



16 March 2012

Civil Legal Aid Framework Consultation
Legal Aid Services
Ministry of Justice
19 Aitken Street
DX SX10125
Wellington 6145

Proposed fixed fee framework for ACC legal aid

Thank you for the opportunity to comment on the proposed *New fees framework for civil (ACC) legal aid providers* (consultation paper). The New Zealand Law Society (Law Society) has consulted with senior ACC legal aid lawyers about the proposed fixed fees and this submission reflects their feedback.

1. Executive Summary

- 1.1 ACC is not an area of law that is suited to being funded by fixed fees. Cases are generally complex, and a “one size fits all” approach, such as is proposed under a fixed fees regime, is not appropriate to ACC cases.
- 1.2 There is a small pool of senior lawyers currently undertaking ACC legal aid work. They do this work out of a sense of social conscience, dealing with what they describe as a flawed system, and heavily subsidising their ACC legal aid clients. The proposals in the consultation paper would reduce further the amount of legal aid available and would exacerbate the difficulties with the current system.
- 1.3 The proposed fixed fees are based on flawed data that does not represent the economic reality of ACC legal aid cases. The level of the proposed fixed fees grossly under-estimates the actual cost of conducting ACC cases. There is a significant disparity between actual hours worked by ACC lawyers and hours claimed under ACC legal aid. This disparity is in effect a subsidy being paid by ACC lawyers.
- 1.4 ACC lawyers strongly believe the proposed fixed fees are too low. The proposed fees represent an estimated 19.5% reduction in current ACC legal aid grants, which are already inadequate to cover lawyers’ actual fees. At the proposed rates, senior ACC lawyers will be unable to meet their overheads, pay their staff, or spend the required time supervising junior lawyers. They will find it extremely difficult to make a business case for continuing to undertake ACC legal aid work. If the proposed fixed fees are adopted, these lawyers indicate they would have no option but to significantly reduce their ACC legal aid work or cease to do it entirely.
- 1.5 The Law Society as the regulator of the legal profession is particularly concerned that the low level of the proposed fees is likely to push ACC practitioners to ‘cut corners’. If this were to happen, lawyers could be at serious risk of breaching their professional obligations under the Lawyers and Conveyancers Act 2006 and the Rules of Conduct and Client Care.

ACC practitioners tell us that this risk would be a key reason for their cutting back on ACC legal aid work.

- 1.6 If the proposed changes are made, there is a risk that the purpose of the Legal Services Act 2011, to provide legal services to people of insufficient means, will be defeated. There is no alternative system of legal representation for ACC claimants: there is no equivalent to the Public Defender Service that is available in criminal cases. If the proposed fixed fees are adopted, the likely result will be a significant inequality of arms as between individuals and the ACC, and access to justice for many claimants will be threatened. The quality of ACC legal aid representation will very likely diminish and there will be a corresponding increase in litigants in person. These changes will cause delays and increased costs within the justice system.
- 1.7 The Law Society is aware that all justice sector agencies are required to operate within the 2010/11 baseline funding for the next four years. The Ministry's review aims to reduce legal aid expenditure by 10%. While the financial pressures facing the government are acknowledged, we query whether the cost of ACC legal aid is in fact significant enough to warrant the changes proposed, particularly in light of the likely consequences. According to data provided by the Ministry, the gross cost of ACC legal aid for claims likely to be affected by the proposed fixed fee changes was \$1,859,843.08 for the 2011 calendar year. This represents 1.08% of the total legal aid bill. Deducting recoveries, the net cost for ACC legal aid to 31 December 2011 was \$1,050,065.30, or 0.6% of the total costs of legal aid.

2. The complex nature of ACC legal aid work

- 2.1 ACC cases where legal aid funding is sought are very often complex, and a "one size fits all" approach, such as is proposed under a fixed fees regime, is not suitable for this type of work. As one ACC barrister put it:

"I view the elements ... in the preparation and developing of [an ACC appeal] as equivalent of High Court type litigation of a medium to high complexity."

- 2.2 A leading ACC practitioner has provided the Law Society with a detailed account of the complex processes involved in a typical ACC legal aid case. This is set out in **Appendix 1**.
- 2.3 ACC cases are generally fact-driven, a wide variety of issues can arise, and considerable, complex and often conflicting medical evidence can have a decisive impact on a case. In addition, ACC legal aid clients are generally among the most vulnerable and present with a range of issues that can take time and expertise to successfully negotiate. (This is also discussed below in answer to the consultation paper's question 3).

3. ACC legal aid lawyers – a snapshot

- 3.1 The Law Society requested a list from the Ministry of Justice (Ministry) of current ACC legal aid providers. The list provided indicates there are 10 such providers. The Law Society has conducted a survey of practitioners who regularly undertake ACC legal aid work. The survey indicates there are 13 practitioners regularly undertaking ACC legal aid work. Of these, nine currently do some ACC legal aid work, with only seven indicating that 5% or more of their legally aided work was on ACC matters. There are only three lawyers doing more than 10% of their legal aid work on ACC. All three of these lawyers have more than 20 years' experience, and between them, on average, 45% of their legal aid caseload is ACC work.

3.3 It is clear from the survey that senior ACC legal aid practitioners in New Zealand number only a handful.¹ It is this small group of senior lawyers, on whom the system relies, who tell us they would reduce or cease ACC legal aid work if the proposed changes are adopted.

4. The current system is flawed

- 4.1 Senior ACC lawyers have made it clear to the Law Society that the current system of legal aid already has them under considerable pressure. They indicated the following difficulties with the current system:
- a) The current level of grants is too low. Legal aid ACC lawyers are subsidising claims by around two-thirds of their value. The Ministry appears not to appreciate the complexity of most ACC claims and the time required to complete the various 'steps'. This lack of understanding is reflected in the consultation paper.
 - b) The process for procuring legal aid funding is overly complex and protracted. This can cause delays in proceedings (for example, where clients are still awaiting a confirmation of grant at early review hearings, which must then be adjourned), with concomitant costs.
 - c) Entry into legal aid comes late in the process, only after a solicitor has analysed a file to assess its chance of success. Hours of time can be spent on this that are not recoverable under a successful grant.
 - d) There is currently an inequality of arms as between ACC and legally aided claimants. ACC can call for as many medical opinions as it wishes, whereas claimants must seek further funding (which may be denied) to be able to query these reports and/or bring rebuttal expert evidence. ACC has deeper pockets than claimants, and when formulating its legal strategy does not have to contend with uncertainty as to whether it will receive funding for trial-related activities.
 - e) The means-tested threshold to qualify for legal aid is too low. At \$22,366 per annum gross for a single person, it represents less than the minimum adult wage on a full time working week of 37.5 hours (\$11.50 per hour; the minimum adult wage is \$13.50 per hour).
- 4.2 The proposed fixed fees significantly under-estimate the actual, reasonable costs sustained by ACC lawyers acting in legal aid cases. The proposals represent a reduction in current ACC legal aid payments, which are already inadequate to cover the actual cost of legal services provided. As illustrated in the following paragraphs, lawyers are in effect currently subsidising ACC legal aid cases to a significant degree.
- 4.3 The Ministry data suggests that an average legal aid payment per ACC case is \$1,043.97. The Law Society has received two alternative data sets (set out in **Appendix 2**) from leading ACC law specialists (one a senior practitioner in a firm, one a barrister). The alternative data sets illustrate the significant shortfall in ACC legal aid payments under the current system:

	Alternative data 1	Alternative data 2
Average actual cost per case	\$3,900	\$7,125
Average payment per case	\$1,300	\$5,775
Shortfall	\$2,600	\$1,350

¹ We note that these lawyers tend to also have junior staff working on ACC legal aid matters, under their supervision.

- 4.4 The average actual cost derived using the alternative data sets is in line with District Court judges' awards of costs in ACC cases. Such cost awards are intended to cover roughly half to two-thirds of actual legal costs in a claim. The awards tend to be in the region of \$1,500 to \$3,000 per case, suggesting that judges anticipate that the actual cost of running an ACC appeal² would be in the region of \$2,250 to \$4,500 at the lower end, and \$3,000 to \$6,000 at the higher end.
- 4.5 The proposed fixed fees amount to a maximum of \$1,040 for a case taken to the District Court on appeal. This is less than half of the lowest cost estimate by District Court judges, and significantly less than the average cost of taking an ACC legal aid case according to the alternative data sets.
- 4.6 The Law Society asked the ACC practitioners surveyed whether they were currently writing-off fees on ACC legal aid claims. The responses were as follows:

Level of write-off on ACC legal aid cases

Lawyer 1	<i>Losing 20% of fees at present</i>
Lawyer 2	<i>We lose around \$1500 per case on average</i>
Lawyer 3 & 4	<i>Billing for one third of time spent at present on average</i>
Lawyer 5	<i>We lose around two-thirds of time we spend</i>
Lawyer 6	<i>We recover \$120 an hour, normal charge out rate is \$270, so we lose \$150 per hour</i>
Lawyer 7	<i>About 50% is written off</i>

- 4.7 This is the status quo. The proposals in the consultation paper would reduce further the amount of legal aid available to claimants and would exacerbate the difficulties with the current system to the point where ACC lawyers indicate they will, reluctantly, no longer be able to provide legal aid services.

5. Senior lawyers will stop taking ACC legal aid cases

- 5.1 At current rates, ACC lawyers are heavily subsidising their legal aid clients. With a further reduction in funding,³ it will not be viable for practitioners to continue to undertake ACC legal aid cases.
- 5.2 The senior ACC lawyers who responded to the Law Society's survey all indicated that they would do "significantly less ACC legal aid work than at present" in the event that the proposed fixed fee changes came about. Comments included:

"We won't be doing these at these rates"

"In reality, we would cease to do ACC legal aid work."

"I would be unwilling to take on serious ACC appeals at a rate of less than \$150 per hour, and would avoid appeals that were not complex because of the poor proposed remuneration."

"This would be the breaking point for us."

² Without taking account of the costs of the review proceedings.

³ See the figures at paragraph 7.4 below.

“We will not take any appeals of legal aid if this policy comes in... therefore many ACC claimants are going to miss out on representation as this firm is often the last resort.”

6. Lawyers at risk of breaching professional conduct standards

- 6.1 The Law Society is concerned that the low level of the proposed fixed fees may push ACC lawyers to provide their services in a rushed or cursory manner. This would put them at risk of breaching their professional obligations under the Lawyers and Conveyancers Act 2006 and the Rules of Conduct and Client Care. Senior ACC practitioners tell us that this risk weighs heavily in their decision to reduce or cease ACC legal aid work.
- 6.2 Lawyers who are expected to get a complex job done in an unreasonably short space of time risk failing to comply with legal obligations as regards the level of service delivered to their clients. There is also a risk that lawyers will take on a case that proves more complex than predicted and that is not awarded an additional legal aid grant, so that the lawyer is bound to continue without being paid for significant time and effort expended.

7. Flawed data

- 7.1 The Law Society and ACC lawyers believe the Ministry data that under-pins the proposed fixed fees is flawed. It cannot be considered a robust basis for the proposed fixed fee levels. We note, for example, that the Ministry has told us:

- The total cost of ACC legal aid cases for the 2011 calendar year was \$1,859,843.08, yet the data under-pining the proposed fixed fees indicates a total cost of only \$150,331.50 for a 14-month period (including most of 2011). Even assuming the removal of some high and low value cases from the Ministry data, these two figures are clearly inconsistent.
- The total number of ACC legal aid grants to 31 December 2011 was 292, and yet the number of matters covered by the Ministry data is only 144.

- 7.2 An analysis of the alternative data (**Appendix 2**) provided to the Law Society highlights the following difficulties with the Ministry data.

Average charge-out rates too low

- 7.3 The Ministry data assumes an average charge-out rate of \$97.32 per hour. (In fact, the proposed fixed fees in the consultation paper assume an even lower average rate, of \$95 per hour). ACC practitioners regard this as being far too low. It does not allow for work by senior lawyers who will tend to be lead providers and whose expertise is required at various stages of an ACC legal aid case, including in a supervisory role for more junior practitioners.
- 7.4 The alternative data makes it clear that the proposed average charge out rate of \$95 per hour is a significant reduction on current legal aid fees being paid to ACC practitioners:

Average hourly rates for ACC legal aid services from alternative data⁴

Data source	Current average hourly rate charged by ACC practitioners	Difference to \$95 fee	
		\$ reduction	% reduction
Alternative data from law firm	\$117.56	\$22.56	19.5%
Alternative data from barrister	\$283.71	\$188.71	66.5%

- 7.5 The reduction in payments to senior ACC legal aid providers can also be seen by looking at the Ministry's current schedule of fees:

Current hourly rates for legal aid services in family or civil law proceedings⁵

Proceedings category	Level of experience (Level 3)	Difference to \$95 fee	
		\$ reduction	% reduction
ACC Review hearing	\$124	\$29	23%
District Court appeal	\$134	\$39	32%

- 7.6 The following table sets out the average cost for each 'step' using Ministry data. This is compared with the proposed fixed fees for each equivalent 'activity' in the consultation paper, and compared with averages from the first alternative data set (in **Appendix 2**):

Step	Activity	Average cost using Ministry data⁶	Proposed fixed fee	Average hours invoiced (alternative data)	Average actual fees (alternative data)
1	Pre review assessment	\$285.16	\$260.00	\$583.00	\$2,044.84
2	Review (including preparation and hearing)	\$1066.64	\$860, plus \$48 per half hour of review hearing	\$1478.55	\$3,574.97

⁴ Based on data provided to the Law Society by ACC legal aid practitioners, set out in **Appendix 2**.

⁵ Source: Ministry of Justice fees schedule for civil and family legal aid services: <http://www.justice.govt.nz/services/information-for-legal-professionals/information-for-legal-aid-providers/provider-rates-fixed-fees-and-special-rates-1/family-or-civil-fee-rates>

⁶ A note of the figures derived from the Ministry data is attached as **Appendix 3** – it includes a further breakdown of the Step 2 activities and the average costs of these.

3	District Court appeal	\$1202.00	\$1040 or \$520, plus \$53 per half hour of hearing	\$1537.00	\$5,275.62
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Number of claims under-counted

- 7.6 The Ministry data appears to represent too few completed matters for the stated time period – 144 cases in total over 14 months. The principals of two ACC specialist firms (two of the most senior ACC legal aid lawyers we surveyed) indicated that, during the 14-month period covered by the Ministry data, they completed the following number of ACC legal aid cases:

	Number of ACC legal aid cases completed
Firm 1	40 ⁷
Firm 2	400+ ⁸

- 7.7 We also note, again, the discrepancy between the Ministry data that under-pins the proposed fixed fees (144 cases in a 14-month period) and data subsequently provided to the Law Society by the Ministry, which indicated that there were 292 ACC legal aid grants in the calendar year to 31 December 2011.
- 7.8 Moreover, the Ministry data indicates that there were only two legally-aided ACC appeals to the District Court during the 14-month period. However, there were 380 ACC appeals to the District Court in 2011 – a number of which would have been legally-aided (certainly more than two).⁹ It is therefore questioned whether the Ministry data can be relied upon as being comprehensive or complete.
- 7.9 If the Ministry data excludes a number of relevant cases, the Law Society questions how representative it can be of actual costs.

The legal aid process itself creates costs

- 7.10 ACC lawyers report that the time required to complete legal aid forms and the degree of information required *creates* costs, as lawyers must spend time completing forms for clients, or assisting clients through the process. Moreover, the fact that legal aid is often not granted by the time of the first Review hearing can lead to adjournments, with associated appearance costs. Costs that are created by the legal aid system are currently borne by ACC lawyers due to low levels of grants and the consequent necessity to subsidise fees or provide services for free.

8. Consequences of ACC lawyers withdrawing from legal aid work

Access to justice denied

- 8.1 The purpose of the legal aid system is expressed in section 3 of the Legal Services Act 2011:

“The purpose of this Act is to promote access to justice by establishing a system that—
(a) provides legal services to people of insufficient means”

⁷ This figure is the result of a manual count of relevant files

⁸ This figure is based on Ministry of Justice records, which indicate that Firm 2 undertook either 376 or 420 cases in a one year period – an average indicative figure of “400+” for the 14-month period is therefore listed.

⁹ Refer to the statistics on the ACC website: www.acc.co.nz

- 8.2 If lawyers are no longer able to provide their services to “people of insufficient means” then the Law Society is concerned that those people will be unable to access justice, contrary to the purpose of the Legal Services Act.
- 8.3 The proposed fees do not adequately reflect the importance of the role of ACC lawyers in the administration of justice and access to justice in the ACC context in New Zealand.
- 8.4 There is no proposed alternative legal service for aggrieved ACC claimants – nothing equivalent to the Public Defence Service that is available in criminal matters. The most likely scenario is that ACC claimants will either represent themselves or seek assistance from non-lawyer advocates. Given the legal and evidential complexity of the majority of ACC cases, this would be likely to lead to significantly fewer successful outcomes for otherwise deserving claimants, and increases in delays and proceedings time/costs, in particular where claimants opt to represent themselves. These costs will eventually circle back to the Ministry.
- 8.5 ACC lawyers procured a breakdown of ACC decisions for the 2011 year up to case number 360/2011. Out of a total of 332 District Court ACC appeal hearings surveyed, 233 (or 70%) were dismissed¹⁰ and 99 (or 30%) were allowed. Of the allowed cases, the figures show that a claimant has double the chance of succeeding if they are represented by legal counsel, rather than representing themselves:

Successful appeals

Counsel represents claimant	Advocate represents claimant	Claimant self-represented
56%	19%	23%

Inequality of arms

- 8.6 The current inequality of arms as between ACC and legally aided claimants will worsen if the proposed fixed fees are adopted. If the proposed fixed fees are adopted, an impecunious claimant will be unable to engage an ACC lawyer if the experts in this field have withdrawn from legal aid work, whereas the ACC will be able to secure expert legal representation.

9. How significant is the problem?

- 9.1 The Law Society questions whether the cost of ACC legal aid, as a proportion of the overall legal aid spend, and indeed as a proportion of the savings that the Ministry is aiming to make, is significant enough to warrant the proposed reductions.
- 9.2 Ministry of Justice data provided to the Law Society gives the total net cost of legal aid grants for ACC cases for the calendar year to 31 December 2011 as \$1,050,065.30.¹¹ The most recently available figure¹² for the total cost to the Ministry of legal aid was \$172 million. Using this data, it appears that the net cost of ACC legal aid for 2011 comprises 0.6% of the total legal aid bill.

¹⁰ In this context ‘dismissed’ means won by ACC as the appellant rather than cases dismissed for non-prosecution, and ‘allowed’ means won by the claimant.

¹¹ The total gross cost of legal aid for the 2011 calendar year was \$1,859,843 and the value of ACC legal aid recoveries for that same period was \$809,777.78.

¹² From the Ministry’s 2011 BIM, the figure for the 2009/10 year.

10. Responses to the consultation paper questions

10.1 The following are the Law Society's answers to the specific questions in the consultation paper.

Q1. What do you think about the modified proceeding schedules? Is the arrangement of the activities practical? In not, please provide reasons

The Law Society has no particular comment to make about the arrangement of the activities. Our concern is with the low level of the proposed fixed fees for each activity.

Q2. Are the fixed fees appropriate for the activity that they cover? Please elaborate.

For the reasons set out above, the Law Society is strongly of the view that the proposed fixed fees are not set at an appropriate level. As a starting point, the Ministry data that was used to calculate the fixed fees is flawed. The fixed fees derived from this data cannot, therefore, be regarded as reasonable or appropriate. Even setting aside the difficulties with the data set, the proposed fixed fees do not adequately cover the legal costs of ACC claims.

Q3. What are your views on the two case levels? Is the distinction an accurate reflection of case complexities? Does the value for the hearing activity reflect this distinction adequately? If not, please provide reasons.

ACC lawyers tell us emphatically that most ACC claims that come as far as seeking legal intervention are complex, and a "one size fits all" approach is not appropriate to ACC cases. Such cases are very often fact driven, a wide variety of issues can arise, and considerable, complex and often conflicting medical evidence can have a decisive impact on a case. In addition, ACC legal aid clients generally present with a range or challenging issues that can take time and expertise to successfully negotiate. Many legal aid clients are vulnerable members of society, they may have mental health issues (both diagnosed and undiagnosed), drug and/or alcohol abuse or dependency, or low levels of literacy.

The Law Society acknowledges that the consultation paper's proposal for an amendment to grant when certain criteria are present in relation to a particular case, including some of the factors mentioned above, is an attempt to address this problem. However, feedback the Law Society has received from ACC lawyers indicates that:

- the number of cases that will involve these sorts of complex factors are the majority, rather than the exception to the rule; and
- there are additional factors to be taken into account.

ACC lawyers tell us that the triangle figure on page 9 of the consultation paper, which purports to depict the proportion of ACC legal aid cases that are complex versus 'fixed fee' (i.e. implicitly 'non complex'), could quite reasonably be inverted.

ACC lawyers tell us that the consultation paper's list of 'amendment criteria' on page 9 reads like a description of a typical ACC legal aid case, rather than an exceptional or 'complex' case. Whilst these criteria are likely to be present in most cases, the process of applying for amendment to grant is time consuming and costly. Some clients with special needs will push cases into the extremely complex category (suggested additional criteria for such clients/cases are set out in the Recommendations below), but overall it is likely that lawyers will require additional time to explain or reiterate matters for legal aid clients in general.

Recommendations

The Law Society recommends that:

- a) Statements about ‘complex cases’ being the exception rather than the norm, and the triangle diagram on page 9, should be removed from the consultation paper. Alternatively, the data that underpins the diagram should be explicitly stated and an explanation given about the criteria by which the Ministry determined the percentage of cases that were “complex” as opposed to “fixed fee.”
- b) There should be an overall increase in the proposed fixed fees to reflect the complexity of most ACC legal aid cases. For especially difficult cases, for example where legal aid clients or their cases present multiple challenging characteristics, amendments to grant may be warranted.
- c) The list of possible complicating factors for especially difficult cases would benefit from addition of the following criteria:
 - i) Sensory impairment (serious difficulty with sight, hearing or speaking). Whether or not these clients have interpreters, additional time is required with these clients because of their special needs.
 - ii) Learning difficulties. This area may prove more difficult to provide a simple or easy identifier. However, one suggestion is that if the clients have been classified by Work and Income New Zealand as falling within the factors that impact on capacity for work.¹³ The factors include:
 - (1) Literacy/numeracy (code E14), limited reading/ writing or numeracy skills.
 - (2) Learning disabilities (code E15), restricted ability to retain new knowledge and may include intellectual disability.
 - (3) Cognitive/neurological condition (code H03), impaired neural functioning. May be due to congenital, acquired brain injury, intellectual disability or other cause.
 - iii) Drug and alcohol dependency issues.
- d) The Law Society recommends that the list of factors for especially difficult cases be reviewed after an initial trial phase to ensure that they are working as intended.

Q4. What are your views on the list of amendment criteria? Are there any other factors that should be taken into account? If so, please provide a list with reasons.

See the recommendations above in answer to question 3.

¹³ See *Health and Disability Guide for Designated Doctors* at <http://www.workandincome.govt.nz/community/health-and-disability-practitioners/guide-for-designated-doctors/appendix-2-factors-which-impact-on-capacity-for-work.html>.

Q5. Do you have any views on the approach to non lawyer and agent fees? If so, what are they?

It is not clear from the consultation paper what the scope of non-lawyer and agent fees may be, so it is difficult to respond to this question. However, if what is being referred to are fees for the advice/evidence of medical experts, then the Law Society is strongly opposed to these fees being treated as disbursements to be paid out of the proposed fixed fee payments.

We have already discussed the inadequacy of the proposed fixed fees to cover the cost of lawyers' time spent on ACC legal aid cases. To then suggest that these should also include the cost of medical experts is unreasonable and unrealistic.

The Law Society notes that the decision to procure additional expert reports is often driven by ACC. Claimants are obliged to respond with expert evidence of their own. The ACC has deeper pockets than claimants. This will be all the more true if the fixed fee proposals are adopted. If this aspect of the proposal were to be adopted, it would create significant inequality of arms. It might also, in some cases, impact on case strategy. For example, an ACC lawyer might decide to seek further evidence so as to force settlement or withdrawal of a claim by a claimant with inadequate means to procure rebuttal evidence.

Q6. Is the approach to provider remuneration for reassignments reasonable? If not, please provide reasons.

ACC practitioners consulted by the Law Society do not regard the approach to provider remuneration for reassignments as reasonable. They note that, in practice, reassignment of an ACC file is not simply a matter of picking up where the previous lawyer left off. In almost all cases, time is required to reassess a case (facts, medical evidence, causes of action and strategy) from the beginning. If the assigning lawyer expended most of the legal aid grant and the reassignment lawyer were only to get what amounts to a small 'top up' payment, ACC lawyers would be reluctant to take reassignments as they would end up working many hours for free.

Q7. Is there a comment/suggestion you wish to make on any other aspect of the proposed changes? If so, please provide details.

The Law Society has significant concerns about these proposals, as outlined in detail above in this submission.

11. Recommendations

11.1 In addition to the recommendations above in relation to the specific questions in the consultation paper, the Law Society recommends that:

- a) The Ministry reconsiders whether the cost of ACC legal aid is significant enough to warrant the proposed changes, particularly in light of the significant consequences of the proposed changes.
- b) The Ministry, while weighing the arguments for and against change, considers the cost recovery situation regarding ACC legal aid and focuses on the *net* cost of ACC legal aid, which is the true cost to the justice system.
- c) The Ministry reconsiders whether fixed fees are an appropriate mechanism for funding ACC legal aid.
- d) If change is to be made to the ACC legal aid regime, the Ministry should procure robust data and use it to calculate hourly rates that reflect the complexity of most cases and the actual time taken to carry out this work.

- e) The Ministry should investigate ways in which the legal aid process could be made simpler and more efficient for legal aid lawyers and their clients. Cost savings could well be achieved by this means.

Conclusion

It will be evident from the foregoing that the Law Society has very significant concerns about the ACC fixed fee proposals. We would welcome the opportunity to discuss our concerns with the Ministry.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jonathan Temm', written in a cursive style.

Jonathan Temm
President

Appendix 1: A senior ACC legal aid practitioner's description of the time, tasks and costs in an ACC legal aid case

In my view, the overall allocated hours are unrealistic. Some parts of the hourly allocation are, with respect, at odds with the reality of practice. For example, two hours are allocated for meeting a client, assessing the case, providing an opinion and reading the ACC files. Any experienced practitioner would ... [say] ... that it is impossible to conduct an interview, assess the case and read ACC files in that timeframe. An average ACC file is two or three volumes, with each volume comprising anywhere from 100 to 200 pages. New files are smaller and could run to 30 or 40 pages, but older files, i.e. claimants who have been in receipt of weekly compensation for five years or more, can run from three through to about ten volumes.... three to five hours of reading is a more realistic guideline, with three hours of reading being the average.

Often ACC files contain orthopaedic reports and occupational physician reports about the same issue. Claims involving treatment injury or sensitive claims contain expert evidence not just on the actual injuries, but often on the psychiatric impact of such injuries. It would not be possible to comply with the duty on a barrister or solicitor to adequately represent their client in the timeframe provided. A lawyer attempting to comply with the guideline would run a very real risk of overlooking important aspects of the clinical evidence, and that is particularly the case where a person has suffered more than one injury and will have more than one claim file under different numbers. With respect, the person who approximated the hours of preparation does not appear to be familiar with the complexity of accident compensation cases.

The assessment of necessary hours does not appear to have taken into account the need for sworn evidence to be given at the review and occasionally on appeal. The need to provide statements of evidence is a fundamental step in many reviews. The evidence given at review is relied upon at the review and at appeal. In the Court of Appeal's decision in *Ambros v ACC* [2007] NZCA 304, the Court emphasised the importance of complete and proper preparation at the review stage, so that informed answers to questions of law could be given in the superior courts. The standard of representation indicated by the precedent decisions is inconsistent with the timeframe provided by the Ministry of Justice.

The time needed to draft review submission for both the review and appeal is insufficient. While the timeframe may be appropriate for a straightforward surgery case, it is unfortunately true that there are few straightforward ACC cases at the appeal level. A significant number of ACC reviews and appeals are about complex issues, involving multiple injuries and difficult questions of law. For example, a review of a gradual process decision requires that the claimant satisfy three separate legal tests for cover. This is inherently more complicated than a decline of surgery. A challenge to an ACC decision on attendant care will require evidence from both parents, evidence of an independent expert and submissions discussing the competing statutory criteria (ACC's discretion to offset care by reference to familial responsibility and the reasonableness of that application). Submissions setting out the evidence, the law, and the argument will need careful drafting. Those types of submissions cannot be completed to a professional standard in one draft. District Court decisions issues on ACC matters often run between 10 and 30 pages. The complexity and length of the District Court decisions are persuasive evidence that the amount of work involved is considerably greater than that indicated by the Ministry of Justice's guideline fee.

... [M]any cases involve the instruction of an expert. The instruction of an expert witness has to be done carefully, and the expert needs to be provided with a background and a bundle of relevant documents. That step often involves around half the work involved with preparing for a review and appeal, but the complexity of that task doesn't appear to be recognised in the assessment of hours provided by the Ministry of Justice. The guideline fee does not recognise that there will be cases where two or three experts will need to be involved. Persons who have suffered complex injury resulting from a car accident, or more than one injury, will often have orthopaedic issues,

musculoskeletal issues and perhaps neurological or psychiatric issues. It is often necessary to obtain expert comment on the consequences of pain (a report from a pain specialist) and how that affects the person's ability to work (advice from an occupational physician).

The steps discussed above do not include the filling out of legal aid forms, providing an opinion to legal aid, or reporting back to the client. ... complying with those requirements would also take a significant amount of time. The preparation of an opinion often requires more than an hour's work, let alone putting aside time to complete the paperwork required by legal aid, interviewing the client or reading the necessary material.

Appendix 2 – Alternative Data

Alternative data set 1 – from a firm that currently undertakes ACC legal aid work

Client number	Steps granted	Hours invoiced	Actual hours	LAS hourly rate	Actual hours x LAS hourly rate	Invoiced hours x LAS hourly rate	Difference between LAS invoice and actual	Hourly rate x actual hours	Difference between hourly rate and LAS invoice
1	2	12.3	51.28	\$92	\$4,717.76	\$1,131.60	\$3,586.16	\$8,974.00	\$7,842.40
2	2	11	18.53	\$130	\$2,408.90	\$1,430.00	\$978.90	\$3,242.75	\$1,812.75
3	2	12	44.07	\$142.60	\$6,284.38	\$1,711.20	\$4,573.18	\$7,712.25	\$6,001.05
4	2	9.92	14.56	\$124	\$1,805.44	\$1,230.08	\$575.36	\$2,548.00	\$1,317.92
5	2	12	25.78	\$124	\$3,196.72	\$1,488.00	\$1,708.72	\$4,511.50	\$3,023.50
6	1	3	10.5	\$120	\$1,260.00	\$360	\$900.00	\$1,837.50	\$1,477.50
7	1	6.5	22.82	\$124	\$2,829.68	\$806	\$2,023.68	\$3,993.50	\$3,187.50
8	3	14.5	49.77	\$106	\$5,275.62	\$1,537.00	\$3,738.62	\$8,709.75	\$7,172.75
9	2	12.25	26.75	\$92	\$2,461.00	\$1,127.00	\$1,334.00	\$4,681.25	\$3,554.25
10	2	18	33.69	\$124	\$4,177.56	\$2,232.00	\$1,945.56	\$5,895.75	\$3,663.75
Averages			29.78		\$3,441.71	\$1,305.29	\$2,136.42	\$5,210.63	\$3,905.34

Alternative data set 2 – from a barrister who currently undertakes ACC legal aid work

Client No.	Hours incurred	Fees on time recorded basis	Actual fee charged
1	20.4	\$7,145.00	\$7,145.00
2	12.2	\$4,258.00	\$3,500.00
3	33.5	\$11,724.00	\$10,000.00
4	18.2	\$6,358.33	\$2,000.00
5	27.4	\$9,595.00	\$8,000.00
6	20.4	\$7,145.00	\$6,591.00
7	21.2	\$7,437.00	\$5,000.00
8	16.2	\$5,687.00	\$5,000.00
9	14	\$4,900.00	\$3,500.00
10	20	\$7,000.00	\$7,000.00

Appendix 3 – Ministry data

Analysis of Justice's data used for ACC legal aid fixed fees

Total spend on ACC legal aid grants	\$150,331.50
Total hours spent on these claims	1545
Average fee per hour	\$97.32
Average number of hours per case	10.73
Average payment per case	\$1,043.97
Total number of cases	144

STEP 1 ('Pre review assessment')

Number of Step 1s conducted	101
Total hours spent on Step 1	301.9
Total payments made for Step 1	\$ 28,801.20
Average hours spent on Step 1	2.99
Average payments made for Step 1	\$ 285.16

STEP 2* (all activities)

Number of cases in which Step 2* conducted	101
Total hours spent on Step 2	1,124.45
Total payments made for Step 2	\$ 107,731.00
Average hours spent on Step 2	11.13
Average payments made for Step 2	\$ 1,066.64

STEP 2 – OTHER (i.e. amended activities outside pre-defined activities for Step 2)

Number of cases in which Step 2 - Other conducted	13
Total hours spent on Step 2 - Other	83
Total payments made for Step 2 - Other	\$ 7,876.00
Average hours spent on Step 2 - Other	6.38
Average payments made for Step 2 - Other	\$ 605.85

STEP 2 – Review ('ACC Review')

Number of cases in which Step 2 - Review conducted	94
Total hours spent on Step 2 - Review	962
Total payments made for Step 2 - Review	\$ 92,177.60
Average hours spent on Step 2 - Review	10.23
Average payments made for Step 2 - Review	\$ 980.61

STEP 2 – Review Hearing ('ACC Hearing', review, not DC)

Number of cases in which Step 2 - Review Hearing conducted	68
Total hours spent on Step 2 - Review Hearing	79.45
Total payments made for Step 2 - Review Hearing	\$ 7,677.40
Average hours spent on Step 2 - Review Hearing	1.17
Average payments made for Step 2 - Review Hearing	\$ 112.90

Appendix 3 – Ministry data

STEP 3 (District Court Appeal)

Number of cases in which Step 3 conducted	2
Total hours spent on Step 3	24
Total payments made for Step 3	2404
Average hours spent on Step 3	12
Average payments made for Step 3	1202

Civil non-standard – Other (activity for which an amendment to grant was made)

Number of cases in which 'Civil non-standard - Other' charges made	13
Total hours spent on this	94.4
Total payments made for this	\$ 11,395.30
Average hours spent on this	7.26
Average payments made for this	\$ 876.56

**This is a collation of all Step 2 activities. These are then broken down.*