



# From The Perspective Of People Injured By Accident

Submissions to the First New Zealand Report on Implementing the  
United Nations Convention on The Rights of Persons with Disabilities

A report prepared for Acclaim Otago by  
Tom Barraclough and Warren Forster

Correspondence to: Acclaim Otago  
PO Box 5022  
Dunedin 9058

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## *Introduction*

It is not disputed that New Zealand has made substantial changes as a country towards accommodating the needs of disabled people in a modern society. However it is also not disputed that New Zealand as a society has much more to do before disabled people are fully accommodated to the degree that we would all hope.

This report predominantly focuses on New Zealanders who suffer disability through accident. Whilst a variety of terms are used, each with their own connotations, we seek to refer to the same class of people throughout: people who suffer a disability through accident, and now come under the jurisdiction of New Zealand's no-fault accident compensation scheme, as administered by the Accident Compensation Corporation (ACC).

Despite the changes made for the best, the role of the Accident Compensation Corporation has been largely overlooked in these changes. Almost all New Zealanders have had interaction with the scheme since its inception in 1974. More than 2 million new claims are lodged every year. Therefore the Accident Compensation Corporation is responsible for the well being of a large percentage of New Zealanders who endure varying degrees of disability both in terms of duration and impact on quality of life.

Despite this, as this report will show, ACC's privileged position with regards to the rights of disabled people is largely unregulated, and accordingly ACC is guilty of severely violating numerous core rights of the disabled person laid out in this convention. The original report to the United Nations (UN) largely overlooks the ACC system generally, but more specifically does not acknowledge the egregious breaches of fundamental rights of privacy, justice, and respect for integrity of the person laid out in the convention.

This report will illustrate how these rights have been breached, the effect on those whose rights have been violated, provide a better account of the state of disabled people's rights for the purposes of the UN Report, and provide solutions to the problems which we see with the system.

Whilst this report focuses on breaches by ACC of Articles in the Convention, it is important to see ACC claimants as similarly disabled as any other disabled person, even if their disability may be only temporary in comparison and caused by accident. More often than not they face the same challenges as identified in the Disability Rights

Promotion International Report: Social Participation, Bureaucracy, Employment, Mobility, and Stigma. However as will be discussed, the prejudices involved against perceived “bludgers” present a different set of problems for social participation and entirely new kind of government-induced stigma surrounding fraud investigations, and the way that claimants are treated by ACC.

*Overview: A Problem of Perception – Falling Through the Cracks*

It is submitted that a primary reason for the continued breaches of the Convention by ACC stems from the perceived nature of the ACC scheme itself. ACC was set up with a view to creating a self-administrating scheme that would look after itself in administering to the needs of persons injured by accident, with the end goal of returning claimants to work as soon as possible. The scheme was intended to minimise societal cost, and originally largely dealt with people who were “injured”, and so were not regarded as being “disabled” in the sense that it was understood at the time. As such, any consideration of the rights of disabled people has not considered the ACC context.

What is now the case is that claimants as disabled people are not accorded the same rights as other disabled people have under separate legislation. In ratifying the convention, the New Zealand government amended several statutes, but they do not seem to have considered ACC claimants as similarly disabled people. As such, legislative amendment overlooked the position of claimants as disabled people. In many ways, claimants are now in a worse position than disabled people in the public system in terms of the protection the law affords them in asserting their rights.

A key example of the problem is how policy is affected differently through ACC than through Parliament. Where the rights of disabled people are determined by legislation, ACC policy is determined pursuant to legislation, but behind closed doors by non-elected representatives, who often have money instead of well-being in mind. Legislation is subject to various checks and balances that control the use of power that could affect the rights of individuals. On the other hand, ACC board members may have no experience or concern for the rights of disabled people and cannot be held to account by public scrutiny or the threat of non-election or any other checks and balances placed on Parliament in their exercise of power.

It is submitted that a failure to ensure these powerful individuals have sufficient training in the administration of justice to disabled people is a further neglect of the government’s

duties under Article 13. Official Information Act requests have failed to make this process more transparent, and in certain cases it is evident that ACC policy has changed in response to contemporaneous legal action against the corporation. The privative provisions in the accident compensation legislation further reinforce the corporation's power over claimants by depriving claimants of the protection of the courts.

Because of the desire of the government to treat ACC as an island in and of itself, the rights of claimants as disabled people have not been protected by the government's ratification of the Convention.

## *Article 13 – Access to Justice*

### ***Summary of Response***

From a legal point of view, disabled people do have full rights of access to justice in New Zealand. However in the context of ACC and its privative provisions, a claimant is often unable to gain either effective representation or effective remedies and access to justice is denied.

### ***Comment on Paragraph 127 of Draft Report***

#### *Overview of ACC Review Process*

The scheme contains a limited dispute resolution process, administered by Dispute Resolution Services Ltd. This involves complaints against ACC for breaches of claimants rights, or ACC's obligations, a review of ACC's decision about a code complaint, or a review of ACC's decision on cover or entitlements. Only review decisions about cover or entitlements can be appealed to the District Court. Apart from following this route, claimants are statutorily barred from accessing the courts.<sup>1</sup> S 317 prevents people suing for personal injury. S 133(5) prevents courts and tribunals from hearing cases involving the scheme. If ACC doesn't make a decision and sweeps the matter under the carpet, there is no jurisdiction to hear the review and no access to justice.<sup>2</sup> In addition, there is no right of final appeal to the Supreme Court.<sup>3</sup>

#### *Code of Claimant's Rights*

The Code of Claimant's Rights came into force 1<sup>st</sup> February 2003 and applies to anyone providing treatment on behalf of, or authorised by, ACC. It seeks to provide claimants with a set of fundamental rights in their dealings with ACC.

The fundamental problem with this Code is that, until 2009, reviewers refused to accept

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<sup>1</sup> Section 133(5) Accident Compensation Act

<sup>2</sup> Van Helmond [2006] NZACC 298

<sup>3</sup> Section 163 Accident Compensation Act

that it applied to assessors (as non-treating health-practitioners) meaning that assessors cannot be held accountable for their conduct. Even then, the 2009 decision was only made when a reviewer was confronted with two documents from the Health and Disability Commission and ACC both alleging that remedies under the Code lay with the other party.

Although this was a substantial step in facilitating claimants' access to justice, the progress is hampered because the review tribunal is not a court of record, and so does not bind other reviewers. This means that reviewers can still claim that the Code does not apply to assessors and decline jurisdiction despite the 2009 decision.

In addition, there is a statutory bar to appealing decisions made pursuant to the Code, even on matters of law, jurisdiction or available remedies.<sup>4</sup> This means that effectively, the Code does not guarantee claimant rights unless the reviewer thinks it should. A company wholly owned by ACC employs the reviewers. ACC has given interest free loans totalling millions of dollars to this company.

*“Intersecting Forms Of Disadvantage” – Financial Control Over Claimants*

A claimant's reliance on ACC for income further compounds the problem of access to justice when the only way to challenge ACC's decision is through legal action. A person who loses their weekly entitlements, and is unable to work, cannot realistically expect to be able to appeal a reviewer's decision when the corporation they seek to challenge has removed their only source of income. This problem is compounded further when it is considered that Dispute Resolution Services Ltd is wholly owned by ACC.

It is accepted that monetary constraints will always limit access to justice in modern society, however when the entity you seek remedy against controls your income, it is submitted that these monetary constraints take on a wholly different character.

Another “intersecting form of disadvantage” faced by claimants is the attitude of the corporation towards perceived “bludgers”. In multiple cases, a longstanding battle with ACC results in a deadlock of sorts. Despite established medical evidence, ACC refuses to believe that the claimant is truly injured. This leads them to refuse every request made to them by that claimant; even where ACC have admitted fault (e.g. admitting fault in

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<sup>4</sup> S 149(3) Accident Compensation Act

failure to properly pay weekly compensation) or a review decision has directed ACC to do something. ACC deliberately flouts the limited rights accorded to the claimant under the ACC scheme because of their own perception, contrary to medical evidence. This discrimination negatively impacts the day-to-day life of the claimant. This attitude also compounds the financial difficulties that ACC is already able to inflict on a claimant. Again, when faced with a delay of years during which time no income will be forthcoming, claimants' access to justice is often useless in a practical sense.

#### *Further Financial Disparity – Costs Awarded in Reviews*

Another key element influencing claimants' access to justice is the limited level of costs available to claimants under the review system.<sup>5</sup> To restrict assistance in preparing often very complex cases involving substantial documentation over periods as long as 20-30 years to only two hours preparation time is a fallacy. The effect of the limit on costs awarded means that even where reasonably brought, a claimant will often have to fund litigation that would otherwise be funded by the opposing side under a judicial system. ACC has no limit on expenditure, and often spends \$10,000 or more on a medical report, yet even if a claimant is successful at review, the most that can be awarded for a medical specialist's input is \$915, even if multiple reports are required. As a further effect of this, ACC law is one of the least profitable areas available to legal practitioners, and because of this clients often go unrepresented, either because:

- A) They cannot afford a battle they could otherwise afford under a higher court system, due to the limits on costs available
- B) There are no advocates available to take their case, because the legislation creates a financial disincentive against lawyers gaining expertise in that area.

#### *Systemic Delay*

In light of the previous paragraph, it is also important to note that there is a current estimated delay several years in appeals to the court system, with approximately 1500 cases waiting. This becomes serious when ACC has stopped weekly compensation, and a claimant has no income on which to survive. The cost of delay is significant. Without a hint of exaggeration, houses are repossessed and relationships fail, children lose their parents and victory in the end can be hollow. In many cases, this has induced claimants to

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<sup>5</sup> Injury Prevention, Rehabilitation, and Compensation (Review Costs and Appeals) Regulations

accede to the requests of the corporation, usually at the expense of a right guaranteed under the convention such as arbitrary breaches of privacy.

***Comment on Paragraph 128 of Draft Report***

It is submitted that although courthouses have been made accessible, this is useless when ACC will refuse to provide the wheelchair, or fund the footwear required to facilitate a complainant's access.

***Comment on Paragraph 131 of Draft Report***

Drawing comparisons between ACC claimants and people in compulsory care may provide an insight into the flaws of the ACC process.

Whilst the report states that people under compulsory care have statutorily-implemented protection, judicial oversight, court representation and a right to legal advice as safeguards of their rights, this position can be starkly contrasted with that of an ACC claimant.

*Statutorily Implemented Protection*

ACC claimants have access to a Code of Claimants' Rights, however as previous discussion makes clear this is a largely ineffective remedy, that is either ignored or barely acknowledged through the ACC review system. As will be discussed later, legislation such as the Privacy Act 1993 can be easily skirted through the ACC system, providing no safeguards to a claimant's privacy.

*Judicial Oversight*

ACC claimants have no right of direct access to the courts due to the statutory privative provisions. Access to the courts is through Dispute Resolution Services Ltd in the ACC review process. Dispute Resolution Services Ltd is wholly owned by ACC. Furthermore, any appeals to the District Court for judicial oversight are made de novo and no new evidence is considered without the leave of the court. Any procedural defects in the

review process cannot be remedied as the court is only interested in the substantive merit of the case, not procedure. It may also be of note that the same three judges are the only ones to routinely consider ACC cases. Furthermore, as previously discussed ACC has substantial financial control over claimants by their ability to cancel weekly entitlements. This heavily affects the ability of a claimant to seek legal representation. In addition, the limits on costs that can be awarded at review level mean that ACC law is financially unviable for many lawyers, and so there is a severe lack of advocates in the area.

### *The Right to Legal Advice*

As previously discussed, there is a severe shortage of advocates in the ACC jurisdiction, mostly because of the lack of financial viability due to the limits on costs available. Many lawyers are shallowly trained in the ACC jurisdiction for this reason. In addition, ACC's financial control over claimants makes the possibility of hiring an advocate remote. There is no compulsory training in ACC disputes resolution, although law schools teach an overview of the scheme.

When these safeguards are further considered in light of the 5-year delay in hearing appeals, the practical ability of a claimant to make use of these bare safeguards is negligible.

### ***Conclusion: Article 13 Access to justice***

Whilst it is agreed that disabled people have full rights of access to justice, it is submitted that this account of the state of affairs is misleading. The report should be amended to reflect the substantial difficulties that people disabled by injury face in gaining access to justice in the context of the ACC system.

#### *Access To Justice Issues for People Disabled By Injury*

- Claimants have no right of direct access to the court system.
- Access to the court system is through the Review Tribunal.
- The review tribunal is owned by ACC.
- Reviewers are not bound by decisions of the review tribunal, and appeals are *de novo*, meaning no procedural issues can be resolved, even by an appeal.

- Despite determining a claimant's legal rights that have significant impact on that claimant's quality of life, very few reviewers have legal training or an in-depth understanding of ACC policy and legislation.
- ACC has the ability to withhold weekly compensation during the review process, potentially removing the claimant's sole income.
- The backlog of cases in the District Court mean there could be a 5 year delay in a claimant's case being heard.
- Limits on costs mean less advocates, and higher personal cost to claimant.
- The emotional and physical cost to an injured claimant of fighting ACC take a significant toll on people already suffering from injury.

#### *Recommended Amendment to Report*

ACC claimants as disabled people have poor access to justice in New Zealand. Claimants do not have direct access to the court system, and access is gained through a wholly-owned subsidiary of ACC. Claimants have difficulty in finding legal representation due to systemic flaws in ACC. Due to the way that appeals are heard from the review system, there is no opportunity to remedy procedural defects that occur in reviews. Reviewers are not bound by decisions of the review tribunal, and this means that the law is inconsistently applied between claimants. There is also a lack of transparency in the review process that means these issues are not readily identifiable. ACC may also have substantial financial control over claimants taking action against ACC, due to their ability to stop weekly entitlements being paid to the claimant.

#### *Recommended Course of Action*

Before the next report to the UN a review should be conducted of ACC's compliance with Article 13 of the convention with a view to improving claimants' access to justice. Our suggestions include a particular focus on the following:

1. Trying to increase legal representation of injured people in dealing with ACC.
2. An independent review system, or allowing claimants direct access to the court system.
3. Reviewing how procedural defects can be corrected in the review process, potentially by making the review tribunal a court of record.

4. Protecting a claimant's financial position from being exploited by ACC during the justice process.
5. Increasing training of advocates and judges in the ACC jurisdiction to decrease the backlog in cases waiting to be heard.
6. Eliminating the cost barriers at review level because of their negative effects on claimants' access to justice.
7. Ensuring top-level decision makers within ACC should be required to have a knowledge or experience of the particular needs of people disabled by injury, in order to consider the social impacts of decisions.

## *Article 17 – Protecting the Integrity of the Person*

### *Summary of Response*

The right to be fully informed and provide consent for all interference with a person's physical or mental integrity underpins New Zealand's medico-legal systems.<sup>6</sup> However a person disabled by accident in New Zealand is not able to effectively control their physical and mental integrity using existing legal mechanisms such as the Code of ACC Claimants' Rights and the Code of Health and Disability Services Consumers' Rights. Informed consent is not recognized or respected by the administrators of the accident compensation scheme and a disabled person seeking to enforce their right to informed consent has no remedy under existing structures. Administrative efficiency is seen to override the rights of individuals.

### *Background – The Assessment Process*

#### *Assessments Related to Cover and Treatment*

Emergency treatment and other exceptions aside,<sup>7</sup> the ACC legislation prohibits payment for provision of treatment without prior approval from ACC.<sup>8</sup> The treating practitioner completes a form and ACC employs a wide range of non-treating health professionals, from psychologists to physiotherapists to general practitioners to orthopaedic surgeons, who consider requests for treatment. Without seeing patients, they increasingly overrule<sup>9</sup> the diagnosis and treatment recommendations of treating practitioners, even when those treating are far more qualified than those assessing.<sup>10</sup>

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<sup>6</sup> Skegg and Paterson *Medical Law in New Zealand* (1st Edition, Brookers, Wellington 2006) 2.6.5 page 43 and Chapter 7, page 205-228.)

<sup>7</sup> Accident Compensation Act 2001, s7; and Sch 1, Cl 4 (2)

<sup>8</sup> Ibid, Schedule 1, Clause 4.

<sup>9</sup> The number of requests for surgery that were declined has nearly doubled in the last financial year to 8,500.

<sup>10</sup> See Review 146466 where ACC followed the advice of their Medical Advisor (a GP) over the advice of the treating Orthopaedic Surgeon, GP and Physiotherapist.

### *The Contracting System*

The contracting system regarding non-treating practitioners can be illustrated by considering ACC's use of non-treating psychologists. ACC branches have psychology advisors who are paid up to \$180,000 per year by ACC in this role. These fifteen practitioners do not see patients in this capacity; yet effectively control the treatment other psychologists can provide to patients.<sup>11</sup> A total of 148 psychologists, including some branch psychology advisors, undertake psychology assessments pursuant to a contract with ACC and receive up to \$540,000 per year for these services.<sup>12</sup> Issues have arisen because a small number of these psychologists conduct 1000-2000 assessments per year, ten times the average number of assessments by contracted assessors.

ACC designed the contracting system and acknowledged to the Commerce Commission the "belief among clinicians that an ACC contract locked them into a 'pot of gold' for the length of the agreement."<sup>13</sup> David Goddard, QC, also discussed the effect of contracting and price fixing on the health market in his ministerial inquiry into physiotherapy.<sup>14</sup> He found that fairness issues arise with a two-tier regime where the contracted tier is funded at nearly twice the rate of the other, making the second not financially viable.<sup>15</sup> ACC's advice to the Department of Labour was that implementation of this contracting system would mean up to 50% of physiotherapists in New Zealand would go out of business but that was acceptable.<sup>16</sup>

### *Assessments related to compensation*

The scheme has a statutory purpose of rehabilitating claimants to the maximum practicable extent.<sup>17</sup> Once this has been achieved, a person is no longer entitled to be compensated with 80% of their pre-accident earnings.<sup>18</sup> Parliament designed a statutory

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<sup>11</sup> New Zealand has 1,897 Registered Psychologists with a practicing certificate. Psychology Board Annual Report 2009, p9.

<sup>12</sup> ACC letter dated 29 April 2010, (Obtained under Official Information Act 1982).

<sup>13</sup> Commerce Commission Decision No. 546, 17 February 2004; Public Version, pages 25-26 (regarding contracts for Orthopaedic services).

<sup>14</sup> David Goddard, Q.C., The way in which Physiotherapy Services are Funded and Accredited by ACC Department of Labour, Wellington, September 2007.

<sup>15</sup> Ibid, para 5.51.

<sup>16</sup> Department of Labour, (Obtained under Official Information Act 1982, April 2008).

<sup>17</sup> Accident Compensation Act 2001, s3.

<sup>18</sup> Ibid, s101.

process to be followed to determine when a person is rehabilitated. The key component of this is an assessment by a medical professional<sup>19</sup> to determine whether the injured person can work 30 hours or more per week in any job.<sup>20</sup> Studies have shown that less than a third of those who are assessed as being able to work full time actually can, with most only able to manage part-time work or receive social security benefits.<sup>21</sup> Either the process is flawed or the assessments are inaccurate.

### *ACC chooses assessors*

ACC previously insisted that claimants were able to participate in the choice of assessor.<sup>22</sup> ACC developed a policy on choice<sup>23</sup> that was inconsistently applied<sup>24</sup> because staff did not think the policy was correct.<sup>25</sup> Today, ACC determines which assessor a person's case is referred to<sup>26</sup> and the scope of the assessment to be undertaken. This policy was changed because denying claimants' choice reduces the weekly compensation ACC has to pay.<sup>27</sup> Once ACC has made administrative determinations, which are not capable of being reviewed through the statutory process,<sup>28</sup> failure to comply with ACC's demands to undergo assessment<sup>29</sup> or treatment<sup>30</sup> results in weekly compensation being stopped.

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<sup>19</sup> Ibid, s107-112 and Sch 1, Cl 29.

<sup>20</sup> See for example *Hohepa v ACC* [2006] NZACC 22 where an Airline Pilot was "rehabilitated" to be a computer operator; and, *Alsig v ACC* [2001] NZACC 54 for a discussion about whether a person with one leg could be rehabilitated to be a tap dancer.

<sup>21</sup> Hazel Armstrong and Rob Laurs, Vocational Independence: outcomes for ACC claimants. Wellington, Feb 2007 at 54.

<sup>22</sup> Accident Compensation Corporation: Case Management of Rehabilitation and Compensation; Auditor General, Wellington 2004 at 4.59.

<sup>23</sup> ACC Policy, Client Choice of Assessor 2004-2009, (Obtained under Official Information Act 1982, 22 Mar 2010).

<sup>24</sup> *O'Malley Scott* [2009] NZACC 135.

<sup>25</sup> Executive Leadership Team Issues Paper: Level of Provider Choice Offered to Clients, 12 October 2009, Wellington at para 4.2 (Obtained under Official Information Act 1982, 22 Mar 2010).

<sup>26</sup> ACC's Policy on Choice of Assessors, 14 Dec 2009, (Obtained under Official Information Act 1982, 22 Mar 2010).

<sup>27</sup> Level of Provider Choice, above n25.

<sup>28</sup> *Raitt v ACC* [2007] NZACC 136; *Gibb v ACC* [2007] NZACC 137.

<sup>29</sup> Accident Compensation Act 2001, ss55 (1) (d) and 72 (1) (d).

<sup>30</sup> Ibid, s117 (3) (b); *Anderson v ACC* [2005] 318.

### *The Sacrosanct Assessors*

*Ramsay*<sup>31</sup> had a profound effect on assessments, as once they had been carried out by ACC's appointed assessor, "the mantra of *Ramsay*"<sup>32</sup> meant that they were treated as sacrosanct and the bar was set very high for convincing the court to put an assessment aside.<sup>33</sup> Appeals heard by the District Court dropped from 407 in 2004 to 179 in 2009<sup>34</sup> and the *Ramsay* principle lasted until the High Court overruled *Ramsay* in *Martin*.<sup>35</sup>

In the intervening years, ACC developed targeted campaigns sending thousands of people with pain to one assessor who asserts that Chronic Pain is of no known aetiology.<sup>36</sup> In the 2004-2006 financial years this assessor was paid between \$2.3 million and \$2.4 million by ACC for providing this service. The courts gave little weight to another assessor for operating outside his area of expertise<sup>37</sup> and for stating that a person did not have a brain injury in the face of decades of medical evidence that they did.<sup>38</sup> This assessor was paid between \$1.3 million and \$1.6 million by ACC for services from 2005 to Sep 2009<sup>39</sup> in addition to a full-time job.<sup>40</sup>

### *The Code of ACC Claimants' Rights*

Separate codes exist for claimants:

- The Code of ACC Claimants' Rights pertains to those dealing with ACC, as users of the ACC system
- The Code of Health and Disability Consumers' Rights applies to those claimants

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<sup>31</sup> *Ramsay* [Christchurch Registry, AP 412/14/02, 12 December 2002].

<sup>32</sup> *Craig Jones v ACC* [2008] NZACC 195, para 65.

<sup>33</sup> Vocational Independence: outcomes for ACC claimants. Hazel Armstrong and Rob Laurs, Wellington, Feb 2007, p31.

<sup>34</sup> www.nzlii.org.

<sup>35</sup> *Martin v ACC* [2009] NZLR 701.

<sup>36</sup> *Thirring v ACC* [2008] NZACC 135 per Judge Beattie at para 31 et seq; *Otto v ACC* [2008] NZACC 253 per Judge Beattie at paras 30 et seq; *Brennan v ACC* [2009] NZACC 101 per Judge Ongley.

<sup>37</sup> *Rackley v ACC* [2008] NZACC 117 at para 26.

<sup>38</sup> *Griffin v ACC* [2010] NZACC 69 at para 30.

<sup>39</sup> ACC letters dated 4 Sept 2009 and 30 Sept 2009 (Obtained under Official Information Act 1982 after the practitioner's judicial review of ACC's decision pursuant to the Official Information Act 1982 was abandoned).

<sup>40</sup> The assessor is employed full-time by a District Health Board.

being treated as patients by Health and Disability Services.

However both Health and Disability Services and the Accident Compensation Corporation involve administering treatment and services for which the Convention requires integrity of the person to be maintained. The report fairly suggests that informed consent is a core principle of the Code of Health and Disability Consumer Rights and underpins New Zealand's compliance with the convention. However it also gives the impression then, that informed consent is available as a protection of the rights of disabled people across the board. Our submission is that this gives a misleading impression of the rights of ACC claimants, as informed consent is not treated by ACC with the same gravity as under the Code of Health and Disability Consumers' Rights.

### *Coerced Consent to Surgery*

Despite the existence of codes of rights, serious issues of duress to consent exist. Section 117(3) of the Accident Compensation Act 2001 allows ACC to decline to provide weekly entitlements "for as long as the claimant unreasonably refuses or fails to...undergo medical or surgical treatment for his or her personal injury." This is contrary to s 11 of the New Zealand Bill of Rights Act 1990, which specifically sets out a right to refuse treatment. Whilst technically s 117 does not require a person to undergo treatment, it allows ACC to remove all support from a disabled person if they do not agree to undergo such treatment.

This is particularly problematic in cases of complicated surgery with significant failure rates, e.g. spinal fusion surgery. Here, the disabled person is told to undergo the surgery and if they refuse, all support including income support will cease.

There are also issues with assessments, where an assessment for one purpose is used for another. For example, if ACC has decided to prosecute a person, they can force them to undergo assessment to procure evidence for their criminal case. ACC and their reviewers are of the opinion that this breach of a person's right to silence is not problematic because the right is not an absolute right and is contingent upon the administration of the ACC scheme. The Appellate courts have commented that the right to refuse treatment in s 11 of the New Zealand Bill of Rights Act 1990 could arguably be interpreted in different

ways,<sup>41</sup> and this needs to be resolved. Unfortunately this cannot be done in an ACC context as the Supreme Court cannot hear ACC cases.<sup>42</sup>

***Comment on Paragraph 167 of Draft Report***

For the report to suggest that freely given informed consent is a fundamental principle of health and disability care in New Zealand is misleading. ACC claims account a significant proportion of all health and disability care in New Zealand, and to suggest that freely given informed consent is protected in dealings with ACC is to be ignorant of the realities of dealing with ACC entirely.

***Comment on Paragraph 168 of Draft Report***

Paragraph 168 states: *“All health and disability services consumers must be informed of their rights”*

It is true that all consumers of health and disability services must be informed of their rights. However pursuant to our discussion of the effects of section 117(3) of the Accident Compensation Act 2001 it is clear that to exercise a right to refuse treatment, or refuse to sign a 167 form, will result in ACC stopping weekly entitlements. As also discussed, weekly entitlements are commonly the only form of income available to claimants, who are often supporting a family or partner. In these situations, consent is effectively given under duress. At worst, a consumer’s right to refuse treatment is a nullity. Consent provided under duress, even when “signed under duress” is written on the form, is used and relied upon by ACC and their contracted providers as a legally effective consent. Unfortunately there is no forum in which this issue can be effectively addressed.

Paragraph 168 states: *“Must be...treated with respect and receive services in a manner that has regard for their dignity, privacy, and independence”*

ACC does not respect the dignity or privacy of disabled persons. They are ostracised from their communities in many cases. As can be seen from a new advertising campaign by ACC, ACC encourages claimants’ neighbours to actively violate claimants’ rights of privacy.

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<sup>41</sup> *Smith v AG HC WN CIV 2005-485-1785* [9 Jul 2008]; *Smith v AG CZ CA55/2008* [2010] NZCA 258; *Smith v AG SC* [2010] NZSC 114

<sup>42</sup> s 163 Accident Compensation Act 2001

### ***Comment on Paragraph 169 of Draft Report***

The report accurately states that court ordered assessment does not mean clinicians do not need to acquire informed consent. This gives the impression that ‘informed consent’ is inviolate even to the courts as a safeguard of disabled people’s interests in New Zealand. As discussed, this is not the case, and ACC is able to circumvent informed consent either by threats to remove entitlements, or by not providing a full account of consequences of signature to claimants. It is submitted the report should be amended to acknowledge this. Just because the courts cannot avoid informed consent, this does not mean that ACC cannot.

The report accurately states that there are numerous checks and balances in place to ensure that informed consent is given, however whilst these checks and balances operate at a court level, the reality is that they do not bind the conduct of ACC. The report should be amended to reflect this.

### ***Respect for Mental Integrity***

Aside from Informed Consent, the majority of breaches of respect for mental integrity stem from disregard for the harmful impacts of such investigations on claimants as disabled people. ACC regularly ignores numerous requests from GPs and psychiatrists to stop investigations, due to the obvious negative impacts they can have on the mental integrity of not only the disabled person, but their families and communities too.

### ***Conclusion: Article 17 Right to Integrity of the Person***

It is agreed that informed consent is an effective model for protecting the integrity of the person in New Zealand, and our legislative framework reflects this. However it is submitted that despite the theoretical intent of this framework, in practice claimants as disabled people do not gain sufficient protection from this framework. The investigative bodies, remedies available, and consequences of a breach seem to provide an effective mechanism for implementation of informed consent in protecting individual integrity, but in the event fail to provide adequate redress for a claimant.

*Issues Affecting Integrity of the Person for People Disabled by Injury*

- Despite being guaranteed by legislation it is not possible to gain any remedy for breach (or anticipated breach) of a right to informed consent.
- This consent is also given without full information as to the consequences of signature or extent of authorization.
- Informed consent is utterly violated:
  - Claimants have no choice of assessor.
  - They are forced to undergo assessment by threat of removing financial entitlements.
  - They are forced to undergo treatment or face removal of entitlements.
  - Their consent to initiate this process by 167 form is often obtained by duress.

*Recommended Amendment to the Report*

*The following paragraph should be added to the report:*

ACC, other agents, and contractors do not respect the right of claimants to be fully informed before providing consent, or make informed choice, with regard to assessment by health practitioners. Despite a legislatively implemented framework for protection of informed choice, pursuit of a legislative remedy yields no redress for claimants. Under threat of removal of entitlements, consent can be effectively coerced. Whilst Health and Disability consumers have ample protection under the Code of Health and Disability Services Consumers' Rights, the same protection is not afforded to people who suffer disability by accident.

*Paragraph 168 should be amended by adding:* "ACC does not respect the dignity and privacy of disabled persons. ACC routinely ostracises them from their communities.

*Paragraph 170 should be amended by adding:* "The systems of checks and balances do not apply to the ACC jurisdiction despite its integral involvement in medical care."

*Recommended Course of Action*

Review ACC's practices surrounding the implementation of the principle of informed consent with particular focus on:

1. Respect for informed consent as a valuable means of protecting integrity of the person.
2. Training of staff to ensure informed consent is understood and valued.

Review of legislation to:

1. Ensure clarity that integrity of the person exists in all cases and must be respected.
2. Look at amending ACC processes so that failure to respect integrity of the person, particularly by a violation of the informed consent principle, should result in harsher penalties for ACC, to act as a disincentive.
3. Make clear to disabled people and agencies acting on their behalf exactly what remedies are available and how they can be accessed.

## *Article 22 – Respect for Privacy*

### ***Summary of Response***

New Zealand has no real right to privacy, and a right to privacy was not included in the New Zealand Bill of Rights Act enacted in 1990. The relevant legislation does not meet the Article 22 requirement as it allows potentially unlawful interference with a person's privacy, that in all cases is completely arbitrary. Disabled people are forced to allow arbitrary breaches of privacy by ACC. Despite Right 7 of the Code of Claimant's rights giving a right to privacy, no effective remedy is available through the tribunal process, and the legislation prohibits access to the courts.

### ***Background***

#### *The Right to Privacy*

When the Code was enacted, it included the right to privacy at Right 7.<sup>43</sup> It states:

##### *Right 7*

You have the right to have your privacy respected

- (a) We will respect your privacy
- (b) We will comply with all relevant privacy legislation
- (c) We will give you access to your information, in accordance with legislation

The right to have your privacy respected is arguably the widest and strongest privacy protection for injured people raising significant issues of interpretation in balancing this right with other aspects of the legislation.

The statutory scheme allows a complaint to be made to ACC about a breach of the Code. ACC then investigates and makes a 'decision' on the complaint. If a complainant does not accept the decision, they have the right to review this, however the reviewer's decision is final<sup>44</sup> and therefore important in determining and protecting rights. It cannot be appealed for judicial determination. Significant issues have arisen regarding resolution

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<sup>43</sup> Injury Prevention, Rehabilitation and Compensation (Code of Claimants Rights) Notice 2002.

<sup>44</sup> Accident Compensation Act 2001, s149(3).

of disputes about the Code, particularly when reviewers<sup>45</sup> inconsistently apply the Code as will be highlighted below.

*The Policy of the ACC Office of the Complaints Investigator*

ACC's interpretation of the law regarding to Privacy is limited to espousing Right 7(b) and limiting the remainder of Right 7 accordingly, as is clear from the standard response to allegations of Breach of Privacy.<sup>46</sup>

ACC takes its responsibilities under the Privacy Act and Health Information Privacy Code seriously. However, it must also meet its own legislative requirements to ensure a direct link between ACC-covered injury and ongoing entitlements. For this reason, ACC must reassess a client's injury status and/or condition from time to time. While [the client] has asked that his informed consent be sought on a case-by-case basis, he cannot unreasonably prevent or veto ACC from discharging its duties in this regard. The standard ACC167 Consent Form meets all of ACC's requirements under the Privacy Act and Health Information Privacy Code. If a client wants particular information, they can ask to be sent copies of ACC's correspondence with third parties, and a copy of documents included. However, ACC is not obliged to seek specific consent each time it needs to do this.

No consideration or weight is given by ACC to the Right 7 words, 'you have the right to have your privacy respected' and 'we will respect your privacy.'

*Approaches to Interpretation of Right 7*

There are two broad interpretations of Right 7 highlighted by two recent review decisions. The first hearing to focus on interpretation of Right 7 and what 'you have the right to have your privacy respected' really means resulted in a wide interpretation. In his decision the reviewer, Mr Baker held:<sup>47</sup>

The thrust of Mr Forster's submissions are that Right 7(a) provides for additional privacy measures over and above Right 7(b). He submits that 7(b) provides ACC must comply with relevant legislation, such as the Privacy Act and the Health Information Privacy Code. He submits that Right 7(a) is in addition to that provision and must confer additional privacy rights to [the claimant]. He submits that this allows [the claimant] the right to require that he give consent on a case-by-case basis. Mr Forster seeks a declaration to this effect. ...

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<sup>45</sup> Although 'Reviewers' and reviews are quasi-judicial in nature, the legislation does not require reviewers to be legally trained or experienced and although some are, others are former ACC employees.

<sup>46</sup> Decisions of the ACC Office of Complaints Investigator dated 30 Jan 2009 and 5 Feb 2009.

<sup>47</sup> Review 147924, DRSL Auckland; P Baker 7 July 2009

ACC has not breached any privacy legislation. That fact is not in dispute. Mr Forster is seeking to impose an additional privacy condition on ACC. ...

I agree with the submission that Right 7(a) must be viewed as different from Right 7 (b). Otherwise there would be no purpose to including it in the Notice. When reading Right 7 it comes before 7(b). In that respect I find that it is a general overriding provision that ACC must respect a claimant's privacy. 'Privacy' is not specifically defined in the Act so it must be given its normal everyday meaning.

Within weeks of this decision, the identical submissions were made at a hearing in Invercargill where the opposite conclusion was reached. Mr Yates stated:<sup>48</sup>

Mr Forster suggested Rights 7(a) and 7(b) are separate. He said Right 7(a) creates a right to privacy in its own right which is wider than the legislation Right 7(b) refers to. ... Mr Forster said ACC complied with Right 7(b) but breached Right 7(a). Mr Forster said Right 7(a) would be redundant unless read as creating a separate right to Right 7(b).

I have considered Mr Forster's construction of Right 7(a) here carefully. Its effect is to suggest a statutory regulation imposes a limit on primary legislation. I note –

- a) If the Minister intended the Code to create a general right to privacy one would expect it to:
  - a. define 'privacy', and
  - b. explain what that right involves.

But that is not the case. If (as Mr Forster suggests) the 5 words of Right 7(a) create a general right to 'privacy' then it is a right that is undefined and without limit. Such a right would offend the basic principles of clarity and certainty underlying statutory drafting, and lead to administrative chaos. I am satisfied the Minister could not have intended that when approving the Code under s44 of the Act.

- b) Section 5 of the Interpretation Act says-

“The meaning of an enactment must be ascertained from its text and in light of its purpose (my emphasis).

Section 40 of the Act and Paragraph 1.2 of the Code say it aims to 'meet the reasonable expectations of claimants' (my emphasis). This is no reason why ACC claimants *qua* (as) ACC claimants should 'reasonably expect' a different level of privacy to that provided to others (whether employees, super annuitants or welfare beneficiaries) in law. No Policy objective would be served by the Code extending the rights for ACC claimants but no-one else. Privacy is not one of the fundamental rights Parliament has chosen to affirm in the New Zealand Bill of Rights Act 1990.

- c) Section 40 (2) says the rights and obligations in the Code are additional to any other rights claimants have, and obligations ACC has, under the Act. However, Acts of Parliament are disapplied only by other Acts of Parliament. The Code is a regulation (section 46 of the Act), not an Act of parliament. The Act did not make any

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<sup>48</sup> Review 147871, DRSL Invercargill T Yates, 14 August 2009

amendments to the Privacy Act 1993 (the Privacy Act) to show the Code is intended to override it. The Privacy Act (at section 7) identifies the circumstances in where other statutes and regulations will override its terms, but the Code does not fall within them.

For the reasons set out above I do not find Right 7(a) creates an overriding right to privacy. I consider the ambit of Right 7(a) is defined by Rights 7(b) and (c).

Subsequent decisions split between the two interpretations. A wide literal interpretation giving effect to Rights 7 and 7(a)<sup>49</sup> and a narrow purposive interpretation, reading down the right through Right 7(b) to compliance with the Privacy Act.<sup>50</sup> Reviewers advocating a narrow interpretation of Right 7 justified their approach on the basis that the privacy legislation is paramount and if breaches occur and harm results, then claimants can seek a remedy pursuant to the Privacy Act. Unfortunately, it is not possible to appeal these review decisions to determine what Right 7 means.<sup>51</sup>

*Context: the ACC 167 Forms*

ACC has been criticised for breaching privacy in the past in a previous Ministerial Inquiry. They were collecting and disclosing information without being able to establish they had consent. Now, when ACC takes on a new claimant, the claimant must sign an ACC 167 form. This form has had its terms expressed differently from version to version, but essentially it authorises ACC total access to a claimant's personal information, and ability to hold and disclose that information to whomever it chooses. The following illustrate how this information has been treated in the past, even if not gained through a 167 form:

- In one case information was given to private investigators, and that information was disclosed to the claimant's whole community during the course of the investigation. This has led to certain claimants being severely ostracised to the extent that they feel they have to leave their community to avoid persecution.
- In another case, medical information that a person was on a methadone program was passed to a private investigator, who passed the information to the police.
- In another case a patient's disclosure to a psychiatrist of cannabis use was

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<sup>49</sup> Review 161269, DRSL Christchurch, J Greene, 21 Dec 2009; Review 186689, DRSL Dunedin, J Wilson 17 Sep 2010.

<sup>50</sup> Review 186689, DRSL Dunedin, J Wilson 17 Sep 2010; Reviews 159866 and 159867, DRSL Christchurch, J Greene, 21 December 2009.

<sup>51</sup> Accident Compensation Act, s149 (3).

disclosed to police.

- In another case, a person with a “sensitive claim” as a result of sexual abuse was forced to give ACC permission to discuss the case with their employer.

Further to our discussion of informed consent, a claimant is forced to either sign an ACC 167 authorisation form, or be declined weekly entitlements essential to their financial security and quality of life. In this sense, this arbitrary breach of privacy is obtained by financial duress.

Further to our discussion of Article 27, despite the Convention’s commitment to employment, and ACC’s original purpose being to get claimants back to work, often ACC’s investigations and carelessness in disclosing information will lead to massive stigma to a claimant, not only making it harder to work in the first place, but causing mental injury leading to social withdrawal, making it infinitely harder for a claimant to return to work.

### ***Comment on Paragraph 212 of Draft Report***

New Zealand does have a comprehensive legislative framework for protecting the use of private information in the form of the Privacy Act 1993. This Act operates in part around 12 Privacy Principles, 11 of which are relevant here.

The key thing to note however is that like other areas ACC does not seem to have been in contemplation of the drafter when the Privacy Act was written. Section 7 of the Privacy Act outlines savings, establishing areas to which the Privacy Principles do not apply. Section 7(1) states that nothing in Principles 6 or 11 derogate from any enactment. The Interpretation Act 1999 states that an enactment includes regulations (delegated legislation). Therefore, these two Privacy Principles give way to ACC legislation and regulations with regard to the collection of information and are of no effect in an ACC context.

Further to this, section 7(4) of the Privacy Act states that an action is not in breach of the remaining 9 of 11 relevant Privacy Principles if it is “authorised or required by law”. If the law is being correctly interpreted by ACC as requiring signature of an ACC167 total disclosure form, or ACC are authorised to require claimants to sign the form, then section 7(4) means that the remaining Privacy Principles are of no application.

Thus, to claim that claimants as disabled people have a legislative framework to protect their right to privacy is wholly inaccurate.

***Comment on Paragraph 213 of Draft Report***

Paragraph 213 states: *“All consumers of health services and disability support services have rights to privacy (including their private life, honour and reputation).”*

It is not disputed that consumers of health services have rights to privacy. However if the question is asked whether claimants as disabled people enjoy those same rights in their dealings with ACC, then the disparity between the way disabled people are treated as consumers and claimants becomes clear. By its own nature, ACC must have access to the same level of information about a disabled person’s condition as their treating professionals. However the extensive legislative restrictions and codes available to Consumers of the Health and Disability Services are not available to ACC claimants and do not restrict the actions of ACC. As case studies show, ACC has very few if any constraints on how it deals with private and sensitive information held on claimants. Furthermore, when it is entrusted to private investigators, there appears to be no bar to full disclosure of private information to anyone who will listen. Further, it has been held that the consumer of services is ACC and not the claimant, as ACC fund the provision of the services. This interpretation by both the Health and Disability Commissioner and ACC epitomises New Zealand’s attitude towards people disabled by accident.

As such the report does not reflect the true position of disabled people in New Zealand with regard to their right to privacy.

***Conclusion: Article 22 Right to Privacy***

Article 22 states:

*“No person with disabilities...shall be subjected to arbitrary...interference with his or her privacy, family, home, or correspondence or other types of communication. ... Persons with disabilities have the right to the protection of the law against such interference or attacks. States Parties shall protect the privacy of...information of persons with disabilities on an equal basis with others.”*

The report states that a legislative framework exists to balance the interests of the individual and society. This gives the picture of a system that will protect the interests of disabled people in controlling information held about them. However in light of our discussion of paragraph 212 it is clear that the balance is heavily tipped in ACC's favour, to the extent that ACC is free of the core privacy principles in the Privacy Act. To say that there is a balancing of interests going on is to give the impression that disabled people are given some protection by this legislative framework. As has been discussed, this impression is simply not true. As the case studies demonstrate ACC has total access to information through its 167 forms. Whilst lawful, the use of this information and its collection is completely arbitrary in contravention of Article 22, and can extend to as little or as much as ACC desires. Often ACC will not enquire far enough, giving itself an incomplete picture that will often result in suspicion of fraudulent activity where none exists – for example in one case an investigation was conducted because the claimant was paying tax. The investigation revealed in time that the tax was not additional undisclosed income, but tax paid on weekly compensation. In terms of a right to privacy, these investigations violate any semblance of a right to privacy on all levels. There is no accountability surrounding these investigations. The rights and checks and balances that accompany criminal investigations are ignored by ACC as claimants have no mechanism to enforce them.

As also discussed, whilst consumers of health and disability services have their rights protected by the Code, this Code does not extend to ACC despite the fact that ACC will often hold even more extensive private information than their medical professionals.

In practice there is no respect for privacy under the ACC scheme. It is submitted the Convention's commitment to protecting rights of disabled people, and bettering their quality of life, is in direct contrast to the way in which privacy is abused under the ACC scheme in New Zealand. The Convention Coalition Report highlights two key issues for disabled people as Social Participation, and Employment. It is submitted that ACC's callous use of private information directly exacerbates these problems.

Disabled people already endure stigma from the wider population due to their disability. The social model of disability even focuses on disability as being a socially inflicted condition – it is not the disability that makes the individual a disabled person, but society's perception of their disability that makes them a “disabled person”. It is submitted that ACC's abuse of private information, particularly in their fraud investigations, only exacerbates this stigma.

It is common for ACC, at the end of an investigation and prosecution, to accept that a person is disabled and entitled to what support they have received. No consideration is given to the hundreds of thousands of dollars wasted on these processes and the devastating effects on the disabled person and their family.

Again, it seems that despite the governments efforts in other areas in protecting the rights of disabled people, the fact that ACC claimants as disabled people should enjoy these rights too has been overlooked.

### *Privacy Issues for People Disabled by Injury*

- ACC has the same level of access to private medical and personal information as medical professionals.
- There is substantial regulation to govern the way that information held by medical professionals can be dealt with.
- There is no real regulation as to how ACC uses that information, and the report does not reflect this. Even where there is regulation, it is ineffective and unenforceable.
- Case studies illustrate how ACC has used this information inappropriately, and in breach of the Articles of the Convention.
- Contrary to the goal of the convention, ACC's use of private information only stigmatises disabled people more.
- ACC has the ability to demand information and it is an offence not to provide such.

### *Submission*

Claimants' right to privacy does not exist under the legislative framework. Furthermore, ACC obtains consent to complete disclosure of sensitive personal information by threats of removing weekly entitlements, effectively a threat of financial duress. ACC further uses this information to their advantage, and to the further stigmatisation of people already living with disabilities. This exacerbates the key areas of concern identified by disabled people, particularly social isolation, and difficulty in finding employment. The report should be amended to reflect the substantial breaches of privacy made by ACC, and the damaging effects these breaches have on claimants as disabled people.

*Recommended Amendment to Report*

*Paragraph 213 should be amended, with the addition:* “However people disabled by accidents who come under the jurisdiction of ACC do not have an effective way to ensure their privacy is respected or to seek an effective remedy when their privacy is breached. Breaches of privacy occur often in the administration of the scheme”.

*Recommended Course of Action*

1. A right to privacy should be included in the New Zealand Bill of Rights Act 1990, to reflect the importance that should be placed on the privacy of New Zealand citizens, particularly those disadvantaged by disability.
2. The Accident Compensation Act 2001 should be amended by removing the section 149(3) privative provision, in order to allow access to the courts to determine the meaning of Right 7(a) of the Code of ACC Claimant’s Rights.
3. The Privacy Act 1993 should be amended so that the section 7 Savings provision does not deprive the Act of its force

## *Article 27 – Work and Employment*

### ***Summary of Response***

Despite an inherent focus on securing work and employment for people disabled by injury, the ACC scheme is not effectively helping claimants obtain and maintain sufficient employment. This is influenced by the history of the scheme in dealing with claimants on weekly compensation. The concept of ‘Vocational Independence’ is being applied to ACC’s advantage, and the disadvantage of people disabled by injury seeking to return to full time employment.

### ***Background: ACC Policy and Historical Context***

The Woodhouse Commission Report laid the foundation to the Accident Compensation Scheme. The Accident Compensation Corporation was set up to administer the scheme. The ultimate goal is to get injured people back into employment as soon as possible. The idea behind it is that through a no fault system, money can be saved that would otherwise be spent determining fault, and instead New Zealanders can be covered under the scheme and get back to work quicker than they would otherwise. New Zealanders for the most part are proud of the ACC scheme, however in the current political climate the problems in administering the scheme are beginning to emerge.

Historically the scheme had problems with perceptions that injured people would abuse the system, usually by overstating their injury in order to remain entitled to weekly compensation. These perceptions and prejudices are the cause of the numerous fraud investigations referred to in this report and have resulted in an over-correction of sorts with regard to ACC policy towards claimants, particularly those receiving weekly compensation. As previously alluded to, there are continuing problems of perception within ACC as a result of this. These perceptions result in ongoing conflict between the corporation and certain claimants that staff within ACC refuse to acknowledge suffer from a legitimate injury, despite medical evidence establishing such. In particular, this can be seen through our discussion of the fraud investigations conducted by ACC in recent times. An inquiry was set up to look into this problem, which resulted in the rebranding of ACC’s fraud unit. In practice, the new name of the unit has not resolved the issues that it has created.

This context is important when understanding how many of the problems that we outline in this report have occurred, particularly when examining how ACC seeks to return claimants to work. There is no doubt that the idea of the scheme is highly progressive in its attitude to tortious litigation and resolution of the consequences of injury. Even critics of the ACC scheme do not tend to criticise the scheme on its core idea, but on how the significant administrative issues that arise in implementing the scheme are dealt with. Calls to ban the scheme are not usually made out of ideological preference for a different scheme, but in exasperation at the inequitable way that ACC is perceived to treat different citizens despite all New Zealanders contributing to the scheme: an issue of administration.

One of the issues for disabled people that arises from this over-correction of policy is the application of the concept of ‘Vocational Independence’.

### ***The Concept of ‘Vocational Independence’***

‘Vocational Independence’ is used to determine when a claimant should be taken off ACC. When a claimant is assessed as being able to work for 30 hours per week in any job they are said to be “vocationally independent”. This must not be confused with being able to return to work in the job the person was employed in when they were injured. There are several issues that arise from this definition of vocational independence.

Statistics New Zealand data indicates that the average working week in New Zealand is far closer to 40 hours per week. This suggests that the bulk of New Zealanders need to work for 40 hours per week to sustain an adequate lifestyle. Therefore, to expect a claimant to survive on being able to work 30 hours a week may seem unrealistic in its expectations, and require many disabled people to earn at a lower level than non-disabled people.

Another problem with ‘Vocational Independence’ is its disconnection from realities in the job market. Under the current definition of Vocational Independence, if a medical assessor states that a claimant is able to work 30 hours a week in any job, whether or not that job exists at the time in New Zealand, and whether or not that job will provide disabled people with more than a subsistence standard of living. This concept may be particularly out of touch with the needs of disabled people, who may have to fund additional disability-related costs. In addition, even if there is only one of this particular job available in New Zealand, ACC is able to say that any number of claimants are

“vocationally independent” because they can work 30 hours per week in this one job, when clearly only one person can hold the job.

Completely aside from this, there is dispute<sup>52</sup> as to whether the medical professionals conducting Vocational Assessments can properly assess a claimant’s ability to work 30 hours per week (see discussion above regarding ACC assessors). Some assessors who have been engaged in this process have recently questioned the accuracy of it.

### ***Comment on Paragraph 286***

In light of the previous discussion, it then becomes clear that ACC are only prepared to go so far in helping injured people return to work. The reality is that as soon as a medical assessor believes that someone can work 30 hours a week, that person is largely on their own. Studies have shown that ACC is not meeting the requirements of the Act in **over 70%** of vocational rehabilitation cases.<sup>53</sup> Further studies have shown that less than a third of people assessed as vocationally independent can actually manage full time work, with most either working part-time or receiving social security benefits.<sup>54</sup>

### ***Conclusion: Article 27***

#### *Work and Employment Issues for People Disabled by Injury*

- Rather than focusing on helping claimants obtain and maintain work that suits their ability, the focus is on arbitrary assessment of 30 hours per week
- Vocational independence and the assessment process are flawed concepts, that mean disabled people are returned to work too early
- The independence and accuracy of assessors in determining whether a claimant can work 30 hours per week is uncertain
- Being returned to work too early results in negative outcomes for disabled people. In the context of injury, it often means that claimants over-extend themselves and are injured further

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<sup>52</sup> John Alchin “Can work capacity and Chronic non-specific pain be validly assessed?” *Ngau Mamae* February 2010.

<sup>53</sup> McPherson, Kathryn. PhD Thesis, Evaluation of Vocational Rehabilitation under the IRPC Act 2001; Feb 2007.

<sup>54</sup> Armstrong et al, above at n 28.

- In spite of the fact that ACC is aimed at returning people to work as soon as possible, an overly aggressive cost-cutting policy results in greater harm to people disabled by injury
- There is an overall focus on process over legitimate outcomes

#### *Recommended Amendment to Report*

*Paragraph 286 should be amended to include:* “Whilst ACC provides some services to injured people to help them obtain and maintain work, the system of vocational independence is flawed. Vocational independence results in more focus on process than outcome, and accordingly outcomes in returning injured people to work leave something to be desired.”

#### *Recommended Course of Action*

1. The measure of a successful outcome must be changed to obtaining and maintaining meaningful employment.
2. By improving individual employment outcomes, the perception of disabled people can change from being as a burden on society to a resource. This would result in numerous positive outcomes for society, including financially.
3. Compensation for lost income must reflect actual income lost. However the concept of duties of mitigation owing between ACC and a claimant must be developed further with a view to maximising positive outcomes.
4. Proper studies must be undertaken to measure the effectiveness of vocational rehabilitation. These should consider the hours worked and income earned before accident, the average rate or earning of “vocationally independent” jobs at 30 hours per week, and the actual hours worked and earning of persons after ACC’s “vocationally independent” decision. By comparing these three measures, the true effectiveness of the scheme and the convention can be benchmarked and measured.

### *Conclusion*

As this report demonstrates, despite significant moves forward in New Zealand in protecting the rights of disabled people, the unenviable position of disabled people injured by accident under the ACC system is still something the New Zealand government should be ashamed of.

It is submitted that integrity of the person, the right to privacy, access to justice, and issues surrounding work and employment are core rights of the Convention, and all are integral in improving the quality of life of disabled people. As can be seen, the Accident Compensation Corporation and its agents are able to violate these rights at their whim with no remedy or redress.

It should also be noted that the substance of these rights means that breaches often exacerbate one another. A breach of integrity of the person by lack of informed consent is compounded by violation of the right to privacy through the complete disclosure of the 167 forms, and a lack of access to justice means that a claimant has no redress for a violation of rights that is so damaging to their personal integrity. The outcome of these breaches of rights often affects the Article 27 rights to work and employment.

The impact of these breaches on ACC claimants cannot be underestimated. The financial costs are significant, but the personal and emotional costs often far outweigh any financial undertaking involved. The effect of the flaws in this process is that often claimants have no option but to just give up. The content of these rights also mean that their violation has the biggest personal impact on the well being of claimants.

Finally, it is again submitted that the reason for this is the governmental perception of ACC. Claimants are not seen as disabled people, and the history of staff within the ACC scheme mean that claimants are treated with suspicion, instead of being given the best treatment possible in order to return them to their full independence. This situation should be remedied by a full review of ACC procedures and legislation, with a view to improving the rights and respect accorded to those who suffer the misfortune of personal injury and fall under the ACC scheme.

### ***The Key Recommendation***

New Zealand has ratified the Convention. ACC must be properly and independently examined against the Convention if the government is to comply with its obligations.