

# **Acclaim Otago (Inc): Submission to Government on Draft Government Response**

## **List of issues, second reporting cycle to Committee on the Rights of Persons with Disabilities**

This document sets out the position of a DPO – Acclaim Otago (Inc) – in response to the Draft Government Response to the list of issues put to the Government by the United Nations Committee on the Rights of Persons with Disabilities.

It puts the question from the UN Committee in context in light of previous shadow reports and the first reporting cycle's concluding observations. We recommend amending the Government report to reflect the points raised in this submission and set out at the conclusion of the report.

### **Background to UN question to Government**

The UN requested a report on measures taken by the Government to review the processes for assessing compensation by the Accident Compensation Corporation to ensure that:

- (1) adequate legal aid is available and
- (2) the processes are fully accessible to all claimants, and
- (3) the mechanism has a human rights-based approach.

### **Acclaim Otago Shadow Report**

In 2014, Acclaim Otago (Inc) produced a shadow report, which set out three requests to the UN Committee (reproduced below).

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.

### **Government response to Shadow Report and Committee's concluding observation**

At the time, the Government explained that it was not receptive to any recommendation about systemic oversight because this was considered unnecessary.

The Committee established a baseline for this second reporting cycle by making the following observation within the word limits available to it:

The Committee notes that persons who have suffered injuries are concerned over the **lack of access to justice** in pursuing their claims. There is concern over the **limited amount of legal aid funding** which is available and over **the exercise of the discretions to award legal costs**. There is also concern that the **Accident Compensation Corporation machinery lacks a human rights focus**.

The Committee recommends that the State party **examine the processes for assessing compensation** by the Accident Compensation Corporation to ensure that **adequate legal aid is available** and that **its processes are fully accessible** to all claimants, and finally to ensure that **this mechanism has a human rights focus**.

[emphasis added]

## General response to Draft Government Report

The Government should amend its draft report. Acclaim Otago (Inc) does not accept that the Government can send its report to the UN Committee in the current format without the risk of seriously misleading the UN Committee, which would undermine public trust and confidence in the Government's commitment to the CRPD reporting process.

The draft Government response:

- ignores the question asked of the Government in 2018,
- ignores the intent of the recommendations in 2014,
- does not specifically state Government's position on these points.

The Committee's concluding observation clearly anticipates the need for access to justice safeguards to be present **throughout the claims process with ACC** (which includes the entire process under ACC's control). The Government has ignored this intention.

The only part of the UN recommendation that was accepted by the previous Government was that legal aid should be available **after** the dispute arises. The Government has not expressly accepted or rejected the remaining recommendations. The Government was advised in a Shadow Briefing to the Incoming Minister dated 6 November 2017 that no action had been undertaken in regard to these recommendations.

In 2017 the independent monitoring mechanism advised the Committee that no action had been taken in regard to the response from the Government.

## Specific responses and amendments to Draft Government Report

Acclaim invites the ODI to amend the Government's response to question 12(a) to reflect the statements set out in this report. Acclaim invites further engagement from the ODI on any specific wording the ODI would prefer to adopt.

The Government in its response has not answered the questions put to it by the UN Committee. To correct this, we recommend that it remove all of the text contained in the Government's response and instead insert the text set out in the following indented paragraphs:

The Independent Monitoring Mechanism has said that the Government has taken no effective steps since 2014 to review ACC's processes in line with the Concluding Observation. Legal aid is unavailable to nearly all claimants. The claims and dispute resolution processes are inaccessible and the mechanisms used by ACC do not have a human-rights based approach. Instead, the Government has decided to leave the rights of people with disabilities under the ACC scheme to be

litigated through the dispute resolution process. Review costs available to claimants have not been adjusted despite specific recommendations to do so. They are inadequate.

### **Legal aid is not available until after the adverse decision**

Legal aid is not available to injured people during their dealings with ACC. It only becomes available after ACC's adverse decisions have been made and we estimate that between 200,000 and 300,000 adverse decisions are made each year.

Even when legal aid becomes available once the dispute is underway, very few people (estimated in the low hundreds nationwide) are able to access this each year. With the exception of two providers of legal aid in Wellington, there are no effective providers of legal aid services who are capable of doing legal aid work at any scale in any other part of New Zealand.

The Government's response should be amended to state:

The Government has not followed the recommendations set out in the concluding observations because the Government does not consider that legal aid is necessary until after the adverse decision is made by ACC.

### **Are ACC's processes fully accessible to all claimants?**

The processes followed by ACC are largely inaccessible. ACC has adopted a significant change programme, but this change programme does not take into account the rights of people with disabilities under the CRPD. Further, the Government continues to adopt legal tests that are very complex and make the decisions issued by ACC inaccessible and difficult to dispute without expert evidence and adequate legal funding.

ACC uses causation-based legal standards to discriminate against persons with disabilities by telling them that the reason they need help is not their "injury" but instead it is their non-covered impairments, for example their mental ill-health or their physical disability. Refusal to expand the scheme discriminates against people with disabilities.

The Government's response should be amended to state:

The Government has decided not to make the ACC system fully accessible to the 5 million New Zealanders who use its services or the 1.2 million New Zealanders with disabilities. Instead, it will tender a commercial contract to an organisation to provide "navigation services" for up to a few thousand people who ACC decides need access to services. The Government has been repeatedly advised that the systems for processing claims create barriers to access to justice (including by Acclaim Otago, the University of Otago and Miriam Dean QC) but the Government will not take steps to remove these systemic

barriers because the Government considers that ACC's own operational needs take priority over the human rights under the Convention.

### **Does ACC have a human-rights based approach?**

ACC does not have a human-rights-based approach. There is no evidence that ACC has any interest in developing a human rights approach. We have seen no work-stream to assess ACC through a human rights framework.

We recommend that the Government advise the UN Committee:

The Government has taken no steps to review the processes followed by the Accident Compensation Corporation to ensure that they have a human-rights based approach. This is because the Government does not accept that ACC's internal mechanisms for processing claims need to have a human-rights based focus.

### **Conclusion – Consolidated Amendments**

The consolidated response to these questions from the Government would then be accurate and it would read:

The Independent Monitoring Mechanism has said that the Government has taken no effective steps since 2014 to review ACC's processes in line with the Concluding Observation. Legal aid is unavailable to nearly all claimants. The claims and dispute resolution processes are inaccessible and the mechanisms used by ACC do not have a human-rights based approach. Instead, the Government has decided to leave the rights of people with disabilities under the ACC scheme to be litigated through the dispute resolution process. Review costs available to claimants have not been adjusted despite specific recommendations to do so. They are inadequate.

The Government has not followed the recommendations set out in the concluding observations because the Government does not consider that legal aid is necessary until after the adverse decision is made by ACC.

The Government has decided not to make the ACC system fully accessible to the 5 million New Zealanders who use its services or the 1.2 million New Zealanders with disabilities. Instead, it will tender a commercial contract to an organisation to provide "navigation services" for up a few thousand people who ACC decides need access to services. The Government has been repeatedly advised that the systems for processing claims create barriers to access to justice (including by Acclaim Otago, the University of Otago and Miriam Dean QC) but the Government will not take steps to remove these systemic barriers because the Government considers that ACC's own

operational needs take priority over the human rights under the Convention.

The Government has taken no steps to review the processes followed by the Accident Compensation Corporation to ensure that they have a human-rights based approach. This is because the Government does not accept that ACC's internal mechanisms for processing claims need to have a human-rights based focus.