



Acclaim Otago (Inc)

CRYING FOR HELP FROM THE SHADOWS:

The real situation in New Zealand

**A summary of survey data for presentation to the UNITED NATIONS
COMMITTEE on the CONVENTION ON THE RIGHTS OF
PERSONS WITH DISABILITIES to be considered at the 12th SESSION**

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“Between the idea and the reality, between the motion and the act, falls the shadow.”

TS Elliot, the Hollow Men.

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BACKGROUND TO SURVEY RESULTS

It's not fair on your kids when you are stuck in this process. It's 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 for advice but it is one the Government told ACC to offer to save on the cost of the huge numbers 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 ... (Q100R54)

The approach [of ACC] is adversarial. After ACC had the assessment report that the arranged and used to make their decision, it was some years before I received a letter advising their decision or had any contact by phone or writing. The review process is difficult, stressful and expensive. I imagine there are many claimants that cannot afford to meet the costs. Review costs [awarded by the reviewer] do not begin to cover the actual costs of a review. ACC fails to realise by their approach that following injury, people are at their most vulnerable and don't have the capacity to manage their interactions with ACC. It is particularly stressful to undergo multiple assessments until ACC receives an assessment that they find suits their purpose. (Q100R106)

Over most of the last 10 years, ACC have waged a relentless war, an orchestrated campaign of harassment, in an attempt to get a case clearance (what they more recently term an "actuarial release") and a performance pay bonus for my case manager. This has taken an enormous toll on my health and well-being. It is my earnest belief ACC is totally corrupt yet the government will do nothing as they benefit directly from that corruption. (Q100R143)

Information about the survey

Why was this survey conducted?

As set out in Acclaim Otago's interim report (the "interim report"), to the United Nations Committee on the Rights of Persons with Disabilities ("the Committee"),¹ Acclaim Otago took the issue identified by the Committee in its list of issues² and conducted a survey of injured New Zealanders to attempt to identify the scale of the problems with access to justice, including funding, procedural fairness and reliable evidentiary procedures.

¹INT_CRPD_NGO_NZL_16661_E.

² CRPD/C/NZL/Q/1.

The survey answered the key question asked by the Committee and identified systemic problems with funding, procedural fairness and reliable evidentiary procedures. These are summarised in the Shadow Report that is available on Acclaim Otago's website (www.acclaimotago.org/un).

The following are conclusions drawn from the analysis of the survey data, the analysis conducted in previous reports, and the experience of the authors. It provides an overview of the systemic problems, including access to justice from the perspective of People with Disabilities Caused by Personal Injury in New Zealand ("PwDI").

85% of respondents believe that the ACC **dispute resolution process does not provide access to justice**. The **systemic breaches of the CRPD** identified in the interim report **were confirmed**.

The purpose of this document is to make data from the survey publicly available by way of background to the shadow report. We hope that this can be a foundation for further research.

How the responses were obtained and limitations of our data

The survey was an online survey and the respondents self-referred through word of mouth, media articles and through membership of the many organisations who sent the report out to their members.

We contacted ACC and Fairway Resolution (the Government agencies responsible for administration of the Dispute Resolution Process at Part 5 of the Act). We asked for them to assist in making the survey representative by helping us to obtain a wider sample. ACC decided not to assist with the survey because their role was "to support the Government's response to the Committee" rather than Acclaim Otago. Fairway did not respond to our request. They later verbally confirmed that this was because they were leaving it to ACC to respond. We recognise that our survey may not be representative in the manner of professional surveys. Other limitations include that some data was incomplete; respondents were self-selected; and that we had limited distribution channels.

Despite these acknowledged limitations, we strongly believe that the survey, even without official support, does indicate that there are **systemic problems** and that the scale of these problems is significant. From a human rights perspective, each individual violation is significant.

The survey data is presented as a percentage of respondents who answered a given question – the survey involved skip logic meaning that irrelevant questions were not asked. Similarly, it was possible to skip questions, and some respondents may have preferred not to answer certain questions. Percentages are rounded to the nearest full percentage point which is why some responses add to 101% or 99%.

The questions were often framed around the concept of an “adverse decision” from ACC, by which we meant a decision that did not give the relevant person what they had asked for. The actual substance of that dispute is largely irrelevant, and the data is directed towards PwDI’s experiences in trying to access justice in relation to that adverse decision.

Survey itself did not significantly change respondents’ views

To check that our survey itself did not significantly alter respondents’ views on the issue of access to justice, we asked the same overall question about access to justice at the beginning and at the end of the survey. There was no significant difference in responses by the end of the survey. Those who thought the current system provided effective access to justice at the beginning of the survey did not change significantly during the survey.

[I was] bankrupted by ACC’s wrongful disentitlement, shackled by student [loan] and personal debt because ACC repeatedly denied vocational rehabilitation entitlements. Other people, relatives etc have judged, abandoned, dismissed and isolated me when being harassed by ACC. ACC denied wheelchair so housebound for years. ACC denied commode and so I lay bedridden for 8 months, shivering in my own urine. [I was] denied access to my own culture, [and could not] keep up with support networks and participate because ACC denied wheelchair support and demanded their permission to attend family tangihanga. [I was] bullied by ACC to assessments so had to leave my kuia’s tangi to rush back exhausted and distressed... The stress from the persecution aggravated my blood pressure, caused anxiety, frustration and anger and impacted on my relationships.... I have been discriminated against [because of] my mobility disability and difficulties, [I’ve experienced] weight gain from the medications and inactivity. [I’ve been] mocked and laughed at and been accused of “ripping off the system” and been told “but you don’t look sick” by unqualified relatives who work in Maori health. It’s destroyed my relationships and forced me to second guess and be suspicious... (Q100R7)

Systemic effects of ACC decisions and the dispute resolution process on PwDI and their families

The Scale of the Problem

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 often unsuccessful due to systemic failure of various access to justice mechanisms.³ 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.⁴ 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 the Interim report. Nearly all respondents said their health was affected **by their injury**

³ Interim report (February 2014), Art 13, p 10-27, paragraph 30 et seq, Acclaim Otago Access to Justice Survey Data (July 2014).

⁴ Interim report (February 2014), Art 23, p 78-83, paragraph 219 et seq.

(89%).⁵ Most (67%) had been told their entitlements would stop if they did not undergo assessment.⁶ Half (51%) had experienced problems with their privacy.⁷ Many (44%) had been assessed to be “vocationally independent” meaning they had been medically assessed as able to return to a hypothetical job for thirty hours per week, and are deemed to have no loss or on-going entitlement to financial support.⁸ Over three quarters (78%) have had their home and living arrangements, including family, affected by their injury or ACC.⁹ A significant group (19%) had interactions with the ACC investigations (fraud) unit.¹⁰ 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.¹¹

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

Respondents’ financial position before ACC’s adverse decision

The financial position of **PwDI is adversely affected because of their injury even before they receive an adverse decision** from ACC that they might seek to challenge.

A person’s injuries and resulting reduced capacity or inability to work mean that they are already financially disadvantaged, and this significantly affects their ability to access justice. This financial disadvantage has to be taken into account when funding is considered (and was not acknowledged by the Government in their response to the list of issues). The survey gathered data to try to understand PwDI’s financial position when they received an adverse ACC decision.

The data shows that nearly all respondents’ financial position had significantly deteriorated between their accident and their adverse decision. The scheme does not

⁵ Interim report, Art 25, p 84-93, paragraph 227 et seq.

⁶ Interim report, Art 17, p 45-65, paragraph 128 et seq.

⁷ Interim report, Art 22, p 70, paragraph 193 et seq.

⁸ 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.

⁹ Interim report, Art 23, p 78, paragraph 213 et seq.

¹⁰ Interim report, Art 14, p 28, paragraph 81 et seq.

¹¹ Interim report, Art 18, p 66, paragraph 188 et seq.

exist in a vacuum. This financial disadvantage makes it harder to overcome financial barriers to challenging ACC's decisions, increasing the importance of the systemic funding mechanisms.

Most respondents (81%) had claimed for weekly compensation. Of this group most (89%) received weekly compensation for a period of time. Those who did not receive weekly compensation (29% of respondents) and could not earn are immediately prejudiced by their lack of financial resources. Survey data indicates social security and legal aid are ineffective or not applicable. Similarly, even the group who did receive weekly compensation suffered financially because of their disability. Weekly compensation under ACC is paid at 80% of a person's pre-injury wage. This 80% limit is meant to act as an incentive towards "regaining independence" from ACC. Of those receiving weekly compensation, most (81%) still had to borrow money to meet everyday expenses as a result of their 20% reduction in income.

This indicates significant cost shifting from ACC to peoples' communities, including their spouse (40%), parents (36%), siblings (13%), and friends (20%). Worryingly, a significant proportion of those receiving weekly compensation relied on interest-bearing finance to support their day-to-day living costs not met by weekly compensation, such as credit cards (45%), personal loans (26%) and remortgaging their home (30%). Instead of acting as an incentive to rehabilitation, the 80% limit on weekly compensation payments instead appears to increase a PwDI's dependency, potentially incurring interest payments, and therefore acts as a significant barrier to independence and rehabilitation.

The purpose of the Act is to reduce the cost of Personal Injury to society.¹² One of the core principles was community responsibility, which was framed in terms of the Accident Compensation Scheme taking the burden from individuals and their families, and shifting this to the entire scheme whereby levies would be collected to spread the load widely.

In addition, it is clear that even before adverse decisions are issued, there is significant cost shifting. PwDI may already be significantly in debt as indicated above because of the rules of the ACC scheme, and because of their injury *before* they start interacting with the dispute resolution process.

¹² Accident Compensation Act, s 3.

ADEQUATE FUNDING

SUMMARY OF SURVEY DATA

Nearly all PwDI believe ACC makes decisions that are wrong. Nearly all want to obtain independent representation and dispute the decision, but the following factors prevent PwDI exercising their rights.

PwDI pre-dispute situation: Because of their injury, PwDI are heavily in debt (to community and commercial lenders) before ACC makes its adverse decision. PwDI do not have the ability to pay for representation at the time they receive their adverse decision.

Private market for representing PwDI: The long-term effect of the existing funding model (in place since 1992) is market failure, which has resulted in significant barriers for PwDI to privately obtain access to justice.

Legal Aid: Legal aid does not provide access to justice. There are three major 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 given limited legal aid providers, and (iii) it is a loan which the person has to repay, which is likely to be difficult if they lose their dispute.

Costs awarded pursuant to regulations: 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). ACC has discretion to oppose an award of costs, and often do.

Effect of failure of the legal market: The effect of the failure of the legal market in the ACC jurisdiction 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 of the jurisdiction, however the Government is finding it difficult to attract judges from other jurisdictions.

THE LAW RELEVANT TO ADEQUATE FUNDING

Legal context for considering adequate funding

The most common way of gaining legal services in New Zealand involves a private contract, with up-front payment of a principal amount by a client into a trust account, and a fee calculated according to the number of hours worked and an hourly rate. This is the traditional idea of legal services. The PwDI enters into a legal marketplace where there are lawyers and advocates competing over their business. Consumers of legal services are protected, and the state's role is to regulate this market through a professional code of conduct and client care for lawyers¹³ and ethical and fiduciary obligations to a client. Importantly, these government protections only apply once a person has instructed a lawyer. There is no specific regulation whatsoever for advocates, which can be problematic, while at the same time being crucial in facilitating low cost specialist legal representation.

Nearly all practitioners in this field operate on an hourly rate and require payment up-front. To charge a conditional fee, that is only payable upon winning the dispute, simply transfers the cost burden onto the legal representative. The market for legal representation in ACC disputes has failed. While there are many PwDI who wish to challenge ACC decisions, and lots of ACC decisions to challenge, PwDI are unable to fund these challenges. This constricts demand in the market for legal services, and means running a specialist practice is seldom financially viable. This is a situation caused by chronic underfunding for decades. It is a result of deliberate policy decisions to restrict funding to this field by setting the regulated amount so low. The Government has rejected efforts to address this inadequate funding.¹⁴

There are two mechanisms provided by the state – legal aid and costs awards – that the state claims to provide access to justice for PwDI. Neither of these actually has this effect.

Legal Aid

Legal Aid is a system where the Government steps into the market and sets the price for legal representation and provides this as a loan to the PwDI, which they must payback over time.

¹³ Lawyers and Conveyancers Act 2006, Rules of conduct and client care.

¹⁴ See Interim report, p 14-15, at paragraphs 42-48.

The lawyer is not allowed to charge the client anything in addition to the set rate. As set out in the Interim report, this rate is very low and survey data indicates it is difficult to obtain a specialist lawyer who will take a case on legal aid. In Auckland, where approximately a third of New Zealand's population lives, there is not a single legal aid provider, who regularly takes ACC cases.

Costs awarded

In every legal jurisdiction, an award of costs has at least two related roles: one is to compensate the successful litigant and the other is to control the behaviour of the parties to ensure that settlement is reached where appropriate. The general rule in New Zealand is that costs should cushion the parties, but if the circumstances (including behaviour of the parties) warrant it, full "indemnity" costs can be awarded. This often happens where parties run a case that is without merit. In the ACC jurisdiction, the level of costs awarded is limited by regulation. The rates that can be awarded fulfil neither of the two functions of a cost award. The amounts available are:

- i) two hours preparation to maximum of \$350,
- ii) attendance (almost always limited to 1 hour) \$175,
- iii) lodging of the application \$117.

The amount for legal representation is therefore limited to approximately \$650. This neither compensates the injured person, nor deters ACC from making adverse decisions that are wrong.

Government's Response

The Government's response claims that funding in the form of costs is available and "usually" awarded. The Government has not acknowledged any of the objections raised by Acclaim Otago in its interim report about the amount of funding, or the financial position of people with disabilities that limits access to justice. They have not acknowledged the long-term effect of the market for legal representation for PwDI, nor how the law, including legal aid, operates in a way to reduce access to justice.

The problem with the Government Response

The Government's response does nothing to reflect the situation in New Zealand. The law operates in a way that denies access to justice on both an individual level and a systemic level. The Convention puts a duty on the state to provide a system that ensures access to justice, rather than simply providing minimum rights.

SURVEY DATA: ADEQUATE FUNDING**Peoples' experiences**

Nearly all (89%) respondents thought that ACC had made a decision that was wrong or incorrect. Nearly all (92%) knew that they could review ACC's decision. Most respondents (83%) who had received a decision from ACC that they thought was wrong, applied to review that decision.

What were PwDI's financial situation after ACC's decision to stop compensation

Of those who received compensation, most respondents (75%) had their weekly compensation stopped and most of this group (57%) were then without any other source of income. Those who had income mainly received it from WINZ.¹⁵ Of those who did not receive WINZ support, either their partner or spouse works (67%), meaning they are ineligible, or they didn't know they could receive WINZ support (33%).

Nearly all (90%) respondents said that challenging ACC's decision would be a significant impact on their financial position. Of this group, most respondents (80%) strongly agreed (when given the option to "agree" or "strongly agree").

Length of process

Respondents indicated that the entire review process, from obtaining the adverse decision to ACC complying with the review decision, takes around a year. This is a long time to be without any income, and planning for a year with no or reduced income has a significant effect on peoples' ability to cope.

Direct barriers against reviewing ACC's decision exist

The reasons given by people who did not apply for review were: didn't have the energy (44%); didn't have the money (36%); thought ACC's decision was correct (36%); didn't know I could (25%); was told by ACC I wouldn't win (17%); received legal advice that I wouldn't win (8%); couldn't be bothered (6%).

¹⁵ Work and Income New Zealand is the statutory organisation that administers the Social Security Act. WINZ support is not usually available if partner or spouse works.

PwDI's experiences highlight these problems.

I was suicidal and unable to fight. (R12)

[I was] told by ACC that it was not really a decision so it did not qualify for review. (R28)

[I was] told by medical experts that it would delay my ability to heal because of the stress. (R 34)

The complexity of the situation involving multiple injuries cannot be underestimated.

I never applied for money, I wanted the therapy for the sexual assault that led to mental injury which I received. I received some physiotherapy for my arm, but not anymore because the injury cannot be fixed. I wish I could get assistance that would relieve the pain and make it easier to live with even if it can't be cured. Perhaps this is something I could apply for review for. I have never thought about questioning this and I don't have the energy to chase it up. (R 28)

Obtaining representation

The survey gathered data to identify the true cost of obtaining representation. The data shows that the cost of obtaining representation is significantly more than the funding available through legal aid, an award of costs, or other funding mechanisms. Very few (*less than 1%*) of the respondents who went through the review process did so without representation because they *did not want a lawyer or advocate*. Barriers to obtaining representation are; cost, not knowing or being misled into believing that they did not need representation, and inability to find representation. These structural barriers show why so many people cannot obtain representation and must be addressed.

Experience of respondents who obtained representation

Of those who challenged one or more of ACC's decisions, 70% had reviewed between one and three decisions, but a significant number (9%) had reviewed more than 10 decisions. 80% had hired a lawyer or advocate, of which 83% had hired an ACC specialist lawyer or advocate.

Most (76%) people had never been granted legal aid to review (or appeal) a decision. The barriers to obtaining legal aid include people who: did not know they could apply (53%); did not meet the eligibility criteria (40%); or couldn't find a lawyer who did legal aid. Of

those who were granted legal aid, it was mostly (66%) granted as a loan that people had to repay.

Of those who hired a lawyer or advocate, most (55%) thought they would have less than \$2,000 available in total to spend. 17% of respondents estimated they had \$0 to spend on legal representation. Interestingly, a relatively large number of respondents (21%) didn't think about their budget for legal services. Lawyers and advocates generally indicated it would cost a significantly higher amount than people had available to spend.

Of those who paid for a lawyer or advocate, and knew how much their lawyers or advocates charged per hour, the hourly rates are indicated below. The median and mode hourly rate was \$200-\$300.

- (i) less than \$50 (6%),
- (ii) \$51-\$100 (8%),
- (iii) \$101-\$200 (27%),
- (iv) \$201-\$300 (36%),
- (v) \$301-\$400 (15%),
- (vi) more than \$401 (8%).

Of those who paid for a lawyer or advocate, the total cost for their lawyer or advocate for the review hearing was as follows. The median and mode amount charged were \$2000-\$4000.

- (i) less than \$100 (1%),
- (ii) \$101-\$1000 (27%),
- (iii) \$1001-\$2000 (17%),
- (iv) \$2001-\$4000 (28%),
- (v) \$4001-\$6001 (11%),
- (vi) \$6001-\$8000 (5%),
- (vii) more than \$8000 (12%).

When asked if they felt that having a lawyer or advocate made a difference to their case. Most (72%) felt it made their case better, some (21%) felt it made no difference and a small percentage (7%) felt it made their case worse.

ACC seldom (11%) offered to settle the case prior to the hearing.

Experience of those who reviewed the decision but did not get legal representation

Of the group who reviewed ACC's decision but did not obtain representation (20% of respondents), the reasons for not obtaining a representative were: it was too expensive (71%), they thought they would not need representation (43%),¹⁶ they couldn't find a representative (16%), and because they didn't want a lawyer or an advocate (4%). Of this group who were unrepresented, most (79%) said that if finance was not an obstacle, they would hire a lawyer or an advocate, some (15%) said they would not and few (6%) did not know what they would do if they had another dispute.

PwDI explained why they did not get a representative as:

I trusted too much. (R2)

I wasn't aware that I could get an advocate to assist me. (R5)

Only allowed one support person and not allowed legal representation. (R7)

I was not made aware by ACC case manager that at the Dispute Resolution Interview that I would be 'up against' a lawyer and [ACC's] legal team. I didn't know there were advocates to assist me, until it was too late. It was a horrible experience (R14).

This raises the issue of having PwDI "up against" a professional representative (either a lawyer or an ACC staff member who has repeatedly attended hearings). ACC and DRSL (now Fairway) were telling PwDI that it is an informal process and representation is not necessary, whilst ACC is in fact instructing lawyers.

Costs awarded by the reviewer

Less than half (47%) of the respondents who had been to review, received a costs award from the reviewer, the remainder (53%) had not. Of those awarded costs, nearly all (85%) said it was not enough to cover their actual costs.

¹⁶ The standard advice from ACC and the organisation that manages the review process suggests that it is an informal process and you do not need a lawyer or advocate.

PROCEDURAL FAIRNESS

SUMMARY INSERT FROM MAIN REPORT

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 significant problems that are likely to affect most review hearings. PwDI have tried to address this in three different ways, none of which is 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.

At the hearing itself: PwDI experience at the hearing is 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. PwDI experiences included.

- (i) Not enough time 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) Nearly all of the files provided contained unfair or prejudicial information.
- (iv) Some had particularly negative experiences 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 failing to comply with the legislative safeguards and there is no remedy for this.

Post hearing: PwDI 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.

THE LAW RELEVANT TO PROCEDURAL FAIRNESS

Legal framework

ACC has to gather information to make decisions about cover (“are you injured and is it covered by ACC?”) and entitlements (“what help do you need because of your accident and what help are you entitled to receive?”). There is no limit to the amount of money ACC can spend on obtaining medical or other evidence to support their decision. Once ACC pays entitlements and begins to investigate on-going cover or entitlement, there are no enforceable limits on ACC in terms of time, money or number of assessments.

Disputes with ACC are characterised by disputes about information. When considering the procedural fairness of the dispute, the collection, use and ability to correct information used in the dispute must be considered.

There are three ways to ensure information on ACC’s files is correct: (i) stop it getting there in the first place by recording all communication with ACC and Assessors so that a verifiable record exists of what was said,¹⁷ (ii) try to use the various processes that exist to correct any incorrect information that makes its way onto the file; and (iii) try to obtain the correct information and try to use this to disprove the incorrect information.

Importantly, ACC has almost overwhelming control over collection of information, the investigation, the findings of fact, and the use of information¹⁸ through the way they interpret the legislation.¹⁹ This was discussed in the interim report under Article 17, integrity of the person²⁰ and Article 22, respect for privacy.²¹

The various professional standards, including the NZ Medical Council rights of people

¹⁷ ACC is in the process of recording all phone calls. Whilst this may be helpful, it is also likely to lead to unfairness as recorded phone calls that support ACC’s position are likely to be transcribed and provided to review hearings, whereas no mechanism has been identified for claimants to do so and unless significant processes are put in place, this will also have the effect of disadvantaging claimants.

¹⁸ ACC has a data warehouse that contains the personal information, including medical information and employment information, and earnings information of every New Zealander who has lodged any claim with ACC since 1992. This data warehouse contains personal information from approximately 40 million claims. New Zealand has a population of approximately 4.4 million people.

¹⁹ Accident Compensation Act 2001, ss 72 and 117; see Executive Leadership Team Issues Papers: *Strategy for the Future Management of Long-term Claims*, 16 February 2009, and *Level of Provider Choice Offered to Claimants*, 12 October 2009 (Obtained under the Official Information Act 1982).

²⁰ Interim report, p 45, paragraphs 128-187.

²¹ Interim report, p 70, paragraphs 193-212.

with disabilities being assessed for third parties, establish the right to record an assessment, either by video or audio recording.²² These are given legislative force through the Code of Health and Disability Consumers' Rights.²³ In practice, none of the oversight bodies enforce this right and PwDI are forced to either be assessed without a record of the information that was obtained, or to have their weekly compensation/entitlements stopped. Reviewers dismiss complaints and Review decisions made about ACC's investigation of a complaint cannot be appealed to the District Court.²⁴

ACC then has unfettered control of the information it provides to review hearings and how and when that information is presented to the PwDI and the reviewer.

There are no legal controls to enforce the procedural safeguards²⁵ at either the hearing, or post-hearing and no remedy available to claimants for breaches of these procedural safeguards.²⁶

The important question is about the effect of the law, and whether ACC's interpretation of the law, is in fact having an effect on PwDI's access to justice.

Government's response

When asked about procedural fairness, the Government responded that there are duties on a reviewer and rights of appeal.

Government response does not accurately reflect the actual situation

Whilst the Government's response could be argued to be legally correct, it does nothing to reflect the real situation in New Zealand. The law operates in a way that denies access to justice on both an individual level and a systemic level. The Government ignores the objections in the interim report about lack of enforcement mechanisms if those duties are breached, and the inability of the appeal process to remedy the defects in the review process because of lack of representation, delay and the *de novo* nature of the appeal.

²² Medical Council Professional Standards: Non-treating doctors conducting medical assessments of patients for third parties at paragraph 11 <www.mcnz.org/news-and-publications/statements-standards-for-doctors/>.

²³ Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 at Right 4.2.

²⁴ Review decision 379587 dated 29 March 2012.

²⁵ Accident Compensation Act 2001, Part 5.

²⁶ Interim report, p 22, paragraph 67.

SURVEY DATA: PROCEDURAL FAIRNESS

ENSURING CORRECT INFORMATION IS PROVIDED TO THE REVIEW HEARING

The survey data indicates that there is likely to be a significant procedural problem with information contained in ACC's files not being correct. This is important when it comes to discussion of reliable evidentiary procedures because all of the information on ACC's file is provided to the reviewer as "evidence", and relied upon as such. Correct information is an important part of procedural fairness, which cannot just amount to window dressing. It is not enough to simply say: both ACC and claimants can provide whatever they want to review hearings. Whilst this might be "equal", it is not fair, nor does it provide justice.

The scale of the problem

When asked about how much they agree with the information held on their ACC file, most respondents felt the medical information (75%) and rehabilitation information (65%) on their file was not correct and that the information on their file as a whole was not correct (71%). Earnings information and employment information on files appears more accurate with only around 40% of respondents reporting the information was not correct.

Trying to stop incorrect information getting on the file in the first place

Assessments by ACC Assessors

The interim report explained the assessment process in detail.²⁷ The survey identified that there are systemic problems with this.

PwDI told that they must attend assessments

In the last five years, two-thirds (67%) of respondents had been told by ACC staff that their entitlements would not be paid if they did not attend an assessment with an assessor.

²⁷ Interim Report at Article 17, p 45, paragraphs 128-187.

ACC can and does compel a large number of assessments

Survey data indicates that 70% of respondents had been to more than four ACC-compelled assessments. Of the total sample size responding to the survey, more than half of respondents had been through “6-10” or more ACC-compelled assessments.²⁸ In terms of ACC-compelled assessments, the responses were:

- (i) none (7%),
- (ii) 1 (7%),
- (iii) 2 or 3 (16%),
- (iv) 4 or 5 (14%),
- (v) 6-10 (18%),
- (vi) 11-15 (11%),
- (vii) 16-20 (9%),
- (viii) 21-30 (7%),
- (ix) 31-40 (9%).

In comparison, when asked about independent assessments, 70% of respondents had been to three or less. This is discussed further below.

PwDI's experience with ACC's assessors

Respondents' experiences with ACC's assessors varied, but the survey data showed definite trends overall. Although most people went along to see the assessor happily, they had a very negative experience. Most (60%) respondents were happy to attend the assessment. Only a small percentage (11%) felt the assessor was independent and of those who did not think they were independent (89%), they indicated this was strongly the case. 40% felt the assessor was qualified. Most (81%) felt the assessor did not listen to them and this was a strongly held view. Less than half (42%) felt the assessor allowed enough time. Tellingly, nearly all (87%) said they would not choose to see the assessor again, and only a handful (14%) felt the assessor understood their condition. In addition, (79%) indicated they would not consent to being in a treating relationship with the assessor. Nearly all respondents (90%) disagreed with the assessor's conclusions.

²⁸ This question explicitly excluded the three-monthly assessments by a GP that ACC requires to ensure that the person's disability has not resolved.

Choice of Assessor

Most respondents (59%) have *never* been offered a choice of whom they could see for their assessment.

Of those offered a choice in one or more of their assessments, nearly all (83%) were not able to choose their own assessor, but instead offered a choice from a list of ACC contracted assessors. Of those who chose an assessor from ACC's list, about a quarter (26%) were refused their choice.

PwDI are not being allowed to record the assessments

A third (34%) of respondents had asked to video or audio record assessments. In most cases, the assessor (71%) or ACC (79%) did not support the request. ACC then demands that the person attends without recording and if the person attends and demands to record, the assessor refuses to proceed and the person's entitlement is stopped.²⁹

*Trying to correct information using the statutory processes***Most PwDI had unsuccessfully tried to correct the information on their files**

Most survey respondents tried at least once to correct information on their file. Most (80%) complained to ACC, nearly half complained to the doctor or assessor who wrote the information, a quarter (25%) complained to the Health and Disability Commissioner, and some (17%) complained to a professional body (for example, medical council or physiotherapy board). Only 15% of respondents had not tried to get information corrected. 5% did not try to correct anything because they agreed with everything on their file. The qualitative responses of respondents trying to correct their data will be discussed below. Very few people reported success in correcting information.

PwDI experiences in trying to correct information can be characterised as being sent in circles from one agency to another and never actually being able to obtain appropriate remedies. Some of the individual comments are set out below.

²⁹ Executive Leadership Team Issues Papers: *Strategy for the Future Management of Long-term Claims*, 16 February 2009, and *Level of Provider Choice Offered to Claimants*, 12 October 2009 (Obtained under the Official Information Act 1982), see also for example Review decision 786087, dated 6 September 2012.

All my complaints and attempts to correct information have been blatantly ignored. (R6)

They treated me like a liar. (R8)

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)

The ENT specialist provided a falsified report, which misled the [Reviewer] on two occasions and the District Court Judges on two occasions. I complained to the medical council about the two ENT specialists involved and the old boy network kicked in with them not accepting my complaint. I found ACC and their (two) ENT specialists corrupt and totally dishonest. (R40)

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)

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)

Health and Disability Commissioner [H&D] tell me they will not engage when the issue also involves ACC. [My surgeon wrote a report that was misleading, as it did not include information from previous surgeries]. My experiences of help was that many months [after complaining], the H&D advised me to contact [ACC who then sent me to the] Privacy Commissioner and one of the hospitals [who had the information that] I claimed the surgeon had not included in his report. The hospital [records] were included to my case manager and my GP. Both ACC and my GP could have supported my complaint for misleading medical information, neither did. ACC made further decisions supported by my GP that led to ACC stopping my compensation of \$13 per week. The Privacy Commissioner officially investigated my complaint, the surgeons report was partially “corrected” but ACC and the GP [would not change their decisions which relied on the first misleading report]. The GP said he was not able to change his opinion to the ACC questions asked of him, even though both the GP and ACC actually knew that [their

decisions were based on the misleading report made without reference to the hospital records]. The H&D wrote to wish me luck for the future but did nothing to help (R28).

Complaining to ACC is generally ineffective

Most people have tried to complain to ACC

Most respondents (68%) had lodged a complaint with ACC and nearly all (92%) were not satisfied with how the complaint was investigated. Of those who complained, few (14%) felt making a complaint helped them at all. Most respondents (59%) were not aware that they could review the decisions made on the code complaint.

There is a statutory bar to judicial oversight of the complaints process (s 149 (3)), so breaches of rights and decisions made by ACC staff and assessors on complaints can never be brought into the Court.

Qualitative data gained about the results of making a complaint indicate significant systemic issues and prejudicial behaviour towards complainants.

Obtaining an independent opinion to obtain correct information

Most people have tried to obtain another opinion

Most (70%) respondents indicated that they had tried to obtain another assessor's opinion in response or in contrast to ACC's view of their condition. Of the group who had obtained independent assessments or reports, 70% had obtained three or fewer (mode = 1, median = 2) compared to ACC assessments, where 70% had been to 4 or more and 40% to ten or more.

Respondents who obtained an independent assessment had to overcome significant barriers. The barriers to obtaining independent assessments were: cost (90%), actually finding a suitable assessor (70%), finding an assessor prepared to get involved with an ACC matter (68%), availability of assessor (65%), and getting an assessor to answer the

particular questions (63%). Of this group, most respondents (60%) had difficulty finding an independent assessor. Individual experiences are shared below.

Respondents paid for their assessment in the following ways: from savings (51%), borrowing money (38%), obtaining a loan (14%), and arrangements to pay it off in weekly or monthly amounts (15%). Lawyers and advocates, legal aid and employers also paid for assessments.

Of those who knew what their independent assessment cost, the costs were:

- (i) under \$500 (18%),
- (ii) \$500-\$1000 (30%),
- (iii) \$1001-\$2000 (29%),
- (iv) \$2001-\$3000 (13%),
- (v) \$3001-\$4000 (4%),
- (vi) \$4001-\$5000 (2%),
- (vii) above \$5000 (3%).

Half of respondents indicated their assessment costs were above \$1000, the median was \$1001-2000 and the mode was \$501-\$1000.

Of those who obtained the assessment for a review hearing, less than half (46%) received an award of costs from the reviewer towards the assessment. The maximum amount of costs that may be awarded for a medical or other report is \$900.00.

PwDI described their experiences in obtaining an independent assessment in the following ways.

What is the point of getting/paying for a non ACC assessment as we found that ACC did not take any notice of the assessment. We did this once but found that ACC did not take into account why the independent assessor said because they were “independent” [and not contracted to ACC]. (Q51R2)

Finding an independent assessor was almost impossible. I cannot find a single OT or Dr who is independent from ACC in my district. (Q51R3)

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

If ACC did their job professionally and were not so corrupt, this would not be necessary. People with severe and long-term injuries have enough to contend with without the added stress and cost of fighting a system that is clearly biased and corrupt to the very core! This corruption however, is very well concealed behind a mountain of bureaucracy, paperwork and medical “qualifications”. (Q51R9)

I had to get medical [assessment] overseas as all NZ doctors and providers are members of the Medical Protection Society and protect abuse and misconduct done by their peers. Neither ACC, the [district health board] nor the court would correct their medical information (Q51R11)

As soon as doctors know that I was going against an ACC appointed doctor, they absolutely DID NOT WANT TO GET INVOLVED. I was turned down by numerous medical professionals because they did not want to fight the “ACC GIANT”. (Q51R13)

One of ACC’s goals of course is to starve people out of funds to stop their ability to challenge their decisions at review or in the Court. (Q51R15).

We ended up paying several thousand dollars to get an Australian neurologist because all the NZ ones were either tainted by already being assessors for ACC, or they didn’t want to get involved. (Q51R16)

I started my ACC fight with a well known law firm [who advised me against challenging ACC’s decision]. The reason that the previous law firm could not proceed with my case is that they could NOT find an assessor in New Zealand to go up against the pre-eminent Professor [Smith]. ACC were obviously counting on this. All previous assessments that had been done... were accepting of my injury. (Q51R23)

The need for me to fund an alternative independent assessor was a considerable barrier, which in contrast to ACC’s ability to fund multiple alternative assessment reports to specialists who knowingly find in favour of their views seemed completely unjust. (Q51R30)

[Independent Assessments] needs to be funded. At the moment, the only assessments I can access are paid for by ACC. They say they are impartial, but every year, no matter what I say, they erode a few more minutes of [support]. My [support] is a quarter of what it was and it is still going down. It has gotten to the point where I don’t do recreational things any more and I don’t do things with my kids as much because I just can’t with my condition worse, due to less support to stay functional. (Q51R32)

Once you can find a specialist to listen to you and you have the funds to pay, and you can supply the relevant and necessary documentation for them to get a “feel” for you, then you are well on your way. (Q51R45)

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)

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)

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)

There appears to be an amount of intimidation by ACC which tends to limit the extent independent assessors will provide reports. (Q51R67)

The costs to fight ACC was 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)

Again, I note how hard it IS to get decent doctors to stand up against ACC, and as many honest doctors admit IF they get too offside with ACC, their ability to earn a living is put at risk!

I was informed [by ACC] that it was my choice [about whether to get another assessment] but that ACC would not necessarily heed the advice or findings of “outside” or non-ACC providers/assessors. (Q51R90)

The ACC stranglehold on the finances of the medical profession stands in the way of independence. (Q51R95)

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)

This has become more difficult over time as more and more providers do not want to become involved with ACC. (Q51R106)

Once some therapists realised we were ACC clients, they refused saying ‘we will deny this if ever challenged, but as we rely on ACC, we will not take you on’. (Q51R130)

It is very difficult to obtain a non-ACC assessment as almost all doctors and specialists have contracts with ACC and do not want to upset ACC and put their incomes at risk. (Q51R137)

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)

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)

ACC employ older or semi-retired professionals who they know will tell ACC what they want to hear. When decisions are challenged in a review, the reviewer always accepts the decision of the professional that ACC have in their pocket. (Q51R148)

Medical professionals seemed unwilling to write on paper what they said at the consultation. They seemed unwilling to contradict other professionals – it is unfair ACC dictate the assessor without consultation. Clearly, they give the work to those who regularly find in ACC’s favour.

Why some people did not try to obtain a non-treating assessor

Of the group that did not try to obtain another opinion, 25% did not do so because they never considered it. Nearly half (48%) did not because they could not afford to, and 32% did not know who they could see. Some respondents (11%) indicated they did not get one because they did not think one was necessary, and some (7%) could not find an assessor prepared to do one.

PwDI described their experiences in the following ways.

I had done once and ACC went over the top of it using another assessor and “bullying tactics”. (R2)

Any dwelling on my ACC conflict spirals me into anxiety and insomnia. Filling in this survey will mess me up for a week, but I have decided it is worth it in that it might bring about some positive change for others. (R4)

I asked but I could not afford the fee. Certainly, one of ACC's appointed assessors even said to me that ACC would bully me, and that I should go back to him if that happened, but I couldn't afford his fee. (R5)

I cannot afford a new assessment, as no neurologist is available in my area. (R19)

As well as cost, I am well aware that ACC has far deeper pockets than me, and can hire an enormous number of opinions, so what was the point of going down that path? (R24)

It has become too much to fight a system that is prepared to alter facts and has non-independent review members. (R25)

Cannot afford to do it, ACC relied on that. (R26)

ACC have told me that they are only required to consider reports from ACC registered assessors. (R30)

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.

LACK OF PROCEDURAL FAIRNESS AT REVIEW HEARINGS

Most survey respondents (79%) had some understanding of the experience of the review process, either by personal experience or through being informed by their lawyer or advocate. Some did not attend the review in person.

At the hearing itself, 69% of respondents either felt there was not enough time to deal with all the issues, or did not know if there was enough time.

PwDI's general experiences

Two-thirds (68%) of respondents did not know they could request more time for the reviews. Some felt that the reviewer listened to their concerns, many (44%) did not, and

some felt somewhat listened to (29%). 22% of respondents felt the written decision reflected what went on at the hearing, but many (46%) did not. 28% of respondents felt that the written decision somewhat reflected what went on at the hearing.

Two thirds (64%) of respondents felt the reviewer was not independent, some (17%) felt the reviewer was independent, and some (15%) felt the reviewer was somewhat independent. Of note, 63% felt that the reviewer did not take an investigative approach, some (15%) did, and some felt the reviewer took a somewhat investigative approach (20%).

Information considered at review hearings

Some (22%) were aware that DRSL and reviewers³⁰ had access to all of ACC’s electronic record management system and electronic files. The remainder (78%) were not.

Most respondents (83%) were not aware that ACC had a secret “party status file” which holds personal information, and is commonly not disclosed to claimants. However, some (17%) were aware of this.

21% of respondents did not know whether they had been provided with a full copy of their file or not. Of those who knew, most (58%) had not seen a full copy of their ACC file, and the rest (42%) believed they had. PwDI commented on whether they had seen a full copy of the file in the following ways:

For 8 months dealing with ACC they said that they had no medical records of injury to my neck. ... I demanded all information they hold about me. A week before the review, I was given a copy of the records which they had previously said didn’t exist. (Q74R5)

ACC picks out the information that suits their case against the client. I have evidence of this. (Q74R7)

Over the years I have found that the information that ACC provide to the claimant is not the same as supplied to the reviewer. (Q74R29)

³⁰ Dispute Resolution Services Limited has recently been rebranded to “Fairway Resolution”. It would appear that this process of unrestricted electronic access may have changed as Fairway has informally advised that they no longer have a general right of electronic access to ACC’s records.

I tried to get [the full file] but ACC kept using delay tactics so that I could not have my full file before I had to attend the review hearing. (Q74R34)

ACC give you only what they want you to see. (Q74R48)

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'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)

Nearly all respondents (83%) said there was unfair or prejudicial information on their file.

ACC have a system where requests for information are vetted (mine were sent to the Minister's office) to determine whether or not they are likely to prove embarrassing for ACC, the minister or the Government on the basis of the person requesting the information and the actual information – NOT on whether a person would be entitled to it under the Privacy Act or the Official Information Act. (Q74R14)

I used heroin in 1986 and haven't since. Every "report" from ACC claimed I was a heroin addict. (Q74R31)

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)

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

The fact that I had been sexually abused had been accepted by ACC, though they later tried to say that because I have a mental illness, I wouldn't be able to distinguish between the highs and lows and the sexual abuse that had happened previous to having a mental illness. (Q74R93)

The assessment by Dr [Brown] was false and inaccurate. He said my 'symptoms' were due to childhood factors (I have a sensitive claim with ACC) and had nothing to do with my cycling accident, even though nothing ever stopped me working before, except my cycling accident. I'm so angry. I'm so so angry. (Q74R99)

Conflict of interest. The branch medical advisor arranged the peer review to be conducted by ... herself. She charged ACC for the peer review she conducted in an independent capacity. (Q74R105)

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)

A recent IT sweep provides evidence of very bad non-independent behaviour from DRSL staff colluding with ACC. (Q74R125)

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)

They blamed my time in the mental hospital as the cause of my condition and not the abuse that put me in the hospital. (Q74R152)

They picked on a previous depression after I was raped years ago. (Q74R156)

On file are comments that are completely false. They slander my character and there was apparently nothing I could do about that, even when we won at review. (Q74R159)

They have incorrect details due to [me] not being listened to properly. (Q74R178)

ACC are only concerned with their own agenda and have/will lie to get what they want – I have all the evidence of this. (Q74R191)

ACC's attendance at the review hearings

Most respondents had experienced ACC attending review hearings in person (71%) and by telephone (52%). Some had experienced ACC not attending at all (14%) and ACC attending by videoconference (2%).

Both times they put us up against a lawyer which I did not think was fair. (Q76R3)

[I felt] intimidated, I felt their word was given more credence than mind. (Q76R9)

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)

I got very agitated and upset and cried, I felt overwhelmed even though I am not a stupid person and know how ACC works. (Q76R13)

I was not taken seriously. (Q76R36)

I felt scared, nervous and anxious. (Q76R37)

ACC couldn't even be bothered to send someone in person [to the hearing], even though this could have changed my whole life!! (Q76R49)

[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! I was the most traumatic experience from me and my parents who attended! (Q76R61)

[ACC's] lawyer was appalling. I had been drug raped and she called me a drug addict – I have never abused social drugs – she retraumatised me. (Q76R63)

I find the team managers that are usually the cause of the problems that arise because they try and push the case managers around. With telephone and video conferencing you will not see that is happening. Also, [I] think the bonus system is unethical, where case managers can be paid to get people off ACC's books and is part of the problem. (Q76R64)

[I felt] intimidated because I was up against a professional. (Q76R69)

[I felt] embarrassed, uncomfortable and sickened. This guy [prominent lawyer] sat directly opposite me and spelled off how ACC can't listen to me about whether the sexual abuse occurred when that was not the question at all. The question was did the [whether the] sexual abuse impact [led] to an overdose. (Q76R78)

ACC staff would not look at me, and only spoke to me in the 3rd person via the reviewer. This is extremely rude and intimidating. (Q76R96)

I think ACC claimants should be told if ACC will send a lawyer to a review hearing. (Q76R126)

I was made to sit next to a security guard in a pre-specified place. This was very intimidating and humiliating. I have never been abusive or violent – EVER. (Q76R137)

Most recently, they sent a legal counsel. I felt abused that they were using their massive budgetary resources to swat me like a fly to be quashed. (Q76R152)

I felt very threatened by their team of two barristers, head of department and case manager. (Q76R154)

They don't front up, its bullshit, nor do they swear an oath as we have to. (Q76R162)

POST-HEARING PROCEDURAL FAIRNESS

There is no remedy if ACC does not comply with the review decision

ACC complied with the review decision in just over half the cases (54%). In some (32%) they somewhat complied and in some (14%), they did not comply.

Although the review decision is binding on the parties (Accident Compensation Act, s 133), there is no remedy for a PwDI if ACC refuses to comply with a review decision. The person cannot appeal the refusal to comply to the District Court, as it is ACC's refusal, not the review decision, which is wrong. The reviewer declines to reopen the case as they are *functus officio*.

I had to go through the review and court appeal process again and again. Grrr grit the teeth. I also sought the intervention of the Ombudsman to intervene. They were helpful but ACC (Board Secretary) still tried to mislead the Ombudsman... I had to wait over 9 years to get the costs awarded at the hearing paid. (Q91R34)

ACC buys time to create stress and frustration so individuals back off due to all pain and suffering. (Q91R40)

[ACC] drag the chain as much as possible. Everything they did was reluctant and they weren't interested in my Rehabilitation, just terminating my entitlements. (Q91R51)

[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)

Because I could not continue with my advocate through lack of money, the reinstatement [of my compensation] that he achieved for me with conditions was not fulfilled because ACC did not accept the historic head injuries without [my advocate] still representing me. (Q91R89)

I contacted IRD, lawyer. My member of parliament phoned ACC many years later and they finally complied. (Q91R93)

I rang ACC complaints to try and get ACC reinstated. Waste of time (Q91R107)

They dragged their feet and six months after the review decision, they had still not done what the reviewers suggestions. (Q91R112)

Review decisions are often unclear

Most respondents (55%) said the review decision was clear, but this is often not the case and many (45%) said that at least part of the review decision was unclear.

The review process is often unhelpful overall

Almost half (48%) felt that, overall, reviewing ACC's decision did not help. Some (31%) felt that it helped to a limited degree, and some (21%) felt it helped.

PwDI recorded how the review affected ACC's behaviour towards them in strong terms.

It just made them come at me like I'm the enemy of the state. (Q94R9)

They got nasty and sent me for more assessments. (Q94R17)

They became more determined to find ways to disentitle me including "fraud investigations". (Q94R18)

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)

They cut my payment from \$20 per week to nil. (Q94R35)

They were communicating behind my back with the Dispute Resolution services. (Q94R48)

ACC found another assessor to discredit the assessment that helped me win my review. (Q94R53)

ACC build barriers, not bridges. They are dishonest and manipulating. (Q94R62)

If you are fortunate to be a lawyer like myself then the review process can work for you. However given that I had to lodge 30 reviews and 4 appeals to claim what I believe is fair, I doubt it works for the lay person. (Q94R105)

They were mean.... I am a survivor of a serious crime and my injuries that I cope with every day are a reminder to me. ACC perpetuated the continuance of high level distress and someone has to stop them doing this as they are causing inconsolable grief to badly injured people. (Q94R114)

They changed their approach to exiting me, now they are saying that I am “malingering”. Q94R157

I was called a leech. (Q94R187)

Nasty. One of the most distressing incidents was when my GP told me that ACC had advised her that I would be very rich as a result of finally having their decision overturned in court. This was while they were still trying to find ways not to pay my awarded back pay compensation. I had so much debt to pay back, was about to lose my home, and I felt like a criminal and wanted to end my life. (Q94R191)

They won at review, then lost at appeal. Then they sent investigators to hound me. (Q94R287)

RELIABLE EVIDENTIARY PROCEDURES

SUMMARY

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.”

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. Reviewers seldom give reasons why such discretion is exercised and it appears there may be some policy approach or alternatively it reflects an institutional bias to accept ACC’s position.

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. PwDI experiences as recorded in the survey identified the following systemic problems.

- (i) ACC nearly always rely on “evidence” from their file that is wrong, inaccurate, out of date or misleading.
- (ii) ACC nearly always rely on “hearsay” that cannot be effectively tested by PwDI at the hearing.
- (iii) ACC nearly always rely on “opinion” evidence from their staff that cannot be tested at the hearing.
- (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.

THE LAW RELEVANT TO RELIABLE EVIDENTIARY PROCEDURES

The Accident Compensation Act at s 141(4) provides that a reviewer may:

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.

The law surrounding the exercise of discretion in New Zealand requires it to be exercised properly and reasonably, and reasons should be given as to why the discretion was exercised. Whilst the discretion is wide, settled principles of common law and relevant provisions of the Evidence Act 2006 should nonetheless guide the reviewer, even though it does not govern the review proceedings. Reviewers do not commonly accept this limitation on their discretion.

Settled principles of common law and the relevant provisions of the Evidence Act

The purpose of the Evidence Act is to help secure the just determination of proceedings by:³¹

- (a) providing for facts to be established by the application of logical rules; and
- (b) providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990; and
- (c) promoting fairness to parties and witnesses; and
- (d) protecting rights of confidentiality and other important public interests; and
- (e) avoiding unjustifiable expense and delay; and
- (f) enhancing access to the law of evidence.

The Evidence Act collated the common law principles into a statute and these would apply in the following ways:

- (i) **evidence** should generally be given in the “ordinary way,” which is orally **under oath** in the presence of the judicial officer and the parties to the dispute, unless a sworn affidavit is admitted by agreement;³²
- (ii) **hearsay** evidence is generally excluded;³³

³¹ Evidence Act 2006, s 6.

³² Evidence Act 2006, s 83.

- (iii) **opinion** evidence is generally excluded;³⁴
- (iv) **expert evidence** means the evidence of an expert based on the specialised knowledge or skill of that expert and includes evidence given in the form of an opinion and the expert must comply with rules which are designed to ensure independence and integrity of the expert evidence.³⁵
- (v) the fact finder can only rely on evidence that has been provided to the parties in advance and has been tested at the hearing.³⁶

Government's response

When asked about reliable evidentiary procedures, the Government stated that either party **can** provide evidence to be considered to support their position.

Government response does not accurately reflect the actual situation

Whilst the Government's response is legally correct, it does nothing to reflect the real situation in New Zealand. The law operates in a way that denies access to justice for PwDI as it does not provide enforceable, reliable evidentiary procedures and instead relies completely on an exercise of discretion, which appears to result in injustice on both an individual dispute level and a systemic level.

The Government ignores the objections in the interim report about lack of reliable evidentiary procedures and the control ACC holds over the process. The situation is such that there appears to be widespread systemic injustice regarding the admission of evidence at review hearings, and there would be no way of knowing of this problem. PwDI are supplicants to the exercise of discretion, rather than participants who can compel compliance with the law. They are subject to discretion in a way that does not apply to other New Zealanders.

It is true that PwDI can provide evidence, but as identified above, there are significant barriers to doing so. Most PwDI are self-represented, have no income, and struggle to obtain independent evidence.

³³ Evidence Act 2006, Part 2, subpart 1, s 17.

³⁴ Evidence Act 2006, Part 2, subpart 2, s 23.

³⁵ Evidence Act 2006, s 5, definition of expert evidence, and ss 25-26.

³⁶ The principles of natural justice, the right to be heard and to reply to the evidence presented.

SURVEY DATA: RELIABLE EVIDENTIARY PROCEDURES

The evidence relied upon by ACC at review hearings

The standard process followed by ACC is to provide information to the review hearing and to rely on this as “evidence”. This is discussed above in procedural fairness. The focus of this section is how reviewers exercise their discretion with regard to this information provided by ACC being considered as “evidence”.

Once ACC “decides” what information is “relevant”, that is the information that travels through to the [dispute resolution] system right up to Appeal. Due to the time constraints, the court now ignores everything but the medical “expert” opinions on the case so the ACC selected “evidence” is crucial. Totally unfair and lawless in my view, particularly as few ACC staff have any medical know how and seem proud of this. (Q78R310)

ACC relies on evidence from their file that was inaccurate or wrong

80% of respondents said ACC relied on evidence from the file that was wrong or inaccurate. Few (8%) said ACC did not and some (11%) didn’t know.

Some (37%) had been given the chance to ask specific questions of ACC, nearly half (48%) had not, and some (16%) did not know.

Wrong information is being provided to review hearings by unsworn ACC staff

In practice, it is rare for ACC staff to formally give evidence in the “ordinary way” or have their evidence tested. Most respondents recall that ACC did not swear an oath (53%). Some did not recall (35%) and few (12%) said ACC staff did swear or affirm to tell the truth. Reviewers regularly state “ACC staff only make submissions so they do not swear to tell the truth.” This overlooks the ACC staff member’s interest in the case and having their decision upheld, and presents a clear conflict of interest that is overlooked.

When asked whether all of the information given by the ACC staff member to the review hearing was factually correct, half (49%) said no, many (40%) said not really, few (12%) said it was.

PwDI experiences show the scale of this problem.

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

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)

[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)

After the review hearing (which we lost) we went about preparing for the [court] hearing. After a year of so, we get a letter from some hot shot lawyers that ACC had hired and they said that ACC wanted to settle without going to court. The filth that they are. (Q78R17)

The case manager was the most unethical human I have ever met. (Q78R33)

The case manager and reviewer failed to include all injuries despite being informed I have more than one directly associated with the same original injury and claim number as these were accepted as part of the same claim file in the 1980s. He omitted to consider subsequent injuries that affect my health and whole body. (Q78R36)

[ACC case manager] used opinions instead of facts. (Q78R39)

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)

Information that I had previously complained about to ACC as incorrect was included in review. (Q78R56)

It's disgusting, so unjust and so corrupt. [ACC sent my file for a medical case file assessment before the review hearing]. The [assessor] they chose – I saw her independently years ago and shared some sensitive information with her at that time, as she was a female and I clearly trusted her back then to share this. But she totally ignored this and turned on me in the file assessment. My legal advocate only received this file assessment the day before the hearing, [despite it being dated a month earlier]. It added trauma, was totally insensitive ... I was trying to prepare for the daunting hearing, I wasn't able to process this new damning material and my advocate had next to no time to prepare any comeback from this new material. Again, unfair, unjust and brutal. (Q78R58)

She called me a drug addict immediately when the reviewer closed the hearing – about five seconds later. (Q78R60)

Facts were muddled up by them ... it was an experience that was derogatory, embarrassing and I felt uncomfortable. The man [ACC's lawyer] was probably about the same age as the man who abused me as a child. (Q78R77)

[What ACC staff said] could not have been further from the truth. The surreptitious lies and manipulation of the facts was rife. I had always kept meticulous notes of every dealing I had with ACC so could categorically prove that they were lying or twisting the truth. They also stooped to removing information from my file, change parts of an independent assessment reports, inform assessors what to include in their so called 'assessments' prior to and after the assessment... (Q78R79)

[The ACC staff member] gave information about a [criminal] conviction that wasn't relevant and also tried to discredit me on several other occasions. (Q78R87)

ACC case manager fabricated information, lied about information received by ACC and also when ACC received information. (Q78R99)

On one occasion [my case manager] gave me a right dressing down that I had won a race on a cycle. I then had to explain I won a handicap race, seemed odd to me that I then had to explain what was meant by handicap. ... At another hearing, the ACC hearing officer asked me to take off my tops so as to expose my back to her. While [my lawyer] was explaining this was out of order, and that he can't see how a Reviewer is going to medically assess me, I continued to strip down to my waist and turned around slowly.... (Q78R101)

ACC claimed that [she] had a mental condition prior to being given psychoactive prescription drugs, despite medical records showing she had no psychiatric or suicidal history of any sort until doctors prescribed psychoactive drugs. ACC showed deliberate intent to cover up that deal was caused by the medications. (Q78R119)

During one of my hearings, an ACC staff member gave very misleading information. The Reviewer asked ACC staff member to clarify and think about if

what they were saying was correct. ACC staff are not asked to take an oath or affirmation when speaking at review hearings, however ACC claimants (and spouse) were asked to take an oath or affirmation before speaking at all! No choice was given! (Q78R121)

ACC staff and there lawyers have been caught out lying numerous times, but that appears to be all good. (Q78R124)

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 – DRSI 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 [Mrs Lawyer] 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)

They presented the reports that justified their case and withheld the reports that were not helpful to their case. (Q78R155)

ACC presented legal case law at the last moment. I have not 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)

This raises significant problems for injured people. There is no remedy when ACC staff do not give correct information at a review hearing. Code complaints are not valid as the behaviour happens at the hearing, and because the staff are not on oath, there can be no criminal complaint regarding perjury.

ACC relies on hearsay evidence at the review hearing

61% of respondents said that ACC relied at the hearing on something someone else had said. Some (23%) couldn't remember and some (15%) said ACC did not. Most common was reliance on what assessors had said (73%), and other ACC staff had said (67%), but a significant number reported that ACC relied upon other sources including former employers (13%), employers (9%), neighbours (7%), media, police and family (5%), ex-partners (4%) and trademe³⁷ (1%).

³⁷ New Zealand website where members of the public can trade things, similar to ebay.
<www.trademe.co.nz>

Nearly all respondents (89%) did not agree with the third party comments on ACC's files. Few (7%) did and few (4%) were not sure. Two-thirds (68%) of respondents were not given the chance to challenge what the other person had said.

Opinion evidence from ACC staff is presented to the hearing

56% of respondents indicated they had experienced ACC staff giving their opinions at the review hearing, 22% had not and some did not know (23%).

[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)

The case manager incorrectly “diagnosed” my medical condition (contrary to Medical Specialists). The case manager stated as fact how the injury occurred – but this was her opinion only. The case manager quoted from “records of phone conversations with the claimant” but no phone conversations ever took place! The whole review process is a kangaroo court. (Q78R55)

Expert evidence is not given in the ordinary way or tested at the review hearing

Of note, 73% of respondents had never asked an assessor to be available at the hearing to answer questions. Some (11%) had, and some (17%) did not know if they had.

Of those who had asked the assessor to attend, data indicates an assessor rarely attended. The reviewer did not support most requests (61%), some (14%) were supported by the reviewer and a quarter (25%) did not know whether the Reviewer supported the request or not. ACC only rarely (3%) supported the request, and usually opposed it (77%), some did not know ACC position (21%).

Out of all respondents, only three indicated they had ever had an assessor attend a review hearing. Our data indicates that an assessor virtually never attends review hearings to give evidence and allow their evidence to be tested. This is consistent with the authors' experience.

The importance of having oral evidence given in the ordinary way and being properly tested before being relied upon as evidence is highlighted by the experiences of PwDI contained in the survey.

A case manager had re-worded part of a Physicians report that totally altered the meaning. This information was presented at 'review' in its altered state. (Q75R55)

In another review held in Whangarei before reviewer [name withheld], he formed an opinion based on false and misleading information that [an ACC staff member] had formed an opinion about, that was outside of their qualifications, knowledge and scope of practice. (Q78R36)

My partner (at one stage) listened in to the conversations from the OT, as we realised that she said one thing to me, but when any information came back from ACC, she had written something else. With a serious brain injury, life is hard enough as it is, without increased doubt and anxiety caused by people taking advantage of you (Q100R32).

Reviewers rely on evidence that was not presented at the hearing

Of those who knew whether the Reviewer had relied on evidence not presented at the hearing, 44% of respondents said that they had, whereas just over half (56%) said the reviewer did not.

The importance of having evidence properly presented, heard and tested is illustrated by PwDI's experiences from the survey.

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)

The reviewer lied and entered false information. I have my actual response on tape. (Q94R255)

Virtually everything the case manager said was a lie. The review was adjourned without conditions. This was so the reviewer could get information from two other parties that were not at review... The review decision favoured ACC. None of the evidence I presented (documented) was mentioned in the review decision document. The DRSL reviewer [name withheld] stated in the review decision document that he had found me to be an uncredible (spellings wrong I know) witness. He offered absolutely no evidence to support this claim. This guy was as corrupt and bias as you could possibly get. (Q78R100)

A CASE STUDY ON HOW DISCRETION IS EXERCISED AND THE FAILURE OF EXISTING MECHANISMS TO ADDRESS THIS

The inability of the appeal process to resolve these issues can be demonstrated by referring to one recent case. The treating expert gave sworn evidence, was cross-examined and answered all questions from the reviewer and ACC. No competing “evidence” was given for ACC. ACC’s representative was unsworn and attended by teleconference. ACC’s representative gave an opinion on what they thought the actual injury was, which differed from the treating expert, but the treating expert was not asked for comment.

In her decision, the reviewer exercised her discretion about admitting evidence in the following way: she disregarded the treating expert’s evidence (without providing any reasons for doing so) and instead relied on what Wikipedia said about the injury that had been identified by ACC’s unsworn representative.

There was no opportunity for the person to present information as to why the ACC representative was mistaken (because the review ran out of time), or why Wikipedia should not be relied upon (because none of the parties had raised the Wikipedia entry at the review hearing).

On appeal four years later, the Court simply quashed ACC’s decision, but the systemic problem of reviewers relying on what Wikipedia said, and relying on unsworn “evidence” from ACC’s representative at the hearing, was simply ignored by the Court as it was a *de novo* hearing. The individual was eventually successful, yet the systemic problems remain.

CONCLUSION

The Government appears to have a conflict of interest between its responsibilities under the Convention and its need for fiscal performance from the Accident Compensation Corporation. The Government appears to have done nothing to properly consider ACC against the Convention. The Government's response to the committee's list of issues is a simplistic misrepresentation of the real situation in New Zealand. Nonetheless, it is now clear that New Zealanders with disabilities caused by personal injury are unable to obtain access to justice. Obtaining this dataset is the State's obligation under the Convention. Instead of assisting in this process, the Government has actively avoided their responsibilities. Given the data we obtained, it seems this was possibly a case of willful blindness.

The data shows that PwDI experience widespread and systemic breaches of their rights under the Convention. The data conclusively shows that the current system does not provide mechanisms that in fact allow PwDI to overcome barriers against access to justice.

Over 300,000 New Zealanders live with a disability caused by accident or injury. ACC only provides support to a small percentage of these people. Available data shows that most people who have ACC entitlements stopped continue to have a significant disability experience. It is reasonable to believe that a large percentage of these 300,000 people may have had their support removed unlawfully, but been unable to challenge that.

No official data has been provided to show the Committee the scale of the problem. We acknowledge that this survey data has limitations. Nonetheless, we maintain that the scale of the problem is systemic, and from a human rights perspective, each individual violation is significant. It is important to note that this report has been conducted without any Government support, and the Government agencies in fact declined to assist to make the survey more representative. It would be inappropriate therefore for the Government to now criticize the survey on these grounds, although we fully anticipate that.

Acclaim Otago has asked the Committee to take note of the systemic failures set out in its Interim Report, Shadow Report and survey results. In its Shadow Report, it respectfully requested that the Committee make the following recommendations to the Government, which were endorsed by a consensus of experts in this field in New Zealand.

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.