



Acclaim Otago (Inc)

ADOPTING ISSUES:

**An INTERIM REPORT to the UNITED NATIONS COMMITTEE on the
CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES
to be considered by the
PRE-SESSIONAL WORKING GROUP to the 12th SESSION**

(28 February 2014)

Consensus list of issues at appendix 1.
Endorsements of parties listed at appendix 2.

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Opening declaration

Acclaim Otago acknowledges that, on the whole, New Zealand ought to be congratulated on its support for the rights of people with disabilities.

The fact remains that the architecture of the Accident Compensation Corporation (“ACC”) scheme and the way it is administered deprives people of fundamental human rights.

The state report does not record this, because the state does not accept this.

ACC claimants are constantly required to prove that they have disability under threat of financial disentanglement, criminal prosecution, and invasion of bodily and mental integrity.

Acclaim Otago accepts that some rights are capable of reasonable limitation, but the New Zealand Government and the administrators of the ACC scheme do not have the correct balance.

In seeking to limit financial outflows from the scheme, mainly for political and electoral reasons, the rights of people with disabilities covered by ACC are not being protected.

The New Zealand Government and ACC, both of whom manage personal injury in New Zealand, do not comply with the Convention.

Breaches of the articles of the Convention often overlap and multiply the disadvantage faced by persons with disabilities. The case studies are included to illustrate the actual lived experience of injured people and how the breaches of each article have an interrelated impact on peoples’ lives.

Dedication

Acclaim Otago dedicates this report to those injured people, their families, supporters and treatment providers who have fought for their rights, battled for fairness, and faced injustice, only to be left frustrated by the structure of the laws in New Zealand.

We acknowledge that behind each case or legislative change, there are people and their stories. We have not been able to tell all of your stories. This is not a report about individuals; it is about explaining the issues that affect thousands of New Zealanders in the hope of making changes that might improve the experiences and outcomes for us all.

We hope that by raising systemic issues in a forum where they can be properly heard, the process of “rehabilitating” a great “New Zealander” can begin. We hope that once it has been rehabilitated, ACC will continue to improve and to ultimately become a leader in the protection and promotion of disability rights.

We would like to thank our members, the committee and others who have contributed. Above all, thank you to the New Zealand Law Foundation, without whose grant this report would not be possible.

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*The situation in New Zealand***Executive summary**

1. The law as it relates to people with disabilities in New Zealand is procedurally and administratively split based upon the cause of a person's disability.
 - i. People with disability caused by personal injury are administered through an Accident Compensation system .
 - ii. People with disability unrelated to personal injury (such as congenital cause or sickness) are administered through other systems including the Ministries of Social Development and Health.
2. The first New Zealand report (“the state report”) on implementing the United Nations Convention on the Rights of Persons with Disabilities (“the Convention”) focused almost entirely upon the latter¹ and did not properly examine New Zealand's ACC system from the perspective of people with disabilities caused by accident.
3. During consultation in 2010, Acclaim Otago made detailed submissions to the draft state report.² These detailed submissions (along with the submissions of individual members) were ignored by the state. None were incorporated into the state report. In 2012, the Convention Coalition prepared a report pursuant to Article 33 (“the Coalition report”) and again focused on the latter.³

¹ Disability caused by personal injury is mentioned in the following paragraphs of the state report: 25.3, 129, 133, 144, 187, 197, 200-202 and in the Annex at pages 6 and 19.

² Available on our website: <www.acclaimotago.com>.

³ One of Acclaim Otago's submissions were included in the Convention Coalition report in the paragraph at the top of page 33. Other criticism of ACC can be found on page 50 and 57, and other mentions of the personal injury system can be found in paragraphs at pages 48 and again in the Annex at pages 103 and 108.

4. In late 2013, the New Zealand Law Foundation provided their annual Shadow Report Award to Acclaim Otago to enable them to present a shadow report to the Convention Committee (“the Committee”) in order to provide balance to the state report. That award has allowed Acclaim Otago to commission the preparation and presentation of this report.
5. This report has been endorsed by the organisations and individuals set out at appendix two who are involved in the ACC system. This document should therefore be considered as a consensus of issues from the accident compensation jurisdiction in New Zealand.

Structure of Acclaim Otago’s report for the list of issues

6. This report raises issues with the ACC scheme by reference to the articles of the Convention. By doing so, we aim to ensure that consideration can be given to adopting a list of issues that requires the New Zealand Government to account for the experiences and outcomes of people who have disability covered by ACC in New Zealand.
 7. The following ten chapters each focus on an article of the Convention. At the beginning of each chapter, we set out the issues raised in that chapter. A compiled list of all of the issues that need to be considered is at appendix one.
 8. The chapters contain case studies. All case studies in this report are drawn from actual examples. Whilst we accept that the exact circumstances surrounding these examples are open to dispute, and ACC may disagree, Acclaim Otago maintains that the description of these events is supported by evidence and legal documentation.
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Further survey to be conducted and recommendations made

9. Once the list of issues has been adopted, we will conduct another survey of injured people covered by ACC to provide more detailed information on these issues, consider the state's response and then provide a further report to the Committee in July 2014 that focuses on the issues and recommendations to address these.

Background to the ACC system

10. New Zealand has a world-leading system of personal injury rehabilitation and social insurance known as ACC. New Zealand has a strong reputation internationally in advocacy for the rights of people with disabilities, and has led the push for the Convention to some extent. Unfortunately, the New Zealand Government has not reported systemic problems with ACC to the Committee on the Rights of Persons with Disabilities.
11. The ACC scheme was founded upon a set of five principles laid out in a report known as “the Woodhouse Report”. It was first legislated in 1972, and the scheme has subsequently undergone significant revision by legislation in 1982, 1992, 1998, and 2001. In some ways, the principles at the core of the ACC scheme share the same commitment to social justice underlying human rights instruments like the Convention on the Rights of People with Disability (CRPD). The principles identified in the Woodhouse report are:
- i. Community responsibility
 - ii. Comprehensive entitlement
 - iii. Complete rehabilitation
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- iv. Real compensation
 - v. Administrative efficiency
12. The scheme was devised in response to deficiencies in how people with injuries caused by accident were supported, compensated and rehabilitated by the common law process of civil litigation. The scheme was revolutionary in the sense that it sought to eradicate disputes about fault and covered all New Zealanders, whether at work or at home. It is commonly called a “24-hour no-fault” scheme.
13. When the scheme was proposed, Sir Owen Woodhouse noted that eventually *all* incapacity, regardless of cause, would need to be compensated and administered by ACC. This was because to discriminate based on *cause* could never be justified. Despite a law commission recommendation that this should occur⁴ and legislation being drafted and before Parliament,⁵ this expansion of the scheme has never occurred. Instead, it has had the effect of separating consideration of people with disabilities in New Zealand into:
- i. Those covered by the ACC scheme,⁶ largely due to injuries caused by accident, work-related injuries or diseases, and injuries caused by treatment; and
 - ii. Those people with disabilities who are not covered by ACC, including congenitally caused disability and disability because of ageing, which are supported under the wider public health and social security arrangements in New Zealand.

⁴ Law Commission *Personal Injury Prevention and Recovery* (NZLC R4, 1988) at p 10, [66].

⁵ Rehabilitation and Incapacity Bill 1990, cls 2(2) and 6.

⁶ There are wide definitions of cover set out in the Accident Compensation Act 2001 at ss 19-38.

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14. The Convention coalition has recommended that this separation be abolished.⁷ We agree.
 15. This report has been structured from the perspective of those covered by the Accident Compensation Act 2001. We make consistent reference to “injured persons” and “claimants”. After considering this, we have decided to persist with this language, as it is commonly used by people in this jurisdiction in New Zealand. We sincerely welcome any feedback or response in relation to this decision.
 16. The evidence outlined below suggests that there are structural problems with the legal and institutional framework around the ACC scheme, and the substantive law that comprises that scheme. These problems have a significant effect on the experiences and outcomes of injured people. There is no proper respect for the privacy of people with disabilities, entitlements are stopped without a person being able to work or being properly rehabilitated, integrity of the person is compromised and effective access to justice is denied.
 17. The way the ACC scheme is legislated and administered breaches several articles of the Convention but this has been largely ignored due to a perception that injured people who are “covered” by ACC are better off than people with disabilities that are not covered under the scheme.⁸
 18. Many of the objections commonly made in legal and extra-legal dealings with ACC are founded on an underlying commitment to

⁷ Convention coalition report at page 83, recommendation 7.

⁸ See for example the state report at 201. See the Coalition report at pages 48 and 118.

respect for human rights. The law and policy around the ACC scheme does not give effect to these rights, and so those objections are rejected as irrelevant or immaterial.

The current context against which the Convention rights should be considered

19. The Accident Compensation Scheme “the scheme” is nominally administered by the Ministry of Business, Innovation and Employment.⁹ It is a state-owned monopoly with its own board and chief executive and its governing statute is the Accident Compensation Act 2001.¹⁰ It is funded through both a spectacularly successful large investment fund, as well as compulsory levies on everything from fuel to workers’ payments.
20. In the 2012-2013 financial year, ACC had revenue of NZ\$6.5 billion, and made a profit of NZ\$4.9 billion. In the last five financial years, its investment fund has more than doubled from NZ\$10.3 billion to \$24.6 billion on the back of annual profits of more than NZ\$3 billion each year.¹¹
21. Any person injured in New Zealand in circumstances covered by ACC¹² cannot sue for damages suffered because of the injury¹³ and must instead turn to the statutory scheme to obtain “entitlements”¹⁴ for their injuries.

⁹ State report, Annex, page 6 which refers to the Department of Labour. This new Ministry incorporates the former Department of Labour.

¹⁰ People who were injured prior to 2001 receive cover under previous versions of the ACC legislation, the first of which was enacted in 1972. This legislation was considerably more generous and avoided many of the issues we propose to discuss. ACC is in the process of attempting to deny cover under this legislation. Various attempts have been made to privatise the ACC scheme since its inception.

¹¹ ACC Annual Reports 2009-2012; Annual report 2013 at page 20.

¹² Accident Compensation Act 2001, Part 2, ss 19-38.

¹³ Accident Compensation Act 2001, s 317.

¹⁴ Accident Compensation Act 2001, s 69.

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22. Any disputes about cover and entitlements can only be resolved through the statutory dispute resolution process.¹⁵ This process denies injured people direct access to all courts and tribunals.¹⁶ Any other matters, for example complaints about ACC, or how the dispute resolution is managed, can only be made to ACC or the company that operates and administers the statutory dispute resolution process. According to law, complaints about ACC's behaviour cannot be appealed to the New Zealand Court system.¹⁷
23. There is no institutional body in New Zealand tasked with independent oversight of the ACC and the way it administers the legislation and policy that constitute the scheme. A proposal was made for such a body in the form of Part 3A of the Injury Prevention, Rehabilitation and Compensation Bill 2001, but the Government applied the financial veto to this part during the final stage of passing the legislation, because of a perceived cost of several million dollars per year.¹⁸
24. Most cases of injuries in New Zealand result in a claim to ACC, with about 1.7 million claims per year.¹⁹ About 100,000 of these claims result in people receiving some form of rehabilitation (85,000) or weekly compensation (76,000).²⁰
25. The New Zealand Accident Compensation System is a well-developed mature compensation system that is well funded.

¹⁵ Until 2011, the company contracted to manage this process was a wholly owned subsidiary of ACC.

¹⁶ Accident Compensation Act 2001, s 133(5).

¹⁷ Accident Compensation Act 2001, s 149.

¹⁸ Hansard NZPD 6 Sep 2001, volume 594 pp 11441, 11445.

¹⁹ ACC's Annual Reports from 2008-2013 show the annual claims for cover lodged with ACC of between 1.6 and 1.8 million.

²⁰ ACC Annual Report 2013, at page 14.

26. It functions well for some people with short-term injuries. They receive income support and rehabilitation in the form of treatment. The focus of this report is not on these short-term claims, but on those people with long-term disabilities caused by injury.
27. The data emerging from the first prospective outcomes of injury longitudinal study undertaken in New Zealand²¹ suggests room for improvements in the system. It appears likely that there is a serious underestimation of the duration and effects of disability amongst injured people. Short-term interactions with ACC do not equate to short-term disability. Unfortunately, ACC and others have ceased funding to this study. This means the five-year post-accident outcomes might soon be lost.

²¹ Potential Outcomes of Injury Study (POIS). See <<https://blogs.otago.ac.nz/ipru/research/pois>>.

Convention articles

28. Acclaim Otago’s response to the draft state report focused on four articles of the Convention.

- (i) Article 13: Access to Justice
- (ii) Article 17: Protecting the Integrity of the Person
- (iii) Article 22: Respect for Privacy
- (iv) Article 27: Work and Employment

29. Since Acclaim Otago’s response to the draft report, there have been ongoing problems with these issues. Issues with other articles of the Convention have also arisen or been identified. These include issues with:

- (i) Article 14: Liberty and security of the person,
 - (ii) Article 18: Liberty of movement and nationality,
 - (iii) Article 23: Respect for home and family,
 - (iv) Article 25: Health,
 - (v) Article 26: Habilitation and Rehabilitation,
 - (vi) Article 28: Standard of living and social protection.
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ARTICLE 13: ACCESS TO JUSTICE

RECOMMENDED QUESTIONS FOR THE LIST OF ISSUES

- Q1. What steps is the New Zealand Government taking to ensure proper funding for injured people to gain access to justice?
- Q2. What steps is the New Zealand Government taking to increase the supply of legal representation for injured people?
- Q3. What steps is the New Zealand Government taking to ensure procedural fairness and reliable evidentiary procedures are observed in ACC dispute resolution?
- Q4. What steps is the New Zealand Government taking to allow serious complaints against ACC staff members to be escalated and given external oversight?
- Q5. What steps is the New Zealand Government taking to ensure that procedural defects in ACC dispute resolution are recorded and resolved on a system-wide level?

*Article 13 – Access to Justice***Relevant Background**

30. There is a distinction to be drawn between “access to law” and “access to justice”. This distinction will be addressed at the conclusion of this section.
31. Access to justice for injured people is limited by statute to the review and appeal process set out at Part 5 of the Accident Compensation Act. Part 5 requires a “review” and then allows for an “appeal” to the District Court. Appeal decisions of the District Court can only be appealed further to the High Court on a question of law. A final appeal is available to the Court of Appeal, but there is a statutory bar to appealing to New Zealand’s highest court, the Supreme Court.²² Findings of fact, such as those made in relation to medical evidence, cannot be appealed beyond the District Court.
32. There are three ways to access the review process:
- i. the first is when ACC makes a “decision” on cover and entitlements;
 - ii. the second is where there has been a delay in processing a claim for entitlements; and
 - iii. the third is when ACC makes a decision about a complaint under the Code of Claimants’ Rights.²³

²² Accident Compensation Act 2001, s 163(4).

²³ The Code of Claimants’ Rights was legislated in 2003 to provide for a gap in Claimants’ ability to hold ACC staff members into account for their actions.

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33. Fairway Resolution, the organisation contracted to manage ACC's obligations under Part 5 of the Accident Compensation Act, processes about 10,000 ACC disputes every year.²⁴
34. The review process is meant to be an informal hearing, whereby an independent person ("a reviewer") puts aside ACC's decision, and ACC's policy, and makes the decision afresh by following the statute. There are commonly discrepancies between ACC's policy and the precise wording of its governing legislation. These differences in interpretation can be crucial, for example in determining the extent of a claimant's obligations under section 72 of the Act. ACC has a discretionary power under section 117(3) to cease entitlements to a person if it decides that someone has not met those obligations.
35. After the hearing, the reviewer makes a decision on the substantive dispute, and on "costs" of the process. The costs that can be awarded by a reviewer to an injured person are limited by regulation.²⁵ These limits include limiting preparation for review to 2 hours, and limiting costs for travel to \$153. There are no direct legislative limits on what ACC can spend on obtaining medical evidence or lawyers to support their decisions at review.
36. Once the reviewer has made a decision, there is a right of appeal to the District Court if the review related to (i) a decision, or (ii) a delay in processing a claim for entitlements. This is a *de novo* appeal so procedural problems, including those to do with the admission of relevant evidence or the conduct of the review hearing, are ignored by the Court on appeal.²⁶

²⁴ Dispute Resolution Services Limited Annual Report (2010), page 17; the number changes every year, it was rising in the years to 2010, but seems to have settled or even dropped slightly. This does not include reviews that are lodged with ACC but not continued to Fairway (formerly known as DRSL).

²⁵ Injury Prevention, Rehabilitation and Compensation (Review Costs and Appeals) Regulation 2002.

²⁶ See for example *Langdon v ACC* [2007] NZACC 6 at [13].

Barriers to accessing justice through the review and appeal process

37. Issues with accessing justice can be broken down into funding, access and procedural issues.

Funding

38. There is disparity in funding medical evidence and legal representation for reviews. ACC fully funds their lawyers, staff, and medical evidence from the pool of money collected from levies and from investments. There is no limit to what ACC can spend in obtaining reports and/or paying lawyers to argue their case.
39. Weekly compensation for lost wages is calculated at 80% of a person's pre-injury earnings. Where it appears likely that a person will be entitled to weekly compensation for an extended period, this represents a significant future fiscal liability to ACC. If ACC prioritises reducing monetary outflows from the scheme, in financial terms, it may be cheaper to litigate extensively a claim than pay that claim for its anticipated lifetime. This has a further effect of reducing ACC's outstanding claims liability, meaning that the scheme becomes closer to reaching its stated aim of being fully funded in the near future.
40. Injured peoples' costs are limited by regulation to \$935 for an expert medical report, \$467 for any other sort of expert report and \$350 for a legal expert to prepare their case. This has an effect on the market for medical evidence to be prepared on behalf of injured persons (see discussion below at article 17).

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41. The New Zealand Parliament is well aware that this creates a barrier to Access to Justice and these set rates have been slowly increased by a succession of Regulation Review Committees who have sought information on, and considered this regulation.²⁷ These increases have been *ad hoc* and do not reflect market rates.
42. In April 2008, the Department of Labour (the government department responsible for administering ACC) conducted a review of the Review Costs and Appeal Regulations. All but one submitter to this review recommended that the current limits on costs that can be awarded be removed.²⁸ Most recommended instead that a Reviewer be given the discretion to award reasonable costs.
43. The Minister ignored the recommendations of both the submitters and the Department of Labour officials. The regulatory limits remain.
44. The state report records that “The government Legal Aid scheme funds legal representation and other assistance to people who would otherwise be unable to afford it.”²⁹ It is correct that the government’s legal services agency has discretion to fund representation; however, this is a loan, which the person has to pay back. Legal Aid commonly registers a *caveat* over a recipient’s house until Legal Aid has been repaid. The amount that Legal Aid can contribute according to governing legislation does not allow an injured person to fund proper representation.

²⁷ Report of the Regulations Review Committee Complaints relating to Accident Insurance (Review Costs and Appeals) Regulations 1999, 1999 AJHR I.16W; Activities Report of the Regulations Review Committee 2002, RI.16B at pages 18 and 19; at page 12; Activities Report of the Regulations Review Committee 2003, I.16D Activities of the Regulations Review Committee in 2009 Report of the Regulations Review Committee, I.16E at Annex E. Amendments were made in 2008 and 2010.

²⁸ Ministerial Briefing Document released by the Department of Labour in response to an Official Information Act request dated 11 September 2008.

²⁹ State report at page 20, paragraph 76.

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45. In 2012, Legal Aid was limited in ACC Reviews and Appeals by the Ministry of Justice.³⁰ The fixed fees for legal representation are \$980 for a review hearing and \$810 for an appeal (\$1080 if the lawyer was not involved in the review hearing). The Ministry acknowledged the small number of Legal Aid providers in this jurisdiction and noted that setting these low rates would further limit the number of Legal Aid providers who do this work. Lawyers who act for clients who are granted Legal Aid, must not charge the client any other fees and any costs awarded to the client in the hearing are paid to the Legal Aid office.
46. Most experienced lawyers in this jurisdiction charge rates between \$200 and \$350 per hour and therefore the amount allowed by Legal Aid provides for only 3-4 hours work.
47. People with disabilities, particularly complex mental and physical conditions caused by personal injuries and years of pain, sometimes (for many reasons) require more time to prepare. It is important that their experience with justice include being properly heard. Fixing the amount of time available does not allow for this.
48. In addition, ACC cases are complex. They involve complicated legislation that has evolved over the scheme's lifetime. Some cases entail twenty years or more of dispute, thousands of documents, and it often takes 10-15 times the amount of work allowed for by the scheme. There is no flexibility in the legislation to allow the circumstances to be considered.

³⁰ New fee framework for civil (ACC) Legal Aid providers, Ministry of Justice, April 2012.

Effect on the market for legal services for injured people

49. The impact of the ACC scheme is that New Zealand has had forty years without litigation for personal injury. There is a very small pool of specialists, and the limited costs awarded for success and Legal Aid, has significantly reduced the number of people who can provide specialist legal services to injured New Zealanders in a way that is financially viable. These limitations directly push legal practitioners out of the market for legal services for people with disabilities.
50. Most ACC law specialists are towards the end of their careers and it is concerning that, there is no career path for younger people to become involved in this field. The law schools in New Zealand have not had a dedicated ACC law course, instead it is taught as part of the law of torts, and the Law Society does not have a dedicated ACC course to encourage practitioners to learn more about this field.
51. These limitations on the supply of legal services mean that in practice, there is severely limited access to justice for injured New Zealanders and, as practitioners retire or leave the field, this will get worse. The state report does not acknowledge this despite clear submissions to the contrary.
52. Tens of thousands of adverse decisions are made by ACC each year. Each of these decisions carries a right to review that decision. Approximately 10,000 of these become formal disputes and only a handful of people are in the market providing legal services to these people.
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53. Ministry of Justice statistics³¹ show that over 50% of appeals involving lawyers are successful, but only around 20% of self-represented litigants are successful. Experience and anecdotal evidence would suggest that there is an even bigger divide in review hearings, although ACC claims that there is no system-wide data regarding the relationship between issues in dispute, representation, review hearings, decisions and outcomes.
54. Issues of funding that prevent access to justice mean that a situation exists whereby, even where litigants are successful, the majority of challenges to ACC's decision-making will fail. Beyond this, many decisions will simply not be challenged. On a system-wide level, these barriers to access to justice therefore represent savings to the scheme and give the appearance that ACC's decision-making is sound.
55. There is also an effect on the legal market in other areas that overlap with ACC. In the field of criminal law, both prosecutors and defence lawyers involved in investigations and prosecutions for fraud do not understand the ACC system upon which the criminal allegations are founded. People facing prosecution are not able to provide an effective defence because of lack of understanding. More must be done to educate the criminal bar about ACC legislation.
56. The privative provisions that should prevent a court sitting in a criminal capacity from making decisions on a person's ACC-related injuries and entitlements³² are never invoked. Rather than referring

³¹ New fee framework for civil (ACC) Legal Aid providers, Ministry of Justice, April 2012.

³² Accident Compensation Act 2001, s 133(5).

the matters subject to the ACC system back to ACC for a proper decision, the opposite occurs, and a criminal court proceeds through the trial process without resolving the central matter of ACC entitlement until after the person is convicted.

57. When ACC alleges fraud in criminal court, it is reasonable to assume that ACC has decided that a person is not entitled. When claimants have sought to argue this in the past, the reviewer and district court judges “decline” jurisdiction.³³
58. Similarly, many employment law and industrial relations disputes involve accidents and injuries to workers. The removal of lawyers from the personal injury system has reduced the number of employment law experts who understand that system.

Procedural problems with access to justice

59. At review hearings, claimants give an oath and must swear to tell the truth. The ACC representative asks them questions but the injured person (or their representative) has no opportunity to ask any questions of ACC staff.
60. ACC staff are not sworn to tell the truth, and their credibility is assumed. In the course of their submissions, they often give significant verbal evidence that effectively goes unchallenged, acting as both legal representative and witness. At times, the sworn evidence of an injured person is ignored because it is different to what ACC staff said at the hearing, or ACC documents produced by the staff member.

³³ *Gibson v ACC* [2012] NZACC 259 at [3] and [12]-[15].

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61. At times, there are issues with ACC staff either deliberately misleading a reviewer, or omitting to provide full and proper information to the reviewer. There is no remedy available when this occurs and reviewers commonly take ACC staff at their word, even when strong assertions are made regarding their behaviour. Complaints lodged pursuant to the Code of Claimants' Rights³⁴ are ignored as being a separate matter to the substantive issue at hand, and are not investigated by ACC. Further, injured persons cannot sue ACC in tort regarding the management of their case.³⁵
62. Review decisions of Code Complaints, including decisions to decline to investigate, cannot be appealed to the Court system.³⁶

Case Study A

Ms Orange was injured when she fell from a roof in 2000. At the time, she was an ambulance officer. Formerly a very strong woman, holding a 4th dan black belt in Karate, she suffered labral tearing in her hip and shoulder. This went undiagnosed for nearly a decade during which she developed a serious pain syndrome and depression. During this period, Ms Orange continued to volunteer for the ambulance service. ACC was aware of this, but it was not recorded on ACC's medical certificates. The ACC case manager arranged for private investigators to investigate Ms Orange's case by alleging that she saw her "carrying a child" and "pushing a trolley" around a supermarket. ACC was not properly managing the case, they did not know that her labrum was torn and claimed not to know about the voluntary activities with the ambulance despite evidence showing they had been informed and approved. Despite receiving medical advice that Ms Orange was suicidal, the ACC case manager did not send Ms Orange to be assessed for mental injury because, according to internal correspondence, there would be "issues with the fraud investigation" if Ms Orange was found to have mental injury. Finally, after

³⁴ The Code is set out in the Annex to the state report at page 19, paragraphs 22 and 23.

³⁵ *Pearce v ACC* (1991) 5 PRNZ 297; *Chalecki v ARCIC* HC Greymouth AP 29/01 10 October 2001; *Robinson v ARCIC* HC CIV 2001-404-2274 [31 Oct 2003]; *Naysmith and Naysmith v ACC* HC WHA Civ 2004-488-627 [20 June 2005] at [82]-[84] takes a slightly different view and suggests it might be possible in negligence, but not for breach of statutory duty.

³⁶ Accident Compensation Act, s 149(3), *Sinclair v ACC* [2013] NZACC 262 at [4].

two review applications were lodged, ACC sent Ms Orange to be assessed for mental injury cover, but only provided the assessor with a fraction of the medical evidence showing depressive symptoms before the fraud investigation had begun. **ACC then decided not to provide any help and support on the grounds that Ms Orange’s mental injuries were caused by their fraud investigation, rather than her injuries.** At the review hearing, ACC was directed by the reviewer to provide her with *all* of the pre-fraud investigation medical evidence. ACC told the reviewer that they had provided all relevant information and, despite Ms Orange giving the reviewer a list of further documents that had not been provided by ACC, the reviewer accepted that ACC had provided everything. The reviewer directed ACC to give the documents that they gave to the reviewer to the medical assessor. Ms Orange complained under the Code of Claimants Rights that ACC should give all of the relevant medical evidence to the reviewer and cannot lie to the reviewer and then rely on their wrongdoing. ACC declined to investigate the breach of Ms Orange’s rights. After that, the reviewer declined to direct ACC to investigate the breach of Ms Orange’s rights saying there was no jurisdiction to complain because all ACC did was follow the reviewer’s direction. Ms Orange appealed the decision to the District Court and although Ms Orange accepted that the Court could not hear the substantive appeal, she asked that the Court direct that the breach of her rights be properly investigated. The Court found it did not have jurisdiction to do so because it cannot hear anything that relates to the Code of Claimants’ rights.

63. The time available for a review hearing is usually limited to one hour. Some cases involve 1000 pages of medical evidence and a thirty-year history, some of which is likely to be disputed. Setting cases down for one hour denies people the right to be heard. A situation exists where ACC can drag out the hearing with issues or information that is legally irrelevant. This ensures that the matter cannot be concluded in the time allowed, and ACC have additional time to prepare and/or obtain further expert opinion which disadvantages the injured person. Whilst experienced legal experts know that they can request additional time at the point that the

hearing is set down to be heard (and sometimes it is provided), most people are self-represented and do not know they can request more time.

64. There is no doctrine of precedent among review decisions, and consistency is lacking amongst reviewers. Review decisions are not publically available. Five reviews involving the same issue can be heard by five different reviewers with five different results. This is particularly the case where the matter at issue is whether either of the parties have acted “reasonably” – an inherently imprecise and value-laden standard. Appeals to the District Court are treated as *de novo* rehearings so procedural matters from a review hearing cannot be considered.
65. ACC attends a large number of review hearings by teleconference. This reduces the claimant’s experience, creates miscommunications and misunderstandings, and makes the claimant feel that their case is not important. Where the issue under dispute may often be explained by neglect or oversight, this simply compounds a claimant’s feelings of neglect and disrespect.
66. ACC staff commonly prepare their own submissions to review. ACC staff do not receive adequate legal training and are under pressure from immense workloads. Submissions often include irrelevant and prejudicial content that amounts to the staff member both giving evidence whilst not sworn, as well as presenting the case without the same professional accountability held by a legal professional.³⁷ It increases the possibility that reviewers will take account of irrelevant considerations. The staff member’s remuneration and continued employment is linked in part to their

³⁷ Lawyers and Conveyancers Act; Lawyers and Conveyancers Act (Lawyers: conduct and client care) Rules 2008.

performance in managing the claim. Successful reviews of a case manager's decision impact negatively on the impression of their performance. Serious conflicts of interest exist, but reviewers refuse to hear submissions on this.

67. There are no firm safeguards of procedural or administrative fairness built into the statutory dispute resolution process. Rather than specific controls, the Act merely makes a general requirement that reviewers be independent and conforms to the principles of natural justice. If a person disputes whether a reviewer has met those requirements, there is no authority or process to facilitate the resolution of that dispute. Access to the Courts to seek oversight and accountability are denied and all appeals disregard any objections based on fairness because of their *de novo* nature.

Case Study B: Jo had a case set for a review hearing with a particular reviewer. Jo became aware that the reviewer had sent an email to her employer demonstrating bias against Jo. Jo produced the email to the reviewer and said that, because of the perception of bias, the reviewer should step down and let the matter be dealt with independently. The reviewer refused to step down so Jo left in protest. The reviewer continued with the case, without Jo and she decided against Jo.

68. The admissibility of evidence during the review and appeal process is not governed by the Evidence Act 2006, which applies to other Courts in New Zealand. Whilst this allows for flexibility in the process, which can facilitate access to justice, it also removes important safeguards around the reliability of evidence and removes the ability of an injured person to test or challenge that evidence. This often works to a claimant's disadvantage. In addition a review officer does not have the power to call witnesses (such as medical assessors or ACC staff) to be cross-examined on disputed

facts in a way that would ordinarily be a commonplace aspect of procedural justice.

69. The safeguards in the Evidence Act 2006 that have been developed over centuries of common law history to ensure procedural justice are specifically excluded from application to people disputing ACC.

Case Study C. Mr Black is a 23-year-old farmer who suffered a serious motor vehicle accident and is living with paraplegia at C7. He wanted to move out of hospital back home to the farm on the outskirts of town with his partner. To do this, \$20,000 in housing modification was required to make the bathroom and kitchen accessible. ACC delayed making a decision, so Mr Black lodged a review about the delay. Mr Black attended mediation with ACC, and ACC did not do what they said they were going to do. Mr Black sought professional advice. Another review application was lodged regarding the delay. ACC again asked for mediation. At the mediation, the matter was not settled, but ACC agreed to let the matter proceed to review. In the week before the review ACC issued a decision not to fund the modifications, and then claimed that the review for delay, lacked jurisdiction, because a decision had now been made. Yet another review had to be lodged and the process started all over again. Finally, 18 months after Mr Black was discharged from hospital, he could finally leave his flat in the city and go home. Unfortunately, by this stage, his mental health and his relationship with his partner had deteriorated significantly. He had incurred over \$5,000 in legal fees, and despite being entirely correct and having three sets of costs awards under the regulations, he was still over \$3,000 out of pocket.

70. Judicial review is available to claimants, however judicial review applications are hampered by the ACC legislation's privative provisions. These require that any dispute around ACC is resolved under the statutory dispute resolution process. The Court's response in an application for judicial review is that the person has to show that the matter cannot be resolved through the statutory dispute process before judicial review is available.

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71. The availability of judicial review must be seen in light of the access to justice issues outlined in discussion of article 13 (above), including funding, availability of expert counsel, and access to medical evidence.

Substantive Justice

72. Whilst the review and appeal process provides access to the law, there is a significant difference between access to the law and access to justice. There are serious and important questions about whether the accident compensation scheme's entitlements, even when correctly provided to injured people in accordance with the law, are actually providing justice.
73. Unfortunately, given New Zealand's constitutional structure, there is no national institution that can be used to hold Parliament to account. As the following excerpts from accident compensation judgments show, the role of the court is to administer the law Parliament has made.

Case D: “The Courts in New Zealand properly see their role in administering the accident compensation scheme to faithfully implement the law that Parliament has made. Regardless of whether it provides fairness (or justice) for injured people. ... whilst the application of the relevant statutory provisions has brought about a less than favourable result for this appellant, the Court is not able to address any perceived unfairness within the parameters of the statutory provisions which it must apply...”³⁸

Case E: “The Court cannot apply a spin to what Parliament has expressed in order to avoid what it may regard as being unfair... it has been legislated for reasons beyond the concept of fairness to individual claimants.”³⁹

³⁸ *Faulkner v Accident Compensation Corporation* [2006] NZACC 295.

³⁹ *Fox v Accident Compensation Corporation* [2006] NZACC 47 at [21] and [24].

Case F: “Whether a broad discretion to allow for possible unfairness in individual cases is appropriate is a question for Parliament. The court cannot ameliorate any perceived inequity which results from a situation which Parliament has clearly legislated for.”⁴⁰

Case G: “It is of course the case that the legislative policy is not to be undermined by an ungenerous or niggardly approach and a broad, rather than restrictive, interpretation is necessary. But where, as here, the meaning of the statutory provisions can be interpreted only in one direction, despite understandable notions of what might be “fair” in an individual case, the remedy if there is to be one has to be provided by Parliament. “Injury” and “incapacity” (to work) are not the same thing and do not necessarily occur contemporaneously, but nevertheless, “incapacity” has to be determined by the Corporation pursuant to the statutory test as confined by the provisions of s 103.”⁴¹

74. Injured people have made various governments and Parliaments aware of injustice. A person who is disabled by accident, who may currently have no means of financial support, is not in a position to enter the political process and lobby Parliament with complex submissions regarding legislative amendment.

An example of substantive injustice – persons abused in state care

75. One example of how the statutory scheme can achieve injustice can be clearly identified by examining the case of a person who is disabled because of abuse, which they suffered as a child in state care.
76. In 2003, the Court of Appeal held that sexual abuse victims had the right to sue the Department of Social Welfare if they suffered abuse because of the state’s involvement in their living arrangements in

⁴⁰ *Milne v Accident Compensation Corporation* [2007] NZACC 140 at [16].

⁴¹ *Vandy v Accident Compensation Corporation* [2011] 2 NZLR 131 at [24].

childhood.⁴² Parliament responded by extending cover under the ACC scheme for all those whose legal proceedings had not yet been determined, but these people lost their right to sue in return for cover under the scheme.⁴³

77. Unfortunately, this group is now left with cover under the statutory provision, but limited support from ACC because they were not working when they were injured. In deciding the case, the High Court said:⁴⁴

The outcomes under the present Act are unquestionably anomalous. It was not suggested otherwise before me. No Judge could frame common law duties in so inconsistent and erratic a fashion. Nor could insurers achieve such outcomes in an informed market. But cover under the Act is the product of careful and crystalline drafting by legislators. The meaning and effect of the statutory words in issue is quite clear.

78. The High Court, by following proper statutory interpretation principles and enforcing what is purported to be Parliament's intention, has put the ball firmly back into the government's court. In the three years since the first High Court judgment on this matter raised the clear injustice, Parliament has been silent. Vulnerable New Zealanders who have injuries caused by the negligence of the state are left with empty cover, no financial support, no entitlement to vocational rehabilitation and an unenforceable social contract that has no value in law and no value politically.

⁴² *S v Attorney-General* [2003] 3 NZLR 450 (CA) and *W v Attorney-General* (2003) unreported, CA 227/02 15 July 2003.

⁴³ Accident Compensation Act s 21A(1)(b) and (5); for explanation see *A v Roman Catholic Archdiocese of Wellington* [2008] NZCA 49, [2008] 3 NZLR 289 at [60]-[61].

⁴⁴ *Murray v ACC* [2013] NZHC 2967 at [69].

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79. Stepping back and considering this issue at an abstract level, the Judiciary has said that a group of people injured by the actions of the Executive branch of government had the right to sue the state in common law for personal injury. Parliament then removed their right to sue the Executive and made a policy decision to extend the application of the ACC scheme (in doing so, limiting its own common law liability). Later the Executive branch that implemented the policy proceeded with an appeal to the High Court and was successful. The effect of this was to deny those who have cover under the scheme any compensation for pecuniary loss they suffered. This group of people went from having nothing, to being able to sue the government, to having compensation under the scheme, to having no compensation.
80. This is the possible effect of having a government unchecked by the courts and law that does not consider the rights of persons with disabilities in making its decisions.

ARTICLE 14: LIBERTY AND SECURITY OF THE PERSON

RECOMMENDED QUESTIONS FOR THE LIST OF ISSUES

- Q 6. What steps is the New Zealand Government taking to ensure people with injuries are not improperly prosecuted or imprisoned because of the management of their injuries?
- Q 7. What steps is the New Zealand Government taking to safeguard the liberty of young New Zealanders with Traumatic Brain Injuries?
- Q 8. What steps is the New Zealand Government planning to take to address long-term loss of earnings for those suffering from injuries who are not entitled to compensation?
- Q 9. What steps is the New Zealand Government taking to ensure that people with injuries receive proper treatment in prison on an equal basis to people who are not imprisoned, including treatment for Traumatic Brain Injury?

Article 14 – Liberty and security of the person

81. The Convention requires that persons with disabilities shall enjoy the right to liberty and security of the person.
82. The words of the law in New Zealand do not breach this right. Instead, the law operates in a way that affects the right to liberty and security of persons with disabilities.
83. This article will be considered in the following order.
- (i) Keeping people with injuries out of prison.
 - (ii) Treating and rehabilitating injured persons in prison.
 - (iii) Reducing the impact of being imprisoned on entitlement to compensation and rehabilitation.

Keeping injured people out of prison

84. Keeping injured persons out of prison will be considered from the perspective of people with traumatic brain injury, followed by a discussion of the state's use of fraud investigations of injured people.

Traumatic Brain Injury and Incarceration in New Zealand

85. There is a serious issue surrounding traumatic brain injury (TBI) in New Zealand's prison population.
86. Nearly a third of New Zealanders suffer a TBI in the first 25 years of their lives, with the prevalence of serious brain injuries requiring overnight hospitalisation being over 12%.⁴⁵

⁴⁵ A McKinlay, RC Grace, LJ Horwood, DM Fergusson, EM Ridder, MR MacFarlane "Prevalence of traumatic brain injury among children and young adults: prospective evidence from a birth cohort." (2008) *Brain Injury* 22 (2) 175-181.

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87. The exact mechanisms that lead New Zealand children with TBI in the direction of the justice system are starting to emerge. By age 15, children with TBI have been found to have very high rates of psychiatric and psychosocial problems. Even mild TBI in childhood is associated with a significantly increased risk of developing psychiatric symptoms during adolescence, including more than six times the likelihood of developing conduct disorder. When problems emerge, the connection with the TBI is rarely made.⁴⁶
88. New Zealand research has shown that conduct disorder is highly predictive of development of criminal behaviour later in life.⁴⁷ These problems associated with TBI flow into adulthood, with increased risk of alcohol and drug dependence.⁴⁸
89. As at June 2009, the peak figures for young New Zealanders serving sentences, either in the community or in prison, were 14% of Maori males at 25 years, 3% of Pakeha males at 22 years and approximately 7% of young Pacific Island males between 21 and 28 years.⁴⁹
90. People with brain injuries are over-represented in prisons. A New Zealand study of a male prison population showed 86% of prisoners have suffered a TBI in their lifetime (the rate amongst

⁴⁶ Audrey McKinlay, Randolph Grace, John Horwood, David Fergusson and Martin MacFarlane “Adolescent psychiatric symptoms following preschool childhood mild traumatic brain injury” (2009) 24 (3) *Journal of Head Trauma Rehabilitation* p 221-227.

⁴⁷ David Fergusson and John Horwood “Male and female offending trajectories” (2002) 14 *Development and Psychopathology* 159-177; Policy, Strategy and Research Group Department of Corrections Over-representation of Māori in the criminal justice system An exploratory report (Department of Corrections 2007) at 32.

⁴⁸ Audrey McKinlay, John Horwood and David Fergusson “Alcohol and Drug use following Traumatic Brain Injury in Childhood, Adolescence and Early Adulthood” (paper presented to the 8th World Congress on Brain Injury, Washington D.C, 13 March 2010).

⁴⁹ Department of Corrections “Offender Volumes Report 2009” (2009) <www.corrections.govt.nz/research/offender-volumes-report-2009.html>.

Maori was 91%), and 56% of prisoners had more than one TBI. The rates of substance abuse were also higher than the general population.⁵⁰ A recent meta-analysis suggests a prevalence of 60% of TBI amongst prison populations.⁵¹ One recent study found prisoners with TBI were younger when they entered the custodial system, had higher rates of re-offending and had spent more time in prison in the previous five years than other prisoners.⁵²

91. More research and resources are required to address issues related to TBI. Even if the nature of the relationship between TBI, treatment (or lack thereof) and offending is not entirely clear, TBI is a useful marker of potential future behaviour and there is an opportunity to provide better treatment for people suffering from TBI prior to offending.

Data suggests there is a discrepancy between rates of traumatic brain injury and rates of claiming

92. Comparisons between ACC claim levels and available data from longitudinal studies (discussed above) and Ministry of Health figures (hospital data) suggest reporting bias with regard to brain injury. Very low levels of claims for TBI (2,912) are lodged with ACC.⁵³ These claims can be compared with data from the longitudinal study. This study suggests an annual rate of 7,000 head injuries requiring an overnight stay in hospital in the 0-25 years age

⁵⁰ TV Barnfield JM Leathem “Incidence and Outcomes of traumatic brain injury and substance abuse in a New Zealand Prison Population.” (1998) *Brain Inj.* 12(6):455-66.

⁵¹ EJ Shiroma, PL Ferguson and EE Pickelsimer “Prevalence of Traumatic Brain Injury in an Offender Population: A Meta-Analysis” (2010) 16 (2) *J Correct Health Care* 147-159.

⁵² WH Williams, AJ Mewse, J Tonks, S Mills, CN Burgess and G Cordan “Traumatic brain injury in a prison population: prevalence and risk for re-offending” (2010) 24 (10) *Brain Injury* 1184-1188.

⁵³ See for Example Accident Compensation Corporation “ACC Injury Statistics 2008/2009 Section 15. Head Claims” (2010) ACC <www.acc.co.nz> at page 2.

group alone.⁵⁴ Furthermore, some ethnic groups appear to have significantly higher rates of reported brain injury at hospitalisation, but these figures do not flow through when it comes to claiming for treatment and rehabilitation via ACC.

(a) Available data on cause and incidence of brain injury

93. The major causes of TBI in children were falls, blows to the head with an object, and motor vehicle accidents (MVA)⁵⁵ which all receive cover from ACC. The data available from the Injury Prevention Research Unit suggests that the incidence amongst Maori and Pacific populations for these injury mechanisms known to cause TBI is more than double what would be expected in the general population.⁵⁶
94. Across all mechanisms identified as significant causes of TBI, Maori and Pacific Islander children had higher incidences of admission to hospital than would be expected by their population size, accounting for nearly half the MVA related injuries amongst children.⁵⁷ It is known that 35% of MVA amongst Maori children result in TBI.⁵⁸

⁵⁴ Studies show 12.9% of people spent a night in hospital after a brain injury in the first 25 years of their life. New Zealand wide, the population in this age group to the year ended 2009 would have been more than 1.5 million and the expected number of traumatic brain injuries in this group alone in 2009 would have been more than 7,000. Obviously the longitudinal data by its nature requires a time lag, so the population rate may have changed, but the discrepancy in the data is significant.

⁵⁵ A McKinlay, RC Grace, LJ Horwood, DM Fergusson, EM Ridder, MR MacFarlane “Prevalence of traumatic brain injury among children and young adults: prospective evidence from a birth cohort.” (2008) *Brain Injury* 22 (2) 175-181.

⁵⁶ Shaun Stephenson, John Langley and Margaret Trotter “Impact of Injury in New Zealand: A description of the impact of injury resulting in death and hospital inpatient treatment by ethnicity, gender, age, and mechanism” (2nd Edition 2005) OR 051 <www.nzips.govt.nz>.

⁵⁷ *Ibid.*

⁵⁸ M Sargent, D Begg, J Broughton, S Stephenson, C Wright and J Baxter “Motor Vehicle Crashes involving Maori” (2004) *NZMJ* 117 (1188) at 746.

95. The major causes of TBI in 15-24 year olds were assaults, MVA and rugby.⁵⁹ The number of hospitalisations, particularly serious ones, for injuries caused by assaults and MVA amongst both males and females is disproportionately high for Maori and Pacific Islanders in this age group.⁶⁰

96. This is consistent with other data indicating that although Maori and Pacific Islanders are less likely to drive, they have a greater risk of injury and death than Pakeha with the risk of hospitalisation by MVA approximately three times higher for Maori and Pacific people.⁶¹

(b) Available data on rates of claiming ACC cover for brain injuries

97. Issues have arisen in the rate of lodgement in various ethnic groups. ACC data suggests TBI are suffered relatively evenly across the general population⁶² but this is inconsistent with the reported rates from hospitals discussed above⁶³ suggesting the low rate of claiming for ACC cover is even lower amongst those groups who suffer higher prevalence of TBI than the general population. This is of major concern and is a strong indication that the majority of young Maori and Pacific Islanders who suffer a TBI do not receive

⁵⁹ A McKinlay, RC Grace, LJ Horwood, DM Fergusson, EM Ridder, MR MacFarlane “Prevalence of traumatic brain injury among children and young adults: prospective evidence from a birth cohort.” (2008) *Brain Injury* 22 (2) 175-181.

⁶⁰ Shaun Stephenson, John Langley and Margaret Trotter “Impact of Injury in New Zealand: A description of the impact of injury resulting in death and hospital inpatient treatment by ethnicity, gender, age, and mechanism” (2nd Edition 2005) OR 051 <www.nzips.govt.nz>.

⁶¹ Ministry of Social Development “The Social Report Te purongo oranga tangata 2009” <<http://www.socialreport.msd.govt.nz/safety/road-casualties.html>>.

⁶² Accident Compensation Corporation “ACC Injury Statistics 2008/2009 Section 15. Head Claims” (2010) ACC <www.acc.co.nz>.

⁶³ Shaun Stephenson, John Langley and Margaret Trotter “Impact of Injury in New Zealand: A description of the impact of injury resulting in death and hospital inpatient treatment by ethnicity, gender, age, and mechanism” (2nd Edition 2005) OR 051 <www.nzips.govt.nz>.

appropriate support and rehabilitation. There might be a number of reasons why, including lack of awareness of brain injury and barriers to reporting such or seeking help.

Further research is required

(a) *Treatment and Rehabilitation*

98. It may be the case that failure to properly treat and provide rehabilitation for young persons who suffer from brain injury contributes to offending and ultimately loss of liberty.
99. Research must be undertaken to consider rates of TBI in particular populations with targeted interventions to treat these and provide proper rehabilitation.

(b) *Addressing loss of earnings*

100. In some circumstances, a person injured before they enter the workforce is not entitled to any compensation for lost earnings, as they were not earning at the time of their injury. Even if they enter the workforce and then the effects of their injury prevent them continuing to work, no compensation is payable.⁶⁴ This has been discussed above in the section on access to justice, and below in the rehabilitation section. The injury and the lack of support can have an effect on education and long-term socio-economic outcomes for young people who suffer TBI.

⁶⁴ *Vandy v Accident Compensation Corporation* [2011] 2 NZLR 13.

Injured people accused of fraud by ACC

101. A more direct way in which the law can result in a person's injury leading to deprivation of liberty, is through an ACC fraud investigation.

Background to the fraud unit investigations

102. ACC believes that approximately 10 per cent of claims to ACC for cover and entitlements involve fraud.⁶⁵ In the last five years, the number of long-term claimants receiving compensation has dropped from 14,500 to about 10,000.⁶⁶ Each year ACC's Investigation Unit investigates approximately 1,500 claimants.⁶⁷
103. The criminal law has been utilised by ACC to stop abuse of the scheme. Whilst there is a small proportion of people who may defraud the scheme by "faking injuries" or by other means, the vast majority of people who have been subject to a fraud investigation were people who were genuinely and seriously injured and prima facie entitled to receive weekly compensation.⁶⁸ Successful fraud investigations rely as much on misunderstandings of ACC legislation as from anything derived from the investigation.
104. One of ACC's indicators for potential fraud is the length of time that a person has received weekly compensation. The effect of this indicator is that ACC discriminates against those requiring support on a long-term basis.

⁶⁵ Transport and Industrial Relations Select Committee 2005/06 Estimates Vote ACC *Report of the Transport and Industrial Relations Committee* Appendix 4, corrected transcript of evidence given on 16 June 2005 at p 28 and 29.

⁶⁶ ACC Annual Reports 2009-2013.

⁶⁷ Written parliamentary Question 4876 (2011).

⁶⁸ Approximately 1 per cent of people investigated are prosecuted (1,500 are investigated and about 15 are prosecuted).

105. One of the most abhorrent effects of this system is that ACC continually requires people with disability caused by injuries to “prove” their disability. Fraud investigations seek to “catch people out” and long-term claimants report paranoia and serious anxiety from constantly “looking over their shoulder”. Putting the onus on the injured person to show constantly they are disabled and “deserve” the money they are receiving, adds to the person’s burden and can increase their social isolation and stigma caused by their disability.
106. People receiving weekly compensation for long periods are caught in a gap of the ACC scheme due to no fault of their own. They are unable to do the job they were doing when they were injured (they are “incapacitated”), yet they may be capable of doing a different job on a part-time basis. This group has no obligation to work under the legislation because they are entitled to continue to receive weekly compensation until they can return to a new job full-time (that is, until they are found “vocationally independent”). ACC case managers, investigators, and many lawyers do not understand this distinction.
107. The fraud investigation became the tool developed to force this group of people off the scheme. It is the only mechanism that allows retrospective determination of entitlement, and is the only way that legislated assessment procedures can be ignored.
108. ACC has successfully criminally prosecuted and incarcerated injured people (alleging that fraud has occurred) where it has subsequently been established that the person *was* entitled to receive the compensation that they were convicted of obtaining by
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deceit. ACC ultimately has to acknowledge that a criminal prosecution does not mean the person was not entitled to weekly compensation.⁶⁹ Despite this, staff within ACC have expended significant effort in securing a prosecution, and this can have an impact on the way that staff relate to a claimant. Similarly, it has a significant impact on the trust and relationship between ACC and the wider community.

The Fraud Process

(a) *Referral to the fraud unit*

109. A fraud investigation can be triggered in several ways. There is a dedicated ACC fraud “hotline” telephone number that allows anyone to leave an anonymous tipoff. Case managers also have a process for triggering a fraud investigation of their clients. There are also data matching processes, whereby tax data on earnings, and companies office data on shareholders and directors, is matched with ACC data.
110. The anonymous nature of the fraud hotline means that there is no accountability. There are cases where injured people have had four or more investigations over a ten-year period, which are likely to have come from the same anonymous source. A previous study, undertaken by Acclaim Otago in drafting submissions for the 2008 ACC fraud inquiry, suggested that relationship breakdowns between friends, families, neighbours and workplaces were a significant cause of these investigations.

⁶⁹ *Burnett v ACC* [2007] NZACC 210; *ACC v Burnett* [2008] NZACC 74; *Tuitaaiti v ACC* [2009] NZACC 68; *Cruickshank v ACC* [2011] NZACC 130; *Hayes v ACC* [2010] NZACC 238; Review 42058; Review 146254; and Review 146255.

111. Another source of referral is staff in the ACC branch that manages the person's claim (see case study A above). There is a potential conflict of interest here, as the key performance indicators of the staff can include ceasing a person's weekly compensation. There is also anecdotal evidence of fraud investigations being triggered by case managers after a breakdown of relationship between the injured person and their case manager.⁷⁰

(b) Investigations aim to reduce payments rather than prevent abuse

112. The purpose of the investigation is clearly identified in ACC's former contract with private investigators. This contract included a key performance indicator that 80 per cent of investigations result in:⁷¹

Prosecution, cessation, suspension of entitlements, civil action, positive change in claimant capacity status ... or some other form of positive action has occurred.

113. Publicity surrounding the release of this contract resulted in a review of the ACC Fraud Unit⁷² and rewriting of the contracts. It suggests that the purpose of the investigations was primarily to cease entitlement payments, rather than identify actual abuse or fraud. Further evidence of this is the fact that the success of the Fraud Unit is measured by comparing expenditure on investigations

⁷⁰ Acclaim Otago conducted detailed interviews and made submissions to: Doug Martin, Chloe Anderson and Barry Jordan *Review of the Accident Compensation Corporation Fraud Unit* (Report to the Accident Compensation Corporation, Wellington, 2007).

⁷¹ ACC Response dated 20 April 2007 to an Official Information Act Request dated 3 January 2007 to disclose the contract between ACC and Private Investigators (Obtained under the Official Information Act 1982 Request to the Accident Compensation Corporation).

⁷² Doug Martin, Chloe Anderson and Barry Jordan *Review of the Accident Compensation Corporation Fraud Unit* (Report to the Accident Compensation Corporation, Wellington, 2007).

with the amount of compensation saved.⁷³ ACC is still undertaking this calculation.

114. ACC fraud investigations severely damage a person's standing in the community. When conducting investigations, ACC contacts the injured person's doctor. The allegation of fraud in the treating relationship has a significant effect on the relationship between the injured person and their treatment provider. ACC also visits people's neighbours, social groups and employers. They rely on the consent provided by the person in the ACC167 form (see discussion of article 22) to show third parties that they are allowed to collect and disclose personal information of the injured person. ACC sometimes also claims to be able to breach privacy without consent by relying on Principle 11 of the Privacy Act 1993. This process has a significant effect on injured peoples' relationship with their community and their employer (or other potential employers).
115. Whilst ACC claim this process is legitimate, there remains significant stigma on persons disabled by injury being supported by the community. Some people within that community view injured people as "bludgers", a piece of derogatory slang referring to someone who chooses not to do their fair share of work and instead to rely on the hard work of others. Simply by telling a community that a person is receiving ACC support can result in stigmatisation and ostracism. There are multiple examples of people with disabilities having to leave their community after an ACC fraud investigation.

⁷³ Transport and Industrial Relations Select Committee 2005/06 Estimates Vote ACC *Report of the Transport and Industrial Relations Committee* Appendix 4, corrected transcript of evidence given on 16 June 2005 at p 28 and 29.

(c) *Prosecution*

116. When ACC prosecutes an injured person, that person is charged with “dishonestly using a document”⁷⁴ or “obtaining by deception.”⁷⁵
117. The key documents for both charges are the medical certificates that ACC requires a claimant to produce in order to prove that they are still disabled every three months.
118. The allegation is generally that the medical certificates record that a person is “fully unfit” in contrast to the evidence obtained by the investigation that the person is capable of performing physical tasks (to the most superficial and limited extent). Based on these two pieces of information, ACC asserts that a person has lied to their doctor, because their doctor has certified that they are fully unfit through the medical certificate.⁷⁶
119. The legislation only requires that a claimant be certified as “incapacitated” under s 103, meaning that they cannot return to the job they were doing when they were injured. ACC’s broader requirement that a person show they are “fully unfit” simply results in confusion, investigation, prosecution, and discrimination.
120. Lawyers misunderstand the medical evidence in an ACC fraud prosecution including complex mental injuries. For example a prosecutor’s closing address to the jury as follows, was one of the foundations for an appeal of conviction, but only after being

⁷⁴ Crimes Act 1961, s 228.

⁷⁵ Crimes Act 1961, s 240.

⁷⁶ Independent Police Conduct Authority *Report into Complaint by Bruce Van Essen* (Wellington, 2008) at p 26, [91].

successfully appealed to the Supreme Court, during which time the person had been found guilty and imprisoned.⁷⁷

What did you make of the psychiatrist that the accused hired just before the trial and paid to try and get a defence to these charges? What did you make of Dr Davis' psycho babble? At the end of the day the doctor agreed that it was ultimately for you to make the decision about deceit or fraud, that's not for a doctor to make. You may well think that Dr Davis was a malingeringer's dream who seemed to be able to come up with an explanation for everything the accused did as being consistent with Chronic Pain Disorder. Do you think he came across as an independent and impartial expert or was he someone who was firmly in the accused's camp bending things around to suit the accused.

...

You may well think at the end of the day Dr Davis' evidence seemed to say that everything was explainable by Chronic Pain Disorder. Is this just another one of those myriad of modern disorders let loose on the world by the medical profession which means that no one's responsible for any of their own actions anymore?

(d) *Reparation*

121. ACC seeks reparation through the criminal court for the value of the weekly compensation that was paid to the claimant over the life of their claim. The Sentencing Act 2002 introduced a presumption in favour of reparation.⁷⁸ The sentence of reparation is based on the idea that it is unfair for a victim of crime (here it would be

⁷⁷ *R v Stewart* [2009] NZSC 53; [2009] 3 NZLR 425; (2009) 24 CRNZ 774.

⁷⁸ Sentencing Act 2002, s 12 (1).

ACC) to be required to prove wrongdoing and quantum of loss in separate civil proceedings where this can be more easily achieved in the course of the criminal proceeding at hand.⁷⁹ However, it is problematic to determine entitlement to ACC compensation in a criminal court, particularly given the procedural complexity of assessing entitlement and the specific statutory provisions for resolving disputes about compensation under the ACC legislation.

Treating and rehabilitating injured persons in prison

122. Despite the state report's claims at paragraphs 78-82, accessing treatment in custody can be a real problem for injured people.

Case Study H. Mr Jones was prosecuted for fraud by ACC on the basis that he was faking his injuries. The catalyst for this was a breakdown in relationship with his former brother in law. Despite having cover for his physical injuries and chronic pain disorder, and the psychiatric evidence at trial conclusively demonstrating that he suffered a pain condition, the prosecutor criticised the psychiatrist. Mr Jones was found guilty and sentenced to three years in prison. At this stage, he was taking regular high doses of prescribed medication for his pain. When he arrived in prison, all of his medication was immediately stopped. The prison staff rang ACC and were told by ACC that there was nothing wrong with him. ACC did not issue a decision or give Mr Jones a chance to dispute this, the prison staff simply relied upon what they had been told by ACC. Mr Jones was not given access to any pain medication for several weeks until his medical records arrived. Mr Jones successfully appealed his conviction to the Supreme Court and his weekly compensation was reinstated. He was not given any compensation for his time in prison because the Accident Compensation Act provides no entitlements to compensation for persons in prison.⁸⁰ Mr Jones was ostracised from his family and the clubs he belonged to because of the inquiries made by a fraud investigator.

⁷⁹ Law Commission *Compensating Crime Victims* (NZLC R121, 2010) p 10 at [2.10].

⁸⁰ Accident Compensation Act 2001, s 121.

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123. Anecdotal evidence from individual cases suggests that people in prison find it harder to access treatment and rehabilitation, and they can experience significant delay. Although data shows the prevalence of TBI in the prison population (discussed earlier in this chapter), there is no available evidence or systemic data regarding ACC providing treatment and rehabilitation of persons with TBI in prison.

Reducing the impact of being imprisoned on entitlement to compensation and rehabilitation

Prisoners have no entitlement to compensation and limited entitlements to surgery

124. If a person is injured, and is then imprisoned for any reason, all compensation to them and/or their family stops for the duration of imprisonment. This applies even when that person is wrongly imprisoned.⁸¹
125. In 2010, the ACC legislation was amended so that if a person was injured in the course of committing an offence (that offence being punishable by a certain type of sentence) and the person receives any sentence of detention, no entitlements can be provided except limited treatment.⁸² This exclusion applies both during imprisonment and after the release of a person and also applies to families of an injured person who is deceased. The Minister has discretion to exempt a person from this exclusion however there is no process in place to apply for the exercise of this discretion.

⁸¹ Accident Compensation Act 2001, s 121, *Chapman v ACC* [2009] NZACC 118.
⁸² Accident Compensation Act 2001, s 122.

126. This means that a person who commits their third drink driving offence and is injured in a car crash, even if they did not cause the accident, may not be entitled to any support except limited treatment. A person who is convicted of driving carelessly causing injury is prevented from obtaining any entitlements, even if their blood alcohol was not over the legal driving limit. This would mean that they have no income support and no retraining. Similarly, if someone is prosecuted for assault after being involved in a fight, they will likely have no entitlement to rehabilitation. The available evidence shows motor vehicle accidents, assaults, and rugby are the main causes of brain injury in 15-24 year old men in New Zealand.⁸³ Accordingly, two of the top three causes of TBI in New Zealand may result in no support, based on a punitive approach.
127. Given the effects of TBI and other injuries on a person's long-term wellbeing, the importance of encouraging rehabilitation rather than preventing it cannot be overstated.

⁸³ A McKinlay, RC Grace, LJ Horwood, DM Fergusson, EM Ridder, MR MacFarlane "Prevalence of traumatic brain injury among children and young adults: prospective evidence from a birth cohort." (2008) *Brain Injury* 22 (2) 175-181.

ARTICLE 17: PROTECTING THE INTEGRITY OF THE PERSON

RECOMMENDED QUESTIONS FOR THE LIST OF ISSUES

- Q 10.** Does New Zealand law enable injured New Zealanders to give or withhold fully free and informed consent to all healthcare practitioners involved in their claim? If not, what steps is the government going to take to ensure that the law is changed to enable this?
- Q 11.** What steps are in place to ensure that an injured person's consent given for one purpose, such as treatment, is not used for another purpose, such as stopping entitlements or prosecution?

Article 17 – Protecting the Integrity of the Person

ACC’s assessment system

128. The right to be fully informed, and the requirement for informed consent for all interference with a person’s physical or mental integrity, constitute the foundation of New Zealand’s medico-legal systems.⁸⁴
129. The state report fairly suggests that informed consent is a core principle of the Code of Health and Disability Consumer Rights and underpins New Zealand’s compliance with the Convention. However, it also gives the impression that informed consent is available as a protection of the rights of people with disabilities across all interactions they have with the healthcare system and healthcare professionals.
130. Our submission is that the state report gives a misleading impression of the rights of ACC claimants to integrity of the person. ACC does not treat informed consent with the same gravity as under the Code of Health and Disability Consumers’ Rights. Similarly, the Code is disregarded as irrelevant in many ACC matters. An undeniable factor in this position is the fact that significant financial support flows from each medical assessment. This can be seen as justifying a more vigilant approach.
131. Informed consent and refusal to undergo treatment presents a highly technical area of medical law that requires adequate legal advice in order to be of any benefit to people challenging ACC’s decisions (see discussion of article 13 regarding access to justice).

⁸⁴ Skegg and Paterson *Medical Law in New Zealand* (1st Edition, Brookers, Wellington 2006) 2.6.5 page 43 and Chapter 7, page 205-228).

132. The Court of Appeal has held that the ability to consent to a disclosure by a medical practitioner depends in the abstract upon the ability of the patient to understand what is involved.⁸⁵ More recently, the Court of Appeal has properly held that a person cannot provide their consent to something about which they are not informed.⁸⁶ Nonetheless, whether a person can provide or did provide informed consent is a different question from whether a person has a right to give informed consent. There is no overriding right for a person to decide whether or not to give their informed consent in New Zealand law.
133. A person with disabilities caused by accident in New Zealand is *not* able to effectively control their physical and mental integrity using existing legal mechanisms such as the Code of ACC Claimants' Rights and the Code of Health and Disability Services Consumers' Rights.
134. Informed consent is not recognised or respected by the administrators of the scheme and a person with disabilities seeking to enforce their right to informed consent has no remedy under existing structures.

The right to refuse to undergo treatment

135. The New Zealand Bill of Rights Act 1990 (NZBORA) sets out at section 11 that “everyone has the right to refuse to undergo any medical treatment.” There are two ways that this can be interpreted: one complies with the Convention and the other does not.

⁸⁵ *Pallin v Department of Social Welfare* [1983] NZLR 266 (CA) at 277.

⁸⁶ *R v Dittmer* [2003] 1 NZLR 41 (CA) at [47].

136. The first is that fully informed consent is required, an interpretation consistent with both articles 17 and 25. The second is that something less than fully informed consent is sufficient, in the sense of a general idea of what is occurring, which a person may take further and refuse if they wish.

137. The New Zealand High Court considered the interpretation of this section in *Smith* where it held:⁸⁷

... s 11 does not create or record a fundamental right to be free from a health professional's negligent failure to secure completely informed consent. The section is not framed as a right to full information about proposed medical treatment. It does not focus on the concept or quality of consent. Its purpose of protecting people from becoming the non-consensual object of another's treatment suggests that it was intended to cover broadly similar ground to that covered by the tort of battery. Accordingly, I consider that it is appropriate to follow the English and Canadian cases cited at [110]-[113] above. The right to refuse to undergo medical treatment is honoured where the patient has a broad understanding of the nature of the proposed treatment, the health professional does not go beyond the treatment proposed, and the consent is not vitiated by fraud or misrepresentation.

138. The Court of Appeal dismissed the Appeal and the Supreme Court declined leave to hear the appeal,⁸⁸ so this High Court case is still the leading case on this point in New Zealand.

139. It follows that section 11 of the NZBORA is not a right to fully free and informed consent. Instead, it is a limited right, which is met where a practitioner gives enough information to avoid being sued for battery.

⁸⁷ *Smith v Attorney General* (HC WN CIV 2005-485-1785 [9 July 2008]) unreported at [119].

⁸⁸ *Smith v Attorney General* [2010] NZCA 258; *Smith v Attorney General* [2010] NZSC 114.

140. Further, when issues of this nature arise, the onus of proof lies with the injured person to show that they did not have a general understanding of the treatment.

No right to fully free and informed consent

141. The law in New Zealand does not provide an absolute right to refuse treatment or assessment.
142. ACC legislation facilitates significant duress to undergo treatment and/or assessment. For discussion of duress as it relates to private personal information and medical records, see the discussion of article 22.

Duress to undergo assessment

143. In the accident compensation context, the High Court recently refused leave to hear a proposed appeal regarding the refusal of a person to undergo an assessment. Justice Williams stated quite simply that the position is clear: a person can refuse medical assessment, but by doing so they risk their entitlements being suspended by ACC.⁸⁹ This is a correct statement of the law as it currently exists. The Court of Appeal refused leave to appeal against the High Court decision. The test for leave is whether case raises a legal question capable of bona fide and serious argument regarding a public or private interest of sufficient importance that it would outweigh the cost and delay of a further appeal. The Court of Appeal said this case did not meet that test.⁹⁰

⁸⁹ *Howard v ACC* [2013] NZHC 188 at [35].

⁹⁰ *Howard v ACC* [2013] NZCA 617 at [18] and [19].

144. According to section 72 of the legislation, the issue for any claimant seeking to refuse to undergo treatment will be whether ACC’s requirement that they undergo the treatment was “reasonable”, and whether the claimant’s corresponding refusal was “reasonable”. “Reasonableness” is a poor defence of a person’s right to refuse treatment. The onus is on a claimant to show that their refusal to undergo treatment was “reasonable” if they wish to remain entitled to compensation. In practice, this falls to being resolved according to the opinion of a reviewer as to the prospects of risk, success, and financial savings to the ACC scheme.
145. The only way to challenge ACC’s decision is through the review and appeal process, with its structural and financial inadequacies (see article 13 access to justice above).

Duress to undergo treatment

146. Examples exist where an injured person has refused to undergo surgery, because of the risks associated with that surgery, but all entitlements were suspended until the person complied. One claimant was told that if they did not have another back operation (having had three previously), ACC would stop weekly compensation, removing an injured claimant’s primary source of income. A person might challenge this through the review and appeal process and might ultimately be successful, but during that period, they will have no income. Where an injured person is making mortgage payments on a regular basis, the choice is between compliance and default.

Case study I: Mr Smith worked as a labourer carrying heavy loads of 50kg and involving twisting. He injured his back at work and underwent a spinal fusion at L5/S1. He was “rehabilitated” back to work and then his entitlements were stopped. He could not maintain the work and left for work that was of a lighter nature physically. Several years later, he was working in a café and could not even sustain this level of work. ACC started paying him weekly compensation based on his café earnings (which were a third of his earnings when he was first injured). He had another back operation. He started his own business, but after a falling out with his neighbour, the neighbour started several fraud investigations. ACC charged him with fraud. As part of the assessment process, an orthopaedic surgeon said he could improve his back with a third surgery. Mr Smith was sceptical, but ACC said that if he did not have the surgery, they would stop his payments. If his payments were stopped, he would lose his house. Mr Smith decided he did not want to risk that and he would have the surgery. The surgery was scheduled and paid for by ACC. He was due to be in court to face the ACC fraud charges on the same day that the surgery was to occur, so the trial had to be adjourned. The media surrounding the investigation and prosecution turned most people in the small town against Mr Smith and it had a huge effect on his relationships. Mr Smith knew that if he went to prison, his compensation would stop and he would lose his house. He accepted a plea deal where he pled guilty and would be sentenced to community work, which he did. The community work turned into a part-time job so now Mr Smith receives half his earnings from his work.

147. ACC’s rationale is that if a medical assessor or treatment provider recommends that surgery will improve the injured person’s function, they may then be able to return to work of some kind. It is therefore unreasonable from the ACC’s perspective to refuse to undergo that surgery because injured people have an obligation to

return to work and reduce the cost of their injury to society.⁹¹ The person's view of the risk involved is not determinative here.

Treatment providers' position

148. Treatment providers and assessors can maintain their legal obligations by ensuring that duress comes from ACC rather than themselves. The medical assessor's obligations do not extend to ensuring that the injured person is not under any duress at all, but instead, that they themselves are not putting the person under that duress.

Personal information collected during assessments and used for other purposes

149. The law in New Zealand does not provide adequate protection to claimants from having information which was collected under duress for one purpose (assessing entitlement to weekly compensation) from being used for some other purpose, for example as evidence in a criminal prosecution. The Privacy Act and Evidence Act⁹² both address this point in New Zealand law generally; however, neither of these provides adequate protection to ACC claimants through the statutory dispute resolution process.⁹³
150. Similarly, despite the existence of the New Zealand Bill of Rights Act and its guarantees against unreasonable search and seizure and pre-trial rights to silence, the law as it currently stands in New

⁹¹ *Andersen v ACC* [2005] NZACC 318.

⁹² Evidence Act 2005, s 30(5)(c); it is also arguable that common law evidence rules of unfairness apply.

⁹³ Accident Compensation Act 2001, s 141(4) excludes evidential rules and the Privacy Act 1993, s 7(2) means the Privacy Act does not apply when ACC is fulfilling its statutory functions.

Zealand is that an injured person has an obligation to undergo assessment when directed by ACC, even when the intention is to use that medical examination as evidence in the prosecution of the person.⁹⁴

151. If a person alleges that one of the purposes of the medical examination is to gain evidence for prosecution, they can refuse to undergo the assessment. However, while they wait to challenge that decision against the barriers inherent in the statutory dispute resolution process they must be prepared to do so without treatment or financial support. When they get to court, they are likely to be told it is unreasonable to rely on their right to refuse to undergo assessment or treatment or their right to silence.

The impact of ACC’s assessments on the integrity of the person

152. New Zealand’s personal injury system is commonly described as being “no-fault”. It would be more accurate to say that the dispute about fault has simply shifted to a dispute about causation. The legislative tests that must be met before a person receives cover all require a person to show that their disability has been *caused* by something covered under the legislation. Causation is the key to support.
153. Cause is often determined by a series of assessors employed by, contracted to, or deriving a significant proportion of their income from ACC. The process is not transparent, there are no guarantees of independence, and causation is an inherently disputable concept.

⁹⁴ *Sinclair v ACC* [2013] NZACC 261 at [23]-[24]; *Howard v ACC* [2005] NZACC 121 at [35]-[36], *Freeborn v Accident Compensation Corporation* [1998] 2 NZLR 371 at 381.

154. It might be questioned whether an assessment of the causative impact of environmental and genetic influences on a human body in relation to its current state of “health” can ever really be meaningful, let alone *determinative* in legal proceedings. This is one of the reasons why we support a holistic approach to the support of people with disabilities in New Zealand.
155. The integrity of the person is neither recognised nor protected through ACC processes, even if individual practitioners make a nominal effort in good faith.

ACC assessments by contracted assessors and employees

156. Emergency treatment and other exceptions aside,⁹⁵ the ACC legislation prohibits payment for provision of treatment without prior approval from ACC.⁹⁶ The treating practitioner completes a form and ACC employs a wide range of non-treating health professionals (including psychologists, physiotherapists, general practitioners, and orthopaedic surgeons) who consider requests for treatment. Without seeing patients, these non-treating specialists increasingly overrule⁹⁷ the diagnosis and treatment recommendations of treating practitioners, even when those treating are far more qualified than those who are assessing.⁹⁸

⁹⁵ Accident Compensation Act 2001, s 7; and sch 1, cl 4 (2).

⁹⁶ Accident Compensation Act 2001, sch 1, cl 4; also see discussion below under article 25, health.

⁹⁷ The number of requests for surgery that were declined nearly doubled between the 2008 and 2009 financial years to 8,500. This increase in declined claims for surgery was maintained (in 2012-13, 10,047 surgery claims were declined) and the number of applications also has dropped. ACC annual reports from 2012 and 2013 showed the number of claimants undergoing surgery at 32,000 and 33,000 (some received more than one elective surgery operation).

⁹⁸ See Review 146466 where ACC followed the advice of their Medical Advisor (a GP) over the advice of the treating Orthopaedic Surgeon, GP and Physiotherapist.

157. The evidentiary and funding issues described above, in the section on access to justice compound the effect of the contracting system. Non-treating specialists cannot be cross-examined through the dispute resolution process, and obtaining alternative medical evidence is often prohibitively expensive.

An example of the contracting system for assessments

158. The contracting system regarding non-treating practitioners can be illustrated by considering ACC's use of non-treating psychologists.
159. ACC branches have Branch Psychology Advisors (BPAs) who are paid up to \$180,000 per year by ACC to advise the branch internally, based solely upon reviews of documents held by ACC. These fifteen BPAs do not see any patients in their role for ACC, but provide their opinion on patients' treatment options. In doing so, they control ACC's expectations of what is a viable course of treatment, control ACC's decision about what treatment they will fund, and effectively control the treatment other treating psychologists can provide to patients.⁹⁹ For further information, see discussion regarding the effects of ACC's treatment funding decisions at article 25, health.
160. A total of 148 psychologists out of the 1897 registered psychologists in New Zealand (some of whom are the same BPAs who provide advice to ACC branches) undertake psychology assessments pursuant to a contract with ACC and each practitioner can receive up to \$540,000 per year for these services.¹⁰⁰

⁹⁹ New Zealand has 1,897 Registered Psychologists with a practicing certificate. Psychology Board Annual Report 2009, p 9.

¹⁰⁰ ACC letter dated 29 April 2010, (Obtained under Official Information Act 1982).

161. Issues have arisen because a small number of these psychologists conduct 1000-2000 assessments per year, which is ten times the average number of assessments conducted by other contracted psychologists.
162. At the very least, ACC appears to prefer certain medical professionals to others, and certain medical professionals appear to have a particularly close relationship with ACC. These appear to be some of the providers who receive high payments from ACC.
163. Other issues have been raised when ACC asks clients to be “independently assessed” by the same psychologist who is employed as a branch psychology advisor.¹⁰¹

An example of the contracting system for treatment

164. ACC designed the contracting system and acknowledged to the Commerce Commission the “belief among clinicians that an ACC contract locked them into a “pot of gold” for the length of the agreement”.¹⁰²
165. In 2008, David Goddard QC undertook a ministerial review into physiotherapy. He discussed the effect of contracting and price fixing on the health market.¹⁰³ He found that fairness issues arise due to the use of a two-tier regime that means a contracted tier is funded at nearly twice the rate of the other, making the second tier

¹⁰¹ *Q v Legal Complaints Review Officer and James Hegarty* [2013] NZCA 570.

¹⁰² Commerce Commission Decision No. 546, 17 February 2004; Public Version, pages 25-26 (regarding contracts for Orthopaedic services).

¹⁰³ David Goddard, Q.C., *The way in which Physiotherapy Services are Funded and Accredited by ACC* Department of Labour, Wellington, September 2007.

not financially viable.¹⁰⁴ ACC’s advice to the Department of Labour was that implementation of this contracting system would mean that up to 50% of physiotherapists in New Zealand would go out of business but that they felt this was acceptable.¹⁰⁵ This will be discussed in detail below at article 25, health.

Assessments related to compensation

166. The scheme has a statutory purpose of rehabilitating claimants to the maximum practicable extent.¹⁰⁶ Parliament designed a statutory process to be followed to determine when a person is rehabilitated, named the “vocational independence process”. This process is deemed to be complete when ACC obtains an assessment by a medical professional that concludes¹⁰⁷ a person can work 30 hours per week in an identified job.¹⁰⁸ A person’s capability to do that job is assessed according to a hypothetical description of that job, such as that it “involves bending and sitting” and is “of light to medium physical demand”. These hypothetical descriptions are often meaningless when considered in light of a real-life work environment.
167. The design of this process means that, in practice, the question ACC asks is what *minimum* level of rehabilitation is required to obtain an assessment that the person is (or *should be*) able to return to 30 hours per week in a hypothetical description of a job (see discussion below under Article 26: Rehabilitation).

¹⁰⁴ Ibid, para 5.51.

¹⁰⁵ Department of Labour, (Obtained under Official Information Act 1982, April 2008).

¹⁰⁶ Accident Compensation Act 2001, s 3.

¹⁰⁷ Ibid, ss 107-112 and Sch 1, Cl 29.

¹⁰⁸ See for example *Hohepa v ACC* [2006] NZACC 22 where an Airline Pilot was “rehabilitated” to be a computer operator; and, *Alsig v ACC* [2001] NZACC 54 for a discussion about whether a person with one leg could be rehabilitated to be a tap dancer.

168. This results in assessments that determine a sixty-year-old who may have never worked with computers before is capable of work involving computers after a three-week basic computer course. For further information, please refer below at article 26, rehabilitation, and article 27, work and employment regarding outcomes of rehabilitation.
169. Once this assessment has been achieved, a person is “vocationally independent” and is no longer entitled to be compensated with 80% of their pre-accident earnings.¹⁰⁹ ACC can then claim that they have enabled a person to get “back to work”. Studies have shown poor outcomes for people assessed as vocationally independent (see discussion under article 27 for a summary of existing data).
170. Either the vocational independence process is flawed, the assessments are inaccurate, or both.
171. The courts have accurately concluded that they must follow the law. In *Albert v ACC*, Judge Middleton considered ACC’s exit strategies contained in an operation policy document and said¹¹⁰

I hope that the proposals outlined in the document of 6 October 1999 are not being implemented in the manner in which I have interpreted them but because of the number of times this issue has been raised before me I have my doubts. These doubts have not been assisted by a recent public statement from the respondent claiming “success” in the reduction of the number of longstanding claimants.

As I have already said, the Court must accept the assessments made by the duly qualified assessors but I have to do so with reluctance.

¹⁰⁹ Accident Compensation Act 2001, ss 101 and 112.

¹¹⁰ *Albert v ACC*, above n 73, at p 10.

172. Injured people regularly allege that assessors are biased in favour of ACC. The position of the Court, however, is that if assessors have followed the statutory process and are duly qualified, then their reports will be considered and weighed.¹¹¹

173. In a recent case, an allegation of perceived bias on the part of the psychologist to support a submission that their client should have a choice of assessor resulted in costly disciplinary action against the lawyer.¹¹²

ACC chooses assessors

174. ACC previously insisted that claimants were able to participate in choosing which assessor would conduct an assessment.¹¹³ ACC developed a policy on claimants' ability to choose their own assessor¹¹⁴ that was inconsistently applied¹¹⁵ because staff did not think the policy was correct.¹¹⁶ In response, ACC developed a further policy in which ACC determined which assessor a person is referred to¹¹⁷ and the scope of the assessment to be undertaken. The rationale for this policy was that denying claimants a choice had the effect of reducing the weekly compensation ACC has to

¹¹¹ *Davies v ACC* [2005] NZACC 74; *Van Ryhn v ACC* [2006] NZACC 1; *Gronn v ACC* [2008] NZACC 101; *U of Gisbourne v ACC* [2006] NZACC 266; *Oliver v ACC* [2008] NZACC 34; *Ilich v ACC* HC AK CIV-2006-485-001074 (25 Oct 2006).

¹¹² In one recent case, a lawyer's submission that a person had a conflict of interest because they were both a branch advisor and a suggested independent assessor resulted in complaints to the law society which were upheld by both the Disciplinary Tribunal and the High Court before being dismissed by the Court of Appeal. See *Q v Legal Complaints Review Officer and James Hegarty* [2013] NZCA 570.

¹¹³ Accident Compensation Corporation: Case Management of Rehabilitation and Compensation; Auditor General, Wellington 2004 at 4.59.

¹¹⁴ ACC Policy, Client Choice of Assessor 2004-2009, (Obtained under Official Information Act 1982, 22 Mar 2010).

¹¹⁵ *O'Malley Scott* [2009] NZACC 135.

¹¹⁶ Executive Leadership Team Issues Paper: Level of Provider Choice Offered to Clients, 12 October 2009, Wellington at para 4.2 (Obtained under Official Information Act 1982, 22 Mar 2010).

¹¹⁷ ACC's Policy on Choice of Assessors, 14 Dec 2009, (Obtained under Official Information Act 1982, 22 Mar 2010).

pay.¹¹⁸ ACC regards this decision as being an internal administrative decision, which is not capable of being reviewed through the statutory process.¹¹⁹ Failure to comply with ACC’s demands to undergo assessment¹²⁰ or treatment¹²¹ with their chosen medical professional results in weekly compensation being suspended.

175. There is no way to compel ACC to consider an assessment from a non-contracted provider. ACC will often refuse to consider such assessments, and attempts to avoid retrospectively funding them.

Until recently, only assessments by assessors contracted to ACC would be considered

176. From 2002¹²² until 2009,¹²³ once ACC’s appointed assessor had carried out an assessment, the assessor’s opinion was sacrosanct. This “mantra”¹²⁴ meant that even if an injured person reviewed and appealed their decision, the Reviewer and the Court would not consider *any* other medical opinions because the bar was set very high for convincing the court to put an assessment aside.¹²⁵ Appeals heard by the District Court dropped from 407 in 2004 to 179 in 2009¹²⁶ and the *Ramsay* principle lasted until the High Court overruled *Ramsay* in *Martin*.

177. In the intervening years, ACC developed targeted campaigns to obtain assessments from particular assessors. Case Management staff organising assessments argued that if they were given targets

¹¹⁸ Executive Leadership Team Issues Paper: Level of Provider Choice Offered to Clients, 12 October 2009, Wellington at para 4.2 (Obtained under Official Information Act 1982, 22 Mar 2010).

¹¹⁹ *Raitt v ACC* [2007] NZACC 136; *Gibb v ACC* [2007] NZACC 137.

¹²⁰ Accident Compensation Act 2001, ss55 (1) (d) and 72 (1) (d).

¹²¹ *Ibid*, s117 (3) (b); *Anderson v ACC* [2005] 318.

¹²² *Ramsay v ACC* [Christchurch Registry, AP 412/14/02, 12 December 2002].

¹²³ *Martin v ACC* [2009] NZLR 701.

¹²⁴ *Craig Jones v ACC* [2008] NZACC 195 at [65].

¹²⁵ Vocational Independence: outcomes for ACC claimants. Hazel Armstrong and Rob Laurs, Wellington, Feb 2007, p 31.

¹²⁶ New Zealand Legal Information Institute <www.nzlii.org>.

for exiting people from the scheme, which impacted upon their personal remuneration, they should be able to choose which assessors to send their clients to.¹²⁷ Examples of what occurred include:

- i. People with pain being sent to one assessor who has asserted that Chronic Pain is of no known aetiology and it is unrelated to injury.¹²⁸ In the 2004-2006 financial years, ACC records indicate this assessor was paid between \$2.3 million and \$2.4 million¹²⁹ by ACC in professional fees and other related expenses.
- ii. People with brain injuries were sent to an assessor who has stated his belief that mild to moderate brain injuries recover within 12 months. This assessor was found to have operated outside his area of expertise¹³⁰ and stated that a person did not have a brain injury in the face of decades of medical evidence that they did.¹³¹ ACC records indicate this assessor was paid between \$1.3 million and \$1.6 million by ACC for services from 2005 to Sep 2009¹³² in addition to a full-time job providing rehabilitation for a district health board.

¹²⁷ Executive Leadership Team Issues Paper: Level of Provider Choice Offered to Clients, 12 October 2009, Wellington at para 4.2 (Obtained under Official Information Act 1982, 22 Mar 2010)

¹²⁸ *Thirring v ACC* [2008] NZACC 135 per Judge Beattie at para 31 et seq; *Otto v ACC* [2008] NZACC 253 per Judge Beattie at paras 30 et seq; *Brennan v ACC* [2009] NZACC 101 per Judge Ongley.

¹²⁹ ACC letters dated 13 February 2009 in response to an Official Information Act request dated October 2006 (Obtained under Official Information Act 1982).

¹³⁰ *Rackley v ACC* [2008] NZACC 117 at para 26.

¹³¹ *Griffin v ACC* [2010] NZACC 69 at para 30.

¹³² ACC letters dated 4 Sept 2009 and 30 Sept 2009 (Obtained under Official Information Act 1982 after the practitioner's judicial review of ACC's decision pursuant to the Official Information Act 1982 was abandoned).

178. These examples are consistent with the reports by the Commerce Commission and David Goddard QC about the effect of the contracting system on the market for medical evidence. The examples are also supported by evidence from an online survey conducted by Acclaim Otago in 2012, which suggested that assessors who write reports that result in a high rate of peoples' support being stopped are amongst the more highly paid assessors. This does not provide evidence that assessors are being paid bonuses to exit claimants. Instead, it would suggest that those assessors whose reports successfully exit claimants from the scheme are preferred by case managers for future assessments, regardless of the accuracy of their medical opinion.

Problems with medical assessments are long-standing and must be addressed

179. Unfortunately, this is not a new problem. It can be traced back to the introduction of the new legislation in 1992 when ACC sent a number of clients to a particular specialist who was overriding other doctors' opinions and ACC was exiting the claimants as a result. A retired Chief District Court Judge, Peter Trapski, conducted an inquiry into the matter. He criticised the arrangements and said ACC's preference of the opinions of their contracted occupational assessors over claimants' general practitioners fuels perceptions of bias and increases disputes about injury and causation.¹³³ He recorded:¹³⁴

Corporation staff, I was told, had become fed up with clients who were seen to be "ripping off the system". These people were therefore referred to a specialist who I was told, was

¹³³ Peter J Trapski *Report of the Inquiry into the procedures of the Accident Compensation Corporation* (1994) at 52-55.

¹³⁴ *Ibid* at 54.

unafraid of examining factors aside from the injury. I was told quite clearly that this was where Dr Gluckman’s usefulness lay, as he was a qualified physician, and a psychiatrist, and he had been used over a number of years as the Corporation’s “hit man”.

Effect of ACC policy on the market for medical evidence

180. This period has had profound effects on the market for medical assessments. Legal experts representing injured people sought fewer medical reports because they would simply be ignored. Similarly, the small pool of experts who would provide medical opinions for claimants reduced even further, as medical professionals were frustrated that their opinion was being disregarded.
181. ACC is also responsible for investigating fraud by treatment and rehabilitation providers, and this can influence the relationship between ACC and providers. This is discussed further below under article 25, health.
182. As noted above under access to justice, there is no level playing field when it comes to medical evidence for reviews and appeals. It is not financially viable to set up a business providing reports for injured people, because they generally cannot afford to pay for the reports. It *is* a viable option to produce reports at the request of ACC because ACC can pay; in fact, the evidence suggests it might be quite lucrative to do so.
183. Even if successful, an injured person can be required to pay thousands of dollars for medical evidence, only to be later compelled to attend an assessment with one of ACC’s chosen preferred assessors.
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Effects of the policy on the integrity of the person

184. People who live with mental and physical disabilities caused by accident are forced to attend these assessments. They often do this knowing that they are going through a process that will likely result in their ACC support being stopped. This significantly compromises the integrity of some vulnerable people and often creates or exacerbates stress, anxiety and depression. Many injured people feel helpless as they are forced to undergo an assessment that they consider will result in their rehabilitation or compensation being stopped, the resulting loss of their house because they cannot pay the mortgage repayments and the breakdown of their family due to the stress of this whole process.
185. The integrity of a person who successfully navigates the assessments is further compromised by the thought that they will be put straight back into the assessment process and face the same risks and uncertainty again.
186. People covered by ACC must constantly prove their disability or risk losing support, even where their health has not changed for decades. The choice is between visiting an assessor, which is likely to lead to untimely or illegitimate exit from the scheme, or refusing the assessment and being exited anyway.
187. The reviewers and judges in the appeal process have a simple response to these concerns: an injured person has to undergo assessment because they have a statutory obligation to undergo assessment by a provider specified by ACC.¹³⁵ This will commonly

¹³⁵ Accident Compensation Act, s 72(1)(d) and (g).

be the case even for claimants who have attended and been the subject of up to 65 different assessments and medical reports, and whose condition is highly unlikely to change. They must repeatedly defend their condition to people who do not necessarily have their best interests at heart, and have a financial interest in the efficiency of the process.

ARTICLE 18: LIBERTY OF MOVEMENT

RECOMMENDED QUESTION FOR THE LIST OF ISSUES

- Q 12.** Are there any legislative provisions that could have the effect of limiting liberty of movement by placing people under duress with regard to their movement?

Article 18 – Liberty of Movement and Nationality

188. While the law does not specifically limit the liberty of movement and nationality of persons with disabilities caused by accident, there are examples of how this is the unintended consequence of the legislation, both for people from overseas injured in New Zealand and injured New Zealanders moving overseas. Initial legislation provided discretion for ACC with regard to providing entitlements to injured people, regardless of their location.¹³⁶ In 1992, the discretion was removed and, since then, entitlements payable overseas have been limited and prescribed by statute.¹³⁷

People from overseas who are injured in New Zealand are limited in their ability to return home

189. People from overseas who are disabled by accident while in New Zealand are not prevented from moving home; however if they do so, the limited entitlements they receive are further limited by statute.¹³⁸ This means that if a person from Australia is injured in New Zealand, and they return home, ACC *must not* pay for any rehabilitation. If the person had earnings in New Zealand, they may be entitled to weekly compensation, however they must return to New Zealand to be assessed when requested to do so. Refusal to be assessed results in cessation of support. Any attendant care stops after 28 days of being overseas.

¹³⁶ Accident Compensation Act 1982, ss 68, 72, 75.

¹³⁷ Accident Rehabilitation, Compensation and Insurance Act 1992, s 88; Accident Insurance Act 1998, s 129; Accident Compensation Act 2001, ss 127-130.

¹³⁸ Accident Compensation Act 2001, ss 127-130.

190. A person seriously injured whilst staying in New Zealand would effectively be prevented from returning home and would be required to stay in New Zealand to receive funding for rehabilitation. This creates a barrier to that person's rehabilitation and wellbeing by limiting cultural and emotional support.

People from overseas who are injured in New Zealand are limited in their ability to stay in New Zealand

191. The legislation that restricts a person's liberty of movement relates to older workers who move to New Zealand and are then injured. Like all injured people, their entitlement to weekly compensation stops when they reach superannuation age, but they are not entitled to superannuation or any other form of state assistance.

Case Study J

Mr Gray is from overseas and came to New Zealand at age 59 with his wife. He realised that he would have to work until aged 69, as he would not be entitled to the New Zealand pension until he had been here for 10 years. He was involved in heavy work as a removalist and at age 63, he seriously injured his back when he tried to stop a box of valuables from falling. He was dismissed from his job on medical grounds but could not take any action against his employer because his injury was covered by ACC. His entitlements stopped when he reached the New Zealand Superannuation Age.¹³⁹ Mr Gray complained to the Human Rights Commission that this was discrimination. They contacted ACC and the Department of Labour who said it would be too expensive to solve the problem. Mr Gray was left with nothing, despite being injured at work, and prevented from any civil recovery.

¹³⁹ Defined at s 6 of the Act, including that it applies regardless of whether the person is eligible to receive the superannuation.

Injured New Zealanders who wish to move overseas

192. Whilst there are no express legislative limits on persons with disabilities moving overseas, the legal limits on the provision of rehabilitation and the requirements to constantly return home for assessment when demanded by ACC, provide an effective limit on injured New Zealander's ability to move elsewhere.

ARTICLE 22: RESPECT FOR PRIVACY

RECOMMENDED QUESTION FOR THE LIST OF ISSUES

- Q 13.** Do people injured by accident in New Zealand have an effective legal right to privacy?
- Q 14.** Do people injured by accident in New Zealand have effective control over the collection and disclosure of their personal information to third parties?

Article 22 – Respect for Privacy

193. The state report records that everyone in New Zealand has the right to privacy.¹⁴⁰ This is a breath-taking claim to those who have been on the receiving end of ACC’s privacy practices. The legislative framework for privacy for people injured by accident must be examined against this claim.

Legislative framework

194. The statutory provisions contained in the legislation have not significantly changed in the past two decades. Despite an international human rights framework seeming to develop in that time, the state’s interpretation of the law and corresponding change in policy has completely altered. In 1994, the policy was informed by the Trapski report. The policy reflected that report’s conclusions by requiring ACC to obtain a person’s informed consent.¹⁴¹
195. The Accident Compensation Act 2001 states, “A claimant who receives entitlements must, when reasonably required to do so by the Corporation... (b) give the Corporation any other relevant information that the Corporation requires, and (c) authorise the Corporation to obtain medical and other records that are or may be relevant to the claim.”
196. Since 1994, the way that this section has been interpreted by ACC and the courts has changed, even if the section’s wording has not. The current interpretation now requires claimants to effectively

¹⁴⁰ State report, page 34, paragraph 150-151.

¹⁴¹ Trapski at pages 79-94.

provide unfettered consent for ACC to have complete control over an injured person's personal information. An injured person has to sign this form when they first lodge a claim with ACC.

197. Furthermore, legislated privacy instruments do not apply to ACC claimants because of various limitation provisions.

- i. The Privacy Act does not have universal application; it is subordinate to other legislation¹⁴² such as the Accident Compensation Act 2001. The section quoted above is therefore interpreted so as to nullify New Zealand's privacy statute.
- ii. The Right to Privacy contained in the Code of ACC Claimant's Rights¹⁴³ is of little or no practical use because it is subordinate to other legislation including the Accident Compensation Act 2001, and cannot be appealed to a Court.¹⁴⁴

198. ACC demands that all claimants sign a form known as an ACC 167 form. This form states that ACC will comply with all relevant privacy legislation, but does not inform claimants that the relevant privacy legislation is subordinate to the legislation governing ACC and is therefore ineffective. By stealth, this form provides ACC complete and unfettered rights to collect and disclose a person's information.

¹⁴² Privacy Act 1993, s 7.

¹⁴³ Injury Prevention, Rehabilitation and Compensation (Code of ACC Claimants' Rights) Notice 2003, summarised in the Annex to the state report at page 19, Paragraph 23.

¹⁴⁴ Accident Compensation Act 2001, s 40(2)(b).

The Courts’ approach to the ACC 167 form and a claimant’s obligations

199. Many claimants have objected to the ACC 167 form on the basis that it breaches their rights to privacy. A significant number have refused to sign the form, or only signed the form with alterations or with a declaration that they have only signed under duress.
200. ACC’s position is that a claimant must sign the form without any alterations. A claimant’s refusal to comply, and sign the form as required, allows ACC to exercise a discretionary power to cease all entitlements to the person until they sign the form.
201. If a claimant wishes to challenge ACC’s decision to decline entitlements on this basis, they must proceed through the review and appeal process, usually without income support, without sufficient funding for legal costs, and potentially without any entitlement to treatment and rehabilitation.
202. The District Court initially took a nuanced approach to a claimant’s obligations under the Act, and decided that each case would be decided on its merits.¹⁴⁵ The current position taken by the courts is an arbitrary one in the sense that every claimant must sign an ACC 167 form and it is unreasonable not to do so.¹⁴⁶ Claimants have twice been refused leave to appeal to the High Court because the District Court considered that there is no question of law capable of serious argument.¹⁴⁷

¹⁴⁵ *Norris* [2006] NZACC 46 and *Farquhar* [2005] NZACC 176.

¹⁴⁶ These include *Burston* [2012] NZACC 11, *Thirring* [2012] NZACC 23, *Lay* [2009] NZACC 103, *Nesbit* [2006] NZACC 130, *Dewe v ACC* [2006] NZACC 290.

¹⁴⁷ *Thirring* [2012] NZACC 206; *Farquhar* [2012] NZACC 34.

203. The following paragraphs are from a leading decision¹⁴⁸ on the ACC 167 form, and they are often directly quoted by ACC in correspondence or in legal submissions to support their position:

[32] The consent form simply sought to clarify the purposes for which the information was being sought. **There can be no reasonable basis** for any claimant objecting to [ACC] releasing information for the purposes of assisting [ACC] to manage that claimant's entitlement to compensation, rehabilitation and medical treatment. Without such authority, [ACC] would be significantly hampered in its ability to manage any claim, and **that would be to the ultimate detriment of the claimant.**

...

[39] Quite frankly, **it seems a waste of the taxpayer's money that these proceedings have been brought about by unhelpful stubbornness on the part of the appellant. It was perfectly reasonable that he sign** the type of consent form tendered to him by [ACC]. Yet the parties, the Reviewer, and this Court have been put too much time and effort over a four-week entitlement to weekly compensation back in 2001 when the impasse could easily have been resolved by the appellant. **While it is most important that claimants' rights be thoroughly respected, basic courtesy and common sense are required from claimants. The justice system should not be required to deal with appeals arising out of a contrary approach from appellants.**

[40] Curiously, [counsel for the claimant] seeks costs for the appellant on the basis that ACC staff misunderstood and mismanaged the appellant's injury. Inter alia, he put it that ACC thought the appellant had been referred to Burwood Hospital for treatment when that did not happen and has not. **This case pivots on the issue of whether the appellant unreasonably declined to authorise ACC obtain relevant information to the claim. The issue of alleged mismanagement by ACC or mistreatment of the injury is peripheral to that.**

[41] It is unfortunate that the appellant has needed to incur legal fees but these **could have been avoided if he had been reasonable and sensible in his dealings with ACC.**

¹⁴⁸ *Dewe v ACC* [2006] NZACC 290.

It would not be fair and just to award him costs against the background of this case; and I decline to do that. Indeed, I understood Mr Hlavac to apply that ACC's position as to costs be reserved, so I reserve leave to apply accordingly.

204. These paragraphs are quoted by ACC staff seeking to persuade a reviewer or the Court to decline to award costs to a claimant seeking to challenge the legality of having to sign the form.
205. It follows that the legal position on claimants' right to privacy in New Zealand is settled after careful examination of the three branches of government – Parliament, the Judiciary and ACC (the executive branch of government). There is no right to privacy.
206. This is to be contrasted with the state report, which alleges that people with disabilities in New Zealand have the right to privacy.

The practical effects of signing the form

207. Once an injured person signs the form (as in practice they must), they have no control over their privacy or their personal information.
208. ACC aggregate their information, hold it electronically, and transfer it to others without the injured person knowing what is occurring.
209. When ACC decides to investigate someone alleging fraud, they use the ACC 167 form to show employers, neighbours and members of the public that they have the person's consent to collect and disclose information. The injured person often has no knowledge that their privacy is being breached and has no remedy once this has occurred.
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Criticisms of ACC’s approach to personal information

210. In the report following his inquiry, Trapski¹⁴⁹ commented on how medical and private information was collected, considered, stored and disclosed. He criticised the process and recommended a proper system be implemented.¹⁵⁰ He said:

I recommend that all medical reports should come addressed to and be opened by the Corporation’s medical officer or by suitably trained staff directly under his or her control. He or she should, as necessary, take from that report sufficient material – and only sufficient material – for a claims officer to work with it, and thereafter the report should be put onto a confidential medical file and be retained under the direct custody and control of the Corporation’s medical officer.

211. Although the relevant statutory provisions have not changed from that time, technology and access to information certainly has. The situation now is that all of a claimant’s personal information is held in several ACC databases. One of these databases records an electronic fingerprint when the personal information has been accessed.

212. Unfortunately, it would appear that the culture of ACC has not materially changed since that time.

Case study K: Mr Green was injured and had been on ACC for a many years. His case involved a dispute and was reported in the media. He became suspicious that his file had been unlawfully accessed by ACC staff not involved in his claim so he

¹⁴⁹ Peter J Trapski *Report of the Inquiry into the procedures of the Accident Compensation Corporation* (1994) discussed above at article 17.

¹⁵⁰ *Ibid* at 94.

asked ACC how many times his personal file had been accessed and they disclosed it was over 2000 times. ACC accepted it was very likely that these were not all legitimate accesses but would not provide the list of people who accessed his file citing the privacy of the individuals.

Case study L: Mrs Brown was injured in the 1990s and her ACC file was a mess. It contained significant wrong information; this included significantly wrong and defamatory statements about her relationship, her family, her mental health and her injury. The injury was not properly recorded and that may be because the correct information was not sent to the assessor in the first place. She demanded that she be allowed to provide information consent on a case-by-case basis. This would require ACC to send her the parts of the file they wanted to send to the assessor and let her check that it was correct and contained all of the relevant information before ACC could send it off to the assessor. ACC refused and told her that she had to sign the ACC167 form or her compensation would be stopped. Mrs Brown refused to sign the form. ACC stopped her compensation. She disputed ACC's decision but she lost at review and at appeal. She represented herself and tried to argue the legal point. She has been without compensation for 3 years. She tried to get compensation started again and limit the length of time in which the form would apply to a period of one year. ACC refused to negotiate at all until she had signed the form. She is under significant duress and has been without compensation.

Case Study M: Mr Oakover refused to sign the form and consent to an assessment because the information ACC wanted to send to the assessor was wrong and incomplete. ACC stopped his compensation. He reviewed this decision but, without compensation, he could not survive, so he went to the Ministry of Social Development to obtain a sickness benefit. They refused to provide it to him on the grounds that he would be entitled to ACC and was non-compliant so he would not be entitled to any support at all from the state.

*ARTICLE 23: RESPECT FOR HOME
AND FAMILY*

RECOMMENDED QUESTION FOR THE LIST OF ISSUES

- Q 15.** Does ACC law in New Zealand operate to limit the right to respect for the home and family of persons disabled by injury in New Zealand?

Article 23 – Respect for home and family

213. There are two main groups of issues with regard to respect for home and family. First, people with disabilities covered by the scheme who wish to have children face uncertainty and barriers from doing so. Secondly, there are issues facing the families of children with disabilities covered by ACC.

People with disabilities and the right to have children

214. People who are disabled by injury face barriers to having children. These are not direct legislative barriers, but are created instead by the administration and application of the scheme according to the statute. These barriers impact upon the freedom of people to start a family and the right to decide freely and responsibly on the number and spacing of children.

215. When people consider starting a family, the factors that they may consider include: long-term financial security, long-term commitment in their relationship, and some relative certainty regarding their anticipated state of health. Many persons with disabilities caused by accident are disadvantaged from the outset because of the uncertainty surrounding their health. Aside from uncertainty in health, the impact of that uncertainty, and the potential for long-term disability, can affect the ability of a person to attain or maintain long-term security in their finances and relationships. An injury affects many of the crucial factors in considering whether to begin a family.

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216. The evidence shows that people injured by accident will suffer a long-term loss of income (see studies below at the section on article 27). They also face substantial uncertainty because even if they are not exited from the scheme in some way, they will continually be reassessed for the entire time they are in receipt of entitlements. Each assessment represents a potential threat to their entitlement, and the outcome of each assessment is not necessarily reliant on their actual health status. Each assessment carries at least *some* risk of premature disenfranchisement, with the only means of challenge being through the statutory dispute resolution process (discussed at article 13).
217. Anecdotal evidence suggests that when ACC ceases compensation it has an impact upon a person's relationship. The effects of this range from general stress to a complete breakdown in the relationship.
218. It is clear that a person with a disability caused by injury being assessed as able to work does not necessarily mean that they can compete equally in the labour market (see discussion below at the section on Article 27). Injured people are aware of this (see discussion regarding the effects of the process on the integrity of the person above in the section on article 17).
219. The way that the scheme is administered, and the way that the legislation is structured, create a whole other set of stressors that impact on the decision to begin a family regardless of the direct effects of a person's injuries. An injured person must not only deal with their injury, but the burdens of the management of that injury through ACC. These effects must be reduced in a way that increases certainty for injured people.
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Families of children with disabilities

220. The New Zealand Government's obligations include ensuring that children with disabilities have equal rights to family life, and that the state must support children with disabilities and their families.
221. Article 7 also mandates that in all actions surrounding the child, the best interests of the child shall be a primary consideration.

Family life includes siblings and parents

(a) The effect of the injury on family

222. Many cases where a child is injured by accident involve significant trauma. Whilst only one person may be injured, more than one family member is involved.
223. In cases where a child's physical injuries lead to mental injuries, those mental injuries receive cover and support from ACC. On the other hand, in cases where the child's siblings and parents have witnessed the accident, they will not receive any support for any mental injury unless they received physical injuries at the same time.
224. International studies into Post Traumatic Stress Disorder (PTSD) have noted prevalence of PTSD in the population who have witnessed traumatic events.¹⁵¹ A New Zealand study has shown that

¹⁵¹ See for example Kessler RC et al, Posttraumatic stress disorder in the National Comorbidity Survey Arch Gen Psychiatry. 1995 Dec; 52(12):1048-60; Tierens M, et al "Differences in posttraumatic stress reactions between witnesses and direct victims of motor vehicle accidents" J Trauma Stress. 2012 Jun; 25(3): 280-7. doi: 10.1002/jts.21692. Epub 2012 Jun 8.

witnessing violence can have a strong impact upon children.¹⁵² It is likely that witnessing a sibling's injury can have an impact on children and if this remains untreated, it can have long-term effects on both children and their families.

225. This must be addressed through legislative change, which acknowledges and treats not only the injured child, but also their family. Section 21B provides mental injury cover regardless of whether any physical injuries were suffered if a person witnesses a traumatic event at work. The Government have not provided the same care to the families of those who witness traumatic events related to a child or loved one. This should be amended by legislation, and discriminates against families in favour of extra support for people in employment.

Case Study N: Wiremu (8 years old) and Jack (5 years old)¹⁵³ raced down the drive on their bikes to get the mail from the rural mailbox located across the road. Wiremu, being older, was in front by about 25 metres. As he got to the bottom of the drive, he could hear the logging truck but knew he had enough time to get across the road. By the time he got to the mail box, he realised his brother was just behind him. He turned and screamed at him to stop, but it was too late. The truck hit the bike and Jack at about 90km/hr. Wiremu thought Jack had died. There was blood everywhere. Jack suffered numerous fractures and a serious brain injury. He was in a coma for 2 months. The whole time Wiremu blamed himself for not taking care of his brother. He cried a lot, and wanted it to be him who was in hospital. He could not sleep properly, had nightmares and wet the bed. After 6 months, Jack came home and things were never the same. His family suffered a lot and Wiremu blamed himself. A psychologist came to help Jack because he was covered by

¹⁵² Martin, J., Langley, J., & Millichamp, J. (2006). Domestic violence as witnessed by New Zealand children. *New Zealand Medical Journal*, 119 (1228)

¹⁵³ Identifying features of this story have been changed to protect the privacy of the family.

ACC, but there was no one to help Wiremu. He started getting into trouble at school and other children started teasing him because he still wet his bed and his brother had a disability.

(b) Family is treated differently than others for providing care

226. Care for an injured child is paid at a different rate if family members provide it, compared to if third parties provide it.

Case Study N Continued:

Jack's family looked after him providing his care along with other employees, but members of the family were paid at a lower rate than other carers (and less than the minimum wage) just because they were members of his family. Jack was entitled to 14 hours of paid care per day. After he had been home six months, ACC arranged for an assessment and the assessor said that Jack needed 24-hour attendant care. ACC did not make a decision on this assessment so Jack's family never became aware of it. Instead ACC arranged another assessment that concluded Jack only required 10 hours of care per day. ACC decided to implement this assessment instead. The relationship between Jack's mother and ACC deteriorated as she became worried that he would be injured again as he was not supervised. ACC decided that Jack's mother wanted more paid care so she could enjoy her life and not have to be responsible as a mother. Five years later, ACC executed a search warrant on the family home alleging that Jack had not been provided with proper care by his family who had lied in the forms about taking care of Jack. Jack came home from school with his brother to find policemen going through his house. His mother was very upset. Jack blamed ACC. Wiremu blamed himself for not taking care of Jack in the first place. No charges were ever laid, but the relationship between Jack and ACC that must exist for Jack's entire life, had been irreversibly damaged.

ARTICLE 25: HEALTH

RECOMMENDED QUESTION FOR THE LIST OF ISSUES

- Q 16.** Does the law regarding the health of injured people in New Zealand operate in such a way as to ensure their health is maintained at the highest attainable standard?

Article 25 – Health

227. The impact of the ACC scheme on the right to health can be considered as follows.
- i. First, the ACC legislation provides for limited circumstances in which ACC can **fund treatment** to a person.
 - ii. Secondly, ACC **interacts with treatment providers** in various ways. This affects the behaviour of treatment providers, and leads to a corresponding impact upon the health of injured people.
 - iii. Thirdly, ACC has **direct dealings with people** that impact on their health status.

Legislative provisions regarding treatment

228. Treatment is provided under the legislation according to a hierarchy. Public health acute treatment (within 7 days) is provided through the public health system in bulk funding to District Health Boards. Other acute treatment can be funded without prior approval, but this treatment is limited to certain levels by the ACC statutes, and can only be funded in limited circumstances.¹⁵⁴
229. The amount ACC is required to pay towards non-acute treatment is subject to another hierarchy that has a significant effect on the market for treatment of injured people in New Zealand.

¹⁵⁴ Accident Compensation Act 2001, ss 7, 73 and 74.

First, ACC is required to pay what they have agreed with the provider to pay. Secondly, if there has been no agreement with a provider, ACC is required to pay what is set out in regulations. Thirdly, if there are no regulations, they are required to reach agreement with the provider in advance.

230. ACC is only liable to contribute to the cost of treatment in accordance with this hierarchy, and this does not necessarily mean an obligation to pay for it in full. This is also the case for persons injured at work, which is in breach of New Zealand's international obligations under ILO 17 and the Convention.

231. The circumstances in which ACC is required to contribute to the cost of treatment are limited by statute to when ACC decides that the treatment:¹⁵⁵

- a) is necessary and appropriate, and of the quality required, for that purpose; and
- b) has been, or will be, performed only on the number of occasions necessary for that purpose; and
- c) has been, or will be, given at a time or place appropriate for that purpose; and
- d) is of a type normally provided by a treatment provider; and
- e) is provided by a treatment provider of a type who is qualified to provide that treatment and who normally provides that treatment; and
- f) has been provided after the Corporation has agreed to the treatment

232. When considering these questions, ACC must take into account:¹⁵⁶

- a) the nature and severity of the injury; and
- b) the generally accepted means of treatment for such an injury in

¹⁵⁵ Accident Compensation Act 2001, Sch 1, cl 2(1).

¹⁵⁶ Accident Compensation Act 2001, Sch 1, cl 2(2).

New Zealand; and

- c) the other options available in New Zealand for the treatment of such an injury; and
- d) the cost in New Zealand of the generally accepted means of treatment and of the other options, compared with the benefit that the claimant is likely to receive from the treatment.

233. This effectively allows ACC to limit treatment to people disabled by accident and brings dispute into the scheme with claims about necessity, appropriateness, quality and whether or not ACC will agree to this. It is up to ACC to make this decision, and the financial implications of a given treatment are a significant influence on their decision-making process.
234. If ACC takes a view that it does not want to provide the treatment, staff will simply obtain an assessment, either from an employee or from an external assessor. The issues with these assessments are discussed above under article 17: integrity of the person.
235. The public health system will generally decline to treat a person who they believe should receive cover under ACC. This can leave a person in limbo between the two systems without treatment.

ACC's interactions with treatment providers and the impact on the right to health

The contracting system

236. The contracts have had the effect of limiting treatment provided to injured persons to the contracted level of treatment, for example according to treatment profiles and guidelines. ACC has an active role in the development of these and at times has conducted experiments on the market of treatment providers.
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237. ACC prefers its own contracted providers and often claims that they will only pay for a person to see a contracted provider. This has an effect on the market and breaches a person's right to choose his or her own provider. It further places the person under financial duress to see a particular provider selected by ACC, which is a breach of his or her right to fully free, and informed consent (these issues dealt with under discussion of article 17).

An example: the physiotherapy system

238. ACC sought to limit the scheme's expenditure on physiotherapy treatments. To do so, they decided that they would pay one group of providers twice as much if that group would agree to limit their treatments to a predetermined number of treatments as set out according to "treatment profiles" for individual identified injuries.
239. ACC expected that those who had a contract to be part of this first group would prosper, and that members of a second group who refused to treat according to treatment profiles would go out of business.
240. They then controlled access to this favoured first group by deciding who would receive a contract based upon ACC's own view of the "quality" of treatment provided.
241. The plan was then for ACC to create financial incentives for providers to move to the first group (the first group was paid twice as much as the second group) and to create disincentives to be in the second group.¹⁵⁷

¹⁵⁷ NZIER Framework for Analysis of the Endorsed Provider Network (April 2002). See summary of this in David Goddard, Q.C., The way in which Physiotherapy Services are Funded and Accredited by ACC Department of Labour, Wellington, September 2007 at page 162 *et seq.*

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242. ACC launched fraud investigations against the outliers in the second group (that is, they only considered providers in the second group for their analysis¹⁵⁸) and administratively delayed giving particular physiotherapists contracts, which caused them significant financial losses.¹⁵⁹
243. Ultimately, ACC lost control of the gate between the two groups and had to stop controlling access to the first group. After that, the amount of treatment provided actually increased as the first group provided more treatment up to the limits set out in the treatment profiles and were paid twice as much for those treatments. The cost to ACC of physiotherapy ballooned as they had to pay most providers for more treatments at twice the rate. This split the physiotherapy profession and led to an inquiry into physiotherapy. The inquiry criticised ACC's actions as a monopoly state funder in the physiotherapy market.¹⁶⁰
244. The impact upon individual providers was significant but the High Court has ruled that ACC was under no obligation to process contracts in a particular manner. ACC were not liable for damages caused to treatment providers whose contracts were delayed.¹⁶¹
245. The other way in which individual treatment providers treating injured people have been targeted is by using the fraud investigation process. This was targeted at providers who were perceived by ACC as over-treating injured people. These providers were often senior treatment providers who dealt mainly with complex cases.

¹⁵⁸ David Goddard, Q.C., *The way in which Physiotherapy Services are Funded and Accredited by ACC* Department of Labour, Wellington, September 2007 at page 72, paragraph 7.12

¹⁵⁹ *Cambridge Physiotherapy Services Limited v Accident Compensation Corporation* [2012] NZHC 999.

¹⁶⁰ Goddard, above n 158.

¹⁶¹ *Cambridge Physiotherapy Services Limited v Accident Compensation Corporation* [2012] NZHC 999.

246. The data used by ACC to conduct the analysis (and still used for *all* ACC analysis) is the initial diagnosis from when the injured person presented to a treatment provider. This initial diagnosis is often a minor injury such as sprain or strain, and does not reflect the impact of the injury. The public health system works on a discharge diagnosis basis and ACC should move to this system.
247. The ACC “Provider Fraud Unit” would contact people who were injured by accident and interview them about their treatment providers. The contact from the fraud unit, and the limitation of treatment according to treatment profiles, had significant effects on the treatment of injured people and the relationship between a person and their treatment provider.
248. There is no data on these injured peoples’ health outcomes, as ACC does not collect any data once treatment stops.
249. ACC continues this strategy of controlling provider behaviour and not obtaining any outcomes data, instead relying on assumptions that those being treated by preferred providers have better outcomes.

Persons with disabilities interacting with the ACC system

250. The state report and the coalition report both record that persons with pre-existing disability suffer greater effects from their injuries than the general population. Acclaim Otago agrees with this.
251. Because of the administrative split between people injured by accident and those with disabilities not caused by accident, there is
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a large amount of dispute around the cause of a person's need for ACC support. To minimise financial payments from the scheme, ACC seeks to show that a person's need for support is caused by a pre-existing condition rather than their accidental injuries.

252. There are two ways ACC denies support to persons with disabilities caused by both accident and non-accident factors. The first is that ACC seeks to deny the person *cover* and declines their claim. The second way is that ACC states that the reason for the need for *entitlements* (even if the person has *cover*) is their disability and not their injury. A third consideration is how ACC's case management processes impact upon the health of an injured person.

ACC declining claim for cover

253. This involves the situation where ACC writes to a person and tells them that they did not suffer an injury.
254. The legislative provisions provide cover for physical and mental injuries caused by accident and other covered causes¹⁶² with three relevant exceptions being personal injury (a) caused wholly or substantially by a gradual process, disease, or infection; (b) caused wholly or substantially by the ageing process or (c) less than 6% binaural hearing loss.
255. The hearing loss matter was raised during the 18th universal periodic review by two submissions, The National Foundation for

¹⁶² Non accident cover can be obtained for other causes including for example work related injuries, sexual crimes and treatment related conditions.

the Deaf¹⁶³ and Hazel Armstrong Law.¹⁶⁴ We endorse these submissions. The Foundation's submission was incorporated into the summary of submissions to the periodic review¹⁶⁵ recording that the statutory amendment resulted in a decrease in claims' volume and costs and could represent discrimination. The Outcome report¹⁶⁶ did not address the hearing loss matter and it was not incorporated into any recommendations. We therefore ask that the committee raise this issue with the New Zealand Government in the list of issues, as part of the consideration of both articles 9 and 25.

256. The other significant non-covered disability is when a person suffers a mental disability, which is not "caused" by the "covered" physical injury. Examples of this include where a person witnesses another's trauma (see discussion above under the right to respect for home and family), or where their depression is caused by the change in circumstances in their life caused by the injury, rather than directly caused by the injury.

ACC stating the need for entitlement is not the covered injury

257. These are cases where it is agreed that a person suffered an accident and an injury, but the effects of the injury have passed and the reason that support is now needed is something other than the injury.

¹⁶³ The National Foundation for the Deaf stakeholders report to the United Nations Universal Periodic Review dated 14 June 2013, at paragraphs 25-33 (NFD/JS17).

¹⁶⁴ See submission of Hazel Armstrong Law to the 18th session of the universal periodic review by the Human Rights Council of the United Nations.

¹⁶⁵ A/HRC/WG.6/18/NZL/3 at page 10.

¹⁶⁶ A/HRC/WG.6/18/L.1.

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258. In these cases, ACC suspends compensation for individuals suffering congenital defects or other pre-existing conditions on the basis that the need for entitlements is caused by congenital defects and genetics and not accident.¹⁶⁷ In view of New Zealand's ageing population, this is likely to become a significant source of disadvantage and increased effects of disability.

Impact of ACC's case management processes upon health of an injured person

259. There has previously been detailed discussion on the sections about articles 13, 14, 17 and 22 showing the impact on injured people.
260. There have been cases where people have suffered mental injuries caused directly or indirectly by ACC. ACC has not disputed this; instead it relies upon the evidence of psychiatrists and psychologists to support its decision that no support or entitlement is available because the mental injury is not caused by physical injuries.
261. These include many cases of mental injury caused by ACC's fraud investigations, and by the effect on the integrity of the person. There is also anecdotal evidence that injured people have taken their own lives in circumstances where the actions and/or inactions of ACC have been a factor.
262. The long-term impacts of short-term claims management are not yet known; however, studies into this should be undertaken in the future, and there is an opportunity to do this through existing studies such as the POIS study.

¹⁶⁷ P Robertson, R Nicholson "ACC and back injuries: The relevance of pre-existing asymptomatic conditions" (2000) 113 NZMJ 16; Richard Wigley, Christopher Walls, David Brougham, Peter Dixon "What does degeneration mean? The use and abuse of an ambiguous word" (2011) 124 NZMJ 73.

ARTICLE 26: REHABILITATION

RECOMMENDED QUESTION FOR THE LIST OF ISSUES

- Q 17.** Does the law in New Zealand provide effective and appropriate measures to enable persons with disabilities caused by injury to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life?
- Q 18.** When does the New Zealand Government propose to begin collecting the rehabilitation outcomes of people rehabilitated by ACC?

Article 26 – Rehabilitation

263. The focus of this chapter is on vocational rehabilitation, however first the overall picture of rehabilitation will be considered. Treatment and health is discussed in detail above. The only available data of overall outcomes of rehabilitation is discussed below in article 27.

The statutory definitions

264. The purpose of the accident compensation legislation includes:¹⁶⁸

ensuring that, where injuries occur, **the Corporation's primary focus should be on rehabilitation** with the goal of achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence, and participation ...

265. Rehabilitation is defined by the statute as meaning¹⁶⁹

... a process of active change and support with the goal of restoring, to the extent provided under section 70, a claimant's health, independence, and participation; and... comprises treatment, social rehabilitation, and vocational rehabilitation.

266. The extent provided under section 70 is:

A claimant who has suffered personal injury for which he or she has cover—

¹⁶⁸ Accident Compensation Act 2001, s 3 (emphasis added).

¹⁶⁹ Accident Compensation Act 2001, s 6, definition of “rehabilitation”.

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- (a) is entitled to be provided by the Corporation with rehabilitation, to the extent provided by this Act, to assist in restoring the claimant's health, independence, and participation to the maximum extent practicable; but
 - (b) is responsible for his or her own rehabilitation to the extent practicable having regard to the consequences of his or her personal injury.

Treatment

267. The provision of treatment is discussed above at article 25: health. It is important to note that treatment does not have to be provided to the maximum practicable extent. Treatment is limited by the unilateral ability of the Corporation to decide whether treatment is necessary and appropriate, and whether ACC believes the treatment provider is of suitable quality.

Social Rehabilitation

268. Social rehabilitation is required to be provided to ensure independence and participation is restored to the maximum practicable extent.¹⁷⁰ Individual entitlements under the heading of social rehabilitation are specified in the legislation and have slightly different tests.¹⁷¹ Problems with social rehabilitation are not so much structural within the legislation, but with the procedures followed by ACC, including assessment processes, which have been described above.

¹⁷⁰ Accident Compensation Act 2001, s 79.

¹⁷¹ Accident Compensation Act 2001, ss 81-84 and sch 1, cls 12-23.

Vocational Rehabilitation

269. Vocational rehabilitation is provided to a different extent than social rehabilitation. Vocational rehabilitation is required to be provided for the “minimum period necessary”¹⁷² to “help a claimant”:¹⁷³

- (a) maintain employment; or
- (b) obtain employment; or
- (c) regain or acquire vocational independence.

270. In many cases of long-term disability, no vocational retraining is required to achieve the statutory purpose described at (c) – vocational independence – because it is possible to achieve an assessment that a person is vocationally independent without having any real rehabilitation or retraining.

271. For a discussion of assessments, see above article 17, integrity of the person. For a discussion of challenging these decisions and whether access to the law equates to access to justice, see article 13, access to justice.

272. Rehabilitation is conducted according to a process that emphasises procedure but does not measure outcomes. Rehabilitation revolves around a series of assessments and rehabilitation interventions that are taken to be of use to the claimant once they are completed. At the end of the process, there is no inquiry or data collected regarding whether the rehabilitation actually resulted in a person obtaining or maintaining work.¹⁷⁴

¹⁷² Accident Compensation Act 2001, s 87(2).

¹⁷³ Accident Compensation Act 2001, s 80.

¹⁷⁴ ACC response dated 15 November 2010 to an Official Information Act request dated 15 October 2010 requesting disclosure of outcomes for long-term clients who were assessed as vocationally independent. See also Forster (2011).

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273. Once a person is assessed as vocationally independent, they have no entitlement to further compensation. Vocational independence is a legal fiction. It determines that a person is no longer incapacitated in their old job, and accordingly they do not continue to suffer any loss due to their injuries.¹⁷⁵ As discussed above, persons not entitled to weekly compensation are not entitled to any vocational rehabilitation.

Examples of “rehabilitation” of injured persons

274. When undertaking this process, ACC takes no cognisance of the realities of the labour market.¹⁷⁶ For example, in Dunedin, there is now only one location where a person can be employed as a “car park attendant”, yet it is possible for there to be dozens of people in Dunedin who have been assessed and determined to be vocationally independent to be car park attendants, and had their compensation ceased on that basis. Similarly, ACC determined that a person who lived in the small central North Island town of Taumaranui was capable of being a customs officer, even though Taumaranui is a prohibitive distance from the nearest international port or airport.¹⁷⁷
275. An injured pilot receiving cover and entitlements under the Act who was earning \$100,000 per year at the time they were injured receives \$1,540 per week as compensation for lost income. Today, if that pilot were assessed to be vocationally independent as a computer technician (earning \$15 per hour for 30 hours/week),

¹⁷⁵ Accident Compensation Act, s 112.

¹⁷⁶ Hazel Armstrong and Rob Laurs *When the Going Gets Tough: What happens to injured workers? An overview of the development and implementation of New Zealand’s Accident Compensation Scheme in Relation to Vocational Rehabilitation for Injured Workers* (Wellington 2007) at p 28.

¹⁷⁷ *Aramoana v Accident Compensation Corporation* [2014] NZACC 26. This part of ACC’s decision was initially endorsed by the review officer but was ultimately quashed by the District Court on Appeal.

they would lose all entitlement to compensation. Their income would drop from \$1,540 to \$0, unless they were able to find a job paying \$450 per week as a computer programmer or they received social security benefits.¹⁷⁸

ACC annual spending on vocational rehabilitation is dropping

276. The annual amount spent by ACC on vocational rehabilitation is dropping significantly. The following data taken from ACC's annual reports show that in the last five years, their spend on vocational rehabilitation has dropped significantly:

2009	\$68,801,000
2010	\$48,718,000
2011	\$42,881,000
2012	\$39,463,000
2013	\$45,783,000

277. Vocational rehabilitation was provided to 27,000 injured people in 2013.¹⁷⁹ This would suggest that on average, less than \$1,700 was spent on vocational rehabilitation for each of these people.

Is the law effective in ensuring maximum independence and vocational ability?

278. The Convention right is to rehabilitation to the maximum extent practicable. It would appear that the statutory goal is in fact vocational rehabilitation to the "minimum extent" to obtain the assessments of vocational independence.

¹⁷⁸ See Forster (2011). This scenario is based on the case of *Hohepa v ACC* [2006] NZACC 22 where an Airline Pilot was "rehabilitated" to be a computer operator.

¹⁷⁹ ACC annual report, 2013, p 14.

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279. The available evidence is that ACC spent \$1,700 on vocational rehabilitation on average per person in 2013.
280. There is no systemic data on how effectively this \$1,700 of vocational rehabilitation maximises a person's vocational ability. Nonetheless, given the statutory goal (minimum extent) and the available data regarding outcomes of persons exited from ACC¹⁸⁰ it would appear that people are not being rehabilitated to their maximum independence and vocational ability.
281. Given these facts, it is likely that the law in New Zealand is not meeting the Convention requirements. This cannot be confirmed, because, as Parliament has noted,¹⁸¹ there is no real evidence that people are leaving the scheme without being properly rehabilitated. ACC does not collect this information.
282. The effects of the current rehabilitation system on injured people are discussed in detail below in article 27.

Habilitation

283. It is also important to note that many people who are injured when they are not working (both before they start working or during a break from working) are not entitled to any weekly compensation so they have no entitlement to vocational rehabilitation.¹⁸²

¹⁸⁰ See article 27 below; Research New Zealand (2013); Armstrong Laurs (2007).

¹⁸¹ Hansard NZPD 27 June 2012. Volume 681 p 3422.

¹⁸² Accident Compensation Act 2001, s 85.

ARTICLE 27: WORK AND EMPLOYMENT

RECOMMENDED QUESTIONS FOR THE LIST OF ISSUES

- Q 19. What steps has the New Zealand government taken to safeguard and promote the realisation of the right to work for people disabled by injury in New Zealand?
- Q 20. What legislative steps is the New Zealand government going to take to safeguard and promote the right to work for people disabled by injury in New Zealand to protect, promote, ensure and enable people in accordance with article 27?
- Q 21. Is the New Zealand government going to amend the ACC legislation to ensure that the appropriate rehabilitation outcomes for injured people is an actual return to work, rather than a hypothetical return to work?

Article 27 – Work and Employment

284. The scheme has lost the opportunity to collect data on work and employment outcomes for injured people over the past three decades. Instead of collecting data, it has effectively assumed that completing the rehabilitation *process* is the same as returning to actual work.¹⁸³
285. ACC and the New Zealand government do not collect data regarding the outcomes for people after they have been exited from the scheme.¹⁸⁴ Parliament has noted that there is no real evidence that people are leaving the scheme without being properly rehabilitated.¹⁸⁵
286. There is a growing body of evidence suggesting that people who are disabled by accident and then rehabilitated or exited from the ACC scheme have poor outcomes in terms of work and employment. This evidence will be discussed in this chapter.
287. The scheme has been significantly affected by a shift in thinking about unemployment. The current competitive New Zealand labour market is a result of significant neo-liberal reform in the 1980s and 1990s. It is completely different from the labour market in existence when the ACC scheme was designed in the 1960s, which was characterised by a heavily interventionist system directed at full employment.

¹⁸³ Terrance Ison “Accident Compensation in New Zealand: Future Options” (Wellington 28 Nov 1985) at 20; Grant Duncan “Advancing in Employment: the way forward for vocational rehabilitation” (2004) 35 VUWLR 801, 803; Pamela Lee *Strategies to Return Injured Workers to Sustainable Earnings, An International Literature Review, July 2003* (Report to the Department of Labour) at 47; PricewaterhouseCoopers *Accident Compensation Corporation Scheme Review* (Report to ACC, March 2008) at xiv.

¹⁸⁴ PricewaterhouseCoopers *Accident Compensation Corporation Scheme Review* (Report to ACC, March 2008) at xiv; ACC Response dated 15 November 2010 to an Official Information Act Request dated 15 October 2010 requesting disclosure of outcomes for long-term clients who were assessed as vocationally independent (Obtained under the Official Information Act 1982 Request to the Accident Compensation Corporation).

¹⁸⁵ Hansard NZPD 27 June 2012. Volume 681 p 3422.

288. At the beginning of their dealings with ACC, people with disabilities caused by accident receive a high level of compensation (80% of their pre-injury earnings). Conversely, the effect of the legal composition and administration of the scheme means that claimants are left uncertain as to how long this compensation will continue (this has an impact on their ability to plan their lives and start a family, as discussed at article 23 above). ACC has several “exit streams” and it codes injured peoples’ cases according to these exits.

289. ACC’s exit streams can be described as follows:¹⁸⁶

- i. **Incapacity exit** – where ACC obtains a medical assessment that the person can return to the job they were doing before they were injured.
- ii. **Vocational independence process exit (“VI exit”)** – where ACC obtains an occupational assessment and a medical assessment that concludes a person is able to work in a specified (but not necessarily available or identified) job for 30 hours or more per week.
- iii. **Causation exit** – where ACC decides that the medical information on file indicates that something other than the accident has caused a person’s inability to work, such as a pre-existing condition or age-related degeneration.
- iv. **Fraud exit** – where a claimant no longer receives entitlements because: (a) they have been investigated by Private Investigators and ACC determines that they are

¹⁸⁶ See Forster, W. *Back to the Future: Compensating injured workers for lost earning*, at Chapter II – Legal Mechanisms for Constraining Compensation for Income, and Chapter III – The Effects of Exit Strategies (2011) OYLR.

not entitled given the information from that investigation and/or (b) the person is imprisoned for fraud and therefore does not receive entitlements under the Act.

- v. **Non-compliance exit** – where a claimant refuses to comply with a request from ACC, a case manager has the discretion to cease entitlements based on that refusal until the person complies.

290. High-value claims that entail large amounts of income support or expensive medications are targeted using these exit streams. From a financial perspective, the savings are the same to ACC whether a person is exited due to non-compliance or due to Vocational Independence. The obstacles to challenging that exit decision have been discussed previously under articles 13 and 17.

291. **Even if one incorrect decision is successfully challenged, it is likely that far more exit decisions that may be equally incorrect will not be challenged, or any challenge will fail.**

292. The legislation governing the ACC scheme means that all that is required is an *assessment* that a person can do something, without requiring ACC to measure whether that person can *in fact* or will later go on to do something. The assessment process is discussed above under article 17, integrity of the person and will not be repeated here.

293. The law is inconsistent with the article 27 requirements to promote work experience in the open labour market. Instead, there is usually no post-accident work experience, and no post-accident work trials. People are exited through the vocational independence process when they are hypothetically able to do the job. They may have

never physically done the job since suffering the impact of their accident. Even where work experience or work trials do occur, they are often not conducted in the context of a competitive and open labour market.

294. What is clear from the limited information that exists, as set out below, is that persons with disabilities are leaving ACC without being able to actually obtain and maintain employment. Two types of studies have been conducted: data-matching and surveys of injured people.

Evidence from data-matching studies

Linked employer employee study using tax records and injury data

295. A data-matching study analysed over 100,000 people who were off work by injury for more than one month from 1999 until 2004.¹⁸⁷ Employees from the agricultural, manufacturing, construction and transport sectors were over-represented comprising 30 per cent of employees, yet 50 per cent of accident victims.
296. The study showed that injured people have poorer long-term outcomes than non-injured people, particularly if the injured person is off work for more than three months following their accident.¹⁸⁸ The real loss of earnings by accident is a significant issue with estimates suggesting that after social security benefits are taken into account, people who remain off work for four to six months continue to receive \$160-220 less per month. Those off work for 7 to 24 months receive \$320-370 less per month.¹⁸⁹

¹⁸⁷ Sarah Crichton, Steven Stillman and Dean Hyslop. "Returning to Work from Injury: Longitudinal Evidence on Employment and Earnings" (2011) 65 *Industrial and Labor Relations Review* 765.

¹⁸⁸ *Ibid* at 774-775 and 777.

¹⁸⁹ *Ibid*, at 780.

297. This study concludes that:¹⁹⁰

injuries have long-term effects on individual labour market outcomes and that the institutional arrangements in place in New Zealand fail to compensate for this.

Data-matching between ACC and Ministry of Social Development

298. There is evidence of system-wide cost shifting. In the five years to 2004, approximately 17,000 people were moved from ACC to sickness and invalids benefits.¹⁹¹ This does not include those who were transferred to the unemployment benefit,¹⁹² or those who are not entitled to receive social support because they have a partner who is employed. The people identified remain unable to work because of their disability, yet system design means that rather than focussing on assisting people to obtain meaningful employment, they are being shifted around New Zealand's social security system. This is confirmed by the Annex to the state report where injury is cited as being a ground for access to an invalids or sickness benefit.¹⁹³

299. The current government has begun initiatives to apply ACC methods to other social security benefits, such as more stringent requirements on beneficiaries, which facilitate further opportunities to achieve a non-compliance exit from those other benefits.

¹⁹⁰ Ibid, at 784.

¹⁹¹ Hansard NZPD (27 July 2004) Vol 618, page 14296.

¹⁹² See state report Annex for explanation of the various benefits.

¹⁹³ Annex to state report at page 27, paragraph 28, 29, 31 and 32.

Surveys of people with disabilities who are assessed as able to work

Research New Zealand (2013)

300. ACC commissioned Research New Zealand to undertake a phone survey of a random selection of 245 injured people from ACC's "Recover Independence Service" who had recently had their entitlement to weekly compensation stopped. The results of this research was not well publicised by ACC.

Most people:

- (i) had only partially recovered from their injury or not recovered at all,
- (ii) reported that the injury had an impact on their general health and wellbeing,
- (ii) remained fully dependent or somewhat dependent on others for their daily living.

Most people had not worked in the previous six months and mostly directly because of the injury. Others struggled to get jobs because of:

- (i) their injury record,
- (ii) their inability to find a job, and
- (iii) their lack of qualifications and experience.

Of those who were working (n=102), most had changed job types and just under half were working part-time. Those working part-time were mostly doing so because of their injury.

Half of the total (including some who were working) were receiving social security support including sickness or invalids benefit, pension, and the unemployment benefit.

Most people said ACC did not:

- (i) take their case seriously,
- (ii) consider all of the relevant facts,
- (iii) take their personal circumstances into account,
- (iv) fairly stop providing help and support.

Most people said:

- (i) it took a lot of effort to deal with ACC, and
- (ii) they did not have trust and confidence in ACC.

Armstrong Lairs Study (2007)

301. This study involved phone interviews with a random sample of 160 injured people who had been determined to be vocationally independent (assessed as able to work 30 hours per week in at least one assessed job type) or equivalent then formally challenged ACC's decision using a review and appeal.

Just over half the people were working either full-time or part-time (54%). Of those working, most suffered a significant drop in real income compared to their pre-injury income (without increasing the drop for inflation).

- (a) a third did not suffer a drop in income,
- (b) 17% suffered a \$5000-10,000 decrease,
- (c) 23% suffered a \$10,000 to \$20,000 decrease,
- (d) 19% suffered a reduction of more than \$20,000.

Of the sample, just under half (46%) were not working and most of this group were being financially supported by the state. 22% of the total sample were on a benefit (mainly sickness or invalids benefits) and 9% were in receipt of weekly compensation

Conclusions that can be drawn from the data

302. The legislative requirements simply require an assessment that a person can work, rather than actual work. This leads to poor outcomes for persons with disabilities caused by injury.
303. Legislative and policy changes are not made on the basis of empirically measured outcomes for clients. Instead they are made on the basis of outcomes for the scheme administrators (ie exits). The assumptions are that once rehabilitation is "complete" and a person "exited":

- (i) it is up to them to compete in the labour market;
- (ii) they will maximise their utility; and
- (iii) they can do so on an equal footing.

304. The evidence suggests that these assumptions are wrong. The Convention requirements at article 27 are simply not being met.

305. If the Convention requirements of “effective” rehabilitation, vocational guidance, placement services and vocational and continual training is to be read as actually resulting in work, then both the New Zealand law and the measures provided pursuant to it are ineffective.

306. People who were injured while they were children were not earning financially at the time of their injury. This means they cannot receive weekly compensation. Similarly, it is difficult for New Zealand’s many small-medium sized business owners (which includes its significant agricultural sector) to show historical (or even current) earnings information to allow assessment of compensation. Only those in receipt of weekly compensation are entitled to the vocational rehabilitation process. The effect of this, therefore, is that those who were injured as children, and those who have difficulty in documenting their earnings, are not entitled to vocational rehabilitation.

*ARTICLE 28: STANDARD OF LIVING AND
SOCIAL PROTECTION*

RECOMMENDED QUESTION FOR THE LIST OF ISSUES

- Q 22.** Has the New Zealand government ensured equal access by persons with disabilities to retirement benefits? If not, when will it do so?

Article 28 – Adequate Standard of Living and Social Protection

307. There are two ways that injured New Zealanders are not given access to retirement benefits and programmes. They reflect the two retirement systems in New Zealand. The first is New Zealand superannuation. This is provided to people who meet qualifying criteria at age 65. The second is Kiwisaver, which is an individual retirement savings scheme funded by employer and employee contributions.

New Zealand superannuation

308. Those who reach the retirement age of 65 have their entitlements to weekly compensation under ACC ceased, regardless of whether they are entitled to superannuation. It is the obtaining of the age of superannuation that triggers the cessation of entitlements, not actual retirement from work or eligibility for superannuation.
309. If a person does not meet the eligibility criteria for superannuation, for example having lived in New Zealand for ten years, they are not entitled to receive either weekly compensation or superannuation.
310. As discussed above article 14, liberty of movement and nationality, this has a real effect on persons injured by accident in New Zealand.

Kiwisaver

311. The second way in which people injured by accident suffer discrimination is that they have no way of obtaining superannuation contributions that they would have received if they

had continued to be employed. They are not “employed” by ACC, so ACC is not required to make a contribution. The Kiwisaver contributions that a person had previously made whilst they were in the workforce are not considered part of their “earnings” so they are not included in their compensation levels.

312. A person’s colleagues who are not incapacitated by injury continue to earn 100% of their wages and obtain their employer contributions to their Kiwisaver retirement funds. In contrast, that injured person has their income reduced to 80% and they are further disadvantaged by the fact that no contributions are made to their Kiwisaver retirement fund.

Acclaim Otago urges the Committee to incorporate the following into the list of issues adopted for consideration by the Committee.

Where the Committee has any doubts about the legitimacy of the issues below, we would request that the Committee please refer to the attached report or seek further information.

These issues represent significant hardship at an individual and systemic level. Where at all possible the state party *must* be required to account for them. Many of these issues have been raised previously in domestic fora, including during consultation on the draft state report, but have neither been addressed nor referred to the Committee by the state. There is consensus regarding these issues amongst the organisations set out below at Appendix 2.

Article 13: Access to Justice

- Q 1. What steps is the New Zealand Government taking to ensure proper funding for injured people to gain access to justice?**

- Q 2. What steps is the New Zealand Government taking to increase the supply of legal representation for injured people?**

- Q 3. What steps is the New Zealand Government taking to ensure procedural fairness and reliable evidentiary procedures are observed in ACC dispute resolution?**

- Q 4. What steps is the New Zealand Government taking to allow serious complaints against ACC staff members to be escalated and given external oversight?**

- Q 5. What steps is the New Zealand Government taking to ensure that procedural defects in ACC dispute resolution are recorded and resolved on a system-wide level?**

Article 14: Liberty and Security of the Person

- Q 6.** What steps is the New Zealand Government taking to ensure people with injuries are not improperly prosecuted or imprisoned because of the management of their injuries?
- Q 7.** What steps is the New Zealand Government taking to safeguard the liberty of young New Zealanders with Traumatic Brain Injuries?
- Q 8.** What steps is the New Zealand Government planning to take to address long-term loss of earnings for those suffering from injuries who are not entitled to compensation?
- Q 9.** What steps is the New Zealand Government taking to ensure that people with injuries receive proper treatment in prison on an equal basis to people who are not imprisoned, including treatment for Traumatic Brain Injury?

Article 17: Protecting the Integrity of the Person

- Q 10.** Does New Zealand law enable injured New Zealanders to give or withhold fully free and informed consent to all healthcare practitioners involved in their claim? If not, what steps is the government going to take to ensure that the law is changed to enable this?
- Q 11.** What steps are in place to ensure that an injured person's consent given for one purpose, such as treatment, is not used for another purpose, such as stopping entitlements or prosecution?
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Article 18: Liberty of Movement and Nationality

- Q 12.** Are there any legislative provisions that could have the effect of limiting liberty of movement by placing people under duress with regard to their movement?

Article 22: Respect for Privacy

- Q 13.** Do people injured by accident in New Zealand have an effective legal right to privacy?
- Q 14.** Do people injured by accident in New Zealand have effective control over the collection and disclosure of their personal information to third parties?

Article 23: Respect for Home and Family

- Q 15.** Does ACC law in New Zealand operate to limit the right to respect for the home and family of persons disabled by injury in New Zealand?

Article 25: Health

- Q 16.** Does the law regarding the health of injured people in New Zealand operate in such a way as to ensure their health is maintained at the highest attainable standard?

Article 26: Habilitation and Rehabilitation

- Q 17.** Does the law in New Zealand provide effective and appropriate measures to enable persons with disabilities caused by injury to
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attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life?

- Q 18. When does the New Zealand Government propose to begin collecting the rehabilitation outcomes of people rehabilitated by ACC?

Article 27: Work and Employment

- Q 19. What steps has the New Zealand government taken to safeguard and promote the realisation of the right to work for people disabled by injury in New Zealand?

- Q 20. What legislative steps is the New Zealand government going to take to safeguard and promote the right to work for people disabled by injury in New Zealand to protect, promote, ensure and enable people in accordance with article 27?

- Q 21. Is the New Zealand government going to amend the ACC legislation to ensure that the appropriate rehabilitation outcomes for injured people is an actual return to work, rather than a hypothetical return to work?

Article 28: Standard of Living and Social Protection

- Q 22. Has the New Zealand government ensured equal access by persons with disabilities to retirement benefits? If not, when will it do so?
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APPENDIX 2 – ENDORSEMENTS

1. The list of issues should be considered as representing a consensus view of the issues facing people with disabilities caused by injury.
2. The list of issues has been endorsed by a consensus of experts that are active in this area as follows. If the report is also endorsed, it is recorded next to their name.
3. The parties recorded below can be taken to include the majority of independent representatives of injured people throughout New Zealand.

Barristers

Andrew Beck endorses the issues raised by Acclaim Otago.

About Andrew Beck

Andrew Beck is a senior member of the Wellington bar, practising chiefly in civil and commercial litigation. His particular areas of expertise include contract, tax, company law, and health law. He has appeared in cases at all levels up to the Supreme Court, and was formerly Associate Professor at Otago University and Crown Counsel.

Dinah Dolbel endorses Acclaim Otago's list of issues.

About Dinah Dolbel

Dinah Dolbel has been practising as a barrister since 1990. She works in the areas of criminal, children and ACC law. In her work she has often met people with disabilities who are struggling because agencies do not fully recognise their different needs.

Law firms

John Miller Law endorses the issues raised by Acclaim Otago.

About John Miller Law

John Miller Law was founded by New Zealand’s leading ACC law expert. A former senior law lecturer at Victoria University, John Miller has represented injured people for the last 30 years and is a tireless campaigner for ACC claimants’ rights. He is a sought-after public speaker, media spokesman and author on personal injury law.

Peter Sara Law endorses the list of issues and the report.

About Peter Sara Law

Peter Sara is an ACC specialist lawyer of 35 years experience based in Dunedin. He is a member of the New Zealand Law Society ACC committee and is active in promoting ACC reform in various fora.

Schmidt and Peart Law endorses the list of issues.

About Schmidt and Peart Law

We are an Auckland-based firm specialising in accident compensation law. In addition to our ACC practice, we litigate personal insurance cases and also represent victims in criminal sentencing matters relating to reparation for injury and emotional harm.

We have been practicing in this area for more than ten years in New Zealand. We also sit on the Advocates and Representatives committee within ACC to advise on strategy and policy. Philip Schmidt has been on the NZ Law Society ACC committee for many years. Hamish Peart was chairperson of Auckland Disability Law centre in Auckland for two years.

Sally Wood endorses the list of issues.

About Sally Wood

Sally Wood is a Whangarei based lawyer working predominantly in ACC and Family law. She represents clients who are challenging decisions made by ACC in reviews and appeals. She has an LLB and a BA from the University of Otago.

ACC Advocates

Brent Consulting endorses Acclaim Otago’s report and the list of issues.

About Brent Consulting

Ray Harris from Brent Consulting is an Advocate from Hamilton working with NZ Accident Advocacy dealing with ACC matters.

Jeannette Brock endorses the list of issues.

About Jeannette Brock

Jeannette Brock has been working as an advocate for over 12 years. She has been working on her own and is very successful in resolving disputes with ACC for her clients.

Michael Gibson endorses Acclaim Otago’s list of issues and report.

About Michael Gibson

Michael Gibson (BA LLB) has advocated for ACC claimants since 1996. In that time, he has litigated at both District Court and tribunal levels. He also represents claimants at Alternative Dispute Resolution venues, notably mediation. Mr Gibson has made many submissions to Parliamentary select committees, political parties and supre-national bodies, such as the United Nations, on matters affecting people with disabilities, including personal injury claimants under New Zealand's ACC scheme.

Mike Kletzkin, Hazelhurst Advocates Limited endorses the list of issues and the report.

About Mike Kletzkin

Mike has worked as an Advocate representing ACC Clients since 2005 in Case Management, Review Hearings and District Court Appeals.

KFM and Associates endorses the report and list of issues prepared by Acclaim Otago.

About KFM and Associates

KFM and Associates is an advocacy firm set up by disabled people for disabled people specialising in Accident Compensation, Employment, Social Security, Human Rights and Health and Disability issues. Kevin Murray has been a disabled persons’ advocate for 32 years actively participating in the blind community in New Zealand and internationally. Mr Murray was involved in the online group around the development of the Convention on the Rights of Persons with Disabilities and also

or Indigenous people. He is the past convenor of the Australasian network of students with disabilities.

Kathryn LeBlanc endorses the list of issues and the report in principle.

About Kathryn LeBlanc

Kathryn LeBlanc is an advocate/advisor for ACC claims and appeals and is familiar with the material issues raised by Acclaim Otago.

New Zealand Accident Advocacy Service endorses Acclaim Otago's report and list of issues in full.

About New Zealand Accident Advocacy Services

The NZ Accident Advocacy Service is a service providing advocacy and regular representation at review and appeal level and we also facilitate access to appeals to the High Court and Court of Appeal by working with lawyers who are prepared to act in appropriate cases. The business has been operating for 7 years however the principal, Mr Darke has over 20 years experience in ACC issues. The business tries to ensure, where possible, that people having limited resources will still be able to have representation.

Tony Prendeville endorses Acclaim Otago's list of issues.

About Tony Prendeville

Mr Prendeville has been involved with ACC for 30 years, as an injured person, an advocate for injured people and a representative on committees involving ACC and disability issues, including as chairperson of the community organisation grants scheme.

Graham Willson endorses Acclaim Otago's report and the list of issues.

About Graham Willson

Graham is an advocate based in Picton, Marlborough Sounds. He specialises in brain injury and paraplegia and has had a significant involvement in New Zealand's personal injury system and disability issues since 1993 and is interested in improving ACC service delivery, ethical conduct and accountability.

Other parties

Mary Butler endorses the issues raised by Acclaim Otago.

About Mary Butler

Mary endorses the issues raised here on the basis of her research (PhD and postdoctoral) and understanding of clinical issues as an occupational therapist and member of the ACC consumer outlook group.

The Brain Injury Association Northland endorses Acclaim Otago's report and the list of issues.

The Brain Injury Association Northland

The Brain Injury Association Northland provides support, information and advocacy to clients with brain injury, their families, whanau and carers. This can include supporting clients at appointments with other agencies involved in their life eg WINZ, ACC, Health services, school etc. We cover from Wellsford North. Typically the relationship we have with clients is long term and intermittent but often they have complex needs. We are supporting Acclaim Otago as many of the issues we deal with on a regular basis are the ones being raised and it is the clients that are missing out. Due to the geography of the North, many people entitled to ACC are falling through the cracks

Cathy Matthews and the Brain Injury Association Otago endorses the list of issues prepared by Acclaim Otago.

About Cathy Matthews and Brain Injury Association Otago

I am a Liaison Officer with The Brain Injury Association Otago. The Brain Injury Association of Otago and I fully support Acclaim Otago submissions to the UN. The Brain Injury Association Otago provides support, information and advocacy to clients with brain injury, their families, whanau and carers across the region of Otago. Much of the support is supporting clients with appointments with government agencies such as ACC, Work and Income, Probation along with health services. Our clients because of the effects of their injury don't always have the ability to understand the ACC system they are expected to comply with, nor do they have the financial capability to be fairly represented to challenge decisions on entitlements and services. There is a sense of helplessness with the complaint process weighted against the claimant. The Brain Injury Association Otago support Acclaim Otago in their submission because the issues the Liaison Service deals with on a regular basis are too common around the country and across all injuries.

About Acclaim Otago

1. Acclaim Otago is a support group for injured New Zealanders and their families. We are an incorporated society based in Dunedin with members throughout New Zealand. Established in 2003, we have been advocating for systemic change to improve the lives of injured people for the last ten years. We are active in the area of human rights in New Zealand.
2. For the last seven years, Acclaim Otago has had a seat on ACC's Consumer Outlook Group, which provides advice to the ACC CEO on issues facing consumers and for the last year has been a member of the Advocates and Representatives Group (ARG) providing direct input into policy and strategy at ACC. We have good working relationships with Members of Parliament from across the political spectrum and seek to work collaboratively to improve the experiences of injured New Zealanders.
3. We have a significant public profile when it comes to ACC claimants' issues and we have a significant media presence.

The Report's Authors

4. The key people involved in writing the Shadow Report will be Dr Denise Powell, President of Acclaim and Mr Warren Forster of Forster and Associates Ltd.
5. Dr Powell was president of Acclaim Otago for ten years. She is an experienced researcher having worked for the Dunedin Multidisciplinary Study, the Potential Outcomes of Injury Study and she undertook her doctoral research into the experiences of deaf students in tertiary education in New Zealand. Dr Powell has published internationally in peer-reviewed journals and is well known in the disability community. She has also been living with a disability for the last two decades. At a recent disability conference, Dr Powell was inspired to submit shadow reports and, since then,

she has been committed to informing the Committee of injured New Zealanders' experiences.

6. Warren Forster is an advocate with wide experience in resolving legal disputes with ACC, identifying systemic problems and implementing change through courts and parliamentary processes. He runs a boutique advocacy business in Dunedin representing injured people at the Review Tribunal and in the District Court.
 7. Mr Forster was awarded an LLB(Hons) from the University of Otago and his dissertation on compensating injured workers was published in the 2011 Otago Yearbook of Legal Research. He has worked with Acclaim Otago on many of their major projects and in 2011 was awarded a summer research scholarship at the University of Otago. He was involved in drafting Acclaim Otago's submission on the draft report. He is a good communicator and has succeeded in incorporating his ideas into legislation through presentations to parliamentary select committees. He has recently presented at conferences on disability and legal ethics.
 8. Tom Barraclough completed a BA(Pols)/LLB(Hons) in 2013 at the University of Otago. His dissertation focussed on environmental law and philosophy. Tom has experience working with Warren Forster and Denise Powell since 2010. He has a great interest in the ACC system because of the fascinating intersection it presents between politics, philosophy, and law. He believes that the ACC system will be capable of great things once it gives due respect to human rights and individual justice.
 9. Tiho Mijatov graduated from the University of Otago with an LLB(Hons) in 2013. His dissertation was on the use of dissenting judgments in New Zealand law and he has an interest in the nature of common law legal reasoning. He has been involved in the build up to this report in undertaking work experience with Warren Forster and Tom Barraclough.
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