidence process is at conciliation.

The timeliness of the process of medical file review would be 10 working days following agreement and where a face to face assessment is required, the aim would be to have a report within 30 working days of agreement.

It must be understood that this process may have an impact upon durations of disputes. However, given the fact that the current review process is now approaching 200 days from review application to resolution, any alternative will be an improvement. The consensus based process has proved to be a small proportion of this, the dispute duration through the resolution process and the independent assessment process could average less than 30 working days for file reviews and less than 60 working days when face-to-face assessment is required.

Once this process is implemented, the resolution rate will continue to improve as cases will not need to proceed to review and appeal. The durations of the dispute resolution process will be more predictable and client experiences will improve.

This process will significantly improve access to independent medical evidence and access to justice. This will also assist in removing negative perceptions that exist and prevent these from re-emerging in the future.

Conclusion

This innovation would assist ACC and its clients to resolve issues by working collaboratively towards an agreement based medical evidence process. This could be developed through collaboration and consultation followed by a pilot and then a trial.

This approach is likely to remove access to medical evidence as a barrier to access to justice.

APPENDIX 3: An empirical analysis of one lawyer's practice 2014 – 2018

Background

A member of my family had an accident in August 2005. ACC declined cover and entitlement to surgery. I returned to New Zealand and undertook a review of her file. Costs for representation were denied by the reviewer.

From 2006 to 2009, I undertook a variety of advocacy tasks including several hundred reviews as an advocate. In 2009, I enrolled in an LLB at Otago University. In August 2009, I established Forster and Associates Limited. From then until late 2011, I worked full time as an advocate whilst undertaking my studies. I provided scholarships and experiences for five students. During this period, we began undertaking work into the ACC system. During this period, we represented people in approximately 120 reviews per year.

From 2011 to 2014, I worked fulltime as an advocate, and we represented people in around 150 reviews per year. I also undertook research into access to justice, and represented Acclaim Otago in the shadow reporting process with the United Nations Committee on the Rights of Persons with Disabilities.

From 2014 to 2018, I worked fulltime as a lawyer. I also employed staff to undertake legal research and administration. I continued to undertake research.

During this period, I would receive between 20 and 100 contacts per week from members of the public seeking assistance with ACC. I would try and give people the opportunity to tell their story. The cases I became involved in largely fell into three categories:

1. Those who could not afford representation and would be denied access to justice if I did not represent them [n = 280]

2. Those who could afford representation and wished for me to take their case on an hourly rate. [n = 137]

3. Those did not want to pay an hourly rate but would proceed on the basis of a conditional fee with a fixed fee and the remaining amount conditional upon success.

Cases excluded from this analysis demonstrate the burden placed on lawyers and advocates

The purpose of providing the information in these paragraphs is to allow officials to understand the impact of policy decisions on people providing representation. About two thirds of cases fell into the first and third category. During this period, I estimate that I undertook several hundred reviews for people who could not afford access to justice otherwise. These cases were undertaken on the conditional fee basis where the condition was the award of costs by the reviewer. The average award ranged from around $700 to $800. I largely took these reviews on legal grounds as the medical evidence system excluded most cases from being able to access medical evidence. I also took a small number of other types of conditional fee cases. These cases have been excluded from this analysis as the purpose is to establish the time and market rates for representation at review and ADR.

Although these cases have been excluded from the analysis, it is important to state that the amount of work involved was similar to those where time was charged. The only difference in my approach to these cases was that I would not get paid for my time. The result was that I personally carried that access to justice burden, and I conservatively estimate that I undertook more than 1,680 unpaid hours of work (6 hours unpaid on average per case x 280 cases with a value of work of approximately $579,000. A more realistic calculation would be 12 hours unpaid work per case[76] x 280 which would be $1,159,200). The impact of carrying that burden of providing access to justice to injured New Zealanders and not getting paid for this continues to this day. It affected my health and wellbeing, my relationships, and my family. Much of this impact on me of undertaking this work for a decade continues through to today.

Pro bono work is an important part of legal practice, but it is unstainable for a legal system to be designed so that it cannot operate without this. By taking this approach, MBIE and Ministers, through flawed regulation making processes, are deliberately or unwittingly externalising the financial burden of flawed decision-making processes onto claimants and the legal community, obscuring the true cost for administering the scheme. This cannot be allowed to continue.

The obligation to provide effective access to justice lies with the state, not individual lawyers.

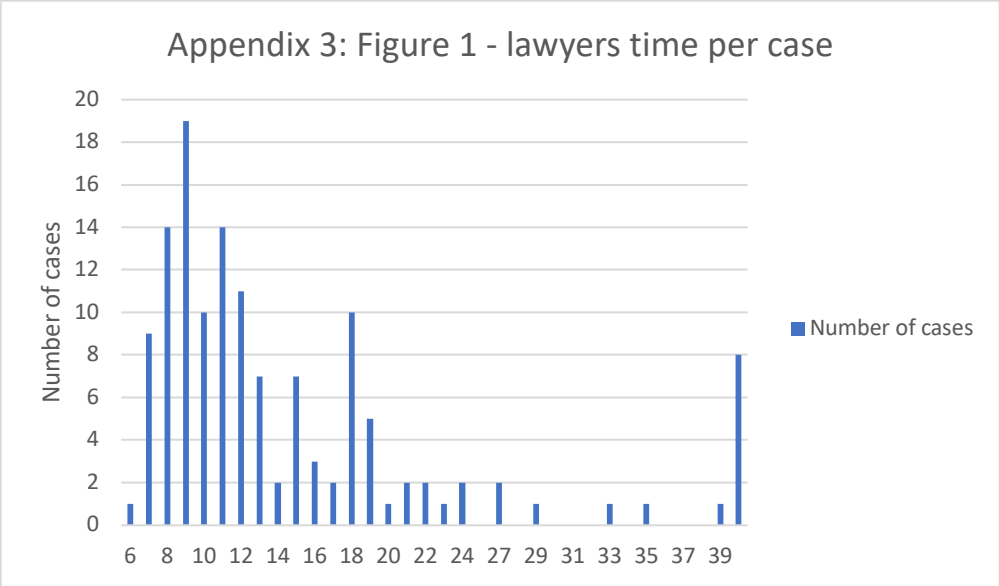
Cases included in this analysis

The purpose of providing the following analysis is for officials to understand a market rate for legal services by understanding the time taken.

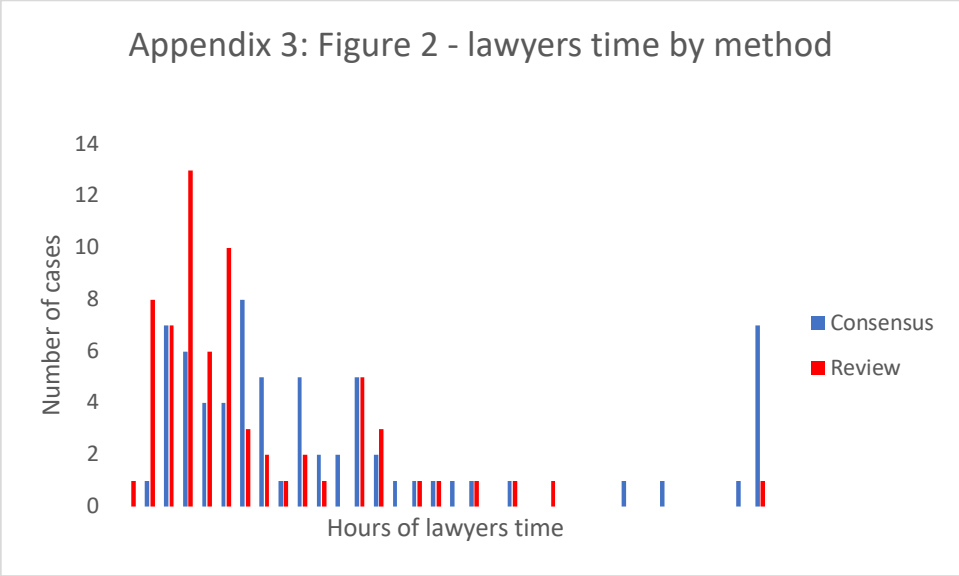
The remaining cases above at point 2 (n=137), approximately 2/3 of cases that proceeded to consensus-based resolution or review hearing were undertaken on the basis of time and hourly rate. The data presented significantly undercounts the hours worked as it reflects the time recorded for purposes of charging to client. It was my practice to consider the reasonable fee factors and the person's capacity to pay the bill prior to finalising time. I would discount my time, rather than my hourly rate. I estimate that on average, I discounted between 10% and 50% of my time in each case. I invoiced remaining time by rounding down to the nearest 15min.

The mean time was 16.02 hours for all cases in the sample. The total spread across all cases was 6.5 to 82.25 hours of lawyer's time.

[76] On the basis that 16 hours on average was spend per dispute and funding would be provided for around 4 hours.



These cases can then be broken down by method (consensuses and review) as set out in figure 2. This shows that consensus cases took longer than review and 7/8 cases that took longer than 40 hours were resolved through consensus.



The time scale ranges from 6 hours to 40+ hours and demonstrates the perhaps surprising fact that cases using consensus-based methods took more lawyers time on average than the review process.

This shows that for cases resolved through review (n=69), the mean hours were 12.83 while the median was 10.75. There was very significant spread (6.5 hours to 41 hours). The 90th percentile of cases through the review process took 19.25 hours of lawyers time.

For cases resolved through consensus (n =68), the mean hours were 19.26 and a median of 13.75. The spread was higher than cases resolved through review (7.5 hours to 82.25 hours). The 90th percentile of cases through consensus based was 39.25 hours of lawyers time.
I attempted to resolve cases using consensus-based methods. Towards the end of this period, I largely stopped using the review process and focused on agreement (consensus) based processes.

The timeframes for costs – an example of all cases undertaken as a lawyer

In my work as a lawyer, there were significant cashflow problems caused by the way in which the system was structured. This acted as a significant barrier to entry for new lawyers and advocates. By way of example, using the review process:

1. A client would approach me after a decision, and I would interview them and start spending time working on their case. In two thirds of cases, this work would not be paid for at least 3 months, and more likely 6-9 months.[77]

2. I would need to obtain the file(s) from ACC which often took 4-8 weeks, depending on the size of the file and whether additional files need to be requested. By this stage, 3 months into the process,

3. I would then need to brief evidence from the client/witnesses.

4. Medical evidence may then need to be obtained and the cost of this funded (this would often require me to fund the cost of $3,000 to $5,000 per report if the client couldn't do this).

5. Submissions would then need to be prepared.

6. Throughout this period, there were significant administration costs communicating with ACC and the review provider and the client.

7. Final preparation would be required for the hearing, including bundles of documents.

8. The hearing would need to be attended, which would either be concluded, or adjourned part heard.

9. Costs may be opposed by ACC's representatives.

10. 28 days later, a review decision would be issued.

11. Four to 10 weeks later[78], review costs would be paid by ACC (to me as lawyer or client). Several times when these were paid to the client, the client's accounts were in overdraft and the legal fees were never recovered.

For each individual case, at least $700 in billable work (and often significantly more) was not going to be paid for at least 6-9 months.

It is not exaggeration to say that in my entire time as a lawyer representing clients, I had over $100,000 in billable hours and at times the same amount in medical evidence tied up in various reviews.

[77] I understand that the current average timeframes are around 70 days from review application to case conference and around 120 days from case conference to review decision, then another month for the costs to be paid.
[78] The law requires payments within 4 weeks.

This acts as a significant barrier to entry into the market for providing legal services to clients. During this time, I had to cover all of the ongoing costs of legal practice.

Conclusions from analysis of hours

The following can be drawn from the data and this experience for purposes of costs for **review:**

i. To allow for representation to be funded in 90% of review cases using a cap, the cap in terms of hours must be set at 20 hours (or higher)

ii. There must be a process for exceptional case fees for the 10% of cases which take from than 20 hours.

iii. Complex cases in the review process take about double the time of standard cases. About twice as much lawyers time was spent on the 50% most complex review cases.

iv. Preparation is important to success of cases and should be properly funded to ensure effective access to justice.

v. The sooner that certainty could be provided for costs, the better.

vi. The sooner the level of costs could be set or indicated, the better.

vii. The sooner out of pocket costs (for example medical evidence) is funded, the better – this should be as close as possible to the costs being incurred.

The following can be drawn from the data and this experience for informing regulation of **consensus-based** resolution:

i. To allow for representation to be funded in 90% of cases, the cap must be set at a rate to cover around 40 hours of lawyers' time.

ii. Complex cases in the consensus-based process take about triple the time of standard cases. About three times as much lawyers time was spent on the 50% most complex consensus based cases.

iii. Data indicates it can take more representative time to effectively use an alternative dispute resolution process than a review process.

iv. The preparation can be significant, particularly preparing a client's case and preparing them to make an informed decision on the day (or soon after).

v. The agreement-based nature of this process means that the parties are required to reach agreement on costs (rather than be decided) and it makes sense that this is done in the most efficient way possible.

vi. A holistic view can be taken to costs for ADR, however a framework/agreed approach will make this easier for ACC representative, claimant representatives and claimants.

vii. The earlier in the consensus-based process that costs are addressed, the better.

APPENDIX 4

Western Australia
schedule of time allocation.

		Allowable Hours
1	Obtaining instructions from client and attempts to resolve the dispute by negotiation prior to involvement in a proceeding—may be claimed once only regardless of the point at which the practitioner or agent becomes involved	4
Conciliation Service		
2	Preparation of and lodging an application to the Conciliation Service including relevant supporting documentation in approved form in accordance with the Conciliation Rules.	+3
3	Where the dispute is resolved after the lodging of an application and prior to a conciliation conference, including all necessary preparation and documentation in approved form in accordance with the Conciliation Rules.	+3
4	Where the dispute is resolved at or after a conciliation conference, including all necessary preparation and documentation in approved form in accordance with the Conciliation Rules. Add for each additional conference	+5 +3
Arbitration Service		
5	Preparation of and lodging an application or reply to the Arbitration Service including all necessary documentation in approved form in accordance with the Arbitration Rules. Add for each application to extend time to lodge an application for Arbitration.	8 +1
6	Where the dispute is resolved after the lodging of an application to the Arbitration Service and prior to the arbitration hearing, including all necessary preparation and documentation in the approved form and attendance at a directions hearing in accordance with the Arbitration Rules. Add for each additional directions hearing Add for each interlocutory application	+6 +2 +3
7	Where the dispute is resolved at or after an arbitration hearing, including all necessary preparation and documentation in the approved form in accordance with the Arbitration Rules. Add for each additional hearing day.	+7 +7
Stand Alone Items—Applicable to conciliation or arbitration service as appropriate		
8	Settlement of the claim by agreement under Schedule 2 or redemption and filing a section 76 memorandum of agreement. (excluding disbursements which are to be paid in accordance with item 10) Excludes agreements made pursuant to section 92(f)#.	10
9	Allowances for witnesses. The amount of any costs to be paid in respect of work done by a practitioner in conducting any proceedings in a dispute may include a reasonable allowance for— (a) witnesses called because of their professional, scientific or other special skill or knowledge; and (b) witnesses called other than those covered in paragraph (a). In fixing an allowance for witnesses under paragraph (b) the taxing officer may have regard to the amount of salary, wages or income (if any) actually lost by the witness, and any expenses in respect of meals, lodging and travel reasonably and necessarily incurred by the witness in attending the proceedings and justify by voucher.	
10	Disbursements (not to include counsel fee and must be justified by voucher). Such amount that is necessarily and reasonably incurred under the circumstances.	

AA Motoring

Running Costs

2021

This AA Running Cost Report provides all-inclusive running costs for petrol vehicles. The information contained in this report is valuable for motorists who use their vehicle for work purposes, employer/employee negotiations, IRD purposes or for businesses applying a mileage rate for customer charging purposes.

The **report** is broken down in to three sections:

1. Report summary
2. Report table indicating average annual ownership costs based upon an average distance travelled of 14,000km per year
3. Report chart to show running cost rates for actual annual distance travelled, ranging from 5,000km to 30,000km per year

For ease of accounting and understanding, the running costs are rounded to whole cents/km.

The **table** for petrol vehicles is separated into four main categories:

1. Small: Smallest hatchbacks and city type cars
2. Compact: Slightly larger sized sedans, hatches or wagons.
3. Medium: Family oriented vehicles, mid-sized SUVs.
4. Large: Larger capacity and luxury vehicles and large SUVs up to 3,500kg.

When selecting which category a vehicle falls into, it is paramount to consider the vehicle's size and value, and not the engine size alone.

To use the chart, locate your TOTAL (work related + personal) distance to identify how much the vehicle costs to operate over that period. That figure can be applied to your work related distance for a suitable reimbursement rate.

These calculations are based upon the first five years of a New Zealand vehicle's life. The fixed costs will reduce as a vehicle ages, primarily because of reduced depreciation. A low value, older vehicle would have depreciated about as far as it's likely to, so the fixed costs will be minimal.

Employee/employer negotiation may be needed to determine a fair rate for older vehicles if these figures are being used for reimbursement purposes. For example, the fixed costs may need to be adjusted downward, while the day-to-day running costs may require an increase to allow for unforeseen costly mechanical repairs.

All insurance cost assumptions are based upon a 35-year-old driver with full no claims bonus, a fully comprehensive policy including glass cover, and excludes drivers under 25.

PETROL

Vehicles

Petrol Car Operating Costs - Summary 2021

The operating cost calculations are a combination of two components; the fixed costs (registration, insurance, Warrant of Fitness and depreciation) and the flexible costs (fuel and maintenance).

The running costs for petrol vehicles have decreased overall by 2.9%, this was due to a mix of changing factors during the year fixed costs across the board saw a small increase of 2%, while flexible costs fell by around 10%.

One of the most significant changes was the cost of fuel which was calculated previously at $2.22. This year, there were significant global factors that led to a drop in the price of fuel to $1.96.

Fuel Summary

This fuel cost is based upon 80% of new vehicles using 91 Octane. Therefore, for the purpose of this report, we have based our calculations upon an 80:20 ratio between 91 and 95 Octane.

Just under a quarter of the pump price comprises of the actual cost of petrol, with taxes making up just over half (even more in the case of Auckland), and the remainder covering the cost of distributing and retailing fuel.

The average price of 91 Octane started the year at around $2.15/litre but by March, prices had fallen sharply as a result of oil prices more than halving due to dramatic reductions in global demand, with much of the world going into lockdown in response to the Covid-19 pandemic. Pump prices reached their lowest point in April, in the middle of our lockdown and when commodity prices briefly reached their lowest, with petrol retailing for under $1.70/litre at some outlets. The AA's recording of average petrol prices showed they hit their lowest level since 2015, when commodity prices were similarly low (and taxes lower).

As countries exited lockdowns, commodity prices gradually recovered and so pump prices rose slightly, while petrol tax also increased by 3.5 cents on 1 July. But overall, and in contrast to previous years, prices have remained very stable throughout most of the year, on average remaining between $1.80 and $1.90/litre.

As usual, there was a wide variation in prices with some parts of the country seeing lower prices due to competition from low-cost unmanned service stations. In a change from a long-term trend, parts of the South Island have often had the lowest fuel prices due to Gull and Waitomo expanding their networks in the mainland during the year, and advertising opening specials. For many years, it was the North Island that had lower prices, as neither of these brands operated in the South Island, but clearly the higher margins there have proven attractive to bring these no-frills brands south – which is now paying dividends for mainland motorists.

During the year, a new Fuel Industry Act was enacted, which primarily will introduce more wholesale competition for the fuel sector. The supporting regulations to enable this are still being developed, but one change the Act introduces is requiring service stations to display the price of all grades of fuel. Whilst it's not yet mandatory, service stations have begun rolling this out and the benefits are already being seen, with lower prices for premium petrol in some cases.

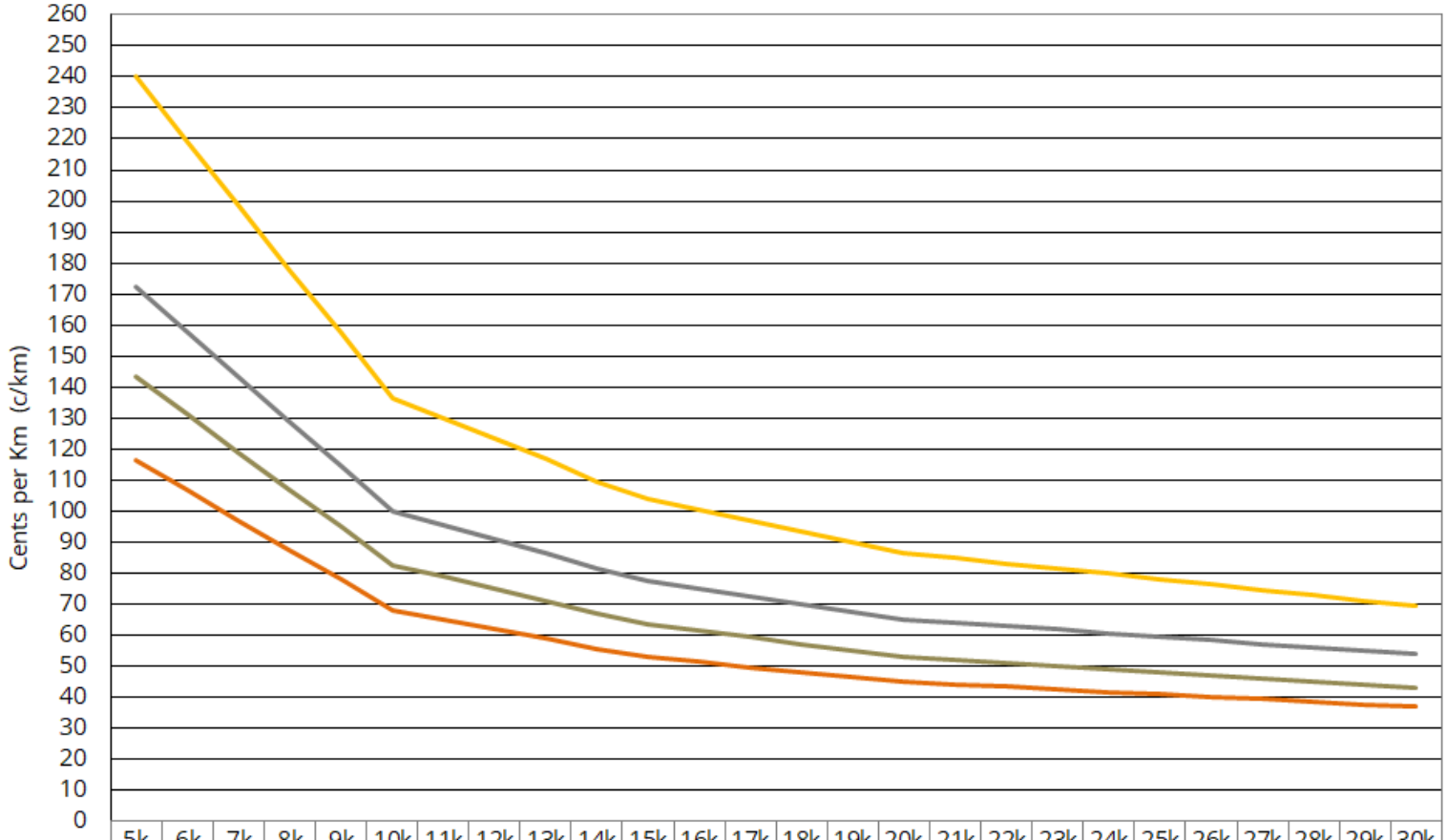
PETROL DRIVEN VEHICLES

ESTIMATED ON 14,000KM PER YEAR FIRST FIVE YEARS OF OWNERSHIP

Category	**Small car** 0-1500cc retail price to $41,000	**Compact car** 1501cc - 2000cc retail price to $59,000	**Medium vehicle** 2001cc - 3500cc retail price to $75,000	**Large vehicle** >3500kg 3501cc + retail price to $115,000
Average value of vehicle surveyed	$33,608	$44,121	$61,824	$81,422
FIXED COSTS				
Average value at start of third year	$18,966.67	$28,992.86	$39,508.33	$50,760.00
Annual relicensing	$109.16	$109.16	$109.16	$109.16
Insurance - Comprehensive, No Claim	$1,135.84	$1,206.41	$1,223.06	$1,510.18
Warrant of Fitness	$65.00	$65.00	$65.00	$65.00
Total Outlay	**$20,276.66**	**$30,373.43**	**$40,905.56**	**$52,444.34**
Interest on outlay	$405.53	$607.47	$818.11	$1,048.89
Capital Cost (Outlay + Interest)	**$20,682.20**	**$30,980.90**	**$41,723.67**	**$53,493.22**
Depreciation at third year	$3,224.33	$4,207.13	$5,130.53	$7,777.22
Depreciation Value	$15,742.33	$24,785.72	$34,377.80	$42,982.78
Total Fixed Costs	**$4,939.86**	**$6,195.18**	**$7,345.87**	**$10,510.44**
Fixed Costs per Day	$13.53	$16.97	$20.13	$28.80
FLEXIBLE COSTS				
Petrol - Litres used per 100km	$6.55	$7.20	$9.70	$11.82
Litres used over 14,000km	$917.00	$1,008.00	$1,358.00	$1,654.80
Cost of fuel annually at 1.96 /litre	$1,797.32	$1,975.68	$2,661.68	$3,243.41
Cost of oil	$102.67	$102.67	$102.67	$102.67
Tyres cost per year	$367.37	$435.60	$573.73	$599.20
Repairs and Maintenance	$571.62	$639.88	$716.49	$859.57
Total Running Costs	$2,838.98	$3,153.83	$4,054.56	$4,804.84
Running Cost per Kilometre (cents)	20.28	22.53	28.96	34.32
Fixed Costs plus Running Costs	**7778.84**	**9349.01**	**11400.43**	**15315.28**
Cost per Km in Cents	**56**	**67**	**81**	**109**
Previous Year	58	69	84	111
Percentage difference over last year	-4.7%	-3.1%	-2.8%	-1.1%
Overall cost have changed by	-2.9%			

RUNNING COST ESTIMATE OF FIVE YEARS OF OWNERSHIP

PETROL DRIVEN VEHICLES



	5k	6k	7k	8k	9k	10k	11k	12k	13k	14k	15k	16k	17k	18k	19k	20k	21k	22k	23k	24k	25k	26k	27k	28k	29k	30k
Large (c/km)	240	219	199	178	157	137	130	124	117	109	104	100	97	94	90	87	85	83	81	80	78	76	75	73	71	69
Medium (c/km)	172	158	143	129	115	100	96	91	87	81	78	75	73	70	68	65	64	63	62	61	60	58	57	56	55	54
Compact (c/km)	143	131	119	107	95	83	79	75	71	67	64	61	59	57	55	53	52	51	50	49	48	47	46	45	44	43
Small (c/km)	116	107	97	87	78	68	65	62	59	56	53	51	50	48	46	45	44	43	43	42	41	40	39	39	38	37

2016 MBIE consultation on the
Injury Prevention (Review Costs and Appeals) Regulations 2002

Submission of Warren Forster on behalf of "Understanding the Problem" research team

Right to change opinion reserved

This submission has been prepared on the basis of information available to the author as at 2 November 2016.

Important information is held by ACC but not available to the general public, such as the total and average amounts it pays its own legal counsel and medical experts. This information is fundamental to assessing, for example, the resource disparity between the parties. That information should be made public in a transparent form for the sake of public trust and confidence.

The author and the research team reserve the right to alter their recommendations and opinion as information becomes available.

About the authors

We are a research team who have authored several reports regarding access to justice.

The team includes lawyers, researchers, academics and persons with disabilities. We have previously prepared reports from Acclaim Otago Inc and the University of Otago Legal Issues Centre.

This report is submitted by Warren Forster on behalf of the research team.

Summary of Recommendations

A. In our submission the Minister should:

(i) In the medium term (6-12 months), direct MBIE to consult on, research and revise the framework for calculating costs under the regulations by revising the "items" by which costs are calculated; and/or

(ii) In the short term (1-6 months), substantially increase the maximum that can be awarded in relation to each item, (with particularly large (5-10x) increase to the maximums for preparation and travel) to allow reviewers to fully exercise the statutory jurisdiction conferred on them by s 148 of the Act; and introduce a regulation that allows the reviewer discretion to go beyond the standard regulated maximum and award a higher regulated maximum in particularly complex cases.

B. In relation to A (ii) the following recommendations are made:

i) The purpose of the regulation be stated as the creation of conditions that will allow a market to develop providing representation for injured persons in challenging ACC's decisions, noting that access to legal representation is a recognised aspect of access to justice.

ii) Immediately add inflation adjustment of **27%** in accordance with increase in wages since fourth quarter 2007.

iii) Insert a new **regulation 13 (below)**, which sets a formula for annual increases to the costs in the schedule by inflation or increases to wages (as opposed to CPI).

iv) In exercising the discretion at s 328(f) to regulate for review costs, the Minister takes into account the following relevant considerations, which may also be reflected in the text of the regulations themselves in a dedicated purpose section:

- *The true costs of representation*
- *The resources available to the Accident Compensation Corporation as a party to the dispute resolution process*
- *The general purpose of the statute*
- *The desirability of an independent market for legal services*
- *The importance of the dispute resolution process: for identifying errors and oversights in ACC's management of the scheme; and for public trust and confidence given the social contract at s 3 of the Act*
- *The right of access to justice*

v) We recommend that the cap of scheduled costs should be set in the vicinity of $3000-$4000, which reflects the true cost of representation based on available data sources.

vi) Insert regulation 4(4) which states:

"Notwithstanding rr 4(1)-(3) above, the reviewer may award up to a maximum of $10,000 for the costs of representation and medical evidence if the reviewer is satisfied that it would be manifestly inadequate to adhere to the schedule or undue hardship would result."

Background

1. Official information shows that there has been a deliberate policy over decades to undermine the market for legal services for ACC claimants.[1] It has become financially and practically undesirable to practice in ACC law. Most recently this has been verified in the Dean Report.

2. Importantly, this state of affairs is the result of a proactive decision to deliberately supress the market for legal services as part of a wider policy to remove legalism from the scheme. The costs regime is premised on the lack of legalism in disputes and as ACC has gradually reintroduced legalism the costs regime is no longer fit for purpose.

3. This decision to "exclude lawyers"[2] has had a deleterious effect on claimants' ability to challenge ACC's decisions, and has resulted in a failure of the market for legal services both at review and appeal. Put simply, there is a dearth of qualified and experienced lawyers practicing in the jurisdiction, and very little incentive for new practitioners to enter. In particular, the integral importance of attaining expert medical evidence in most disputes separates this jurisdiction from others.

4. It cannot be forgotten that most people seeking ACC reviews are, by definition, incapacitated for employment and suffering the effects of injuries or other health conditions. This reduces significantly their capacity to pay for legal services and medical evidence. Acclaim Otago's survey indicated that it was common for claimants to incur debt or deplete savings as a result of their injury or health condition even where they did receive weekly compensation, because of the 20% reduction in earnings, and the "user pays" rationale that imposes co-payments on individuals even for services that they are entitled to receive under the Act.

5. There is no good reason why the cost of ACC's legal and evidential services should be entirely funded by ACC, but only a reasonable contribution available to claimants, even where they have been entirely successful and ACC's decision entirely unjustified.

6. We attribute much of the public trust and confidence issue facing ACC to this state of affairs. This means the problem is likely to remain and may risk undermining ACC's ongoing efforts to improve trust and confidence. An effective and transparent market for legal services is one of the simplest yet most effective means of increasing public trust and confidence in the Corporation and the scheme.

Legal framework for regulations

7. In terms of the legal framework for applying the regulations, the statute is clear that priority should be given to the reviewer as the judicial officer who heard the review application: the section 148 discretion is theirs. The

[1] District Court submissions to MBIE tribunal proposal; Dean Report.
[2] I.16W at 17.

regulations must be drafted to facilitate this exercise of discretion according to the purposes of the AC Act.

8. The Minister has authority to make regulations relating to review costs under s 328 of the AC Act 2001. The stated purpose of the regulations is to be used by reviewers in exercising their regulated discretion at s 148 of the Act.

9. In making regulations, the Minister is obliged to consider the purpose of the AC Act 2001. Nothing in the primary statute limits the Minister's authority to promulgate regulations to the current form of the regulations: for example by the use of two columns that relate to calculation of the specific items listed on the left-hand side of the printed regulations themselves.

10. Taking a medium-term view, it would be preferable for the "items" to be revised after a process of consultation to better reflect the actual steps taken in preparing and presenting a review application. This process can be expected to take time. The current consultation round is inadequate for that purpose, and nor do we understand that to be its purpose.

11. In the interests of making swift changes to the regulations in order to improve access to justice for claimants, the key legal changes we recommend to the structure of the regulations is:

    i) the inclusion of a regulation that indicates their purpose ("**purpose-oriented regulation**"),
        a) to guide the reviewer's exercise of discretion in applying the regulations and making costs awards, and
        b) to give legislative guidance to the Court which hears appeals against costs awards made under s 148 by virtue of s 149(1)(b) and (2)(b).

    ii) to introduce a power for the reviewer to exceed the normal regulated maximum and award up to a higher regulated maximum for cases that are particularly complex to avoid the "one size fits all approach" criticised in the Dean report ("**complex cases regulation**").

12. The inclusion of a purpose-oriented regulation and a complex circumstances regulation play an important role in guiding reviewers to exercise their discretion in accordance with Parliament's intent, as reflected in the Minister's recommendation to the Governor-General.

Brief history of legal costs at review under the scheme

History of legal costs that can be awarded at review

13. The 1972 and 1982 Acts provided for "reasonable costs" to be awarded. Even in 1978,[3] the review numbers were approximately 2050 per year. Of these 2050 reviews, 542 were revised in favour of the claimant, 446 were not revised in favour of claimant and were withdrawn, and 1059 proceeded to review hearing. Of these 1059 proceeding to review hearing, only 78 appeals

[3] The following statistics taken from Terence G Ison, *Accident Compensation: a commentary on the New Zealand scheme* (1980, Croom Helm London) at 108.

were heard by the appeal authority (i.e., only 4% of the original applications for review that indicated the presence of a legal or factual disagreement).

14. During the period that these Acts were in effect, the test for causation was a low bar. That is, to say, it was significantly easier to prove a causative link between one's accident and one's injury. Payment of entitlements could only be suspended if exclusively caused by factors other than injury or the accident. At this time there were approximately 2,000 reviews and appeals per year. The current enactment (Accident Compensation Act 2001) has much more stringent standards for causation, the origins of which can be traced to the 1992 reforms. These stringent standards lead for more opportunities for disputes to arise, and also increase the complexity and amount of evidence and legal argument in those disputes.

15. As well as making the legal disputes more complicated, the 1992 reforms also reduced the costs payable for reviews to a scheduled rate. The rate has, in real terms, trended downwards since then, except for minor increases at a lesser rate than inflation, and forced substantive increases (including a one hour increase in preparation for the review, and an increase in "other costs"). There has been a reduction in the travel rate from 50c/km to 27c/km, and an increase in medical report costs.

16. In 1999, the cost of representation at review was considered to be between $1,500 and $2,500,[5] which could be compared to costs awarded at the time of $545[6] for a one-hour hearing, including travel and full "other costs". At that point, the regulated costs allowed for a maximum award of only 21%-36% of the going rate for representation at review. The maximum award for a review with no travel and no other costs would be $315, reflecting the 13%-21%. The range using this method would be 13%-36% of the real costs of representation.[7]

17. At the time, the Law Society recommended a costs regime to pay in the vicinity of $1,500 in legal costs, including $250 for lodging the review application, $165 per hour of preparation (based on the legal aid rate, payable for up to 7 hours), $165 per hour for attendance and witness expenses, and travel and other expenses ($350). The regulations review committee, based on the law society's (and others') submissions determined that the regulations were in breach of the standing orders and referred it back to officials for revision.

18. Four years later, after a change in Government, increases which were manifestly inadequate were made (for example, an increase from 1 to 2 hours of preparation). At this point, the same committee considered the problem had been solved. This mistaken view exacerbated the effect of the market failure.

19. Five years later in 2008, eight of nine submitters again advised of the effects of the regulations on the market and recommended significant increase. These were ignored by policy makers when providing advice to the Minister

[5] I 16W at 11.
[6] I 16W at 27.
[7] This can be compared with the results of Acclaim Otago's survey which reported rates as between 12.5% and 30% of overall costs incurred.

as being outside the scope of the consultation.[8] Another opportunity to fix the problem was missed.

20. The only available evidence of current payments by ACC to its own lawyers (discerned from a small number of cases) is that in 2011 and 2012, ACC paid its external lawyers over $3,000 for representation at reviews. ACC has refused to disclose this information at a systemic level, despite specific requests. This payment to ACC's lawyers does not reflect the entire cost ACC spends on defending a review. It does not include the internal costs ACC expends (staff time, file preparation, medical and clinical experts), which continue to be entirely absorbed by ACC. Even at the full rate of costs available to claimants for review and appeal (not including travel), the costs for the review would be $641. Applying the same analysis as above (ie not including ACC internal expenditure), and excluding the de facto penalty imposed by an artificially low rate for travel, the rate paid to the claimant is only 21% of the rate paid by ACC to its own lawyers.

21. The market for representation has been suppressed. The effect is that the rate of review is approximately 0.2%, which can be compared to rates of 2-9% in comparable Australian systems.[9] The lack of available data means that it is impossible to show a causative relationship between the suppression of the market and the low rate of reviews, but we argue that this can be clearly inferred. Regardless, most decisions being issued by ACC are simply not being externally reviewed. There is no identified cultural difference between New Zealand and Australia to explain a disparity of this magnitude. Furthermore, the rate of review has dropped from being 2% under the 1972 Act reasonable costs regime, to 0.2% under the more recent regimes. This drop must also be seen against a background of drastically low levels of public trust and confidence in ACC, and the now widely acknowledged failures to provide access to justice.[10]

22. The fact that the market consists of only a small pool of lawyers and other legal representatives – who can gain limited income given the costs regime – also means that any disruptions to that market have a disproportionately large effect. For example, if ACC complains about a lawyer or otherwise interferes with their legal business (whether justified or not), that can have a substantial effect on the individual practitioner, with that individual practitioner themselves being a disproportionately large actor within the overall market. Such action can have a chilling effect on the market for legal services.

23. The problem is sometimes referred to as unmet legal need and there is some official evidence from 2006 verifying the prevalence of unmet legal need for injured persons.[11]

---

[8] Weekly report from Department of Labour to Minister of ACC dated 8 May 2008, Cabinet Paper SDC (08) 67.
[9] PWC report 2008.
[10] Research New Zealand, PIF review 2014, Dean Report, Minister's comments, Cabinet paper.
[11] *Legal Services Agency* 2006 National Survey of Unmet Legal Need (LSA, 2006).

History of medical costs that can be awarded at review

ACC has historically exerted significant influence and control over the market for treatment providers, which has limited the available market and also acted as a disincentive to providers wishing to be involved with ACC or reviews

24. The market rate for medical evidence for claimants has been set artificially low and this has caused a market failure, in the sense that those who wish to obtain services are unable to do so, even where there is a recognised legitimate need for those services.

25. The process by which medical experts provide evidence requires a significant amount of work, much of which may be laborious and for which remuneration is inadequate. Practitioners find it difficult to engage in such work when their primary interest is in actually treating patients with immediate need.

26. ACC's system for funding treatment gave it undue control over providers. It developed "ACC units" which official information shows were deliberately used to "control provider behaviour". These have been used quite unscrupulously by individual ACC claims staff – for example, telling treatment providers who supported claimants to "stop playing silly buggers", or acting with the goal to "run [a treatment provider] out of [town]".

27. In the past, the Key Performance Indicators (KPI) of ACC Healthwise have included objectives such as controlling provider behaviour in order to "constrain the provision of entitlements" to claimants. At that time, the director of ACC Healthwise presented an idea of how the regulatory and compliance regime could be used oppressively to "hound" providers, including by demanding compliance with ACC's demands so as to manipulate the markets for treatment providers. In the case of the Goddard physiotherapy services inquiry, ACC was criticised for using "quality" as a discriminator in a situation where the only "quality" measures related to business system quality, rather than treatment quality.

Providers consider they have a conflict of interest if they provide services to ACC

28. On occasion, when claimants or their lawyers approach some treatment providers seeking expert evidence, the providers claim having a conflict of interest because they provide services to ACC. This conflict is only perceived, and not real. Similar findings were reported by the Dean inquiry. But the self-reported sense of conflict of interest nonetheless have the effect of reducing further the market for services that are available to claimants.

Cost and risk is a barrier to treatment providers providing evidence for claimants at review

29. Even where maximum costs are awarded at review, the actual funds are only made available 6-12 months after the service was provided. As recorded by the Dean inquiry, even the regulated maximums are simply insufficient to

properly compensate experienced providers for their services. Very complex cases can involve forbidding amounts of historical evidence and the quality of providers' evidence will be questioned unless all historical evidence is accounted for in the eventual written report.

30. By comparison with the payments available to practitioners offering services to ACC claimants, ACC pays its medical experts $220 per hour for preparation and attendance at review hearings.[12] There is no cap on this cost. There is no risk for these experts and they get paid immediately upon invoice.

31. There is no principled reason as to why ACC should immediately pay their experts from public funds, at an unlimited rate and experts providing the same service should risk not being paid, and if they get paid, only months to years later, at a significantly lower rate. These market conditions do not provide for access to justice, or natural justice. Nor do they allow a claimant to feel that they are being heard at review, as there is a pervading sensation that ACC have unrestricted access to expert evidence while the claimant must make do with what can be afforded and attained in the timeframes available.

Advantages from repeated involvement in litigation and claims assessment

32. ACC has adopted investigative evidential practices that are designed to be efficient, such as the use of the Clinical Advisory Panel or similar bodies. These panels involve a diverse range of specialists all sitting at once to consider a case from a multidisciplinary perspective. The panel is made cost-effective by the fact that it considers large volumes of cases at a high rate of processing in an efficient manner. It is important to recognise that even if funds are made available to facilitate access to reports from individual practitioners, claimants still face a significant barrier by their inability to match ACC's organisational advantages, particularly the speed and quality of evidence that can be obtained. The only apparent way to counter this advantage is to make the market for claimant services lucrative enough that practitioners are incentivised to collaborate, and produce speedy, high quality reports. Where claimants face evidence given by a panel, the burden to displace that evidence is significantly higher, and so a system predicated on single reports by individual doctors is unlikely to facilitate access to medical evidence. The rate should be increased to reflect this.

[12] Official Information database.

Response to 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 costs of a review? Are there particular areas where increased support is necessary?"

33. It should be apparent from the discussion above that the area that requires particular attention is setting the rate high enough for legal and medical services to create a viable market.

34. It is inevitable that overall costs expenditure will increase, but that is only because the market has been artificially suppressed in the past.

35. In that sense, the only legitimate policy concern is that the market is growing out of proportion or unjustifiably. This risk will be mitigated by the reviewer's ability to set reasonable payments of costs within the maximum scale allowed by the regulations. ACC also has the opportunity to reduce the cost by making appropriate submissions on costs in individuals cases, and also by proactive settlement and improving the quality of its decision-making. Reviewers can decline to award costs where a dispute is unreasonably brought.

36. It must be remembered that significant market correction will occur but this will then stabilise over time. The "freeway effect" may also lead to increases in total costs as more reviews are brought. These indicators need to be seen as good things: care should be taken to avoid seeing these as a "blowout" in the costs. Not all increases are unjustified.

37. For the above reasons, we consider it is fundamentally important that data is kept to prevent misunderstanding of the changes.

38. Given the policy history surrounding the review costs regulations, it is apparent that there is a much greater risk of the market for medical and legal services being continually suppressed by a conservative approach than it growing unsustainably.

39. The Minister retains the power to revise the rates downwards if the market grows unsustainably, but that decision should be made on the basis of sound statistical and financial evidence.

40. We recommend:

    (i) In the medium term, MBIE consult on, research and revise the framework for calculating costs under the regulations by revising the "items" by which costs are calculated.

        There is no reason, for example, why there should be a fall-off in costs payable based on the number of hours of preparation: if anything, the fact that more preparation is required for medical evidence, appearance at a hearing, or legal representation, is an indication that the case is more complex and deserves a higher rate.

        The legal framework for the regulations indicates Parliament's intent that the reviewer, as the person responsible for hearing the review

and making costs awards, is the appropriate person to decide how costs should be awarded. That should not be artificially limited for all cases – regardless of complexity – by the current unduly prescriptive framework.

(ii) In the short term, substantially increasing the maximum that can be awarded in relation to each item, (with particularly large (5-10x) increase to the maximums for preparation and travel) to allow reviewers to fully exercise the statutory jurisdiction conferred on them by s 148 of the Act; and introduce a regulation that allows the reviewer discretion to go beyond the standard regulated maximum and award a higher regulated maximum in particularly complex cases.

41. The current rate is inadequate remuneration for all but a small number of the simplest reviews (which entail significantly less legal work and medical evidence).

The costs process is largely misunderstood by reviewers and officials

42. The prescriptive nature of the statutory tests are largely misunderstood and incorrectly interpreted by the majority of reviewers. It is not a tariff that applies in every case. It requires tests to be engaged with and considered.

43. There is a three stage test in s 148:

i) the reviewer must first determine whether or not the review is successful (move to step 3) or whether the factual test of the applicant acted reasonably in applying for review is met (move to step 2)

ii) If the review is unsuccessful, then the reviewer must then consider the exercise a discretion as to whether to award costs and then

iii) If successful or the reviewer exercises discretion to award costs, then the reviewer must decide on the level of costs to be awarded, up to the maximum, this must be based upon costs incurred or which the claimant is liable to pay.

44. This is currently approached by reviewers as a one-step discretionary process, with inadequate consideration given to the factual questions at (i) and (iii) and the proper exercise of discretion at (ii). This approach has been litigated and the Court agrees that such a process was wrong in law (Sutton).

45. Section 148 provides the appropriate framework to account for personal responsibility and the reasonableness of a dispute. It would be wrong to deny reviewers their statutory discretion by imposing an artificially low regulated maximum.

Knowledge gaps: "Do you have any data that will help us to establish the extent of the shortfall more clearly?"

ACC has not provided its own data on costs for its medical and legal experts

46. ACC has not provided its own internal data. This makes the creation of a level playing field largely impossible. There is no good reason for it to be withheld or for the Corporation to be slow to gather or collate it, given the significant public interest in making the data available. Any reform that the Minister makes is unlikely to enjoy any public trust and confidence without awareness of how much ACC is spending in relation to the amounts available to claimants. We have requested this information and although it clearly exists and is accessible by ACC, barriers exist to the provision of this information. A list of information directly on point is set out at Appendix B.

Existing data

47. Data exists from the 2014 claimant survey, which is attached to this response. The relevant extract is set out at Appendix A. This put the contribution to the claimant costs paid by ACC at between 12.5% and 30% of real costs to claimants. This is in the same region as the 13%-36% figure provided by the Law Society at select committee in 1999, and the 21% of ACC's payments to its lawyers from review in 2011 and 2012.

48. It must be noted that when the UN challenged the Government about this, its response was that costs are available and usually awarded. Available data suggests that costs are not usually awarded and are in fact awarded in less than half of cases (approximately 2,500 out of 6,000). The authors' experience is that some or all of the costs sought are usually opposed at review by ACC or its lawyers.

49. It is also noted that officials may not accept this data as the Cabinet paper stated:

> The independent review did not validate the claim that the review costs awarded were only 12.5% to 30% of the actual costs of clients. However, it does note some areas where there are apparent shortfalls and recommends that consideration be given to increasing costs available at review beyond an inflation adjustment.

50. The independent review was not asked to consider evidence as to the true costs. It was outside of the scope of the terms of reference.[13]

51. Further, ACC told Ms Dean QC that it could not provide data of what it spends on reviews and appeals to allow this comparison to be made.[14]

52. Finally, Ms Dean made it clear despite the gaps in the data and the limitations of her inquiry, there were problems that must be addressed by significant increases "and more than by just inflation." She reported:

> The Ministry of Business, Innovation and Employment is reviewing the regulations governing review costs. There is no doubt these costs, not

[13] Refer to terms of reference December 2015.
[14] Miriam Dean QC report at pp10 and 11.

> looked at since 2008 when they were adjusted for inflation, do not reflect actual costs, nor are they currently a meaningful contribution to them.[15]
>
> Many 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 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 some 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).[16]
>
> Scale review costs should also be increased – and by more than just inflation.[17]

53. Many of these points are consistent with the issues identified by Acclaim Otago in its survey results from 2014. The requirement for significant increase is undeniable.

Existing Official Information

54. The attached documents from 2008 show what information was relied upon. They refer to 2002 market research. This 2002 baseline data upon which the original level was set has not been provided. The 2002 rate mirrors the adjusted 1992 rate. It would be of great help if MBIE would provide the historic data from 1992, 1993, 1996, 1999, 2002 and 2003, as this will add to the body of knowledge and provide for effective consultation.

Research

55. If the data regarding 12-35% contribution of regulated costs to real costs is not accepted, empirical research ought to be commissioned to assess the subject. It must be done independently of ACC and Fairway. Counsel and advocates have records of cost to claimants that can be compared to costs awarded by reviewers. It will need to be extracted and presented it in a way that protects the private interests of the claimant and the commercial interests of the lawyers and advocates.

---

[15] Miriam Dean QC report at 31.
[16] Miriam Dean QC at p 32.
[17] Miriam Dean QC report at pp10 and 11.

56. The other problem with undertaking research at this stage is that the market has already failed, and any research is likely to provide data from a failed market.

57. The 2016 cabinet paper suggests that there is some scepticism of the 12.5-30% referenced to Acclaim Otago's report. Nonetheless, two independent cross-checks verify the validity of Acclaims 2014 survey data about the market rate (ACC's payments to lawyers (recent market rate) and the Law Society's 1999 report to Select Committee (1999 market rate)). Any continued scepticism without an evidential basis cannot be substantiated.

58. To test the validity of the 2014 data, a survey of reviewers would give an idea of the time taken to lodge review applications, prepare for cases (bundles of documents, submissions etc), present cases at review and follow-up directions.

59. There are likely to be several factors leading to the very low contribution currently in accordance with the regulations, including:

    i. The failure to set the rate at the appropriate level initially (set in 1992 and continued since through to 2016).

    ii. The increasing complexity of reviews (see Fairway's comments).

    iii. The gap between the hourly rates of specialised lawyers and advocates and the $175 per hour cap on ACC's contribution. The only available evidence from ACC's lawyers at review hearing shows a market rate of over $300 per hour. The median and mode hourly rate was between $200 and $300, and most hourly rates were above $200.

    iv. The gap between the total time taken (in number of hours) to complete the various tasks and the maximum regulated amount.

Relevant considerations for setting the scale of costs

The scale must reflect the true costs of representation

60. Legal representation and medical expertise for the benefit of claimants will remain subdued so long as it is unprofitable to providers to offer such services: that is the nature of a market.

61. Available data shows that the median and mode of costs to claimants are in the range of $2000 to $4000.[18] This is consistent with the $1500 to $2500 figure identified in 1999[19] and reflects the market rate of $3000 that is the best estimate of how ACC paid its counsel. Should this estimation be incorrect we would welcome evidence as to the correct number. The scale should be set to cover costs of at least $3000. There are many examples of costs above $8000 in complex cases.

[18] Acclaim Summary of Survey data 2014.
[19] Law Society Submissions to Regulations Review Committee 1999.

62. The regulations also need a mechanism for addressing costs at or above this level. We propose the inclusion of an "complex circumstances regulation", which allows a reviewer to award costs of up to $10,000 in the usual manner in cases of particular complexity or where it can be shown undue hardship would be caused by adhering to the schedule.

There is no principled reason for the stated intention not to cover full costs in appropriate cases

63. Claimants should not have to bear the costs when ACC gets it wrong. If anything, there should be a disincentive for ACC getting it wrong, akin to a fiscal penalty, and certainly not a fiscal penalty on the claimant, which directly disincentives attempts to enforce one's rights under the scheme regardless of merit.

64. There is no principled reason that has been provided as to why the costs of an entirely successful review should be borne by the claimant. The call for "personal responsibility" is already factored into decision making, by the requirement that claimants' costs in bringing a review will only be available if that review is reasonably brought. Beyond this, we see no further use for loose or unspecified "personal responsibility" language or reasoning. We expand on this further below.

65. Any impact on financial sustainability or blow-outs in the costs of legal and medical representation is borne by ACC: only ACC has control over the quality of the decisions it issues. If anything, a cost blowout is an important signal to ACC that its decision-making needs addressing.

66. The cost of increased medical and legal services will be borne by ACC, and not the Government. The opportunity to reduce these costs over time will also rest with ACC, and it can make better decisions, conciliate cases, and work with the market for legal services to reduce the being heard barriers.

67. Similarly, any concern that high rates will distort the market can be dealt with within the reviewer's discretion to award only costs that are reasonable, and only up to the maximum award.

The importance of the dispute resolution process for error correction and public trust and confidence

68. In previous reports, we analysed the accountability mechanisms responsible for ACC and concluded that the effect of barriers to access to justice is that, in an extreme situation, ACC could repeatedly suspend entitlements secure in the knowledge that it either wouldn't be held to account, or that it would take some time for any review to be successful. Meaningful costs awards play a crucial role in discouraging this kind of behaviour and provide a mechanism for reviewers to indicate their disapproval of ACC's conduct in appropriate situations.

69. For example, one claimant was "exited" (the internal term for having entitlements suspended on the various grounds available to ACC) twice in consecutive years in the week before Christmas. Both occasions occurred under the same case manager. While we cannot know the intention behind

these episodes, the effect of them was that it allowed both the case manager and the branch to meet the requirements of their respective KPIs.

70. In such circumstances, it is reasonable to infer that ACC has been influenced by an ulterior motive: the important thing is that there was no disincentive against doing so. Each time, the claimant's compensation was reinstated, but the claimant was nonetheless burdened with the costs of review and the delay while the error was corrected. There is no principled reason why this should be the case.

71. In the Dean report, ACC advised Ms Dean QC that – in a best case scenario – it would have approximately 84% of its decisions upheld at review. That means, even on a best case scenario, ACC anticipates that some 16% of its decisions will be quashed at review. In that situation, there can be no reason for imposing a financial burden on claimants for something largely outside of their control.

The general objects and intention of the statute

72. The statute's purpose relates to fairness, public good and the social contract (s 3). ACC's overarching function is to manage personal injury. At a high level, the statute's object and intentions are to provide for access to justice for injured persons. It does this in three ways: (1) by providing for a system of substantive rights (entitlements), (2) by providing for process rights (the Code of ACC Claimants' Rights), and (3) by providing for a review mechanism to enforce the provision of statutory entitlements.

73. The enforcement mechanism can and will be effective in providing access to justice, but only if it is functionally independent of ACC. Part 5 gives a clear legislative intention that all parties should have access to a fair and effective dispute resolution procedure. The intention of Parliament set out in s 148 is that a successful applicant is entitled to be awarded his or her costs. If the scale of costs is set so low as to exclude reasonable legal representation, the object and intention of the Act to pay costs is defeated. As the rate has been inadequate for twenty-five years, and the object and intent of the legislation has been subsequently defeated. This must not be allowed to continue as it is having a serious impact on New Zealanders and is in breach of New Zealand's obligations.

74. Furthermore, compliance with standing order 319(2)(a) is a relevant consideration and the proposed schedule is not in accordance with that standing order.

The right to access to justice

75. There are three relevant sources of the right to justice: the Convention on the Rights of Persons with Disabilities, the New Zealand Bill of Rights Act, and the Statute itself.

(i) Convention on the Rights of Persons with Disability

76. There is a general right of access to justice for persons with disabilities. There are around 320,000 persons with disabilities caused by accident in New

Zealand,[20] with a similar number of adverse decisions made by ACC each year. The executive is responsible for ensuring New Zealand's compliance with its international obligations. In this context, persons with disabilities caused by injury have the right to access to justice. Whilst it is accepted that the Regulations Review Committee "has not determined the question of whether a treaty that is consistent with New Zealand domestic law can provide a source of rights capable of being trespassed on,"[21] it is submitted that the question should be answered in the affirmative. A personal right to access to justice exists. Whilst it is correct that Parliament can legislate contrary to its international obligations, the same does not exist in regulation-making powers by the executive, particularly given the executives role under the Convention. Nonetheless, it is largely academic as there are two statutory provisions which both provide a basis for the right to access to justice.

(ii) The New Zealand Bill of Rights Act

77. The New Zealand Bill of Rights Act 1990 provides for the observance of the principle of natural justice.[22] Natural justice requires not just the right to be heard but the right to a fair hearing. This incorporates rights to present and test evidence, and put forward legal arguments.

(iii) The right of review in the Accident Compensation Act

78. These general rights are given specific force by the Accident Compensation Act providing a right of review.[23] The introduction of the scheme removed the right to sue and replaced it with a system of entitlements and rights of review. In 2008, the percentage of total claims disputed was of 0.2%, which is an order of magnitude lower than Australian states.[24] This shows that the right of review is being exercised significantly less. One bald explanation might be that people are much more satisfied with their claims in New Zealand, another that people lack the resources or ability to maintain a dispute. The only available data[25] shows that most people want to be represented at review, but they cannot afford representation.

79. Compliance with standing order 319(2)(b) is a relevant consideration and the proposed schedule is not in accordance with that standing order.

---

[20] Census Disability Survey 2013.
[21] *Knight and Clark* Regulations Review Committee Digest 6th edition 2016 at Chapter 7.
[22] New Zealand Bill of Rights Act, s 27.
[23] Accident Compensation Act 2001, s 64(4)(c), s 133(5), 137(2)
[24] PWC 2008 report, executive summary.
[25] Acclaim Survey results August 2014, pp 7 et seq (attached marked "A").

Irrelevant factors for setting the scale of costs

Personal responsibility is already provided for in the reviewer statutory function a s 148 and can be dealt with by intelligent application of the regulations rather than an ungenerous statutory maximum

80. There has been an overemphasis on the concept of personal responsibility as a deterrent to frivolous disputes. This is not to say that personal responsibility is not or should not be a factor considered, but rather, there is already a mechanism specifically built into the regulations to deal with it – in making the decision above at (ii) when the reviewer decides whether "the applicant acted reasonably in applying for the review" (s 148(2)(b)). If the claimant did not act reasonably, then there is no need to continue to the regulations so the regulations are not required to limit the award to take into account review applications that should not be brought

81. As it stands now, setting all costs artificially low as a general deterrent circumvents this power. We strongly argue that this is neither useful nor effective for the scheme. Rather than simply deterring frivolous disputes it has the effect of indiscriminately deterring all disputes, which is plainly undesirable at a systemic level. Furthermore, it deprives the reviewer of the proper function under the regulations in assessing whether costs have been reasonably brought. These powers have been given to the reviewer deliberately by Parliament, and they should not be usurped by subordinate legislation.

Financial sustainability to ACC

82. Taking into account the cost to ACC of paying regulated costs is an irrelevant factor for reducing the costs that can be awarded to claimants. Firstly, It incentivises poor quality decision making by ACC. Secondly, providing access to justice is one of the unavoidable process costs of administering the loss allocation mechanism. The total of administrative costs is around $500 million, [26] while the costs paid by ACC for claimants to review its decisions is approximately $2 million.

83. This is less than 0.5% of the process cost of the system. The fact that ACC has not provided accounts of its spending on reviews means that any submission of costs to ACC cannot be considered against the fact of what ACC spends, and is detrimental to achieving transparency. Frankly, we do not accept ACC's argument that they cannot afford to fund such a crucial aspect of the dispute resolution mechanism.

ACC's view on the scale

84. ACC, together with the Department of Labour, created and implemented the "Policy" and the "policies" to remove claimants' lawyers from the market. ACC then implemented a litigation strategy to create dispute about costs that had

[26] ACC has not provided the total cost as it claims it cannot be separated between pure administrative costs and costs for multiple purposes, for example treatment and assessment costs are paid under the same code, or vocational rehabilitation costs of $43 million relate both to assessments and rehabilitation.

the effect of denying access to justice. We argue that ACC has played a critical role in the suppression of the legal market in this area, though ACC does not accept such responsibility.

Purpose of regulatory change

85. The purposes of the proposal are also referred to as objectives. We disagree with these objectives. Removal of barriers in order to provide access to justice for the injured person should be the purpose of the regulatory change. This is what is required by statute and by the United Nations Convention on the Rights of Persons with Disabilities.

86. A level playing field with ACC is an important foundation to achieve. However, it must be recognised that by the time ACC appoints counsel it has completed investigations and spent considerable staff time on preparing the case both in terms of legislative compliance and medical evidence (please refer to discussion above).

87. Nonetheless, if a level playing field is the goal, it must be remembered that there is, insofar as we know (and we encourage ACC to provide statistics or policy to the contrary), no limit on what ACC spends on lawyers or medical evidence. There are examples of ACC spending $10,000 on medical evidence and more than $3,000 on lawyers.

88. Overall, a frank policy discussion needs to be had, and ultimately a decision made, about the state of the market for legal services in this jurisdiction. We argue that in its current form the market is suppressed and unable to meet the requirements and demands of claimants, who badly need assistance in asserting their legal rights.

89. What is also required is a shift in thinking by ACC, to embrace the review process as a fundamental part of the way it ensures it has made good-quality decisions, rather than an unwelcome interruption to its ordinary business.

90. **We Recommend:** The purpose of the regulation is stated to be creating conditions that will allow a reasonable market to be established to provide access to justice for injured persons challenging ACC's decision.

Inflation Adjustment

91. There must be immediate inflation adjustment. It should be subject to an annual increase in accordance with inflation. This should be increased according to the cost of labour (wages) rather than the consumer price index. Most of the costs of providing legal services is labour (staff time), and if these are not indexed in accordance with the cost of labour, but instead with the consumer price index, then the value of the increases will fall over time. Using CPI as an inflation measure will continue to supress the market.

92. The inflation adjustment using the Reserve Bank of New Zealand's inflation calculator shows that the total percentage changes in wages from fourth quarter 2007 until second quarter of 2016 is 27%.

93. The effect of using CPI in 2008[29] can be seen by comparing the wages inflation adjustment from the fourth quarter 2003 until second quarter 2016. The wages inflation was 50%. This will need to be addressed as part of the wider review.

94. The inflation period used for the 14.9 CPI adjustment is wrong. The October 2008 increase only applied the CPI increase until December 2007.[30] The current proposal to use CPI from first quarter 2008 until first quarter 2016 misses the CPI indexation of 0.7% between the last quarter of 2007 to the first quarter of 2008 and also the CPI of the second quarter of 2016. Even using CPI, the correct rate for the relevant period that should be applied is 16.2% from the last quarter of 2007 until the second quarter of 2016.

95. **We recommend:** Immediate inflation adjustment of 27% (using wages); and insertion of regulation 13.

96. **We recommend:** a regulation 13 should be added to the regulations which sets a formula and a process for annual increases to be applied to the costs in the schedule by inflation or increases to the cost of labour – wages – as opposed to CPI.

Other adjustments

Mechanism to take into account complex cases

97. There is a small but growing number of reviews that are complex, where the costs to claimants are well above $4,000 and are closer to $10,000. There must be a way of dealing with these cases without making it impossible to bring them, or meaning they can only be brought *pro bono*.

98. **We recommend:** a cap in the vicinity of $3000-$4000 by setting the schedule rate accordingly. In recommending a cap, we recognise that real costs will likely rise to some degree relative to increases in the costs available – a cap on costs will help keep this in check as will the reviewer's ability to limit awards.

99. **We recommend:** Despite the cap, regulation 4(4) be inserted to provide a mechanism by which the reviewer can provide commensurate costs in complex cases with higher costs incurred to the claimant, along these lines:

    The reviewer may award costs in excess of the cap on costs if satisfied that it would be manifestly inadequate or that it would impose undue hardship to the applicant if the cap on costs were to be applied having regard to the cost of any legal and medical expenses incurred by the claimant or the claimant is liable to pay.

    OR:

    Notwithstanding rr 4(1)-(3) above, the reviewer may award up to a maximum of $10,000 for the costs of disbursements, representation and medical evidence if the reviewer is satisfied that it would be manifestly inadequate to adhere to the schedule or undue hardship would result.

[29] Cabinet Paper SDC (08) 67 at page 2.
[30] Cabinet Paper SDC (08) 67 at page 2, paragraph 3.

Preparation

100. The cost of preparing for a review also deserves special attention.

101. There are numerous steps in preparation which do not receive any mention in the schedule of costs.

102. Files (often for numerous different claims for a single claimant) have to be requested from ACC, which takes time given ACC's emphasis on privacy. Those files must be closely and exhaustively read and considered. Just reading the files takes at least 5-10 hours for a complex case, even by a specialist lawyer.

103. There is a detailed body of statute and case law – sometimes across numerous enactments – which then needs to be considered, requiring legal research of another 1-2 hours at least.

104. Depending on the above two steps, a decision needs to be made about whether to obtain expert evidence, and if so from whom. Claimant's evidence is required to be briefed (1-2 hours).

105. If the case involves issues of cover (for example treatment injury), then more than one expert will need to be briefed (2-3 hours). A similar situation exists for vocational independence decisions.

106. For each expert to be briefed, a bundle of documents and letter of introduction is required. The bundle of documents needs to be prepared before the assessment can be undertaken and this may amount to several hundred pages of medical evidence (3-4 hours).

107. Once the medical experts have provided their reports, they need to be provided to ACC who can then obtain evidence in reply and it is then necessary to seek clarification from the experts or if new issues requiring other specialties arise brief additional experts (2-4 hours).

108. Once the expert evidence has been completed, it is then necessary to draft and file submissions (2-4 hours) and consider the submissions from ACC prior to the hearing (1 hour) which may then necessitate further legal research (2-3 hours).

109. The total in the range of 19-33 hours preparation for a case is not unreasonable or uncommon and it can be considerably more. The market rate for this work using a $300 per hour market rate for expert legal services is $9,900. This can be compared to the current maximum award of 2 hours preparation at $175 per hour (ie, $350 for two hours).

Travel

110. The inflation adjustment alone is inadequate to have a significant impact on the market. For example, the per km rate of 29 cents compares poorly with the rate ACC is understood to pay its contractors (79c/km), and even the rate paid in 1992 (50c/km, before accounting for inflation since that time).

111. The rate for review is inadequate and this increases the access to justice barriers in regional areas. Many lawyers will not travel to the regions to attend hearings with their client, meaning claimants outside of Auckland, Wellington and Dunedin are unlikely to have their lawyer attend in person. Similarly, while the market for legal services remains small there will be a need for travel by the small number of market actors.

112. While audio-visual conferencing is used heavily by ACC, the regulations cannot be drafted on the assumption that conferencing will always be appropriate. There are important access to justice reasons for representatives and claimants appearing in person at hearings. This again is an area that should be left to reviewer discretion and not artificially limited by miserly regulated maximums.

113. The regulation must be amended to allow reasonable travel costs for claimants and counsel at a rate reflective of the actual cost of travel and the higher rate provided by ACC, and furthermore, that provides access to justice for injured persons in the regions.

114. **We recommend:** the costs for travel be increased in line with IRD rates (currently 72c/km) or the rates ACC is understood to pay its assessors (79c/km), and the limit on these costs be increased to $500.

Conclusion

115. We welcome the opportunity for further discussion on these matters and are prepared to assist however we can.

116. Please contact Warren Forster at forsterandassociates@gmail.com.

Warren Forster

4 November 2016

Enclosures:

"A" Extract from Acclaim Otago Survey Data 4 August 2014 available at www.acclaimotago.org

"B" Extract from list of information dated 18 May 2016

"A"

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)

Acclaim Otago Incorporated
PO Box 5022
Dunedin 9058
New Zealand
Email: Privacy of natural persons
Website: http://www.acclaimotago.org
Contact Dr Denise Powell:
Privacy of natural persons

Prepared by Forster & Associates Ltd
PO Box 5949,
Dunedin 9058
New Zealand
Contact Warren Forster:
Privacy of natural persons

"Between the idea and the reality, between the motion and the act, falls the shadow."

TS Elliot, the Hollow Men.

BACKGROUND TO SURVEY RESULTS

> It's not fair on your kids when you are stuck in this process. It's not like you can just decide you don't want to be involved with ACC. You are dependent on them. The law protects lots of society, who are dependent, but not ACC claimants. There is no independent body you can go to with problems. There is a support line for advice but it is one the Government told ACC to offer to save on the cost of the huge numbers of complaints ACC get. It is still serving ACC, not claimants really. It doesn't go far enough to offer funding to help you get the info and proof and advocacy you need … (Q100R54)

> The approach [of ACC] is adversarial. After ACC had the assessment report that the arranged and used to make their decision, it was some years before I received a letter advising their decision or had any contact by phone or writing. The review process is difficult, stressful and expensive. I imagine there are many claimants that cannot afford to meet the costs. Review costs [awarded by the reviewer] do not begin to cover the actual costs of a review. ACC fails to realise by their approach that following injury, people are at their most vulnerable and don't have the capacity to manage their interactions with ACC. It is particularly stressful to undergo multiple assessments until ACC receives an assessment that they find suits their purpose. (Q100R106)

> Over most of the last 10 years, ACC have waged a relentless war, an orchestrated campaign of harassment, in an attempt to get a case clearance (what they more recently term an "actuarial release") and a performance pay bonus for my case manager. This has taken an enormous toll on my health and well-being. It is my earnest belief ACC is totally corrupt yet the government will do nothing as they benefit directly from that corruption. (Q100R143)

Information about the survey

Why was this survey conducted?

As set out in Acclaim Otago's interim report (the "interim report"), to the United Nations Committee on the Rights of Persons with Disabilities ("the Committee"),[1] Acclaim Otago took the issue identified by the Committee in its list of issues[2] and conducted a survey of injured New Zealanders to attempt to identify the scale of the problems with access to justice, including funding, procedural fairness and reliable evidentiary procedures.

[1] INT_CRPD_NGO_NZL_16661_E.
[2] CRPD/C/NZL/Q/1.

The survey answered the key question asked by the Committee and identified systemic problems with funding, procedural fairness and reliable evidentiary procedures. These are summarised in the Shadow Report that is available on Acclaim Otago's website (www.acclaimotago.org/un).

The following are conclusions drawn from the analysis of the survey data, the analysis conducted in previous reports, and the experience of the authors. It provides an overview of the systemic problems, including access to justice from the perspective of People with Disabilities Caused by Personal Injury in New Zealand ("PwDI").

***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 purpose of this document is to make data from the survey publicly available by way of background to the shadow report. We hope that this can be a foundation for further research.

How the responses were obtained and limitations of our data

The survey was an online survey and the respondents self-referred through word of mouth, media articles and through membership of the many organisations who sent the report out to their members.

We contacted ACC and Fairway Resolution (the Government agencies responsible for administration of the Dispute Resolution Process at Part 5 of the Act). We asked for them to assist in making the survey representative by helping us to obtain a wider sample. ACC decided not to assist with the survey because their role was "to support the Government's response to the Committee" rather than Acclaim Otago. Fairway did not respond to our request. They later verbally confirmed that this was because they were leaving it to ACC to respond. We recognise that our survey may not be representative in the manner of professional surveys. Other limitations include that some data was incomplete; respondents were self-selected; and that we had limited distribution channels.

Despite these acknowledged limitations, we strongly believe that the survey, even without official support, does indicate that there are **systemic problems** and that the scale of these problems is significant. From a human rights perspective, each individual violation is significant.

The survey data is presented as a percentage of respondents who answered a given question – the survey involved skip logic meaning that irrelevant questions were not asked. Similarly, it was possible to skip questions, and some respondents may have preferred not to answer certain questions. Percentages are rounded to the nearest full percentage point which is why some responses add to 101% or 99%.

The questions were often framed around the concept of an "adverse decision" from ACC, by which we meant a decision that did not give the relevant person what they had asked for. The actual substance of that dispute is largely irrelevant, and the data is directed towards PwDI's experiences in trying to access justice in relation to that adverse decision.

Survey itself did not significantly change respondents' views

To check that our survey itself did not significantly alter respondents' views on the issue of access to justice, we asked the same overall question about access to justice at the beginning and at the end of the survey. There was no significant difference in responses by the end of the survey. Those who thought the current system provided effective access to justice at the beginning of the survey did not change significantly during the survey.

> [I was] bankrupted by ACC's wrongful disentitlement, shackled by student [loan] and personal debt because ACC repeatedly denied vocational rehabilitation entitlements. Other people, relatives etc have judged, abandoned, dismissed and isolated me when being harassed by ACC. ACC denied wheelchair so housebound for years. ACC denied commode and so I lay bedridden for 8 months, shivering in my own urine. [I was] denied access to my own culture, [and could not] keep up with support networks and participate because ACC denied wheelchair support and demanded their permission to attend family tangihanga. [I was] bullied by ACC to assessments so had to leave my kuia's tangi to rush back exhausted and distressed... The stress from the persecution aggravated my blood pressure, caused anxiety, frustration and anger and impacted on my relationships.... I have been discriminated against [because of] my mobility disability and difficulties, [I've experienced] weight gain from the medications and inactivity. [I've been] mocked and laughed at and been accused of "ripping off the system" and been told "but you don't look sick" by unqualified relatives who work in Maori health. It's destroyed my relationships and forced me to second guess and be suspicious... (Q100R7)

Systemic effects of ACC decisions and the dispute resolution process on PwDI and their families

The Scale of the Problem

PwDI experiences are largely **inconsistent with the Articles of the CRPD that deal with substantive rights**. Attempts to remedy or mitigate breaches of these rights are often unsuccessful due to systemic failure of various access to justice mechanisms.[3] 85% of respondents believe that the ACC dispute resolution process does not provide access to justice. Only 9% of respondents believe it does.

Adverse decisions made by ACC and the resulting dispute resolution process, have significant impacts upon PwDI and their home and family.[4] Most respondents had dependents at the time of the adverse decision (*55%*). Three quarters of respondents had significant ongoing costs for housing for mortgage payments or rent (*75%*). More than a quarter of total respondents have had to move out of their home because of injury or losing their ACC entitlements. Of this group, about half were renting (*47%*) and the other half had a mortgage on their house (*48%*).

When asked about their experience **as a result of ACC's adverse decision**, the responses were clear. Nearly all (*91%*) experienced stress. Most experienced relationship stress (*65%*), reduced independence (*65%*), and deterioration in physical health (*65%*). Half (*50%*) developed mental health issues. Many respondents lost friendships (*41%*), had a breakdown in their personal relationships (*32%*), or lost their job (*30%*). A quarter experienced increased drug and alcohol use (*25%*). Some lost their house (*20%*) and experienced verbal violence (*22%*). A small but significant group experienced physical violence (*7%*). Few experienced none of these (*7%*).

The survey identified many of the systemic problems that were set out and discussed in the Interim report. Nearly all respondents said their health was affected **by their injury**

[3] Interim report (February 2014), Art 13, p 10-27, paragraph 30 et seq, Acclaim Otago Access to Justice Survery Data (July 2014).
[4] Interim report (February 2014), Art 23, p 78-83, paragraph 219 et seq.

(*89%*).[5] Most (*67%*) had been told their entitlements would stop if they did not undergo assessment.[6] Half (*51%*) had experienced problems with their privacy.[7] Many (*44%*) had been assessed to be "vocationally independent" meaning they had been medically assessed as able to return to a hypothetical job for thirty hours per week, and are deemed to have no loss or on-going entitlement to financial support.[8] Over three quarters (*78%*) have had their home and living arrangements, including family, affected by their injury or ACC.[9] A significant group (*19%*) had interactions with the ACC investigations (fraud) unit.[10] Some (*13%*) were from overseas or had tried to move overseas since their accident, but would have been prevented by the rules of the scheme.[11]

These breaches are all highly relevant to access to justice – PwDI cannot uphold the CRPD rights without the legal mechanisms for doing so.

Respondents' financial position before ACC's adverse decision

The financial position of **PwDI is adversely affected because of their injury** even **before they receive an adverse decision** from ACC that they might seek to challenge.

A person's injuries and resulting reduced capacity or inability to work mean that they are already financially disadvantaged, and this significantly affects their ability to access justice. This financial disadvantage has to be taken into account when funding is considered (and was not acknowledged by the Government in their response to the list of issues). The survey gathered data to try to understand PwDI's financial position when they received an adverse ACC decision.

The data shows that nearly all respondents' financial position had significantly deteriorated between their accident and their adverse decision. The scheme does not

[5] Interim report, Art 25, p 84-93, paragraph 227 et seq.
[6] Interim report, Art 17, p 45-65, paragraph 128 et seq.
[7] Interim report, Art 22, p 70, paragraph 193 et seq.
[8] Interim report, Art 28, p 101, paragraph 284, see paragraphs 300 and 301 for the studies showing most people whose weekly compensation stopped cannot actually return to work, and those who do suffer a significant drop in income.
[9] Interim report, Art 23, p 78, paragraph 213 et seq.
[10] Interim report, Art 14, p 28, paragraph 81 et seq.
[11] Interim report, Art 18, p 66, paragraph 188 et seq.

exist in a vacuum. This financial disadvantage makes it harder to overcome financial barriers to challenging ACC's decisions, increasing the importance of the systemic funding mechanisms.

Most respondents (*81%*) had claimed for weekly compensation. Of this group most (*89%*) received weekly compensation for a period of time. Those who did not receive weekly compensation (*29%* of respondents) and could not earn are immediately prejudiced by their lack of financial resources. Survey data indicates social security and legal aid are ineffective or not applicable. Similarly, even the group who did receive weekly compensation suffered financially because of their disability. Weekly compensation under ACC is paid at 80% of a person's pre-injury wage. This 80% limit is meant to act as an incentive towards "regaining independence" from ACC. Of those receiving weekly compensation, most (*81%*) still had to borrow money to meet everyday expenses as a result of their 20% reduction in income.

This indicates significant cost shifting from ACC to peoples' communities, including their spouse (*40%*), parents (*36%*), siblings (*13%*), and friends (*20%*). Worryingly, a significant proportion of those receiving weekly compensation relied on interest-bearing finance to support their day-to-day living costs not met by weekly compensation, such as credit cards (*45%*), personal loans (*26%*) and remortgaging their home (*30%*). Instead of acting as an incentive to rehabilitation, the 80% limit on weekly compensation payments instead appears to increase a PwDI's dependency, potentially incurring interest payments, and therefore acts as a significant barrier to independence and rehabilitation.

The purpose of the Act is to reduce the cost of Personal Injury to society.[12] One of the core principles was community responsibility, which was framed in terms of the Accident Compensation Scheme taking the burden from individuals and their families, and shifting this to the entire scheme whereby levies would be collected to spread the load widely.

In addition, it is clear that even before adverse decisions are issued, there is significant cost shifting. PwDI may already be significantly in debt as indicated above because of the rules of the ACC scheme, and because of their injury *before* they start interacting with the dispute resolution process.

[12] Accident Compensation Act, s 3.

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.

1.8.8	Delegations	Please provide a copy of all delegations made pursuant to Accident Compensation Act, Sch 5, clause 25, which have been in place since 2005. Please provide a copy of all delegations that have been in place since 2005, which have been made pursuant to any other statutory basis.	
1.9	**Reviews**		
1.9.1	Claimant lodges application for review	With respect to the period from 2005 to 2015, how many reviews were lodged in each year with ACC? How many of those reviews come within the following categories: By branch/business unit (separated by business unit eg, Recover Independence Service or Elective Surgery Unit) Separated by type of claim and type of injury Passed back from review unit and referred back to branch Resolved at administrative review level By who lodged the review (claimant, lawyer, advocate, other representative and/person) Are there any key performance indicators (or other performance measures) about the numbers of reviews that are lodged, processed, etc? When were these indicators introduced? Is there any information on the effect of these performance indicators in relation to the total number of reviews lodged? *Source of information: Could use vendor ID for lawyers/advocates*	UtP at 132 (d)
1.9.2	Claimant representation	For the years 2005 to 2015: In how many reviews were costs awarded by the reviewer or paid by ACC for legal representation for either an advocate or legal counsel? (This information can be obtained from the codes used for accounting/administrative purposes ie, lodging (REV01), preparation (REV03) or attendance at review hearings.) What information exists regarding the total sum of payments to claimants or their representatives by ACC for representation at review hearings? (ie, review costs for lodging, preparation or attendance at review hearings (REV01, REV03 and REV04 or equivalent if code has changed)).	
1.9.3	Market for claimant representatives funded by review costs	For the years 2005 to 2015: How many different providers received REV coded payments or equivalent from ACC each year from 2005 to 2015?	

		What kinds of organisations received these payments, for example separated by incorporated societies, law firms, barristers, advocates or other? How many costs awards were made to each of the organisations (without separating by organisations) Is there any official information accounting for the total annual payments made by ACC in costs awards as a result of review hearings? What was the mean and median payment made each year by ACC in costs awards per review? *The bulk data could be provided in an anonymised form to enable researchers to conduct this analysis independently.*	
1.9.4	Market for medical evidence funded by review costs	For the years 2005 to 2015: How many different providers received REV coded payments for medical or other evidence (REV08 or equivalent) from ACC each year from 2005 to 2015? Is there any official information on the kinds of organisations received these payments? For example, incorporated societies, law firms, barristers, advocates or other? How many costs awards were made to each of the organisations (without separating by organisations) What were the total annual payments made by ACC in costs awards for medical evidence as a result of review hearings? What was the mean and median payment made each year by ACC in costs awards for medical evidence per review? *The bulk data could be provided in an anonymised form to enable researchers to conduct this analysis independently.*	
1.10	**Alternative Dispute Resolution at review stage**		
1.10.1	ADR	What policies and practices exist regarding alternative dispute resolution mechanisms that were used between January 2005 and December 2015? When did they change, and what policy documents are available regarding the changes and analysis of these changes? Please provide data or official information indicating how many of each of the following ADR-resolutions occurred per year prior to a review hearing being held, but after a review application was lodged:	

		Direct settlement between the parties. Mediation Facilitation Arbitration Other (appointment of independent person to undertake inquiry/review of claims, who was appointed) Please indicate how ACC considers mediation, facilitation, and arbitration are distinguished from each other for statistical purposes. Separated by type of ADR above, is there any official information to show how often claimants received independent legal advice (for example *noted by payment of REV01, REV03 or REV04 codes*) or obtained independent medical evidence either before or during the ADR process (for example *noted by payment of REV08 code*)? What was the result of each of the kinds of ADR interventions listed above? Where possible, please separate the data according to the following categories/results/outcomes: ACC revokes decision, ACC settles in favour of claimant, ACC settles on basis that review is reasonably brought (costs award in represented cases) data source could be payment of review costs, claimant withdraws for other reason)	
1.10.2	Early dispute resolution pilot	Please provide all official information and data around the development, implementation, structure and results of the early dispute resolution pilot programme referenced by the Minister for ACC in public statements.	
1.10.3	Providers for ADR	What official information or analysis exists showing the steps have ACC considered to provide a competitive market from the provision of ADR services? Please provide all official information and data around the selection of providers for ADR services to resolve disputes between ACC and claimants.	
1.10.4	Cost of review process	What official information or analysis exists regarding the total costs to ACC arising directly or indirectly out of the pre-review ADR process per year for the past ten years? What official information or analysis exists accounting for changes in this cost, and is there any analysis or information explaining this change?	
1.10.5	Cost of implementing ADR	What is the total annual cost to ACC of implementing ADR agreements including reinstatement of entitlements?	
1.11	**Reviews from ACC's formal processing perspective – ACC review Unit**		

1.11.1	Processing of review applications made to ACC	How many reviews in total are lodged per year. and how are these separated? *For example, by review number, by the number of issues in the review, or according to the number of section 6 decisions ACC has issued.* What are the criteria or policies around "coding" these applications for administrative purposes? How many reviews are lodged that review more than one section 6 decision? Please separate this data according to the codes used in the Contract between Fairway and ACC for each year since 2005 (for example, Z5 or X23). What processes are in place for changing "codes" or developing new "codes" as a case law changes? How many new codes have been developed each year since 2005?	
1.11.2	The progression of review applications	Please provide official information showing how review applications are conveyed to Fairway (formerly DRSL). Please provide official information showing what information is included when the application is conveyed to Fairway.	
1.11.3	Settling of reviews	Does ACC keep any data in relation to review applications that are settled prior to the reviewer's decision being issued? How many reviews are settled by the following means: - ACC revokes or revises decision under s 65; - ACC settles in favour of claimant, ACC settles on basis that review is reasonably brought (*costs award in represented cases, data source could be payment of review costs*); - claimant withdraws for other reason. Does ACC collect any information about how often claimants do not pursue a review application that has been lodged, and the reasons why claimants may not pursue a review application to its completion?	
1.11.4	Extenuating circumstances for late lodgement of review applications (s 135(3), ACA 2001)	What official information exists regarding the number of decisions which are made by ACC on extenuating circumstances for the late filing of reviews? What official information exists to show the criteria used by staff to assess extenuating circumstances? What kind of staff member (ie technical claims manager, case manager) is responsible for assessing extenuating circumstances questions? Of the total number of decisions on extenuating circumstances, how many were to accept the claimant's application and how many were to decline? How many review applications were lodged in relation to a decision by ACC that extenuating circumstances were not present? Is there a review code for extenuating circumstances reviews? When was this code added to the coding system	

		used by the Review Unit? When was the extenuating circumstances review code added to the contact between DRSL and Fairway? What official information exists in relation to review applications around extenuating circumstances, and how many applications are successful each year? How many extenuating circumstances reviews have been appealed to the District Court or High Court in the past 10 years? What has been the outcome of each of these appeals?	
1.11.5	Frivolous or vexatious review applications	What information exists to explain the processes that ACC have in place for considering whether a person is frivolous or vexatious? How many persons each year who lodge reviews are considered by ACC to be frivolous or vexatious? How many review applications have each of those persons lodged per year since 2005? How many persons have been subject to an application brought under s 88B of the Judicature Act by either the Attorney General (or the Solicitor General) on ACC's request, or by ACC directly?	
1.12	**Information about reviews from the perspective of ACC's representatives at the review**		
1.12.1	Representation of ACC at review	What policies or official information does ACC have regarding its representatives at review hearings? How many reviews do ACC legal services have involvement in? For how many reviews does ACC instruct external counsel? How does ACC decide which reviews to allocate external counsel to? What is the total paid to external counsel in respect of review hearings? What is the total cost to ACC of its legal services at review level, separated by type of review, and internal and external costs	
1.12.2	Success rates for business units	What official information or analysis exists regarding the success rates for each of ACC's business units in defending review applications, separated by year and by type of review as coded by the Review Unit?	
1.13	**Reviews from Reviewer's perspective (ACC may hold this information which is why it is listed here as well as below)**		
1.13.1	Review hearings	How many review hearings were conducted in each year between 2005 and 2015?	

		What was the subject matter of each of these reviews? For example, separated by the type of review that was held.	
1.13.2	Case conferences/ directions	How many case conferences were held by reviewers each year between 2005 and 2015? Is there any record of how many interventions or case conferences or directions are issued in relation to the number of review hearings held?	
1.13.3	Adjournments	How many adjournment applications were made in respect of review hearings? How many were granted? Which party requested each adjournment? In how many of these adjournment requests did the claimant have legal representation?	
1.13.4	Review hearing	What data or official information exists to show how long each review hearing ran for? Information could be gained from averaging the length of each reviewer's recording of the hearing. What official information or data exists on the mean and median length scheduled for review hearings annually between 2005 and 2015? *If no direct information is held, other measures would allow some indications, for example in relation to reviews where claimants are represented, it may be possible to gain some idea of which reviews last longer than an hour by examining the quantity of individual review cost payments to lawyers/advocates, which break these down by 15 minute intervals.*	
1.13.5	Jurisdictional issues	In how many review applications or hearings did jurisdictional issues arise? We understand that there is a particular "code" for administrative purposes that indicates a jurisdictional matter at review. What is the assigned cost or payment made by ACC to Fairway for a jurisdictional review hearing? *If this information is claimed to be commercially sensitive, it could be provided as a percentage of overall revenue in relation to other types of review hearings, e.g. cover, vocational independence.*	
1.13.6	Review decisions	What official information or data exists regarding the number of review decision documents were issued annually for the years 2005-2015? How many review decisions contained decisions on more than one review application? *We are available to explain this distinction if it is unclear. A review decision is a single document giving a written decision under the Accident Compensation Act 2001. A single review decision may deal with multiple review applications – this is usually indicated by more than one "review number" (a unique identifier assigned for administrative purposes). For example, a reviewer may hear an issue to do with cover, and if a person is successful in making out a claim to cover, deal with entitlements also claimed or declined previously by ACC in relation to that*	

		claim for cover.	
1.13.7	Decisions on Costs	In how many review applications were costs awarded under the regulations to the applicant? Where costs were awarded, how much was awarded under each item specified in schedule 1 to the Injury Prevention, Rehabilitation, and Compensation (Review Costs and Appeals) Regulations 2002? Please separate this by the REV 1 – REV15 codes.	
1.13.8	Reviewer qualifications	Please provide policy documents or official information showing the process for a reviewer obtaining a warrant to conduct reviews under the 1982 legislation and the 2001 legislation. What process does ACC follow when it considers whether to appoint a particular person to be a reviewer?	
1.14	**Total cost of reviews**		
1.14.1	Cost of review process to ACC	What official information or data exists accounting for the total cost to ACC arising directly or indirectly out of the review processes per year for the past ten years? (Do not include cost of implementing review decisions.) What official information or data exists regarding changes in the yearly cost over a ten-year period, and is there any analysis or information explaining this change?	
1.14.2	Cost of review process to claimants	What official information or data exists regarding the total costs to claimants arising directly or indirectly out of the review processes per year for the past ten years that is not funded directly by ACC? What official information or data exists regarding changes in the yearly cost over a ten-year period, and is there any analysis or information explaining this change?	
1.14.3	Cost of implementing review decisions	What official information or data exists accounting for the total annual cost to ACC of implementing reviewer's decision including reinstatement of entitlements?	
1.15	**Alternative Dispute Resolution at Appeal stage**		
1.15.1	ADR	What policies and practices exist regarding alternative dispute resolution mechanisms that were used post-review and pre-District Court Appeal between January 2005 and December 2015? When did they change, and are any policy documents available regarding the changes and analysis of these changes. Please provide data or official information indicating how many of each of the following ADR-resolutions occurred per year prior to an appeal hearing being held, but after a notice of appeal was lodged:	

		Direct settlement between the parties. Mediation Facilitation Arbitration Other (appointment of independent person to undertake inquiry/review of claims, who was appointed) Please indicate how ACC considers mediation, facilitation, and arbitration are distinguished from each other for statistical purposes. Separated by type of ADR above, is there any official information to show how often claimants received independent legal advice (*noted by payment of REV01, REV03 or REV04 codes*) or obtained independent medical evidence either before or during the ADR process (*noted by payment of REV08 code*)? What was the result of each of the kinds of ADR interventions listed above? Where possible, please separate the data according to the following categories/results/outcomes: ACC revokes decision, ACC settles in favour of claimant, ACC settles on basis that review is reasonably brought (costs award in represented cases) data source could be payment of review costs, claimant withdraws for other reason)	
1.16	**Total cost of pre-appeal ADR**		
1.16.1	Cost of pre-appeal ADR process to ACC	What official information or analysis exists accounting for the total costs to ACC arising directly or indirectly out of the pre-appeal ADR processes per year for the past ten years? (do not include cost of implementing review decisions) What official information or analysis exists regarding changes in the yearly cost over a ten-year period, and is there any analysis or information explaining this change?	
1.16.2	Cost of pre-appeal ADR to claimants	What official information or analysis exists regarding the total cost to claimants arising directly or indirectly out of the review processes per year for the past ten years that is not funded directly by ACC? What official information or analysis exists regarding changes in the yearly cost over a ten-year period, and is there any analysis or information explaining this change?	
1.16.3	Cost of implementing review decisions	What official information or analysis exists accounting for the total cost to ACC of implementing reviewer's decision including reinstatement of entitlements?	