

**INDEPENDENT REVIEW OF THE ACCLAIM OTAGO (INC) JULY 2015 REPORT INTO
ACCIDENT COMPENSATION DISPUTE RESOLUTION PROCESSES**

Miriam R Dean CNZM QC

MAY 2016

PREFACE

Until this review, I had no real understanding of accident compensation law and processes. This was perhaps an advantage because it enabled me to consider Acclaim's report into accident compensation disputes free of any preconceived views or biases.

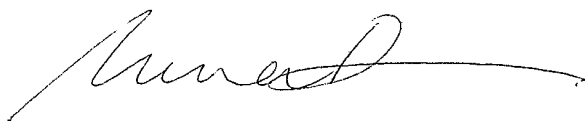
Two things are striking. The first is that the extreme complexity of this area of the law (and of ACC processes) makes it imperative claimants get as much help as practicably possible to resolve their disputes with ACC in a fair, timely and cost-efficient way – and, above all, in a way that makes them feel their stories have been genuinely heard. Many of the practical changes I have proposed are small, but I hope they may go some way towards achieving this important objective.

The second striking fact is the dedication of those – particularly the lawyers, advocates and support groups – who are so committed to, and passionate about, helping claimants, especially the more vulnerable ones, with the inevitable disputes that arise. I am full of admiration for them.

The contributions of those who assisted the review, whether by providing briefing papers or participating in long interviews, are gratefully acknowledged. All were prepared to assist, and many gave the issues considerable thought. Their insights and views were most helpful.

I am indebted to Melinda Geary of the Ministry of Business, Innovation and Employment, who worked with me closely on this review; also Alexandra Jackson and Paige Wilburn, of the ministry, who assisted with various aspects of the review.

I also thank Peter Riordan for his invaluable contribution as editor of this report.

A handwritten signature in black ink, appearing to read 'Miriam R Dean', with a long horizontal flourish extending to the right.

Miriam R Dean CNZM QC

26 May 2016

CONTENTS

	Page No
OVERVIEW	2
PART ONE: REVIEW PROCESS	6
1. Introduction	6
PART TWO: CONTEXT	8
2. ACC: Legislation and operation	8
3. Dispute resolution processes	9
4. Acclaim and its report	10
PART THREE: THE WIDER PICTURE	13
5. Common themes	13
PART FOUR: BEING HEARD	20
6. Research results	20
7. Statutory review process	20
8. District Court appeals	32
9. ACC decision-making and dispute resolution processes	33
PART FIVE: ACCESS TO THE LAW	36
10. Research results	36
11. Review findings	37
12. Improvements	39
PART SIX: ACCESS TO EVIDENCE	42
13. Research results	42
14. Medical evidence problems	42
15. Improvements	47
16. District Court appeals	50
PART SEVEN: ACCESS TO REPRESENTATION	52
17. Research results	52
18. Valid findings	52
19. Improvements	56
20. District Court appeals	58
APPENDICES	
One Terms of engagement	60
Two ACC claims, reviews and appeals	62
Three Summary of Acclaim's suggested short and longer-term solutions	63
Four Elective services data, 2015-16	64
Five FairWay reviews by subject, 2015	66
Six ACC data on open appeals and outcomes, 2010-16	67
Seven ACC's alternative dispute resolution process	68

OVERVIEW

The introduction of New Zealand's "no-fault" accident compensation legislation in 1974 was a pioneering step by world standards – and remains so to this day. The Accident Compensation Act 1972 was passed by a unanimous vote of Parliament, and despite reviews and amendments over the years, its essential purpose remains unaltered: to provide a system of compensation for people who suffer personal injury by accident, whether at work, at home, on the road or on the sports field. Who is at fault is not relevant. In return for foregoing the right to sue for damages, individuals have a right to claim compensation and rehabilitation assistance from the Accident Compensation Corporation (ACC).

Sometimes ACC declines claims for cover and entitlements. In such instances, claimants can challenge its decisions using a dispute resolution framework that includes an internal ACC review of decisions, recourse to alternative dispute resolution, an independent statutory review (principally) by FairWay and, in the last resort, the courts.

A report by Acclaim Otago (Inc) in July of last year identified four broad "themes", or problem areas, with accident compensation dispute resolution processes:

- access to law: that is, inadequate access to legal resources
- access to evidence: that is, limited access to evidence (particularly medical)
- being heard: that is, claimants not feeling that their stories are genuinely heard
- access to representation: that is, limited access to experienced lawyers.

The task of the review has been to examine the validity of Acclaim's four themes and recommend changes, whether legislative, policy-related or operational, in response to any of the report's findings deemed to have substance. A summary of the review's findings and recommended improvements is outlined here:

Being heard

This theme is in many respects the most important, and the review has devoted more attention to it than to any other. Current problems with FairWay's review process include concern about whether the Crown entity is independent from ACC. Despite the fact reviewers are legally required to act independently, and their agreements with FairWay are explicit in spelling out this obligation, some claimants remain "suspicious" of its independence. Concerns about a lack of impartiality are perceived rather than real, but they nonetheless raise questions about whether changes are needed to remove such perceptions.

Other problems are process-related, ranging from inconsistency in the way reviewers approach review hearings (some are investigative, others adversarial); the high rate of hearing adjournments (about 30 per cent); the limited hearing time (one hour) that leaves claimants feeling their side of the story has not been heard; and scale review costs that are "so low" many claimants cannot afford to apply for, or continue with, a review. And no lessons are drawn from the 6,000 review decisions issued each year to help prevent disputes or help claimants through the dispute process (whether in the form of case notes, guidelines or anonymised sample decisions).

FairWay is certainly taking steps already to remedy many of these problems, but the review considers more improvement is needed to meet dispute resolution best-practice principles. The review suggests a revised process, which it calls "tracking" and "triage" that will get away from the one-size-fits-all approach. The heart of this new process is effective case management. It would enable reviewers, in consultation with the claimant and ACC, to manage cases more efficiently and expeditiously. It would also enable reviewers, where appropriate, to direct ACC (and sometimes the claimant) to provide medical evidence for the hearing – evidence that is so often central to the outcome. An ability to give early, in-principle decisions on costs – thereby encouraging claimants to put any expert medical evidence to the review and not leave it until a court appeal – should also help in this regard. Scale review costs should also be increased – and by more than just inflation.

Acclaim is right to express concern about the complexity of ACC's decision-making processes. But changes are afoot here, too, especially with ACC's new alternative dispute resolution process, which should go a considerable way towards meeting claimants' concerns that their disputes are not genuinely heard; and reduce the number of reviews.

The review finds no barriers to justice relating to District Court processes. District Court judges are independent and impartial, and claimants can rightly feel they are being heard. Acclaim has since affirmed to the review that it has never sought to suggest otherwise.

Access to the law

Acclaim provided some insightful analysis of the way accident compensation judgments were written over the six-year study period. But the fact judgments may not explicitly refer to the relevant legislation or case law does not amount to a denial of justice. The review agrees with Acclaim that, at the time of its study, claimants were hindered in their proper access to law by the absence of some ACC-related judgments on the New Zealand Legal Information Institute website. But that is now largely in hand.

Nonetheless, given the complexity of the legislation, and ACC's processes, the review considers far more can be done to help claimants – particularly those representing themselves – to understand and navigate their way through this extremely complicated area of the law. The review recommends various improvements. One is publication of a primer for users of the institute's website (and ACC is already progressing this); another is that FairWay publishes case notes and other guidance material; and a third is that ACC hugely improves its online guidance material.

Access to medical evidence

Acclaim's main finding that claimants have difficulty gaining access to medical evidence, crucial in determining most disputes, is undeniably valid. This was almost the universal view and experience of those interviewed by the review. But it is a problem that is simply beyond the scope of this review to address. The reality is that the role of medical evidence – and all the necessary processes and procedures that go with it – in deciding disputes (and even earlier when deciding on cover or entitlements) is complex.

The range of problems, and also the variety of proposed solutions put to the review, suggest it would be useful for all parties to join forces to try to solve some of these problems – both in the shorter and longer term. The review recommends forming a working group to examine the myriad of difficulties in this area.

Acclaim's report makes observations about how judges resolved evidential matters in the sample judgments it analysed. The review sees no concerns in the way judges resolved such conflicts – factual or medical. But it does put forward a few practical improvements, including supporting the District Court's proposal that it be able to commission a medical report in limited circumstances.

Access to representation

The review agrees with Acclaim that the lack of representation is a barrier to claimants seeking to challenge ACC decisions. The barrier exists because of a considerable imbalance in the resources ACC can bring to bear on cases compared with those available to claimants, particularly in a tight legal market. Those who represent themselves are therefore at a disadvantage to ACC.

But there are ways – even if small – to help redress the imbalance, such as resolving more disputes through alternative dispute resolution processes, improving the review process, and improving claimants' access to the law.

One improvement with potential to make a big difference would be the establishment of more independent advocacy services to support claimants through the dispute process. The Accident Compensation Act 2001 provides – and clearly intended – that ACC assist claimants with ACC-

funded advocacy services. At present, only two such services – very small-scale – receive ACC funding. Both are under-resourced and overworked.

More ACC-funded advocacy services would not only be good for claimants but also for ACC. The review has no doubt that one of three positive outcomes often emerges when claimants are assisted by good lawyers or advocates: claims without merit are withdrawn before review hearings; reviews are settled before any hearing; or, if a hearing proceeds, it runs more smoothly, resulting in lower costs for ACC, the funder of the review process.

There is probably little that can be done to encourage more lawyers to take on accident compensation work, although a rise in review costs for representation (set out in regulation) may go some way to increase the legal pool. And there are other small ways in which lawyers could be encouraged into the area which the review highlights.

Other themes

Beyond these specific themes, the review also notes some wider themes that emerged from the review. These included the need for ACC to collect and analyse data better, such data being critical to understanding the triggers, outcomes, costs and trends of disputes. Another, which the review heard repeatedly, is the need for ACC to do more to manage claimants' expectations early on in the claims process. Claimants do not adequately understand what getting cover means, especially in relation to any future medical complications, and interviewees predicted a drop in dispute numbers if ACC were clearer on this score.

The review perceived a real need for more dialogue and better collaboration between all participants. A half-day forum convened by the review drew a wide cross-section of participants, who agreed it had been a valuable opportunity to share information and lessons and work collaboratively on ways to improve the statutory review process. Significantly, they saw benefits in more such meetings.

All agreed on the need to ensure disputes involving those with disabilities were handled fairly, in a timely way and with empathy. ACC has taken steps in this regard, but there remains room for improvement. Further, given concerns expressed about the way some accredited employers and their administrators handle disputes, it may be useful for ACC to collect feedback to assure itself that the accredited employers' programme follows best-practice dispute resolution principles.

And finally, the review notes the positive changes ACC is making to put "people before process", as part of its Shaping our Future organisational strategy to improve its customers' outcomes and experiences. Change is already evident. And changes – present and pending – will go some, but certainly not all, of the way towards addressing some of Acclaim's concerns. Most importantly, these changes should lead to fewer disputes – the focus of this review – as well as a better overall experience for ACC customers.

Consolidated recommendations

Wider picture

- ACC explores ways to better collect and analyse data about claims and disputes.

Being heard

- FairWay develops and publishes guidelines setting out an improved review process (broadly by tracking and triaging).
- The Ministry of Business, Innovation and Employment, ACC and FairWay consider how best to address problems, perceived or otherwise, with FairWay's independence.
- The Government increases review costs – and by more than just inflation – to ensure claimants receive a meaningful contribution to review costs.
- ACC considers ways to accelerate and improve its settlement processes, including exploring settlement of appeals as early as the process allows, better tracking of settlement data at all stages, the possible adoption of a public settlement policy (in outline form only) and adoption of a formal model litigant policy.

Access to law

- The New Zealand Legal Information Institute:
 - is funded to provide a primer enabling users of its website to search accident compensation law and cases more easily
 - updates its website, with help from ACC and/or the Ministry of Justice, to include all High Court and Court of Appeal accident compensation decisions.
- FairWay:
 - publishes a selection of (anonymised) review decisions by subject matter and/or case summaries of relevant decisions and other guidance material
 - provides a “submission builder” on its website to help claimants prepare submissions for review hearings.
- ACC and FairWay consider other ways (such as more graphics and video content) to explain easily to claimants how dispute resolution processes work (and in ACC's case, also how it decides particular claims).
- The Ministry of Business, Innovation and Employment and/or ACC consider creating a visual map to help claimants navigate their way around the various accident compensation Acts and regulations.
- The District Court considers how it can best help claimants representing themselves to easily search for relevant cases.

Access to medical evidence

- ACC convenes a working group to address the policy and process-related problems with accessing medical evidence.
- Consideration be given to District Court judges having the ability to commission an expert medical report for claimants who are unable to do so where appropriate.
- Reviewers and District Court judges consider directing experts, where appropriate, to confer and identify where they agree and disagree on medical issues.

Access to representation

- ACC consider:
 - increasing funding to existing free advocacy services
 - funding a free nationwide advocacy service modelled broadly on the Health and Disability Commission Advocacy Service.
- ACC more widely promotes organisations (existing and new) offering advocacy services on its website and in other guidance material.
- Relevant participants in the accident compensation area explore initiatives to encourage more lawyers into this field of work.
- Consideration be given to the District Court's proposal that it have the power to appoint counsel to represent claimants in those exceptional cases where justice and efficiency require it.

PART ONE: REVIEW PROCESS

1. Introduction

In July 2015, Acclaim Otago (Inc), an incorporated society that supports and advocates for injured people, published a comprehensive assessment of ACC dispute resolution processes. The report runs to 176 pages and, among other things, analyses 500 court judgments as well as the findings of an earlier (self-selected) survey of 600 claimants and their experience of ACC's dispute resolution system.

Understanding the Problem: An analysis of ACC appeals processes to identify barriers to access to justice for injured New Zealanders also contains extensive academic research and commentary.¹ The report considers there are four broad “themes”, or problem areas, with the current system, and that these are “likely causes of current inefficiencies”. They are:

- access to the law: that is, inadequate access to legal resources (case law and review decisions, along with the complexity of the legislation and guidance material)
- access to evidence: that is, limited access to evidence (particularly medical)
- being heard: that is, claimants do not feel competent and impartial decision-makers genuinely listen to their stories – they do not feel they have “had their day in court”
- access to representation: that is, limited access by claimants to lawyers experienced in accident compensation law, as well as poor outcomes for claimants representing themselves.

The report's purpose was not merely to “describe and understand” the system's deficiencies. The authors also wrote with a view to prompting “meaningful and comprehensive reform”. And when, a month later, Acclaim issued a follow-up memorandum proposing various solutions, the Minister for ACC, the Hon. Nikki Kaye, responded by initiating an independent review of these areas of concern. The Ministry of Business, Innovation and Employment commissioned this review.

Purpose

The terms of engagement (appendix one) essentially require me to:

- review the validity of the four areas highlighted by the Acclaim report
- consider the proposals in Acclaim's subsequent memorandum
- recommend any legislative, policy or operational changes to fix any of these four areas.

The terms of engagement ask the review, in the course of its work, to take into account the following key objectives:

- resolve disputes fairly and at the first available opportunity
- ensure claimants feel they are “heard”
- ensure the process is cost-effective for the claimant and for the sustainability of the accident compensation scheme.

This review does not consider wider civil dispute resolution questions such as availability of civil legal aid and judicial resources. Nor does it contain any determination about whether to establish a proposed Accident Compensation Appeal Tribunal, even though the Government intends this review to complement targeted consultation about such a move. The review has been careful not to do so, although inevitably some of its findings and recommendations may be of use in making that decision. Also, the Acclaim report makes many ancillary points that range beyond these key themes. To examine these is neither necessary nor practical.

¹ The report was funded and supported by the New Zealand Law Foundation and the Legal Issues Centre at the University of Otago.

Approach

Recognising time and cost limitations, the review adopted an informal investigative approach. This was also the preference of many participants. The review conducted interviews with key stakeholders, including Acclaim, ACC, FairWay, the District Court, the Government Centre for Dispute Resolution, advocates and lawyers, medical organisations and specialists, disabled people's organisations, ministries, accident compensation-related committees and organisations commonly engaged in accident compensation disputes.² As with any review or inquiry, there was no substitute for interviews, and more than 50 of these were conducted. All were treated as confidential to ensure full and frank discussion.

The review also considered a range of written material, including earlier reports on the accident compensation system, briefing papers and responses to questions the review put to participants. ACC, the District Court and FairWay also provided the review with written responses to the Acclaim report, which were, in turn, given to Acclaim for its response. All of this material – which it is neither possible nor practicable to refer to fully here – has helped assess the validity of Acclaim's four key findings and make suggestions for change.

Structure

This report is in seven parts: review process, context, wider picture, being heard, access to the law, access to evidence and access to representation. Each part addresses Acclaim's key research results relating to the four areas highlighted by its report; the review's findings as to the validity (or otherwise) of these; improvements (or options for change); and recommendations.

Acclaim's third theme – “being heard” – is in many respects the most important and the review has devoted more attention to it than any other. This reflects first, the singular importance of ensuring any dispute resolution process gives its clients the trust and confidence that their side of the story will be heard. Another reason is that this part encompasses aspects of FairWay's statutory review process, which is the area most in need of improvement and which, along with ACC's new alternative dispute resolution process, has the greatest potential to result in a better experience for claimants and fewer appeals. The review starts with this theme.

As to recommendations, these fall into two groups. The first group comprises those matters of policy, strategy or legislation capable of implementation by the Government, or by ACC where consistent with the Government's priorities, as set out in the letter of expectations to ACC from the Minister for ACC. One such expectation is for ACC to continue to support initiatives for fair, timely and cost-effective dispute resolution.

The second group comprises those matters relating to ACC's or FairWay's day-to-day operations in dispute resolution. These are for the Crown entities' respective boards and management. Whether they are adopted is a matter for them. However, the review hopes they will be considered in the spirit in which they are offered – as insights that inevitably develop during the course of any review such as this.

Other points the review makes – of which there are a good number – are more in the nature of suggestions and fall short of formal recommendations.

² FairWay is the principal review services provider. The law firm Gresson Dorman & Co is contracted to deliver reviews in Timaru.

PART TWO: CONTEXT

Some brief background is necessary to put Acclaim's report in the context of the accident compensation scheme and dispute resolution processes. A summary of the Acclaim report, including its research methodology, follows.

2. ACC: legislation and operation

ACC is governed by the Accident Compensation Act 2001 (the Act) and the Crown Entities Act 2004. The former is universally regarded as long, complex and highly technical. It contains 401 sections, along with eight schedules (of which Schedule 1 alone contains 78 clauses).

The Act also contains transitional provisions relating to earlier pieces of legislation and accompanying regulations (as do these earlier pieces in turn). They are the Accident Compensation Act 1972, the Accident Compensation Act 1982, the Accident Rehabilitation and Compensation Insurance Act 1992 and the Accident Insurance Act 1998. These provisions relate to, among other things, injuries that occurred under previous legislation but are the subject of claims under subsequent legislation.

ACC is responsible for managing the accident compensation system, which offers comprehensive, no-fault cover to all New Zealand residents and visitors (although some large accredited employers are allowed to manage their employees' work injury claims and rehabilitation). In 2014-15, ACC received 1.9 million claims for cover, of which it accepted all but about 50,000 claims (or 97 per cent). In the same period, it paid out \$3.2 billion in cover and entitlements (86 per cent for fees to medical or health professionals).

Assessing a claim consists, broadly speaking, of two steps: evaluating whether an injury or condition is covered by the scheme (it may be that ageing is mainly or solely the cause) and then deciding what entitlements the claimant should receive.³ In the case of, for example, a knee injury caused by a fall, ACC might conclude that the claimant was covered, but was entitled only to an initial treatment by a doctor or physiotherapist – not knee surgery, as the claimant was seeking. Many claimants deal solely with their doctor over a short-term injury and have no contact with ACC. Others have complex, longer-term injuries or conditions that require contact with an ACC branch (over, for example, weekly compensation or rehabilitation) or a specialist ACC unit, such as the elective services unit (for surgery) or the sensitive claims unit (for mental injury resulting from sexual abuse or assault).⁴

Case managers handle claims, although staff with different titles also perform this function. For convenience sake, this report refers only to case managers.⁵ Assessing claims ranges from straightforward to complex. Cover decisions on complex claims such as mental injury or treatment injury require analysis of medical information and opinion to determine cover.

Entitlements come in a variety of forms, including treatment and rehabilitation costs, vocational rehabilitation, compensation for lost earnings and compensation for impairment. Weekly compensation (at 80 per cent of earnings) is a key entitlement under the scheme. Every year ACC makes many decisions on entitlements, whether relating to new or existing cover claims. For complex claims, ACC will make not one, but a series of decisions during the lifetime of a claim. As a result, ACC is unable to say exactly how many decisions it makes in any year declining entitlements, whether in whole or in part. Some decisions, such as to decline to pay for a taxi fare, will not be recorded easily in its data system.

³ Section 26(2) of the Accident Compensation Act 2001 says an injury is not covered if it can be shown to be caused "wholly or substantially by gradual process, disease or infection".

⁴ The other specialised cover and/or entitlement units are accidental death, treatment injury, hearing loss, dental, serious injury, work-related gradual processes and cover assessment.

⁵ Examples include case owner, case co-ordinator, claims manager, claims officer, service co-ordinator and support co-ordinator. Note also that the review refers to claimant, client or customer interchangeably depending on context. ACC uses the term client.

Acclaim estimates ACC makes about 100,000 decisions a year declining cover or entitlements, although it has no precise data to support this estimate.⁶ ACC estimates the number is about 70,000 a year. The review had no way of verifying which number is likely to be more accurate, although it has no reason to disbelieve ACC's number because it is the entity in the better position to give an estimate. A small number of decisions are disputed – about 6,500 in 2014-15 – and these are the subject of this review. Attached as appendix two is a diagrammatic outline (which ACC gave the review) of the claims process, from lodging a claim through to a review and on to an appeal.

3. Dispute resolution processes

Anyone declined cover or entitlements can challenge that decision. The first step is to lodge an application for a statutory review of the decision. Claimants have three months from ACC's decision to lodge a review application for a hearing.⁷

ACC internal dispute resolution process: Between a claimant filing a review application and the hearing (or even before the lodging of an application) ACC activates its own internal dispute resolution mechanisms to see if the matter can be resolved without a hearing. There are two parts to this. First, it considers, in consultation with the claimant (or his or her lawyer or advocate), whether the matter is suitable for ACC's new alternative dispute resolution process (considered later). Secondly, regardless of whether ACC attempts to resolve the dispute in this way, it will internally reconsider all decisions that are the subject of a review.

Reviews: Failing resolution through ACC's internal processes, the review application goes to FairWay Resolution Ltd, the Crown company responsible for reviewing disputed decisions (or to law firm Gresson & Dorman in the case of a Timaru-based review). FairWay employs reviewers to carry out these reviews and a hearing must be set down within three months of ACC's receipt of the application. ACC gives FairWay and the claimant (or his or her lawyer or advocate) the relevant file, which is confidential and for use solely in the review hearing. That hearing takes place in person or via a teleconference. Reviewers issue a written decision within 28 days, and also determine costs.

Court appeals: Either party can appeal against a review decision to a District Court if dissatisfied with the outcome. (ACC, however, rarely does.) The court has wide powers to admit new evidence, which happens frequently. The court can dismiss the appeal or grant it and quash or modify the review decision. The appeal is a rehearing.⁸ Either side can, in turn, appeal against a District Court judgment to the High Court, and on to the Court of Appeal but the appeal must be limited to questions of law and with leave from the relevant court. The High Court and Court of Appeal hear reasonably few substantive appeals.⁹ The Acclaim report covers these courts' dispute processes, but its central focus is on the review and District Court appeal process – as is the focus of this review.

In examining dispute resolution processes, this review adopts the best-practice principles developed by the Government Centre for Dispute Resolution: being customer focused and accessible, objective and fair, effective, efficient and accountable.¹⁰ The centre also notes, aptly, that key measures of the success of such processes are: a reduction of delay and cost, fairness and equity of outcomes and parties' satisfaction with the process.

⁶ Acclaim report, paras 132 and 154.

⁷ Although it can be extended by agreement, such as if both sides agree it would be useful to try to resolve the dispute through alternative dispute resolution processes, or if ACC is satisfied there are extenuating circumstances: s 135(3) of the 2001 Act. If ACC declines to accept there are extenuating circumstances, claimants can lodge a statutory review of that decision.

⁸ See the discussion at part five, page 37.

⁹ Acclaim report, para 113.

¹⁰ The centre was set up as a two-year pilot project to develop a coherent, best-practice approach to dispute resolution throughout the public sector: <http://www.mbie.govt.nz/about/our-work/roles-and-responsibilities/government-centre-dispute-resolution>

4. Acclaim and its report

The Dunedin-based group (established in 2003) supports and advocates for changes to improve the lives of injured people. The report's four authors are Dr Denise Powell, Acclaim's former president and an experienced researcher and publisher, particularly in disability-related matters; Warren Forster, a barrister with wide experience in resolving ACC disputes; and Tom Barraclough and Tiho Mijatov, Otago law school graduates.

The report is not Acclaim's first on accident compensation. It compiled two "shadow reports" in February and July 2014 for the United Nations Committee for the Convention on the Rights of Persons with Disabilities, as part of its review of New Zealand's implementation of the convention.¹¹ In August of the same year, it submitted a third shadow report to the UN committee containing the results of an online (self-selected) survey of more than 600 claimants.¹²

Acclaim's report is, in part, a response to concerns with the Government's decision to create an Accident Compensation Appeal Tribunal to replace the District Court Accident Compensation Appeal Division (as well as the Accident Compensation Appeals Authority, which hears a dwindling number of cases under earlier legislation). The Government considered that a tribunal might fix the problem of excessive delays in particular. Acclaim's view is that the problem is much broader than that. It maintains there are systemic, not merely administrative, barriers in the way of claimants appealing against ACC decisions.

Research approach

In seeking to uncover the barriers facing those challenging ACC's claim decisions, Acclaim analysed more than 500 court judgments issued between 2009 and 2014. That total consisted of about 15 per cent of all District Court judgments (selected at random) and every High Court and Court of Appeal case (including applications for leave to appeal).¹³ In evaluating whether claimants had "access to justice", Acclaim adopted Lord Woolfe's definition in his well-known civil justice reforms, namely that "the civil justice system should be just in the results it delivers; fair in the way it treats litigants; capable of dealing with cases at reasonable speed and at reasonable cost; and understandable to those who use it".¹⁴

To evaluate each judgment, the report's authors used an approach known as "thematic analysis". Widely accepted by social scientists, it involves encoding qualitative information.¹⁵ In essence, researchers develop "codes", either words or phrases, to label information and then review and sort it into categories. In this way, researchers can move beyond simply a broad reading of data to discerning patterns and developing "themes".

The authors developed their first set of codes by intensively reading a sample of 30 judgments and, based on their own experience and research, identifying areas that amounted to a barrier to justice. Next, they read all 500 judgments (and reread the original 30), identifying passages of text that qualified for labelling with these codes (about 300 in all).¹⁶ Detailed guidelines ensured researchers correctly identified whether a particular code was present in a judgment. The researchers ran checks to ensure coding was consistent and the analysis was rigorous. From

¹¹ *Interim report to United Nations Committee on the Convention on the Rights of Persons with Disabilities*, 28 February 2014; *The Costs of Paradigm Change: Access to Justice for People with Disabilities Caused by Personal Injury in New Zealand: A Shadow Report to the United Nations Committee on the Convention of the Rights of Persons with Disabilities*, 24 July 2014. Shadow reports are done by "civil societies" (of which Acclaim, is one) in response to state parties' reports to United Nations on the Convention. The reports were prepared with the support of the New Zealand Law Foundation's "shadow report award".

¹² *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*, 4 August 2014. Extracts of this self-selected survey are also referred to and relied on in its current report.

¹³ Acclaim report, paras 108-116.

¹⁴ Acclaim report, para 71.

¹⁵ Acclaim report, paras 90-107.

¹⁶ Codes included, for example, whether the claimant was represented, the claimant's gender and whether the judge relied on evidence.

there, the codes were collated into categories of similar codes, and then finally into the four themes this review has examined.¹⁷

The focus on qualitative rather than quantitative data makes it difficult for the review to evaluate the report's methodology. Even so, it can discern some limitations – freely acknowledged by Acclaim in its report and to this review. First, the researchers presupposed the existence of barriers to justice, which they then “search[ed] out” while “remaining alert ... to any other unrecorded themes”.¹⁸ Secondly, the relatively small sample of District Court judgments (which turn on their own particular combination of facts and law) makes it impossible to know whether it fairly represents all judgments over the six-year period. Thirdly, thematic analysis can only describe the presence or absence of variables – it cannot, as Acclaim acknowledges, draw any causal links between them.¹⁹ For example, Acclaim did not, nor could not, draw any causative link between the fact the claimant had a lawyer and the outcome of the appeal.

And finally, an examination of judgments cannot, alone, measure access to justice. A wider lens is needed, encompassing the whole lifecycle of a claim from the original decision through to (internal and external) reviews and finally on to appeals.

None of this is to question Acclaim's obvious commitment to analysing the judgments in an objective and consistent way. Nor is it to dispute the benefits that such detailed research has in identifying areas in need of improvement or in making for better-informed discussion. And in any event it is unnecessary to go beyond the limitations just noted since most participants in accident compensation dispute resolution broadly accept the validity of the four problem areas identified by Acclaim.

Only in relation to one of the four is a qualification necessary. This review has found nothing to suggest decision-makers (reviewers or judges) are anything but competent or impartial. The lack of independence is more perceived than real, as Acclaim itself acknowledges. But that is not to say the dispute resolution process is without room for improvement to ensure claimants really do feel the process is fair and that decision-makers genuinely listen to their side of the story.

The report draws on material from Acclaim's earlier shadow reports (briefly read as background material only). However, this review is confined to the four problem areas identified in Acclaim's latest report and it has necessarily discussed most of them at a high level (less so FairWay's process, which the review considers in some detail). Acclaim makes many detailed, and often disparate, claims that purport to be related to any one or more of these areas. Many are tangential and some are not accepted as valid by other parties.

Also, many points have been overtaken by events. ACC has made significant changes, especially since July 2015, to the way it deals with customers through its Shaping our Future programme (see part three). These changes go part – but not all – of the way towards resolving some of Acclaim's concerns. The same applies to some of Acclaim's comments about FairWay's review process. FairWay is already making changes to these (see part four). Finally, Acclaim's report was correct to note that past District Court processes contributed to long delays in resolving cases. However, the appointment of three full-time judges hearing accident compensation appeals, and active case management, have dramatically cut the number of appeals on hand and the time taken to determine them. Acclaim and the District Court now largely agree that the situation has almost reached the point where “there will be no more problems with delay”.²⁰

Postscript: potential solutions

A month after releasing the report, Acclaim submitted a memorandum to the Minister for ACC suggesting interim and longer-term solutions ranging from more rigorous application by ACC of

¹⁷ Acclaim report, para 95.

¹⁸ Acclaim report, para 107.

¹⁹ Acclaim report, para 127.

²⁰ Acclaim report, para 470.

its decision-making processes, prescribing rules for the conduct of review hearings, and changes to District Court processes to help further reduce delay. A summary of these solutions is attached as appendix three.

This review has, as asked, considered and reported on most of these suggestions. However, the first (relating to a change in ACC's decision-making key performance indicators) is an operational matter for ACC. However, the review hopes ACC will review these to ensure the more intangible but key objective of ensuring the right decisions are made. The performance improvement framework review of ACC published in December 2014 noted the importance of such indicators, and that ACC is changing these.²¹

Acclaim's suggestion to increase funding of registry processes to move from a paper-based to electronic system of case management is a much wider topic affecting all court processes and features as part of the Ministry of Justice's court modernisation programme.

²¹ *Performance Improvement Framework Review: Accident Compensation Corporation*, State Services Commission, The Treasury and the Department of the Prime Minister and Cabinet, pages 27 and 40.

PART THREE: THE WIDER PICTURE

5. Common themes

Better information

The need for better data on dispute resolution processes appears throughout Acclaim's report. It quotes overseas literature that "data-driven strategies are more likely to help decision-makers achieve their goals in a cost-effective way than policies pursued in the absence of evidence".²² This review agrees there is such a need. The absence of good dispute resolution data is not, however, unique to New Zealand, and Acclaim acknowledges this.²³

This review is not the first to have identified the need for ACC to carry out more analysis of its data. The 2014 performance improvement framework review observed: "ACC is relatively inactive in mining complaints and other data that give clear indications of claimant issues. The complaints and review processes, and court actions are a vital source of information in all industries to look and understand what is happening."²⁴ ACC says that since then it has begun collecting more complaints data as part of a project to improve customer feedback channels. Specifically, case managers now have a "new data warehouse and tools they can use to search for specific data, including in relation to complaints". It can also investigate trends with these new tools. ACC also says it is looking at ways to incorporate customer feedback into business improvement measures.

It is unclear, however, whether these initiatives will produce the sort of data that will fill gaps about specific areas of the dispute resolution process. Acclaim says such data will enable better decisions about what ACC does and how it does it, and also why. It calls for:

- data on ACC's all-up cost of defending reviews and appeals, including internal and external legal costs and also the cost of obtaining medical experts' opinions
- accurate and publicly accessible data on how many decisions on cover and entitlements ACC declines, the number of review applications lodged, the number withdrawn, the number settled and the number appealed to the District Court
- data on why those declined cover or entitlements did not lodge a review application, why those who lodged a review did not pursue the application through to a hearing, and why those whose review decision was rejected did not appeal to the District Court
- data on why those who appealed to the District Court did not proceed with their appeal to a hearing (whether because ACC settled with the claimant beforehand; the claimant found the process too challenging; the claimant lacked the money; or the claimant could not obtain medical evidence).²⁵

Other interviewees questioned whether ACC had data on the gender, age and ethnicity of those declined cover or entitlements, as well as of those who did not seek a review of such decisions. FairWay said it saw few review applications from Maori, Pacific Islander or Asian claimants. If these ethnic groups were to make up even a moderate share of those declined a claim, it begs the question: why are they not seeking reviews?

ACC could give the review only limited data that answered these questions. ACC said it could provide some of the data requested, but it would be a "complicated and potentially unreliable exercise", particularly given the review's time constraints. Other data the review requested was either not collected or not collected at the level of detail required or was collected for different purposes and hence unsuitable. A point ACC made with some force was that entitlement decisions run into the millions each year and range from insignificant requests (for a taxi fare) through to very substantial requests (declining complex surgery). Furthermore, it said decisions

²² Acclaim report, para 557, footnote 375.

²³ Acclaim report, para 162, footnotes 133 and 134.

²⁴ See footnote 21, at page 34.

²⁵ Acclaim report, paras 160 – 161.

were communicated and stored in a variety of ways. Millions are sent out by letter each year, and therefore mining such correspondence for data would be almost impossible. Extracting data from other claim decisions was more straightforward because of the way it assessed and coded the claims (such as for elective surgery).

The review makes four broad comments. First, it acknowledges the complexities and inadequacies of ACC's current system, but it was nonetheless surprised ACC could not readily provide comprehensive and reliable data on its cover and entitlements decisions, and also on the number of decisions that went on to review. Data is critical to understanding the triggers, outcomes, costs and trends of disputes, which in turn helps identify mitigation measures and opportunities for improvement. The review hopes ACC's transformation project will enable better extraction of such valuable data.

Secondly, it was equally surprising to the review that ACC does not have at least some general idea of the total costs of defending disputes. The review can well understand that ACC pays medical and legal professional advisors "under a range of different payment codes" and that such advice can "have multiple uses". The review also appreciates that ACC's legal spending extends beyond defending claim decisions to such things as legal representation and advice, court fees, debt recovery and the like.

But as the Government Centre for Dispute Resolution emphasised in interviews with the review, it is important to understand the cost of disputes not just for the organisation that incurs them, but also because of the significant financial impact disputes can have on "individuals, families, communities and businesses".²⁶ Even a manual process that attempted to add up spending on internal and external legal advice (and the cost of any medical report, if possible) for reviews and appeals would seem a useful exercise to give some idea of the all-up costs of these and how those costs compare with the sums in dispute.

Thirdly, ACC said that it would be administratively complex to identify a robust sample of declined claims, collect the information and then analyse why claimants did not challenge its decisions. But equally the review would have thought that ACC – like any organisation that put the customer first – might have wanted to get a deeper understanding of customers' responses when it declined their claims and what factors influenced their decision to accept or challenge such outcomes. Also, as the performance improvement framework reviewers noted, identifying client dissatisfaction is important to help determine the underlying causes and take mitigating actions.²⁷ ACC's work to improve customer feedback channels, discussed above, may help in this regard.

The review agrees with Acclaim that such data, even if qualitative, would be helpful to clarify whether claimants do not pursue reviews and appeals because of barriers of one sort or another in their way, or whether other reasons unrelated to questions of access to justice have a bearing. Acclaim's authors aim to collect such data in the next stage of their research.²⁸ The review would hope it would be possible for them, with the co-operation of key participants, to survey a sample of those who elected not to seek, or continue with, a review or appeal to understand why not.

Finally, as to the gender, age and ethnicity of those declined cover or entitlements, ACC told the review some of this data might be on its ACC45 form, but it had never collated such information for the purpose of understanding the composition of those who have their claim denied (in whole or in part) or who have filed review applications.²⁹ ACC also said it was optional for claimants to include information about ethnicity. The review has already noted above its (and many interviewees') view of the reasons why such data might be relevant.

²⁶ See also Dispute Resolution: *Best Practice Report Two of Two to Joint Ministers* March 2014, page 22.

²⁷ See footnote 21 at page 25.

²⁸ The Otago Legal Issues Centre (of which the authors are members) has been given Law Foundation funding to carry out further research (especially into data) and to consider solutions to the problem.

²⁹ Both the claimant and treatment provider must complete this injury claim form.

ACC provided some helpful data (as shown below) on claims for cover and for entitlement to elective surgery for the 12 months from February 2015 to February 2016. This data is especially pertinent because these two claim types result in the highest number of reviews.

Claim	Accepted	Declined	Number reviews filed	Percentage filed	Review in claimant's favour ³⁰
Cover	1,861,180	43,914	1,469	3%	15%
Elective surgery	43,934	9,650	2,670	28%	20%

As is apparent, the number of claimants lodging a review application for declined cover is consistent with the Acclaim finding that fewer than 10 per cent of people receiving an adverse decision lodge a review application (3 per cent). The position is rather different, however, for elective surgery applications (28 per cent). ACC provided data for some other claims, but for different time periods and with less detail, with the result that it was of limited use for present purposes.

The elective services unit, which handles elective surgery claims, offered even greater insights into the number of elective surgery reviews withdrawn before the hearing, overturned because of new information (and whether that occurred before or after the FairWay process began) and whether the claimant was represented in such cases: see appendix four. The unit also provided useful statistics on outcomes, including use of alternative dispute resolution. The way it examines data represents a potential template for other units (and branches) to copy to extract the same level of instructive information.

Managing expectations

The review heard over and over of the need to do more to manage claimants' expectations early on in the claims process. Interviewees said much of the "angst" felt by claimants was likely to dissolve if they understood at the time of the accident exactly what getting "cover" meant, especially in relation to any future medical complications. Interviewees predicted a drop in dispute numbers if ACC were clearer on this score.

The 2014 performance improvement framework review noted "a number of significant issues" with the way ACC managed claims, beginning with ACC's acknowledgment letter. This would state that the claimant was covered, but a later letter would advise the recipient that, although covered, he or she was not entitled to any benefits under the scheme. "Many people," it said, "assume that cover implies entitlement and so expectations are raised, and decisions may be taken on that assumption, only to be disappointed or worse when the second letter arrives."³¹ Many interviewees said much the same thing to this review.

A typical example recounted many times to the review is the person who suffers a back strain in an accident. ACC accepts cover and pays the claimant's physiotherapy costs. Two years later, after continuing problems, the claimant consults a specialist who says back surgery is necessary. The claimant thinks, often mistakenly, that having been covered at the time of the accident for physiotherapy, he or she will be covered for surgery. But that proves not to be so. Further diagnosis suggests surgery is necessary because of a degenerative condition, and ACC therefore declines to accept surgery costs.

³⁰ This includes reviews withdrawn or settled.

³¹ See footnote 21 at page 33.

ACC is the first to acknowledge it needs to work harder to manage claimants' expectations. This will be one focus of its transformation project – to ensure it does much better at communicating cover and entitlement decisions (whether declined or accepted) in a way that is unambiguous. It intends to be sure electronic and written communication will pre-empt unrealistic expectations that subsequent treatment may be covered. In the meantime, ACC is trying to improve how it communicates its decisions by talking informally to claimants before sending written correspondence, and also by giving case managers more training in how to write decision letters (see also part four).

Dialogue and collaboration

An accident compensation scheme that encourages all participants to work collaboratively, particularly over disputes, has greater prospect of achieving its aims. Creating more opportunities to come together as a wider group would, as interviewees often pointed out, enable discussion of legal developments, ACC processes and other matters of common interest. A similar theme emerges from the performance improvement framework review.³²

Lawyers and advocates thought it would be useful to have more discussions with FairWay: to air problems, share lessons and generally work together to make the review process as smooth as possible for claimants. Organisations that support and advocate for people with disabilities told the review they knew little about the FairWay process, yet a fair number of their members have had to go through the process.

Several long-standing advocates drew the review's attention to a 2006 training manual written by ACC and the (then) Legal Services Agency to help advocates. The manual's opening words are that "the law governing ACC is extremely complex and detailed" and that it would be "difficult for advocates to provide effective advice and support for their clients without a detailed and comprehensive knowledge of ACC law". Neither a lot of time nor money would be needed for ACC to update the manual to take account of law changes and new ACC processes. Also, such a manual could provide advocates with the guidance they need to give ACC's clients accurate advice. It would also be a very visible sign of ACC's willingness to work with advocates to lift their expertise to support ACC's clients when a review or District Court appeal is likely. Another advantage is that, with a better understanding of the law and regulations, advocates may be more likely to give realistic advice to claimants and avoid needless reviews and appeals.

Disabilities organisations raised with the review the need, as they see it, for better collaboration between government agencies. One organisation asked: "Why can't the agencies work together? The process between them takes too long. It should be quicker." It went on: "We want an easy and continuous process and dialogue between agencies like ACC and the Ministry of Health both while a claim is in dispute and when we have to move over from one agency to another because the claim is denied." This plea, although outside the review's scope, seems worthy of mention.

People with disabilities

Acclaim's report argues that the accident compensation appeals system must be considered through a "human rights lens", taking particular account of the Convention on the Rights of Persons with Disabilities. Acclaim says the disabled must, therefore, have meaningful input into developing solutions to problems impeding access to justice. "This brings the users of [the] system in to be part of the solution."³³

The review agrees. But an examination of how this can be achieved is beyond the review's scope. Its purpose here is to consider how people with disabilities fare when challenging an ACC decision. And what it was told by some lawyers, advocates and disability organisations was that it took too long for their disabled clients' disputes (and claims more generally) to be dealt with. Some injuries had turned their clients' lives upside down in an instant, yet ACC still took too long

³² Ibid, page 18.

³³ Acclaim report, paras 560 and 566. And note that article 4(3) of the Convention requires persons with disabilities to be consulted in decision-making processes concerning issues that relate to them.

to respond to such a drastic change of circumstances. Interviewees noted that some ACC staff had no idea what “these life-changing circumstances mean for the disabled”. For the disabled, the loss of potential earnings – and therefore claims for weekly compensation – can make a “massive difference to how [they] get on to returning to work”.

Disputes involving the disabled ought to be resolved, as Acclaim says, as quickly, fairly and empathetically as possible – especially since such individuals’ needs are greater than those of other claimants. ACC is the first to acknowledge the importance of this. A dedicated unit manages the claims of ACC’s most seriously injured clients, and serious injury advisors give case managers specialist help with these claims. ACC will, where necessary, arrange for a support person to help seriously injured claimants through the dispute process. Claimants found by a needs assessment to be incapable of making decisions for themselves will receive ACC help in seeking appropriate orders under the Protection of Personal and Property Rights Act 1988. ACC will contribute towards the reasonable costs of such a step.

Any best-practice dispute resolution scheme will prioritise disputes for the vulnerable, and ACC recognises this. But given some of the comments the review heard, it would appear there is still room for improvement – although the review was heartened to hear more widely that ACC is stepping up efforts to help the disabled in their rehabilitation.

Accredited employer programme

Legislation allows accredited employers to take responsibility for their employees’ workplace injury claims in exchange for a reduction in their levies. Such employers often use third-party administrators to assist with taking care of their responsibilities, including managing disputed claims. Each year ACC audits and reviews the claims management performance of employers in its accredited employer programme, including third-party administrators to verify that participants meet the programme’s criteria. The review was told about 330,000 full-time equivalent employees are covered by the programme.

It was neither possible, nor practicable, for the review to look at how accredited employers manage disputed claims, including their efforts to resolve them early. Several interviewees said much the same thing: that some employers and/or the third-party administrators “adopt the more traditional insurance litigation approach to disputes”. Some interviewees also highlighted what, in their view, was the poor quality of medical evidence relied on by accredited employers. Often, the employer relied on its own company doctor for expert medical evidence. It is clear to the review, however, from speaking to the New Zealand Association of Accredited Employers, that other employers/third-party administrators take a different approach and like ACC see the benefit of early alternative dispute resolution. In short, approaches vary.

The review can do no more than note the concerns. Nonetheless, the fact they were raised suggests it may be useful for ACC to collect feedback from all programme participants, on top of that gathered during the independent audit and monitoring already undertaken, to satisfy itself that all accredited employers follow best-practice dispute resolution principles,³⁴ and also, of course, that they manage claims to the standard required by the Accident Compensation Act 2001.³⁵ Some of the review’s recommendations will help to mitigate these concerns, especially those relating to use of alternative dispute resolution, changes to FairWay’s review process and access to medical evidence. Another way to ensure consistency of approaches, as well as fair outcomes for employees, is for ACC to better benchmark employers’ claims and disputes management against best practice and implement the lessons from such benchmarks. This was a suggestion put to the review by the association, and it is one the review endorses. Finally, the review simply notes that accredited employer programme employees are entitled to complain to ACC directly about the management of their claim in the same manner as a person whose claim is managed by ACC, and have the same access to the ACC complaints service.

³⁴ Accredited employers are independently audited annually against prescribed standards for health and safety and injury management. In addition, their management processes are monitored on a rolling basis at least every two years and on an ad hoc basis if an issue comes to ACC’s attention.

³⁵ It is required under the Accredited Employers Agreement.

ACC initiatives

In July 2014 (towards the end of Acclaim’s study period), ACC committed itself to improving the experience of its customers, including those declined claims. One way it planned to do this was by putting “people before process”. Another was by being “fair and open”.

Shaping our Future: Shaping our Future is ACC’s organisational strategy to improve its customer outcomes and experience. To do this, ACC has established a transformation programme, adopted a new vision and set of values and implemented intensive customer experience training. Shaping our Future is about changing ACC’s culture to be more “customer focused” and to “increase public trust and confidence”. The programme aims to remove some of the complexity that obscures what ACC does, how customers can access its services and the advice it provides. ACC acknowledges the changes are not “big bang changes happening all at once”.³⁶

Although small, some were evident to the review, particularly those related to the way some of ACC’s dedicated units deal with claims and disputes. The review found that participants have noticed a “huge improvement” in the way the elective services and sensitive claims units work with clients. Staff are “empathic, helpful and prepared to resolve matters”. One interviewee described the elective services unit as “fantastic to deal with”.

At the branch level, however, the consensus is that “it still feels like process before people”, including the way staff handle reviews and appeals. The review heard many anecdotes from lawyers, advocates and support groups about their frustrations dealing with case managers to sensibly resolve disputes. Changing the culture of an organisation, especially one as large as ACC with a workforce of more than 3,400, takes time: ACC said that changing its culture remains a key focus and is a work in progress.

Tika: Launched in February 2014, Tika (“the right thing, the right way, at the right time”) focuses on improving the customer experience and the quality of ACC decision-making. Tika puts emphasis on face-to-face conversations with clients to explain decisions before they are issued (clearly a good thing); on encouraging more customer feedback; and on reviewing ACC processes to record, analyse and learn from complaints and reviews.³⁷ (A related project is ACC’s Voice of the Customer programme, in which customer groups provide feedback about ACC’s service and how it can be better tailored to customer needs.)³⁸

ACC is also piloting a project to improve the quality of medical opinions from doctors and specialists (which will in turn improve the quality of decision-making) in relation to claims, reviews and appeals. The project also aims to ensure that the way ACC selects medical assessors and seeks medical opinions is both consistent and clear to clients, medical providers and the public (see part six).

Transformation programme: This programme involves an investment of \$456 million to integrate ACC’s people, process, information and technology to meet customers’ needs.³⁹ Until now, however, it has not, as one ACC interviewee acknowledged, “made great progress in providing information to clients in a way that is automated and simple to understand and navigate”.

It is clear to the review that ACC has put a lot of careful thought into the programme’s design to help deliver its Shaping our Future strategy. As part of the first phase, ACC undertook research into what customers wanted, recognising this was an essential step before undertaking any major system redesign. It surveyed or conducted workshops involving about 5,500 New Zealanders (including 1,400 staff). The research results were fed into the second stage – planning and design – which was completed late last year.

³⁶ Annual report, 2015, page 5.

³⁷ This project particularly stems from the 2014 report from the Office of the Auditor-General New Zealand, August 2014: *Accident Compensation Corporation, How it Deals with Complaints*.

³⁸ These include the Older Persons Advisory Group, the Serious Injury Advisory Group (meeting six times a year) and the Advocates and Representatives Group (lawyers and advocates meeting four times a year).

³⁹ ACC press release, 3 March 2016.

The delivery phase will happen in two stages over the next five years. The first stage, which is underway, focuses on improving services for business customers (levy payers) through such measures as simplified levy invoices. It also focuses on improving weekly compensation processes for clients. The second stage, to start in 2018, will focus on enhanced digital access and improving rehabilitation and return-to-work processes. Implementing this programme is a huge exercise. The intention is that, by the project's completion, all of ACC's customer groups will be able to access information more effectively online. Tangible differences clients will notice in the longer term include:

- an online portal for clients to view, manage and edit all their personal information, view their entitlements and change the date for weekly compensation payments
- an integrated electronic platform that will enable clients to get instant cover decisions when they first consult a doctor
- an upgraded website.

Changes as part of the first two programmes are starting to have some impact. ACC reported that client satisfaction levels have risen, in particular with the way respondents' claims are handled and the time taken to do this, while the percentage of respondents who strongly agreed that "ACC would look after them" has also risen.⁴⁰ And importantly, reviews and appeal numbers have fallen (see part four).

All these changes – present and pending – will not eliminate disputes. And claimants will still feel that ACC continues to put "process before people". But they should address some of Acclaim's concerns about ACC processes and, in the longer term, should lead to fewer disputes – the focus of this review – as well as a better overall experience for ACC customers.

The wider themes considered here are essentially about organisational culture and do not, nor need not, lend themselves to formal recommendations. The review is confident ACC will nonetheless give them careful consideration. Only one formal recommendation is made.

Recommendations

The review recommends:

- ACC explores ways to better collect and analyse data about claims and disputes.

⁴⁰ As measured by quarterly Research New Zealand surveys.

PART FOUR: BEING HEARD

6. Research results

What exactly does not “being heard” mean? Acclaim defines it as “the injured person [not] being able to have a competent independent person in power examine the problem they present and decide on the problem”.⁴¹ But it adds two further dimensions, one of perception – that justice is being done – and the other of genuine consideration of a claimant’s case (which may go beyond the strict legal dispute).⁴² Acclaim’s concerns under this theme extend to all three stages: ACC’s internal decision-making, FairWay’s statutory review and District Court appeals.

Acclaim details a range of concerns about the first stage – that processes have been “overlaid with complex procedural requirements before [a] claim will even be accepted”; that adverse decisions by ACC have a significant impact on claimants, their homes and family; and that the experience of dealing with ACC causes “stress” and “deterioration in health”, including mental health problems.⁴³

As to the second stage, it notes with concern the small number of reviews relative to the overall number of claims for cover or entitlements that are declined. Acclaim says it would be difficult to explain the very small proportion of reviews and appeals relative to the overall number of ACC decisions “solely according to the substantive merits of the dispute”.⁴⁴ Rather, it says there are barriers in the way of claimants at the review stage. These are principally procedural, such as whether the reviewer adopts the investigative approach required by statute (including testing of evidence); has sufficient time during the hearing; and is independent.⁴⁵

Acclaim’s research relating to stage three, the District Court process, ranges widely and includes comments by judges expressing sympathy with claimants who represent themselves, comments indicating concern with ACC’s conduct, comments (or lack of them) in judgments about fault or blame for a claimant’s injury, references in judgments to a claimant’s distress, the extent of discussion (or not) of non-covered effects of injury in judgments, and the virtual absence of any record of language or communication barriers.⁴⁶ These various matters – as Acclaim acknowledged to the review – do not demonstrate any failure by the judges to hear claimants’ cases impartially and fairly. But they do raise, it says, the question of how a claimant can truly *feel* heard if these other factors – so important to them – go unacknowledged by the courts (or by ACC or reviewers).

Finally, Acclaim says there is a fundamental problem of delay, especially with District Court appeals, that exacerbates “already difficult circumstances for those that are disabled”.⁴⁷

Acclaim’s chief focus is on the statutory review and District Court processes as directly relevant to the access to justice problem. This review, too, has focused primarily on FairWay’s processes and to a far lesser extent the District Court’s. It makes only brief comments on, and suggestions for improvement of, ACC’s internal processes at the end of this part of the report.

7. Statutory review process

The review – as does FairWay – agrees that the review process is in need of change and proposes improvements. One solution Acclaim proposes is to make regulations setting out a framework, or rules, governing the conduct of the statutory review process.⁴⁸ But first, it is necessary to outline how the current FairWay review process works and the problems that stand

⁴¹ Acclaim report, para 289.

⁴² Acclaim report, para 7.

⁴³ Acclaim report, paras 132, 136, 138.

⁴⁴ Acclaim report, para 143.

⁴⁵ Acclaim report, paras 149-151.

⁴⁶ Acclaim report, paras 298-310.

⁴⁷ Acclaim report, para 182.

⁴⁸ Sections 328 and 328A of the Act provide that, on the recommendation of the Minister, regulations can be made governing the conduct of the review (or indeed any other alternative dispute resolution) process.

in the way of its fair and efficient operation.⁴⁹ This section then outlines some reform measures. (Brief mention is made of Gresson Dorman & Co's review processes in Timaru, which is small-scale and works well.)

The FairWay process

General

FairWay is a Crown-owned company that provides various complaint management and dispute resolution services. It reports (via an independent board) to the Ministers of Finance and ACC. ACC contracts FairWay to conduct reviews and pays FairWay for this service. (Section 139 of the Accident Compensation Act 2001 gives ACC the power to engage reviewers, which is exercised independently by FairWay under its contract with ACC.)⁵⁰

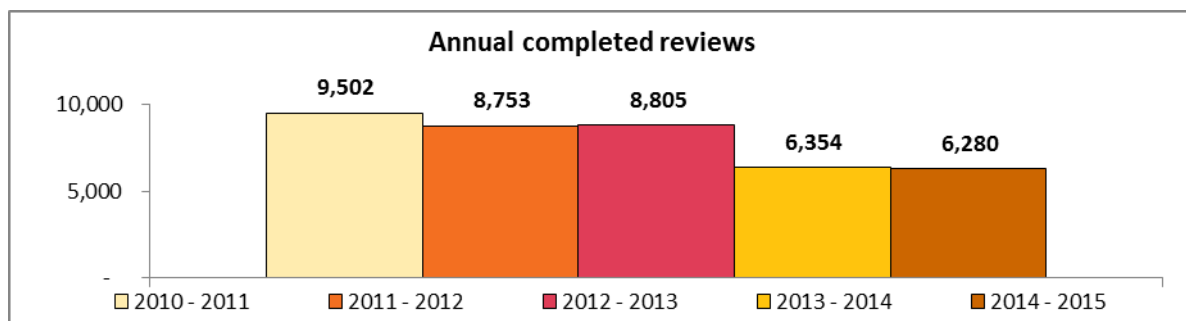
FairWay currently has 30 reviewers (20 employees and 10 contractors). Twenty-five are legally qualified and all are trained in alternative dispute resolution methods.⁵¹ One full-time mediator is also employed to mediate reviews where ACC and the claimant agree to this.

The Accident Compensation Act 2001 requires every reviewer to:

- act "independently" when conducting a review (s 138)
- conduct reviews "in any manner he or she thinks fit" but complying with natural justice (s 140)
- adopt an investigative approach to ensure the review is informal, timely and practical (s 140)
- hold a "hearing" (s 141)⁵²
- admit any "relevant evidence" whether or not "admissible in a court" (s 141)
- put aside ACC's decision and "look at the matter afresh" (s 145).

Legal representation is allowed (s 142) and case law establishes that the parties can give evidence and make submissions. Case law, too, establishes that the reviewer's role is essentially an inquisitorial one in deciding whether to revoke, modify or uphold ACC's decision to decline cover or entitlements.

FairWay completes about 6,000 reviews a year.⁵³ Numbers are falling:



FairWay and ACC consider there are two key reasons: first, ACC's greater emphasis since 2014 on improving the customer experience has resulted in fewer disputes; and secondly, an increase in the number of reviews resolved before reaching a hearing. Both organisations expect the trend to continue as ACC's new alternative dispute resolution process is used more. Acclaim, on the other hand, considers this reduction reflects access to justice problems. Without hard data it is

⁴⁹ For a more detailed outline of FairWay's process see its 28-page guideline: <http://www.fairwayresolution.com/>

⁵⁰ Since 2011, the Government has owned FairWay, largely to avoid perceived concerns of non-independence.

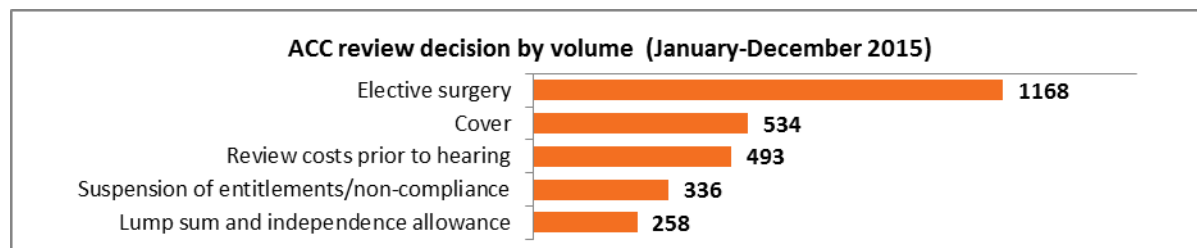
⁵¹ FairWay has a comprehensive training process for reviewers, including a three-month induction programme and monthly learning groups. It also maintains a manual of legislative and case law information for reviewers.

⁵² This is unless the review application is withdrawn or all parties agree that a hearing is unnecessary and that the matter can be dealt with on the papers.

⁵³ Completed reviews include those filed but withdrawn before the hearing.

difficult to say which view is correct. But given the sudden drop occurred about the same time as ACC began initiatives to improve the customer experience, the review considers the ACC-FairWay explanation is a credible one.

The scope of reviews is broad. FairWay's graph below (and see also appendix five for all types of reviews) shows that by far the largest proportion of completed reviews in 2015 related to elective surgery (often addressing the thorny injury versus degeneration question) and cover (addressing the questions: was there an injury and/or what caused it?).⁵⁴ Some disputes can involve medical costs running into thousands of dollars. Others may involve a claim for a few hundred dollars for physiotherapy treatment (although these types of claims are declining since ACC has stepped up its efforts to resolve low-value claims).



The process

A claimant has three months from ACC's decision to lodge a review application. FairWay typically receives the application (and ACC file) three to four weeks after the lodging date. Requiring claimants to file their applications with ACC allows the corporation to re-examine its decision (or try to resolve the claim by alternative dispute resolution) before sending it to FairWay.

ACC forwards the relevant file electronically to FairWay (historical cases can run to hundreds – sometimes even thousands – of pages), along with a list of the documents ACC (and sometimes the claimant if consulted) considers to be “relevant” to the decision. An executive reviewer (not the reviewer who will hear the matter) looks at, among other things, whether the review is within the statutory scheme and whether the case is ready to be set down for a hearing.⁵⁵ Sometimes the executive reviewer convenes a telephone conference to case-manage the file. The file is then assigned to a co-ordinator to liaise with the parties and set down the hearing.

The co-ordinator must schedule a hearing date within three months of ACC (not FairWay) receiving the review application. If not scheduled by then, the application is deemed to have been in the claimant's favour.⁵⁶ The reviewer hearing the case typically receives the file a week before the hearing. The hearing then takes place unless the claimant withdraws his or her application or ACC revokes its original decision. Withdrawals happen frequently (and are on the rise).⁵⁷ ACC data for 2014-15 shows 42 per cent of reviews were withdrawn before the hearing (34.4 per cent for 2009-10).

ACC could not provide data about precisely why 42 per cent of cases were withdrawn (it does not collect such data). But it (and FairWay) said a good many withdrawals would have been because ACC settled the case (often when new medical evidence was obtained) or the claimant withdrew, having realised (often after taking advice) that the decision was the right one – medically and legally. Acclaim and others, however, gave the review anecdotal evidence that some claimants decided the process was simply too costly, time-consuming or challenging. No doubt all three reasons were at work. But what is clear from the elective services' data (appendix

⁵⁴ Note that with the third category (review costs prior to hearing) these costs reviews arise because withdrawals are often subject to a claim for the costs incurred to that point. While ACC often does not dispute such costs, where FairWay gives a decision on these, they are done on the papers.

⁵⁵ Meaning there is jurisdiction to hear the matter.

⁵⁶ Section 146 Accident Compensation Act 2001.

⁵⁷ Withdrawals must be in writing and unconditional before FairWay will accept them. If a claimant withdraws, the reviewer must also be satisfied the individual understands the consequences of such a step.

four) is that ACC reversed 25 per cent of reviews in this area in 2014-15 after getting “new information”.

Hearings are held at 31 locations nationwide. Claimants are usually present. ACC is often represented via telephone. Hearings are typically allocated an hour unless agreed otherwise. The hearing, like the entire process, is intended to be informal and investigative, but the review was surprised to learn that many hearings involve the administering of oaths and cross-examinations. Some descend to the level of adversarial contest, which the statute plainly never intended. A real bone of contention for claimants is that they must take the oath but, where the case manager attends the hearing, he or she (mostly) does not (as ACC’s advocate, rather than witness, at the hearing).

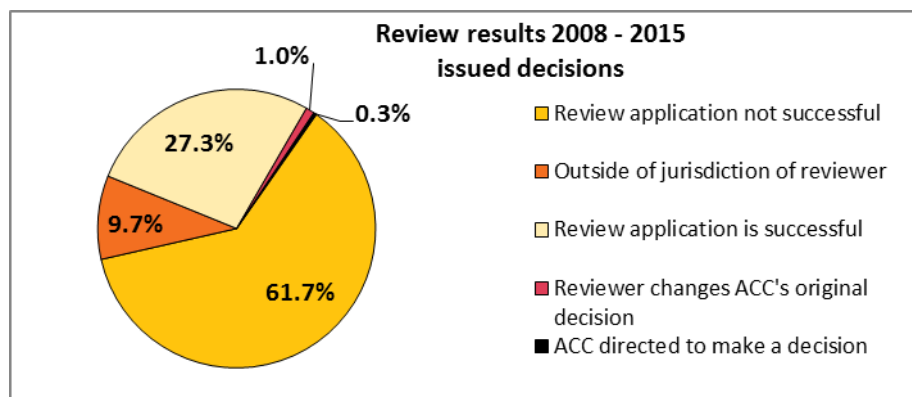
Resolution times (the period from lodging a review application to the issuing of a decision) depend on the nature and complexity of the claim, but on average 80 per cent are completed in six months. Of the remaining 20 per cent, half are completed within seven to nine months, and half within nine months to two years.

A final note: ACC has contracted FairWay to conciliate (or mediate) a small number of reviews following the introduction in December 2015 of its alternative dispute resolution process. About 60 per cent of cases handled in this way were resolved either at the conciliation conference or shortly after.

Decisions, costs and appeals

Decisions are issued within 28 days of the hearing. Reviewers have a decision template to follow, but styles differ nonetheless. The review was generally impressed by the quality of the decisions, especially when delivered in such a short time. FairWay’s involvement ends with the written decision, except for preparing a transcript of the hearing (hearings are recorded) if the claimant appeals to the District Court. Decisions are not published because there are so many, and because it would compromise claimants’ privacy.

FairWay figures between June 2008 and June 2015 show nearly two-thirds of review decisions favoured ACC, and one third claimants.



ACC’s target is for reviews to favour it in 84 per cent of cases (a measure that includes reviews withdrawn or settled before the hearing).⁵⁸

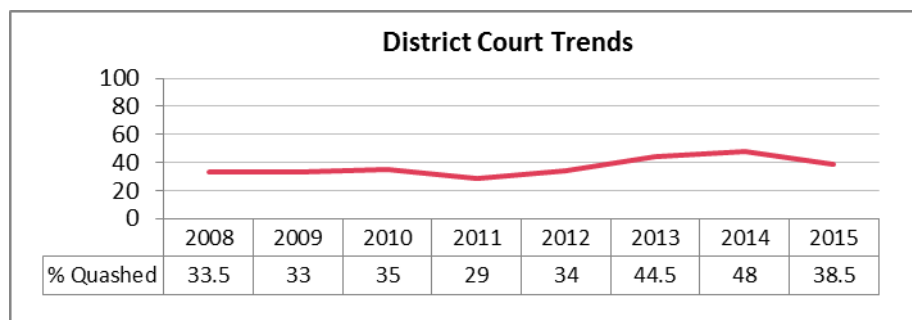
The reviewer awards prescribed costs under regulations (or “reasonable” costs for cases falling under the 1982 Act).⁵⁹ Costs must be awarded in claimants’ favour if they win the review, and

⁵⁸ See ACC Statement of Intent 2015-2019. That target was met in 2014-15.

⁵⁹ Injury Prevention, Rehabilitation and Compensation (Review Costs and Appeals) Regulations 2002, which set a scale of costs on review, including maximum awards for preparation and lodging of the review application, participation in any case conference, other preparation for the review, appearance at the hearing, relevant and reasonably necessary reports from medical specialists and other reasonably incurred expenses, such as transport to a hearing or time off work.

costs may be awarded to unsuccessful applicants as long as they acted reasonably in applying for the review.⁶⁰ FairWay said reviewers awarded costs in about 80 per cent of cases.

The percentage of FairWay decisions appealed to the District Court and overturned has been increasing. Between 2008 and 2015 the number of appeals to the court rose 34 per cent, and the number overturned rose 15 per cent. In 2014, almost half were overturned.



The reason for the significant jump in successful appeals in 2013-14 is hard to pinpoint, but FairWay attributes it partly to the appointment of full-time judges to hear appeals at about this time; but also to a rise in the number of claimants providing new medical evidence at the appeal. As one judge put it, there is “a tendency for parties to keep their experts for the court hearing, seen as the big battle”. Since then, the percentage of reviews overturned has fallen. FairWay says data for the first four months of 2016 shows the number of review decisions overturned is 24 per cent, but it is too soon to say whether this is a temporary or longer-term trend. FairWay data suggests about 70 per cent are overturned because of new medical evidence or because the court takes a different view (or interpretation) of existing medical evidence, and that the remaining 30 per cent are overturned because of a point of law or because the court takes a different view of factual evidence. This highlights how critical medical evidence is to outcomes.

Gresson Dorman & Co

Individuals who have taken part in reviews conducted by Gresson Dorman & Co said the process works very well. The firm receives nearly 100 review applications a year (about a third of which are withdrawn before a hearing). The firm’s cases are a different mix to those that come to FairWay: about two-thirds relate to suspension of entitlements or declined medical treatment costs. The balance is mainly about vocational independence assessment decisions or declined cover claims.

The key feature of the firm’s approach is its active pursuit of all medical evidence before the hearing. It will inquire whether the claimant, or his or her lawyer or advocate, has sought all possible evidence and when it is likely to arrive. It always makes a follow-up inquiry several weeks before the hearing. In the event evidence fails to arrive, the firm grants any adjournment on the strict understanding that it be available at the rescheduled date. The firm happily acknowledged its reputation as “the big bad ogre that requires the medical evidence to be due on time” and told the review that, mostly, parties comply with rescheduled dates.

To ensure maximum efficiency, it requires any submissions to be filed five working days before the hearing. It arranges for the simultaneous exchange of submissions between the parties. If one party is late, it delays the exchange. In that way, neither side gains the advantage of extra time to scrutinise submissions. Hearings are usually one to two hours. Reviewers put a strong emphasis on “questioning and probing”. They also “try to articulate what each side is saying so as to help all parties, including the reviewer, fully understand the issue in question”. Reviews are typically completed within three to four months. Lawyers and advocates said that the quality of the firm’s written decisions was high.

⁶⁰ Accident Compensation Act 2001, s 148. ACC must pay costs within 28 days of the decision to award them.

There can be no question such an approach is administratively much easier with 100 cases a year than FairWay's 6,000 a year. Nonetheless, the firm's methods provide lessons about the importance of close and active tracking of cases and a definite investigative approach.

Current problems

The need to improve FairWay's process was a recurring theme among those the review interviewed. FairWay freely acknowledges the necessity of change. Indeed, it began planning improvements in late 2014. Some were implemented in 2015 (and interviewees noted an already discernible improvement) while others are scheduled to come into effect in July 2016. The main concerns expressed by interviewees were as follows.

Independence: Acclaim's 2014 survey strongly highlighted respondents' perception that reviewers are not independent of ACC. Comments to the review echoed that viewpoint. Claimants struggle to understand how FairWay can be independent when ACC funds its review work. But service funders and service providers can stand at arm's-length from one another. Ombudsman schemes in New Zealand – the Banking Ombudsman and Insurance and Financial Services Ombudsman – are funded by their respective industries, but there can be no doubt about their obligations to provide impartial and fair decisions. Moreover, not only are reviewers legally required to act independently, but FairWay's agreements with its staff and contractors are explicit in spelling out this obligation. And reviewers emphasised that their independence is something they jealously guard. But as the review notes later, such independence should not be at the cost of consistency of process and adherence to FairWay guidance on the conduct of reviews.

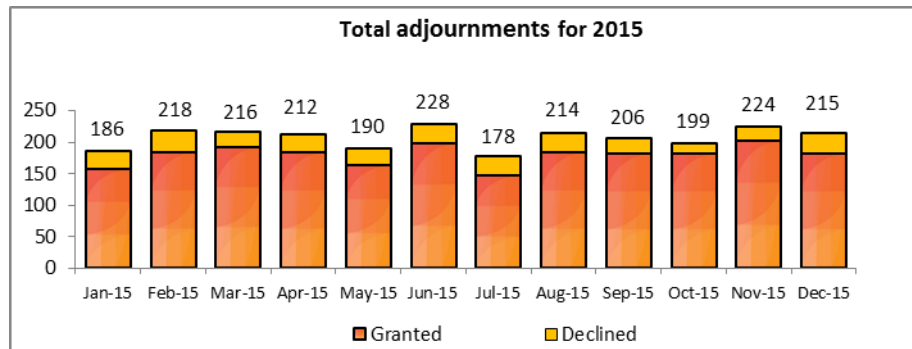
But what it is unusual here (as Acclaim, FairWay and others pointed out to the review), is that claimants must file their review application not with FairWay as the reviewer, but ACC as the cover provider whose decision is under challenge. The application is an ACC-branded form (ACC33). And it is ACC that contracts with FairWay to provide the review service and sets FairWay's key performance measures. The contract is publicly available, having been released under the Official Information Act 1982 (subject to the deletion of pricing and key performance measures). Plainly, funding is confidentially sensitive but it is questionable why key performance measures should remain confidential when these relate to customer focus, timeliness, service quality and the review decision's compliance with statutory requirements – all characteristics fundamental to any best-practice dispute resolution scheme. ACC is currently considering whether these measures should be made public.

Concerns about partiality are perceived rather than real. But they nonetheless raise questions about whether changes are needed to remove such perceptions.

Inconsistency between reviewers: Another recurring theme is the considerable inconsistency in how reviewers approach review hearings. Some are "investigative", others "adversarial". There is also a marked difference, the review was told, in what reviewers consider the statutory process allows them to do in managing the hearing. Some are prepared to give directions requiring, for example, ACC to provide further medical evidence where appropriate. This is perfectly permissible as part of an investigative approach. Others, however, are not prepared to do so, believing such directions exceed their powers. Such inconsistency in approach is unacceptable. Given the importance of ensuring relevant medical evidence is presented at the review hearing and not left for District Court appeals, any steps that ensure reviewers can direct medical evidence to be provided (whether by ACC or the claimant) deserve encouragement.

Adjournments: About 30 per cent of reviews (see graph below) are adjourned each month – often at the last minute, and even on the day of the hearing. FairWay told the review the "single biggest issue is claimants' inability to access medical evidence". Claimants have difficulty finding an expert, and even when they do, the individual is invariably busy, with the result that their specialist reports are often unavailable by the hearing date. Because the law requires an applicant to be given a week's notice of a hearing date, there is no opportunity to fill gaps that appear at short notice in reviewers' schedules. (Reviewers hear a number of reviews the same

day as they travel around the country.) The result is huge inefficiency and “severely depleted” hearing lists.



Claimants represented by lawyers accounted for 80 per cent of adjournment requests in 2015 (although these cases made up only 50 per cent of reviews). Partly this is because their lawyers often recommend their clients seek medical evidence (and hence the adjournment) and partly because of their busy workload. The review was told some lawyers repeatedly asked for adjournments (sometimes four or more per case).

To avoid cancelling a hearing date altogether, reviewers sometimes hear from the applicant and ACC on factual aspects of the case and adjourn the matter partly heard to a later date – often three or more months away – until medical evidence arrives and the hearing can resume. This is totally unsatisfactory for both sides. Interestingly, several long-serving FairWay reviewers noted that when, in earlier days, hearing reviewers were given the task of case managing the review file, the adjournment rate was nothing like today’s levels. Gresson Dorman & Co’s experience bears out the importance of active case management in minimising adjournment requests.

Withdrawal of reviews: As already noted, a significant number (currently 42 per cent) of reviews are withdrawn before hearings. This is a good thing in those cases where ACC and the claimant have resolved the dispute. However, the review heard repeated pleas for settlements to happen sooner in the process to spare claimants the time, cost and stress of preparing their case. Notably, reviewers issued 493 decisions in 2015 about claimants’ entitlements to receive costs incurred before withdrawing their reviews, including settlement.

The one-hour hearing: Many claimants feel an hour is insufficient time to tell their story – a sentiment borne out in Acclaim’s 2014 survey.⁶¹ There is an option to set down longer if necessary. But claimants who represent themselves seldom know this, and reviewers have no scope to go over the one-hour booking time in such situations without affecting those next on the schedule.

Telephone hearings: ACC’s reliance on the telephone, rather than having a representative physically present, at hearings is not particularly helpful for claimants, but the reality is there is no real alternative since costs would escalate steeply if ACC were always represented in person (especially when so many reviews involve its Dunedin-based elective services unit). Pleasingly, however, FairWay began trialling video-conferencing in 2015 and, with technology improvements, hopes this will be used more in future.

Case manager attendance: Exactly who handles a review varies widely in the different units and branches of ACC. Elective surgery disputes are dealt with by a dedicated review team. Its members are not involved in the original decisions to accept or reject surgery applications. In other parts of ACC, “designated advocates” represent the corporation – again, not the original decision-maker. In other reviews, it is the case manager (or equivalent) who handled the customer’s claim who attends the review hearing. According to ACC, however, case managers now represent ACC in only a minority of cases, almost exclusively at branch level.

⁶¹ Acclaim report, paras 135 – 150.

A commonly expressed view was that, to use one interviewee's words, "claimants don't want case managers at the hearing because they think they've got a fixed view". Other interviewees said some branch case managers showed, in their view, little empathy for claimants and their predicament, although this was in contrast to that shown by the dedicated units (such as elective services and sensitive claims) where, they said, there had been a discernible increase in such understanding.

Reviewers, as well as lawyers and advocates, said some case managers were defensive about their decisions; their submissions were too long and they cited irrelevant case law. Reviewers also told the review that hearings in the past were "better" when designated advocates represented ACC. These individuals were legally qualified or experienced senior staff who were quick to recognise when an ACC decision under review was wrong and would reverse it before the hearing. They would also work with claimants' lawyers and advocates to identify the real issues in dispute and generally ensured hearings ran smoothly.

The review file: Reviewers, lawyers and advocates all said that some review files could be "messy and difficult to follow because they frequently contained many duplicated documents that disrupted the chronological sequence". This was especially so with branch files. They noted, however, that ACC files had been getting tidier in recent times, especially from dedicated units such as elective services (which has the largest number of reviews). Extraneous documents were removed and those remaining properly indexed. These parties all spoke of the inevitable task of tidying up ACC's files (at a cost to themselves or the client) to get them into a manageable shape to study. ACC acknowledges file management remains a problem.

Reviewers' preparedness: Several interviewees said that reviewers were not reading the review file in preparation for the hearing. Nor, they added, could reviewers do so when paid only "\$450 a case".⁶² FairWay acknowledged that in the past some reviewers did not read the file until the hearing, preferring to hear from both sides in person. But FairWay now insists reviewers read the file beforehand – critical, this review considers, to "being heard".

Scheduling hearings: As previously noted, FairWay must schedule the hearing within three months of the date that the claimant lodges the review application. Since FairWay does not usually receive the application and file until three to four weeks after lodging, this puts it under pressure to contact claimants or their representatives to set down a hearing. Lawyers and advocates commonly complained that such phone calls are "frustrating" if they have not had the time, where required, to re-assemble the file, read it and understand the issues before being asked to decide on a hearing date.

Delays: It is troubling that 10 per cent of reviews are taking nine months or more to complete, and some of those as long as two years. This is far from timely.

Decisions: Readability varies between reviewers. Some decisions can be reasonably well understood by the claimant, but others cannot. A key objective must be that reviewers write decisions in plain English, free as much as possible from legal and medical jargon, consistent with an "informal" process.

Costs: Acclaim's 2014 survey noted that some claimants were unaware of their ability to ask for costs. FairWay told the review that in February 2015 (after Acclaim's report) it introduced a hearing checklist for reviewers that makes clear they must discuss costs with both parties. But plainly claimants need to be told this at the outset of the review process. ACC told the review it provided a fact sheet to all clients when they lodged a review application informing them of their ability to seek costs. Another theme was that the scale of review costs was "so low" that many claimants simply could not afford to apply for, or continue with, a review. Others might

⁶² See, for example, the New Zealand Law Society's submission on the Tribunal proposal dated 11 March 2016, page 3. FairWay told the review \$450 per review was the amount paid to contractors (not employees) and there were sufficient lawyers and other suitably qualified people to take on contract work. Also, contractors were paid more for particularly complex cases.

successfully challenge a decision, but were still left out of pocket because awarded costs fell far short of actual costs.

Pending changes

FairWay is taking steps to remedy many of these problems. In late 2014, after talking to claimants, lawyers, advocates and ACC, it began a programme of service improvements. Among the programme's initiatives is the introduction from July 2016 of an electronic customer portal that will allow both the claimant and ACC to review the case file, set dates and times for a case management conference and hearing, upload documents and request adjournments or withdrawals. Other improvements include the trialling of a case management process in which hearing reviewers, not executive reviewers, conduct conferences, to be introduced nationally from July 2016; development of a procedural checklist for use by reviewers during the hearing; a better decision-writing template to ensure consistent plain English decisions; and the extension of a peer-review trial to ensure the quality and readability of decisions.⁶³ Particularly pertinent, too, are FairWay's plans to require reviewers to adopt a more investigative approach in hearings – by orienting the hearing towards an inquiry into the facts rather than, to use FairWay's words, "allowing the parties to lock horns".

Improvements to the review process

Despite this programme of improvements, there was a widespread feeling among participants that more improvement is needed to meet dispute resolution best-practice principles. This review agrees – as indeed does FairWay – and sets out options for improvement below.

Independence

FairWay is satisfied, as is this review, that reviewers act independently of ACC. But the fact remains that some claimants – as the Acclaim report notes – think otherwise. FairWay says the perception of bias towards ACC is very real and is often raised by claimants during the review process. Indeed, as hard as it tries to emphasise its independence from ACC, claimants remain suspicious it is "following ACC's instructions".

FairWay says its 100 per cent ownership by the Government exacerbates matters because it constrains its ability to promote its independence from ACC and the Crown. A change of ownership would resolve this difficulty, but such a step would obviously require careful consideration and is a matter for the Government, not this review.

The more immediate question is whether it is appropriate, when independence (real and perceived) is such an important attribute of any dispute resolution scheme, that FairWay's contractual relationship is with the entity whose decisions it reviews. It is also hard to know whether, even if unintentionally, ACC's – rightfully imposed – time and cost performance measures may stifle FairWay's ability to innovate, improve or identify concerns about ACC's performance. Acclaim also pointed to numerous clauses in ACC's contract with FairWay that, it said, undermined FairWay's independence.

Some participants suggested the idea of inserting a third party into the contractual relationship between FairWay and ACC to enhance the perception (and substance) of independence. The Ministry of Business, Innovation and Employment, they said, was one candidate. It was already responsible for accident compensation policy and had contract management expertise as well as dispute resolution expertise within its Government Centre for Dispute Resolution. (Another candidate, some said, might be the Ministry of Justice.) Funding could be via the ministry (much as it flows from ACC to the Ministry of Justice to fund the District Court appeals process) or directly, as at present. Contractual separation could still allow ACC time to carry out its own internal review process.

⁶³ FairWay said this involved another reviewer reading his or her colleague's decision to ensure the decision was easy to read and also to encourage "collaborative learning".

ACC considers that it is unnecessary to insert a third party into its contractual relationship, suggesting that the current arrangement adequately ensures FairWay's independence.

It would be inappropriate for the review to decide between these competing contentions. Any change in the contractual relationship between ACC and FairWay – with its obvious policy implications – would be a significant step requiring careful consideration by the Ministry of Business, Innovation and Employment and the Treasury (responsible for monitoring ACC and FairWay). Also, such a change might possibly require statutory amendment.⁶⁴

But on the premise that the contract remains with FairWay and ACC, the review does consider it important to make some practical modifications to the current system:

- the application form should be reformatted to look less like a standard “ACC document”
- claimants should file review applications with FairWay (copied simultaneously to ACC to enable it review the decision internally or initiate alternative dispute resolution) unless the extra cost of doing this outweighs the benefit – a point emphasised by ACC
- the contract should be reviewed to remove any provisions that might be perceived as undermining FairWay's independence, real or perceived
- FairWay's key performance measures should be made public
- FairWay (and Gresson Dorman & Co) should make decisions on extending the three-month period for a review, not ACC.

These reforms – if only partially implemented – could go a long way towards lessening concerns about FairWay's independence and could also avoid the inevitable delays associated with contractual (or statutory) change.

Process

At a forum to discuss possible reforms, all participants agreed that the review process could be further improved by what the review calls “tracking” and “triage”.⁶⁵

Tracking. This new process would get away from the one-size-fits-all approach. Cases – as happens with courts and other dispute resolution schemes – could be classified as, say, “simple”, “standard” or “complex” and dealt with accordingly, both in terms of speed and process. Many simple cases (for example, cover for physiotherapy visits or straightforward surgery) would be dealt with informally (without oaths and cross-examination) within three months and within a one-hour hearing (possibly up to two hours for some). Fast-tracking urgent cases could be another option.

Standard cases – the less straightforward, but not the hugely complex – would likewise be handled with a fair degree of informality but with a deadline of, say, three to six months. Very complex cases, such as those about work-related gradual process injuries and vocational independence (which many lawyers said were “hugely complex” and time-consuming), would need a greater degree of formality. Some complex cases might realistically take six to nine months to complete. Cases should not, bar the very exceptional, take more than a year to complete. Oaths and cross-examination might be appropriate for such cases, but the reviewer's approach would still be within the more “informal” and “investigative” framework the statute requires.

Tracking, it must be emphasised, would be an administrative tool only for FairWay (and the reviewer) to help better manage cases. Its use would depend on a range of factors, such as the parties themselves, the nature of the issue in dispute and whether the claimant had legal representation. Early triaging to decide whether a case is simple, straightforward or complex will be required. Flexibility would also be needed. A review might begin on a standard track but on closer examination might prove more complicated. The important point, and one the review

⁶⁴ Section 139 of the Accident Compensation Act 2001.

⁶⁵ This was a half-day forum convened by the review with key participants to discuss the review process.

cannot emphasise enough, is that cases would not be treated, unlike currently, as though they were all the same.

Triaging: Good triaging requires active and continuing case management by the reviewer in the period between reading the file and the eve of the hearing. A case management conference should look to identify the real issues in dispute, what further information the reviewer or parties may need, the likely hearing time and a realistic timetable for providing evidence and/or submissions if required. Case management would also allow the reviewer to give directions, for example, that medical evidence be provided where appropriate – sometimes by ACC, sometimes by the claimant. Some complex cases may even require several case management conferences. And it would be important that such conferences were minuted.

Timetabling: The process should allow for better allocation and use of time and ensure neither party turns up on the day with new evidence or submissions. There should be greater discretion to discuss how the arguments might be presented. In a straightforward case, parties – with the reviewer’s input – might agree that no more than an outline of argument of a few pages was necessary.⁶⁶ The review heard several anecdotes about submissions for quite small claims that ran to tens of pages. There would also be greater follow-up of parties to ensure they would meet deadlines. Adjournments would be permissible where needed, but would not be the norm for 30 per cent of cases, as at present.

Early costs decision: The review was told many claimants were reluctant at the review stage to get a medical report because of the cost. They did not know, until the end of the review, whether the reviewer would accept that the application was reasonably brought, and therefore they would be entitled to costs (including for a medical report). The review proposes that FairWay reviewers be able to give an in-principle costs decision once they have all the information they need at the case management conference or shortly thereafter to decide that the claimant acted reasonably in applying for the review. (This would be subject only to any matters arising later that would warrant revoking this decision – something likely in only exceptional circumstances.)

This would not be an award of costs, but it would give claimants the certainty that costs would ultimately be awarded. Secure in this knowledge, they could obtain the medical report that might be critical to their prospects of success. It might even be possible in some cases to agree on a way to enable early payment for those lacking the means at this point to pay for such a report. The review has no doubt that for some claimants, the problem of finding the money to pay for a medical report, and thus to have any real prospects of success at the review hearing, is a very real one.

Hearings: Hearings would no longer be scheduled in one-hour blocks, a change that would require more nimble administration. But with good case management it should be possible to schedule cases according to the *estimated* hearing time. The degree of informality would, as already noted, vary with the particular case. But above all reviewers must, as the statute requires, be more investigative in their approach. They should question, probe and more generally aim to get the issue aired in a way that goes beyond merely asking the claimant to present his or her case, then ACC to present its case, then the claimant to give a reply. The review read a sample of hearing transcripts, and some were conducted with so little testing of either side’s case that claimants were unlikely to have felt that their case had been heard properly. Other transcripts, it should be said, revealed a quite different approach, with frequent helpful intervention by the reviewer. It is a matter only of ensuring reviewers fully understand what “investigative” means and that they get the requisite training. FairWay already has this under way.

Outcomes: An important attribute of a best-practice dispute resolution scheme is that lessons are identified and disseminated for educational and prevention purposes. FairWay should have this obligation, a matter discussed in the next part of the report (access to law).

⁶⁶ The elective services unit said that, rather than file “submissions”, it and the claimant would sometimes each speak briefly to the main points – “more helpful to the layperson than getting some long formal submission”.

It is hard to see that such changes would need significant extra funding. But plainly there will be some extra costs for more effective case management, peer-review work and employing staff to focus on education and prevention (the last of these amounting to perhaps \$250,000 a year at most). Because better case management ought to produce some savings as a result of fewer adjournments, FairWay and ACC will need to resolve what funding adjustments may be required, allowing for the extra time reviewers will need to case-manage their workloads and peer-review decisions. The review has no doubt more robust review decisions will lead to fewer appeals, and that the savings from this will help defray the extra outlay.

Regulations or guidelines: The question that arises is whether such a revised process is set out in regulations or formal rules (as Acclaim proposed) or in guidelines. Weighing all considerations, the review favours guidelines. Process and procedural matters – like the suggested improvements – are less suitable for regulations. And guidelines have the advantage of speed (regulation would be some time away) and flexibility if change is required. This was the clear majority view of the forum. The point was also well made that if participants did not co-operate and follow such guidelines, then regulations might be a future option. The review adds, too, that the forum also demonstrated the obvious benefit in FairWay consulting with participants on draft guidelines and indeed meeting, say, twice a year with a cross-section of participants to help identify issues, lessons and any changes to the guidelines that might be required from time to time.

FairWay intends to begin making a series of improvements to its processes by 1 July 2016. It will take FairWay some time to draft guidelines and get participants' feedback, so it may well choose to defer those improvements and introduce all the changes simultaneously. That is a decision for FairWay to make. However, publication of the guidelines should not be delayed by debate about their form. Some participants believe statutory change or regulation is the way forward, but the review is unconvinced this is necessary. It considers a degree of pragmatism and goodwill is needed at this point. Early publication of guidelines will provide certainty, clarity and consistency of process, making it vital they are put into practice as soon as practicable. After all, the sooner improvements are made, the better the outcome for claimants.

A final word about all the changes: Acclaim told the review the focus of any reform must be to "get reviewers less independent from FairWay" and at the same time to "get FairWay more independent from ACC". The review could not put it better. Its hope is that the suggested improvements, both to processes and to perceptions of independence, will achieve exactly that.

Other matters

Designated advocates or case managers: ACC's elective services unit considers there are clear advantages in having a dedicated team manage reviews. It says the advantages are many. The claimant does not feel that the person who made the decision is at the review to defend it; the relationship between the case manager and claimant is preserved; and the review manager can step away from the review process once the review is complete. Also dedicated reviewers can build relationships with reviewers, lawyers and advocates, making for better all-round management of the review as well as build up their own expertise to help ensure more consistency in outcomes. The unit regards this arrangement as providing a potential "template" for all reviews. The review agrees. But this is a matter for ACC's board and management.

Review files: As to review files, ACC says its transformation project will ultimately allow for more efficient file management. But given the elective services unit's proven ability to improve its file management, the review is confident ACC can take short-term measures to try to remedy the problem of "messy" files.

Costs: The Ministry of Business, Innovation and Employment is reviewing the regulations governing review costs. There is no doubt these costs, not looked at since 2008 when they were adjusted for inflation, do not reflect actual costs, nor are they currently a meaningful contribution to them. Many interviewees pointed to the fact that the costs award for specialist (and non-

specialist) medical reports (a maximum of \$945 and \$466 respectively) falls far short of actual costs and must be reviewed to improve claimants' access to medical evidence.

The review was given a range of report costs. A report by an orthopaedic specialist, for example, costs \$500 to \$1,500; a report by a psychiatrist costs \$1,200 to \$2,500; and an impairment assessment report costs \$1,500 to \$2,500. Non-specialist reports can often cost very similar amounts: \$1,000 to \$2,000 for an attendant case assessment; \$500 to \$1,000 for an occupational assessment; and \$1,500 to \$2,000 for a neuropsychology report.

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).

8. District Court appeals

The review does not find there are barriers to justice relating to District Court processes. There can be no question District Court judges are independent and impartial, and that claimants can rightly feel they are being heard. Acclaim has since clarified that it never sought to suggest otherwise.

The review does agree with Acclaim, however, that for claimants to feel that their case has been heard, any court hearing must take place without undue delay. In the past there were long delays. But the number of appeals yet to be heard has been falling steadily. In August 2013, the courts were still to hear 1,553 appeals. By February 2016, this had dropped to 621. Deliberately targeting old appeals has cut the average appeal age from 700 days in August 2013 to 553 days by February 2016.⁶⁷ And after taking into account the time for filing submissions, the reality is that the waiting time is now 323 days. Appendix six sets out ACC data for the number of open appeals (those waiting on a hearing) as well as a breakdown of outcomes for the period 2010 to 2016.

All review participants agree there are many reasons for appeal delays, including the high number of claimants who represent themselves; the relatively high proportion of claimants who have a mental or physical disability; the need to obtain medical evidence after filing an appeal and the lack of available specialists to provide such evidence; advocates' lack of technical skills; too few lawyers practising in accident compensation law; delays in getting legal aid; the lack of hearing time in small centres; and the intrinsically greater time needed to case-manage and hear accident compensation appeals.⁶⁸ The delays, the review agrees, are not merely of an administrative nature.

⁶⁷ This is because the total number of days includes the 182 days prescribed in the current practice note for an appellant to file submissions in support of the appeal, together with the 28 days specified for the respondent to file – a total of 210 days.

⁶⁸ See the submission of the District Court in respect of the Ministry of Business, Innovation and Employment discussion document on delays in accident compensation appeals, dated 14 March 2016.

The District Court has drawn together current practices and procedures into a single document, *Guidelines to Practice and Procedure to Accident Compensation Appeals in the District Court*, which should help mitigate the effect of some of these factors and still further reduce delay. It has already issued a draft for comment.⁶⁹

On the various subsidiary points made by Acclaim, the fact is that matters such as fault, a claimant's resentment towards any particular agency (ACC) or individual (the person who caused the injury), distress at the hearing, or language and communication matters during the hearing are seldom relevant to the legal issues at appeal. The full-time judges currently hearing these appeals are aware of claimants' needs and endeavour to hear such appeals in as informal, investigative and sensitive a manner as possible, without compromising due processes. Judges undoubtedly make remarks on such matters in the course of the appeal, but they do not – nor need not – form part of the judgment.

Acclaim did not intend – and the District Court did not take – its comments as criticisms of the court. District Court judges are the first to acknowledge that Acclaim's remarks are a "timely reminder of the sensitive nature of many of the appeals that come before the District Court and the vulnerability of the claimants bringing them, [and they] are matters that must always be borne in mind by the judge hearing a particular appeal matters in the course of the appeal".⁷⁰ In that spirit, one suggestion that the review makes is that the judges' training programme could include a segment on how to handle cases like these sensitively.

9. ACC decision-making and dispute resolution processes

Acclaim is right to express concern about the complexity of ACC's decision-making processes.⁷¹ Many of those processes, however, are outside the scope of this review, which is limited to those directly (or indirectly) relating to dispute resolution. And ACC is taking steps (outlined in part three) to remove some of that complexity. The review confines itself to five broad comments, which note concerns, but also improvements – both potential or in train.

Correspondence: Many interviewees noted that correspondence preceding a dispute (declining or even accepting parts of a claim) was often unclear and confusing. Claimants could not understand, for example, exactly what injury was covered (and for which body part cover was accepted or not); what entitlements they were eligible for or not; and what ACC meant when it referred to the need for a "causal link" between the accident and injury. One advocacy service said some claimants even read this as a "casual" link. (Many interviewees also remarked on the complexity of ACC's forms and said it would be helpful if these were simplified, "in plain language and without jargon or abbreviations".)

On the positive side, many interviewees praised the helpfulness of the internal "decision rationale" document. Since 2012, ACC has used this document to set out why it has declined, cancelled, suspended or revoked cover or entitlements.⁷² ACC's treatment injury centre issues something similar (a rationale report for complex decisions) while the elective services unit provides claimants with a copy of the clinical advisory panel's decision when declining surgical treatment. In the main, these are available only when requested. Many said these documents should be included with every letter declining a claim. Doing so, some said, might even avoid needless reviews. ACC agrees such a step may be worth considering.

ACC also highlighted its efforts – as part of its greater focus on customer engagement – to talk over decisions declining cover or entitlements before sending the claimant formal correspondence. Also, staff have been given new support tools to help them work with

⁶⁹ Attached as Appendix C to the District Court submission above.

⁷⁰ Letter Chief District Court Judge to the review dated 22 March 2016.

⁷¹ See Acclaim report, paras 519-529; also paras 207-209.

⁷² This is a document case manager's use setting out the relevant claim details, background information and the key information relied on in making its decision (including medical-related information) to decline or revoke cover or entitlement.

customers.⁷³ This is a welcome development because FairWay told the review that up to 20 per cent of review decisions stemmed from “communication problems”.

Administrative review process: Acclaim’s examination of ACC’s processes did not include steps ACC takes between the filing of a review application and the hearing (and in some cases, even before the application is filed) aimed at resolving disputes by other ways than a review. ACC conducts internal reviews which involve staff experienced in review hearings. Some panels include (or get input from) case managers; others do not. ACC is looking at developing a more consistent approach about whether, or the extent to which, the original decision-maker is involved in the internal review process. ACC has a period of 20 days for its internal reviews to give it the opportunity to explain the decision (and its reasoning) to the claimant, consider any new information and to consider whether the dispute is appropriate for alternative dispute resolution processes. ACC does not keep data on the number (or percentage) of internal reviews that result in new decisions in claimants’ favour. The review urges ACC to do so.

Alternative dispute resolution: Most significantly, in late 2015, ACC extended a trial of an alternative dispute resolution process from six branches to all regions across the country. The process (outlined in appendix seven) tries to resolve disputes before they get to a hearing, either by a facilitated conference, conciliation or mediation.⁷⁴ In a third of cases dealt with in this way, reviews were withdrawn or settled. Importantly, claimants felt they had been “heard”, and many “appreciated the help ACC was willing to give them”. They also generally “welcomed the time and opportunity to rethink and relook at decisions and consider alternative ways forward”. This should go a considerable way towards alleviating Acclaim’s concerns that some claimants – rightly or wrongly – do not feel their dispute is heard, as well as reduce the number of reviews. And to speed up resolution of low-value disputes, ACC has increased the delegation power to case managers to settle these from \$500 to \$2,000.

Settlements: Acclaim suggests ACC initiate a settlement process as soon as claimants file District Court appeals, thereby helping to reduce delays.⁷⁵ At present, ACC’s review monitoring panel usually considers whether to settle appeals after claimants have given the court and ACC their submissions. Settling cases early is always a good thing, rather than, as so often happens, on the eve of a hearing. But the reality is it is typically not until an appellant has filed its submissions that the respondent (here ACC) will truly know the case it has to meet. All the review will say is that clearly anything ACC can do to settle earlier – including use of mediation where appropriate – would be desirable.

ACC told the review it was actively reviewing all District Court appeals, including those where claimants had taken no action to progress their appeal, with the aim of establishing whether any issue remained in dispute or whether the matter could be resolved. The reality is that closer to the hearing (which may yet be several years away) many of these claimants will settle. ACC’s current targeted approach – even bringing in outside assistance if needed – to review all appeals filed before 2016 and make earlier, rather than later, determinations to settle or proceed to a hearing, could go a long way to reducing the backlog.

Acclaim says that settlement processes should be made public. Many government agencies (the Commerce Commission being one example) make public their settlement policy and processes.⁷⁶ Taking such a step may be something ACC could consider (even though it is not an enforcement agency) so its customers understand its internal processes to reconsider (including settling) claims where appropriate, if only in outline form. It would also dispel any perceived

⁷³ One such tool measures how well case managers interact with customers and helps coach them to view things from the customer’s perspective. Another enables recordings of calls between case managers and customers to be used to improve conversation skills. Still another enables a case manager’s team leader to track caseloads to ensure timely decisions.

⁷⁴ A facilitator helps to resolve the dispute without imposing a decision and such a conference can include medical experts; in conciliation, a conciliator helps the two sides reach an agreement and this can include appraising the facts and giving advice on the probable outcome at a review. Mediation is a more formal facilitation-type process.

⁷⁵ Memorandum 14 August 2015, page 6.

⁷⁶ Such a policy outlines broadly the agency’s approach, and factors it considers, in deciding to settle.

unwillingness to settle. Such a policy could also pinpoint exactly what the client must do to get a favourable outcome, such as providing an expert medical report and not waiting, as so often happens, until the review or even appeal stage to do so. As to its call for settlement data, the review agrees ACC should be tracking this – it is insightful information.

ACC litigation tactics: The review rejects Acclaim’s contention that ACC’s litigation tactics during District Court appeals are “aggressive” or adversarial.⁷⁷ Undoubtedly, ACC enjoys significant advantages as a seasoned participant in this process, but so do other ministries and Crown entities when they are involved in court action in their particular spheres of operation. The Inland Revenue Department and the Ministry of Social Development are just two examples that spring to mind. Only last year, the High Court commended ACC for its non-adversarial spirit.⁷⁸ As a repeat litigant, it is critical, however, that ACC is *seen* to act, as a model litigant. The review suggests ACC might adopt (again as other agencies do) a formal model litigant policy.

Lastly, the review has seen no evidence to support Acclaim’s contention that ACC pursues costs against litigants who represent themselves for deterrent effect. Like any party to litigation, ACC may be entitled to costs if it succeeds in an appeal and this is not inconsistent with the role of a model litigant.⁷⁹

Recommendations

The review recommends:

- FairWay develops and publishes guidelines setting out an improved review process (broadly by tracking and triaging).
- The Ministry of Business, Innovation and Employment, ACC and FairWay consider how best to address problems, perceived or otherwise, with FairWay’s independence.
- The Government increases review costs – and by more than just inflation – to ensure claimants receive a meaningful contribution to review costs.
- ACC considers ways to accelerate and improve its settlement processes, including exploring settlement of appeals as early as the process allows, better tracking of settlement data at all stages, the possible adoption of a public settlement policy (in outline form only) and adoption of a formal model litigant policy.

⁷⁷ Acclaim report, para 519.

⁷⁸ *Baker v ACC* (2015) NZHC 3343, at [45].

⁷⁹ See the *Attorney-General’s Values for Crown Civil Litigation*:
<http://www.crownlaw.govt.nz/publications/guidelines-protocols-and-articles/>

PART FIVE: ACCESS TO THE LAW

10. Research results

Acclaim's principal finding was that District Court judges differed in how, and the extent to which, their judgments referred to relevant accident compensation legislation and case law, and also that judges differed on questions of statutory interpretation, review decisions – in particular they were not always putting these aside as they should – and generally how they analysed and resolved issues.⁸⁰ These matters assumed a special importance, Acclaim said, because the District Court was the primary source of legal guidance for reviewers (and indeed ACC), given how few cases went on to higher courts.

A quarter of judgments between 2009 and 2014 did not cite the Act (although citation increased later in the six years) – despite setting the threshold for a reference as low as a single mention of “the Act” or a single citing of a section number. Judges more often explained the legislation in judgments where claimants represented themselves or used advocates.⁸¹ The researchers were surprised to find – given causation is a question of law – that many judgments did not identify a question of statutory interpretation. When they did, the judges usually resolved the question by applying case law (as precedent) or by adopting a purposive interpretation of the legislation.

Fewer than half of the judgments cited case law (although in 2010 it was only a third of judgments, rising to two-thirds by 2015). Judgments cited case law most often when claimants used lawyers (55 per cent), less often when they represented themselves (40 per cent) and least often when they used advocates (33 per cent).⁸² Decisions issued up to 2013 revealed little reasoning from case law, although this increased markedly in 2014.

The report found the “vast majority” of judgments mentioned the review decision. Acclaim said this was “significant given the statutory requirement to set aside the review would seem to eliminate the need for any reference to the review decision except in identifying jurisdiction”.⁸³ Acclaim therefore considers it is “manifestly clear” a rehearing is “not what is happening in every case” such that claimants were denied proper access to law.⁸⁴ Only 14 per cent of judgments made no mention of the review decision and only 3 per cent stated that the decision was being set aside. In the small number of cases where the court did more than neutrally summarise the review decision, comment was evenly split between criticism and commendation of the decision.

A second finding was that proper access to the law was hindered by the fact ACC-related judgments were not all available on the New Zealand Legal Information Institute website. “Public availability of the law,” it noted, “is a key component of the rule of law.” Given the Ministry of Justice’s website referred claimants to the institute if they were searching for ACC precedents, it was incumbent on the ministry, it said, to ensure the institute database “is complete, or has sufficient resources to be completed”.⁸⁵

A third area examined by Acclaim was the precedent value of District Court judgments. It said ACC’s board had resolved not to change its policies as a result of adverse District Court decisions, only those from the High Court. And given there were few High Court cases, it argued this allowed ACC to “manipulate the appeals process to obtain favourable precedents, and to settle questions which have been determined by the District Court when leave has been granted to the High Court”.⁸⁶

⁸⁰ Acclaim did not analyse applications for the District Court’s leave to appeal: Acclaim report, para 214.

⁸¹ Acclaim report, paras 219.

⁸² Acclaim report, paras 232 and 233.

⁸³ Acclaim report, para 236.

⁸⁴ Acclaim report, para 215.

⁸⁵ Acclaim report, para 231.

⁸⁶ Acclaim report, para 228. In this, it relies on ACC board minutes released under the Official Information Act 1982 but gives no detail of these.

11. Review findings

In short, for the reasons that follow, the review does not agree with the conclusions Acclaim draws from the first and third of its key points, as above. The review agrees, however, that at the time of Acclaim's study, proper access to the law was hindered by the unavailability on the New Zealand Legal Information Institute website of all relevant ACC-related judgments. But resolving this problem is now largely in hand.

District Court decisions

The review does not accept the significance Acclaim attributes to the finding that some judges make no reference to the Act or case law in their judgments. It does not mean that judges are deciding on the merits of claims without reference to these for two reasons. First, it goes without saying that judges make their decisions taking into account the Act. They cannot do otherwise. The fact they do not quote the Act, or a particular section of the Act, is incidental. Sometimes it may be necessary to refer to specific sections of the legislation, or to case law; other times not.

Secondly, judges are being encouraged to write judgments for a layperson. Training by the Institute of Judicial Studies places considerable emphasis on this point. And so judges have been encouraged to avoid legalese, and especially the quoting of long extracts from the Act or case law. But as Acclaim noted, the proportion of judgments making reference to legislation (and case law) rose during the course of the study period, in any event.

In short, the review finds nothing to suggest – merely because the way in which judges write their judgments – that claimants are denied justice. But the review does agree with Acclaim that it would be useful if District Court cases (as the primary guidance material) did refer to the relevant sections to which the case relates to make it easier for all concerned – but especially those representing themselves – to search for case law relevant to their dispute.

Another of Acclaim's findings is that some judges are not complying with a statutory obligation to disregard review decisions in hearing appeals. But this is not correct. As Acclaim acknowledges, the appeal is a *rehearing*. And a rehearing must be, as the word implies, a hearing based on the material presented before the decision-maker, and any further new evidence, albeit that the decision-maker is able to come to his or her own view "afresh" on such material. In other words, the court does not start with a clean slate.⁸⁷ Accordingly, far from criticising judges for making reference to such decisions, this review takes the opposite view – that it would be surprising, if remiss, were judgments never to make any mention of the decisions below. It is part of the record. The importance of that decision, however, will vary, depending, as it often does, on the admission of any new evidence.

Acclaim may have arrived at its view by conflating two concepts – "de novo" ("from the beginning, anew" where in its strictest sense the judge ignores the fact, and result, of the earlier hearing) and a rehearing (on the record below). Earlier in its report, it says the District Court holds a "de novo rehearing".⁸⁸ An aspect of an appeal may be de novo in the sense that the District Court can admit any other relevant evidence (not at the review hearing) including, as so often happens, new medical evidence. But this should not lead to conflating two different concepts, de novo and a rehearing. Acclaim says that reviewers and judges also employ the concept of "a de-novo rehearing". If they do, they should not be.

Case law

Inquiries by the review suggest the institute did indeed have trouble keeping up to date with District Court decisions. But since Acclaim's report it has this in hand. The institute has been reviewing its files and believes only about 100 District Court judgments, out of a database of more than 11,000 accident compensation cases, have yet to be scanned and loaded. It is working on this. Previously, institute staff received the District Court decisions from the Ministry

⁸⁷ And see *New Zealand Procedure Manual: District Court*, 2nd edition, 2013; pages 1032 to 1034.

⁸⁸ Acclaim report, para 132.

of Justice tribunals unit and ACC. Now court staff load the decisions directly on to the website themselves. The review was told the institute website had most of the High Court and Court of Appeal decisions, but some pre-2007 decisions might be missing – a matter that needs to be addressed with the co-operation of key participants, that is, the Ministry of Justice, ACC and (possibly) the courts.

In fairness, the institute's work is carried out on a largely voluntary basis by a few dedicated individuals with very limited resources.⁸⁹ The free service is heavily used – about 10 million hits in 2015 (a figure likely to double in 2016). The website hosts much of New Zealand's case law as well as legislation, law journals and law reform papers. Significantly, accident compensation is the third-highest category of cases searched on the website.

Claimants' difficulties may well have been compounded by the way judgments are catalogued, which is by a combination of year and alphabetical order and is not especially intuitive. Experienced practitioners, the review heard, could find their way around the institute's database, but claimants representing themselves struggled to carry out precise searches for files – or even to know that such searches were possible.

Review decisions and guidance material

Although not directly raised in Acclaim's current report, a key criticism made in its shadow reports is that FairWay does not make public its review decisions. Others interviewed by the review also considered these decisions should be published on FairWay's website. ACC, on the other hand, notes that publication carries the risk of breach of privacy and that District Court decisions are more authoritative (a view some lawyers shared). FairWay said it did not make them available because of the amount of work entailed in redacting identifying details from 6,000 decisions a year. The review considers there may be a middle ground between publishing nothing and publishing thousands – such as regularly publishing (on an anonymised basis) the more significant or instructive cases reviewers have ruled on (as discussed below).

As with the last point, Acclaim was critical in its shadow reports of guidance material for claimants on ACC's and FairWay's websites, and lawyers and support groups also told the review they received frequent calls from claimants who could not understand the steps to lodging a claim, let alone a review. One advocacy group told the review that disabled people did not know their rights and did not have information that was easy to read and understand. Nor was anything in braille. Another criticism was that guidance material suggested legal representation was unnecessary. Yet, with complex reviews a claimant can be at a significant disadvantage if unrepresented.

The review agrees on the need to give claimants, no matter what stage their claim is at, the clearest information possible. It allows them to make informed decisions and access the law to the full extent of their rights, and also ensures the maximum efficiency of the claims process and appeal process. Many interviewees said ACC's website contained large amounts of dense text that was often far from easy to navigate or understand. The review agrees.

ACC policy

Acclaim says ACC's board has resolved to modify its policies only in response to decisions by the High Court, never those by a District Court. ACC says this is incorrect. It says it amends its policies for a host of reasons, including in response to District Court decisions where they are not fact-dependent and have precedent value. It cites as examples two District Court decisions in 2014. In one, a court found claimants did not have to supply certain information requested on an ACC167 form, and in the other a court found ACC could not decline a claim because an

⁸⁹ Funders of the institute are: the New Zealand Law Foundation, the University of Otago, the Australasian Legal Information Institute, the New Zealand Law Society and the New Zealand Law Librarians' Association.

individual refused to sign the same form. ACC reversed its policy and also took steps to find, and put right, claims declined on the basis of the earlier policy.⁹⁰

Complexity of legislation

The Acclaim report highlights the complexity of accident compensation legislation and how it acts as a barrier to claimants seeking a review of an ACC decision or seeking to appeal against a review decision. And it canvasses the possibility of reforming and simplifying the legislation.⁹¹ Almost all of those interviewed by the review agreed that accident compensation law was complex, a situation not made any easier by the many transitional provisions relating to earlier legislation still in force. However, those same interviewees firmly believed that attempts to simplify the legislation were likely to have unintended consequences in areas well settled by the courts.

12. Improvements

Primer

The New Zealand Legal Information Institute has equivalent bodies in Canada and Australia – the Canadian Legal Information Institute and the Australasian Legal Information Institute.⁹² The Canadian institute offers a 48-page primer designed to help people representing themselves to navigate its website in preparing their cases. The primer outlines the Canadian legal system and explains what legal precedent and case law mean. Using screen shots, it describes how to use the search engine by jurisdiction, case name and legislation.

ACC should consider funding a primer on accident compensation law and cases for institute website users who intend to represent themselves. It would be a tangible demonstration of its willingness to help its customers. Pleasingly, ACC has told the review it has already taken steps to get this under way. Such a primer could also serve as a trial for primers in other areas such as family or criminal law (which might be funded by the Ministry of Justice or the Law Foundation which has as one of its objectives “providing opportunities for the acquisition and diffusion of legal knowledge”).⁹³

Review decisions, case notes and guidance material

Every tribunal builds up a body of decisions and publishes online a sample of cases (minus identifying details). The Disputes Tribunal, for example, dealt with nearly 15,000 cases in 2014-15. Its website, at the time of writing this report, features 22 cases of interest.⁹⁴ FairWay could consider publishing a selection of (anonymised) review decisions online. This would especially help claimants representing themselves, giving them an indication of what reviewers look for in making their decisions. Plainly, anonymising decisions would require considerable care to avoid any breach of privacy. One point noted at the forum was that it might be especially important to publish some of those review decisions (properly anonymised) that were rarely appealed against, such as treatment injury decisions. ACC acknowledges there may be a case for publishing (or case-noting) these types of decisions.

One practical option is for FairWay to build a search engine on its website that would enable claimants to access a sample of review decisions relating to particular subject areas. One example is the New York No Fault Personal Injury Scheme (run by the American Arbitration Association), which has a search engine to provide access to all its cases. The reader can select a “case issue” to assist in accessing helpful material. FairWay has the technology to do this. But there would be a cost. The review has already noted that it is critical FairWay draws lessons from

⁹⁰ *Powell v ACC* [2014] NZACC at 89 and *K v ACC* [2014] at 90.

⁹¹ Acclaim report, para 574.

⁹² <https://www.canlii.org/en/>. www.austlii.edu.au

⁹³ One of the foundation’s objectives is to “provide opportunities for the acquisition and diffusion of legal knowledge” and “promote the interests of the public in relation to legal matters”

http://www.lawfoundation.org.nz/?page_id=5

⁹⁴ *Ministry of Justice annual report* 1 July 2014 to 30 June 2015.

the thousands of review decisions it makes each year. Extra funding should be made available under the ACC-FairWay contract to enable it to meet this best-practice requirement.

Case notes would be another good way of helping claimants (whether in addition to, or as an alternative to, publication of a sample of cases). Only in last month's *LawTalk*, the Insurance and Financial Services Ombudsman highlighted the importance of case studies: "Our case studies are one of the most valuable resources we have. While these do not create precedents, they are useful as a guide to how we are likely to approach issues."⁹⁵ The Banking Ombudsman Scheme and Electricity and Gas Commissioner Scheme regularly publish case notes to help customers consider whether to make a complaint; and secondly to give guidance on how the decision-maker might consider such a complaint.⁹⁶

ACC acknowledges its website needs to be easier to navigate and read, and that it could do with a lot more graphics and videos. Videos especially are a good way of communicating information to claimants about how, for example, to challenge an ACC decision. A video explaining ACC's internal review process and/or its new alternative dispute resolution process would be another.

ACC is rightly concerned that "quick fixes" or short-term measures do not divert it from its singular focus on implementing its huge transformation project. But putting together good video content that could be put on its existing website now – and uploaded later to an improved website – would not interfere with that project. And the benefits of video content, going beyond dispute resolution processes, and explaining to clients simply and clearly what tests ACC applies to determine issues such as accident versus degeneration (particularly for claims that come up time and time again like back sprains or rotator cuff issues) are obvious.

An example of one organisation using video content to inform and educate very effectively is the Commission for Financial Capability. Recognising that it is video content that New Zealanders find easiest to access and understand, the commission has recently purchased the relevant equipment and employed two journalists to produce its own video content. It costs the commission relatively little and its website now features regular video content on all manner of subjects.

Examples of overseas workers compensation schemes that use videos effectively are Workers Compensation Commission New South Wales and Accident Compensation Conciliation Service.⁹⁷ Another example closer to home – although in a different context – is the animated video that the Ministry of Justice has released explaining how victims of crime can expect to be treated and what happens during the criminal justice process. An animated video explaining the review process would seem a particularly good tool for FairWay to explore, and indeed it told the review it is looking to do this.

Both ACC and FairWay could also consider other innovative ways to improve their information on dispute resolution processes. This could include tools to help claimants make their cases, one example being a "submission builder" with prompts such as description of the condition, its cause and medical evidence.⁹⁸ FairWay would seem the appropriate organisation to provide claimants with such a submission builder.

Statutory change

To make the accident compensation legislation easier to understand, one short-term option may be for ACC or the Ministry of Business, Innovation and Employment to create a tool to help claimants navigate their way around the various Acts and regulations. (The Ministry of Primary Industries provides such a tool: a "road map" for the dairy industry to navigate all relevant dairy

⁹⁵ *LawTalk*, 886, 22 April 2014, page 28.

⁹⁶ See www.bankomb.org.nz and www.egcomplaints.org.nz

⁹⁷ See <http://www.wcc.nsw.gov.au/Resolving-your-dispute/Pages/DVD-and-audio.aspx>; <http://www.conciliation.vic.gov.au/about-us/preparing-for-conciliation>

⁹⁸ An example is the "employment agreement builder" on the business.govt.nz website, which helps businesses to create contracts tailored to their circumstances.

<http://employment.govt.nz/er/starting/relationships/agreements/builder.asp>

laws and regulations).⁹⁹ In the long term, the Ministry of Business, Innovation and Employment and Parliamentary Counsel could consider including the Accident Compensation Act 2001 in the revision bill programme to make it more accessible, readable and easier to understand without changing its substantive legal effect.

District Court appeals

To make it easier for those representing themselves (but even for lawyers and advocates), it is recommended that the District Court consider how it could best help claimants find decisions relevant to their particular circumstances. One possibility would be for judges to include on the front page of their judgments the salient subject matter (for example, treatment injury, weekly compensation) and/or sections of the Act to which the case relates. The District Court told the review it would consider how it can best help claimants representing themselves to easily search for relevant cases.

Recommendations

The review recommends:

- The New Zealand Legal Information Institute:
 - is funded to provide a primer enabling users of its website to search accident compensation law and cases more easily
 - updates its website, with help from ACC and/or the Ministry of Justice, to include all High Court and Court of Appeal accident compensation decisions.
- FairWay:
 - publishes a selection of (anonymised) review decisions by subject matter and/or case summaries of relevant decisions and other guidance material
 - provides a “submission builder” on its website to help claimants prepare submissions for review hearings.
- ACC and FairWay consider other ways (such as more graphics and video content) to explain easily to claimants how dispute resolution processes work (and in ACC’s case, also how it decides particular claims).
- The Ministry of Business, Innovation and Employment and/or ACC consider creating a visual map to help claimants navigate their way around the various accident compensation Acts and regulations.
- The District Court considers how it can best help claimants representing themselves to easily search for relevant cases.

⁹⁹ Ministry for Primary Industries: Food Safety (<http://www.foodsafety.govt.nz/elibrary/industry/dairy-legislation-roadmap.pdf>).

PART SIX: ACCESS TO EVIDENCE

13. Research results

Acclaim's main finding is that claimants have difficulty gaining access to evidence, particularly medical evidence crucial to determining most disputes, and that this places them at a serious disadvantage to ACC.

Within that main finding, there are four subsidiary findings. The first is one of timing and resources. ACC collects its evidence before its decision, whereas claimants attempt to gather theirs after the decision – a “tactical advantage” Acclaim describes as “overwhelming”.¹⁰⁰ ACC, it says, “controls” the investigative process, has a well-funded and well-developed system for collecting evidence and decides what evidence it will obtain and from whom. By contrast, claimants find it challenging to obtain evidence, especially medical evidence.

The second is the question of the worth and reliability of evidence put forward by claimants during appeals compared with that presented by ACC. Acclaim's research found judges commented that evidence (especially medical) was “non-existent, not specific enough or wrong” 10 times more often about claimants' evidence than about ACC's evidence. Judges also commented twice as often on the credibility or reliability of claimants' evidence – a potential concern, it said, “in the light of the disability context that is relevant to many claims”.¹⁰¹

The third relates to the outcomes of conflicts over evidence. Acclaim found there was conflicting medical evidence in about half of all appeals – conflicts resolved in ACC's favour twice as often as in claimants', although notably this ratio varied over the study period, shifting back slightly towards claimants in later years. The report also looked at the connection between conflicts over evidence and how claimants were represented. In two-thirds of the cases where claimants used a lawyer, conflicts arose over medical evidence (which were resolved in claimants' favour slightly more than half the time). In half of the cases where claimants used an advocate, conflicts arose over medical evidence (and were resolved in claimants' favour in 15 per cent of cases). In less than half of the cases where claimants represented themselves were there conflicts over medical evidence. Resolution favoured claimants in a quarter of such cases.¹⁰²

The fourth is that judgments seldom explicitly referred to concepts of evidence law.¹⁰³ When there were such references, they were usually to concepts of onus or standard of proof, despite the fact the High Court has stressed that onus is rarely relevant to the resolution of a case.¹⁰⁴ In fact, the report found the onus concept was the most common mechanism used by the District Court to dismiss appeals. More generally, the authors note the obvious point that judges' approach to resolving conflicts included examining the actual content of the evidence, evaluating the expertise and experience of the expert giving the evidence, and assessing the evidence against legal tests.

14. Medical evidence problems

The review agrees with Acclaim that access to medical evidence for claimants is a problem and requires attention. That was also almost a universal view and experience of those interviewed by the review, whether medical specialists, lawyers, advocates, reviewers, judges or support groups. And ACC, too, acknowledges the problem.

It is a problem, however, that is simply beyond the scope of this review to address. The reality is that the role of medical evidence – and all the necessary processes and procedures that go with it – in deciding disputes (and even earlier when deciding on cover or entitlements) is complex. The range of problems outlined to the review, and also the variety of proposed solutions put to the review, suggest it would be useful for all parties to join forces to try to solve some of the

¹⁰⁰ Acclaim report, para 244-247.

¹⁰¹ Acclaim report, paras 249 and 225-259.

¹⁰² Acclaim report, paras 273-278.

¹⁰³ Acclaim report, paras 132(g) and 269-272.

¹⁰⁴ *Wakenshaw v ACC* [2003] NZAR 590.

problems – both in the shorter and longer term. The vast majority of interviewees agreed that a working group would be a good idea.

Role of medical evidence

Some brief background is necessary. ACC, as already noted, receives 1.9 million claims a year. ACC accepts cover for 1.7 million of them more or less immediately, which means that for 90 per cent of New Zealanders their experience with ACC is very satisfactory.

The remaining 200,000 claims go to one of eight specialist teams according to the nature of the claim (for example, the Hamilton-based hearing loss team or the Wellington-based sensitive claims team) to determine whether the claim is covered. There is also a non-specialist team, called cover assessment, that deals with about half of these 200,000 claims. It processes all other (more general) injuries.

Once the claim has been received by the relevant cover assessment team, claimants (or their medical professionals) may have to complete more than the standard ACC45 claim form. ACC has many forms covering many claim types, each requiring claimants to supply further details.¹⁰⁵ The claim is then assessed on the basis of the medical information to hand. It may, for example, have come from a claimant's GP and surgeon, together with other clinical notes, specialist reports, X-rays, scan results and so on.

Where necessary, case managers will seek more medical information to determine whether an accident caused the injury and whether the claimant is eligible for cover or – when determining entitlements – whether the requested treatment is appropriate. Or case managers will seek medical guidance when re-examining continuing entitlements such as weekly compensation or home help (and suspension or revocation of such entitlements comprises a significant number of disputes). Case managers often refer such matters to branch medical advisors who are registered medical practitioners from a variety of backgrounds (both generalists and specialists). Branch medical advisors help case managers to decide whether further medical information is required and, if so, help frame the questions to elicit the relevant information, particularly if ACC decides a case warrants seeking external medical advice, such as a medical assessment.

ACC purchases such assessments from medical providers in order to determine cover (and entitlements). These include, for example:

- *medical case reviews*: these determine cover or the continuation of entitlements when it is unclear whether an accident caused the claimant's injury or whether a claimant is still incapacitated by an injury caused by an accident
- *initial medical assessments*: these determine whether a claimant needs vocational rehabilitation
- *vocational independence medical assessments*: these determine whether a claimant can undertake suitable alternative employment (a "yes" answer will mean weekly compensation payments stop).

A key group is ACC's panel of clinical medical advisors (referred to as CAP). It helps the Dunedin-based elective services unit to determine whether a claimant requires surgery for the injury. It is comprised of 10 medical advisors around the country (most of whom are in active practice and employed by ACC on a part-time basis). Individual members are available to help the unit by providing advice on whether the available medical information supports a causal link between the condition to be treated surgically and an ACC-covered injury. Panel members meet weekly to discuss complex claims and may decide to seek more information before making a final clinical decision. Very occasionally, it will question a patient's recommended treatment (in which case the full panel will look at the case). Panel members endeavour to reach clinical decisions by consensus. The panel was a body frequently referred to in interviews with the review.

¹⁰⁵ There are, for example, specific ACC forms for treatment injury, dental, hearing loss, sensitive claims, work-related gradual processes and so on.

Problems

Difficulties abounded in obtaining medical evidence, said a cross-section of interviewees. The use of such evidence also had its own problems, in part, as one specialist noted, because “law and medicine are not good bedfellows”. Among the chief concerns expressed by interviewees were the following matters.

Availability: A pervading theme of interviews was the lack of available medical experts to help claimants challenge decisions declining cover and entitlements. Some experts are simply in short supply and hard for both ACC and claimants to get hold of (such as specialists in neurosurgery and occupational medical specialists). Others, to quote a commonly used phrase, had been “captured by ACC”.

Exploring what interviewees meant by this expression produced different answers. Some said they did not mean captured in the sense that by contracting their services ACC had “bought them”; rather, that specialists who did a lot of work for ACC felt it was somehow inappropriate for them to act for claimants. The result was that they seldom, if ever, took instructions from claimants.

Others used the word captured in the sense that they felt some experts – and this included ACC’s in-house experts – tended to interpret medical evidence “through ACC’s view of the world”, that is, they had a bias, whether conscious or not, in favour of ACC. A representative for one medical association considered that some experts and assessors “do develop a bias towards ACC’s perspective and when an expert does go against ACC, we call it ‘going to the other side’”. But some interviewees were unsure whether this was more a matter of perception than reality.

It is worth noting in this context that up to half of orthopaedic surgeons’ work is funded by ACC, and, in some interviewees’ eyes, this was a reason why such experts are reluctant to act against ACC. It is also worth noting that other interviewees took the view that ACC wanted independent, objective advice, and that individuals who acted for both sides, without a thought for how it might be perceived, actually enhanced their professional standing, as well as building broader experience and expertise.

Battle of experts: Many interviewees talked about a “battle of medical experts”, particularly at the review and appeal stages where, as Acclaim’s research shows, reviewers and judges must often decide between conflicting medical evidence. A typical example was said to be this: ACC declines a decision on medical grounds, but its decision rationale amounts to no more than two or three paragraphs. The claimant gets a lengthy external medical report to respond to these two or three paragraphs. ACC produces an internal or external specialist report responding to the claimant’s lengthy report. The claimant feels disadvantaged that ACC’s specialist report was unavailable to his or her specialist at the time of writing. The claimant’s dilemma is then whether to seek a second specialist’s report. Is it likely to materially shift the weight of medical evidence in his or her favour? And will it be worth the cost (because second reports are not presently covered by review costs)? The stream of reports is, in one interviewee’s words, “endless”. Some experts who regularly did reports for appeals said that there should be more “testing of the evidence”: one said “if that were done, it would soon sort the experts out and the real point in dispute would become clearer”.

Lack of dialogue: Warring experts rarely talk to one another to try to understand how they arrived at different medical opinions. Yet, as many spoken to said, early dialogue could identify why opinions had diverged, including that the ACC expert did not have all available information. The review was told that, in reaching opinions, ACC experts (including clinical advisory panel members) often did not have copies of MRIs, scans and other imaging results (which ACC pays for but does not get automatically because the claimant’s permission is necessary first). Yet such evidence will often be crucial in determining entitlement to surgery. The review was also told there was scarcely ever dialogue between a claimant’s expert and clinical advisory panel members.

Understanding of independent role: Claimants do not understand that specialists engaged by ACC are independent, that is, their code of professional ethics requires them to give independent, objective advice, regardless of the fact ACC pays for that advice. This is a common gap in claimants' knowledge about medical experts and needs to be rectified.

Internal advice prevails: Interviewees said ACC often preferred a branch medical advisor's advice over that of a claimant's specialist – something claimants found hard to understand, especially when the branch medical advisor might be a general practitioner and the claimant's expert was the treating surgeon or a third-party expert. ACC's response was that it would rely on the in-house advice if it considered the independent expert lacked the requisite expertise or if it considered the quality of the expert's report to be inferior to that of its own branch medical advisor or panel member. Several lawyers and advocates were candid enough to admit that the in-house opinion often worked to their advantage at the review or appeal: they could convince the reviewer or judge to come down in favour of their independent expert.

Delays: Claimants who succeed in securing the services of a specialist often face a long wait for the specialist's report. The result is frequent adjournments, whether at the review or appeal level. Such delays are a particular frustration – and cause of stress – for claimants whose claims are related to a continuing incapacity. Many interviewees said orthopaedic surgeons were particularly busy individuals and among the hardest to engage – a problem compounded by the fact that providing medical reports for accident compensation-related matters was a low priority for them. The ceaseless demand for reports, observed one interviewee, was a source of frustration for the specialists themselves.

Inconsistency: Many said medical assessments were inconsistent: patients could present with almost the same condition but one would get cover (or entitlement) and the other would not. One general practitioner gave the example of the plumber bending a pipe who got a hernia as a result and was covered; yet the patient shifting furniture, who also developed a hernia, was not. He could not reconcile the two decisions. Inconsistency was especially a problem, many said, where the issue is one of accident versus degeneration.

Perverse outcomes: The cost of obtaining a specialist report often runs to several thousand dollars and is simply beyond some claimants' means. So they wait until ACC declines the claim and then file a review application, at which point they are entitled to almost \$1,000 from ACC towards the cost of obtaining a report. That report may sometimes reverse ACC's decision (and notably, as discussed earlier, many decisions are overturned by the elective services unit once new information comes to hand and the review withdrawn as a result). Obviously, ACC's contribution towards a claimant's report is not the only cost it must bear. There are also its own costs and FairWay's. The review heard, too, that some claimants' lawyers and advocates would – although understandably – recommend holding their key medical evidence in reserve for the District Court where they could expect to recoup the full cost of the report, if successful. But it just may be that ACC, if given such evidence at the outset, would have accepted, rather than declined, cover or entitlements.

Leading instructions: Experts should be asked to give an opinion on a question, or questions, posed in an open, neutral way. But some lawyers and advocates said ACC case managers sometimes posed leading questions. Examples given to the review were the case managers who asked experts: "Would you agree that it is more likely than not that such and such a syndrome was not caused by the accident?" An observation from several interviews was that ACC's questions were "usually pretty good" when concerned with cover assessments, but were "poor" when seeking vocational independence medical assessments. Interviewees noted that open-ended questions were the norm when ACC and a claimant agreed to appoint a third-party expert to break a deadlock.

Reports: Specialists' reports vary in how they are written and how familiar their authors are with the relevant legislation, in particular the evidential requirements for determining cover and entitlements – tests that require care in how findings are phrased. Language such as "it is not certain that ..." is quite common and quite unhelpful because the test is not whether it is certain or not that an accident caused the injury but rather whether it is probable or not that it caused the

injury. This is where input from lawyers and advocates can ensure correct wording. Claimants representing themselves simply lack the skills to identify and correct such mistakes. Many interviewees noted the need for more education – whether at medical schools or in the form of written guidelines. The review was told that despite the fact occupational medical assessments were critical to work-related gradual process injuries, there is no longer any occupational medical training at Auckland’s medical school.

Criticisms of colleagues: Acclaim’s report notes reluctance by medical specialists to criticise their colleagues, especially when claims relate to treatment injury. Both the New Zealand Medical Association and the New Zealand Orthopaedic Association flatly deny this. The latter said “orthopaedic surgeons have no difficulty challenging or disputing medical evidence”. This may be another case of perception, rather than reality.

Impairment assessors: ACC will pay lump sum compensation when an accident results in a “degree of whole person impairment of 10% or more”.¹⁰⁶ Only ACC-trained impairment assessors can determine whether claimants have sustained such a degree of impairment (following a prescribed assessment set out in Schedule 1 to the Act). Claimants can challenge an assessment if some aspect is shown to be flawed or incorrect – a step that requires claimants to find another ACC-trained impairment assessor. The review was told some medical fields (such as psychiatry) have few ACC-trained impairment assessors. Some lawyers said the effect of restricting challengers to only other ACC-trained assessors was to create a “closed shop”. But a medical specialist said it was important impairment assessors were trained in the same way – and the same went for vocational independence medical assessors.

Several medical people said that ACC was wrong to rely on the “obsolete” (in their words) fourth edition of the *American Medical Association Guidelines*, rather than the sixth edition, which has long superseded the older edition in the United States for assessing permanent impairment resulting from injury (for lump sum or independence allowances). ACC said that in 2010 it put a proposal to the Ministry of Business, Innovation and Employment to update the relevant regulations to allow ACC to use the sixth edition.¹⁰⁷ The ministry told the review it consulted on the proposal in 2011-12, but did not proceed because of competing government priorities for regulatory change. It may be timely for a working group to re-examine this matter.

Vocational independence medical assessments: Many interviewees said claims requiring a vocational independence medical assessment were among the most “controversial and complex” of all cases because an adverse assessment could put an end to weekly compensation payments. Some said the District Court often overturned ACC’s decisions in these cases, but the review had no way of establishing if this was so. However, others noted that there had been discernible improvements in the way ACC was more recently conducting these assessments, and to its credit ACC had taken on board many of the changes recommended by its Advocates and Representatives Group. As a result, disputes had declined.

Despite such progress, further improvement was still required, some said, in the way these assessments were carried out to ensure claimants lost their weekly compensation only when they were genuinely employable and work was available. One medical specialist said the biggest flaw with vocational independence medical assessments was that they did not actually help people into alternative work, but merely came up with a “theoretical” way in which they could do other work – work for which they were not trained – in order to reduce ACC’s long-term claims obligations. And to his knowledge, no current data was available to show whether the end result of such assessments actually produced a job for claimants, or whether they simply became Work and Income beneficiaries.

Work-related injuries: A common concern of many is that the scheme will not cover a work-related gradual process injury unless the injury is physical. This is an issue for claimants who suffer disabling pain syndromes such as occupational overuse syndrome (formerly known as

¹⁰⁶ Clause 54 of the First Schedule to the Accident Compensation Act 2001.

¹⁰⁷ The Injury and Prevention Rehabilitation, and Compensation (Lump Sum and Independence Allowance) Regulations 2002.

RSI).¹⁰⁸ Yet medical evidence, they said, was moving in the direction that these conditions were physical in nature.

The review must emphasise that the concerns expressed here are those of interviewees – in some cases a large number of interviewees – but it is nonetheless beyond the review’s scope to determine their validity. Some concerns are policy-related, others process-related. Some may be describing the norm; some may be describing the exception. However, the fact interviewees consistently raised so many of them suggest that a good many are indeed well-founded. The question is what measures should be taken in response.

15. Improvements

The review heard a range of short and long-term solutions put forward by interviewees. And the review has identified others. The following deserve consideration.

Independence: To ensure claimants understand that a medical expert’s opinion is objective (notwithstanding that he or she may have been engaged and paid by ACC), it would be good practice if experts stated clearly at the outset of their reports that they abide by the code of independent experts, which is the code experts must abide by when giving expert evidence in the higher courts (as well as in some specialist courts and tribunals, such as the Environment Court). Experts declare that they are not an advocate for the party instructing them, and that they have an overriding duty to impartially assist the court (here, ACC or the review) in the area of their expertise.¹⁰⁹ Not only would this help claimants to understand that such evidence was truly independent, but it would also be a reminder, some interviewees said, to those experts who regularly did ACC work to be always sure that they did not “see things from ACC’s view of the world”. The Health and Disability Commissioner requires experts it engages to abide by the code. In the review’s opinion, so should ACC.

Rotation: To prevent any possibility, even if unintentional, of experts “falling under the sway” of ACC, one option is that ACC rotates the membership of the pool of experts it engages, whether external experts or members of its internal panels, such as the clinical advisory panel. The Health and Disability Commissioner reviews the membership of its panel every two years. It selects members based on various factors, including a requirement for nomination by the relevant college. Such rotation may dispel suspicions – if only perceived – that experts used time and again risk being “captured”.

Dialogue: Processes should be put in place, many said, to enable medical experts to confer with each other – whether before ACC made a final decision or once a claim had gone on to review or appeal. This can be very helpful in identifying the real issues in dispute. Clinical advisory panel members should be encouraged to pick up the phone and talk to the claimant’s medical expert about the claim (at present, they do this on occasions only). Interviewees suggested that, in complex cases, the reviewer should encourage or require medical experts (again, in line with the High Court or Environment Court) to confer and advise the reviewer where they agree and disagree.

Guidelines for medical reports: ACC should provide clear guidelines to independent medical experts about their roles and their reports. The Health and Disability Commissioner has issued such guidelines. (It contains information on the Health and Disability Commissioner Act 1994, the Commissioner’s processes, the role of the advisor and how the advisor should write his or her report, among other things.¹¹⁰) The review considers it to be an excellent informative guideline and it may be a useful template for ACC. At present, ACC provides some guideline material, including best-practice example reports, but a comprehensive set of guidelines is recommended.

¹⁰⁸ Not a term, however, ACC says it uses any more.

¹⁰⁹ Judicature Act 1908, Schedule 4.

¹¹⁰ *Guidelines for Independent Advisors, 31 July 2014*. This is not a public document but it is provided to any party making a request under the Official Information Act 1982.

Panels: Many interviewees considered there ought to be panels of medical assessors from whom a claimant could choose when either the Act, or ACC, requires a medical assessment (whether to determine cover or entitlement or to resolve a disputed decision). As part of its medical assessments project (see below), ACC is working to give claimants a choice of assessors on a more consistent, not ad hoc, basis.

Blind panel: One medical association suggested establishing an “independent blinded expert review group who can provide medical reports for both ACC and claimants”. By a blind group, the association means members would not know if the report had been commissioned by ACC or the claimant. The review raised this with ACC, which said the idea had been trialled, unsuccessfully in its view, in the United States.

Education of experts: Interviewees said experts should not be the only ones to be given guidelines about their role and what was required of them. Medical schools or medical colleges (which provide pre- and post-qualification vocational training for doctors) should offer more practical education for medical specialists who give expert opinion evidence on accident compensation matters. The interaction between law and medicine is complex, and more practical education, especially about the balance of probabilities test and the role of the expert, would be useful.

Templates for GPs: Several interviewees suggested a template for use by GPs when patients seek cover. It might be useful in ensuring earlier compilation of all pertinent information about an injury – including relevant past history sometimes omitted at first. GPs could, said some, more easily generate reports with the right software.

Cross-disciplinary committees: Several interviewees suggested that cross-disciplinary committees (law and medical) could be a good idea to produce agreed codes of practice. Many interviewees said the various statutory tests to determine cover or entitlements contained elements of both law and medicine. ACC has an extensive range of clinical guidelines to help medical providers and claimants, many prepared in consultation with medical practitioners (generalists or specialists). But they are not cross-disciplinary.

One interviewee said it would be particularly helpful to have a code of practice – put together by both medical and legal experts – on occupational overuse syndrome. This would not be determinative, but it could be a persuasive authority and also provide clarification about what was covered and what was not. ACC, however, says this is no longer a medically diagnosed condition. Even that debate needs resolving. Others pointed out that new health and safety legislation made it essential ACC and WorkSafe developed a common approach to work-related injuries. The review was told the two entities could take different views on whether an injury was work-related. This point just highlights the importance of ACC and WorkSafe continuing with present efforts to develop a closer relationship.

Costs of reports: Several interviewees suggested that one way to encourage claimants to submit their medical evidence at the review hearing is to guarantee that those claimants who succeed on appeal may recover the reasonable costs of reports provided at the earlier stage, where not covered by the review regulations.¹¹¹ In other words, the District Court would have the power to award disbursements incurred at both the review and appeal stages. After all, if a claimant ultimately satisfied the District Court that ACC’s decision was wrong, interviewees said, then fairness would suggest the claimant should be able to recover the difference between the actual (reasonable) cost of engaging experts at the review and the amount awarded at that stage of the process.

Access to medical experts: No one had easy answers on how to encourage more experts, particularly surgeons, to do ACC work. One medical association said: “It’s time-consuming, interrupts business patterns and is not well compensated.” Yet the no-fault accident

¹¹¹ This might cover the situation where a second or third medical report did not qualify for costs (there is currently a dispute before the District Court about whether the regulations limit costs to one report only), or the costs award did not reimburse the claimant for the full cost of the report.

compensation scheme is integral to the way injuries are treated. New Zealand is fortunate in having such a scheme, particularly when research shows that in certain fields it “has a major influence on patient outcome[s]” and is superior to “dramatically inferior outcomes for those patients under other workers’ compensation systems”.¹¹²

Interviewees also pointed out that the scheme directly benefited doctors because patients could not sue them for medical negligence. Therefore, they said, the medical profession ought to own up to its responsibilities and help claimants when everyone acknowledged the difficulties they faced in accessing medical evidence. Some discussion among the profession might produce incentives for more medical specialists to undertake ACC work on behalf of claimants. Could it be a condition of providing expert reports to ACC that experts must also take on claimants’ work? Could ACC work count as credits for the continuing professional development that medical specialists must undertake? Undoubtedly, there will be other options worthy of exploration.

ACC improvements

ACC already has various projects and other initiatives under way to respond to many of these concerns. One, called the medical assessment project, was established in 2013 in response to public concerns that ACC obtained assessments from a small number of preferred external assessors. In essence, the project aims to give claimants a choice of medical assessor and increase the overall quality of such assessments. A key change, to take effect in July 2016, is that ACC is introducing a new contract with medical practitioners to improve the quality of medical assessments. ACC says the new contract will ensure more consistency in what case managers ask of assessors, more consistent and better-quality medical advice, and less variation in costs and should go a long way to addressing concerns about inconsistency in clinical decisions. An e-learning video for medical assessors is also planned to improve report-writing.

ACC introduced a vocational medical services contract last year. It is an open contract. This means suitably qualified and experienced medical practitioners can apply to hold a vocational medical services contract at any time. The hope is that this will increase the pool of practitioners able to provide such assessments. An added benefit, ACC says, is that it should enable customers to access specialist clinical support at any stage in their rehabilitation and also ensure consistent quality assessments nationwide.

ACC is also piloting the use of external medical panels for complex cases. The idea is to bring medical specialists together to reach a consensus about diagnosis, causation and management of clinically complex cases. Established in December 2013, it is due for completion, and evaluation, in September 2016.

Finally, ACC’s transformation project should ultimately make a big difference to the interaction between ACC and GPs, including the consistency and quality of the information the GP gives to ACC in support of his or her patient’s claim. The prospect of real-time cover decisions is an exciting development.

A working group

The review has come to the conclusion it is important all participants join forces to solve these problems in the interests of both claimants and ultimately ACC. Finding solutions to challenges is not something one entity can, or should, do on its own. And greater access for claimants to medical expert evidence may ultimately lead to better decision-making and fewer disputes. ACC itself acknowledged that “the factors contributing to this issue [access to medical evidence for claimants] are complex and there is no easy resolution”.¹¹³

¹¹² For example, see Peter Robertson: *The Influence of the Fault Compensation on Functional Outcomes after Lumbar Spine Fusion*, *Spine*, Volume 40, Number 14, page 1140.

¹¹³ Letter ACC to the review dated 29 April 2016.

ACC is concerned that any such working group does not go back over ground it has already covered (as briefly outlined above). That is a reasonable request and there should be no need to do so. But round-table dialogue may yet be useful in fine-tuning the intended improvements or countering misperceptions already forming about these projects. Some interviewees, not understanding the medical assessment project in any detail, were concerned that “contracting” specialists would only heighten concerns about erosion of specialists’ impartiality.

The review recommends that ACC convenes a working group with an independent chair to examine the myriad of problems in this area. It should comprise representatives from ACC, the Ministry of Business, Innovation and Employment, the New Zealand Association of Accredited Employers, medical groups (the New Zealand Orthopaedic Association, New Zealand Medical Association and College of General Practitioners all said they would play their part to help fix the problems), support groups (for example Acclaim), lawyers and advocates (and possibly a member of the District Court bench).

It would be for ACC to decide how best to put together such a group. All the review notes is that ACC would need to provide adequate resourcing to enable the group to complete its work. Short-term and possible longer-term solutions (particularly for enlarging the pool of medical specialists available to claimants) should be examined. Four to six months would seem sufficient for such a group to undertake and complete its work. And the review detects that a by-product of this group’s work could be the fostering of the greater dialogue and collaboration between all participants to improve the fairness, timeliness and consistency of claim decisions, both before and after disputes. That, too, may go some way to helping ACC build the trust and confidence it wants, and needs, from its many stakeholders, including, most importantly, its clients.

16. District Court appeals

As already noted, Acclaim makes a range of observations in its report about how judges resolved evidential matters in the sample judgments it researched and analysed. The review can address these matters very briefly.

First, this review considers there is no foundation for any concern that judges may be rejecting evidence relied upon by claimants on the grounds the claimant is disabled.¹¹⁴ As the District Court told the review, to the extent judges may reach adverse conclusions with regard to the claimant’s evidence (as opposed to ACC’s), the outcome is just as likely to relate to the lack of legal representation or a lack of medical specialist advice (matters, of course, considered elsewhere in Acclaim’s report). Indeed, that explanation for the rejection of such evidence is supported by Acclaim’s own finding that conflicts in medical evidence occur far more (in two-thirds of cases) when claimants use a lawyer than when they represent themselves (only 15 per cent of cases). Helpfully Acclaim has since clarified with the review, and the District Court, that it did not seek to allege that judges were rejecting evidence on the grounds of a claimant’s disability. But it maintains the view that there is no reason to suggest that international studies on the experience of people with disabilities would not apply in New Zealand.¹¹⁵

Secondly, plainly judges will adopt a variety of approaches to resolve conflicts in evidence (factual or medical). The authors themselves note the obvious, that judges’ approaches to resolving evidential issues will depend on the particular case and the matters at issue. As to their finding that judgments seldom explicitly refer to concepts of evidential law, that is not surprising when (as noted earlier in the discussion on access to law) judges are being encouraged to write judgments for an ordinary reader. The fact judges may not refer explicitly to such concepts does not mean they do not take these into account in reaching their decision.

Thirdly, the judgments under review do appear to have used the onus or standard of proof (the balance of probabilities) as a “common tool” to dismiss appeals, but this is no longer so.¹¹⁶ The District Court told the review the current full-time judges put huge focus in their judgments on

¹¹⁴ Acclaim report, paras 224-247.

¹¹⁵ Acclaim report, para 251.

¹¹⁶ Acclaim report, para 271.

resolving the essential issue – whether the injury was caused, or not, by the accident – without resort to the onus of proof. Only where the evidence is “evenly poised” may the onus be relevant.

Fourthly, conflicting evidence is as much an issue in District Court appeals as it is in reviews. The question arises whether there are any practical improvements to District Court processes and procedures that would help resolve such conflict. The review has already noted the suggestion from many interviewees that experts should confer and identify where they agree, and disagree, on medical issues. The ability to do so – in appropriate cases – might be something that could be usefully added to the District Court’s proposed guidelines to practice and procedure for accident compensation appeals.

Fifthly, the District Court’s submission to the Ministry of Business, Innovation and Employment on the future of the accident compensation appeals jurisdiction contained a suggestion that judges have the power to commission medical reports for claimants before hearing appeals.¹¹⁷ Such a power, it said, would “in appropriate cases improve access to justice for claimants to enable particular reports in reply to be commissioned if appropriate, when a claimant either does not have the resources to commission such report or the specialist refuses to engage with the claimant and would ensure the court has all available information prior to the hearing taking place”. Given the concerns the review heard about the inability of some claimants to obtain medical evidence, there is merit in this option.

Finally, several interviewees noted – and the District Court confirmed – that the court rarely uses its power under section 157 of the Accident Compensation Act 2001, which gives it the power to appoint an assessor to sit with a judge on certain cases. Some lawyers consider an assessor would be useful in particularly complex medical cases. The District Court said there was often a practical difficulty in the way: an assessor has the expertise to probe, and hopefully resolve, conflicting evidence from medical experts, but more often than not medical experts do not appear in person to give oral evidence. It is presented in the form of written reports. The review acknowledges that the procedure has its limitations, but it might be a useful option, especially if medical experts were to attend in person, in complex cases.

Recommendations

The review recommends:

- ACC convenes a working group to address the policy and process-related problems with accessing medical evidence.
- Consideration be given to District Court judges having the ability to commission an expert medical report for claimants who are unable to do so where appropriate.
- Reviewers and District Court judges consider directing experts, where appropriate, to confer and identify where they agree and disagree on medical issues.

¹¹⁷ See the discussion at part four, page 32.

PART SEVEN: ACCESS TO REPRESENTATION

17. Research results

Acclaim's central finding is that the 60 per cent of claimants not represented by a lawyer in District Court appeals were disadvantaged in "navigat[ing] the complicated process of litigation" compared with ACC, which had legal representation in every case it examined.¹¹⁸ Further, the outcome of cases was linked to the type of representation claimants used.

Those who used lawyers were successful 50 per cent of the time; those who represented themselves were successful 30 per cent of the time; and those who used advocates were successful 20 per cent of the time.¹¹⁹ It also found that the "vast majority" of claimants were too well off to qualify for legal aid, but not well off enough to afford a lawyer unaided.¹²⁰ (It is worth repeating here that the scope of the review prevents any consideration of the availability of civil legal aid.)

Applications for leave to appeal doubled during the six years covered by the study, from 14 in 2009 to 30 in 2014. The six-year total was 190 applications. Claimants brought all but four of these. Those who used advocates or represented themselves made up nearly 60 per cent of applications. All but two failed. Those who used a lawyer – the balance of 80 applications – were successful half of the time.¹²¹ Acclaim found the market for accident compensation lawyers had "failed", with the result that claimants found it difficult to obtain representation.¹²²

The report also found that ACC drew heavily on a small pool of lawyers whose resulting depth of experience was "likely to give them a better knowledge of the courts, the personalities involved, the developing jurisprudence and the arguments that are likely to be successful".¹²³ It said competition among the lawyers ACC engaged was not "particularly open".¹²⁴ (This minor point can be dealt with now since there is nothing to suggest this is so. ACC, like any organisation, can be expected to choose its legal representatives wisely and aim to contain its legal spending.)

18. Valid findings

The review agrees with Acclaim that the lack of representation is a barrier to claimants seeking to appeal against ACC decisions. The barrier exists because of a considerable imbalance in the resources ACC can bring to bear on cases compared with those available to claimants, especially in a very tight legal market. Those who represent themselves are therefore at a disadvantage (as Acclaim's statistics show).¹²⁵

It should not be inferred, however, that claimants represented by lawyers will necessarily do better than those who represent themselves. The District Court told the review two other factors also came into play: first, claimants with lawyers were often likely to also have the resources to obtain specialist evidence, and it was frequently this evidence – rather than the lawyer's skill – that swayed the case in the claimant's favour; and secondly, it was not uncommon for lawyers to withdraw from unmeritorious cases, which claimants pursued alone to their unsuccessful conclusion. The elective services data also shows that claimants represented by a lawyer or advocate make up nearly two-thirds of withdrawn reviews (see appendix 4).

That aside, the New Zealand Law Society wrote to the review, putting it this way: "Despite the original intentions of the scheme, there is a need for lawyers with expertise in ACC law to assist people who wish/need to exercise their rights to appeal ACC decisions. Self-representation is not

¹¹⁸ Acclaim report, paras 7(d), 405 and 417.

¹¹⁹ Acclaim report, para 418.

¹²⁰ Acclaim report, para 444.

¹²¹ Acclaim report, paras 427-430.

¹²² Acclaim report para 148b.

¹²³ Acclaim report, para 430.

¹²⁴ Acclaim report, para 446.

¹²⁵ See also *Access to Justice Arrangements*, Australian Productivity Commission Inquiry Report, 5 September 2014, chapter 14.

a solution for a number of claimants because the ACC regime is complex, and there are information asymmetries and inequalities of litigation funding and litigation experience between ACC and claimants.”¹²⁶ It went on to say that the “low number of lawyers specialising in ACC law has resulted in an access to justice issue for claimants ... and we would encourage further work in this area to address the causes of this problem”.

Some of the ways – even if small – to address this problem have been discussed in other parts of this report, such as resolving disputes through greater use of alternative dispute resolution processes, improving the review process, providing more guidance material to claimants, and teaching them how they can navigate the New Zealand Legal Information Institute’s database. Others, such as more help for advocacy services, are set out below. What is clear is that increasing the number of lawyers willing and sufficiently able to undertake accident compensation work is no easy task. In the meantime, other measures should be taken.

Few experienced lawyers

Lawyers working in the field of accident compensation law told the review the pool of specialists available to help claimants was small. How small they could not say exactly, but they knew of only a handful of modest-sized firms and sole practice lawyers specialising in the area. They worked in Auckland, Wellington and Dunedin, and all ran busy practices and had high caseloads. The Law Society told the review its data indicated that only 35 out of about 12,000 lawyers (or less than 1 per cent) spent more than half of their time doing ACC work. Another 30 lawyers spent up to half of their time doing such work. The average time in practice for the 35 lawyers is 21 years.¹²⁷ Of course, only some of these lawyers act for claimants, so the pool of claimants’ lawyers is even smaller.

The work itself was certainly interesting, lawyers told the review, and also offered opportunities to appear at hearings, which was useful experience to acquire in its own right. The difficulty, it seems, stems ultimately from the complexity of accident compensation legislation. It requires considerable skill in managing specialist evidence, and more fundamentally it requires a great deal of experience to practise competently in the field. It is not work lawyers can “easily dabble in”, as one interviewee put it.

This means devoting considerable time and resources to training young lawyers in accident compensation law. Some firms specialising in the area simply do not have the time and resources to do this and thereby encourage younger lawyers into the specialty. Training requires expert senior lawyers to supervise junior lawyers. And those willing to make such a commitment do not always find their investment rewarded. One interviewee said lawyers with litigation experience were highly sought after by big law firms, and as a result “we train them up and they disappear”. Such a “flight of talent”, said the Law Society, “risked eroding the incentive for firms and senior lawyers to train junior lawyers if they do not recover their often considerable investment in training junior lawyers”.

A contributor to the lack of growth in this area of the profession, many said, was the inadequate remuneration for such complex, time-consuming work. Lawyers said that the legal aid payment system “provides inadequate and patchy funding” (a matter, however, beyond the scope of this review).

Advocates

Claimants sometimes engage advocates instead of lawyers to provide advice and appear on their behalf at review hearings and District Court appeals. Some advocates have a law degree, but many do not (and for quite a few their qualification is their own experience in fighting with ACC for cover or entitlements). Advocates are essentially unregulated, other than by general legal duties such as those contained in contract or privacy law. Advocates are required neither to

¹²⁶ Letter New Zealand Law Society to the review dated 3 May 2016.

¹²⁷ Data provided to the review by the New Zealand Law Society.

undergo training nor to hold a certificate of any kind. There is no occupational regulator overseeing advocates, as is found elsewhere.¹²⁸

That said, the review spoke to, and heard of, some highly competent advocates. But the review also heard numerous unsettling anecdotes from many of the interviewees about advocates, who:

- charge claimants excessive fees (in one case, \$40,000 for a review hearing)
- charge clients a percentage of their weekly compensation as a fee
- pose such a risk of unruly or disruptive behaviour that FairWay must station a security guard at review hearings they attend
- give claimants unrealistic advice and take on cases lawyers have already withdrawn from because of a lack of merit
- fail to develop a theory of the case and manage the evidence competently so as to maximise the client's prospects of success
- are former disaffected claimants who take on cases to "have a go at the system" rather than act in the best interests of their clients.

Acclaim's finding that claimants are more likely to be successful in District Court appeals if they use a lawyer rather than represent themselves is no surprise. What is surprising – and also a matter for concern – is the finding that claimants are less likely to be successful with, rather than without, an advocate (a 20 per cent success rate with an advocate compared with 30 per cent if appearing alone).

The review can only speculate about why this should be so. One explanation put to the review was that many lawyers withdraw from cases they consider have no prospect of success, but claimants in such cases sometimes press on at the advice of less scrupulous advocates. That said, some advocates have very high success rates. A second explanation was that the small size of the sample of District Court cases analysed (15 per cent) made the 20 per cent statistic unreliable.

Putting this issue aside, the use of good advocates to help claimants at a review hearing or District Court appeal is, on the whole, a much-needed resource, given that few lawyers are available to represent claimants.

Advocacy services

ACC-funded services

There is some help for claimants in the form of two free advocacy services ACC funds as part of its obligation to deliver fair and effective services.¹²⁹ These services (which are more advisory than advocacy in nature) are laudable and highly regarded by users. However, they can make only a very limited impact, given the number of individuals who have cover or entitlements declined and also given the dearth of experienced accident compensation lawyers and the deficiencies with some advocates. That said, advocacy services offer great potential to lower the barrier created by an inadequate supply of lawyers.

As part of its obligations under the Act, ACC funds the Workplace Injury Advocacy Service and Linkage Ltd. These agencies offer free advice only and do not represent claimants at review hearings or District Court appeals. ACC told the review that restricting their services to pre-review advice helped ensure "their investigations and advice remains independent". The review does not consider any such restriction is required to preserve independence. Indeed, the review was in no doubt from its interviews with both services that their overriding aim was to help claimants in an impartial way. But there may be other reasons – such as ensuring a focus solely

¹²⁸ For example, individuals advising on immigration matters must be licensed as immigration advisers and are subject to the requirements of the Immigration Advisers Authority and the Immigration Advisers Complaints and Disciplinary Tribunal.

¹²⁹ Section 262(4) of the Accident Compensation Act 2001.

on helping claimants resolve disputes – that warrants restricting advocacy services to the pre-review stage.

The Workplace Injury Advocacy Service is an arm of the New Zealand Council of Trade Unions, employing one full-time advocate in Auckland who provides advice and help over the phone about claimants' entitlements. This person also works with union officials, ACC case managers and others to get the best outcomes for clients. The agency mostly helps union members. Satisfaction with the service has been consistently high. In a 2014 survey, 81 per cent of respondents said they found the service useful, and 87 per cent said they would recommend it to others.¹³⁰ It deals with about one new case a day.¹³¹ Cases range from straightforward to complex.

Hamilton-based Linkage Ltd also employs one full-time staff member working by phone to help claimants around the country through the claims process. This can include contacting case managers. Its workload averages about 50 cases a month (consisting of new and existing claimants). User satisfaction is high. In a 2015 survey, 70 per cent of respondents said they found the service useful, and 80 per cent said they would use it again.¹³²

ACC used to fund a third agency, the Brain Injury Association of New Zealand, to provide free advocacy services to ACC claimants, but that ended in May 2011 when the association was no longer able to continue the service.

The funding of such services was endorsed by an Office of the Auditor-General report on ACC's complaint services. The report found that giving complainant's access to free advocacy "makes sense" because "advocates better understand ACC processes and terminology and can easily access ACC staff".¹³³ ACC's funding covers salaries and administration and is, in the scheme of things, very modest. ACC's funding of the two services was \$125,000 for Linkage Trust and \$159,960 for the Workplace Injury Advocacy Service for 2015-16.

The Workplace Injury Advocacy Service said its existence was not widely known but could be more widely promoted. ACC's website lists its contact details on a page dedicated to advocates rather than claimants.¹³⁴ (The same goes for Linkage Ltd's details.) Both agencies said their workloads were high – a claim backed up by data on case volumes – and they could easily expand their services, but would need the funding to do so. Of course, promoting these services without giving them more resources would merely overload them.

Southern Cross

The involvement of private healthcare insurer Southern Cross Health Society on behalf of members seeking to appeal against ACC decisions underscores the complexity of navigating the ACC system. The society employs a small team of legally trained advocates to represent members at review hearings. Most of the 300 or so review applications it files each year are about elective surgery requests ACC has declined. The society is successful in about 75 per cent of cases, which goes to show the difference good advocacy (as well as medical evidence) can make for claimants.¹³⁵ The review was told the society heard comments from members daily about how "they don't know what they would have done" without its help.

Some exemplars

Interviewees often cited the National Health and Disability Consumer Advocacy Service as an excellent example of a free, independent and properly funded advocacy service. The service's

¹³⁰ *Workplace Injury Advocacy Service user satisfaction survey 2014*, page 12.

¹³¹ Between 6 June 2012 and 28 January 2016, the Workplace Injury Advocacy Service dealt with 1,463 cases, an average of 34 cases a month.

¹³² *Linkage Trust annual client satisfaction survey results report*, March-April 2015, pages 15 and 16.

¹³³ *Accident Compensation Corporation: How it deals with complaints*, August 2014, Controller and Auditor-General, para 3.25.

¹³⁴ http://www.acc.co.nz/making-a-claim/for-advocates/WIM2_065285

¹³⁵ *Southern Cross Health Society 2015 annual report*, page 6.

roles and responsibilities are set out in the Health and Disability Commissioner Act 1994. The director of advocacy, who reports to the Health and Disability Commissioner, contracts with the National Advocacy Trust for advocates to provide advocacy services and also monitors the quality of that work.

Forty-six advocates at 23 offices around the country help consumers resolve complaints about health and disability services, and in more than 90 per cent of cases they are successful.¹³⁶ The organisation received nearly \$3.4 million for 2015-16.¹³⁷ Admittedly, the advocacy service has a complaints resolution focus, whereas ACC must assess a claimant's statutory entitlements. But it nonetheless shows what could be done to support and empower claimants.

The Australian state of Victoria has a free service to help claimants resolve work cover disputes through conciliation. WorkSafe Victoria funds WorkCover Assist to provide this service.¹³⁸ In 2011-12, WorkCover Assist advocates handled 5,300 disputes. Advocates explain the process, provide technical assistance, identify useful information for the conciliation, and attend the conciliation conference. Advocates are not lawyers. Legal representation is not allowed at the conciliation conference unless all parties agree.

19. Improvements

Advocacy services: There is an urgent need for more ACC-funded independent advocacy services to help claimants steer their way through the dispute process. Broadly, consideration could be given to:

- providing more funding to existing free advocacy services so they can expand
- encouraging organisations with relevant or related expertise to provide advocacy services
- giving greater (and correctly placed) prominence on ACC's website to organisations offering advocacy services, including details about the services they offer and how to contact them.

The review – like many interviewees – considers the Health and Disability Commission Advocacy Service provides a valuable template with a nationwide service. The Act provides – and clearly intended – that ACC support claimants via ACC-funded advocacy services. An expansion of such services would give claimants the support and assistance they need. An ACC-funded nationwide advocacy service would be a tangible demonstration of ACC's new vision and values (to be "customer focused" and put "people before process"). At the same time, ACC is likely to benefit: good advocates are more likely to give claimants realistic advice and work co-operatively to resolve disputes.

One option, like the ACC-funded advocacy services, is that advocates support claimants up to, but not at or after, the review hearing. Another is that advocates help claimants at the review hearing. This topic needs careful consideration. The latter option has benefits and drawbacks. Assisting and advocating for a claimant pre-review, and at a review hearing, are different, and require different skills. The review is inclined to allow an advocate to help a claimant where ACC and the claimant agree to try to resolve the dispute through alternative dispute resolution processes like conciliation, much like WorkSafe Victoria advocates attend conciliation conferences, but not hearings. The Workplace Injury Advocacy Service told the review that in the past (although less so of late) it had attended mediations involving ACC and the claimant as an alternative to a review hearing, an approach it believed had been useful for claimants as well as ACC.

Moreover, ACC-funded advocates could always – as the Workplace Injury Advocacy Service does now – identify when the complexity of a case required representation at the review hearing

¹³⁶ *Health & Disability Commissioner annual report*, pages 19 and 21. Survey results showed 93.5 per cent of consumers and 85.5 per cent of providers were satisfied with the service they received.

¹³⁷ *Ibid*, page 71.

¹³⁸ WorkSafe Australia is a health and safety enforcement and workers' compensation body. It is responsible for preventing workplace injuries, enforcing health and safety laws and managing a workers' compensation scheme.

and refer the case to an advocate or lawyer. In this way, restricting advocacy services to the pre-review stage would not deny claimants access to representation.

Equally, lawyers told the review these schemes would mean that, where appropriate, they could refer claimants to a local advocacy service in the knowledge the dispute would be competently handled and help reduce their busy workloads and all the pressures that go with this, including delayed hearings. Lawyers told the review they often had to turn away potential clients because of such workloads. As one lawyer said, more funded advocacy services would be a “win-win for all of us – claimants, ACC and lawyers”.

A pragmatic approach may be the staged introduction of such a service, beginning with pilot services in the regions, much as ACC did with its alternative dispute resolution pilot project. Another option is to fund several specialised advocacy services, such as for claimants with a brain injury or treatment injury (and possibly in these complex types of claim an advocate could support the claimant at the review hearing if he or she would otherwise be unrepresented). Or another option still is a combination of both. Just as with reviews, the approach need not be a “one size fits all”.

Clearly, establishing a nationwide advocacy service would require careful examination of scope, criteria to qualify for funding, training, oversight and so on. But none of these is an insurmountable obstacle. ACC’s oversight and funding of the Workplace Injury Advocacy Service, although very small in scale, seems to raise no difficulties. Importantly, despite that funding and oversight, there appears to be no perception of compromised independence, as abounds with the review process. That is probably not surprising because ACC funding and monitoring of advocacy services for claimants is clearly different from funding and monitoring the contractual performance of the decision-maker in disputes over its decisions. There appear to be no such concerns with the Health and Disability Consumer Advocacy Service.

Southern Cross Health Society told the review it was unlikely to expand its service beyond its members, but it would be prepared to offer guidance about how best to set up and operate an advocacy service, based on its own successful model.

Quality of advocates: Occupational regulation could be one way to lift the calibre of privately funded advocates. Immigration advisers, as noted earlier, must be licenced.¹³⁹ Such regulation, however, has its costs, both to establish and to maintain, and much of that burden would fall on advocates, who would inevitably pass it on to clients. Alternatively, greater ACC funding of high-quality advocacy services (backed up by appropriate monitoring and reporting) might lessen the need for claimants to seek out poor-performing and privately funded advocates in the first place. Some of the improvements previously discussed may also have the effect of helping to discourage the use of poorly performing advocates. For example, reviewers’ ability to give early cost decisions would allow them to signal early on to a claimant who had been poorly advised by an advocate and brought an application unreasonably that an award of costs at the end of the process was unlikely and so to continue with the advocate’s services, and with the review application, would be a waste of the claimant’s time and money.

Published review guidelines could make clear that a failure to comply with the guidelines risked losing the prospect of being awarded costs. (Reviewers have such discretion when claimants lose.) Wider dissemination of information about qualified and experienced privately funded advocates on relevant websites may be another way to promote the services of better-performing advocates at the expense of poorly performing ones. Competent advocates may have some ideas of their own about self-regulation of their profession.

What is clear is that something must be done to stop poor-performing advocates from taking advantage of vulnerable claimants. If more ACC-funded advocacy services and other practical measures do not have the desired effect, regulation may in the long run be the only alternative.

¹³⁹ Licensed immigration advisors ordinarily resident in New Zealand pay an annual licence fee of \$2,039.33.

More lawyers

Poor remuneration is one reason for the shortage of experienced accident compensation lawyers. The review has already noted that the scale of capped costs ACC pays for representation (among other things) is under review. It is possible that increased rates may go some way towards encouraging more lawyers into this neglected area of the law.

The review was impressed with the innovative ways in which some firms have continued to take on, and fund, ACC work. Examples include payment plans for clients, conditional fee arrangements, pro bono work or substantial discounting of fees. (These arrangements tend to be used by well-managed firms attracting high volumes of ACC work.) Indeed, the review was told by several firms that, with these arrangements in place, and an efficient operating structure, they were able to earn a “reasonably decent living”.

Other initiatives to encourage lawyers into the area should be explored. These could include:

- placing greater focus on accident compensation law in the law degree curriculum
- trialling a law school summer programme paper or clinic in accident compensation dispute resolution
- encouraging more pro bono work by larger law firms
- more promotion of accident compensation work in professional publications such as *LawTalk*.

On the option of pro bono schemes, the review notes that this can be a win-win for both claimants and more junior (but supervised) lawyers. The former gets the benefit of representation; the latter, challenging and interesting work that gives them the experience – so often lacking in the big firms – of forensic and appearance work. Acclaim, for example, in its support role for injured people, could explore such a scheme with one of the large law firms (conscious, as they are, of the need to take on pro bono work). Any pro bono scheme could act as a useful “filter”, as one lawyer said, to identify which cases were more straightforward and which needed the involvement of an experienced practitioner.

The review agrees with the Law Society that the “solution is not to just throw money at the problem [of limited access to representation]”. It says “public resources are finite, and the design of incentives needs careful consideration to ensure appropriate and proportionate representation for ACC claimants”. It must be pointed out that the Law Society’s view is that this area of the law needs more legal aid, but the matter is beyond the review’s scope.

In a competitive legal environment, an area of law where demand for legal services exceeds supply ought to be attractive to some lawyers entering the profession. But plainly some initiatives, even if only small, are needed to encourage their entry.

20. District Court appeals

A final word is needed on District Court processes. In especially complex appeals by claimants suffering from a physical or mental injury, it is a hard ask for claimants to represent themselves because of the attendant risks of unfairness and injustice. It is just such claimants who are often at the mercy of unscrupulous advocates. The District Court raised with this review – and also in its submission on the discussion document about the future of accident compensation appeals – a power for judges to appoint counsel to represent claimants where appropriate. At present, the District Court has the power to appoint an impartial adviser to the court (*amicus curiae*) but such appointments are primarily to assist the court, not a party. Māori Land Court judges have such a power.¹⁴⁰

The review has no doubt the power would be exercised only in exceptional cases where both justice and efficiency require it. Such a power would be one small measure to ensure representation is available for those most in need of it, and (as some lawyers for both ACC and

¹⁴⁰ Section 70(3) Te Ture Whenua Maori Act 1993.

claimants said) ensure hearings run more smoothly. ACC rightly raised concerns about its funding of lawyers for the opposing side. There are also obvious wider policy implications for civil justice that would require careful thought. However, the option may be one worthy of some consideration.

Recommendations

The review recommends:

- ACC consider:
 - increasing funding to existing free advocacy services
 - funding a free nationwide advocacy service modelled broadly on the Health and Disability Commission Advocacy Service.
- ACC more widely promotes organisations (existing and new) offering advocacy services on its website and in other guidance material.
- Relevant participants in the accident compensation area – whether Acclaim, the New Zealand Law Society, or others – explore initiatives to encourage more lawyers into this field of work.
- Consideration be given to the District Court’s proposal that it have the power to appoint counsel to represent claimants in those exceptional cases where justice and efficiency require it.

APPENDICES

Appendix one: Terms of engagement

Terms of engagement for review of the issues raised in the Acclaim Otago Report

Background

1. On 9 July 2015, a report was issued by Acclaim Otago (Inc) (“Acclaim”) *Understanding the Problem: An analysis of ACC appeals processes to identify barriers to access to justice for injured New Zealanders* (“the Report”).
2. The Report considers the accident compensation appeals process by analysing over 500 judgments issued since 2009. These comprised all available appellate decisions (High Court and Court of Appeal) in the period and a random sample of District Court decisions.
3. The Report is based on the analysis of court decisions as well as a survey of self- selected members of the public carried out by Acclaim in 2014. The report also contains theoretical analysis and discussion on what access to justice means.
4. The Report’s authors conclude, ‘the current system does not provide access to justice’¹⁴¹ and identify the following four issues as the ‘likely causes of current inefficiencies in the dispute resolution system’¹⁴²:
 - (i) access to the law
 - (ii) evidence
 - (iii) being heard
 - (iv) representation (including access to lawyers).
5. The Report also discusses how the four issues apply in relation to access to appellate courts, and makes recommendations arising out of the findings, including more research to address gaps in information. On 14 August 2015 the Report’s authors issued a follow up memorandum proposing an interim solution, and more extensive reform in the medium term to address the barriers to access to justice they identified in the Report.

Independent Review

6. An independent review of the Report, (“the Review”) has been commissioned by the Ministry of Business, Innovation and Employment (“MBIE”) at the request of the Minister for ACC.
7. The purpose of the Review is
 - (i) To review the validity of the four accident compensation dispute resolution issues raised by the Report’s authors as set in paragraph 4 and to consider the memorandum of 14 August 2015 as set out in paragraph 5.
 - (ii) To make any recommendations for policy, operational or legislative changes to the Accident Compensation Act 2001 (the Act), and regulations made under the Act, which

¹⁴¹ Page 2, paragraph 8 of the Report.

¹⁴² Page 174, paragraph 590 of the Report.

address all or part of the four accident compensation dispute resolution issues raised by the Report's authors as set out in paragraph 4.

Context

8. The Review's consideration of the four issues arising out of the Report is within the context of the objective that disputes on accident compensation claims:
 - are resolved at the first available opportunity
 - are resolved fairly
 - are resolved in a timely way
 - provide an opportunity for a claimant to be heard
 - are cost effective for the claimant and for the sustainability of the accident compensation scheme.

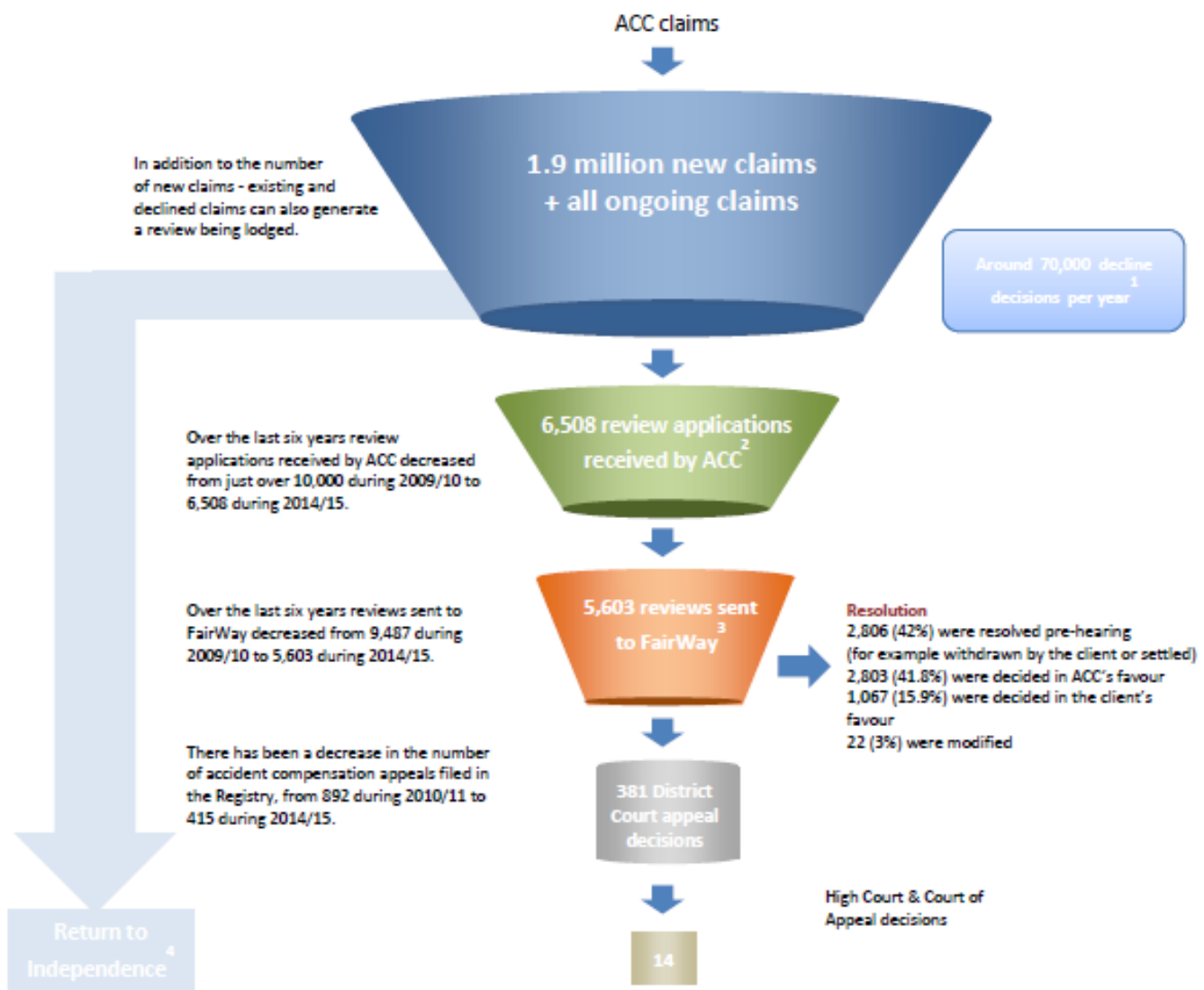
Scope of the Review

9. The scope of the Review is limited to the matters outlined in paragraph 7.
10. Consideration of wider civil dispute resolution issues such as civil legal aid provided through the Ministry of Justice and availability of judicial resources are not within the scope of the Review.
11. The Review is intended to complement the decision by the Government made in June 2015 that there is to be targeted consultation on the proposed Accident Compensation Appeal Tribunal ("the Tribunal"). While there may be areas of overlap between this Review and consultation on the Tribunal, they are two separate processes and this Review is not intended to include any determination on whether or not the proposed Tribunal should be established.

Reporting

12. The Review is to report on its findings and opinions, together with any recommendations, to MBIE. The timing of this report will be agreed by the end of the year.
13. Secretariat support to the Review will be provided by MBIE.

Appendix two: – ACC claims, reviews and appeals



Notes:

¹ This includes decisions on cover and on entitlements in relation to both new and ongoing claims

² Excludes levy review applications.

³ During 2014/15 there were 6,698 review outcomes. The number of reviews sent to FairWay does not match the number of review outcomes for the year because: some cases were waiting to be heard, were adjourned or required new evidence; or the case was lodged in a previous year, and the decision was issued in a different year; or applications were withdrawn or resolved prior to being forwarded to FairWay.

⁴ Includes new claims for 2014/15 not any past claim results.

Appendix three: Summary of Acclaim's suggested short and longer-term solutions

Acclaim's solutions include:

- stemming the flow of new appeals by changing the way ACC makes its decisions, including by more rigorous application of ACC's internal administrative review process, and changing key performance indicators (Acclaim's concern is that key performance indicators (which are confidential to ACC) may, even if unintentionally, encourage staff to focus more on processing and "exiting" the claim from the system rather than reaching the right outcome: Memorandum, 14 August 2014, page 6)
- reducing the number of reviews that go to a hearing (particularly via alternative dispute resolution processes) while simultaneously ensuring safeguards are in place to "address inequalities and power imbalances that exist between the well-resourced and experienced repeat player (ACC) and an often vulnerable injured person"
- prescribing rules for the conduct of review hearings, increasing the funding for such hearings, and generally instilling "greater public confidence in the review process"
- implementing settlement processes as soon as District Court appeals are lodged, to achieve early settlements and reduce court delays
- changing District Court processes, including: appointing *amici curiae*, or friends of the court, to act for some individuals who represent themselves (with the cost borne by ACC), increasing the number of decisions decided by the District Court in the short term to help further reduce delay and for ACC judges to develop a practice note to formalise recent case management changes (a development already under way)
- increasing funding of registry processes to "move from a paper based to electronic system of cases management, including classifying and streaming of appeals".

Appendix four: Elective services data, 2015-16

Surgery Review Outcome	Volume	% All Decisions
Client Withdraws - Decision Stands	359	17.7%
Dismissed	721	35.5%
Overtured by ACC - New Info	529	26.0%
Overtured by ACC -original decision incorrect	5	0.2%
Quashed	377	18.5%
Quashed - Directions	41	2.0%
Settled on Economic grounds	1	0.0%
Grand Total	2033	

All Surgery Reviews	Volume	%
No Advocate	1014	50%
Advocate	1019	50%
Grand Total	2033	

Total in Favour of ACC	1615	79.4%
Total in Favour of Client	418	20.6%

Overturn/Withdrawn	After FairWay(FW)	Before FW	Grand Total	After FW	Before FW
Client Withdraws - Decision Stands	333	26	359	92.8%	7.2%
Overtured by ACC - New Info	321	208	529	60.7%	39.3%
Overtured by ACC -original decision incorrect	3	2	5	60.0%	40.0%
Grand Total	657	236	893	73.6%	26.4%

Overturned	Volume	% Overturns with or without an Advocate
No Advocate	248	46%
Advocate	286	54%
Grand Total	534	

Notes:

Advocate includes both lawyers and advocates.

After FairWay refers to the period of time following ACC's transfer of the review application to FairWay.

Before FairWay refers to the period of time where ACC is considering a review application, before it is transferred to FairWay.

Overtured	After FW	Before FW	Grand Total	After FW	Before FW
No Advocate	111	137	248	44.8%	55.2%
Advocate	213	73	286	74.5%	25.5%
Grand Total	324	210	534	60.7%	39.3%

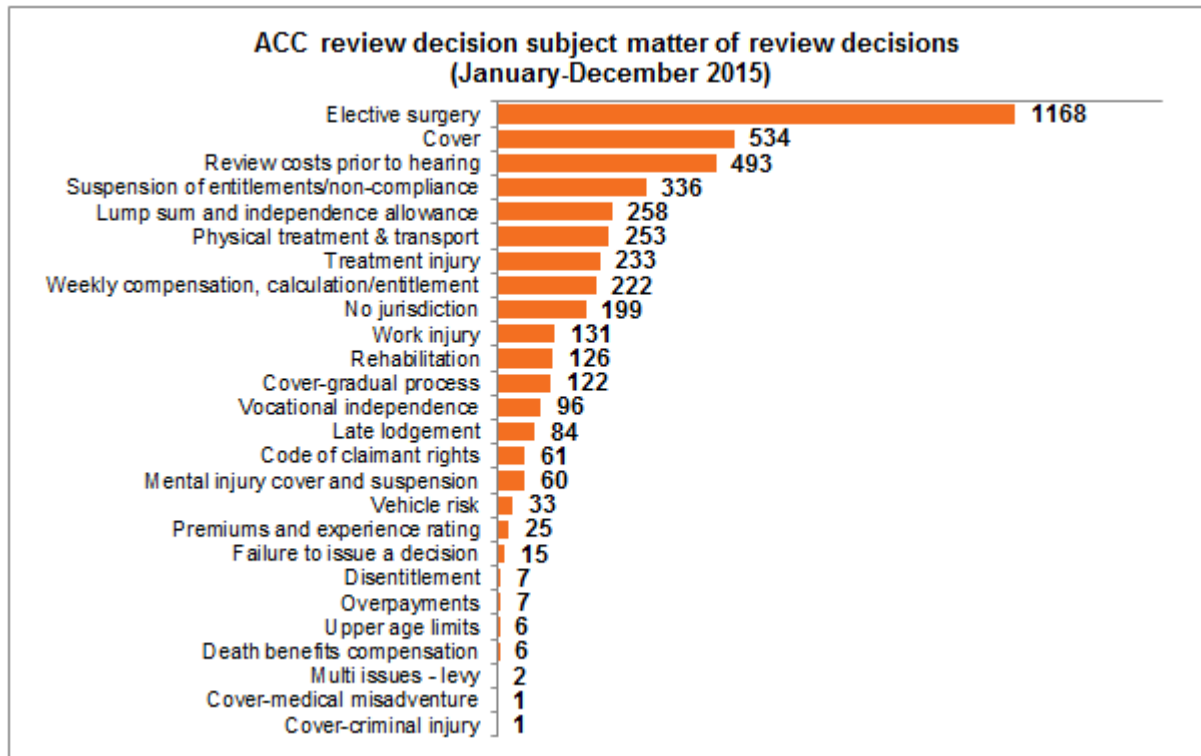
Withdrawn	Volume	% Withdrawn with or without an Advocate
No Advocate	130	36.2%
Advocate	229	63.8%
Grand Total	359	

Withdrawn	After FW	Before FW	Grand Total	After FW	Before FW
No Advocate	112	18	130	86.2%	13.8%
Advocate	221	8	229	96.5%	3.5%
Grand Total	333	26	359	92.8%	7.2%

ADR - Files Received: 169

ADR Outcome	Volume	% All ADR Outcomes
No ADR	14	9%
Original Decision Overtured	65	40%
Original Decision Stands	51	31%
Re-Declined - Not Reviewed	13	8%
Re-Declined - Reviewed	21	13%
Grand Total	164	

Appendix five: FairWay reviews by subject, 2015



Appendix six: ACC data on open appeals and outcomes, 2010-16

Open appeals

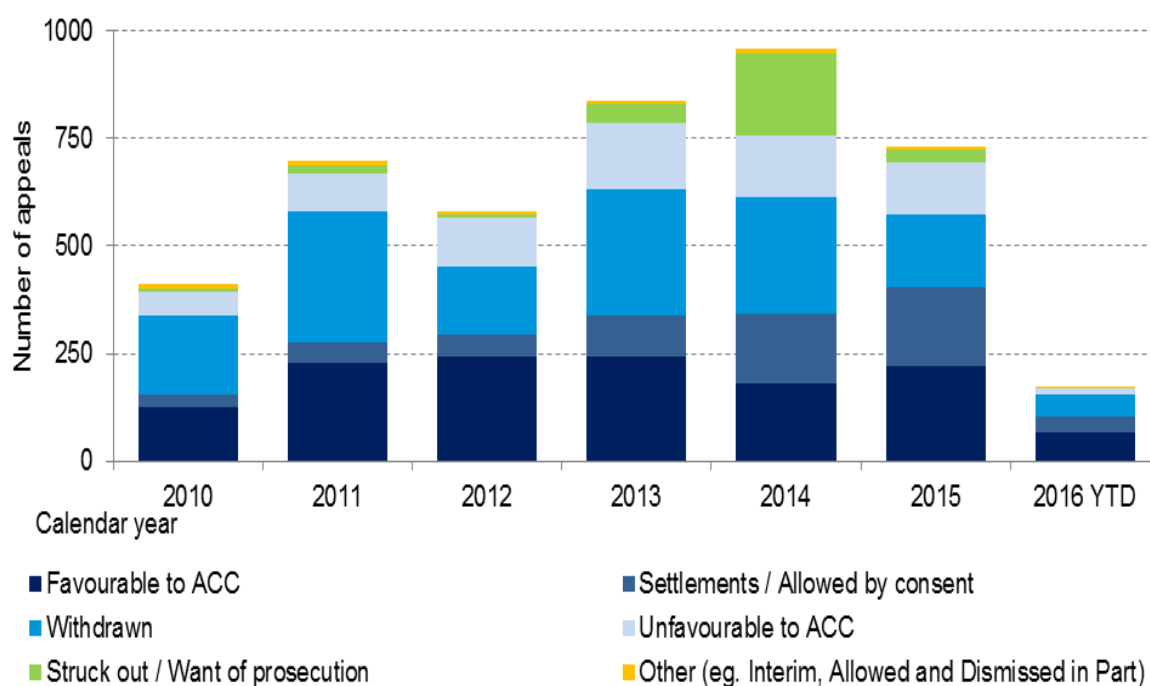
As at 18 April 2016, there were 690 open District Court appeals where no decision had been issued by the Court. This number includes appeals recently filed through to those that have been heard and are awaiting a decision from the Court. The table below shows what proportion of those 690 appeals were filed in the different years.

Open appeals by year filed

Year filed	Pre-2010	2010	2011	2012	2013	2014	2015	2016 YTD
% of total open appeals by year filed	2%	3%	3%	6%	12%	16%	39%	20%

Appeal outcomes

Appeal outcomes (including settlements and withdrawals) from 2010 to 16 March 2016 are summarised in the graph below.

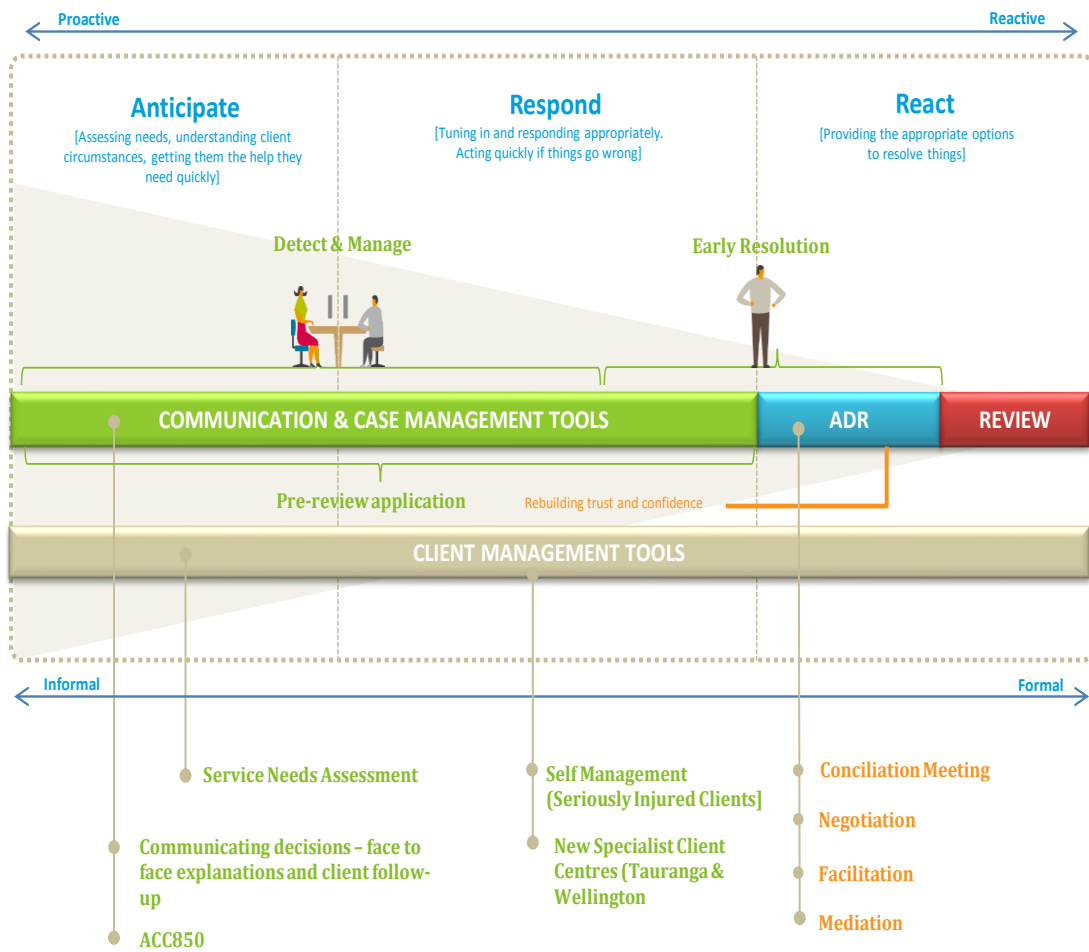


Appendix seven: ACC’s alternative dispute resolution process

Minimising disputes

Maintaining the Client Relationship

“The aim is to have fewer disputes arising in the first place.”



Resolving disputes

