MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

# ACC Review Costs Regulations consultation:

## Summary of Submissions

New Zealand Government

# Contents Page

# 1 Introduction

## 1.1 Purpose

In March 2022 the Ministry of Business, Innovation and Employment (MBIE) released the discussion paper 'Proposed amendments to the Accident Compensation (Review Costs and Appeals) Regulations 2002' (the Regulations) for public consultation. The proposals in the discussion paper aim to increase transparency in the Regulations, and increase the effectiveness of ACC claimants' access to justice where they disagree with a decision made by ACC.

When public consultation on the proposed reforms closed on 28 March 2022, MBIE had received 19 submissions. MBIE will use the submissions to inform its advice to the Government on the proposed changes to the Regulations.

## 1.2 Snapshot of all submitters

MBIE received 19 submissions. The majority of submissions came from lawyers or law firms and organisations involved in the ACC dispute resolution system.

Major stakeholders who submitted include: the New Zealand Law Society (NZLS), the Royal New Zealand College of General Practitioners (RNZCGP), and ACC Futures Coalition.

Figure 1: Submitters

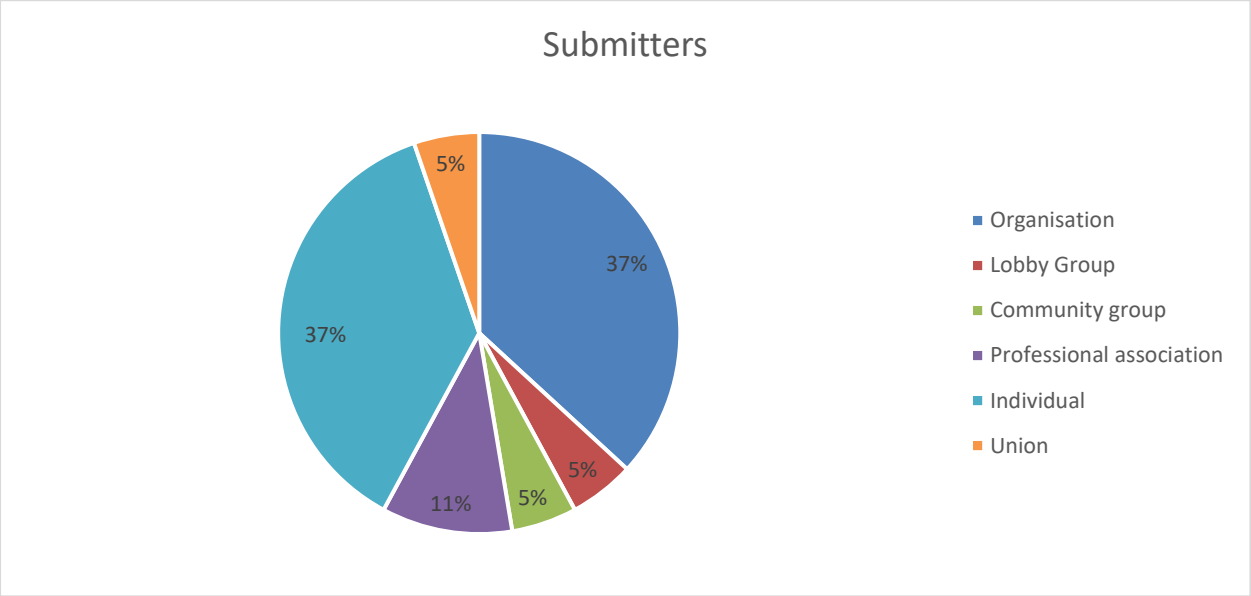

Figure 2: List of Submitters

| No. | Name | No. | Name |
|---|---|---|---|
| 1 | David Sparks | 11 | Warren Forster |
| 2 | Benjamin Hinchcliff | 12 | Talk-Meet-Resolve (Service of Clayton & Associates Limited) |
| 3 | *[Redacted]* | 13 | Acclaim Otago |
| 4 | Peter Sara | 14 | The Independent Complaint and Review Authority (ICRA) |
| 5 | Stuart Macann | 15 | Fair Way |
| 6 | RNZCGP | 16 | Kym Koloni (I.C.E. Insurances Ltd) |
| 7 | Community Law Centres o Aotearoa | 17 | Tom Barraclough |
| 8 | Southland ACC Advocacy Trust | 18 | NZLS |
| 9 | ACC Futures Coalition | 19 | Schmidt and Peart Law |
| 10 | Dairy Workers Union Te Runanga Wai U (DWU) | | |

## 1.3 The consultation process

MBIE consulted on proposals for realigning review costs categories (currently 14 categories) into four broad categories with set maximum limits, including:

1. Application costs.
2. Representation costs.
3. Medical and other reports.
4. Other expenses.

MBIE also consulted on two alternative options for the representation costs category (Category 2), including:

Option 2.1: One single set maximum limit for all representatives (including both advocates and lawyers), with no distinction made for complexity, qualifications, or time, in determining maximum cost awards.

Option 2.2: Splitting representation costs into a range dependent on complexity and/or time, and qualifications of the representative. The proposed matrix of costs is provided below.

| | *Complexity and/or time →* | |
|---|---|---|
| | *A.* | *B.* |
| *1. Advocates* | *$660* | *$1,320* |
| *2. Lawyers* | *$1,320* | *$2,640* |

The discussion paper invited people to respond to a number of questions, which were included in a submission form. Submitters could also make a written submission outside of the submission form format. The discussion paper is available on MBIE's website.

### 1.4 How this document works

This document is a summary of the submissions MBIE received, including some of the key themes and issues raised by submitters. Not all suggested amendments have been included in this document.

### 1.5 Meaning of terms used

This document is designed to give the reader a general idea of the numbers of submitters making similar comments throughout the document. The numerical values of terms used are outlined below:

| Term | Number of submissions |
|---|---|
| One / single / a | 1 |
| A few / a couple | 1 - 3 |
| Several / a number of | 3 - 7 |
| Many or a large number | Up to 50% of submitters |
| Most or the majority | Over 50% |

### 1.6 Disclaimer

Some, but not all, submissions have been directly quoted in this document. All submitters were notified that their submission or the content included in the summary or other report could be made public. Making a submission was considered consenting to making the submission public, unless the submitter clearly specified otherwise.

## 2 What we heard

### 2.1 Submitters' views on the overall proposal

The majority of submitters agreed that change is needed and that simplifying the cost categories seemed like a reasonable proposal. There were mixed responses as to the appropriate maximum cap for all of the categories.

Category 4 – Other Expenses was one area where there was strong agreement or support for the proposals, with the majority of submitters agreeing or strongly agreeing that the proposed maximum cost cap was fit for purpose.

The maximum cap for Category 2 – Representation Costs was one area where there was strong disagreement or where submitters suggested the assumptions behind the proposals should be revisited. Most submitters disagreed that the proposed maximum for Category 2 would be sufficient.

A few submitters were keen to provide additional information for MBIE to refine the proposal.

## 2.2 Summary of key points by area

### Submitters' views on the proposed objectives

The majority of submitters agreed with the objectives we set for the review of the Regulations.

Many submitters suggested additional objectives or amendments to current ones. These are outlined in Table 1 below[1].

***Table 1 – Suggested alternative objectives***

| Submitter | Suggested objectives |
|---|---|
| 4 | The overriding objective should be the purpose of the Act under s 3 –<br>"to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community …This, in essence, requires access to justice for claimants."<br><br>"to encourage skilled and experienced advocates and lawyers to enter into this area of legal work, and retention of said lawyers and advocates" |
| 8 | "To encourage & facilitate the right to a fair & independent review of ACC's decisions.<br>To improve ability to obtain appropriate & affordable representation in order to present the best legal case, on an equal footing with ACC Review Specialists." |
| 9 | "Encourage lawyers to specialise in ACC (Particularly Claimant work);<br>reflect 'the True Cost of Representation';<br>balancing the resources available to the ACC when compared to the applicant;<br>supporting the importance of dispute resolution for identifying error and oversights by ACC in its management of the scheme;<br>and for public trust and confidence in the scheme." |
| 11 | "(i) providing **effective** access to justice for claimants<br>(ii) meeting best practice in dispute resolution, and<br>(iii) supporting the administration of justice in this jurisdiction." |
| 12 | "The objective should be to provide **effective** access to justice for people. The regulatory focus should be removing the barriers to accessing consensus-based services and providing clear legislative guidance to ACC." |
| 13 | "The objective must be providing **effective** access to justice for people." |
| 16 | "Ensure claimants receive fair reimbursement of costs per km of travel at review." |
| 18 | "The Law Society submits that the objective of improving access to justice must include access to culturally appropriate assistance for claimants. This would, for example, enable Māori claimants to seek reimbursements for costs which may be incurred when seeking cultural support during the dispute resolution process. We understand that ACC has, in the past, appointed Pae Arahi (Māori cultural advisors who liaised with the Māori community and the ACC branches in their area and ensured Māori claimants felt safe and seen in the dispute resolution process). ACC does not currently provide any such support, so it may be appropriate to consider reimbursing claimants who receive this type of support via other (external) avenues. This approach would be consistent with ACC's Whāia Te Tika and its obligations under Te Tiriti o Waitangi." |

[1] Some words have been bolded to show the key difference suggested by submitters.

## Submitters' views on the proposed cost categories

Most submitters either agreed or were unsure about the proposed cost categories. Many submitters supported the reduction in the number of categories. However, a few submitters worried that the reduction in the number of categories was too simplified and may lead to appeals of reviewers' decisions on costs.

Specific recommendations from submitters included:

- Community Law Centres o Aotearoa (Submitter 7): "…we submit that there should be a category to cover the cost of reviewing a file before an application for review is made. Our CLCs noted that reviewing a case file for a 'simple' claim can take 4-6 hours. A review of a complex claim can take up to 12 hours. This cost could be built into the representation or application costs category, or could be provided for under a separate costs category.
  There is also a need for a separate category to cover the cost of instructing a specialist, which takes an average of 3 hours as a file note of the case must be prepared along with drafting specific questions for the specialist to address. Our lawyers and advocates noted that this is a separate cost under legal aid and that it is appropriate to include a similar category for review-related costs.
  Further our CLCs noted that this consultation document makes no reference to case management requirements and recommended that case conference costs either be a separate category or be a sub-category of representation costs. This is common throughout costs jurisdictions. It is particularly important to specify this category as it will be relevant in situations where a case conference leads to a claim going to ADR rather than review."
- ICRA (Submitter 14): "…We also recommend that MBIE clarify how the categories relate to each other, and in particular whether costs can be captured under multiple categories."

A few submitters also provided suggestions for detail within the categories or for additional categories which relate to representation.

## Submitters' views on Category 1 – Application Costs

There were mixed views on whether Category 1 – Application Costs should remain separate from Category 2 – Representation Costs, and on the proposed increase in maximum costs awardable.

Specific comments from submitters included:

- Benjamin Hinchcliff (Submitter 2): "Client's often do not understand how difficult the process is until they get to the case conference, or receive ACC submissions. Clients should be able to engage a representative at any time without being penalised.
  Due to the time limits, clients will lodge a review and then seek representation. They are not aware that they will be charged $150 if they lodge their own review.
  There is no good reason to keep the costs separate. Often, a file review is needed prior to lodging a review. Clients are not aware of the interplay with ACC decisions and it takes time to ensure the correct review is lodged."
- ICRA (Submitter 14): "There is no cost to lodge an application for review, and the form is relatively straightforward to complete. It is difficult to identify an expense that would be incurred in the application process that isn't already covered in another category (eg,

printing costs or an interpreter's fee would be recoverable under category 4, and a representative's time and expenses to fill in the form would be recoverable under category 2).

If this category is intended to only reimburse for expenses incurred, then we recommend this category is dispensed with, as it only introduces uncertainty about which category can be used for which expenses.

However, if this category is intended to apply more widely, we recommend it remains a separate category. For example, it could allow a reviewer to award a one-off payment for the claimant's time and effort in attending to the review, or compensate for the time and effort provided by friends, family members or volunteers. If this is the intention, we strongly recommend that the category be decoupled from the application form (which incurs few, if any, expenses and very little time). Instead, we recommend that this category allow for a claim for any attendances related to the hearing. It should also emphasise that, unlike category 4, it is not a reimbursement for an expense incurred but is wider (costs, compensation, or the like)."

- NZLS (Submitter 18): "The Law Society considers that application costs should remain separate from representation costs. Lawyers are required to complete numerous administrative steps before an application can be made under section 135 of the Act. These tasks are time consuming and do not simply involve a lawyer completing a review application form upon receiving instructions from their client."

A few submitters mentioned that the increase in the maximum costs awardable under Category 1 would not be sufficient to cover the time allocation that many representatives need to prepare a case before lodging an application.

## Submitters' views on Category 2 – Representation Costs

The majority of submitters preferred option 2.2 for the Category 2 – Representation Costs.

The majority of submitters did not think the new rates reflected an appropriate market rate for lawyers and advocates. The following suggestions and evidence outlined in Table 2 below were provided by submitters to aid the determination of an appropriate rate.

***Table 2 – Suggested rates/evidence***

| Submitter | Suggested rates/evidence |
|---|---|
| 4 | "The market rate for a junior lawyer is $200-250 per hour,senior lawyer $250-400 per hour and principal $400-600 per hour ( LegalVision December 2020) .It is noted that the cost increase proposed for medical reports is based on a rate of approx. $550 per hour. The differential is difficult to justify." |
| 5 | "I propose a 3 tiered payment structure as follows:<br>• Family and friends not experienced in representing claimants( IE Carey) $100 per hour<br>• Experienced professional advocates $200 per hour<br>• Lawyers $250 - $400 per hour<br>The figure you quoted of $220 per hour for a lawyer is too low and will not attract lawyers to enter the ACC space. I suggest the rate that ACC pays it's contracted lawyers should be used which I understand is in the order of $400 per hour." |
| 7 | "While we think the hourly rate of $220 is appropriate, we do not agree with the estimation of 12 hours of representation, and we query how this amount was reached. Our CLCs noted that occasionally, ACC instructs a private lawyer to represent them in reviews of complex cases. It would be instructive to look at how many hours are spent preparing for a review by lawyers instructed by ACC.<br>Our lawyers and advocates estimate that they spend 20 to 60 hours on a complex file. Most straight-forward 'simple' cases would require at least, and often more than, 12 hours preparation." |
| 9 | "Suggested rates: $4,400 2a $6,600 2b* *The 2a band which we are proposing is based on 20 hours at a rate of $220. The 2b band is 30 hours at a rate of $220. This does not include the work on the file such as creating a bundle. A complex case that is legally aided can result in substantial write-offs by the firm. We, for example, have written off $7,000 (using the standard $124 an hour rate, which is the rate our firm uses for calculating write-offs for legal aid cases). Even our proposed fees in the table are less than actual costs and reflect the concept that a claimant must make a contribution of about a third of the actual costs. If we go to the proposed costs from option 2 of the discussion paper, the contribution would represent about 1/3 of the cost of the fee and accordingly would result in about a 2/3 contribution by the client. Presently the contribution under the regulations is about 1/10 of the actual cost incurred." |
| 11 | "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.<br>7. The capped rates must be calculated taking into account the three fee factors:<br>i. Hourly rates set for type of representative, informal representatives (family/friends), professional advocates and lawyers.<br>ii. A complexity level based on characteristics of the dispute (simple, standard and complex).<br>iii. Allocated maximum hours for specified tasks (for each level of complexity) in the dispute resolution process. |

| | |
|---|---|
| | 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)." |
| 13 | "The new rates do not reflect appropriate market rates for lawyers and advocates. When we undertook the survey, the average costs were $2000-$4000. That was eight years ago. The costs would have increased by now. A complex case would be five to ten times this ($10,000 to $20,000).<br>The rates should be set to allow most cases to be funded within the cap and the remaining to have a process for exceptional case fees. We have already shared the results from our survey with MBIE officials.<br>Three factors should be used to set the cap that will apply in each case: the representative, the type of case and the work tasks undertaken by the representative. These caps need to be three to five times higher ($7,500 to $12,500) if they are going to include 90% of cases (with the final 10% of cases subject to a separate exceptional case process)." |
| 16 | "I believe the current hourly rate for a lawyer is $400 + GST per hour." |
| 18 | "The Law Society does not consider that the proposed new rates reflect appropriate market rates for the following reasons:<br>(a) Lawyers often require up to 10 hours to complete a 'simple' review (i.e. from first contact with the claimant to closing the file).<br>(b) Reviews which involve advocates and lawyers are often more complex. Even the simplest of cases tend to feature conflicting medical information, points of law, previous injuries (which often require additional disclosure), and the need for additional medical information.<br>(c) Representation on more complex cases also involves reading through complex medical opinions, medical practitioners' notes, lengthy ACC case notes and a variety of other documents, all of which are time-consuming.<br>(d) Lawyers have indicated that the proposed hourly rate of $220 per hour is well below the hourly rates that are currently used to calculate costs.7 As a result, there is an immediate gap between the amount that is charged to a client, and the amount that would be reimbursed by ACC.<br>We therefore propose that these rates are further increased as follows:<br>(a) The hourly rate that is used to calculate the minimum and maximum costs awards should be increased so that it more closely reflects current charge-out rates. The Law Society would be happy to collate and provide data relating to current charge-out rates, if that would assist. The maximum costs awardable for legal representation should be based on an estimate that a complex review requires, on average, 20 hours of legal work (rather than 12 hours, as noted in the Discussion Paper)." |
| 19 | "The review costs proposal states that complex reviews take around 12 hours to prepare. This is an accurate average for most reviews but not for complex reviews. Complex reviews often take around 15 to 30 hours<br>of work. The most complex reviews, such as birth injury cases, can involve 40 to 60 or more hours of work over several months, often 6 months to two years. The cost proposal states that the standard hourly rate for counsel is around $200 an hour. With respect, that is not correct. The standard hourly rate for counsel acting on |

| | |
|---|---|
| | complex reviews is around $400 to $500 an hour. It is submitted that the hourly rate upon which complex reviews should be based should be $400 an hour." |

A few submitters agreed that lawyers must adhere to the rules and regulations of NZLS and this prevents them from overcharging a claimant for services, whereas advocates are not regulated and do not face the same competency requirements.

Many submitters did not think the proposed changes would increase claimants' access to justice (and therefore improve outcomes) for claimants. The primary reason given was that the maximum cap was set too low to make any meaningful difference.

Submitters provided the following evidence, data, or precedents outlined in Table 3, which could be used to determine the complexity of a review.

***Table 3 – Suggested evidence/data/precedent***

| Submitter | Evidence/data/precedent |
|---|---|
| 2 | "Just anecdotal. The availability and complexity of obtaining medical reports to support a client's case is also a consideration. The files of VI cases are usually a lot bigger and take an average of 4 times as long to review. Treatment injury files are usually 2-3x as big as standard PICBA files. The legal arguments are more complex in category B and require an understanding of the law to help reviewers." |
| 4 | "Gradual process work injuries and treatment injuries are notoriously more complex than other cases such as standard PICBA causation" |
| 7 | "We agree with the examples listed in Table 7 and with reference to section 57 of the AC Act.<br>We would also include cases that span multiple pieces of legislation, sometimes the 1982, 1998 and 2001 Acts are all relevant to a claim. In some cases, an earlier Act governs eligibility while a later Act applies to entitlements. Such cases should be considered complex.<br>Other indications that a case is complex is where external clinical advice has been sought or where there is more than one medical report required. One of our CLCs was involved in a review where 12 medical reports were required.<br>Complex files are often characterised by the complexity of the legal issue, complexity of the injury, needs of the client or the amount of evidence that is involved. Many clients with complex cases also have higher access needs, and this adds time to the services provided by advocates and lawyers." |
| 9 | "Complexity can arise from cover decisions and suspension decisions. The complexity can arise when an injury spans a number of years, a large file with multiple reports or complex injuries such as involving mental injury and an injury that is multi-faceted, or occupational disease claims.<br>-Size of file<br>-Length of time covered<br>-Complex claims such as treatment injuries and occupational disease claims<br>-Triggering of degenerative condition requires complex medical evidence<br>-Type of claimant i.e. suffering mental injury, angry, digital exclusion<br>-Agree that vocational independent is very complex and time-consuming" |
| 11 | ''Data to determine the complexity of the review is available. It is recommended that the following could be considered<br>i. The type of claim (ACC holds this data)<br>ii. The type of decision (ie, the decision letter subject to the dispute)<br>iii. The type of review (ie, the code provided to the review) |

| | |
|---|---|
| | iv. Whether external evidence is obtained<br>v. The issues brought to the review hearing<br>vi. The complexity agreed to by ACC and the representative (either directly or at the case conference)<br>vii. The complexity determined by the reviewer (either at the case conference or once the outcome has been determined)." |
| 14 | "ICRA is very familiar with the "complex" versus "standard" review categories. These categories are based either on the "issues code" assigned by ACC or where cases involve "multiple reviews".<br>In general, we would say that the "complex" category has very little connection to the actual time and effort expended by the parties and their representatives. As a result, it is an imperfect measurement.<br>For example, a claim for cover for an injury caused by an accident or its consequential injures (code X2) may involve medical records dating back 30 years and claims for multiple accidents that occurred under the currency of various Acts. These can be very difficult to untangle and review. By contrast, a vocational rehabilitation decision (code X16) may involve an ACC decision based on appropriate VIMA/VIOA reports and a simple assertion by the claimant on the other hand that the reports are incorrect. As a result, issues codes have very little power to predict how complex or time-consuming a matter will be. We do agree, however, that some issues codes will always be 'complex' – 1982 Act matters and (most) LOPE or treatment injury claims.<br>We also suggest that the "number of reviews" element of the sliding scale is based on a misconception of how costs are awarded. Currently, costs are awarded per review. We see no reason why this wouldn't continue going forward. This means that if there are two review numbers, two lots of category 2 costs can be claimed. Therefore there is no need to increase the amount of costs under category 2 for multi-review cases.<br>In light of the above, ICRA queries whether there might be another way to limit costs for straightforward cases or increase costs for complex cases (if this is MBIE's intention). The issue here will no doubt be one of predictability versus flexibility.<br>ICRA recommends a flexible approach. We suggest that no sliding scale is necessary, and that a single maximum (the higher amount) would be sufficient – reviewers can exercise their discretion." |
| 18 | "A page count of non-duplicated disclosure would be helpful in determining the complexity of a review as it indicates the length of a claim and the complexity of the relevant issues.10 It could also be helpful to consider the health of the claimant and whether they have, for example, any learning difficulties, brain injuries, serious disabilities or mental injuries (as these factors are considered to be relevant to the complexity of a claim for the purpose of granting legal aid)." |
| 19 | "The limitations set by the proposed review costs<br>regulations are, with respect to complex cases, at odds with these decisions. The costs regulations should align with these judicial determinations about what complex reviews involve. Many complex claims files are large and date back many years. This is particularly true of claimants who suffered serious injuries from childhood and claimants who have suffered from multiple injuries due to serious accidents, such as a car crash. In these cases, the evidence will encompass several hundred pages. Such evidence is not indexed. The only way to review the material is to read it. Although an experienced solicitor can do this efficiently, 5 to 10 plus hours of work can be required to extract and collate relevant evidence. That work |

| | |
|---|---|
| | is essential if a claimant is to be properly represented at review. Preparation for the review will require drafting written submissions. This involves setting out the issue, the factual background, the testamentary evidence, the medical evidence, the relevant statutory provisions, case law and the argument. Written submissions for complex cases are often 20 to 30 pages long and can take15 to 20 hours to draft. Issues of statutory interpretation can be crucial to success or failure at review. Accordingly, a lawyer representing a claimant needs to review the relevant sections and the case law when drafting submissions." |

### Submitters' views on Category 3 – Reports

The majority of submitters thought that the proposed new rates would increase access to medical reports, although many of those noted that this would only be the case if the rate was per report and not a cap for all reports. When asked whether or not they agree with the proposed new maximum costs awardable for medical and other reports, there were mixed responses, although slightly more submitters agreed.

One submitter (Submitter 2) suggested that another $2,000 should be available for a follow-up report if ACC obtains an opinion after the initial report is filed.

One submitter (Submitter 7) recommended that "where a report by a registered specialist leads to ACC's decision being overturned then the full amount of the report should be refunded, even if this is over the allowable amount".

The majority of submitters thought that removing the distinction between 'registered specialist reports' and 'other reports' would improve claimants' access to reports.

### Submitters' views on Category 4 – Other expenses

The majority of submitters supported the proposal to increase the maximum cap for other expenses.

Most submitters either agreed or were unsure if the new rates would increase access for in-person reviews for rural communities. Several submitters noted that online options such as Zoom were now readily available. A few submitters pointed out that rural communities face difficulties accessing medical and legal specialists, and often have to travel long distances to attend a hearing – including, in some situations, to attend an online hearing (digital exclusion was mentioned several times).

ICRA (Submitter 14) noted that "The ability to recover a higher amount for expenses may have some benefits for access to reviews. However, we would observe the following:

- During the Covid-19 pandemic, review hearings have moved to being almost entirely online. This has been a good litmus test of whether the remote hearing model will work, and in general we would say it has been very successful. It is fair to say that remote hearings are likely to become the default, unless a claimant requests an in person hearing.
- A remote hearing has a number of benefits, including the ability for a claimant to join from the comfort and safety of their own home (rather than travelling to an unknown and clinical location), and reduce travel time and interruption to their business."

A few submitters noted that the increase in the maximum cap will allow for more time off work to travel and attend in-person hearings. At the same time, several submitters pointed out that the

mileage rate specified in the current regulations will also need to be increased to match the Inland Revenue Department (IRD) rate (this theme is mentioned throughout the submissions - a few submitters also noted the AA milage rates).

Several submitters wanted to see more detail added into what the category covers, including costs of travel, childcare, whānau support, time off work, cultural support, accessibility, and peer support.

One submitter (Submitter 16) questioned whether some costs should be paid upfront, in order to allow claimants certainty that at least some costs will be reimbursed. "I think at a Case Conference, the reviewer could have the discretion to award and agree to certain costs paid up front, in seeking a second opinion, or gathering additional evidence, or agreeing to the costs of travel to be reimbursed."

Most submitters either agreed or strongly agreed with the proposed new maximum costs awardable for other expenses.

### Submitters' views on the overall changes

The majority of submitters thought that MBIE should conduct regular reviews of the maximum caps in the Regulations. Submitters had varying suggestions for what an appropriate amount of time between reviews would be, i.e. one or two yearly.

One submitter (Submitter 11) recommended that LCI is used instead of CPI to adjust for inflation.

### Submitters' views on Alternative Dispute Resolution

Most submitters did not think that extending the regulated timeframes for Alternative Dispute Resolution (ADR) would have any impact on a claimant's decision to use ADR. A few submitters noted that it could discourage the use of ADR. One submitter (Submitter 14) noted that it would reduce the pressure and administrative burden on ACC and review services alike.

One submitter (Submitter 12) noted "We propose regulations are introduced to allow adjustment of current timeframes where ADR is used as a dispute resolution pathway. This applies to both lodging a review application and for setting a review hearing date. We consider regulations could be made that allow the parties to agree to extend both timeframes if required. One option is that part of agreeing to use ADR is that the parties "stop the clock" on the three-month review timeframes for the duration of the services, for example from the date the parties agree to attend ADR to the closing of the case. Despite the benefits, the barriers to access remain. We submit that overcoming accessibility barriers is going to require systemic changes and/or legislative changes where ADR becomes the primary pathway to resolve an ACC dispute."

Several submitters noted that changing the pathway to resolution for cases may be more effective, i.e. proceeding straight to ADR before a review takes place. It was noted that this would be similar to other jurisdictions.

Many submitters had incurred costs as a result of undertaking ADR and many noted that they had received cost awards. One submitter (Submitter 12) noted that "The process for awarding costs is set-out in the ACC Act and the Regulations. There is currently no legislative or regulative structure in place for awarding costs associated with ADR. ACC have implemented a policy decision to apply the

same amounts as set in the Regulations for ADR. We submit that costs and a cost structure need to be carefully considered to:

✓ ensure equity

✓ minimise the impacts of any inequity

✓ mature the scheme

✓ promote system level change to improve access to justice

✓ inflationary pressures that are not currently reflective of actual costs

We submit that ADR disputes are more complex, and any cost structure needs to consider this. There are currently review costs in the Regulations and none specified for ADR, so people have more of a chance in recuperating costs at review than for ADR."

ICRA (Submitter 14) noted that "MBIE should carefully consider who has the ability to award those costs [costs for ADR] and in what circumstances. Our initial views are:

- It would be inappropriate to allow a mediator to award costs, and this places them into a position of having to pass judgement, which is the antithesis of their role.
- It would be inappropriate to have costs awarded on the basis of whether an applicant was "successful" or not. For the reasons outlined above, even an "unsuccessful" mediation has a beneficial effect on the review process."

A few submitters welcomed the idea of separate and/ or the current regulations outlining the ADR process.

### Submitters' suggestions that are outside the scope of this review of the Regulations

Submitters made a range of suggestions that are outside the scope of this review. This includes suggestions for clearer processes for agreeing to costs with ACC, procedural reform on the process for obtaining evidence, improving the manner in which ACC delivers case files to representatives, and the establishment of committees to oversee various processes within the review space.

As many of the suggestions are operational in nature, they have been passed to ACC for consideration.

## Submitters' recommended amendments to the Regulations

A few submitters provided specific recommendations for amendments to the Regulations, which are listed in Table 4 below (note recommendations mentioned above have not been repeated in this table):

***Table 4 – Suggested amendments***

| Category | Amendment | Submitter |
|---|---|---|
| N/A | "Insert a new regulation which sets a formula for annual increases to the costs in the Schedule." | 9 |
| Category 2 | "The Government should actively support ongoing training and PD in the ACC advocacy field by funding at least 1 law school to offer a specialist post graduate paper in ACC law - higher rates of regs could then be tied to those who attain this paper." | 8 |
| Category 3 | "Procedural reform is required to the process of obtaining evidence. It is proposed that an expert evidence trust be established (see Appendix 2 of submission 11). It is essential that the current process of regulatory reform allows for payments to this type of organisation to avoid the funding mechanism acting as a barrier.<br>"the establishment of an independent expert evidence trust."" | 11 |
| All Categories | "Insert regulation 4(4) along the following<br>lines:<br>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.<br>or<br>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. 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." | 11 |
| All Categories | "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." | 11 |
| Category 2 | "The establishment of a guidelines committee [refer to submission 11 for details of proposal]" | 11 |
| All Categories | "We recommend adopting the legislative language in the Tertiary Education dispute resolution system. | 12 |

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| All Categories | Costs incurred as a result of consensus-based resolution (ADR) should be set out in a guideline. This would be used as a starting point in each case and agreed to by the parties during the initial part of our process and confirmed at the conclusion of the meeting. We would be willing to lead the work developing this guideline for the consensus-based processes (or more widely). We explain in detail how such a guideline might operate based on a capped amount where representation costs take into account; the complexity of the case, the cost and type of representative and the tasks undertaken as part of the consensus-based process. The maximum costs to the cap must be set the same as review (or higher) and a process set out for dealing with exceptional cases.<br><br>Regulations must address costs for consensus-based cases. Specifically setting out a level of reimbursement for "consensus based" resolution or "conciliation" (as well as "reviews") in the regulations. This would make it clear to people considering their options (and representative advising them) that representative, evidential and other costs incurred during the process can be recovered." | 12 |
| All Categories | "There is opportunity through section 328A of the AC Act to set out a framework for ADR. We consider that this is required." | 12 |
| All Categories | "In 2017 the Labour Party set out the following policy:<br>Consider the future of the review jurisdiction, including the impact of privatisation of the current service, and whether the jurisdiction should now be placed under the umbrella of the Ministry of Justice.<br>It seems like now is the time for the Government to address this." | 13 |
| Category 2 | "Include a definition of Lawyer in the Regulations." | 14 |
| Category 2 | "ICRA recommends a flexible approach. We suggest that no sliding scale is necessary, and that a single maximum (the higher amount) would be sufficient – reviewers can exercise their discretion. ICRA would endorse the creation of an additional cost category that could be claimed if an advocate considered the case to be significantly complex (say, an additional uplift of $500). Such an additional fee could be claimed if the advocate considered that the case involved a significantly large file to review, complex submissions to make, or multiple case management conferences and hearings to address the issues; and the reviewer could award it if they considered such a claim was justified. ICRA would recommend that the Cost Regulations make it clear that this additional cost category was not available to be claimed "as of right" but was intended as a kind of "exceptional case fee"." | 14 |
| Category 3 | "Remove the cap for medical reports." [i.e. provide no maximum limit for medical reports] | 14 |
| Category 4 | "I think at a Case Conference, the reviewer could have the discretion to award and agree to certain costs paid up front, in seeking a second opinion, or gathering additional evidence, or agreeing to the costs of travel to be reimbursed." | 16 |

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| All Categories/ Category 4 | "The Law Society submits that the objective of improving access to justice must include access to culturally appropriate assistance for claimants. This would, for example, enable Māori claimants to seek reimbursements for costs which may be incurred when seeking cultural support during the dispute resolution process. We understand that ACC has, in the past, appointed Pae Arahi (Māori cultural advisors who liaised with the Māori community and the ACC branches in their area and ensured Māori claimants felt safe and seen in the dispute resolution process). ACC does not currently provide any such support, so it may be appropriate to consider reimbursing claimants who receive this type of support via other (external) avenues. This approach would be consistent with ACC's Whāia Te Tika and its obligations under Te Tiriti o Waitangi." | 18 |
| All Categories | "The Law Society encourages officials to consider including provisions relating to costs awards for alternative dispute resolution (ADR) in the regulations (for the reasons set out in paragraphs 10.1 and 10.5 to 10.7 below). We submit this work should be undertaken as part of MBIE's current review of the Regulations." | 18 |
| Category 2 | "Our view is that whatever the final format of the different cost categories, there should be a category for complex reviews where the standard for an award of costs is "reasonable costs". What amounts to a complex review and what costs are reasonable should be determined by the reviewer, considering the complexity of the matter, the need for specialist representation and the actual costs incurred by the applicant.<br><br>In summary, our submission is that a separate cost category should be in place for complex reviews. What amounts to a complex review and what costs are reasonable should be determined by the reviewer, considering the complexity of the matter, the need for specialist representation and the actual costs incurred by the applicant." | 19 |
| All Categories | "There is another very important aspect of the proposed review costs regs review which has not been addressed. This is the issue of liability for representation costs when a claimant is being represented by a lawyer or advocate engaged by a union. The claimant is not usually liable for legal costs, being a union member, but the union is. The point about not paying such costs is taken by some accredited employers but not by ACC which is very curious. Please see Tonga v ACC [2021] NZACC 181 which sets out the issues. This is matter which requires attention as well as the quantum issues." | Additional submission after consultation ended |