Acclaim Otago (Inc)

# THE COSTS OF PARADIGM CHANGE:

## Access to Justice for People with Disabilities Caused by Personal Injury in New Zealand

**A SHADOW REPORT to the UNITED NATIONS COMMITTEE on the CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES to be considered at the 12th SESSION**

**(24 July 2014)**


Acclaim Otago Incorporated
PO Box 5022
Dunedin, 9058,
New Zealand
Email: acclaimotago@gmail.com
Website: http://www.acclaimotago.org
Contact Dr Denise Powell: +64274136371

Prepared by Forster & Associates Ltd
PO Box 5949, Dunedin 9058,
New Zealand
Contact Warren Forster +6421627213

## *About the Authors*

**Acclaim Otago (Inc)** is a support group and a collective voice of people disabled by injury. Our committee consists of 12 members; the majority are disabled by injury (9) with the remainder having a spouse or child with a disability caused by injury. To our knowledge, Acclaim Otago is the only organisation in New Zealand specifically established for and by persons with disabilities caused by injury.

We receive no external funding and have an annual budget of between NZD $3000 and $4000. We have not received any government support to prepare our Interim report, conduct the survey, or prepare and present our shadow report. Our work is undertaken by volunteers, and in 2013, we were provided with a Shadow Report Award from the Law Foundation, which has made the compilation of this shadow report possible. Acclaim Otago has recently been recognised in New Zealand as a Disabled Persons Organisation and has sought Non Government Organisation status with the United Nations.

Preparing and presenting these reports and collecting the voices of persons with disabilities covered by ACC has taken an enormous toll on our organisation, the individuals who have made this happen, and the people who have contributed their voices. Collectively, we have taken this as far as we can and given it everything. We would like to thank the people who have provided financial and emotional support. The cost of doing this cannot only be measured in financial terms, but without significant change, this process will never be able to be repeated. If the torch is going to keep burning, then the Committee and the Government will need to put in place the mechanisms to make this happen.

Dr Denise Powell is the immediate past president and spokesperson of Acclaim Otago. She has lived with a disability for over 25 years.

**Forster and Associates** was contracted by Acclaim Otago to prepare this shadow report.

Mr Warren Forster became involved in the ACC jurisdiction in 2005 after his mother suffered an accident. He flew from his home in London to assist her through the statutory dispute resolution process and an independent inquiry. He then obtained LLB(Hons) from Otago University and now practises as a Barrister in Dunedin, New Zealand.

Mr Tom Barraclough drafted Acclaim Otago's first response to the Office of Disability Issues Draft State Report in 2010. He was diagnosed with Type 1 Diabetes in 2002. Since then he obtained BA(Politics)/LLB(Hons). He will soon be admitted to the Bar and is looking forward to working for change in this area of law and policy.

# *Foreword*

On 2 September 2008, New Zealand's Parliament ratified the Convention on the Rights of People with Disabilities. The gallery was packed on that historic night. Members of Acclaim Otago stood amongst those hopeful and excited people. We were celebrating. Finally, here was a comprehensive approach to guarantee basic human rights for us all. It set an expectation that we would be involved in ensuring compliance with these rights. We hoped that this would balance the power and control held by the ACC and the Government and make them focus on human rights.

Recently, the government announced its plans to remove our right to have the facts of our ACC cases determined by an independent judge and to strike out our appeals if we do not have everything filed within 60 days. They did this without consulting any injured people or their representatives, or the law society. The Minister stated in official briefings to the Cabinet that their decision did not pose any issues for human or disability rights.

When you engage with the New Zealand Government in Geneva on 15 September 2014, over six years will have passed without persons with disabilities caused by accident or injury obtaining any real recognition, implementation or realisation of those rights. Parliament ratified these rights after what has been a lifetime of struggle for many people who came before us. When Denise, Warren and Tom arrive in Geneva in September, we urge you to hear our voice and to challenge the Government to uphold the highest possible ideals and aspirations of the CRPD. We need help to create a society in which we can be supported to live with our families without prejudice, without persecution, without stigma and without the social barriers constructed by this system.

We have tried to change the culture of unrestricted intervention in our lives and violation of our autonomy, but we have failed. Time and time again, senior ACC staff are "appointed" to be our "voice" at the table. Time after time, we find that in fact we are being ignored.

Like many of our members, I cannot travel to Geneva to speak to you, but I hope in the true spirit of the CRPD, that disability does not muffle our voice.

Mr Bruce Van Essen,
President of Acclaim Otago
Dunedin
11 July 2014

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## *Executive Summary*

New Zealand is a state party to the CRPD. Official government statistics show that from a population of 4.4 million, there are 1.062 million people in New Zealand with long-term disabilities. Accident or injury is the most common cause for men and the third most common for women. Overall, the 2013 New Zealand Household Disability Survey identified 320,000 people as living with a long-term disability caused by accident or injury ("PwDI").[1]

New Zealand has an Accident Compensation Corporation (ACC), which is a statutory monopoly established for the purpose of managing personal injury in New Zealand. It is part of a "social contract" (Accident Compensation Act 2001, s 3) in which New Zealanders gave up the right to sue for personal injury in exchange for a system of rehabilitation and financial support. It is a compulsory scheme with a $29 billion surplus funded through levies and investments. In many cases, particularly with short-term injury, ACC does well. Nonetheless, it appears that ACC only provides assistance to a small percentage of those with long-term disabilities caused by accident. It is likely that this percentage would be much higher if those people had access to justice. We do not know what has happened to the hundreds of thousands of people who no longer receive ACC support.[2] They are invisible to other official statistics[3] and their voices are not being heard.

It does not appear that the Government has considered the ACC, its governance, its administration, its policy and its laws according to the convention. There have been no questions asked nor data kept that would allow the Government to claim that ACC is in fact properly managing personal injury. None of the official reporting bodies to the convention, including the Office of Disability Issues and the article 33 Convention Coalition, have **properly** examined ACC issues.

Both the CRPD and ACC are important to all New Zealanders. ACC receives 1.7 million claims annually. The ACC scheme has been excluded from CRPD reforms that have

[1] Statistics New Zealand Disability Survey released 14 July 2014.
[2] The exact data is unclear however the number of "long-term claimants" receiving weekly compensation has recently been "reduced" by ACC to 13,000.
[3] Warren Forster *Back to the Future: compensating injured workers for lost income.* OYLR (2011) pp 34-44.

been implemented in New Zealand. Unlike nearly all other disability schemes in the world, ACC has $29 billion in reserve and last year generated a $5 billion profit (approximately 3% of annual NZ GDP). The Government and ACC have a unique conflict of interest due to this bilateral financial relationship. To the extent that implementing CRPD reforms cost the scheme money, this conflict of interest means they are unlikely to be implemented. This must be independently addressed.

With the support of the New Zealand Law Foundation, Acclaim Otago undertook a systemic review of ACC against the convention rights. This was included in the Interim Report and raised significant systemic questions that need to be answered in order to identify whether or not the scheme is achieving either its statutory purpose, or compliance with the CRPD. The evidence suggested that the ACC system is doing neither. As discussed in the Interim Report, the vocational independence process is ineffective and breaches article 27 of the CRPD. The Committee on the Rights of Persons with Disabilities ("the committee") asked a number of questions of the New Zealand Government, including an important question about access to justice for persons with disabilities disputing ACC's decisions.

Acclaim analysed data from 600 New Zealanders, obtained via a publicly available online survey to gather data on individuals' experiences to answer the question asked by the Committee. The results are summarised at Chapter III, and the detailed survey results are available at www.acclaimotago.org. **We acknowledge this may not be a representative sample, but that is irrelevant from a human rights perspective, and there are strong trends regardless.** In addition, the nature of the law constituting the dispute resolution process suggests that individual issues identified in the survey are likely to be part of a systemic problem. Further, without the collaboration of government agencies as required by the CRPD, we will never be able to obtain a representative sample.

The survey confirmed that the issues Acclaim Otago identified in its Interim report are systemic. The ACC system breaches multiple articles of the convention, including articles 13, 14, 17, 18, 22, 23, 25, 26, 27, and 28. With regard to **article 13**, we conclude as follows.

**Funding is inadequate** and provides direct and indirect barriers to people accessing justice. Costs will only be awarded if specifically requested, and the Reviewer believes a

person acted "reasonably", involving an exercise of discretion about the behaviour of a PwDI by an official. ACC commonly opposes an award of costs. Legal aid loans and costs awards are limited by regulation and are completely inadequate to provide access to justice. The market for representation is broken by decades of underfunding and the effects of this can be seen in the lack of representation and the delays in hearings. Immediate action is required to address this.

There is **no procedural fairness** and, despite cosmetic legislative safeguards, there is no effective way to enforce these. People cannot effectively enforce procedural fairness before, during or after the hearing.

The **evidentiary procedures are completely reliant on a Reviewer's exercise of discretion** rather than on the procedural safeguards available to all New Zealanders in other legal proceedings. These have been developed over centuries of common law to ensure the fair determination of proceedings and were enacted into the Evidence Act 2006. There is significant and reliable evidence that, at a systemic level, the discretion is not being exercised in a way that allows access to justice.

**Institutional mechanisms for upholding the rights of injured people have failed. The principles and purpose of the CRPD have not been understood or implemented. ACC and the Government have a conflict of interest that suppresses motivation for reform, and we conclude strongly that an independent commissioner for ACC is required to reform the system according to the CRPD.**

Acclaim Otago recommends that the committee take the specific action on each of these points set out at Chapter IV – Conclusions and Recommendations. The three recommendations at the conclusion of this report can be considered a consensus view of the independent experts in this field in New Zealand working in the ACC dispute resolution system. The list of experts who have endorsed all three recommendations is at Appendix 1.

This shadow report draws heavily on the lived experiences of PwDI. Some of their responses to our survey are included in **yellow text boxes**. Some individual experiences have been videoed and put on our website.

## *The CRPD and ACC*

**Why is the CRPD important for Injured New Zealanders?**

> It's not fair on your kids when you are stuck in this process. Its not like you can just decide you don't want to be involved with ACC. You are dependent on them. The law protects lots of society who are dependent but not ACC claimants. There is no independent body you can go to with problems there is a support line to phone for advice but it is only the government told ACC to offer to save on the cost of the huge number of complaints ACC get. It is still serving ACC, not claimants really. It doesn't go far enough to offer funding to help you get the info and proof and advocacy you need to be able to get the things that should be part of your rehab. That's the other thing. ACC, no matter that your injury is permanent, always assess on the proviso you are on the road to independence. We wish. That is how they can erode your support and gives them justification to push you into doing more that is detrimental to your overall wellbeing. (R 54)
>
> The most abusive and horrific experience of my life – fighting for the rights of my son … (Q100R39)
>
> If I ever get injured again I will do everything in my power to not use ACC … (Q100R22)
>
> The entire system is tailored to suit a positive outcome for ACC. (Q100R72)

Without seeking to tell the Committee about their own area of expertise, the CRPD promises many things. It has been seen as a shift from previous human rights treaties because of its explicit acceptance of a social model of disability (art 1). Some go further and say the CRPD has created a previously unacknowledged disability rights paradigm.[4] As the text of the Convention acknowledges, this transformative social shift cannot occur without good data (art 31), positive messages (art 8), the voices of people with disabilities (arts 33 and 4(3)), and without a careful approach to interpreting the convention's text so that its detailed provisions are not read down.[5]

2014 is New Zealand's first opportunity to show the Committee how their efforts in promoting the Convention prior to 2008 have translated into action. The CRPD would

[4] Paul Harpur (2012) Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities, Disability & Society, 27:1, 1-14.
[5] Teodor Mladenov (2013) The UN Convention on the rights of persons with disabilities and its interpretation, ALTER, European Journal of Disability Research 7, 69-82.

not exist unless there was significant work to be done – its purpose is to progress that work – and now the New Zealand Government must be rigorously examined on its work so far.

**The ACC scheme has been excluded from CRPD reform**

> Over the years, ACC has tried every dirty trick in the book, including complete intimidation to the point at one stage a suicide attempt seemed the only way out and this was then used against me at the hearing. They play dirty, can you understand now why we finally threw our hands in the air and gave up. (Q74R46)
>
> When you have a chronic injury, you are not prepared for the litigious, aggressive, time consuming unethical framework you are now forced to work within. I have a substantial injury that is likely to never get better. ACC has delayed and denied key treatments and my injury deteriorated in the process. The only way to describe what it is like is you have to FIGHT to get anything. You must have a good lawyer. Dealing with ACC is as bad as having the worst injury – you effectively get 2 injuries. (Q100R175)
>
> I gave up in my dealings with them, they treated me with disregard and without dignity. They had made up their mind well before as they were not prepared to reassess those beliefs. I felt they used the [review] process to run me around, burn me out, so I wouldn't get my complaints to avenues outside of ACC. They misguided and misinformed me, and I don't trust them or have faith in any dealings with them. There is no access to fair and just treatment when dealing with significant complaints. Even when these breach ethical codes. (Q94R34)

The Accident Compensation scheme is essential to the Government. It provides legal immunity for itself, the medical system, its businesses (including its tourism industry), Ministries of the Crown, and other New Zealanders by removing legal liability for personal injury. Instead, it promotes an agenda of rehabilitation and prevention. In some ways, it was pioneering given its inclusion of social rehabilitation, and providing support aiming to reduce the social barriers against people disabled by accident. It does not fit neatly into any disability model. The level of services it provides to those receiving **cover and proper entitlements** is something to which any disability system can aspire.

But the Accident Compensation system is in conflict. Now, it is arguable that ACC creates as many social barriers as it removes. There is a strong medical focus and a culture of repeated intervention as directed by officials and non-treating assessors. People who are injured have impairments that can be "fixed". The perception is that they

are given a high level of services, and so any resulting effects of their injuries can only be their "fault". Even from other disability organisations, there is an attitude that such a generous scheme should only result in the "gratitude" that such a medical or charitable model demands.

> I found my experience with ACC extremely negative, they are meant to be there to help people that have been in accidents and had injuries but they make you feel "guilty" even when you are not. As soon as they think you are going to be on ACC for a period of time I think they just find any reason to decline cases without due course. This causes the claimant so much stress financially and mentally, when you have a serious injury and you have to fight for compensation this does not help you get better quicker. (Q100R64)
>
> It has been a constant battle to obtain and hold onto my rightful cover and entitlements. I have spent 100s and probably 1000s of hours of my time in litigation with ACC and cannot get financially reimbursed for this time (as self representing). They would rather spend $10k fighting a claim than pay you the $1000 item requested. I regard the organisation as morally corrupt and the antithesis of the supportive and humane concept originally envisaged … (Q100R86)

If the Committee has the time to look at the ACC website, they will note that, along with administrative news, and positive messages, the most prominent topic is fraud. ACC loves to "catch" claimants who they say are lying about their disability, relationships, or employment.

> My neighbour (who unbeknownst to me worked for ACC) took photos of me doing chores on my lifestyle property that my specialist and doctor told me I should be doing. ACC then called me into the office, ambushed me and totally humiliated me in front of my wife and threatened me with legal action if I didn't sign their forms. My doctor and lawyer both disagreed and told me to fight it, but it was too much after years of fighting them and I ended up having a mental breakdown. (Q100R24)
>
> I feel like a 2nd class citizen, I have had my honesty questioned by AON, ACC and their assessors. Been made to feel I am ripping ACC off, and that I should be grateful I get any help at all. I have had work mates abuse me, ignore me, insult me, some of whom I had worked with for 10 years who knew I didn't shirk work. I ended up dreading going to work every day. Boss who treated me that way as well. Then losing my job. (Q100R119)

Claimants must return to a General Practitioner every three months and prove they are still disabled. They are forced into "functional capacity evaluations", and assessors commonly comment about whether a person has applied "sub-optimal effort". There is a disconnect between how people with disabilities see their own experience, and how that is viewed by assessors. The first statement below is a response to our survey from a treatment provider, the latter from PwDI.

> Spending time focussing on unfavourable events and blaming them for every other factor in a person's life is unproductive. I am often surprised at how little some people do to try and improve their 'lot in life' and simply spend their time trying to apportion blame on others … drug addiction to opioids is a problem with some long-term claimants and cannot be underestimated. This provides a reason to continue to assert the on-going presence of injury and pain … in order to ensure on-going supply of opioid medication. … The judicial process is not necessarily the best way to settle disputes – it is part of it but not the whole. Some patients need to take increased responsibility for their own life … It should also be recognised that lawyers such as … Warren Forster may lose income if disputes are removed … they need to declare a possible conflict of interest. Dispute resolution will always be an imperfect system, no matter what process is in place. Some people, or groups of people, will always feel that they are 'hard done by' or that others are conspiring against them. Unfortunately, that is a fact of life – as Charles J Sykes famously wrote "Life is not fair. Get used to it" (a quote often mis-attributed to Bill Gates). (Q100R35)

> During my lowest moments I was suicidal. Thankfully I have beautiful grandchildren and the thought of what a choice like that might do to them and to my adult children is what kept me going. I also have a strong faith and utilised these challenges to work on my own personal and spiritual growth. Two of my six children have walked out of my life and want nothing more to do with me as a direct result of my emotional struggle to manage pain, brain altering medications, loss of confidence, loss of job, loss of independence, loss my beautiful family home, loss of being close to my family, friends work colleagues and neighbours when I was forced to move. My other 4 children have been absolutely amazing, lending me mortgage money, paying for firewood etc during the 18 months that WINZ became my sole income. The final court review was going to result in either me paying everyone back, or selling up completely and paying everyone back. Fortunately for me, the Judge was a just man, and saw the Truth. I really feel so upset for others who don't get this opportunity and I have met plenty of them. My lawyers continued to represent me after losing the review for no charge if they lost, as they believed in me. I was so very blessed, (Q100R160)

The Accident Compensation Corporation recently returned an annual profit of $5 billion dollars (approximately 3% of New Zealand's annual GDP). It generates this through compulsory levies and a huge investment portfolio. It is an integral part of New Zealand's national fiscal and budgetary integrity.

**The Government and ACC have a conflict of interest**

> Was real pressure to "recover" and get off the books. Created anxiety about whether I was recovering quick enough and what happens if you don't. There is a malevolent feel about the process. (Q100R82)
>
> ACCs treatment of my husband's case directly caused his death, and their treatment of me has left me emotionally shattered. Now I have had my case manager for 6 years it has really helped, I have a lot of issues and he has handled everything so well for me. He has worked for me against ACC as it were. (Q100R112)

The conflict of interest created by the income from ACC has meant that the necessary reforms promised by the CRPD have neither been considered nor realised. In fact, they are being suppressed. ACC is the second highest source of income for the Government behind New Zealand's Inland Revenue Department (taxation). The ACC profits from law and policy that has the effect of breaching CRPD rights, and this profit is beneficial to the Government. To the extent that breaches of CRPD rights generate this significant income, they are unlikely to be remedied in good faith. This conflict of interest makes effective access to justice incredibly important, in fact fundamental to the integrity of ACC decision-making and scheme itself. There are no effective existing mechanisms to hold ACC into account for these breaches.

> When my weekly compensation was stopped I filed for a review. The pressure from my case manager to withdraw my review was tremendous and put a lot of stress on me. When I withdrew my review my case manager sarcastically asked me if it was too stressful to go on and laughed. (Q100R102)

An emphasis on financial measures of success means that all expenditure must be minimised, which disproportionately affects people with long-term disabilities. The

Government tends to decrease ACC levies just prior to a general election because of a perception that this garners votes, and in fact announced in today's Otago Daily Times.

> I believe that these assessments are vital – so much so that I don't feel ACC should be involved in the diagnosing process of conditions that can have a long term effect on people. Their involvement because it is based around entitlement that in some cases will mean a longer length of time means money. ACC attempt to discredit the injury rather than support it. Long term claimants are disadvantaged by ACC because there is monetary value linked to their diagnosis and ongoing chronicity. This means that we have to undergo assessment after assessment. (Q51R56)
>
> ACC is a monopoly and uses its bargaining power to its own advantage and it doesn't even try to do this covertly. (Q51R57)

For the first time, injured New Zealanders can point to the Convention and say, "we have a right to a minimum level of services, to access to justice, and to be heard on issues affecting us." But these voices have not been acknowledged. Our objections have been actively marginalised, ignored or avoided during this reporting process by everyone except the New Zealand Law Foundation and the Committee of Experts. This includes the Office of Disability issues, the Article 33 Convention Coalition, the ACC itself and the Government.

> Health and Disability Commissioner referred me back to ACC. The Medical Council also referred me back to ACC. My complaint to Dispute Resolution Services Limited referred me back to ACC and the New Zealand Medical Association. Human Rights Commissioner [would not help] because I could appeal the District Court decision [to the High Court]. In my opinion, they should have considered the issues and acted on them as the appeal to the High Court is not easy and as a lay person, virtually impossible. Unfamiliar with the process, I filed my submissions a few days late and it was thrown out for that reason. (R133)

**The Government's Response to the List of Issues**

Acclaim Otago's Interim report, to our knowledge, is the first time the ACC scheme has been considered against the CRPD. There is no indication that the Government has read it. There is no independent representative voice for the 320,000 long-term injured people in New Zealand. There is no recognition within the Government or ACC that the CRPD guarantees human rights to PwDI.

The Government's response to the list of issues reflects the fact that it has not internalised the conceptual or specific goals of the Convention. It repeatedly refers to a distinction between ACC claimants and persons with disabilities, saying "[ACC claimants], including persons with disabilities."

The Government's response illustrates a continuing commitment to a philosophy of minimal civil/political rights and an adversarial system. The CRPD is founded on principles of inclusiveness, consultation and social and economic rights that cannot be read down by reluctant signatory states.

When asked about **funding**, they respond that funding is available and state that it is "usually" awarded. They have not acknowledged our objections about the amount of that funding, or the financial position of people with disabilities that limits access to justice. They have not acknowledged the long-term effect of these on the market for legal representation and how the law, including legal aid, operates in a way to reduce access to justice.

When asked about **procedural fairness** they respond that there are duties on a reviewer and rights of appeal. They ignore our objections about enforcement mechanisms, delay, and lack of transparency. They ignore the fact that these are difficult to enforce without proper funding for representation and that on appeal, it is a de novo hearing, and so procedural defects in the review process are never addressed.

When asked about **reliable evidentiary procedures**, they simply respond that evidence may be provided. Acclaim Otago, its members, the survey data, and the authors of this report have not seen or heard of a Reviewer obtaining an independent assessment in order to clarify a factual question during the course of a review. It may be theoretically possible, but the effect of the existing system is that it does not happen, and even if it did, it would require a PwDI to rely on the reviewer exercising discretion that is rarely if ever exercised.

The Government's response (accepting ACC's view verbatim) indicates the exact "hands-off" approach that has led to this report, and that approach is a breach of the CRPD.

**Lack of consultation – "The Accident Compensation Appeal Tribunal"**

While Acclaim Otago has been preparing this report and its predecessors, the Government has been consulting with ACC and other government ministries since mid-2013 on revolutionary changes to the dispute resolution system that would **remove access to the District Court**. It would replace judges, who have security of tenure, with tribunal appointees, who would be appointed by the Minister of Justice (currently also the Minister for ACC, Judith Collins). Tribunal members are different from Judges because their appointment can be terminated. This is of constitutional significance for New Zealand's Westminster Parliamentary system and the Separation of Powers.

PwDI are blamed for the delay in having appeals heard, presumably on advice from ACC as a party who was consulted, so the Government's plan is to introduce a system to strike out Appellants' appeals. Whilst this will also apply to the rare cases where ACC appeals a review decision, it will disproportionately effect PwDI. No attempt was made to consult with PwDI or to understand the systemic reasons for delay (ie, market failure or inability to obtain medical evidence).

**The Accident Compensation Tribunal proposal illustrates exactly the slow creep of the power of the Accident Compensation Corporation that has been occurring for four decades. It illustrates the Government's role in encouraging and facilitating this. It is the reason that existing institutional and legal protections have failed.**

Cabinet certified that the tribunal proposal had no human rights impacts, and no impacts on persons with disabilities. They decided that people with disabilities covered by ACC did not need to be consulted. The "efficiency" and "quality control" cited in the new tribunal proposal is of significant concern to Acclaim Otago. When asked for comment by the media, the Minister for Courts suggested our concerns were completely unfounded. Acclaim Otago repeatedly referred to the CRPD obligation to consult, but subsequent media comment ignored this. Despite our best efforts, the CRPD is not part of public discourse in New Zealand.

A **letter to the Minister** from one of the leading law firms specialising in this field is attached as **Appendix 2**. This is the view of two senior lawyers, who are the partners in that firm. It concisely explains the flaws in the Government's proposal. The Government's failure to consider any of these points and instead rely on advice from ACC highlights the problems that develop when Cabinet continues to make decisions without consulting with PwDI and their chosen representatives.

**Please help**

Acclaim Otago has expended all of its resources in bringing this report to the Committee. Unless durable and careful recommendations are made, it is likely that this will be its last.

> I see no future, but an empty vegetable state, not a life I want to go on living. (Q100R79)
>
> Loss of confidence and belief in self. (Q100R94)
>
> … I exist at the moment, this is not living. (Q100R116)

People with disabilities caused by accident or injury need a paradigm shift within ACC. The motivation for that paradigm shift, unfortunately, will need to be imposed by the Committee and supervised by disabled people. We need you, the Committee of Experts, to hear us and help us to make this shift.

> … I have to say that I have undergone between 200 and 300 assessments (mostly ACC directed assessments) over the past 35 years and virtually every assessor (without any doubt) has furnished a report to ACC that categorically substantiates the authenticity of my injury yet ACC have relentlessly, surreptitiously and deliberately employed every unscrupulous tactic ever thought of to try to deny me even the basic things that allow me to function as a good and decent human being. They set out to destroy the very essence of who I am all for the sake of a pittance of money and although at times I came close to not being able to keep living, I had the strength within me to keep rising up and fighting for the justice that I was so denied. My ability ruled, not my disability. (Q100R123)

*Survey Results and Response to List of Issues*

The following are conclusions drawn from analysis of the survey data, analysis conducted in previous reports, and the experience of the authors. It provides an overview of systemic problems, including access to justice from the perspective of PwDI. Detailed information is provided in the Survey Data document, which will soon be available at www.acclaimotago.org.

PwDI experiences are largely inconsistent with the Articles of the CRPD that deal with substantive rights. Attempts to remedy or mitigate breaches of these rights are unsuccessful due to systemic failure of various access to justice mechanisms.[6] **85% of respondents believe that the ACC dispute resolution process does not provide access to justice.** Only 9% of respondents believe it does.

Adverse decisions made by ACC and the resulting dispute resolution process have significant impacts upon PwDI and their home and family.[7] Most respondents had dependents at the time of the adverse decision (*55%*). Three quarters of respondents had significant ongoing costs for housing for mortgage payments or rent (*75%*). More than a quarter of total respondents have had to move out of their home because of injury or losing their ACC entitlements. Of this group, about half were renting (*47%*) and the other half had a mortgage on their house (*48%*).

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

The survey identified many of the systemic problems that were set out and discussed in

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

Acclaim Otago's Interim report. Nearly all respondents said their health was affected **by their injury** (*89%*).[8] Most (*67%*) had been told their entitlements would stop if they did not undergo assessment.[9] Half (*51%*) had experienced problems with their privacy.[10] Many (*44%*) had been assessed to be "vocationally independent".[11] Over three quarters (*78%*) have had their home and living arrangements, including family, affected by their injury or ACC.[12] A significant group (*19%*) had interactions with the ACC investigations (fraud) unit.[13] Some (*13%*) were from overseas or had tried to move overseas since their accident, but would have been prevented by the rules of the scheme.[14]

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

*Inadequate funding*

> The costs to fight ACC were impossible to meet. Every time I got a report they would commission one from an opposing doctor. Too hard to fight an organisation with unlimited funds. (Q51R79)
>
> The ACC appointed assessor for my brain injury clearly indicated to ACC the extent of my injury… the assessor told me that he expected I would be bullied by ACC and if I was, I should go back to him. [As expected ACC ignored him] but I can't afford to go back to the specialist that diagnosed me. Instead, ACC sent me to different psychologists until one of them wrote a report that I must be lying about having a brain injury after 3 years.
>
> ACC presented legal case law at the last moment. I have no way of checking the case law presented – nor could I ever afford that level of information if I employed a lawyer. Effectively, I'm paying ACC via my levies to employ the best legal minds in the country. I have no chance of winning a review. (Q78R168)
>
> [My lawyer] wrote letters and phone calls too. What I can tell you is that I have spent over $120,000 on legal fees over 26 years and have had a fraction of that cost returned to me from ACC. That is criminal! (Q91R63)

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

Nearly all PwDI who completed the survey believe ACC makes decisions that are wrong. Nearly all want to obtain independent representation and dispute the decision, but many factors prevent them exercising their rights, and those who do are usually unrepresented.

**Pre-dispute situation:** Because of their injury, most PwDI are in debt (to community and commercial lenders) before ACC makes its adverse decision. They do not have the ability to pay for representation when they receive their adverse decision. Many do not have energy, are suffering from the physical and mental consequences of their accident and injury and have an aggravated disability experience.

**PwDI are struggling to hire a lawyer and pay for it (Private market for representation):** The long-term effect of the existing funding model (in place since 1992) is market failure, which has resulted in significant barriers for PwDI privately obtaining access to justice.

**Government lending money to PwDI for a lawyer does not work (Legal Aid):** Legal aid does not provide access to justice. There are three major interrelated problems with legal aid: (i) the amount of the award is not adequate (15%-40% of the actual cost), (ii) it is very difficult to obtain representation, and (iii) it is a loan, which the person has to repay.

**ACC paying limited costs if PwDI "acted reasonably" does not work (Costs awarded pursuant to regulations)**: Even a maximum costs award made in accordance with the law is not adequate to provide access to justice. There are three problems: (i) timing of the payment (costs are not available until 6-12 months after they are incurred), (ii) amount of the payment (the maximum amount is 12.5-30% of the actual cost of the process), and (iii) the award not being made (most PwDI disputing ACC's decision had not received a cost award). Also, costs are not usually sought by self-represented PwDI.

**Effect of failure of the legal market:** The effect of the failure of the legal market is widespread. It is very difficult for PwDI to obtain representation. The market is not competitive. There is a lack of development of expertise. There is not a pool of qualified and experienced barristers to appoint as judges, so judges are appointed from outside this highly specialised jurisdiction. It appears that the Government is finding it difficult to attract judges to this jurisdiction as there is an identified need for 3.5 judges, but only two permanent judges have been appointed.

As long as you have the money to cover the cost, then this can be done. On the other hand, paying out for this report $1,500 and only being able to claim $800 at review is a disgrace where ACC had spent over $7,500 on one report plus paid out $6,000 in fees for a barrister to aid my case manager at the review. The system is abhorrent. (Q51R60)

### *Lack of procedural fairness*

Even though ACC state they provide all of the files, I do not believe ACC as I have caught them out time and time again for withholding information. (Q74R76)

ACC refused to correct my medical records. The review process was a farce, disadvantaging me and designed to work in favour of ACC. I was then told by ACC that if I wanted to pursue it further, I would have to do it through the courts. I decided to stop pursuing it at this point for financial and health reasons. I was not coping with the stress and anxiety of dealing with the deliberate obstacles put in my way. (R12)

My complaint to ACC was rejected. I complained to the Ombudsman [who referred me to the] Privacy Commissioner. The Privacy Commissioner claimed to investigate but [twisted] the complaint and found against me on a different question. I complained to the Police, who would not prosecute because [the Policeman said a] conviction would "carry with it the possibility of imprisonment" if our allegations were true and "I do not believe they would warrant such punishment against the named individuals." (R 92)

I never knew until doing this survey that I could obtain an independent assessment. (Q51R4)

Every time you see a new assessor, they are just one more of the many people who are now viewing your most private and personal information. (Q51R138)

My file contains specific allegations of criminal offending in the period prior to my accident. I was never investigated or convicted of any such offences. My file also contains an allegation that I had committed fraud in lodging my claim with ACC…. Despite a direction from the Privacy Commissioner that this be removed, it remains on my ACC files. (Q74R126)

Last review I attended, ACC appeared to collaborate with Reviewer and I was cut off before even presenting my case! Reviewer said he had googled me before the case. Amazing. (Q76R11)

There were things in ACC report that were not correct, but we either run out of time or were not allowed to speak. (Q78R3)

> [ACC] referred to file information that I had already corrected and absolutely refused to listen to me when I tried to explain. I was brushed off and treated like I had no intelligence and shouldn't be there. (Q78R13)
>
> Because I have an auditory processing problem I found it hard to follow the review hearing. After the review, I obtained a copy of the recording of the review. This was not a complete recording – [Dispute Resolution Services Limited] had cut off the opening comment where I complained that I had not received ACC's submissions until arriving at the review hearing. Also, upon reviewing the recording, it became evident that ACC's lawyer [name redacted] had lied extensively in the evidence she had presented to the reviewer. Her evidence relied upon a banned assessment report which ACC had undertaken would never be used for any purpose… As a result of the use of the banned corrupted assessment report, and my inability to challenge ACC's submission, the review hearing went against me. (Q78R151)

**Pre-hearing:** There are significant problems ensuring that the information provided to the review hearing about the PwDI is in fact correct. The survey data shows these are significant problems that may affect most review hearings. PwDI have tried to address this in three different ways, none of which are effective in resolving the problem of incorrect information being provided to the review hearing by ACC.

(i) Stopping the incorrect information getting on the file in the first place by: (a) PwDI choosing assessors, (b) refusing to attend assessments with particular assessors, and (c) enforcing professional standards on assessors.

(ii) Complaining about the assessor or the incorrect information using the existing statutory complaint mechanisms and then requiring ACC to correct the information it has provided to the review.

(iii) Obtaining another assessment from an independent assessor that contains the correct information and providing that to review.

These approaches are not effective because of a combination of structural, ideological, and operational factors, which result in ACC holding absolute power: the ACC legislation places obligations on PwDI that are ambiguous; existing statutory commissioners refuse to hold ACC into account; there is a statutory prohibition preventing PwDI accessing the Courts to address breaches of their rights (ss 133(5) and 149(3)); ACC exert control over the market for expert medical evidence; and ACC

actively manages and maintains the negative public perceptions of PwDI. Together, these factors operate in such a way as to remove pre-hearing procedural fairness.

**At the hearing itself:** Experiences at the hearing are generally negative. People are not being heard, reviewers are not independent, the principles of natural justice are not complied with, reviewers do not take an investigative approach and the hearings are adversarial without any of the safeguards that have developed to ensure the adversarial system works properly. A reliance on discretion puts PwDI in the position of supplicant rather than participant. Individual experiences included:

(i) Not enough time was allocated for the hearing (only 20-30 minutes for each side to present their case, including giving evidence).
(ii) They did not have all of ACC's information in time to prepare their case.
(iii) In nearly all cases, ACC's entire file on the person was provided to the Review, and in nearly all cases, this file contained unfair or prejudicial information.
(iv) Some had particularly negative experiences that were influenced by how ACC attended the hearing (in person, by telephone, not at all) and how the ACC case was presented (what ACC said, how they said it).
(v) Reviewers failed to comply with the legislative safeguards but no remedy was available.

**Post hearing:** Experiences include (i) principles of natural justice not being complied with as reviewers relied on information that was not presented at the hearing; (ii) lack of independence of the reviewer; (iii) being left without a remedy if ACC does not comply with the review decision.

There are **structural, ideological and operational factors** contributing to the lack of procedural fairness during and after the hearing. For example, the contractual agreements between Fairway and ACC, and Fairway and its reviewers, have an impact on how reviewers behave and exercise their discretion when conducting hearings in relation to time and procedure (see Interim Report). These various factors that cause procedural injustice are compounded by the **lack of mechanisms to remedy these problems**, or their perceived indirect relationship with the substantive dispute. For example, there are no mechanisms to enforce the requirements on a reviewer to

observe natural justice. Another consequence of an inability to address these problems is that they **cannot be recorded on a system-wide level**, and so it is difficult to show systemic issues exist.

These breaches at the Review level are not remedied by an appeal for several reasons: (i) because of significant financial and other barriers to the appeal, (ii) the inability to find a lawyer for the appeal because of the failure of the market for legal services, (iii) the same barriers to obtaining independent assessors, and (iv) the fact that it is a *de novo* rehearing (a new hearing from the beginning) meaning judges are not concerned with the procedural defects of the reviewers as they are remedied by the hearing of the appeal. Systemic procedural injustice is never remedied.

> [It is] quite intimidating when they attend in person. However, my sensitive claim reviewer, they attended only by telephone and I felt this was much worse as it was easier for them to discredit me/my story/my symptoms/my pain over the phone. They weren't there so they didn't see my body uncontrollably shaking and the uncontrollable tears. In particular, the Branch Psychology Advisor was very cold, harsh, intimidating and unempathetic – it was harrowing. I felt like I was the criminal on trial (I could understand this as she was the defence in a criminal court) but this was me fighting to just get help and support (from the very system designed to help) – she made me feel so violated all over again! It was the most traumatic experience for me and my parents who attended! (Q76R61)
>
> [ACC's case manager] was distant, she tried to trick me into saying things that were not true by confusing me when I was already upset, and she disadvantaged me by handing over information I had been asking about for months over the review table – for months she had let me believe that she did not have this information. I felt VERY DISADVANTAGED. (Q76R103)
>
> My trust is shattered. The sad, sad, reality is who can us claimants trust in this entire country who will give a fair, objective, no biased opinion and report. Short of going to Australia for an independent opinion, which I have not done yet but I have considered. At the actual assessment the assessor can agree with me and support my case and cause. They know how corrupt ACC is and they can make me feel really validated, but at the end of the day, it is what they choose and are prepared to write in the report that matters. (Q51R51)

### *Unreliable Evidentiary Procedures*

> Given the amount of financial and bureaucratic power ACC wield over the NZ medical fraternity, it is hard to have confidence in the objectivity of any medical assessments. Many of the medical assessors I have been to have told me in

> confidence that although they have no doubt of the causal connections and severity of my medical condition, they are constrained in how much support they can give me because of lack of objective medical evidence. (Q51R145)
>
> [The case manager] tried to talk about her own opinions about me rather than sticking to the facts. She also blatantly lied about what had happened during a meeting, which was the subject of my complaint. (Q78R1)
>
> She blatantly lied about a promise they made at a meeting at the ACC offices a few weeks prior to the review. However on this occasion, we had no recording of the meeting to prove our point. (Q78R8)

**Reviewers' discretion:** Reviewers have discretion to "admit any relevant evidence at the hearing from any person who is entitled to be present and heard, regardless of whether or not that evidence would be admissible in a court."[15] This is the only control on evidence.

**The exercise of that discretion:** The survey data shows that the way that reviewers are exercising this discretion is to allow all of the information provided by ACC in their file, and all information provided orally by ACC staff to be relied upon at the hearing. Information is not sufficiently tested to ensure it is reliable. This may be explained by some policy approach to this effect, or it may reflect an institutional bias to accept ACC's credibility. Reviewers seldom give reasons why or how such discretion is exercised. Again, PwDI are treated as supplicant to the exercise of discretion, rather than participant according to law.

**Systemic problems identified:** The evidence law of New Zealand has developed from centuries of common law to ensure the fair determination of disputes. The survey data makes it clear that injured New Zealanders are not afforded those protections. Experiences recorded in the survey identified the following systemic problems. Nearly all PwDI who responded to the survey said:

(i) ACC relies on "evidence" from their file that the PwDI believes is wrong, inaccurate, out of date or misleading.

(ii) ACC relies on "hearsay" that cannot be effectively tested by PwDI at the hearing.

(iii) ACC relies on "opinion" evidence from their staff that cannot be tested at the hearing.

[15] Accident Compensation Act 2001, s 141(4).

(iv) There is no way of testing the "expert" evidence from ACC's assessors and no way of ensuring that what has been provided meets the legal thresholds of expert opinion evidence.

(v) Reviewers rely on evidence in their decisions that was not presented at the review hearing.

(vi) Reviewers reinterpret the conclusions of expert independent assessors.

Some medical specialists have no difficulty in arguing against ACC's position. Others have refused to 'compromise the working relationship' they have with ACC. A third group will selectively use data to support whatever position they have taken. (Q51R101)

A case manager had re-worded part of a Physician's report that totally altered the meaning. This information was presented at "review" in its altered state. (Q74R55)

My doctor who treats me with some good results was called by my case manager and instructed what she would like the report to say. He informed her he did not form opinions or write reports before he saw clients, and IF they had forced me through an assessment he would as a professional expect me to be complaining of exactly what I was complaining about with my base underlying condition. … they also used a video, comprised of about 3 minutes of my life and filmed over a 3 week period. They were also informed by people how the reality of the day was very different from the 3 minutes they kept and made available online. (Q74R109)

I put it to the Reviewer there were a number of factors ACC were obliged to look at when making a decision… not the solitary test the case manager had used. The Reviewer asked the case manager if she had considered the other factors I had enumerated. She weakly and quietly responded "I must have". In my view, the body language and tone of voice indicated an unconvincing lie (now confirmed that no documents exist to confirm "other thoughts"). … ACC will do anything to defeat your claim. They take a completely adversarial approach and have no moral restraints on the methods they will use to obtain victory (unlike a member of the legal profession). The truth, a fair result and a result in accordance with the purposes of the Act is of no interest. (Q78R54)

The reviewer's decision was a joke. Full of cut and paste errors including calling me by another claimant's name. The reviewer also attempted to give her own (erroneous) medical opinion. An opinion of her own that had not been part of any assessor's opinion. (Q94R234)

*Conclusion*

There is complete and widespread failure of the existing statutory mechanisms providing access to justice for injured people. There are no effective mechanisms to identify and address systemic problems with the ACC system. The Health and Disability Commission, the Privacy Commission, the Human Rights Commission and the Ombudsman have not been able to effect the necessary changes. The internal ACC complaints process is entirely ineffective and subject to a conflict of interest. This has resulted in **widespread systemic failure to protect the CRPD rights of persons with disabilities caused by personal injury in New Zealand**.

The State does not recognise the application of the CRPD to injured persons with disabilities covered by ACC. It stated that there were no disability rights or human rights issues with their proposal to remove all access to a Judge to make findings of fact, and replace the Court with a second layer of tribunal. That tribunal is highly likely to operate in a way that strikes out PwDI appeals and will lead to further systemic injustice.

The voices of injured people are clear that the current system does not work and the following radical changes are required if the CRPD aspirations are going to be realised.

*Recommendations*

Acclaim Otago asks that the committee takes note of and recommends the following.

**1.** **Notes** the concerns raised by Acclaim Otago about the failure to apply the CRPD to people with disabilities caused by personal injury in New Zealand and **recommends** that the state party:

> comprehensively reconsiders the Accident Compensation system including the effects of its law, governance and administration against the CRPD according to a human rights conception of disability, including by reference to all of the systemic issues identified in the Interim Report; and completely suspend its proposed removal of access to the Courts to make findings of fact until after this process has occurred.

**2.** **Notes** the concerns raised by Acclaim Otago about the failure of the current systems of independent monitoring, investigation and reporting to maintain the integrity of the ACC system and **recommends** that the state party:

> establishes a permanent independent mechanism to ensure the integrity of the ACC system by reference to the CRPD, in the form of a statutorily constituted commission with the required powers to oversee the scheme, conduct investigations and remedy systemic failures by reference to the CRPD, to be funded by a statutorily fixed percentage of ACC's income from levies and investments.

**3.** **Notes** the concerns raised by Acclaim Otago with regard to Access to Justice and **recommends** that the state party:

i) reassesses the regulated Review costs system and rates for legal aid after proper consultation with injured people and their representatives, with a requirement that "reasonable" be interpreted in accordance with the CRPD and allowing for full indemnity costs to be awarded against ACC where appropriate;
ii) enacts enforceable procedural safeguards in the information gathering (including assessment), dispute resolution process that can be enforced against assessors, ACC, ACC staff, and a Reviewer, and creates a systemic mechanism for measuring and resolving procedural defects in the prehearing, hearing and post-hearing stages of dispute resolution; and
iii) ensures the application of proper and appropriate evidential procedures to the ACC dispute resolution process.

# APPENDIX 1 – ENDORSEMENTS

The recommendations set out above, like the issues out at Appendix 1 to Acclaim Otago's interim report (28 February 2014) should be considered as representing a consensus view of how to address some of the systemic issues facing persons with disabilities caused by personal injury in New Zealand.

The recommendations have been endorsed by a consensus of experts that are active in this area as follows. Exactly what has been endorsed is listed.

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 recommendations made by Acclaim Otago. He has previously endorsed the systemic issues raised by Acclaim Otago in their interim report.

*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** endorsed the list of issues raised in Acclaim Otago's interim report.

*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*

**Hazel Armstrong Law** endorses the recommendations made by Acclaim Otago.

*About Hazel Armstrong Law*

Hazel Armstrong Law is a specialist law firm, based in Wellington, New Zealand. Hazel specialises in ACC law, and also acts for clients in health and safety and employment law. She also has undertaken Inquiries on behalf of government and organisations, for example, KiwiRail and the Rail and Maritime Transport Union; the Minister for Tertiary Education. She has served on Boards as a ministerial appointee.

**John Miller Law** endorses the recommendations made by Acclaim Otago having previously endorsed the issue raised by Acclaim Otago in its interim report.

*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 recommendations made by Acclaim Otago and their entire shadow report. He earlier endorsed the entire interim report and the list of issues.

*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 recommendations made by Acclaim Otago. They have previously endorsed the list of issues set out in the interim report.

*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 recommendations made by Acclaim Otago. She has previously endorsed 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 the recommendations made by Acclaim Otago having previously endorsed the list of issues and the interim report.

*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 recommendations made by Acclaim Otago and previously endorsed the list of issues raised by Acclaim Otago.

*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 recommendations, and previously endorsed the list of issues and interim 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 supra-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 recommendations made by Acclaim Otago and previously endorsed the interim report and the list of issues.

*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 recommendations made by Acclaim Otago after previously endorsing the list of issues and the interim report.

*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 recommendations made by Acclaim Otago and previously endorsed the list of issues raised by Acclaim Otago and the interim 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** endorsed the interim 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** endorsed the list of issues contained in Acclaim Otago's interim report.

*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 the recommendations made by Acclaim Otago having previously endorsed the interim report and list of issues in full.

*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 recommendations made by Acclaim Otago having previously endorsed 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** endorsed the list of issues and the interim report by Acclaim Otago.

> *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

**The Brain Injury Association Otago** endorses the recommendations made by Acclaim Otago, having previously endorsed the list of issues prepared in the interim report.

> *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.

**The New Zealand Council of Trade Unions *Te Kauae Kaimahi*** endorses the recommendations made by Acclaim Otago and also endorses the issues raised by Acclaim Otago in their interim report.

*About The New Zealand Council of Trade Unions*

The New Zealand Council of Trade Unions brings together over 350,000 New Zealand union members in 40 affiliated unions. We are the united voice for working people and their families in New Zealand. The NZCTU supports the work of Acclaim Otago and acknowledge the huge contribution the organisation is making towards promoting a better system of support for injured New Zealanders. NZCTU also provide a Workplace Injury Advocacy Service to assist their members find the best way to resolve any problems accessing their ACC entitlement under ACC law including assistance to prepare a statement of evidence for a review hearing. The Interim Report to the UN Committee is supported by the NZCTU and provides a significant analysis into New Zealand's accident compensation scheme.

2 July 2014

Hon Chester Borrows
Minister for Courts
Parliament

Dear Mr Borrows

**Proposed changes to ACC Appeals**

We are writing to express our concern about the proposed changes from the current ACC Appeals Registry and Appeal Authority, to a new ACC Appeals Tribunal, distinct from the District Court.

We are specialist ACC lawyers and represent a large number of ACC claimants in litigation from the review stage up to and including the Court of Appeal. Philip Schmidt, Partner, is a longstanding member of the New Zealand Law Society's ACC committee. Hamish Peart, Partner, has previously worked as a corporate solicitor for ACC, and has chaired the Auckland Disability Law Steering Group.

The reasons put forward for these changes do not reflect reality. That is a consequence of the system being developed by ACC and the Ministry of Justice without independent input. The Minister for Courts, Hon Chester Borrows, has advised that the changes are administrative. Our view is that the changes involve significant constitutional, legal and practical issues, including:

- Removal of access to independently appointed District Court judges.
- Important, valuable and complex appeals being heard by tribunal members with little or no experience at the independent bar.
- Introduction of a one-sided set of procedural rules that are unworkable and likely to produce unfair outcomes.
- ACC avoiding responsibility for the costs of personal injury, with those costs being shifted onto families, WINZ and the Ministry of Health.

**"The long delay in resolving appeals in the current model"**

The policy papers relied upon do not accurately identify the reasons for delays in the ACC appeal jurisdiction. The message in the papers is that the time lag is "too long", with an inference that claimants, their representatives and "the system" are to blame. The real reasons, from our extensive experience acting in the jurisdiction on a daily basis, are as follows.

- In the previous four to five years there was a very large increase in the numbers of adverse ACC decisions, leading to a sustained increase in the numbers of review applications filed. As a result the number of ACC appeals also increased. The significant increase in appeals was an outcome of focused policy from ACC to remove long-term claimants and to reduce the cost of surgery and attendant care.

- There has been a sustained lack of sufficient judicial resources to deal with appeals. New Zealand has been served by only two or three specialist judges during this time, with sporadic appeal circuits around different regions of the country. Expert counsel raised this issue of the shortage of judges with the registry over this period but were ignored. ACC was and is responsible for the cost of the judiciary. ACC's lack of investment in judges to hear cases is a material cause of the backlog of appeals.

- There is a shortage of specialist lawyers in ACC law. Those of us practicing in the area have very high workloads. Because of the number of adverse decisions and the numbers of people wishing to challenge those decisions, there are inevitable delays due to workload pressure.

- There are funding issues for appellants, including obtaining legal aid and paying for additional medical evidence. There are significant costs involved in pursuing an appeal, which causes difficulty for people who have had their income stopped. ACC does not have such costs constraints as their legal costs are fully funded by levy payers.

- A significant reason for delay is the complexity of cases and the need for careful investigation and proper specialist evidence to be gathered. Many of the delays are at the hands of medical specialists, who are naturally very busy themselves. It is also true that ACC often does not properly investigate claims until it is before a District Court judge and are then required to obtain proper evidence which causes further delays.

- There are often delays in ACC considering the merits of an appeal, responding with evidence and filing submissions. We have numerous examples in our own office of frustrated clients waiting for ACC to respond so that their appeal may be heard in a timely way. In a recent District Court directions conference it was ACC that was ordered to take action in many of the appeals before the Court.

- There are delays caused by ACC not settling cases that should settle. Often cases are not referred to ACC's appeal panel until the very last moment before a court hearing. This in turn creates vacant spots in the appeals circuit which cannot be filled due to the lateness of settlement.

- ACC has abandoned mediations with claimants and their representatives up until recently. This has resulted in a litigious approach and a breakdown of trust between the claimant and ACC, which reduces the prospects of resolution. Because of the limited costs awards, there is little incentive on ACC or its counsel to resolve disputes at review or appeal.

We observe that the issue of delays is only now being effectively addressed by creating more appeal time in the District Court and bringing extra judges on board to clear the backlog. Under ACC's current leadership significantly fewer adverse decisions are being issued resulting in fewer reviews and appeals. The number of outstanding appeals is diminishing due these changes. The problems referred to by the Minister can and are being solved by better resourcing and a less litigious approach. It is important to note that unmeritorious appeals are, and continue to be, struck out where appropriate. That power should remain with a judge because, for the reasons noted above, the picture is often far more complicated than the Minister has been led to believe.

The Minister has said publicly that issues around obtaining evidence can be managed under the proposed changes. With respect, that is at odds with the proposals we have seen, where an exception to a 60 day timeframe is only available in "extraordinary circumstances". That leaves a judicial officer with little discretion but to strike out an appeal notwithstanding an appellant trying to act in a timely fashion. If the proposed Bill comes into force in anything like its current form, the timeframes for providing evidence and lodging submissions will result in things being missed and a lower quality of argument. In that environment, erroneous decision are likely to result. It will place lawyers in impossible positions, where they will have to refuse to act for people rather than accept unworkable time limits and resultant professional liability. By comparison, there are no strict time limits on ACC in the proposed rules despite the policy papers saying the new rules would apply to both sides and the fact that ACC's conduct contributes to the delays in the current system.

**Removal of Judges and replacement with "tribunal members"**

ACC appeals have been "lumped in" with other tribunals as part of the Ministry's new process for tribunals and courts. The message is that ACC appeals should sit alongside "similar types" of low level, low cost tribunals, rather than be the subject of "judge-led adjudication". That approach is wilfully blind to the complexity, significance and high value of many ACC appeals. Some appeals will be relatively straightforward, but many cases include such things as:

- Historical attendant care of seriously injured children;
- Medical misadventure and treatment injury cases involving medical negligence, or rare and severe medical consequences;
- Complex birth injuries and serious motor vehicle accidents where causation is complex;
- Serious workplace injury and gradual process conditions, including industrial diseases; and
- Backdated weekly compensation cases covering several different versions of ACC legislation.

These types of cases require expert counsel, specialist medical evidence and careful consideration by a specialist judge. These appeals are often worth tens and hundreds of thousands of dollars in terms of past and future entitlements. These are some of the reasons why the ACC jurisdiction has not previously been incorporated into other types of tribunals. The vast differences between the legislation pre- and post-1992 is also why Parliament has chosen to preserve the Appeal Authority for historical claims up until now.

Our office has been involved in a number of these types of complex appeals in recent years. Counsel refers to the following cases, as examples: *Crampton v ACC* [2013] NZACC 182, *Felton v ACC* [2013] NZACC 226, and *Tangi v ACC* [2012] NZACA 4. Reading those judgments reveals the law, facts and judicial application required would be beyond most members of a tribunal. It is commonsense that extremely difficult and high value cases should be determined on their facts by a

judge of the District Court. Only a judge has the range of legal skills and real world experience required to do justice to the issues and the families affected.

It seems to have been forgotten that the current review system operates like a tribunal. It is the tribunal of first instance for hearing ACC disputes. An appeal to the District Court is against a tribunal decision. The Ministry's proposal would set up a second round tribunal process, with the same types of adjudicators hearing the cases. Under the proposed system, there would be no material difference between the judicial officers who hear reviews and those that hear appeals. There will be a well-founded perception that the public has lost access to a high quality, independent judicial process when it comes to determining the facts of a case. That perception has dogged the review process, but has been alleviated because of recourse to a District Court Judge on appeal. To remove that right, and remove the opportunity for facts and evidence to be tested in a court (an appeal to the High Court being only on a point of law) raises significant constitutional issues and may amount to a breach of the Bill of Rights Act or Human Rights Act.

**Proposed "greater consistency of decision making"**

Greater consistency of decision making is one of the grounds put forward for the proposed change. It is unclear what the basis is for asserting the proposed tribunal will be "more consistent" than the District Court judiciary. The inference is that the District Court is "inconsistent", but no evidence or explanation has been put forward around this. Our experience is that the District Court provides a high level of decision making. It is a specialist bench of judges who sit primarily on ACC matters and are familiar with the difficult and specific legal and evidential characteristics of the jurisdiction. The Ministry seeking "greater consistency" by removing District Court judges and replacing them with a tribunal implies a blurring of the lines between the government, who will appoint the tribunal members, and the judiciary who are being removed for "inconsistency". We refer to the case examples given above, and the overall quality of the decisions of the District Court over many years in support of our view that the court is not inconsistent and generally provides a high quality of decision making.

**Proposed "significant cost savings"**

One of the issues that has not been publically discussed, but which is heavily emphasised in the written proposals by the Ministry is the resulting cost savings. The current ACC appeals system is funded through ACC allocations to the Ministry of Justice and is seen by both ACC and the government as expensive. The Ministry suggests that the cost of administering the current system is higher than "other similar bodies" administered by the Ministry – which illustrates the lack of rigour applied to the proposals with respect to the types of cases the courts are dealing with (see above). The proposals suggest that serious injury and the resulting high personal and financial costs do not merit the attention of a judge. Putting aside that many ACC appeals are of higher complexity and value than many other cases heard in the District Court, this will be an example of cost shifting rather than cost saving. While it is true that ACC will achieve cost savings by the implementation of a cheaper tribunal system and may well save money by avoiding responsibility for meritorious claims, the cost of personal injury will simply be moved onto families, the community and the public health system.

That outcome will become obvious if meritorious cases are struck out under the harsh procedural rules or decisions are overturned in the High Court as being unreliable. That will erode faith in the Corporation, which currently deserves significant credit for the hard work it has been doing recently in improving the compensation system and client relationships.

**Conclusion**

Changing the jurisdiction hearing ACC appeals will not address the root causes of the problems discussed above. Removal of the District Court judiciary is a very serious change that is not administrative in nature. With respect, it is apparent that the consequences of doing so is poorly understood by the closed circle of officials proposing it – who have not consulted adequately and have not brought to Cabinet's attention the points raised in this letter.

Before the government and the legislature makes a final decision we ask that the points we have raised be addressed, as it is injured individuals and their families who will be on the receiving end of the proposed changes.

Yours sincerely

Hamish Peart
**Partner**

Philip Schmidt
**Partner**

CC: Hon. Judith Collins, Minister for Justice and Minister for ACC
Don Rennie, Convener of the New Zealand Law Society ACC Committee
Scott Pickering, CEO of ACC
Iain Lees-Galloway, Labour Spokesperson for ACC
Andrew Little, Labour Spokesperson for Justice
Kevin Hague, Green Party Spokesperson for ACC