SHADOW BRIEFING: MINISTER AND ASSOCIATE MINISTER FOR ACC

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INTRODUCTION

The following advice is provided to you on the basis of the authors' experience with ACC at all levels in legal, professional, political and research-based contexts.

The authors have nearly a decade of experience in dealing with ACC at all levels, including holding it into account using legal, conciliatory, political, and public relations mechanisms.

This shadow briefing: firstly provides an executive summary; then draws your attention to key tensions in the scheme that we believe you will be repeatedly confronted by as Minister. It then lists some specific policy issues that require Ministerial attention, and provides you with a selection of issues that have been raised in the media during the last few years.

We are available to consult with the Minister, Associate Minister, or their representatives on these issues. We emphasise that the purpose of our attempts to engage with the Minister are on the basis of a need for constructive criticism of advice received from ACC and other agencies.

EXECUTIVE SUMMARY

The core policy issue in the ACC system is the absence of a competing voice to ACC on ACC issues. It must be recognised that ACC is an institution itself, with its own interests and priorities. We have prepared this briefing to assist you to ask questions of ACC that we will be asking publicly and in other forums.

As a Minister, we suggest to you that this absence of competing advice will be the problem most likely to cause you difficulties, or prevent avoidable issues from escalating. No part of the system can be considered in isolation.

An associated issue is the tension between financial and political imperatives on ACC, and the status of the ACC scheme as a self-contained legal system.

Public trust and confidence in the system is generated when: (1) people get what they believe they are entitled to according to their need and the law; and (2) where ACC disagrees with them on the law, they have a fair chance to have an independent institution persuade them that ACC's decision is a fair application of the statute.

The Courts' role is limited to adjudicating individual disputes and provides no oversight of systemic policy and practice. The Courts often explicitly refuse to hear complaints about systemic issues or service failures.

The scheme itself, even if lawfully administered, can be unfair. Unfairness can arise from specific policy problems in the statute. It can also arise from the way that ACC interacts with other institutions that manage personal injury. There is no single institution in New Zealand responsible for coordinating the efforts of the many institutions that play a role in preventing and managing personal injury.

A common theme through these issues is the difficulty of demonstrating whether a particular problem is a case of "one bad apple", or whether there might be a systemic nature to the problem. We emphasise the positive pockets of change within the organisation and the difficulties they sometimes find in trying to do the right thing against the organisation that employs them.

The best way of identifying systemic problems is to have reliable data about the operation of the personal injury system. ACC uses data to defend itself against criticisms. Civil society organisations generally do not have faith in ACC's data.

There is a consistent historical legacy of independent offices criticising ACC's reluctance to receive and learn from criticism. We suggest that one reason criticism is not well received is because it cannot be properly targeted. In the absence of nuanced data and transparent organisational structures, criticism is unfairly levelled against the whole organisation.

To provide this competing voice, we recommend a competent, independent, long-term statutory body that becomes a useful institutional partner to ACC in its management of the scheme. We believe that public trust and confidence requires this institution to be independent from the Executive because of the financial implications of ACC's outstanding claims liability and asset-base on executive government.

KEY TENSIONS IN SCHEME MANAGEMENT

1. The scheme is planned at a high level on an **actuarial and epidemiological basis**. Those disciplines take data about past events and use them to predict future events. They create a population-level prediction about the future. By contrast, the ACC statute and the judicial process requires careful consideration of the **evidence in an individual case**. Too often, ACC (wittingly or otherwise) treats individual people who do not fit these idealised future profiles as being problems. For example, ACC assigns a predicted recovery timeframe drawn from population-level data, and then becomes suspicious of individuals who deviate from that prediction.

2. ACC **does not consult regularly or effectively on policy issues**. This has been noted by independent government institutions as well as being a common criticism by civil society, including the Advocates and Representatives Group set up by ACC for that purpose. When ACC does consult, **consulted parties are hampered by a lack of access to information to critically evaluate proposals**, meaning ACC may proceed based on flawed assumptions. Any information ACC does have is not seen as being reliable. ACC would do better to consult with organisations at the outset on what data they should be collecting and any issues to look out for, rather than collecting the data and then receiving the criticisms later.

3. There is an understandable emphasis on financial viability of the scheme, but that cannot be permitted to play any role in ACC's application of the law. The law sets out the boundaries of the scheme in advance. **Injustice and perverse incentives result from situations where ACC adopts different positions over time in relation to the same legal tests based on its own interests**. The law, as far as possible, is meant to be static and allow people to rely on it in advance. Like cases must be treated alike. There will always be cases at the margins, but it is **illegitimate for these to be determined narrowly on the basis of ACC's own financial imperatives**.

4. There is a perception that, because ACC is a relatively generous and unique scheme, that any criticism of it is somehow unwarranted. There was a concerted

effort from 2009 onwards to generate a culture of financial stewardship at ACC that took a **restrictive approach to the scheme** on the basis that a minimum application of the statute was appropriate. That needs to be contrasted with the Government's obligations under the **United Nations Convention on the Rights of Persons with Disabilities** and the nature of the scheme as a set of legalised entitlements that people are entitled to rely upon and should be interpreted "expansively" in light of the social, political, and economic objectives of the statute.

5. For whatever reason, over time, peoples' right to cover and entitlements has become a matter of law determined on the basis of the legislation. This means **disputes with ACC are inevitably legal disputes**. They require access to legal advice, medical evidence, legal representation and fair process. **Any attempt to treat these disputes as being informal ignores the fact that ACC itself is required to (and does) treat them legalistically**. While some aspects of formal process can disadvantage claimants, other aspects of process are basic to natural justice and fairness.

6. The scheme places a lot of emphasis on **substance** regardless of **process**. The attitude generally is that dispute resolution emphasises the substantive correctness of ACC's decision about whether a person meets the tests for cover and entitlements. That is important, but **people will not accept a substantively legitimate decision procured by an unfair process**. These process failures linger and include issues like access to information, consent to undergo treatment, and perceived misrepresentation by ACC staff.

7. **ACC and its staff move on, but people with sincere grievances against ACC do not**. While ACC is appropriately focussed on improving itself in the future, there has to be some way of dealing with the people who deal with the consequences of the "pendulum swings". ACC's response to access to justice issues was to suggest only 3% of claims are declined, but for this 3% the consequences are catastrophic and life-changing. We believe vulnerable groups are overrepresented in this 3% of people. The only way to help people move on is to take a pro-active person-centred approach to dispute resolution, including managing those people into other social services where appropriate. **People will only accept being moved on from ACC if they believe a fair process has been followed.** In a dispute, trust has broken down and it cannot be restored solely by assurances from ACC.

8. **Policy changes have an equal if not greater impact on individuals than legal changes do**. There is no remedy for a policy change. ACC does not go back and put people back on again when it changes its policy or a judicial decision criticises ACC's policy. The **onus is put on individuals to approach ACC again**.

9. New Zealand has reconfigured personal injury from being a private matter between individuals, to a matter of public dispute with the State. Accordingly, the same issues that face any person dealing with a large state agency are relevant to a person's injury experience. **There needs to be a concerted effort to enhance peoples' access to mechanisms that equalise power imbalances** between the state and individuals, such as the Privacy Act and Ombudsman.

10. In any situation where someone is suspicious of ACC's behaviour, the only basis for having any confidence in ACC's decisions is by independent oversight. That means ACC must make itself absolutely transparent to independent medical and legal experts at a systemic and individual level. **The dispute resolution process and the relationship between individuals and their treating practitioners must be given the highest priority.**

LEGAL AND POLICY ISSUES REQUIRING MINISTERIAL SCRUTINY

1. **Review Costs Regulations:** The amendments to the Review Costs and Appeals Regulations have been allowed to linger and this has undermined confidence in the Government's commitment to access to justice for ACC claimants and its commitment to the Miriam Dean recommendations. Each dispute heard under the old regulations perpetuates the financial impact on claimants and their representatives and is a significant barrier to the effective operation of the dispute resolution process.

2. **Quantification of "decisions":** ACC cannot measure the number of "decisions" it issues to decline cover and entitlements every year. Each decision can come a dispute, and therefore it is impossible to quantify the impact of ACC's policies and decision-making on the dispute resolution process and on other interrelated medical and social services. This is an example of how the system has been set up according to ACC's needs, rather than according to the statute and wider policy issues.

3. **Shaping Our Future historic grievances:** We have seen no evidence that Shaping Our Future will have mechanisms to deal with historic issues caused by ACC's culture and management of the scheme. It is solely forward-looking, and historic issues pose a significant financial and legal risk to the implementation of the programme and its outcomes.

4. **UNCRPD:** The previous Labour Government ratified the United Nations Convention on the Rights of Persons with Disabilities in the Disabilities (United Nations Convention on the Rights of Persons with Disabilities in the Disabilities) Act 2008. We obtained a recommendation from the UN Committee about the UNCRPD but we have seen no evidence that ACC has conducted any analysis of the consequences of that recommendation.

5. **Advocacy Services:** The Miriam Dean recommendations have been left to ACC to implement, in particular the advocacy services recommendation which was not welcomed by ACC and is a significant check on ACC's power to operate unhindered. This has undermined trust and confidence in their implementation and work done on them. ACC is highly reluctant to relinquish power, and the ACC Board has yet to hear options despite the recommendations being put to ACC more than a year ago.

6. **Privacy and predictive risk modelling:** In 2017 the public was made aware that ACC was using predictive risk models. We are unaware of the specifics around this and any ethical oversight over this process and its uses. This is unacceptable and ACC should have been aware that it would be unacceptable given the response to MSD's similar proposals.

7. **Tax on backdated weekly compensation:** There has been acknowledged issue for many years about the unfairness resulting to claimants receiving large backdated payments of compensation and interest when they successfully challenge an ACC decision. It means that even when a claimant wins in Court, they are still taxed at a rate that means they are not fairly compensated for the consequences of their injury or the legal dispute they have conducted with ACC.

8. **Fairway sale and oversight:** In 2017 Fairway was sold with no public consultation or tendering. That decision can only be seen as a deliberate attempt to avoid public controversy that Fairway and the Minister must have known would result, given the controversy that resulted from the proposed changes around the ACC tribunal, and the shadow report to the UNCRPD on process issues with the review process.

Fairway is no longer subject to the Official Information Act 1982, which is unacceptable, and severely undermines trust and confidence in that process.

9. **Section 114 (Interest):** A substantial number of the cases heard by the High Court and Court of Appeal in recent years on ACC issues have related to the payment of interest pursuant to s 114. The judiciary has adopted reasonably differing position on the interpretation of that section, and also noted the differing policy factors underlying its interpretation. This is a clear matter suitable for statutory amendment following consultation to clarify the law and reduce the amount of litigation on this issue.

10. **Medical Issues Working Group:** There has been no observable progress from the Medical Issues Working Group. It has just concluded its fourth of four sessions. It is clear there is a present and impending issue with access to medical evidence and this has been hampered by ACC's conduct of the group and its refusal to provide meaningful information to the group. It is also clear that ACC has treated the group as a question of access to a supply of medical evidence, rather than a question of fair procedure and limiting the demand for evidence by less litigious administration of the scheme.

11. **Causation:** The statute is organised around causation tests that form the boundaries of the scheme and occupy a lot of ACC's time and resources. These causation tests lead to disputes that require access to lawyers and access to medical evidence. As a concept, "causation" can be interpreted widely or narrowly and it is a difficult test to apply with consistency. We have suggested that "causation" could be defined under the Act in order to better indicate to the Courts and to ACC the policy imperatives that should influence determination of whether a causative link is present. This would allow a more cohesive body of case law to develop and properly focus argument on the policy and purpose of the scheme rather than a contestable notion of "causation".

12. **Personal Injury Commissioner:** We have made our position clear that the system would benefit from a dedicated statutory Commissioner to develop expertise and provide alternative advice in this complex area. We have set out the policy basis for this proposal elsewhere and would be pleased to brief you on it further.

SELECTION OF MEDIA REPORTS

A list of media reports is available on request if not already available from Ministerial staff. We would be happy to collate these reports for the Minister if it would assist.

AUTHORS' QUALIFICATIONS

We are able to provide a list of our qualifications and experience in this area upon request.