



**FACULTY OF LAW  
LEGAL ISSUES CENTRE**

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**SOLVING THE PROBLEM:**

**Causation, transparency and access to justice in New Zealand's personal injury system**

**22 May 2017**

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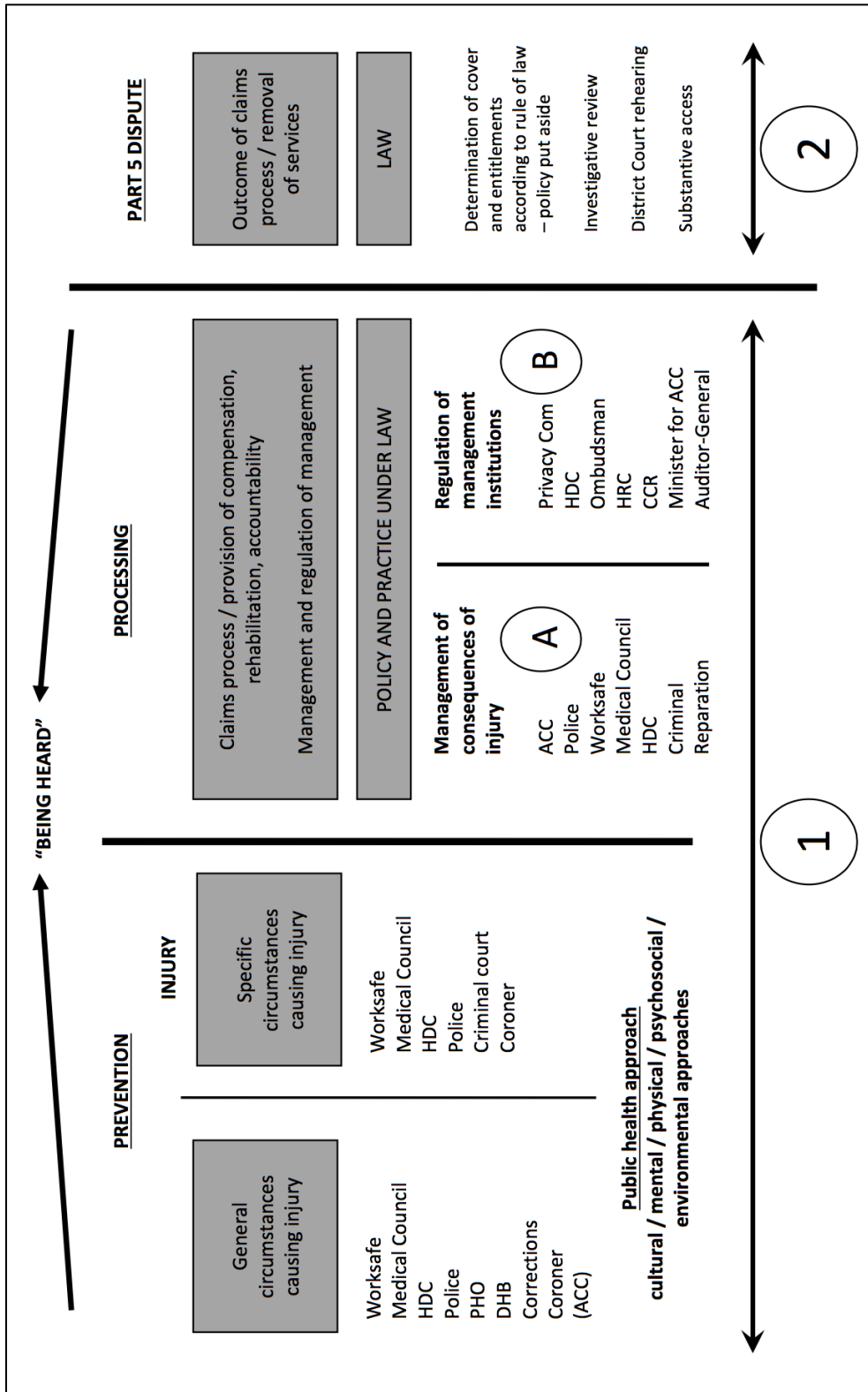
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Warren Forster, Tom Barraclough and Tiho Mijatov

...I am deeply conscious that the various events which are the basis of this inquiry took place nearly 10 years ago so that there will be a natural inclination to react by saying that all of the systems and procedures which I now discuss were of that era, and have been overtaken by new and corrected systems, operated by new and more enthusiastic staff. Whilst I readily acknowledge that there have been changes, particularly over more recent months, I caution against the general reaction that all is well. Many, if not most of the matters I raise are I believe still current, at least to some degree, or to the extent that there needs to be a conscientious checking to see whether all these matters have in fact been attended to ...

Peter J Trapski *Report of the inquiry into the procedures of the Accident Compensation Corporation* (1994)

# New Zealand's Personal Injury System



## Acknowledgments

The authors would like to acknowledge the invaluable support from the New Zealand Law Foundation and the University of Otago Legal Issues Centre. We would like to thank Curtis Barnes, Ben Bielski and Denise Powell for their valuable assistance our research. We would also like to thank the President, Committee and members of Acclaim Otago who have continued to show leadership in this area.

We acknowledge the injured people whose experiences have shaped our research. We remain committed to making a difference for you.

The authors would like to acknowledge the collaborative way in which many of the institutions involved have approached this research project over the past 18 months. We have found that we have been able to work towards implementing interim solutions during the course of the research project. We have done our best to obtain information to understand the current official processes and understand where the limits are of current solutions and we have made recommendations based upon the information we had available at the time of writing.

Our goal is to provide a framework that will implement long lasting reform which improves access to justice and has a positive impact on the lives of thousands of New Zealanders every year.

We wish to thank Miriam Dean, QC for investigating and recognising the problems we identified in our previous report and her effort to trigger positive change. We also acknowledge the former Minister for ACC, Hon Nikki Kaye for her leadership in this area during 2015 and 2016.

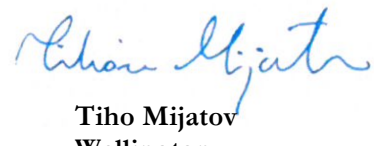
We hope that this report focuses institutions' and leaders' attention on what needs to be done to bring about long lasting reform and solve the problems with access to justice for injured New Zealanders.



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2. Table outlining government response to Miriam Dean QC Review, and associated Cabinet Paper  
(Cabinet Paper “Response to the Independent Review of Acclaim Otago’s report into Accident Compensation Dispute Resolution Processes” (Undated), available from: <[www.mbie.govt.nz/info-services/employment.../cabinet-paper-response.pdf](http://www.mbie.govt.nz/info-services/employment.../cabinet-paper-response.pdf)>.)
3. Communication to ACC staff dated 24 March 2017 regarding concerns with medical evidence working group as a result of Dean recommendations on medical evidence. Enclosing draft letter to CEO (not sent to CEO) with 6 appendices of supporting information and seeking guidance.
4. Hon Nikki Kaye “Speech to ACC’s Injury Prevention Partners’ Conference: Shifting ACC to a greater focus on injury prevention” (21 October 2015), <[beehive.govt.nz](http://beehive.govt.nz)>.
5. Performance Improvement Framework (PIF) Review of the Accident Compensation Corporation, December 2014, pp 1-20 (Executive Summary and Agencies’ Response).  
Murray Horn and David Moore *Performance Improvement Framework Review: Accident Compensation Corporation* (State Services Commission, the Treasury, and the Department of the Prime Minister and Cabinet, December 2014).
6. Memorandum to Minister for ACC re “Interim solution to delay in the District Court’s ACC division”, W Forster, D Powell, T Barraclough, T Mijatov (dated 14 August 2015).
7. Draft Accident Compensation Corporation Model Litigant Policy, November 2016
8. Submission to MBIE consultation on Review Costs and Appeals Regulations by Warren Forster on behalf of research team, November 2016 (and appendices).
9. Agreement between ACC and Fairway Resolutions Services Limited, received 22 January 2016 under Official Information Act. Includes three pages by report authors noting clauses of concern for independence and public trust and confidence.
10. Letter from Ministry of Business, Innovation and Employment regarding work on Review Costs regulations, 28 April 2017.
11. Request for Official Information and ensuing correspondence 6 September 2016 to 8 March 2017, including recently compiled summary document of Shaping Our Future.
12. Correspondence and memorandum between research team and ACC to attempt to meet and discuss Shaping Our Future, March 2017.
13. Executive Leadership Team Issues Paper “Strategy for the Future Management of Long-Term Claims” (16 February 2009).
14. Service and Purchase Agreement 2009-2012, Minister for ACC and Board of ACC.
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16. Judge Peter J Trapski “Report of the Inquiry in the Procedures of the Accident Compensation Corporation” (1994).
17. Correspondence and table compiling request for information about data to describe ACC dispute resolution process, 2 November 2015 to 18 May 2016.
18. Claim Service Report including code for “District Court Medical & Other Advisors”.

## Executive Summary

This report follows our report to the United Nations in late 2014,<sup>1</sup> our access to justice report of July 2015,<sup>2</sup> its review by Miriam Dean QC,<sup>3</sup> and our subsequent attempts to constructively engage with agencies responsible for implementing Ms Dean's recommendations.<sup>4</sup>

After considerable reflection and research, we have concluded that the most effective way of reducing the harm done by access to justice barriers "downstream" is to look at the systemic factors creating those barriers "upstream".

We have done our best to understand how current reform processes will help to improve access to justice. With limited exceptions, we are not confident that these will be successful. We are further concerned that ACC itself is not committed to solving the problem: its transformation programs are inward-looking and are not transparent. Part of the problem is a lack of coordination of reform efforts. It is also problematic that reform is being led by ACC, when ACC has (or is perceived to have) interests and incentives to allow access to justice barriers to remain in place.

We see the access to justice issues in this area as having two problems in common. The first is the way that ACC assesses causation as a boundary test for the scheme and the effects of that process. The second is the lack of transparency and oversight around this and all other ACC dealings with other organisations and with individuals.

### Causation

ACC is sometimes called a "no-fault system". That description is not quite correct. While ACC claimants do not have to prove that their injury was somebody's "fault", claimants do now have to prove medico-legal "causation" of their injury in some way for every one of the 1.9 million claims for cover and entitlements each year.

Over time, causation has come to be applied in a narrow, technical, legalistic way. Because of this, any dispute with ACC involves legal advice, legal representation, and complex medical evidence. Causation is inherently arguable and difficult to assess.

ACC has an unfair advantage in arguing about causation. All of this is expensive, time-consuming, and not well understood by injured New Zealanders or the public. The complexity of "causation" as a legal test means that it is applied inconsistently with lots of room for misunderstandings and errors.

The way ACC applies causation makes injured people feel like the system is unfair. The way ACC understands causation is not consistent with the way the public understands causation. These misunderstandings drive a large number of grievances with ACC, some of which go on to become formal disputes. In each of these disputes, a claimant is distinctly disadvantaged, in part because of access to justice barriers. When they lose their dispute, they feel like they have not been heard or properly understood.

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<sup>1</sup> Which led to an observation on access to justice for injured people by the UN Committee at appendix 1: UN Committee on the Rights of Persons with Disabilities, "Concluding Observations on the Initial Report of New Zealand," Doc XII CRPD/C/NZL/CO/1 (3 October 2014) at para 23.

<sup>2</sup> Acclaim Otago, "Understanding the Problem: An Analysis of ACC Appeals Processes to Identify Barriers to Access to Justice for Injured New Zealanders" (9 July 2015). See also for associated media coverage: <<http://www.otago.ac.nz/humanities/news/otago116209.html>>.

<sup>3</sup> Miriam R Dean "Independent Review of the Acclaim Otago (Inc) July 2015 Report Into Accident Compensation Dispute Resolution Processes" (Ministry of Business, Innovation and Employment, Wellington, May 2016).

<sup>4</sup> See appendix 2, see also appendix 3 and appendix 12.

The way causation is being applied by ACC has recreated the problems that existed with access to justice before we had ACC, which the ACC scheme was meant to prevent or overcome. These problems waste significant resources that are meant to be spent on rehabilitation, treatment, and entitlements. It undermines people's experience of access to justice, and has resulted in unacceptably low levels of public trust and confidence.

### **The Personal Injury Commissioner and the Personal Injury System**

The ACC scheme is only one part of a wider network of institutions in New Zealand that manage the impact and incidence of injury<sup>5</sup>. We call this network of institutions "the Personal Injury system". It includes any organisation tasked with prevention (incidence) and consequences (impact) of injury, and includes for example the Coroner, Worksafe, Police, criminal processes, District Health Boards and the Medical Council. By contrast with ACC, other organisations generally assess "causation" (of injuries and injury-causing events) in a very broad way that is consistent with public expectations and effective injury prevention.

People need help navigating this complex system. Our recommendation is that the Personal Injury Commissioner should be established to lead, monitor and co-ordinate these institutions, while maintaining appropriate deference toward the existing expertise and jurisdiction of current institutions and mechanisms.

We agree with Ms Dean's recommendation of a system of advocates, but we say those advocates should be managed by the independent Personal Injury Commissioner and responsible for helping people navigate the personal injury system, rather than arguing cases for claimants in Court.

The Commissioner will have final responsibility for the coordination and leadership<sup>6</sup> of the existing institutions in the personal injury system, through the advocacy system and through analysis and publication of data about the operation of the system at a system level. We envisage that it will report directly to Parliament to neutralise any perception of party-political influence.

The Commissioner will also act as an accountability mechanism over ACC in respect of everything other than decisions about cover and entitlements, which will be left to the Courts. That will include greater integration of and access to the regulatory institutions as we define them, by working with existing organisations such as the Privacy Commissioner, the Health and Disability Commissioner, the Ombudsman, and the Human Rights Commission.

At a micro-level, focussed on individuals, the Commissioner's job is to fix upstream issues that cause downstream problems. The focus is on enhancing transparency at ACC, feedback from regulatory into management institutions, dispute prevention and increasing public trust and confidence.

At a macro-level, focussed on systems, the Commissioner will generate better data for policy-makers, ensure more effective injury prevention and facilitate coordination of the wider personal injury system.

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<sup>5</sup> Accident Compensation Act 2001, s 3: "Purpose". Includes "...minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs)..."

<sup>6</sup> Currently left to the Minister for ACC, which makes this leadership role into a political one that is subject to regular change due to electoral cycles, Government needs, and other factors.



## Causation and the Personal Injury Commissioner

The Commissioner will play an important role in making the ACC scheme less political. Independent reviews of ACC, including by the State Services Commission, have recently acknowledged the problem of ACC becoming a “political football”. The Government has acknowledged this public perception and passed legislation in 2015 to enhance transparency (at this stage only around levy-setting).<sup>7</sup> We anticipate the Commissioner could be inserted as a third party in situations where ACC is perceived to have a conflict of interest.

We say the growing issue with causation is a result of inappropriate incentives and performance indicators being placed on ACC and its staff. In combination with a lack of adequate oversight and transparency, in part because of access to justice barriers, the result has been severe damage to public trust and confidence.

The growing gap between ACC’s understanding of causation and the public’s understanding of causation is a result of ACC more rigidly applying the law based on its own policy priorities. This had led to increasingly higher thresholds for cover and entitlements and the need to produce more complex evidence before cover will be accepted. It leads to more argument about what “caused” your injury.

ACC doesn’t apply the same standard in every case. ACC acknowledges its use of insurance-style algorithms to “stream” claims,<sup>8</sup> but denies using it to try to resist expensive claims. We suspect, as do others, that, directly or indirectly, there is greater targeting of “higher risk” claims<sup>9</sup> that ACC believes will impose a great financial burden on outstanding claims liability. This means the most vulnerable injured people who make a claim are faced, in effect, with the selective deployment of greater access to justice barriers than others who interact with ACC. The fact that we cannot be certain about our suspicions (and these cannot be established empirically or disproven by evidence to the contrary) illustrates the importance and need for transparency.

## Conclusion

We have two key recommendations:

- 1) **Causation:** To clarify the way that “causation” is assessed under the ACC scheme by the introduction of ss 3A, 6A, and 6B by amendment to the Accident Compensation Act 2001; and
- 2) **Personal Injury Commissioner:** to introduce by means of a bill (which we have drafted) a “Personal Injury Commissioner”, who will be responsible for:
  - a. leading and coordinating the efforts of the numerous institutions that manage the incidence and impact of injury in New Zealand, and helping people navigate that system through an advocacy service; and
  - b. collecting and publishing injury-related statistics and information to inform policy-makers, and acting as the agency ultimately responsible for management of personal injury in New Zealand; and

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<sup>7</sup> Accident Compensation (Financial Responsibility and Transparency) Amendment Act 2015.

<sup>8</sup> “Predictive analytics” is said to be a specific advantage of the “EOS” computer system ACC uses. See “FINEOS holds its tenth APAC user group in Sydney” (18 November 2016, Sydney) <fineos.com>, accessed: 17 May 2017, 6.48pm. “...followed by a presentation from the Accident Compensation Corporation (ACC) of New Zealand on their use of Predictive Analytics in the FINEOS Claims ecosystem...”.

<sup>9</sup> See appendix to appendix 3, appendix 6 p 10, ACC Clinical Quality Team “Practical Guide to ACC clinical advice standards” (September 2015, released under Official Information Act): “when claims are seen as low risk and short term”.

- c. enhancing transparency within the Accident Compensation Corporation, and acting as a dedicated oversight and accountability body, whose task is to develop specific expertise in ACC's history, policy, processes, and systemic practice.

The problems with access to justice that we have sought to resolve are the results of now well-known issues with the ACC system. Within government and academia, the nature and significance of the upstream problems and downstream effects have been widely acknowledged in substance.<sup>10</sup>

We suggest that many of the access to justice problems we have identified can be resolved by making the work that ACC does more transparent, particularly around how it assesses and makes decisions about “causation” and resolves its conflicting priorities and incentives.<sup>11</sup>

Others who have investigated the impact and incidence of personal injury in New Zealand (and ACC's role within that) have already acknowledged the need for better leadership and co-ordination of the Personal Injury system<sup>12</sup> and the importance of injured people's experiences within it.

Our recommendation is that this acknowledged policy need would be best met by the establishment of an independent Commissioner, who will be best able to act dependably, independently, impartially and decisively to develop expertise, improve access to justice and improve public trust and confidence.

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<sup>10</sup> Appendix 4. Hon Nikki Kaye, Minister for ACC, “Speech to ACC's Injury Prevention Partners' Conference: Shifting ACC to a greater focus on injury prevention” (21 October 2015).

<sup>11</sup> Murray Horn and David Moore *Performance Improvement Framework Review: Accident Compensation Corporation* (State Services Commission, the Treasury, and the Department of the Prime Minister and Cabinet, December 2014). Appendix 5, executive summary of PIF report and responses from relevant agencies.

<sup>12</sup> Above, n 10.

## Minister for ACC, 21 October 2015

I currently have work underway to ensure ... that everybody gets the assistance they're entitled to under law. ... [T]he ACC board has put in place a new approach for injury prevention. They now have a strategy which has clear priorities to drive reductions in the incidence and severity of injuries ... ACC has identified a targeted level of investment over a five-year horizon. This allocation has been identified based on factors such as the likely impact on the outstanding claims liability, and the Government's priorities. ... We are taking a hard look at how agencies work together and what improvements can be made right across the system. ... If we combine initiatives such as these with others, such as improving nutrition for our senior citizens, then in a "system" sense we will begin to get synergies and multipliers that will lead to an overall improvement in well-being. ...

As Minister for ACC, I am taking a leadership role in certain areas, particularly where I can see that agencies themselves haven't taken a clear lead. ... At the heart of partnering, agencies and organisations need to have shared understanding of the problems, common objectives and most of all a willingness to work differently. ... Looking ahead, we will see an increased injury prevention spend, supported by an improved strategic focus, a better evidence base and the development of longer, stronger partnerships. I will also work to lead change and ensure ACC works better across agencies.

[excerpts from speech text at appendix 4, underline emphasis added]

## State Services Commissioner's Performance Improvement Framework review of the Accident Compensation Corporation, December 2014

"...[E]ntitlement experience should only change in response to a transparent and well informed regulatory, legislative or judicial process that changes cover and entitlements; rather than as an administrative response to financial pressure, ministerial preferences or public concern over a particular issue. ... [T]he tendency to respond to different pressures at different times undermines the confidence of ACC's partners and people that it will "stay the course" when it sets a new direction. Little wonder then that the biggest concern raised by the majority of people we spoke to was the 'pendulum effect' ie, the way ACC seems to swing between a focus on claimant satisfaction and public trust and confidence in some periods and improving financial performance in others.

...

While public trust and confidence has started to recover, ACC still scores the second lowest amongst all public agencies. ACC aims to lift these Net Trust Scores ... This lift in trust will need to be delivered in a way that does not increase or prolong entitlement because that would bring the pendulum effect back into play, thus destabilising levies and the entitlement experience all over again

...

The change environment in the organisation is a potpourri of willingness to change but poor ability to implement. ... ACC management recognises the need for cultural change to complement the required changes in operating model. The behaviours that will be important in future need to reflect the desirability of greater openness, recognising the individual needs of customers and working more effectively with partners. All of those elements are underpinned by some notion of shared trust where parties are willing to work together and share information in an open and frank manner. The Net Trust Scores indicate that ACC has a lot of proactive work to do to earn this trust."

[excerpts from PIF report text at appendix 5, underline emphasis added]

## Chapter 1. How did we get to here?

This is the latest report in a series from our research team, which has gratefully received funding and support from the New Zealand Law Foundation and University of Otago Legal Issues Centre. We deal in part with the history of access to justice reform in New Zealand's ACC scheme in an open access article in the Windsor Yearbook of Access to Justice.<sup>13</sup> In our previous work we have analysed ACC against the United Nations Convention on the Rights of Persons with Disabilities,<sup>14</sup> produced a Shadow Report for the United Nations about New Zealand's compliance with the right to access to justice for injured people<sup>15</sup> and produced empirical thematic analysis of large numbers of court decisions to better understand existing access to justice barriers.<sup>16</sup>

Since late 2015, we have been researching long-term solutions to access to justice barriers that exist for injured New Zealanders. We recognise the important work undertaken by Miriam Dean QC in her review of our previous work at the request of the then Minister for ACC, Hon Nikki Kaye. During this period, we have been involved in numerous official processes in an attempt to facilitate a collaborative approach.<sup>17</sup>

### 1.1 Increase in volume of claims, decisions, reviews for structural reasons

The historical development of the Accident Compensation scheme – from Sir Owen Woodhouse's original vision in 1967, through to its various incarnations marked by the legislative overhauls of 1972, 1982, 1992, 1998 and 2001 – is well traversed elsewhere and these changes will not be detailed here. However, it is worth noting two general changes that have occurred over the course of these iterations that have contributed to the current access to justice problem.

First, there has been a transition in how we all think about the scheme. Originally, the scheme was principle-based with a community focus largely constructed around broad discretion rather than rigid procedure. Now, however, the scheme is individually focussed: it is managed through "claims" made by injured people and "decisions" made by ACC. This has taken on a highly legalistic and procedural character. Second, there has been a change in the treatment funding model so that a "claim" must be lodged before "rehabilitation" in the form of "treatment" can be funded by ACC, even if that treatment is just a GP's visit. This change in the early 1990s saw a significant increase in "claims"; from hundreds of thousands of claims per year to over 1 million claims per year, which have continued to increase. These increases were most significant in non-work and non-motor vehicle accidents, which occurred primarily at home.

These changes have contributed to a flood of minor claims that are popular with the public because they allow for immediate funding for treatment from a GP, physiotherapist or other health provider, which are almost never declined. But they were not necessarily part of the

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<sup>13</sup> Mijatov, Barraclough, Forster "The Idea Of Access To Justice: Reflections On New Zealand's Accident Compensation (Or Personal Injury) System" (2016) 33 Windsor Y B Access Just 197.

<sup>14</sup> Acclaim Otago, "Adopting Issues: An Interim Report to the United Nations Committee on the Convention on the Rights of Persons with Disabilities" (2014), online: <[http://acclaimotago.org/wp-content/uploads/2014/07/Report\\_to\\_UN.pdf](http://acclaimotago.org/wp-content/uploads/2014/07/Report_to_UN.pdf)>.

<sup>15</sup> Acclaim Otago, "The Costs of Paradigm Change: Access to Justice for People with Disabilities Caused by Personal Injury in New Zealand" (2014), online: <<http://acclaimotago.org/wp-content/uploads/2014/08/Acclaim-NZ-Shadow-Report-for-UN.pdf>>.

<sup>16</sup> Understanding the problem, above n 2.

<sup>17</sup> Some information and correspondence outlining the scope of this involvement can be found at appendices 3, 6, 8, 11, 12, 17.

original conception of ACC. That is not to say they should be removed from the scheme altogether. But we should recognise that the system was not designed with a short-term injury focus and that the massive increase in claims volumes is partly due to structural policy choices.

The number of “claims” as measured by ACC does not directly translate to the number of injuries that happen in the real world: an increase in claims by itself is only an indicator of injury rates. Nevertheless, the number of “claims” for cover has increased from 128,747 in 1981,<sup>18</sup> to 185,530 in 1991,<sup>19</sup> to 1.4 million in 2001<sup>20</sup> to 1.7 million in 2011.<sup>21</sup>

Each “claim” requires ACC to make a “decision” on cover and then on entitlements. These volumes also depend on how far ACC acts proactively to inform claimants of potential entitlements. Each decision has the potential to lead to a dispute, because each injured person can “review” these decisions. The number of review applications has fluctuated, with 3,847 in 1981, 4,893 in 1991, 4,053 in 2001<sup>22</sup> and then 9,134 in 2011.<sup>23</sup> Because ACC’s decisions are what establish the right to use the review and appeal processes, legal arguments about those decisions have grown in number and importance. Further, the law on the topic is evolving because ACC regularly defends its conduct by arguing the reviewer has no jurisdiction rather than getting on with defending its conduct directly.<sup>24</sup>

## 1.2 Reason for caution about ACC’s assurances on numbers of disputes versus numbers of claims

Despite the importance of “decisions” to the scheme, ACC was not able to provide data on the number of decisions it issued that were adverse<sup>25</sup> to injured people to Miriam Dean in her review. Instead ACC estimated this number as totalling around 70,000 per year.<sup>26</sup> ACC acknowledges that it can provide no data on decisions about low-level but numerous entitlements, such as taxi fares.<sup>27</sup> Data of this kind used to be published in ACC’s annual reports, for example 2,708 claims were partially or fully declined in 1981.<sup>28</sup>

The number of adverse decisions, and associated potential disputes, is much higher than first thought. Using the year 2012 as a benchmark, declines of cover alone in 2012 were over 50,000.<sup>29</sup> Turning to entitlements, the number of treatments declined was over 110,000.<sup>30</sup> Add to this the decisions on adverse weekly compensation, independence allowance and lump sum compensation decisions (where no data is available but we estimate at least 20,000), and adverse rehabilitation decisions (vocational and social rehabilitation) which we estimate at over 30,000, the number of formal adverse decisions is likely to be between 200,000 and 300,000. This does not include any “informal” decisions where ACC verbally declines entitlements without a formal notice of decision being issued. It also does not account for situations where a claimant might be entitled, but has never lodged a claim for whatever reason.

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<sup>18</sup> 1981 annual report.

<sup>19</sup> 1991 annual report.

<sup>20</sup> 2001 annual report.

<sup>21</sup> 2011 annual report.

<sup>22</sup> 2001 annual report.

<sup>23</sup> Official Information Act response from ACC dated 7 October 2016.

<sup>24</sup> See for example *Splite v Accident Compensation Corporation* [2016] NZAR 947.

<sup>25</sup> Here meaning declining a claim for cover or entitlements or both, as sought.

<sup>26</sup> Dean report, above n 3, p 9.

<sup>27</sup> Dean report, above n 3, pp 8-9.

<sup>28</sup> 1981 annual report.

<sup>29</sup> 54,475, Official Information Act response dated 9 December 2014.

<sup>30</sup> Approximately 17,000 surgeries were declined (based on 2010 data from Review of the Elective Surgery Unit), other treatments declined included acupuncture: 3,612; chiropractor: 3,843; hand therapy: 5,043; occupational therapy 23; osteopath 2,951; physiotherapy 77,245; podiatry 766, based upon various Official Information Act responses.

The fact that ACC has no data on the number of adverse decisions is concerning, because all decisions must notify the person of their right to review and be in writing. Decision letters are a relatively formal legal document. Decisions are usually issued on standard forms for this reason, so we were surprised to learn that this simple but critical number – the number of decisions – is apparently unquantifiable.

The figures offered by ACC about the number of claims it declines appear to be incorrect: some people have relied on those estimates and drawn conclusions that the overall number of declined claims is small enough that access to justice issues do not pose a significant problem. Based on our analysis of the data available, there is reason for doubt about that impression.

### 1.3 Validation of access to justice barriers leads to attempted reform

Some decisions, after being reviewed, are appealed to the courts. Throughout this process – from a claim by an injured person, to receiving an adverse decision by ACC, through reviewing that decision, to appealing that decision (often for multiple claims) – an injured person must navigate a complex area of law and policy, often without adequate resources or expert assistance, against a statutory Crown Entity with an abundance of both.

It is now widely accepted that there are barriers to access to justice for injured people in New Zealand.<sup>31</sup> In our previous research, *Understanding the Problem*, we identified four main barriers:

- i) access to law;
- ii) access to representation;
- iii) access to evidence; and
- iv) being heard.

When these findings were released, we were disheartened that ACC’s initial response, as we understand it, was to dispute that these barriers existed, or to diminish their significance. Nonetheless, we were able to meet with the Minister in 2015 and 2016, who expressed a clear policy emphasis on immediately reducing the length of District Court delays. For that purpose we produced an 11 point plan<sup>32</sup> proposing an interim solution to delays in the District Court and recommendations about long-term solutions.

At the same time, Minister Kaye commissioned Miriam Dean QC (via the Ministry for Business, Innovation and Employment) to undertake an independent review of our findings.<sup>33</sup> The Dean Review confirmed the validity of our findings in all material respects.<sup>34</sup> The review made some specific policy and process-oriented recommendations, as well as other recommendations that initiated processes of reform. Some of these recommendations were solutions themselves and others were aimed at creating an environment where long lasting solutions might be developed.

It is approaching two years since *Understanding the Problem* was given to the Minister for ACC and then publicly released. Another year has passed since the *Dean Review* was given to the Minister. Despite this, the problems remain.

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<sup>31</sup> Although we have not seen any public statement by any senior leader at ACC on the recommendations in the Dean Report.

<sup>32</sup> Memorandum to Minister for ACC dated 14 August 2015, appendix 6.

<sup>33</sup> See Nikki Kaye “Government focused on access to justice for ACC claimants” (press release, 6 December 2015): includes terms of reference for review.

<sup>34</sup> The chief area of disagreement as we see it related to access to law and how judges write decisions and deal with concepts of evidence law. We deal with this topic further in Tiho Mijatov, Warren Forster, Tom Barraclough “Problems with access to law in personal injury disputes” (2016) 27 NZULR 365.

That is not to say nothing at all has been done. In chapter 2, we outline changes that have been, or are being, made by ACC, Fairway, the courts, and MBIE in response to these problems. Unfortunately these changes are unlikely to solve the significant barriers to access to justice, as we anticipated when they were announced.<sup>35</sup> This conclusion has required us to consider without restraint or preconceptions what the most effective solutions are likely to be.

## 1.4 Outline of report and recommendations

In chapter 3, we consider the issue of “causation” under the Act. In particular, we describe the problems generated by the use of “causation” as a tool for monitoring the boundaries of the scheme in terms of the purpose of the Act and for the management of personal injury in New Zealand. In our view, upon close inspection it is clear that New Zealand does not have a “no fault” personal injury justice system. Many institutions ascribe accountability or blame for causing injury. In relation to ACC specifically, instead of fault, claimants must prove causation in many varied ways that are constantly changing and inherently difficult to measure. Combined with legalistic processes, we conclude that many of the problems that originally led to the Woodhouse report have been reproduced.

Chapter 3 details this complexity, and provides recommendations to help improve access to justice in the face of this issue. Stepping outside ACC into the wider personal injury system, we have identified numerous different causation standards used by different agencies. This variety undermines the management of personal injury in New Zealand. For most New Zealanders, the standard applied by ACC does not equate with their understanding of what “caused by accident” means, which aggravates their perception of injustice.

In Chapter 4, we expand on our understanding of the personal injury system. The problems we have previously identified are found beyond narrow disputes with ACC, throughout the personal injury system. In this chapter we explain that the “personal injury system” needs to be understood widely. It includes all groups and institutions that have something to do with the impact or incidence of injury, with due respect to personal responsibility and the limits of state intervention. In our view all these institutions must operate collectively in an effective manner in order to provide “effective access to justice”<sup>36</sup> for injured people. We propose that a Personal Injury Commissioner be established to lead these groups that make up the personal injury system.

New Zealand’s limited fault personal injury system has been developed piece by piece, often as a response to systemic failures.<sup>37</sup> It is not an integrated system and it does not provide for system learning based on accidents or injuries. Moreover, it is too hard to navigate. Because of the public perception that we have a no-fault personal injury system, many people expect that they can go to ACC and get access to justice, when ACC’s primary function is simply to process claims for cover and entitlements. The failure of the ACC system to deliver is what creates a lot of dispute with ACC, even when ACC itself is not responsible for the injury or injustice.

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<sup>35</sup> Eileen Goodwin “Group says ACC alone can’t fix problems” *Otago Daily Times* (New Zealand, 21 September 2016); Ian Telfer “Govt to accept changes to ACC appeals system” *Radio New Zealand* (New Zealand, 20 September 2016).

<sup>36</sup> As required by the human rights focus in article 13, United Nations Convention on the Rights of Persons with Disabilities.

<sup>37</sup> For example the Health and Disability Commissioner and the Cartwright inquiry; Worksafe and the Pike River disaster; Oranga Tamariki and high-profile cases of egregious injury to children.

To solve this problem, an expert system navigation service is required to assist people in navigating our complex limited fault system to access the services and supports that exist. We must develop mechanisms that both reflect injured persons' expectations and understandings of causation and create an independent institution to oversee not just ACC but all of the mechanisms that comprise our personal injury system.

In chapter 4 we explain in detail the Personal Injury System and show that the problems cannot be solved by ACC, Fairway or any of the Personal Injury System's present constituents. This is because – often by design – none of these institutions have the capacity, authority or learning capability needed to operate the Personal Injury System as a whole. Instead, we propose the establishment of a Personal Injury Commissioner to oversee the wider personal injury system in New Zealand. We have drafted a Personal Injury Commissioner Bill 2018 (attached at page 66).

There is a need for a dedicated statutory agency with long-term oversight responsibility, “oversight” here meaning accountability over ACC, and monitoring and coordination over the rest of the system. This will not only mitigate existing barriers to access to justice but will provide dedicated institutional knowledge for that system. It will allow problems that occur in the future to be quickly identified and solved based on experience and knowledge of previous issues. The Commissioner will also be able to act as an independent third party in situations where there is a perceived conflict of interest held by ACC, for example in negotiating contracts with medical professionals, providing advice on policy or regulatory issues, or providing advocacy services.

We do not suggest radical overhaul of the Personal Injury System, dismantling ACC, or changing ACC so that it is responsible for the entire system. Instead, we recommend development and coordination of the existing institutions by a Personal Injury Commissioner, who would pay appropriate deference to the existing specialisation and jurisdiction of other institutions, while leading and coordinating the system to provide access to justice for injured New Zealanders.



I am firmly of the view that before any medical practitioner could report effectively to the Corporation he or she must have had a good working knowledge of the requirements of "personal injury by accident". Without this he or she had no proper basis upon which to formulate an opinion which would facilitate the Corporation's decision-making; the specialist would have been talking of "chalk" while the statute and the claimant's entitlement would be anticipating "cheese" in classic Alice in Wonderland style.

But this is what was happening in many of the cases I reviewed, ...

... the experience I have had in reviewing so many files in the course of this inquiry and the lack of an effective complaints system leads me inextricably to the conclusion that claimants need protection. I appreciate that I was reviewing the actions of staff ten years ago in the largest city in New Zealand, but that in my view is little excuse for the injustices which I saw being visited on so many people. Inadequate personalities and lack of training may well be a reason, but it is not in my view an excuse. The Corporation has a monopoly. There is no competition. There is nowhere else to go. The effect of hearing the threat that "you won't get your money" unless you "do as I say", will remain with me for a long time. I only wished that responsible officers of the Corporation could have been with me at that time and seen the looks on the faces of ordinary people telling me of being faced with those alternatives in situations of real crises.

...

There is too much room for a perverse decision simply because of an officer's subjective views about a particular claimant and his or her motives in making a claim. There was not only the opportunity but more particularly the reality of people suffering an injustice because of their lack of knowledge and lack of bargaining power against the power and lack of knowledge of the officer with whom they were dealing.

...

But apart from these very practical situations it seems to me that the public of New Zealand are entitled to overt protection from administrative deficiencies in return for the statutory removal of something as serious as their common law right to sue in the ordinary courts of the land. ... There must be a confidence that anyone involved in an accident is able to receive a proper decision on their entitlement under the law with a minimum of fuss and cost, but given the present legal and medical niceties and the complexity of the statute and its administration, and the lack of a complaints system, there is little wonder that confidence has eroded. There is a real need to restore that degree of confidence which the scheme demands.

...

The Corporation must institute and operate an effective system of recording, investigating and dealing with complaints. This must include a system of reporting promptly to the claimant the result of the investigation .... There is a need for a Compensation Ombudsman with functions and powers similar to those of the Banking Ombudsman and the Insurance Ombudsman.

Peter J Trapski *Report of the inquiry into the procedures of the Accident Compensation Corporation*  
(1994, Accident Compensation Corporation) at 50, 106-109, 115

## Chapter 2. Current reform processes are inadequate

ACC has recognised that there are barriers to justice that injured people face. In our view ACC is overly optimistic about the limited scope of the problems, and in its apparent view about the effectiveness of solutions that are in progress at ACC. ACC made it clear to the Dean Review that it believed it had appropriate solutions in hand. These proposed solutions were not made available to us at the time.

Some have since been made available. After careful assessment of this information, we consider that ACC's processes will not improve access to justice. We welcome any evidence to the contrary but the information we have eventually been provided does not demonstrate a commitment to a human rights focus; a culture of embracing lawfulness of operational decision-making; or access to justice; despite all that has taken place in the last few years.

We consider that many of the solutions contemplated by ACC are too limited in scope, effect and ambition. We also emphasise that the solutions we propose are outside of ACC's direct control. But we are of the view that they are the changes that need to be made to the personal injury system.

In this chapter, we examine changes made or proposed by ACC, Fairway, the District Court and MBIE against the four identified access to justice barriers. We do not analyse other institutions within the personal injury system, because other institutions have not yet been officially engaged with the current access to justice reforms. In undertaking our review, we assume that current changes as we understand them will be entirely successful and timely in their implementation.

### 2.1 Changes at ACC

ACC's transformation project involves a process of reshaping ACC (Shaping our Future) towards a Target Operating Model, and a process of culture change and change management (Tika). The research team commends ACC for its efforts in this regard and considers that both of these changes are necessary. Nonetheless, from the information available to us and from responses to questions we have asked various ACC staff, we cannot see how they will address the access to justice barriers that we have previously identified and which have been validated by the Dean Review.

#### *Access to law*

We have detailed this barrier in our recent publication *Understanding the Problem*.<sup>38</sup> We understand that ACC is working towards a publicly available repository of policy instruments. This must be encouraged and properly funded. It is an opportunity to create readily available policy information, to bring this policy into line with the legislation where necessary, and to incorporate changes to the policy through challenges in the courts.

Nonetheless, at this stage, such a policy would remain a one-sided document: as we understand it, it would explain what ACC does, but would not anticipate any influence or change from external sources. ACC's view appears to be that the public should follow ACC's needs, rather than ACC following the public's needs, or taking them into account before developing or changing the ways that it operates.

ACC has developed a model litigant policy.<sup>39</sup> It treats ACC as an adversarial civil litigant and we believe it is likely to undermine the public interest. It also undermines the public's perception that ACC is prioritising the public interest over its own interests. We do not know if it has been

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<sup>38</sup> See also "Problems with access to law in personal injury disputes", above n 34.

<sup>39</sup> Appendix 7.

finalised. We understand that it applies to court processes but not the Fairway processes including review. It also does not apply to ACC's external counsel.

We see the model litigant policy as another example of ACC acting in its own interests and is likely to preserve ACC's advantages as a repeat player in legal challenges. These exclusions will undermine the effect that ACC's solutions can have on improving claimants' access to law. Review is the way in which claimants can challenge ACC's decision at first instance. To exclude ACC's model litigant policy from this early opportunity for dispute resolution is unhelpful. We cannot understand why ACC does not wish to behave as a model litigant from the outset. The same is true for excluding the policy from ACC's externally instructed counsel. In terms of how ACC behaves at review hearings, in our experience, many of the issues are the same as when we first identified them in our UN reports: problems with fair process, reliable evidentiary procedures, and access to funding for representation and other associated costs.<sup>40</sup>

ACC has refused to publicise its settlement policies and procedures, which hampers any ability by counsel to assist ACC in settling appropriate cases and simply generates uncertainty and unnecessary delay. ACC has indicated that one reason it does not publish these policies is to limit the likelihood of it having to face judicial review challenge. We consider this to be unsatisfactory. It is for the court to determine the merit of ACC's policies, if challenged, so that seeking to limit review by the courts for its own sake is not an appropriate approach.

#### *Access to representation*

We consider that the changes at ACC will not address the systemic failures of access to representation. The changes that we have been told about are all inward-looking – what can ACC do better from within? ACC does not appear interested in leading change in the market for legal services for injured people, which we have previously explained has failed.<sup>41</sup> In our experience, many at ACC remain hostile to the involvement of lawyers. The numbers of those with sufficient expertise to represent ACC claimants is dwindling, and can be contrasted with the ready access that ACC has to senior lawyers of its choice. This should be the focus of reform in this regard. Although a workshop has been held on funding for advocacy services, any advocacy service would have to be sufficiently independent from ACC in funding and structure to have any credibility.

#### *Access to evidence*

We have been involved in a working group to resolve problems with access to evidence. The process to date and the tendency to restrict the scope of this working group leads us to the unfortunate conclusion that it will not be effective at making the necessary changes. The process to date has been focused on measures that will simply reinforce the power imbalance that the Dean review identified as needing correction. For example, ACC intends to create agreed statements of medical policy that will be applied widely within ACC: it has done so unilaterally with medical professionals of its own choosing. Its effect would be to transfer medical judgement to ACC directly away from the medical profession and entrench the issues caused by the causation issue. We have raised these issues directly with ACC with a view to collaborative engagement.<sup>42</sup> As with some of our other concerns, we await a satisfactory response.

#### *Being heard*

The problems with being heard arise from access to and navigation of the wider personal injury system. The essential problem is that a person with a dispute does not feel like they have "been

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<sup>40</sup> "The costs of paradigm change", above n 15.

<sup>41</sup> For more detailed analysis of attempts to undermine this market see appendix 8, submission of Warren Forster to MBIE on review costs regulations.

<sup>42</sup> Appendix 3, draft letter to CEO and attachments.

heard”; that is, that from their perspective, the right person has not listened or acted in the right way, leaving the person feeling they have not had access to justice. This barrier to accessing justice is not about criticising the person charged with deciding the dispute (such as a judge); rather, the problem is about people not feeling that they have had a “justice experience”.

ACC’s processes (and the ensuing District Court dispute) are necessarily focused narrowly on access to cover and entitlements under the statute, which means many aspects of a person’s grievance are never addressed. Changes made by ACC will not significantly address this barrier to accessing justice. Nearly six months ago, ACC did hold a working group on implementing a nationwide advocacy service which, in our view, was an excellent example of what could be achieved with well-coordinated consultation: but ACC has not indicated whether there will be any follow-up workshops or other steps and a general election is approaching. This is unsatisfactory and does not generate confidence by attendees or more generally.

Moreover, this process should not be led by ACC. ACC is focussed on determining cover and entitlements under the scheme. That is only one part of the personal injury system and of the experiences of those who navigate it. Instead, there should be an independent body established to help people navigate all aspects of the personal injury system. We recommend that this work be undertaken by the Personal Injury Commission. For this reason, any proposal by ACC or the Government to fund an advocacy service needs to be carefully targeted and would best be invested as part of a Commissioner in the way we suggest in chapter 4.

## 2.2 The changes to the Review process at Fairway

Fairway has made good progress under strong leadership; it has created guidelines to introduce consistency in the review process.<sup>43</sup> These guidelines require case conferencing and require reviewers to take a more investigative approach consistent with the statute.

While we are positive about Fairway’s commitment and action in this area, two remaining areas are of concern: firstly, there has been no public change to the agreement between ACC and Fairway. As it stands, this agreement creates conflicts of interest: in some cases, Fairway is liable to ACC for a portion of a claimant’s entitlements<sup>44</sup> and the overall duty of independence and impartiality must be “subject always to the terms of this Agreement”.<sup>45</sup> There are also key performance indicators and quality assurance measures on staff that are not publicly available.<sup>46</sup> The effect of these structural arrangements and the lack of transparency around them is to undermine confidence in Fairway’s independence.

The second area of concern also relates to independence: the agreement between Fairway and ACC requires Fairway to notify ACC of official information requests and matters of reputational risk to ACC.<sup>47</sup> The ACC-Fairway agreement requires specific quality assurance reports from Fairway to ACC under particular clauses: we have requested these and followed up our request numerous times. We have received multiple assurances they would be provided, but they have not been made available. We have been advised that these are being reviewed by the Chief Executive of Fairway before they are released. Our understanding is that this is contrary to Fairway’s ordinary OIA policy and the requirements of the OIA. It would be disappointing if this were an example where ACC has influenced Fairway’s decision to release this information.

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<sup>43</sup> See Fairway Resolution “Guidelines for ACC reviews”, accessed 17 May 2017, 9.12pm: <<http://www.fairwayresolution.com/node/599>>.

<sup>44</sup> Appendix 9, schedule 1 cl 2.7 and 4.5.2 (final bullet point).

<sup>45</sup> Ibid, schedule 1.1.3.

<sup>46</sup> Ibid, cls 5.1-5.3, and schedule 1 cl 8.1-8.3

<sup>47</sup> Ibid, cls 3.4-3.5, 24.3.3, and 36.3.

### *Access to law*

Fairway has not indicated that they will make any changes that will assist access to law: in our experience, despite the emphasis on an investigative jurisdiction, reviewers tend to rely on case law that was not put to the parties yet fail to distinguish case law relied upon by the applicant. The Fairway Benchbook, released late May 2016, was a generally useful document but runs to 395 pages.<sup>48</sup> This document was a guide to case law for reviewers used by them and relied upon in issuing decisions.

While we can understand the need for such a document, it would be prudent for reviewers to indicate to the parties where particular cases will be relied on, so that the parties may make submissions on the matter. As well, we note that the Benchbook was released but only after some resistance and the involvement of the Ombudsman. Moreover, Fairway has now said that the publicly available Benchbook will not be further updated for the public's benefit. We infer there must be another similar document being used by Fairway, and perhaps by ACC, raising questions of fairness, transparency and natural justice.

We consider this is a missed opportunity to incorporate a single, free, publicly available policy/law document in conjunction with various stakeholders including ACC, Fairway and the Court. Fairway would be a sensible author for this. It has the skills to do so (as evidenced by the Benchbook) and this could be published on NZLII, Fairway and ACC websites. Rather than each agency conducting this work at cross-purposes and with duplication of resources, it would be preferable that a single neutral source take responsibility for this effort: we think the Personal Injury Commissioner would be well suited to this work as an initial project.

This would complement other work that is being done in the public interest, such as publication on NZLII of a free guide for self-represented litigants in this area.<sup>49</sup> Some caution is also required around guides for self-represented litigants: such a guide will not overcome the impact of other access to justice barriers, particularly access to representation and access to medical evidence. Further, claimants are unlikely to feel they have had a justice experience or "been heard" if they feel their case depended entirely on their ability to perform in relation to this guide.

### *Access to Representation*

The guidelines will not resolve the problems that exist in relation to access to representation. As with ACC's efforts, the guidelines do not seek to address the most significant problem in this regard: the failed market for legal services for injured people. The adoption of investigative processes by a reviewer will not address this issue: investigative processes still generate a need for legal advice, especially where issues of causation and medical evidence arise.

### *Access to evidence*

The Fairway guidelines may go some way to resolving access to evidence at the review stage. Nonetheless, there are currently only a few hundred independent assessments funded by ACC at review. Fairway has estimated that this will need to increase to around 1,800 and there is no evidence available to identify how it will be obtained.<sup>50</sup> Current indications are that it will be

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<sup>48</sup> Available from:

<[http://www.fairwayresolution.com/sites/default/files/policies/FairWay\\_Benchbook\\_Released%20May%202016.pdf](http://www.fairwayresolution.com/sites/default/files/policies/FairWay_Benchbook_Released%20May%202016.pdf)>, accessed 17 May 2017, 7.34pm.

<sup>49</sup> We note there is a growing body of literature suggesting guides can be ineffective and/or create false confidence.

<sup>50</sup> The two most prominent recent suggestions in the group include widening the market of specialists (by seeking opinions from overseas practitioners and relying on opinions from General Practitioners or Physiotherapists) and enhancing consultation on medical matters before a decision is issued. ACC's own Branch Medical Advisers produce between 2000 and 3000 individual opinions per month (appendix 3, draft letter to CEO, at appendix 6).

obtained within ACC's existing framework. This will not solve the problems.<sup>51</sup> For this reason, we consider that wider changes are required to address the evidence problem and we will address these both when we consider causation (Chapter 3) and the Personal Injury Commissioner (Chapter 4).

#### *Being heard*

As discussed above, the problems with being heard are largely related to access to and navigation of the wider personal injury system. Changes at Fairway are likely to increase perceptions of independence but they will not address the wider personal injury system, and we consider a dedicated personal injury system navigation process is required. Fairway's role is limited to review of decisions on cover and entitlements: reviewers must specifically ignore ACC's policy and procedure under s 145(1)(b) of the Act.

### **2.3 The changes in the Court Process**

The District Court has recently brought a guideline into force. This guideline details the steps that need to be taken by people before the courts in this area, and set out the considerations that will apply to resolving many questions that arise in the court process, such as obtaining legal aid, extensions of time, and preparing for and appearing at the hearing. This is a positive step and we consider that the Chief District Court Judge and her team should be commended for developing and implementing the guidelines and recognise that this is the Court doing what is appropriately within its ambit. We particularly commend the series of hui facilitated by Judge Powell which resulted in important changes.

#### *Access to law*

The Court has a critical role to play in providing access to the law. As our previous research has explained in detail, courts are the independent backstop for access to justice. In the ACC context, which is statutory, there are many steps courts can and do take to ensuring the law is readily understandable, easily accessed and consistently applied. Although the purpose of the guidelines is not on the substance of the law, but on the process, we consider these guidelines will assist in access to the law because they set out that process clearly and publicly.

#### *Access to Representation and Access to evidence*

The District Court said to the Dean Review that these barriers to access to justice might be mitigated by giving the Court statutory powers to appoint counsel and evidence for individuals in appropriate cases. We do not believe that this suggestion has been considered further by the government. If legislative change is required to allow this to occur, it could be done with the enactment of the legislation to create the Personal Injury Commissioner. Another option would be amendment to the review costs and appeals regulations<sup>52</sup> to give the Court specific powers.

In any case, it is important to consider this solution in perspective; several hundred disputes are heard in Court each year compared to hundreds of thousands of adverse decisions being issued by ACC. The ability to correct problems with evidence and representation in court is important, but it will not be an overall solution to the upstream systemic issues that go on to generate access to justice barriers in the courts. The Court will remain an important backstop by applying the law to cases of systemic failure in individual cases. To make this mechanism function effectively, the proposed powers of the Court to appoint lawyers and experts should be implemented and we suggest this is an appropriate task for the Commissioner in conjunction with the Government and ACC

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<sup>51</sup> See appendix 3.

<sup>52</sup> Injury Prevention, Rehabilitation, and Compensation (Review Costs and Appeals) Regulations 2002, reg 10.

## *Being heard*

As discussed above, the problems with being heard are largely related to access to and navigation of the wider personal injury system. It may not be appropriate for changes in the Court process to attempt to address the wider process and we consider a dedicated personal injury system navigation service is required.

A key feature of the being heard problem is that the Court generally (like Fairway) only has jurisdiction once a s 6 decision is issued<sup>53</sup> and only on matters affecting cover and entitlements. The Court's emphasis is on substance in decision-making on cover and entitlements, not process, unless process can be shown to have materially affected the substance. The Court's emphasis is properly on swift access to entitlements and matters of law, not policy or practice. Nonetheless, process, policy and practice generate sincerely-held grievances in people who deal with ACC. The mechanisms to be heard on these issues (regulatory institutions) do not integrate well with the institutions managing personal injury (management institutions). The Court's function is not to examine any of the antecedent policy and practice issues unless they are clearly contrary to law: policy reform tends to happen indirectly. The Court's role is to focus on individual cases, rather than systemic issues. These issues of system design continue to contribute to the being heard problem and we propose to deal with these issues through the Personal Injury Commissioner, and explain them in more detail in Chapter 4. But they are not an issue for the ACC division of the District Court.

## **2.4 Processes within the Control of MBIE**

The Ministry of Business, Innovation and Employment (MBIE) has an important role in addressing some of these barriers. Unfortunately, we believe there has been insufficient resourcing and political leadership on these issues with a failure to adequately prioritise them, particularly in regard to the indexation of the review costs regulations. We also believe there has been a lack of cooperation by ACC particularly in regard to analysing and providing data that has been repeatedly called for by Ministry officials.<sup>54</sup>

The *Injury Prevention, Rehabilitation and Compensation (Review costs and appeals) Regulations* are in urgent need of revision. We understand MBIE is only beginning to embark on this process from June 2017.<sup>55</sup> These revisions need to address the market failures in the provision of legal services to injured people, in terms that explicitly state their purpose is to facilitate access to evidence and access to representation.<sup>56</sup> The regulations should explicitly provide for the appointment of experts and counsel for litigants.

The Dean Review called for urgent revision and increases in the amounts that injured people's lawyers are allowed to be paid for the legal help they provide. This was one of the key recommendations put to the Minister in 2015,<sup>57</sup> some 2 years ago. We had also hoped this would be a tangible example of the Government's commitment to dealing with these issues that could be progressed swiftly to improve access to justice. There has been some limited consultation by MBIE followed by a restricted increase of rates, simply to keep pace with inflation (but below the rate that was called upon by the Dean Review), which itself has undermined the real impact of those costs by 16.6%, though even that has not been implemented. The lack of positive change even in this simple way is unsatisfactory and we are sceptical anything will be achieved before the general election.<sup>58</sup>

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<sup>53</sup> Or for delay under s 134(1)(b), which generally prompts the issue of a decision under s 6.

<sup>54</sup> See for example appendix 18, which indicates data about District Court costs.

<sup>55</sup> Appendix 10, letter from MBIE dated 28 April 2017 regarding reform to review costs regulations.

<sup>56</sup> See appendix 8, enclosing submission by Warren Forster to MBIE dated November 2016.

<sup>57</sup> Appendix 6, Memorandum to Minister dated 14 August 2015.

<sup>58</sup> Appendix 10, letter from MBIE dated 28 April 2017 regarding reform to review costs regulations.



## 2.5 Conclusion – the existing processes will not solve the underlying problems

In our experience, there are four common themes running through all of the responses to the Dean review. We attach a table included in the cabinet paper responding to the Dean report:<sup>59</sup> it shows much of the work has been handed to ACC (or Fairway, as a closely related organisation to ACC) to handle open-ended processes. It is an example of the policy gap we have identified and the lack of an organisation to take appropriate leadership generating the need for the Commissioner we propose in Chapter 4. The common themes are:

- 1) there is a lack of coordination and leadership, with ACC being unable to lead reform of its own procedures because of a perceived and actual lack of independence or commitment to the public interest. In particular ACC leadership has not to our knowledge even publicly acknowledged the Dean Report's findings.
- 2) there is a lack of expertise in the policy and practice in the ACC system (let alone wider personal injury system) in any institution except ACC, and ACC's own expertise is often based on assumptions rather than data. There is a legacy of external reviews and internal reports that are overlooked and lost over time without being implemented or learned from and loss of institutional expertise at ACC due to staff turnover.
- 3) there is a lack of transparency around reform processes, both within and between the institutions responsible, with infrequent public reporting of progress.
- 4) there is a lack of any coordinated systemic data upon which to base decisions, let alone publicly available data for external analysis and comment.

### *Access to law*

Having considered the steps that are currently underway, there is a potential solution to part of the access to law barrier which shows some promise. If the various institutions can work together to create a transparent accessible comprehensive policy database, which reflects the legislation and allows amendments to the policy based upon interpretations of the legislation by the Courts (as opposed to ACC), then it may be possible to improve access to the law. There are some shortcomings with such an approach: it would not deal with the gaming of the system of precedents and other repeat player advantages that are enjoyed by ACC. These wider issues can be solved by the introduction of a Personal Injury Commissioner that has powers to intervene in litigation and bring litigation under its own name where appropriate. For this reason, powers to do both these things are included in the Personal Injury Commissioner Bill. This is discussed further in chapter 4.

We are positive to an extent about ACC's Tika programme, which is directed at culture change and change management. We were grateful for the time spent by ACC explaining Tika. It seems like a relatively effective way to identify systemic issues as identified by internal staff, and is an important recognition of the degree of expertise held by front-line staff. However we have advised ACC that we believe that culture change will be meaningless without some transparency and reform around key performance indicators (we deal with this in more detail in chapter 3). As long as ACC keeps structural influences on decision-making away from public scrutiny, claimants will continue to speculate about them. They have a direct influence on decision-making and the resulting volume of disputes.

### *Access to evidence, representation and being heard.*

The current processes will not overcome the barriers of access to representation, access to evidence or being heard. We propose to address these by changing the causation tests under the Act, thus reducing the need to obtain expert evidence and removing the over-reliance upon

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<sup>59</sup> Appendix 2, appendix to cabinet paper on response to Dean review.



experts by both ACC and injured persons. This will increase the reliance on treatment providers, and reintroduce an explicitly principle-based approach to causation which does not rely so heavily on a bio-medical standard of causation based on the medical model of disability. As well, we propose to reduce the reliance on representation by having the Commissioner provide a personal injury navigation service to assist injured people throughout the personal injury system and make use of mechanisms available to them, even if that falls short of formal legal advice.

We do not need lawyers, medical experts or fault-based systems of dispute resolution in order to manage the two million claims made per year. We do not even need these to resolve disputes arising from the 300,000 adverse decisions per year. This is the reason we are suggesting that we reconsider the approach to providing access to justice for injured people in New Zealand. We think the best improvements in access to justice will come from a wide understanding of “access to justice”,<sup>60</sup> which comes from an acceptance by all those who form part of the personal injury system that the work they do affects the justice that is enjoyed by those who have to be involved in that system.

We propose an integrated system that continues to limit fault-based disputes by continuing to provide compensation and rehabilitation, but recognises that at times, it is worth the community investing in disputes which may result in education, accountability and blame. We must create a system of determining how we make decisions about this.

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<sup>60</sup> “The Idea of Access to Justice”, above n 13.

“Thus the problems of etiological [causation] classification are not going to become easier with the passage of time. They are going to become more difficult because causation is going to become more obscure. ... as long as we rely on etiologically based systems of compensation we will have increasing injustice rather than a reducing incidence of injustice.”

...  
“It is more than just injustice that concerns me here, it is also therapeutic damage. It has long been obvious to me that etiological classifications involve delay, they involve a lot of expense, they involve a great deal of waste, they involve a diversion of resources away from compensation towards administrative structures, legal processes, insurance processes, and so on. They involve delay while people are being classified into one etiological classification or another, and delays in compensation decisions are often associated with delays in the commencement of rehabilitation. That has long been obvious. What has become more apparent to me in recent years is that these delays in rehabilitation can involve permanent damage to rehabilitation prospects and not merely a delay in commencement. ... As long as we keep sending people to doctors, and the adversary system is the worse where you may have people examined by doctors on both sides, those medical examinations are themselves a cause of therapeutic damage.”

Terence Ison  
(1985) 10(1) *Adelaide Law Review* 86 at 89-91

An efficient service that addresses the actual social outcomes was always more important to the Woodhouse Commission than the short-term problems of determining fault or causation and allocating liabilities according to risk profiles. Superficially, it may appear to be the case that self-insurance, the competitive provision of cover, or “experience rating” have some advantages in terms of efficiency or equity, but these ideas have to be evaluated in terms of the administrative and legal inefficiencies and the inequitable treatment of persons that they can produce. We also have to be wary of the ways in which such systems can undermine the no-fault basis of the ACC scheme. ... We should seek a structure that does not create a sense of fault through attempts to have fine-grained systems that allocate liabilities and entitlements on the basis of risk and causation.

Grant Duncan  
“Boundary Disputes in the ACC Scheme and the No-Fault Principle”  
[2008] *NZLRev* 27 at 35

“[1] This appeal raises an issue that is by no means uncommon in the accident compensation area. The appellant had a fall. Since that fall he has suffered incapacitating back pain. It is common ground that Mr Johnston, like a significant proportion of the population, had some pre-existing degeneration of the spine. Like most people he was unaware of this. It had caused him no problems. It probably would never have caused him issues, at least during his working life, but for the fall. The immediate injuries caused by Mr Johnston’s fall – a back sprain, a wrist sprain etc – would be expected to heal themselves over not too long a period. But Mr Johnston’s problems continue and they are incapacitating.

[2] Obviously there is a link between the accident and Mr Johnston’s current situation. But a settled line of authority has said that is not enough. More is needed than the triggering of an existing injury. The accident must cause its own injury which continues to contribute to the incapacity.”

*Johnston v ACC* [2010] NZHC 1726; [2010] NZAR 673

## Chapter 3. Causation

### 3.1 Introduction to causation

#### 3.1.1 Summary of causation tests issue

One part of the ACC scheme drives a large proportion of all disputes that injured people have with ACC. We call this problem “Causation”, or “the causation tests issue”.<sup>61</sup> Here is what we mean by this:

- (i) The Accident Compensation Act 2001 has a multitude of legal tests that ask a decision-maker to decide whether one thing has caused another thing<sup>62</sup>. The decision-maker generally has to look at evidence of some kind to make their decision. We call these “**causation tests**”.
- (ii) Every time a person has to apply a causation test under the legislation, it creates an opportunity. The opportunity creates a possibility that ACC will make a decision to exclude its responsibility to assist a person by refusing to provide cover or entitlements. Whenever one of these opportunities means ACC decides not to provide cover or entitlements, a person can lodge a review application against that decision. Each opportunity therefore generates a potential dispute. These might be called “causation disputes”.
- (iii) In every causation dispute, ACC has a specific advantage because of:
  - a. the impact of barriers to access to justice, as well as
  - b. the way that causation tests work, which we explain in this chapter.

These “causation tests” establish the boundaries of the ACC scheme. There is<sup>63</sup> a legitimate need to draw boundaries around the ACC scheme. That is what law does – it determines who is out and who is in.<sup>64</sup> But, because of the tools used to draw those lines, it is inevitable that large volumes of disputes of a particular kind will be generated (requiring lawyers and medical evidence). The causation issue has led to attempts to impose a higher level of certainty on an uncertain concept. In some situations, the level of certainty sought is higher than can be attained. This results in a standard that is selectively and inconsistently applied, to the detriment of injured people generally, and even more so to claimants who are perceived as generating a significant outstanding claims liability. We have reason to believe that factors influencing this perception include complexity of injury, certain kinds of injury, demographic information, and socio-economic circumstances.

#### 3.1.2 The effect of the causation test issue

In combination, these factors mean that the causation issue:

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<sup>61</sup> We note Richard Gaskin’s excellent analysis of the role causation plays in undermining the goals of the Accident Compensation Scheme in Richard Gaskin’s “Accounting for Accidents: Social Costs of Personal Injuries” (2010) 41 VUWLR 37 at 43 et seq.

<sup>62</sup> Eg “the accident caused the injury”, “the injury caused the need for surgery”.

<sup>63</sup> In a situation where the ACC scheme continues to restrict entry based on cause of injury or illness, contrary to the United Nations Convention on the Rights of Persons with Disabilities.

<sup>64</sup> See Asha Kaushal “The politics of jurisdiction” (2015) 78 MLR 759.

- (i) perpetuates the comparative disadvantages faced by a person who wants to challenge an ACC decision;
- (ii) increases the potential number of disputes under the Act and increases the likelihood that a legal or evidential dispute will develop; and
- (iii) undermines access to justice, the overall purpose of the social contract, and the accident compensation scheme, which seeks to limit dispute and streamline decision-making.

### 3.1.3 How we identified causation tests

There are lots of examples of causation tests. They are worded differently, but have a similar effect.

We analysed the Accident Compensation Act 2001 looking for examples of causation tests. To be consistent, we identified criteria for what we meant by a causation test before we started. Many of the tests we identified did not look like causation tests: they did not explicitly use the phrase “caused by”, but still asked a decision-maker to draw a causal connection of some kind.

The selection criteria were:

1. There is a decision-maker.
2. The decision-maker must apply a legal test in the Act when making their decision.
3. The decision-maker must consider evidence in applying the legal test and making their decision.
4. The legal test in (3) relates to the presence or absence of a “causative connection” between one thing and another thing (“accident caused injury”, or “X caused Y”).

Within criterion 4, we noted that there were two kinds of causative connections that the Act asks a decision-maker to draw: one we describe as “biomedical or scientific” and another as “legal or purpose-oriented” causation.<sup>65</sup> This distinction relates to the kind of causative connections that appear to be contemplated by the legal test in criterion 2, and the corresponding kind of evidence required to answer it in criterion 3. Tests for cover tended to be viewed as biomedical or scientific in nature. Tests for entitlements tend to be seen as social or purpose-oriented. Our view is that causation in general under the Act must be understood socially, legally, or purposively, and that a biomedical or scientific view of causation is one that has arisen in part due to ACC’s insistence that the Act requires a higher evidential threshold and an inappropriately restrictive understanding of causation.

### 3.1.4 Outline of this chapter

First we will explain some examples of causation tests and demonstrate how prevalent they are throughout the Act (3.2.1-3.2.4). We then describe the judicial guidance that has been provided to help apply these tests, though we note that this form of assistance applies in a small

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<sup>65</sup> “New Zealand’s Mental Health Act in Practice” at 40-45 adopts a similar dichotomy when describing interpretive approaches adopted by the Court under the Mental Health Act to the definition of medical disorder, which includes psychiatric-style language as well as words in common usage. The authors reconcile them in a “dynamic” approach as outlined by the Tribunal. The authors there describe a “legal approach” (“While the mental disorder definition includes clinical content, it is in the final analysis, a legal definition” from *Re MJB* [2006] MHRT 06/090 at [8]) or a “psychiatric approach” (terms such as delusion should be given “a specialised meaning which has evolved over 200 years of psychiatric and psychological scholarship...” from *Re IM* p2002] NZMHRT 57/00 at [68].

proportion of the vast number of claims considered by ACC (3.3.1). We then explain why we have a concern about *potential* disputes that are generated with each decision on causation, and how the nature of the causation test amplifies the actual and potential numbers of complex medico-legal disputes, amplifying the impact and prevalence of the barriers to access to justice (3.3.2-3.3.4). We then explain how a real and perceived lack of independence by ACC generates cause for concern about how the causation tests are being applied in response to ACC's own interests and priorities rather than claimant need, the purpose of the Act, or the rule of law (3.4.1-3.4.3). We then outline our recommendations for dealing with this issue and recommend that the Commissioner's first job be to lead reform on the causation tests issue (3.5).

## 3.2 Examples of causation tests in the Act

In this part we illustrate how causation tests are pervasive throughout the Act and explain what we mean by a causation test using examples. In order for the reader to consider whether the need for reform is justified, it is necessary to consider the complexities of the causation tests and their prevalence in any claim under the Act.

### 3.2.1 Causation tests in cover

Causation tests are used to create boundaries<sup>66</sup> around the accident compensation scheme. They do this by creating classes that determine what injuries are "covered" and what injuries are not covered. Covered injuries are a "personal injury", a statutory term with a specific meaning.<sup>67</sup> A claimant can have cover for their injury, but this may not lead to entitlements: causation tests also draw boundaries around entitlements.

*"personal injury caused wholly or substantially by"*

Section 26 of the Act defines "personal injury". Section 26(2) and (4) of the Act state that personal injury "does not include personal injury caused wholly or substantially by a gradual process, disease, or infection" and "does not include ... personal injury caused wholly or substantially by the ageing process".

Sections 26(2) and (4) demonstrate that there must be some difference between something being "caused by" something else, and something being "caused wholly or substantially" by something else. These are both obvious examples of causation tests, but they demonstrate that there can be different standards of "causation" to be applied in different circumstances. In this case, that there is a different standard to be applied is obvious, even if it is not clear exactly what that standard means. Because they are legal tests, the question is what Parliament meant when it used those different words. Over time, any decision-maker who had to apply those sections has had to work out what Parliament meant when it said that something was caused "wholly or substantially" by something else.

There is another key aspect of s 26 that reveals a lot about the nature of causation tests under the Act. In particular, even in any accidental injury, for example, s 26 acknowledges that it is possible that five different types of "causes" may have a causative impact on the injury: (1) the accident;

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<sup>66</sup> Chief Justice Elias said this in *Allenby v H and others* [2012] NZSC 33 (9 May 2012): "The [Act] provides cover on the basis of line-drawing which reflects policy choices. Such line-drawing has resulted in legislation which is technical. Approaches taken to the interpretation of provisions under earlier accident compensation legislation need to be treated with some caution in considering the current legislation. Nor is this easy legislation to follow. It contains much cross-referencing, repetition, and circularity in expression."

<sup>67</sup> *Ibid* at [18].

(2) the ageing process; (3) “a gradual process”; (4) disease; or (5) infection.<sup>68</sup> The decision-maker has to consider whether an outcome (the injury) has been “caused by” the accident, but also *not* “caused wholly or substantially by” four other possible physiological processes.

The legal test looks objective and scientific. In reality, it asks a person to make a decision from a mixture of causative factors that cannot always be measured, and can often be the subject of reasonable disagreement among well-informed experts. Further, the test that any well-informed experts have to apply is ultimately a social or contextual one: to our knowledge, there is no logically demonstrable difference, nor medical-scientific difference, between “caused wholly or substantially by”, “caused by”, or “because of”. Despite this, the Act requires a different standard. This leads to a lack of clarity and consistency, and the creation of ostensibly different standards that must be applied by decision-makers

*“mental injury because of physical injuries”*

In a similar vein, there are some kinds of injuries that are inherently less capable of measurement according to objective, empirical, scientific methods than others, for example “mental injury”.<sup>69</sup> Mental injury is defined in the Act at s 27 as “a clinically significant behavioural, cognitive, or psychological dysfunction”. By contrast with a fracture, for example, “behavioural” and “psychological” dysfunctions relate to the observation of human behaviour. Any time we are measuring human behaviour, we have to acknowledge that there are an incalculable number of known and unknown causative factors at play. The various individual physical determinants of mental health are not well understood, at least not well enough to determine whether one cause is either necessary (it would not have developed without) or merely sufficient (other people subject to that cause may not develop a mental injury).

The other objective-looking term in the definition is the phrase “clinically significant”. This is also capable of reasonable disagreement between well-informed experts in arguably every case.<sup>70</sup> Many of the most common mental injuries such as anxiety or depression are understood clinically as very severe examples of otherwise expected behaviour. In many clinical manuals, the only distinguishing factor that gives something “clinical significance” is that it impairs normal functioning or causes undue distress to the individual. This, again, depends on one’s perception of “normal function” or “undue distress”, which is admittedly shaped by expert training and experience. Arguably, “cognitive” dysfunctions now have a more solid physical basis, and are more amenable to empirical measurement through neurological scans. But the question remains: what steps are required by a decision-maker in order to be satisfied that a cognitive dysfunction is “because of physical injuries” and *not* “caused wholly or substantially: “by the ageing process”, or by a “gradual process, disease or infection”? Within s 26, personal injury is defined to include “mental injury suffered by a person because of physical injuries”. Does “because of” mean the

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<sup>68</sup> Bearing in mind that a gradual process, disease or infection can be covered in certain circumstances, just not as an accident per se. Notably, the words “gradual process, disease or infection” are never defined in the Act, either as a composite phrase or individually.

<sup>69</sup> We do not diminish the importance of clinical experience, but that kind of evidence is of a different kind than objective empirical science. Diagnosis is often made by consensus and capable of reasonable disagreement rather than absolute certainty.

<sup>70</sup> See New Zealand’s Mental Health Act in Practice edited by John Dawson and Kris Gledhill, for a much more informed view of this area. Chapter “The Complex Meaning of Mental Disorder” at 38-39: “... there are still problems determining the range of disorders of mental function to include in the list and the precise language in which they should be expressed. The terms used then have to be applied to the endless varieties of psychological life. Even psychiatrists will sometimes disagree about their meaning or application, especially if the words used are not terms of art within psychiatry but are broader philosophical terms, like ‘cognition’ and ‘volition’ in the New Zealand list. Moreover, even if psychiatrists could agree on their meanings, the courts and the Tribunal must settle *their* interpretation, and that may differ from psychiatrists’ reading of the law. A situation might even arise in which the same terms were given different meanings in different contexts or by the members of different professions – a pluralistic approach raising concerns about consistent application of the law. ...”

same thing as “caused by”? Both phrases seem to require someone to decide whether there is some kind of causative connection, but what kind of causative connection is required and what kind of evidence will suffice? What level of certainty should be required? In practice, a decision-maker under the Act may simply rely on a medical assessor’s opinion: the consequence of that is a need for opposing evidence, including instructions and advice by lawyers.

*“caused by accident” - what does the Act indicate that “causation” means?*

If you can pass the causation tests in s 26 of the Act, section 20 of the Act then says what kinds of “personal injury” defined by s 26 are covered. Section 20, again, uses causation tests. Those causation tests relate to the circumstances in which the injury was caused.<sup>71</sup>

The highest volume of claims processed by ACC are claims for cover for accidental injuries under s 20(2)(a). That test asks ACC to decide whether the “personal injury [was] **caused by an accident** to the person”. “Accident” is defined by section 25 of the Act and also relies on concepts of causation to include and exclude particular things.<sup>72</sup>

Section 25(3) is particularly interesting for illustrating what “causation” means. We argue that it defines what kind of evidence is required to show a causative link, or what kind of evidence will not be enough. In doing so, it gives some indication of what the Act actually means when it asks decision-makers to decide whether one thing was caused by something else:

“The fact that a person has suffered a personal injury is not of itself to be construed as an indication or presumption that it was caused by an accident.”

ACC relies on this section to separate the causation tests under the Act from the way a person on the street might think about causation. If I have no pain in my knee, then I fall on my knee, and have pain in my knee, I would say my fall caused the pain, or an injury. A member of the public may well believe their “knee injury” is covered on that basis, when often a more specific medical diagnosis is insisted upon by ACC. Section 25 says that just because I have pain in my knee, that is not evidence of the fact that my pain was caused by accident. Section 25(3) means that just because something happened after something else, that doesn’t mean that the earlier thing caused the thing that came after. Section 25(3) says that we need something more and is a direction to any person making a decision under the Act who is considering whether an injury was “caused by” accident. It is also sometimes applied by assessors making assessments of causation under the Act.

We argue that, despite the way it is relied upon in some circumstances, s 25(3) actually sets a very low bar. In practice, as long as a GP or physiotherapist has stated that there was an injury caused by accident, that should be enough evidence for ACC to accept cover for low level injuries with a low “risk profile”. The extent of a GP’s investigation may simply be, using the example above, that the claimant says to the GP: “I had no pain; I fell on my knee; now I have pain in my knee; my injury was caused by accident.” All that is needed to avoid the s 25(3) bar is a single further bit of evidence to suggest causation. This can be as simple as a GP’s agreement.

Once the claim becomes “high risk” or will be inherently expensive (we understand that ACC streams claims on this basis), ACC will begin to insist, based on s 25(3), that there needs to be further evidence of some kind linking the accident with the injury. In particular, the “scope of cover” issue is described elsewhere, and provides an opportunity for ACC to selectively decline cover based on causation and insist on a higher or more complex evidential burden, which in turn amplifies the advantages held by ACC from its sophisticated processes and resources.

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<sup>71</sup> The Act does not always clearly differentiate between something that is a “circumstance” and something that is a “cause”.

<sup>72</sup> Section 25 includes inhalation or ingestion of bacteria as a result of a criminal act, movement to avoid a force, and exposure to the elements.

Despite that, the vast bulk of claims for cover accepted by ACC are accepted solely on the basis that a physio or GP has completed a form.

*The only situation where a claimant does not have to show a causative link*

The only situation where the Act does not require a causation test is when a person may be eligible for “deemed cover”<sup>73</sup>. These sections “deem” that a person has cover in a situation where ACC fails to notify a person of its decision on cover in a timely manner (including certain time limits in the Act).

In our experience, ACC does not like accepting that a deemed cover decision has arisen.<sup>74</sup> In our experience, its first response where a deemed cover decision has arisen is to argue that the claim it was meant to process was deficient in some way that meant it was not obliged to consider the claim. That can include arguing that the claim was a “duplicate”. In practice, this becomes another causation analysis, but of a slightly different kind: the question will be who caused the claim to be lodged in a particular state, and effectively whose actions caused ACC’s failure to deal with it. This largely includes technical or administrative evidence such as who emailed what where, and when; or whether a claimant responded to a request for further information; or whether they were specific enough when they made their claim. In a recent case, it argued that it was confused about the identity of a claimant despite the inclusion of a specific unique identifier in the letter. It can also include disputes about medical evidence, for example where ACC alleges that the medical substance of the claim was so similar in nature that they were either reasonably confused by it, or did not have to process it.

Where there is a reasonable prospect that deemed cover has arisen, it is our experience that ACC will still turn the dispute towards medical evidence about causation in two ways. First, in addition to its arguments about who caused the claim to be lodged in a deficient manner or who caused ACC’s failure to process it, ACC will often submit that regardless of whose fault it is and whether deemed cover has arisen, the claim does not meet the causative assessments ACC is required to consider in any event. In practice, this means that a claimant would still be unwise not to obtain medical evidence to counter ACC’s medical evidence about causation, even though the Act says they are meant to receive cover automatically as a penalty for administrative delay. Secondly, in situations where ACC accept that deemed cover has arisen, ACC will often immediately revoke cover under s 65 of the Act on the basis that there is no causative link as required by the Act. In some situations, it has done this only days before a review hearing is set down to be heard, and then argues that this deprives the reviewer of jurisdiction such that the review should be dismissed. Where it does this successfully, the review is recorded as being upheld in ACC’s favour, obscuring the failure in ACC’s processes. It is not clear whether ACC can say how many deemed decisions occur every year.

*“caused in the circumstances”, “Causes, or contributes to the cause of”, where “the risk ... is significantly greater”, “solely attributable”, “not a necessary part, or ordinary consequence, of the treatment, taking into account all the circumstances”*

The analysis above only pertains to relatively simple injuries that make up a high volume of claims to ACC: accidental injuries and resulting mental injuries. The analysis in relation to treatment injury or work-related gradual process is similar, but exponentially more complex.

We deal with these later to illustrate one of our potential solutions, which includes making the complexity of these tests more transparent, or acknowledging the inherent uncertainty in them by adopting different causation tests.

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<sup>73</sup> Pursuant to ss 54-64 of the Act.

<sup>74</sup> We suspect this is because of key performance indicators or specific control objectives that impose consequences on staff, but we have never been able to confirm or deny this suspicion because of a lack of access to relevant information.



Sections 30 and 32 of the Act deal with work-related gradual process injuries and treatment injury. In terms of drafting, they present a contrast to the apparent simplicity of a section such as s 20(2)(a) in relation to accidental injury, but the contrast is illustrative of the issues raised by causation tests.

Section 30 of the Act deals with work-related gradual process, a staple of any workers compensation scheme, which continues to raise issues around causation in jurisdictions that retain the tort of personal injury.<sup>75</sup> Section 30 is of interest because: it incorporates “circumstances” of injury into a causation analysis; and it uses two interesting devices to modify the causation analysis, the phrase “causes, or contributes to the cause of” and the use of a schedule of injuries where causation does not have to be proved. The section is set out here to illustrate just how many causal requirements can be included in a single cover test and the variety of means available for drafting them already in use under the Act. We have underlined the phrases that are about causation, although we acknowledge that “caused by” is repeated multiple times as part of a defined term rather than setting out separate tests.

### **30 Personal injury caused by work-related gradual process, disease, or infection**

- (1) Personal injury caused by a work-related gradual process, disease, or infection means personal injury—
- (a) suffered by a person; and
  - (b) caused by a gradual process, disease, or infection; and
  - (c) caused in the circumstances described in subsection (2).
- ...
- (2) The circumstances are—
- (a) the person—
    - (i) performs an employment task that has a particular property or characteristic; or
    - (ii) is employed in an environment that has a particular property or characteristic; and
  - (b) the particular property or characteristic—
    - (i) causes, or contributes to the cause of, the personal injury; and
    - (ii) is not found to any material extent in the non-employment activities or environment of the person; and
    - (iii) may or may not be present throughout the whole of the person’s employment; and
  - (c) the risk of suffering the personal injury—
    - (i) is significantly greater for persons who perform the employment task than for persons who do not perform it; or
    - (ii) is significantly greater for persons who are employed in that type of environment than for persons who are not.
- ...
- (4) Personal injury of a type described in subsection (3)<sup>76</sup> does not require an assessment of causation under subsection (1)(b) or (c).

Section 30 makes explicit the substance of what occurs in a causation analysis to gain cover. The question is whether a particular thing caused another thing, but what that really asks us to do is: identify a particular cause among many potential causes; extract that cause’s impact from other acknowledged causative factors; and determine the probability, likelihood, or risk, that the

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<sup>75</sup> One of the most recent controversies in the tort of personal injury is the litigation in *Fairchild v Glenhaven*, which was one of the cases dealt with heavily by authors and commentators relied upon by the Court of Appeal in *Ambros*, illustrating the broad applicability (within reason) of “causation” principles across different kinds of legal action.

<sup>76</sup> Referring to a list of injuries described at schedule 2 of the Act.

particular thing in question caused the outcome. In work-related gradual process injuries, the decision-maker under the Act must find that: there is a factor about someone’s employment or employment environment; that factor is not found outside of employment so that the employment must be taken to be causative and nothing else; that the cause was present at some point, but does not have to be present continuously; and that there is a higher documented<sup>77</sup> risk of suffering the thing when exposed to the environment or the characteristic of employment, based on analysis of analogous cases (usually epidemiological studies of comparable populations). Interestingly, the section also explicitly acknowledges that “circumstances” can “cause” something, when circumstances are generally taken to be, by definition, circumstantial, and not causative. In the case of workplace injury and gradual process, there is also an acknowledgement that the surrounding circumstances are more complex, and it may only be possible to say that it is highly likely to have “contributed to the cause of” the injury.

This same analysis is framed in an even more complex counterfactual manner in the test for treatment injury.

### 32 Treatment injury

- (1) Treatment injury means personal injury that is—
  - (a) suffered by a person—
    - (i) seeking treatment from 1 or more registered health professionals; or
    - (ii) receiving treatment from, or at the direction of, 1 or more registered health professionals; or
    - (iii) referred to in subsection (7); and
  - (b) caused by treatment; and
  - (c) not a necessary part, or ordinary consequence, of the treatment, taking into account all the circumstances of the treatment, including—
    - (i) the person’s underlying health condition at the time of the treatment; and
    - (ii) the clinical knowledge at the time of the treatment.
- (2) Treatment injury does not include the following kinds of personal injury:
  - (a) personal injury that is wholly or substantially caused by a person’s underlying health condition;
  - (b) personal injury that is solely attributable to a resource allocation decision;
  - (c) personal injury that is a result of a person unreasonably withholding or delaying their consent to undergo treatment.
- (3) The fact that the treatment did not achieve a desired result does not, of itself, constitute treatment injury.

The section requires a decision-maker to take an outcome (the person’s injury) and tries to extract, in reverse once an injury has been suffered, the causative impact of: the underlying health condition; the treatment if it had worked; the effect of the treatment having not worked; the knowledge of the treating practitioner in relation to the knowledge of other treating practitioners; the impact of a resource allocation decision; and the impact of delays in treatment caused by unreasonable refusal to consent to treatment. Again, it calls for attention to the “circumstances”, and distinguishes a “necessary part” (understood as outcome) or “ordinary consequence” from other causal terminology like “caused by”, “wholly or substantially caused by”, “a result of”, and “solely attributable to”. It also includes s 32(3), which is directly analogous to s 25(3) of the Act and forbids decision makers from a merely temporal or *res ipsa loquitur* analysis that infers or presumes that the injury was caused by something just because the injury has occurred or been identified. Section 22 of the Act imposes another layer of circumstantial tests on a person suffering treatment injury outside New Zealand. Subsections (3) and (4) of s 22 pose a further counterfactual and ask whether an injury “would be personal injury caused by treatment if the

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<sup>77</sup> This is often taken by ACC’s assessors as requiring epidemiological literature even for fairly common-sense correlations, ie between cleaners and back injuries.

treatment were given by or at the direction of the equivalent of a registered health professional and the person suffered the injury in New Zealand”.

In practice, sections 30 and 32 call for complex medico-scientific and epidemiological evidence, that engages questions of the reliability of statistical evidence in individual cases and the interpretation of case studies. They are incredibly complex in their drafting and cannot be resolved without legal skills and training. They also ask decision-makers to consider counterfactuals and make findings on questions that, in many cases, are simply incapable of proof. For example, where a medical practitioner fails to diagnose a brain tumour, what part of that brain tumour’s growth can be attributed to the medical practitioner’s failure to diagnose early and how much of it would have occurred anyway? Would treatment have made any difference?

The interesting point about ss 30 and 32, however, is that they are only different in degree, but not in kind, from cover for accidental injury in s 20(2)(a) and mental injury in s 20(2)(b). Sections 30 and 32 merely make explicit the specific aspects of a causation test that may (and are) already conducted in relation to the bare phrase, “caused by”.

*The requirements of a causation test and evidence available to answer it varies in the circumstances*

Nothing in this analysis is meant to demean or disrespect the scientific qualifications of medical practitioners: our complaint is that the legal test is unsuitable, not the people being asked to answer it. The point is that the requirements of a causation test, even if they look very similar, can change depending on the nature of what is being measured by the decision maker. It also follows that the kind of evidence available and level of certainty possible about a causative connection in some situations cannot be the same kind as required in other situations.

Causation tests are therefore flexible and change in the circumstances. In part, this flexibility is a good thing. That is because it allows a legal rule to be drafted and put on paper in a way that anticipates a wide variety of potential future situations. The problem is that this same flexibility means the application of a causation test is inherently nuanced, complex, and arguable. Those features mean that there is an unavoidable risk that it is misunderstood and misapplied in the various situations where it comes up. Further, even where it is correctly applied, it is still arguable, and the resources required to argue it are significant. In the ACC scheme, causation tests come up all the time, even in relation to quite low level matters.

### **Summary of causation tests in cover**

Even in simple claims, there is a wealth of *opportunities* for ACC to reject cover based on causation assessments. Importantly, that is not to say that its decisions will always be unjustified, or that there is no need to draw boundaries around the scheme.

The point is, from a dispute resolution perspective, that the Act itself generates a huge number of *potential* disputes even on basic issues. If claimants had full access to resources and did not have to bear the undue personal consequences of a dispute because of access to justice barriers, who can say how many of these decisions would really be upheld? In light of this vast collection of potential disputes, there is cause for concern about the integrity and oversight of ACC’s decision-making processes.

Further, because of the Act’s reliance on causation tests, each one of those disputes is of sufficient complexity that medical evidence is required to address uncertain legal tests. Legal counsel is necessary for a fair hearing in any situation where causation is contested. An investigative reviewer can play some part in addressing this need, but the review process would be incapable of bearing the potential investigative burden required if every decision on causation was to be subject to independent review (in terms of human and capital resources).

Finally, we emphasise that ACC holds significant advantages in addressing causation questions. It has experience in litigating causation, and all its internal processes (including thousands of opinions by Branch Medical Advisors every month) are geared toward the assessment of this question and the instructions that are sent for the medical opinions that are produced, with ACC knowing that they will probably be used in medico-legal proceedings. Independent experts receive no such guidance from ACC.

Claimants continue to face significant barriers to gaining medical or other evidence in their disputes with ACC. There is no empirical basis to say otherwise. The only basis for such an assertion would be that ACC says so. But we repeat that ACC has a significant advantage when it comes to evidence of any kind. It has no incentive to improve claimants' access to evidence because in any situation where a claimant cannot produce counter-evidence or test ACC's evidence, ACC will have exclusive control over any evidence that is considered by the decision-maker – unless the decision-maker specifically calls for further or different evidence. ACC also has an overwhelming tactical advantage in the production, obtaining, processing and analysis of evidence.

This has been identified for several years now, recently in the Dean Review. It has still not been addressed. Perhaps the reason it has not been addressed is because ACC is in charge of the process, and it either lacks the incentives to do it properly, or has disincentives to ensure it does not undermine ACC's own power and control.

Evidence for the causation tests comes from a wide variety of sources and is a combination of already-existing medical or financial information held or created by other people, and new information created by ACC or the claimant after the injury or claim (such as medical reports). We have dealt with this issue previously and will not explore it again here other than to note that all official information we have received since has simply confirmed our suspicions about ACC's internal evidence gathering processes.

Finally, we note the UN Convention's insistence<sup>78</sup> that to discriminate on cause of disability is contrary to the Convention, and that the Committee made a specific recommendation<sup>79</sup> to reconsider this mechanism in accordance with a social or human rights focus, rather than based upon a medical model of disability.

### 3.2.2 Causation tests in entitlements

Even if a person can overcome these hurdles to get cover, that does not guarantee they will receive any entitlements. To gain entitlements, they must overcome further causation tests.

The Accident Compensation Corporation has publicly stated it is unable to provide any data on the number of decisions it issues in relation to minor entitlements such as taxi fares. These small entitlements are all potential disputes because they result in reviewable decisions. Similarly, on some of ACC's forms that relate to pharmaceuticals, there is an explicit statement that each prescription charge is a separate decision, which necessarily entails a right of review.<sup>80</sup> We raise this point for two reasons: (1) it makes it surprising that ACC does not measure the number of adverse decisions made; and (2) the anticipated growth in the number of potential disputes that

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<sup>78</sup> United Nations Convention on the Rights of Persons with Disabilities.

<sup>79</sup> Above n 1; extracts at appendix 1.

<sup>80</sup> Based on arguments made by ACC's external counsel, if a claimant wishes to recover costs in relation to each decision successfully challenged, a separate review application is required for each decision. In combination with jurisdictional arguments, this can mean filing up to ten review applications at once to ensure that the various issues subject to dispute are comprehensively dealt with without having to return to the start of the review process.

will become review applications is impossible to predict or calculate based on current information.

In this section we refer to causation tests in matters of entitlement under the Act.

### *Weekly compensation*

Disputes about weekly compensation make up a significant number of disputes under the Act. The Accident Compensation Corporation holds data on the exact number of review applications lodged about weekly compensation but that information has not been made public to our knowledge, despite our specific request for that information.

Sections 102 and 103 outline a classic causation test in terms of the criteria outlined at the start of this chapter. “Incapacity” is subject to a large number of disputes because it determines entitlement to weekly compensation, entailing significant financial consequences for claimants and ACC.

#### **103 Corporation to determine incapacity of claimant who, at time of personal injury, was earner or on unpaid parental leave**

- (1) The Corporation must determine under this section the incapacity of ... [claimants].
- (2) The question that the Corporation must determine is whether the claimant is unable, because of his or her personal injury, to engage in employment in which he or she was employed when he or she suffered the personal injury.
- (3) If the answer under subsection (2) is that the claimant is unable to engage in such employment, the claimant is incapacitated for employment.
- (4) The references in subsections (1) and (2) to a personal injury are references to a personal injury for which the person has cover under this Act.
- (5) Subsection (4) is for the avoidance of doubt.

Section 102 sets out the assessment procedure for the causation test, which includes specialised or technical advice:

#### **102 Procedure in determining incapacity under section 103 or section 105**

- (1) The Corporation may determine any question under section 103 or section 105 from time to time.
- (2) In determining any such question, the Corporation—
  - (a) must consider an assessment undertaken by a medical practitioner or nurse practitioner; and
  - (b) may obtain any professional, technical, specialised, or other advice from any person it considers appropriate.

The test for incapacity is applied at the beginning of a claim, but also at any time during a claim, including by ending a claim for weekly compensation.

#### **117 Corporation may suspend, cancel, or decline entitlements**

- (1) The Corporation may suspend or cancel an entitlement if it is not satisfied, on the basis of the information in its possession, that a claimant is entitled to continue to receive the entitlement.

The Corporation appears to have incentives to target claims that impose a significant financial burden on its outstanding claims liability because they represent the biggest immediate financial cost to ACC.<sup>81</sup> There is therefore an incentive on both parties to pursue disputes about weekly

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<sup>81</sup> These were described as “low-hanging fruit” by an ACC staff member giving a presentation to a conference of actuaries in 2012: see Phil Kitchin “ACC’s quota deal with Smith revealed” *Dominion Post*

compensation because of the financial consequences of the dispute. Each of these disputes potentially require lawyers, medical evidence and legal argument.

#### *Interest on outstanding weekly compensation payments*

Where the Corporation wrongly declines to pay weekly compensation or fails to pay it in a timely manner, the Corporation may be liable to pay interest on outstanding payments. Section 114 governs interest payments and has been the subject of extensive litigation. The section itself does not use any causal language:

“The Corporation is liable to pay interest on any payment of weekly compensation to which the claimant is entitled, if the Corporation has not made the payment within 1 month after the Corporation has received all information necessary to enable the Corporation to calculate and make the payment.”

Despite the absence of causal language in the section, over time disputes about interest have in substance become disputes about causation, even extending to considerations of fault. The key issue in dispute on the current interpretation of this section is at what point the Corporation “has received all information necessary” to enable calculation of the weekly compensation payment. Since the Court of Appeal’s decision in *Miller*,<sup>82</sup> the High Court has noted that interest disputes have developed an undue emphasis on fault.<sup>83</sup> In practice, these devolve into causal arguments, for example about who caused ACC not to have “all information necessary”. This is particularly difficult where ACC no longer holds records that would have allowed a claimant to demonstrate what information ACC held or did not hold at the time. In *Kearney*<sup>84</sup> the Court of Appeal introduced considerations of equity into this analysis on the basis that ACC cannot refuse to pay interest in a situation where it never asked for the information it required.

In dispute resolution the interest provisions are often treated by ACC as if they are punitive, with arguments being raised that it would be absurd to require ACC to pay interest on claims which, for example, it had no knowledge of. Yet courts have said the provision is compensatory in nature (albeit with a punitive aspect)<sup>85</sup>. When looked at purposively in relation to “fair compensation”, there is no absurdity to a suggestion that a claimant is entitled to interest on money that they should have received at an earlier date, regardless of whose fault it was (or who caused) the delay in payment.

#### *Surgery*

Surgery disputes made up a significant number of disputes under the Act and generate relatively significant financial consequences for the parties. ACC will decline surgery on the basis that “your need for surgery is not caused by a covered injury”, implying that it has been caused by something non-covered, usually “degeneration” or osteoarthritis. Despite that, there is no specific section that says “ACC may only pay for surgery if the need for the surgery was caused by covered injuries”.

Entitlement to surgery is governed by sections 67 and 69, and sched 1, clauses 1-5 of the Act. A claimant can only be entitled “in respect of” personal injury, which means, in practice, that you cannot be entitled if the need for entitlement is caused by non-covered injury or other factors. It is therefore applied as a hidden causation test based on the phrase “in respect of”. Many reviews

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(New Zealand, 25 June 2012); and a transcript of the presentation given on 20-22 November 2011, online at: < [https://home.greens.org.nz/sites/default/files/acc\\_transcript\\_-\\_cosgrove\\_and\\_frank\\_0.pdf](https://home.greens.org.nz/sites/default/files/acc_transcript_-_cosgrove_and_frank_0.pdf)>.

<sup>82</sup> *ACC v Miller* [2013] NZCA 141.

<sup>83</sup> *Bailey v ACC* [2016] NZHC 1277; *Beveridge v ACC* [2016] NZHC 511.

<sup>84</sup> *ACC v Kearney* [2010] NZCA 327.

<sup>85</sup> *Miller, Bailey, Beveridge, Kearney (supra)*.

and District Court appeals will turn on the extent to which medical and scientific evidence demonstrates that the need for surgery is caused by a covered injury (a sprain or strain) or a non-covered injury (a specific tendon tear, osteoarthritis, degeneration). We deal with the “harder line” taken by the Corporation on surgery later on in this chapter, which insisted on a higher degree of medical certainty, and more comprehensive evidence before surgery would be funded.

### 67 Who is entitled to entitlements

A claimant who has suffered a personal injury is entitled to 1 or more entitlements if he or she—

- (a) has cover for the personal injury; and
- (b) is eligible under this Act for the entitlement or entitlements in respect of the personal injury.

Section 69 states that the entitlements referred to in s 67 include rehabilitation and treatment. Entitlement to surgery as treatment arises from schedule 1 of the Act at clauses 1-5, but the key clause in terms of surgery is clause 2.

### 2 When Corporation is liable to pay cost of treatment

- (1) The Corporation is liable to pay the cost of the claimant’s treatment if the treatment is for the purpose of restoring the claimant’s health to the maximum extent practicable, and the treatment—
  - (a) is necessary and appropriate, and of the quality required, for that purpose; and
  - (b) has been, or will be, performed only on the number of occasions necessary for that purpose; and
  - (c) has been, or will be, given at a time or place appropriate for that purpose; and
  - ...
- (2) In deciding whether subclause (1)(a) to (e) applies to the claimant’s treatment, the Corporation must take into account—
  - (a) the nature and severity of the injury; and
  - (b) the generally accepted means of treatment for such an injury in New Zealand; and
  - (c) the other options available in New Zealand for the treatment of such an injury; and
  - (d) the cost in New Zealand of the generally accepted means of treatment and of the other options, compared with the benefit that the claimant is likely to receive from the treatment.

At an abstract level, clause 2 requires a decision-maker to ask, “would this purpose be achieved if X?”, where X refers to features of the claimed treatment. In other words, “if X didn’t happen, would the purpose be achieved?” The exercise becomes a causative assessment: what will be the causative effect of X on the injury and the achievement of the purpose? The clause takes an outcome, being the purpose of restoring the claimant’s health to the maximum extent practicable and the impact on the covered injury, and effectively asks what the causative impact will be of: the treatment; the number of treatments; the timing and location of the treatments; whether the treatment is “generally accepted” as having a causative impact on the injury; and the proportionate “benefit that the claimant is likely to receive”.

We include analysis of this entitlement here because it illustrates what appears to be a different kind of causation test: one that calls for consideration of whether the achievement of a *purpose* will be the outcome of a course of events, and moreover one that calls for a predictive assessment of what will happen in the future. The achievement of a purpose calls for a qualitative judgement, but still asks decision-makers to forecast the causative outcome of a course of treatment, engaging similar evidential and legal issues. The difference is that the analysis is explicitly speculative and social in nature, rather than being a question of purportedly objective causation: even though medical evidence will be used to inform the overall decision, the overall question is a matter of judgement and speculation for the decision-maker based on the evidence available, rather than appearing to have a single, fixed, objective, correct answer. Rather than

asking a yes-or-no question (“did the accident cause the injury?”) the way the clause is drafted invites a nuanced answer: “probably, based on these factors”. This is important when it comes to considering our suggested solutions and our analysis of the Court’s approach in *Ambros*.

### 3.2.3 Causation tests in administrative or claims processes

Quite apart from the substance of a person’s injury – and their cover and entitlements under the Act – there are causation tests even in the administrative parts of the scheme. For example, in relation to deemed review decisions under s 146, one question that often needs resolution is whether the claimant caused or contributed to the delay. Similarly, in s 53, questions arise whether extenuating circumstances caused delay in lodging a claim, and in turn whether any lateness “caused” prejudice to ACC. The short point is that these are additional barriers to cutting through to the substance of personal injury – and they turn on causation and fault.

## 3.3 Discussion of causation

### 3.3.1 When people talk about “Causation”, they mean different things in different contexts

In an ACC context, if I ask you “Did the accident cause the injury?”, without any further knowledge you have no way of knowing whether I am speaking in a lay (ordinary, non-legal, non-medical), medical or a legal sense. The difference is important. Ultimately, the question is a legal one for the Court. Our analysis of causation would be incomplete without a discussion of the Court’s approach to causation.

The Court of Appeal judgment in *Ambros* is the leading authority on the meaning of causation in ACC disputes. It comprehensively reviewed overseas case law and academic literature before reaching its conclusion, which we quote in full because to summarise it in other words would only amplify the confusion generated by this issue. The first part of the prominent passage defining causation in the Court of Appeal’s judgment is relatively clear cut.

[65] The requirement for a plaintiff to prove causation on the balance of probabilities means that the plaintiff must show that the probability of causation is higher than 50 per cent. However, courts do not usually undertake accurate probabilistic calculations when evaluating whether causation has been proved. They proceed on their general impression of the sufficiency of the lay and scientific evidence to meet the required standard of proof ... The legal method looks to the presumptive inference which a sequence of events inspires in a person with common sense ...

[66] The legal approach to causation is different from the medical or scientific approach. ... the scientific concept of causation has been developed in the context of explaining phenomena by reference to the relationship between conditions and occurrences whereas in law problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence. At law the cause is not the sum of the conditions which are jointly sufficient to produce the occurrence. ...

[67] The different methodology used under the legal method means that a court’s assessment of causation can differ from the expert opinion and courts can infer causation in circumstances where the experts cannot. This has allowed the court to draw robust inferences of causation in some cases of uncertainty ...

The difficult question is when a “robust inference” of causation can be found by the Court in a situation where, medically or factually speaking, the evidence is unable to generate a high level of certainty. The Court continued at [67]:



However, a court may only draw a valid inference based on facts supported by the evidence and not on the basis of supposition or conjecture ...

One may wonder what the difference is between “supposition and conjecture” and asking oneself “Is it more likely than not that the thing happened?” The Court clarifies this by saying that the inference has to be based on evidence. Importantly, that evidence is not limited to medical or scientific evidence, and can include, for example, the claimant’s own explanations about what happened to them:

[67] ... Judges should ground their assessment of causation on their view of what constitutes the normal course of events, which should be based on the whole of the lay, medical, and statistical evidence, and not be limited to expert witness evidence ...

[68] ... the only time that a Judge is not able to draw a robust inference of causation are cases where medical science says that there is no possible connection between the events and the injury or death ... If the facts stand outside an area in which common experience can be the touchstone, then the Judge cannot act as if there were a connection. However, if medical science is prepared to say that there is a possible connection, a Judge may, after examining all the evidence, decide that causation is probable. ...

[69] We agree that the question of causation is one for the courts to decide and that it could in some cases be decided in favour of a plaintiff even where the medical evidence is only prepared to acknowledge a possible connection. ...

[70] The generous and unniggardly approach referred to in *Harrild* may ... support the drawing of “robust” inferences in individual cases. It must, however, always be borne in mind that there must be sufficient material pointing to proof of causation on the balance of probabilities for a court to draw even a robust inference on causation. Risk of causation does not suffice.

In our view the notion that a “**risk** of causation does not suffice” tends to be confusing, when compared against the Court’s earlier finding “that the question of causation is one for the courts to decide and that it could in some cases be decided in favour of a plaintiff even where the medical evidence is only prepared to acknowledge a **possible connection**”. We consider that many people who have to make decisions about causation may struggle to reconcile these passages, let alone the many other judgments on causation of the District Court, High Court, Court of Appeal and Supreme Court. Ideally, they could instead apply a clear list of statutory factors as set out in the amendments that we propose, as appropriate in the circumstances of each case.

The Court went on to consider the use of statistical evidence in making causation assessments.

[76] We consider that statistical evidence may be of use in the assessment of causation but the limitations of such evidence must be clearly borne in mind. There is always a risk that statistical evidence gives an illusion of precision that is lacking. Statistics as to what has happened to other patients in similar situations are also not necessarily a guide to what might have happened in the case at hand ... Such evidence can, however ... provide evidence of possibility which might translate into the requisite degree of probability, depending on the strength of that statistical evidence and any other relevant evidence pointing to causation.

We emphasise this here because, so far as we understand it, the use of epidemiological, actuarial and statistical information appears to be how ACC at a high level plans its behaviour in making causative assessments and how it formulates policy and educates and trains the people making causation assessments. It does this in two ways: firstly, in developing policy, including medical guidelines that it uses to streamline cases. This is a significant part of how ACC proposes to deal with the access to medical evidence issue. Second, it conducts actuarial calculations to plan

scheme viability and to anticipate the cost of a claim and its likely duration. These are fundamental aspects of the administration of the scheme at a system level.

But following the Court of Appeal's decision, it would appear that the only relevance of the kind of statistical evidence that shapes ACC's system level decision making is to *facilitate* access to the scheme, rather than to exclude it. The way that ACC uses statistical information, however, is to decline claims. It gives precisely the "illusion of precision" that the Court warned against and that we say makes the causation standard unfit for purpose (and requires reform).

Finally, the Court considered proximity as a basis for causation, being the "I fell on my knee now it hurts, therefore the fall caused it" analysis: an ordinary non-legal understanding of causation. The Court confirms that this is a legitimate basis for inferring causation, contrary to the approach adopted by ACC in some cases as a result of s 25(3):

[78] In some circumstances proximity alone may be deemed sufficient to prove causation. For example, if a person suffers an allergic reaction just after being injected with penicillin (a known risk with penicillin) then, in the absence of evidence of a supervening cause, a court would almost certainly infer causation. Proximity, however, would not suffice where, for example, the reaction was not a known possible result, particularly where there were other possible causes of the reaction.

Such an analysis is difficult to apply. This, again, demonstrates the volume and diversity of evidence that can be required to answer causation questions, and the flexibility, nuance, and variety of analysis it can generate. Generally, ACC will operate on the basis that proximity is insufficient to show causation because of s 25(3) of the Act, but will equally argue that a lack of proximity indicates a lack of causation. Unless this is done with transparency or consistency, it may as well be the exercise of discretion, or a vague assessment of opinion by an ACC case manager. In reality, we suspect that is how many people perceive ACC's decisions.

*Systemic factors influencing how ACC assesses causation in the claims process and before the Courts*

In practice, the only time a Court will have to deal with this situation is where ACC itself is not satisfied by the evidence, because it will have declined cover or entitlements leading to the dispute. In that situation, ACC's external counsel will then argue adversarially: that is, they will argue for the most restrictive interpretation of the law and the most restrictive interpretation of the evidence because their instructions are presumably<sup>86</sup> to defend the appeal.

Over time, organisational factors have meant that ACC's role has been to insist on increasing levels of scientific evidence, contrary to the approach of the Court in *Ambros*, which is founded on a wide variety of diverse evidence and based on legal responsibility and the purpose of the ACC scheme. Whether this has been part of a strategy or simply an unhappy outcome of systemic factors is not a question that can be answered conclusively. Regardless of the intention, our solutions are directed towards minimising the impact of and enhancing transparency in respect of systemic factors influencing causative assessments (through a commissioner) and clearly articulating in the Act itself how causation should be understood in unambiguous terms. As it is, in any situation where ACC has to consider any kind of causative connection, we rely upon the integrity and competence of ACC's own policy and practices in implementing a wide swathe of Court decisions in order to get it right. This means:

- 1) because the exercise involves the application of a judicial decision to evidence, lawyers are required, and the application of the law to the facts is inherently arguable and

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<sup>86</sup> While solicitor-client privilege is important, there is also a public interest in understanding how ACC instructs its lawyers to litigate cases and how much it pays them, such as for purposes of accountability, transparency and fairness.

requires a degree of legal training. The Court has specifically stated it is not just a matter of “common sense”.

- 2) the ambiguity of the causation standard means that in every case there is a complicated and uncertain application of conflicting principles, as evidenced by the complexity of the Court of Appeal’s judgment in *Ambros*.

Importantly, ours is not a criticism of the Court’s interpretation: it is a criticism of the question that Parliament has set out in legislation for the Court to apply. The Court’s interpretation imposes much more certainty on the concept of causation than would be available on a bare reading of the statute. The Court has subsequently rejected attempts to revisit its judgment in *Ambros*. Our criticism is of the standard itself, and the difficult process involved in applying the standard within a large organisation, which has to survive the following process, passing from:

1. the evidence-seeker / decision-maker, who must understand the standard correctly, to
2. posing the question for an assessor correctly in writing, to
3. the correct understanding and application of the standard by the assessor, including training and policy guidance,<sup>87</sup> to
4. the correct, accurate and unambiguous expression of the assessor’s opinion in writing, to
5. the correct understanding of the assessor’s opinion in writing by the decision-maker, to
6. finally, the correct application of the law to the evidence as provided by the assessor to answer the question: for example, “Did the accident cause the injury?”

In that process, people could be using the same language but still talking past each other. The test has to be applied often on more than one occasion for each claim, by more than one person. That is the shortcoming of causation as a boundary test, especially in the context of a large complex organisation. Later, in any legal dispute, lawyers will make arguments that ACC did it rightly or wrongly depending on what their client’s interest is in the outcome of the case and the available evidence, further obfuscating the exercise.

ACC does not follow this process in every case: that would be impossible because of the volume of claims made. In practice, it only follows that process with any rigour where it does not want to accept a claim, for whatever reason. At times where ACC is concerned about its outstanding claims liability, as a matter of policy, its application of the causation standard will become more rigorous and more restrictive, because, in the words of a past Chairman of the Board,<sup>88</sup> and various past Ministers of ACC, ACC should only be paying for what it is required to pay for under the legislation. We say this is an issue of transparency and the rule of law, which should cause concern given the volume of *potential* disputes generated by the everyday application of the Act’s causation tests in response to ACC’s policy and practice. ACC’s policy and practice therefore changes people’s access to the scheme and their access to justice experience without having to make any explicit change in the law.

### 3.3.2 How the application of causation tests transform into disputes between injured persons and ACC

Some explanation is required of why we consider that “potential” disputes or “opportunities” for dispute are concerning. We adopt the social account of how disputes are generated (or caused).<sup>89</sup>

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<sup>87</sup> ACC’s quality assurance processes require medical evidence to comply with ACC policy, appendix 3 (attachments to draft letter to CEO, at appendix 6).

<sup>88</sup> See an editorial piece by then chairman of the Board of Governors for the Accident Compensation Corporation, who was tasked with remedying a \$4.8 billion annual loss in part by “limit[ing] its services to those it was legislatively required to provide [sic].” John Judge, “Only Years of Vigilance Will Solve ACC Debt Crisis,” *New Zealand Herald* (8 July 2010), online: <[http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10657185](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10657185)>.

<sup>89</sup> Stated by Felstiner, W F, Abel, R L, Sarat, A “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...” (1980) 15(3-4) *Law & Society Review* 631.

Of the inevitable conflicts that arise by living in society, only some transform into legal disputes. In an ACC context, conflict embraces every interaction (or non-interaction) between ACC and injured people: it is not limited to reviewable decisions. We agree with the social theory that says people suffer “injurious experiences”, which can include any prejudice to a person’s interests as they perceive it, such as a privacy dispute or even a case of simple disrespect in interpersonal relations.

Some of these experiences transform into legal disputes along the following lines:

1. A dispute begins with an **unperceived injurious<sup>90</sup> experience (or unPIE**, in Felstiner et al’s terminology). This is something that could be perceived as injurious to a person’s interests, but is not yet perceived that way by the person who has been prejudiced. This could include, for example, a decision that has been made by ACC to decline to provide cover or an entitlement, but that the claimant is unaware of. A specific example might be where a deemed cover decision has arisen but the claimant is unaware of it. In the causation context, an example would be where ACC has investigated and assessed causation erroneously but the claimant lacks the knowledge to identify ACC’s errors.
2. An unperceived injurious experience then becomes a **perceived injurious experience (or PIE**, in the Felstiner et al’s terminology). This occurs once a person has named the injurious experience and become aware of it, and the transformation process is described as “**naming**”. In an ACC context, this could occur when a person becomes aware of a decision to decline cover or entitlements, or becomes aware that they may be entitled to a deemed cover decision but have not been told of that fact by ACC. Another example would be where a claimant becomes aware that ACC has assessed causation wrongly either legally or evidentially.
3. The transformation to the next step is described as “**blaming**”. It involves a subjective experience by the person that results in them attributing the injurious experience that they have perceived (PIE) to another person’s conduct (including a social institution such as ACC). Once blame has been attributed, Felstiner et al say that a “**grievance**” has come about. An important step in this process is the perception by the injured person that the person who has caused the PIE is able to do something about it, or that the person themselves can do something about it. For example, it is not an “act of god” or nature, including for example a non-culpable accident. In this situation, “accident” could refer either to misadministration by ACC or to a person who actually caused the injury (ie a doctor in the case of treatment injury, an employer in the case of work injury, another driver in the case of a automobile accident).
4. A grievance is transformed into a “**claim**” when the grievance is voiced to the person perceived as being responsible. This process is known as “**claiming**”.
5. The final transformation into a “**dispute**” occurs when a claim is **rejected**, in whole or in part, by the person who is perceived as having caused the PIE. Rejection is again a perceived experience, and can include a simple refusal to acknowledge the claim and/or delay in responding.

When considering how best to deal with disputes in the personal injury system, it is helpful to understand Felstiner et al’s conclusion that these transformations are unstable, reactive, complicated, and incomplete – in a word, human. These learnings are critical if the personal injury system’s problems are going to be resolved. It means that whether a conflict turns into a legal dispute is heavily influenced by people’s perceptions and relationships. This doesn’t mean their behaviour is unjustified: it simply acknowledges that these subjective considerations are just

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<sup>90</sup> Felstiner et al use the terminology of an “injurious” experience – this should be understood in a wider sense than just “injury” and includes any “injury” to a person’s interests.

as important as the “objective” rightness or wrongness of ACC’s decision on a particular matter. Considerations like public confidence or faith in the administration of the personal injury system are important to dispute reduction and prevention. The mismatch between the public understanding of causation and the narrow technical understanding of causation by ACC only amplifies this sense of grievance.

ACC applies a narrow medical-scientific model of causation and the injured person applies their common sense understanding, which, in nearly every case, generates a perceived injurious experience. We say this is reflected in ACC’s public trust and confidence levels. ACC’s response is to blame the public for their misunderstanding, and attempt to re-educate the public rather than changing ACC’s own application of the Act. In this light, ACC’s attempts to improve public perception are doomed to failure. No amount of media or education campaigns will change people’s understanding of causation from a lay model to a medical-scientific one. Further, requiring strict proof of a technical understanding of causation is surely not the purpose of the scheme, and it would mean ACC’s approach is inconsistent with the rest of the personal injury system. To reduce dispute, and increase access to justice, the most effective long term option is to bring the causation test into line with a lay understanding and remove the root cause of almost all disputes under the Act.

It is alarming that ACC does not view conflict and dispute from this social perspective. Indeed, ACC has emphasised to us that it does not hold data on many steps along the path of transformation of a conflict into a legal dispute. It monitors a “review uphold rate” and the overall rate of review applications filed in an attempt to measure quality assurance, but those statistics only measure steps 4 and 5 of Felstiner et al’s process. That measure entirely overlooks steps 1-3 of the process, which should be seen as generating the wider “being heard” problem and damage to public trust and confidence.

ACC interprets these data gaps, and gaps between the number of claims lodged versus those declined, or disputed, as good news. It assumes that when a person does not challenge an ACC decision declining cover or entitlements, the person must be satisfied with the *outcome* of ACC’s decision; that they are satisfied that ACC’s decision is *correctly made*; and they are satisfied with ACC’s conduct towards them. Similar assumptions are made by ACC about complaints made to its own complaints services and complaints made to external regulatory agencies, where a drop in complaints or review numbers is perceived as reflecting favourably on ACC rather than unfavourably on access to justice. There is reason to doubt ACC’s approach and assumptions. For one thing, it has long been established by access to justice scholars that at some point, aggrieved people may simply give up.<sup>91</sup> Moreover, ACC lacks an empirical basis for the assumptions underlying its measures of success. There is also the obvious issue of historically low levels of public trust and confidence in ACC, which tends to suggest that its approach is unlikely to be a good one.

It can be expected that an improvement in these qualitative characteristics (that affect perception and relationships), together with a simplification of the multitude of causation tests, may well increase the number of disputes, at first. People may finally feel they have a chance, if they were to challenge ACC’s decision with which they are unsatisfied, but this should not be seen as a bad thing.

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<sup>91</sup> Hazel Genn *Paths to Justice* (Hart Publishing, Portland, Oregon, 1999); Galanter, M “Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change” (1974) 9(1) *Law & Society Review* 95; Dean review at p 14; Minister for ACC on Nine to Noon “Fighting ACC decisions futile says report” *Radio New Zealand* (New Zealand, 23 July 2015): “...there will be a group of people that if you don’t get those costs right they’ll just look at it and they won’t go through the process.”

### 3.3.3 “Causation” is not a bright line test; it is a variable standard or spectrum

If it is true that causation tests are complex, evidence-based, and inherently arguable then it follows that every time ACC applies a causation test, an opportunity is created. That opportunity is for the causation test to be applied restrictively or generously. A restrictive reading of causation means requiring a high evidential threshold and burden which is then assessed according to a narrow understanding of causation. A generous reading of causation would be the sort of “person walking by on the street” analysis that says if my knee didn’t hurt, then I fell on it, and now it does hurt, then the fall caused the hurt, which requires a low evidential threshold and burden and an expansive<sup>92</sup> understanding of what “causation” means. We are not trying to change the boundaries of the scheme – we are simply trying to remove the negative consequences generated by the way that we currently assess it.

### 3.3.4 Non-transparent systemic influences affect how restrictively ACC applies its causation tests

Historically, we argue that the threshold for causation and the associated number of disputes rises and falls when ACC changes its policies or practice about how it assesses and applies the causation tests. ACC recognises that, inevitably, there will be some errors: in 2016, for instance, ACC’s target was that 80% of reviews of its decisions are upheld, meaning that, even in a best case scenario, 20% of decisions can be expected to be wrong for some reason or another.<sup>93</sup>

At 3.3.3, we said that each causation test generates an opportunity. Depending on your trust and confidence in ACC, we suggest that you can see ACC’s behaviour in response to these opportunities cynically or optimistically. A cynical view would be that ACC selectively deploys higher burdens and more restrictive approaches to claims that will impose a significant financial burden on its outstanding claims liability. In our view, there is evidence for a cynical interpretation of ACC’s approach to causation. For example, ACC acknowledges that it uses insurance style algorithms and data-matching to “stream” claims according to their anticipated future cost, although we understand that it denies using that data to make decisions about cover and entitlements. An optimistic interpretation of ACC’s response to causation would include that it is simply impossible for ACC to get things right all the time, its staff act in the best interests of the claimant and in good faith attempts to comply with the law, and ACC generally has a very difficult job to do in challenging circumstances. We accept that there are strong reasons for adopting an optimistic interpretation of this situation too and we have encountered some excellent staff in our experiences with ACC. There is a difference between law and policy, and a difference between ACC’s policy and ACC’s historic, systemic and individual practice. The point is that, as it is, only ACC knows what ACC does: there simply isn’t enough transparency to make an evidence-based claim about how ACC applies causation tests.

Within each opportunity, it is possible for any person considering the causation test to understand that test differently. People who are considering and trying to understand “what causation means” include internal advisors, case managers, supervisors, as well as the media, reviewers, judges, lawyers, members of the public, and claimants and their families and friends. The Court has tried to articulate how causation should be understood, and ACC in turn has also tried to develop a fixed and predictable understanding of it through its policies and internal analysis. While that can help, it still creates an opportunity for misunderstanding. The difficulty is that judicial decisions or internal policies still have to be applied by the people responsible for applying them. Further, the application of judicial decisions and policies is also something that generates potential for argument. People who are not specifically trained in this kind of argument (the public) are at a disadvantage to people who regularly deal with those concepts (ACC staff,

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<sup>92</sup> *Allenby*, above n 66.

<sup>93</sup> Accident Compensation Corporation: 2016 annual report at p 18; 2015 annual report at p 15; 2014 annual report at p 10; 2013 annual report at p 106.

lawyers, judges). Such disputes require formal and informal dispute resolution mechanisms to resolve them.

The problem with this flexibility is that very few people in the ACC jurisdiction explicitly acknowledge it. Instead, there is a pervasive attitude that “causation” is a binary bright-line standard with a single fixed meaning. By “binary” we mean that something is either caused, or not caused – people act as if there are only two possible answers to the “causation” question. By “bright-line”, we mean that people act as if there is a clear dividing line between these binary choices with no “grey area” in between. Yet the analysis above shows that there are different ways to express a legal test that asks a decision maker to draw a causative link between circumstances and an outcome. We have also shown that different causation tests ask a decision-maker to consider different kinds of evidence depending on the context of the test, including scientific (an x-ray or MRI scan), medical opinion (an expert opinion from a doctor), and evaluative (an affidavit or statement from an injured person about what happened). Other causation tests call for consideration of a purpose or goal and whether that brought about an outcome, so that causation can be inferred or assumed. These kinds of causation test are measured by social, cultural or human standards with only a limited role for scientific observation.

Further complicating matters is that the court must consider whether “on the balance of probabilities” a causative link exists. This is also phrased as whether it is “more likely than not” that the causative link is present. This is a low standard, and should be consciously and explicitly distinguished from the criminal standard, “beyond a reasonable doubt”, where, if a “reasonable doubt” is raised, then the prosecution will fail. In practice, the ACC jurisdiction has become dominated by questions tending towards “reasonable doubt”. A claimant will lodge a claim that asserts their injury was caused by accident. Usually the only evidence in support of their claim at that stage will be the judgement of a medical professional. ACC’s evidential processes then set about essentially raising reasonable doubts and its internal processes are directed towards identifying doubt about whether X caused Y, according to whatever evidence is available. Importantly, under the statute as presently drafted, this approach by ACC can fairly be described as a faithful application of the statute. It is the nature of the statute itself and the nature of ACC’s structures that *causes* the problem.

Even in situations of the highest scientific rigour, scientists (including medical practitioners) will acknowledge that they can only make claims about causative connections based on probability and frequency. At best, the surest scientist in the world will say it is incredibly likely that there is a causative link between something and something else and after a certain threshold we call that a fact. Despite that, ACC’s processes set about raising only reasonable doubts about the cause of injury, and this puts claimants at a disadvantage. In all cases, the best answer that ACC is entitled to expect is “probably”.

In reality, legal tests that require decision-makers to attribute a causative connection between X and Y are not “one size fits all” and are arguably infinitely variable. The same wording can mean different things. Significantly, this means that “causation” as a boundary test for admission to the ACC scheme is not a “bright line” test. The ACC scheme and the people responsible for administering it have to either embrace this problem fully and adapt the system accordingly (for example by remedying access to justice barriers, providing access to lawyers and medical evidence, and increasing transparency around decision-making at ACC), or it needs to find another way of wording the tests that create boundaries around the scheme. This report contains two solutions that we believe will deal with this problem directly, or will implement a framework for it to be dealt with in future.

### 3.4 There is already public concern about rule of law and the way ACC assesses causation: ACC itself cannot lead reform

We emphasise that we do not think ACC is capable of leading these changes. Many of the main problems with access to justice have resulted from ACC's misunderstanding and misapplication of "causation" under the Act.

The ACC scheme, understood as we have described it above, has reproduced the problems associated with the system of tort litigation that ACC replaced four decades ago. We attribute this reproduction in large part to ACC's structural organisation and its incentives as an institution:

- (i) The "fault" principle (here, causation) determines access to justice (understood as access to a remedy), and it is out of step with community expectations, difficult to apply, and generates perverse and variable outcomes.
- (ii) There is often a resource imbalance between the victim of an injury and the person being sued in personal injury.
- (iii) The real motivation behind the dispute is not about the parties involved, but instead about extraneous financial considerations – in tort, the financial interests and sustainability of an insurance company; in ACC disputes, of the Corporation. In combination with the adversarial system, this significantly complicates disputes, which delay the administration of justice and make justice overwhelmingly expensive for the average accident victim.
- (iv) Many of the things that a claimant is required to prove are incapable of proof, or would be so expensive to prove that it would not justify the cost.
- (v) The amount recoverable is often insufficient to sustain the costs and risk of bringing litigation.

This misunderstanding and misapplication of causation has been incentivised, encouraged and enhanced by putting the same financial and political pressures on ACC as are faced by a private insurance company. This has prevented ACC from behaving as a custodian of a legal system and instead given it "skin in the game". In many situations, the only difference between getting cover and entitlements out of ACC and getting money out of a tortfeasor is that ACC is a government agency specifically designed and funded for that purpose: we have turned the ordinary tortfeasor into a statutory specialised monopoly billion-dollar repeat litigant.

Some say that the function of law is to state predictable rules in advance, that are then applied to the facts in a transparent way that can be argued by reasonable people in a logical manner. Like cases must be treated alike unless there is a good reason for treating them differently, which results in substantive and procedural complexity. People have a right to be heard on decisions that will affect them as a matter of natural justice and generally effective administration. The ACC scheme is still founded on the idea of the rule of law, which is an important part of the emphasis on fairness and the social contract. Even matters of discretion have to be conducted lawfully, with the purpose of the Act in mind. We say that causation fails these legal requirements in the way it is incorporated in the Accident Compensation scheme.

In practice, the meaning of the law changes not based on parliamentary amendment after public consultation, but based on ACC's priorities, which are not transparent, and not always obviously in promotion of the purpose of the Act and the interests of justice.

#### 3.4.1 The State Services Commissioner's Performance Improvement Framework

We are not alone in stating these concerns. We believe that this overall problem of incentives, causation, and lack of transparency is the source of the lack of public trust and confidence in



ACC.<sup>94</sup> A review of ACC was conducted by the Performance Improvement Framework of the State Services Commissioner, in 2014. It is the most insightful and comprehensive analysis of the scheme we have seen from a government source. Notably, it deals heavily with the policy and practice of ACC, rather than ACC law. We attach the executive summary to this report as an appendix because it has not been given the attention it deserves. The PIF report itself should be read in conjunction with our analysis of how access to justice and the Court process is fundamental to correcting these significant pendulum swings and protecting individual rights against executive power. The PIF's analysis was appropriately nuanced, taking into account ACC law, policy and practice from a holistic critical perspective:<sup>95</sup>

ACC can only deliver a better experience for its customers while simultaneously delivering financial sustainability with levy stability by improving service quality and effectiveness. Trying to win the trust and confidence of customers and the public with a more generous administration of the scheme creates an unnecessary tension between these goals. That tension leaves ACC chasing customer goals in one period and financial goals in the next. This 'pendulum effect' adds to scheme volatility in ways that undermines confidence in the scheme. It also makes ACC difficult to partner with and undermines partner and staff confidence that ACC will persist with any particular course of action. ...

Meeting all of these challenges requires ACC to become more confidently outward-focused; with more customer- and partner-centred behaviour "when no-one is looking". Being more responsive to the needs of individual customers and partners requires more authority delegated to the frontline. Reconciling that with a more consistent and predictable customer experience requires a widely understood and accepted approach to using that discretion, ie, of the right 'ACC way' to behave. ...

ACC's environment is largely shaped by three factors: ACC's position as a monopoly state-owned insurance provider in an environment where claimants have lost the right to sue ... [ACC] needs to find other ways to try and be as responsive to the needs of its customers as it would be in a competitive situation. And because its customers cannot go elsewhere, they can only express their dissatisfaction through the media and complaints which find their ultimate expression in judicial and political processes. ... The nature of the scheme creates plenty of scope for dissatisfaction. People are typically not clear on their entitlements and the rules can be applied inconsistently. ACC has a difficult job because it can be hard to make clear cut assessments about both the cause of a claimant's condition (injury or illness and degeneration) and their eventual readiness to return to work.<sup>[96]</sup>

Given the low cost of disputing ACC decisions, these factors result in a relatively high number of disputes of decisions that are adverse to the claimant. To the extent that these disputes end up in court, judgements that go against ACC expand entitlements.<sup>[97]</sup> While this judicial impact is important, it is not as important as political influence on the scheme: ... Different governments have tended to view the scheme with more or less of an insurance or welfare lens. The operation of the scheme is sensitive to the views of its Ministers, so these different views also add to the variability in scheme operation and entitlement experience over time. ... The operation of the scheme is also sensitive to

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<sup>94</sup> See Hayley Stirling, Katrina Magill and Emanuel Kalafatelis *A Survey of Non-earner and RIS Clients who have been Discontinued ACC's Help and Support* (Research New Zealand and Accident Compensation Corporation, April 2013).

<sup>95</sup> PIF review, above n 11, at 8-9.

<sup>96</sup> We note that the return to work process also assesses causation by examining the ongoing causative impact of injury factors versus non-injury factors on ability to return to work, and is a causation test.

<sup>97</sup> Not all judgments against ACC expand entitlements and this is an unusual perspective: in many cases, judgments against ACC will merely grant access to existing entitlements. Very few judgments generate widespread legal change.

claimant dissatisfaction on issues that attract media attention (as recent privacy breaches have done).

... entitlement experience should only change in response to a transparent and well informed regulatory, legislative or judicial process that changes cover and entitlements; rather than as an administrative response to financial pressure, ministerial preferences or public concern over a particular issue. Finally, the tendency to respond to different pressures at different times undermines the confidence of ACC's partners and people that it will "stay the course" when it sets a new direction. Little wonder then that the biggest concern raised by the majority of people we spoke to was the 'pendulum effect' ie, the way ACC seems to swing between a focus on claimant satisfaction and public trust and confidence in some periods and improving financial performance in others.

As a result of our legal analysis, we take this even further, and argue that, as a result of the flexibility in the causation standard, not only does ACC's policy change, effectively the legal rules change depending on what ACC needs at any given point. It is no answer to say that claimants have a right of review and appeal or that ACC's conduct is simply unlawful: most causation decisions will never be reviewed by a reviewer or a Court, and even the ones that do make it that far are undermined by barriers to access to justice, including lack of a lawyers, lack of access to legal materials, lack of access to medical evidence, and the system's focus on matters of substance rather than process.

We are currently in the midst of one of the "generous" swings of the pendulum and anecdotal reports are that ACC is being generous with its treatment of entitlements. That may benefit claimants now, but they have no say through any consultative or parliamentary process in how these rules will affect them later once the pendulum swings again.<sup>98</sup> Further, we comment that, in line with our previous research into access to justice, we believe there has been a concerted failure to encourage one of the few mechanisms that does allow claimant input in these changing priorities: through complaints and judicial oversight. In fact, ACC still measures low numbers of reviews as being a good thing rather than a cause for concern about access to justice barriers. The Auditor-General has commented on ACC's failure to learn from complaints<sup>99</sup>, as did the Dean review, and we have seen no evidence about how ACC plans to learn from complaints despite specific requests and an answer to that request at ACC executive level.<sup>100</sup> The failed Accident Compensation Tribunal proposal was concerning for this reason: it represented an entrenchment of access to justice barriers that undermine the few legal rights available to ACC claimants in response to the overwhelming executive power exercised over them by ACC.

### 3.4.2 Reports reflecting public concerns about role of policy change within ACC

The changeability of the scheme without consultation or legislative reform is already a matter of public concern. A piece in the New Zealand Herald from 2012 stated:<sup>101</sup>

ACC monitors what it calls its "review uphold rate" - the percentage of formal reviews of ACC decisions that are decided in favour of the corporation - as "an important measure" of the quality of its service. The rate gives "a key indicator of whether the proportion of ACC's decisions that comply with the legislation has changed". Its target in recent years has been a 70 per cent success rate at review. ... But the corporation adopted a tougher approach to long-term claims in early 2009. In June 2010, then-ACC Minister Nick Smith

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<sup>98</sup> See appendix 13, ACC Executive Leadership Team Issues Paper "Strategy for the Future Management of Long Term Claims" (16 February 2009, Accident Compensation Corporation).

<sup>99</sup> Office of the Auditor General "Accident Compensation Corporation: How it deals with complaints" (Wellington, August 2014).

<sup>100</sup> See appendices 11 and 12.

<sup>101</sup> Adam Bennett "ACC's tougher line fails to satisfy independent reviewers" *New Zealand Herald* (New Zealand, 26 June 2012).

and ACC chairman John Judge signed a three-year deal setting out a "priority" that the corporation would get rid of 1150 long-term clients a year. It had 13,157 clients when the service and purchase agreement was signed. In 2010 the RIS [recover independence service] review uphold rate fell to 64 per cent, was 66 per cent last year and just 55 per cent in the 10 months to April this year.

ACC commissioned in-depth research in 2013 into the experiences of people exited from the RIS unit which returned overwhelmingly negative feedback, and eventually contributed to the RIS unit's abandonment. The RIS unit is the latest in a repeated series of similar initiatives by ACC when its outstanding claims liability is perceived as being unacceptable. Similar problems have been identified in other ACC units, for example in elective surgery. In a piece from 2011, the New Zealand Herald wrote:<sup>102</sup>

The Accident Compensation Corporation, after an internal review, said last month it had been rejecting too many elective-surgery claimants and would improve its processes. ... ACC's general manager of claims management, Denise Cosgrove, told him the corporation would not review all historical elective surgery decisions. "While we agree aspects of historical decisions could have been done better, the option for clients to review decisions [take them to a review hearing] was always made plain to clients at the time."<sup>[103]</sup> ... During the Herald series, about 400 people complained to the paper about their ACC cases. Some lawyers and independent orthopaedic surgeons criticised ACC over its crackdown on surgery access, alleging it relied on brief, weak opinions from its doctors, some of whom had retired from treating patients and were often not specialists in the areas they advised on. At the time, ACC said it was simply applying its legislation more strictly to control spending on elective surgery, which had risen from \$128 million in 2005 to \$240 million in 2009.

In relation to applications for entitlement to surgery, the New Zealand Herald had this to say in an editorial from 2010 about the flow on effects of ACC's change in priorities and the lack of consultation and transparency:

In effect, ACC's change of approach has opened a Pandora's box. In the resulting bewilderment, the victims are those forced to endure long waits for surgery in the public health system. And those unaware of their right to challenge ACC decisions, or unable to pay a lawyer to do so. There is another reason for concern. The strict application of this policy began without any public notification. There was no announcement from ACC about why this approach was necessary, by how much it wanted to cut the cost of elective surgery, and how precisely the policy would be applied. The first information has come in response to [a New Zealand Herald] report on the motorway accident claimant. ... In support of its policy, the corporation points to "long-established legal precedent that funding surgery for these [pre-existing] conditions is not the responsibility of ACC". That, however, does not excuse the distinctly harder line that is being taken with many older accident victims. A jump in the proportion of rejected surgery claims from 12 per cent in 2008 to 20 per cent last year confirms the impact of this approach.<sup>104</sup>

There was no change in the law, only the way ACC applied the law, and the level of certainty and volume of evidence it required in the assessment of causative links. This change was possible because of access to justice barriers, and the unique organisational factors of ACC as a large

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<sup>102</sup> Martin Johnston "ACC tells rejected claimants: We've been too strict so try again" *New Zealand Herald* (New Zealand, 28 June 2011).

<sup>103</sup> This comment now needs to be seen in light of barriers to access to justice and several judicial decisions at the time that generated precedents now acknowledged to have produced unfair consequences for claimants such as the cases in *Ramsay* and *Vandy*. Ms Cosgrove is also the individual who described the exits achieved by ACC as "low-hanging fruit" in a presentation to an actuaries conference in 2012.

<sup>104</sup> Editorial "Change of approach unduly harsh" *New Zealand Herald* (New Zealand, 10 December 2010).

statutory monopoly, including its own particular culture, which is described as follows by the performance improvement framework report at 39-40:

The culture is curiously obedient and reflects the KPIs. There is, we observe, seemingly a more direct line from senior management to the front line via KPIs than via middle management. There are some major consequences to this culture - one being the organisation can turn on a pin. In the past, this ability to change direction quickly has assisted with the quick turnaround of the scheme financially but has also added to the pendulum effect felt by claimants. The organisation needs to make client centricity an 'and' rather than an 'or'. Selection of KPIs is paramount. Currently behavioural 'competencies' are set alongside quantified and objectively measured outcome KPIs in individual performance agreements. When these conflict, there is a natural tendency to weight outcome KPIs that are clearly specified and objectively measured over the more subjective behavioural aspects of performance.

### 3.4.3 Measures of performance as tools to implement changes in causation approaches across the organisation

KPIs are shaped by the Minister's expectations of the Board, which reflects political priorities. The financial position of the wider scheme, including the outstanding claims liability (number of long-term claimants), has direct implications for the government's financial position and its ability to use the scheme politically.<sup>105</sup> For 2009 to 2012, the Service and Purchase Agreement between the Minister of ACC and the Board (see appendix 14) set out five objectives. Two of these objectives are described as follows at page 6 of that document:

#### **3: Improve ACC's rehabilitation performance**

Rehabilitation rates measure the percentage of clients receiving weekly compensation who have left the Scheme within a specified period of time. It is expected that ACC will be able to show a demonstrable improvement in its rehabilitation performance over the 2009/10 year.

#### **Performance Measure for 2009/10:**

As per Output Class 3 of ACC's Statement of Intent, ACC has operationalised this objective in the following 2009/10 key performance indicators:

- 3.1 Percentage of exits within 1-70 weekly compensation days paid (3 months) – to equal or exceed 69.0%
- 3.2 Percentage of exits within 1-273 weekly compensation days paid (9 months) – to equal or exceed 91.3%

#### **4: Minimise the rate of increase in the long-term claims pool**

It is expected that ACC will work to minimise any increase in the volume of the long-term claims pool over time.

<sup>105</sup> Vernon Small "Surprise Government surplus on higher tax take" *Stuff* (New Zealand, 11 March 2015); Editorial "Govt wrong to prop up surplus with ACC levies" *New Zealand Herald* (New Zealand, 20 August 2014); Adam Bennett "Workers and bosses lose out to motorists" *New Zealand Herald* (New Zealand, 6 August 2014); Paula Oliver "\$4.2b surplus gone – Govt in the red" *New Zealand Herald* (New Zealand, 6 March 2008).

**Performance Measure for 2009/10:**

As per Output Class 3 of ACC’s Statement of Intent, ACC has operationalised this objective in the following 2009/10 key performance indicator:

4.1 the net change in the volume of the long term claims pool is to increase by no more than 100.

Objective 1 also requires that “Scheme cash costs” for “non-fatal weekly compensation” grows “no more than 8%”.

The conflation of “rehabilitation rates” with “exits” should generate significant concern. An “exit” is not the same as being “rehabilitated”.<sup>106</sup> It can include, for example, an exit for “non-compliance” for refusal to sign an ACC standard form in a situation where the claimant believes the form exceeds ACC’s authority under the Act. Two of the most pervasive standard-form documents in the scheme, the ACC18 and the ACC167, were recently found to demand more than the Act allows ACC to demand: both policy and practice exceeded the legislation. The appellants in both cases, *Powell* and *K*,<sup>107</sup> were exited between 2009 and 2012 and this would have been recorded by ACC as a positive rehabilitation outcome. It also includes exits for non-compliance in relation to attending assessments, for example because of a refusal to allow claimants to choose their preferred assessor. This assessor-choice policy was rigidly applied by ACC during the period in question and then altered later, but with no proactive retrospective analysis and readmission of claims that we are aware of.

It is notable that the percentage point KPI measurements in the agreement above are calculated to the first decimal place, indicating nuanced data analysis and record-keeping which is not publicly available. Further, there is no indicator of the durability of that rehabilitation and the actual outcomes for claimants. That generates perverse incentives on ACC staff, for example to exit, then re-admit, then exit claimants again. Anecdotally, we understand that ACC staff refer to “a cycle”, being the point at which branches “cycle” their entire long-term claimant load through the exit mechanisms available. Similarly, rehabilitation performance is something fundamental to all claimants under the scheme, not just those “receiving weekly compensation”, as stated in the agreement. That misstatement of the purpose of rehabilitation reflects ACC’s overwhelming internal and external imperatives to minimise financial cost, the biggest component of which is weekly compensation.

We suspect, but cannot demonstrate because of a lack of transparency and access to information, that many internal KPIs at ACC were directed toward this performance target (exits).<sup>108</sup> Data from ACC on this topic should be released to demonstrate whether that is the case. There have been repeated anecdotal assurances that the KPIs by ACC were wrong and counter-productive – as found by the PIF – along with assurances that the KPIs have been changed: there is no publicly available information to generate faith in these assurances.

ACC has repeatedly said that it is changing now and will improve in the future: this is the commitment made by its political leaders too. We note that ACC appears well accustomed to brushing aside criticism in this way. As long ago as the 1990s, ACC’s attitude led one independent review of the corporation to “caution against the general reaction that all is well”, and that ACC should instead resist “a natural inclination to react by saying that all of the systems

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<sup>106</sup> Warren Forster “Back to the Future: Compensating Injured Workers for Lost Income” (2011, (LLB(Hons) dissertation, University of Otago, Otago Yearbook of Legal Research). See also appendix 13 and 15.

<sup>107</sup> *Powell v ACC* [2014] NZACC 89, *K v ACC* [2014] NZACC 90, *K v ACC* [2016] NZACC 243.

<sup>108</sup> Appendix 15 “Exit management plan” and explanation of RIS Unit KPIs as percentage of figures in appendix 14.

and procedures ... have been overtaken by new and corrected systems, operated by new and more enthusiastic staff.”<sup>109</sup>

The simple point is that whether ACC is changing now or not has little bearing on the lawfulness or fairness of the way it has acted in the past, and the impact on people subject to those practices. There is a steadfast refusal to reconsider the cases of those claimants who have been exited unless claimants approach ACC first. Rather than resisting criticism, we consider the better approach for ACC is to embrace criticism and oversight as a basis for understanding where it has gone wrong in order to implement changes that are likely to be enduring. In particular, enhancing independent oversight, a body of specialist expertise, and access to justice mechanisms is likely to mitigate “the pendulum’s swing”.

ACC and the ACC Board still calculate ACC’s organisation-wide performance on the basis of “weekly compensation days paid”, and still use the metrics of 1-70 and 1-273 days.<sup>110</sup>

### 3.5 Recommendations: Causation and Commissioner

We suggest a strategy to resolve this comprehensive problem in a holistic way.

- (i) The various tests for cover and entitlements can be left as they are, but statutory amendments should be introduced that require decision-makers to consider particular factors in assessing causation, and introducing a statutory investigation process around cover and entitlements that reorients it toward prevention and more transparent accounting of the circumstances and causes of an injury. This will focus the issues for argument when causation is disputed. It will avoid bringing a wide range of unspecified factors into a causation analysis. It will ensure that causation is determined honestly and openly in a way that instils public trust and confidence.
- (ii) The establishment and work of a Personal Injury Commissioner will enhance transparency and public trust and confidence in relation to ACC’s internal processes and accountability for how it investigates. As well, people who do not have injury covered by the Act will be referred to services that help them navigate the personal injury system, including better coordination and integration of the management and regulatory institutions. This will also minimise access to justice barriers in relation to representation, evidence, access to law and being heard.
- (iii) Both these recommendations require the government to take seriously the need to improve access to justice because of the continuing impact this will have on public trust and confidence and the rehabilitation outcomes of people with injury covered by the Act.

We think causation needs to be re-examined in the Accident Compensation Act 2001. We think this should be the first task of the Personal Injury Commissioner. We outline our suggestions below.

Specifically, we think one option for reforming the current Act without extensive structural amendment would be to insert a statutory definition of “causation”. The effect of this definition would be to direct ACC and the Courts to consider “causation” in a way that acknowledges its

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<sup>109</sup> Peter J Trapski *Report of the inquiry into the procedures of the Accident Compensation Corporation* (1994, Accident Compensation Corporation) at 18. Notably, one of Dr Gluckman’s cases was only overturned as recently as 2012 in *B v Accident Compensation Corporation* [2012] NZACAA 5, resulting in an order to back-pay entitlements to 1986.

<sup>110</sup> Accident Compensation Corporation Annual reports 2015, 2016. “Return to work” does not mean “return to work”, and should be understood as “excluded from ACC’s responsibility” or an “exit”.

complexity, arguability and in its specific statutory context. We suggest the following definition could be a starting point for consideration by the Commissioner to be inserted as s 3A in the Accident Compensation Act 2001:

**3A Assessments of causative connections under this Act**

- (1) In this Act, **causative connection** includes any situation where a person exercising functions and powers under this Act in relation to cover and entitlements considers whether there is a causative connection between two things, whether or not specific causal language is used.
- (2) All persons exercising functions and powers under this Act in assessing whether a causative connection exists, shall have specific regard to the following matters:
  - (a) that the purpose of this Act and the social contract represented by the accident compensation scheme must be given effect to;
  - (b) that causation is understood in different ways by different professional disciplines;
  - (c) that, so far as possible, it is desirable that causation under the Act is interpreted as a lay person would understand that concept;
  - (d) that requiring proof of a causative connection must not exceed the requirement of what can reasonably be proved in all the circumstances;
  - (e) that the standard of proof is the civil standard on the balance of probabilities, and causation must not be determined against a claimant on the basis of a reasonable doubt;
  - (f) where any doubt exists about a causative connection, whether the cost of further investigation is undue, for example because of the emphasis on timely provision of entitlements under the scheme;
  - (g) where there is any evidence that the Corporation's conduct has played a role in causing personal injury, that evidence must be taken as supporting a claim for cover and/or entitlements;
  - (h) that the extent of any resource imbalance between the Corporation and a claimant must be taken as supporting a claim for cover and/or entitlements; and
  - (i) that causation must be considered only by reference to the individual claimant in the particular circumstances.
- (3) Under this Act, whenever a causative connection is being considered in relation to cover, no person considering that causative connection may take into account the potential cost of entitlements payable to a claimant or prospective claimant if cover were to be accepted.
- (4) For the avoidance of doubt, nothing in this section affects the obligation of a reviewer or the Court under ss 145 and 149 of the Accident Compensation Act 2001.

Additional sections could be added to more transparently explain what is the purpose of making a causation assessment. The following wording may be appropriate:

**6A Purpose of investigation of causation**

- (1) The Corporation may only open an investigation into cover and/or entitlements for the purposes of this Act and the 3 purposes of this section, and not to determine civil, criminal, disciplinary or other rights or liabilities.
- (2) The first purpose is to establish, on the balance of probabilities,—
  - (a) that a person has suffered personal injury; and
  - (b) when and where the person suffered personal injury; and
  - (c) the causes of the personal injury; and
  - (d) the circumstances of the personal injury.
- (3) The second purpose is to make recommendations or comments in accordance with section 6B.

- (4) The third purpose is to determine whether the public interest would be served by the injury being investigated by other investigation authorities in the performance or exercise of their functions, powers, or duties, and to refer the injury to them if satisfied that the public interest would be served by their investigating it in the performance or exercise of their functions power, or duties.

**6B Recommendations or comments by Corporation<sup>111</sup>**

- (1) The Corporation may make recommendations or comments in the course of, or as part of the findings of, an inquiry into a personal injury.
- (2) Recommendations or comments may be made only for the purpose of reducing the incidence or impact of further personal injury occurring in circumstances similar to those in which the personal injury occurred.
- (3) Recommendations or comments must—
  - (a) be clearly linked to the factors that contributed to the injury to which the inquiry relates; and
  - (b) be based on evidence considered during the inquiry; and
  - (c) be accompanied by an explanation of how the recommendation or comment may, if drawn to public attention, reduce the chances of further injuries occurring in similar circumstances.

These sections have been modified from ss 57 and 57A of the Coroners Act 2006. Causation features prominently in that Act but the causative assessment that has to be made by the coroner is phrased differently than under the Accident Compensation Act 2001. We suggest that the Coroners Act invites a more transparent assessment of causation and could be used as a template for reforming causation tests. We note that the section appears to reverse the onus from a claimant to ACC, but that is not the case: ACC already bears the investigative onus,<sup>112</sup> and already decides in which cases it will investigate causation. The section would therefore simply guide a process that already takes place. It would also situate ACC's investigations into causation within the wider personal injury system.

We note that the Accident Compensation Act 2001 already contains some sections that equate the "circumstances" surrounding an injury with the possible causes of the injury. The focus on surrounding circumstances as being separate from individual multiple causes will assist with critical analysis of the events leading to an injury.<sup>113</sup> Further, it ensures that any investigation will generate useful findings in terms of prevention, whether or not ACC is ultimately responsible for cover and entitlements. It will ensure that the focus of an investigation is not simply rejecting liability for an injury by raising reasonable doubt about one cause. Further, where ACC's investigation does culminate in refusing liability for an injury, there will be a statutory obligation on ACC to refer that person to the appropriate agency rather than simply allowing the person to fall through the cracks.

As it happens, reforming causation in this way will make ACC's job easier. It will encourage staff at ACC to work within a professional practice framework where they exercise supported independent judgement with much more statutory guidance, rather than having to come to grips with the complexity of case law on this issue. Rather than asking case managers to be scientists and lawyers, case managers can hopefully focus more on relationships and rehabilitation with their clients.

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<sup>111</sup> We note that the Coroners Act includes a number of sections that introduce procedural safeguards around this investigation process such as right to comment before an adverse finding is made. These would also need to be considered.

<sup>112</sup> *Ambros* (supra).

<sup>113</sup> For example the five possible causes under s 26(2) and (4) can be considered and weighed transparently with regard to the purpose of the Act and other relevant factors.



## Historic failure to capture and publicise statistics on management of the scheme

“The best statistical use should be made of the unique records which will become so readily available to the new compensation authority”

Woodhouse report, 1967, p 184.

“For most of its 20-year history ACC has failed to produce adequate statistical data which could be used not only to improve its own performance but also as a basis for research. ... Only through ... [rehabilitation and prevention] ... will the ultimate cost of injury be kept within bounds. It is quite wrong to attempt to achieve cost control solely at the expense of the claimants. It is important for the public at large to realise that ACC can never be the provider of safety, it can merely stimulate those who can act effectively to be more dynamic. That in itself is a substantial task. ... It is essential ... that a balanced approach [be] adopted. One could perhaps recall and adapt the dictum of Sir William Blackstone made over 200 years ago: ‘It is better that ten guilty persons escape than one innocent suffer.’ So is it not better to place emphasis on ensuring that no deserving claimant goes uncompensated rather than on making certain that the underserving are not compensated?”

Ian Campbell

Director of Safety at ACC until 1981

*Compensation for Personal Injury* (1996) at 256-257

“The next point I want to make is that it has also been obvious that the quality of data that we have does not assist the high quality, robust debate that people in this room are keen to have. We need to improve that and it is high on my agenda.”

Hon Ruth Dyson, Minister for ACC and Disability Issues

Remarks at the closing of a symposium in 2004

(2004) 35(4) *Victoria University of Wellington Law Review* 775 at 776

“One of the biggest failures of New Zealand policy flowing from the introduction of the ACC scheme has been an unwillingness or incapacity to produce comprehensive injury statistics with associated data. These criticisms have been voiced for years, but little has been done to remedy the situation. Proper statistics would enable superior policies to be adopted in a number of areas, particularly in safety and rehabilitation.”

Rt Hon Sir Geoffrey Palmer

Then President of the Law Commission

(2008) *NZLR* 81 at 95

“This review is not the first to have identified the need for ACC to carry out more analysis of its data. The 2014 performance improvement framework review observed: “ACC is relatively inactive in mining complaints and other data that give clear indications of claimant issues. The complaints and review processes, and court actions are a vital source of information in all industries to look and understand what is happening.” ... [The Review] acknowledges the complexities and inadequacies of ACC’s current system, but it was nonetheless surprised ACC could not readily provide comprehensive and reliable data on its cover and entitlements decisions, and also on the number of decisions that went on to review. ... it was equally surprising to the review that ACC does not have at least some general idea of the total costs of defending disputes.”

Miriam Dean QC

Independent Review Of The Acclaim Otago (Inc) July 2015 Report

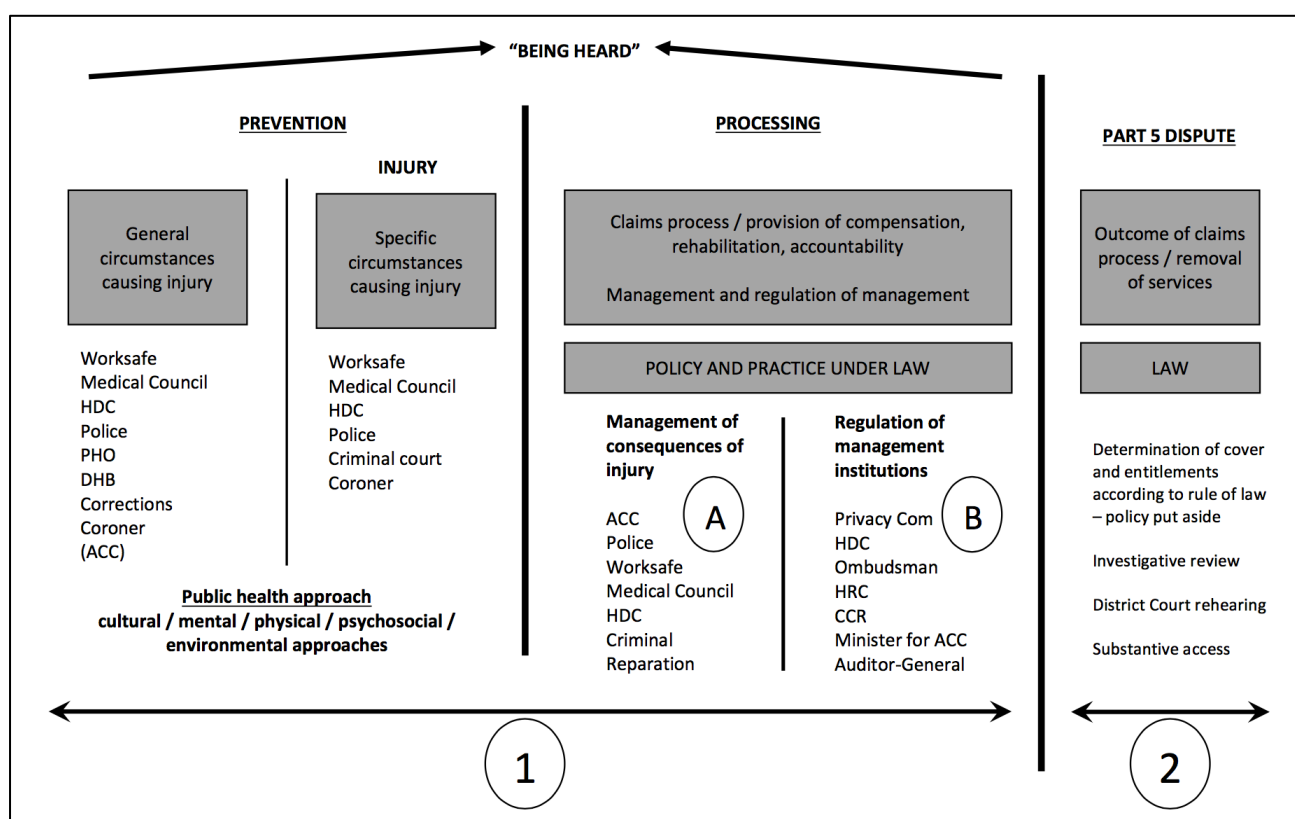
26 May 2016

## Chapter 4. Personal Injury Commissioner

### 4.1 Summary: why is a Personal Injury Commissioner needed?

Despite what might be thought at first glance, ACC is not the only organisation that is – or should be – involved in helping injured New Zealanders navigate the personal injury system. Instead, “personal injury” in New Zealand must be understood in a wide or unconstrained manner: it relates to both the incidence and impact of injury, meaning overall rates of injury, prevention, and management of the consequences of injuries that take place despite our best efforts.

When considered in this way, the following diagram illustrates the real scope of the personal injury system in New Zealand:



The personal injury commissioner’s role will be to facilitate the best interactions between groups who appear above in different areas of the diagram. Currently, the only input from other areas of the diagram into ACC is input that is managed and monitored by ACC, and is subject to systemic failures, conflicting incentives, and low levels of trust and confidence.

The Commissioner will be responsible for the influence of: (2) on (A) and ACC; (B) on (A); and educating (B) on the operation of (1) and (A) to facilitate their investigation. The Commissioner will also be responsible for the coordination and monitoring of (1); and the personal injury advocacy service will play a direct role in (1) only, but not (2), which is the province of lawyers and professional legal advocates. The Commissioner will also have the ability to intervene in disputes under (2) in cases where there is a public interest in having moot questions of law

settled, or putting a systemic perspective before the Court, including systemic evidence.<sup>114</sup> The diagram also illustrates that people’s experience in the personal injury system is determined not solely by law, but by policy and systemic and historic practice of the institutions managing personal injury too. We explain this later.

The diagram illustrates that personal injury functions can be held by a wide variety of agencies. It also illustrates an interaction between prevention and processing of injury. In the prevention sphere, we take a broad approach to causation which includes both general circumstances causing injury, and investigation of the specific circumstances causing injury, which serves both accountability and prevention purposes. We have called this a “public health approach” as a convenient shorthand, because it recognises that there can be many determinants of injury that go much wider than the kind of narrow mechanical analysis applied by ACC. One example is the kind of broad health and safety requirements applied by Worksafe. The problem with being heard, as we see it, arises from people’s inability to navigate the area labelled (1). People bring their grievances from (1) into (2), yet the institutions in (2) have no jurisdiction to deal with those grievances.

ACC is mainly concerned with the limited system of claims for cover and entitlements, with a much lesser prevention function. There are many organisations that do or should play a part in solving the problems that arise, including the shortcomings in access to justice that arise from interacting with the system. We collectively describe the operation of these groups in relation to the incidence and impact of injury as New Zealand’s “personal injury system”.

New Zealand has reconfigured personal injury<sup>115</sup> as being between the individual and large state institutions that manage the incidence and impact of injury: we describe these as “management institutions”. In addition to management institutions, there are also a number of institutions that regulate the interactions between these management institutions and individuals, which we describe as regulatory institutions.

The purpose of the personal injury commissioner is to enhance:

- 1) coordination between the management institutions’ management of personal injury; and
- 2) facilitate durable system learning and feedback from the regulatory institutions into the management institutions to better manage management institutions’ relationship with individuals and prevent disputes; and
- 3) improve injured people’s access to justice and the being heard barrier by providing for system navigation advocates.

The existing system structure does not and cannot achieve these outcomes.

As we have stated previously, interacting with ACC is not governed only by the law: ACC’s conduct is a hierarchy of law, policy, and practice.<sup>116</sup> The Court’s main concern is with decisions on cover and entitlements in respect of individuals. Any effect on wide policy or practice is just a side-effect of its decisions on the law and the facts in individual cases. The Court has no role in the systemic implementation of its decisions. It does not examine policy or systemic practice unless that is directly relevant to the case before it. This includes even to a refusal to examine the

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<sup>114</sup> See for example *Heads v Attorney-General* [2015] NZHRRT 12, where ACC assisted the tribunal with the estimated cost of different policy positions. A potential issue of evidence (or lack thereof) about the overall cost to the scheme was also raised in *McGougan v Depuy International Limited* [2016] NZHC 2511 at [120].

<sup>115</sup> See for example the description of ACC as a distributive justice approach in: *Ambros* at [25]; Simon Connell “Justice For Victims Of Injury: The Influence Of ACC On The Civil And Criminal Law In New Zealand” (LLM Thesis, University of Otago, 2011); Jesse Wall “No-fault Compensation and Unlocking Tort Law’s ‘Reciprocal Normative Embrace’” (2016) 27 NZULR 125.

<sup>116</sup> See *Understanding the Problem* at para 485 et seq. Practice should be understood as both historic practice and current practice, as distinct from policy – you can have a policy but fail to follow it in one or more cases so that its practice can be said to be different from its policy.

conduct of review hearings. At the point that ACC offers to provide the entitlement the claimant is seeking, the dispute becomes moot, and the Court will refuse to hear it, even though the Court's guidance could have an important regulatory effect and enhance systemic learning.

Other than the Court, the only institutions that deal with ACC's policies, and ACC's practice in implementing those policies in a systemic manner, are the "regulatory institutions", primarily the ombudsman (general administration and access to official information), the privacy commissioner (dealing with access and control over personal information), the medical council (accountability of medical specialists) and the health and disability commissioner (dealing with patients' rights in respect of medical practitioners and assessors). These organisations do not have specific knowledge or training in the ACC system, which importantly must be understood as ACC law, policy, and practice, including historic practice. This hampers regulatory institutions' ability to fully investigate and perform their functions effectively. In a worst case scenario, claimants wind up in a situation where ACC says something is the responsibility of one of these regulatory institutions, but the regulatory institution refers a claimant back to ACC. A regulatory institution might also identify a repeated problem that has arisen in the past but fail to recognise that nothing has been done about the problem since the last time it was identified.

Currently, the only institution in the personal injury system that can inform people in the system about ACC's law, policy and practice is ACC, even in a situation where it is ACC's conduct that is under scrutiny. ACC is the "repeat litigant" and a claimant is a "one-shotter"<sup>117</sup> meaning ACC has, among other things, an unfair credibility advantage and is often given the benefit of the doubt as the perceived authority on any issue. Even where an investigation by a regulatory institution makes a finding against ACC, it is then largely up to ACC to monitor how that is implemented unless either a claimant or the regulator takes a proactive approach. The scale of the ACC system means this is unsustainable: a claimant cannot fight systemic battles by themselves, and the regulatory institutions have to manage a wide variety of organisations, not just ACC. Therefore, a situation is created where ACC infringes one of the regulatory enactments, affects the conduct of the investigation and its outcome, and then is left to implement the regulatory findings unsupervised. This hampers system learning and exacerbates a claimant's sense that they have not been heard. It leaves the systemic issue to rise again in another form and create another grievance.

Quite apart from the interaction between ACC and regulatory institutions, there is a further mismatch between ACC and other management institutions, which is not well understood by claimants, managements institutions, or regulatory institutions. The range of management institutions is broad, and could include, for example, interface between the police and criminal courts and ACC in respect of victims of injury. The Commissioner would be tasked with coordinating and following people through the system, by a system of advocates. These advocates would be responsible for developing expertise in the policy and practice of the management institutions, and act as "system navigators" rather than legal representatives, leaving legal disputes to the Courts and the legal profession.

It can be confusing, harmful, and a waste of the considerable resources already expended on isolated parts of the personal injury system, to continue to have these organisations each doing their bit, separately from the others. This results in uncommunicated overlap, or silos of information, or a lack of clarity about function. Importantly, it also results in a maze for injured people that has to be navigated. We can make the most of the work that is performed by these organisations by having an independent, knowledgeable, investigative and responsible person or organisation dedicated to overseeing the work they do. We call that person the Personal Injury Commissioner. The result of this dedicated oversight will be a more efficient, fairer, clearer and *personal* personal injury system.

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<sup>117</sup> See Galanter, above n 91.

## 4.2 What is “personal injury” in New Zealand?

We define personal injury broadly, in the manner of s 3 of the Accident Compensation Act 2001 and the Woodhouse report as: the “overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs) ...”.<sup>118</sup>

In law, “personal injury” was historically (in New Zealand) and continues to be (overseas) part of private law, i.e. the law that governs relationships between individuals. Personal injury embraces the kinds of “injury” that you might not describe in conversation as an “injury”. For example, many kinds of industrial diseases are a personal injury, as can be pregnancy, and as are injuries that we have not traditionally considered to have a physical basis, such as depression or post-traumatic stress disorder. “Personal injury” even in a narrow sense therefore has a much wider meaning than the stereotypical ACC “injury”, for example a back sprain or strain.

New Zealand has reconfigured disputes about personal injury to be a relationship between individuals and large state institutions. These institutions are tasked with both management and prevention of personal injury. Personal injury embraces a wide understanding of injury as a concept as well as a social problem, and two components: the **incidence** or rate of injury suffered by individuals within the community and aggregated to the community as a whole; and the **holistic impact** of that injury once it has occurred, including economic, social and personal costs on individuals and the community.

The use of the word “costs” too is more than just financial. It includes “social” and “personal” cost and should not be limited to an economic calculation. It includes costs to both individuals and the community.<sup>119</sup>

The personal injury system therefore has two goals in relation to the “management” of personal injury: minimise incidence, and minimise impact. This is the function of the “management institutions” in our diagram, who must work individually and collectively.

Injuries are often thought of in terms of the linear passage of time: action, accident, injury, recovery. On this analysis, you can prevent injuries from existing,<sup>120</sup> you can seek to minimise the magnitude of injuries that have not yet occurred (ie by the use of speed limits or seatbelts in private vehicles) or once they do exist, you can minimise their impact. However, we think the proper way to think about injury is cyclical. To prevent injury, you have to predict injury, and to predict and minimise injuries the best source of data about future injuries is derived from studying how current injuries occurred.

This broad understanding of management and its feedback loops is important when considering how the personal injury system works together. It can sometimes lead to counterintuitive results that are not apparent when taking a “birds-eye view” of policy. For example areas such as the criminal process (including investigation, prosecution, and imprisonment), the Consumer Guarantees Act, or customs and border patrol are not traditionally thought of as being part of New Zealand’s personal injury system, but they all seek to prevent injuries and minimise the impact of injury on individuals and on the community in various ways. Another significant area of “injury” that is not commonly seen by the public or government as being within ACC’s ambit is the public health system, because of the treatment injury regime, the common law action for negligence in treatment, and the criminal law’s historic role in punishing breaches of bodily

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<sup>118</sup> Accident Compensation Act 2001, s 3.

<sup>119</sup> Ibid. See also R Gaskins “Accounting for Accidents: Social Costs of Personal Injuries” (2010) 41 VUWLR 37.

<sup>120</sup> Which must be carefully contrasted with a drop in claims numbers, or low rates of claiming that may have no correlation with overall rates of injury. Many of ACC’s performance targets relate to reducing numbers of claims not overall rates of injury. See for example Accident Compensation Corporation “Statement of Intent: 2013-2016” (Accident Compensation Corporation, Wellington) at 10 and following.

integrity without consent as common assault. But, in our view both are squarely part of New Zealand's personal injury system as broadly understood.

### 4.3 Personal injury system: its functions and its limits

The personal injury system as we see it therefore relates to anything that achieves a wide variety of functions, some of which we have listed below, because they are directed toward minimising the incidence and impact of injury. We believe this focus on functions helps analyse the problems more clearly than other approaches, because it recognises that institutions have multiple functions, and because it avoids classifying an institution based on its name rather than its actual practice.

To illustrate the breadth of what we mean, the following are all properly described as personal injury “functions”, because they are directed toward “managing personal injury”, as properly understood as both impact and incidence of “injury” on individuals and the community:

1. Detection of injury and statistical quantification of injury to ascertain the current incidence and impact of injury.
2. Research into causation of injury, in a medical sense, in a social sense, and in a circumstantial sense, and its contribution toward minimising the incidence of injury and the impact once a person is injured.
3. Prediction of injury, including actuarial analysis, and the retrospective analysis of accidents for avoiding circumstances likely to cause accidents in the manner of the transport accident investigation commission or the Coroner.
4. Prevention of injury by direct intervention, for example by preventing the use of inappropriate medical devices like surgical mesh or defective hip implants, health and safety procedures, detaining people or removing privileges from them such as licences to practice dangerous activities like flying, driving, working, or medicine.
5. Minimising the gravity of injuries sustained in certain circumstances, for example by requiring the use of seatbelts and imposing speed limits on roads or limiting the number of participants in clinical trials.
6. Research into managing the consequences of injury, for example seeking more effective treatments or management strategies for traumatic brain injury, spinal injury, nerve injury, or depression.
7. The financial compensation of people for economic, social and personal costs of injury, either to individuals in the form of paying for treatment or by direct compensation payments for lost income, or to the community, for example by bulk funding of the public health system
8. The direct medical treatment of injuries, regardless of funding source.
9. The social and vocational rehabilitation of people with injuries.
10. Government services that provide wrap-around support to injured people and their communities, whether covered by the accident compensation scheme or not, for example the Ministry for Vulnerable Children, Ministry of Social Development

*There are inevitable limits on the scope of the personal injury system*

That all said, we realise there need to be limits: the state's obligation is not to totally indemnify individuals or society for the negative consequences of personal injury. Resources are limited. Other social goals may be more important. There is a need to “draw the line” somewhere that has long been a part of personal injury in law. The negligence action recognised that foreseeability and remoteness limited liability. Entitlement to criminal reparation largely rests upon the moral and legal culpability of the person causing injury through criminal conduct. Indeed the nature of law and politics is to draw lines where people will or will not be held accountable for the impact of their actions on other individuals or on society. But we say that where the lines are currently drawn, we miss systemic learning for the personal injury system. We

need to redraw the line around the entire system and treat it as a system. The institution we propose to do this is the PIC.

There is another natural limit on the personal injury system. The personal injury system remains orientated toward injury and health of the person, and does not compensate for loss of or damage to property except in the form of lost earnings, even where there might be a clear link between causation of injury and the injury's impact on property, like a farmer who is unable to recover profit from their crops because of her inability to perform physical labour. Another example would be a person with depression or another mental illness that limits their ability to maintain their own property. A further example is the personal injury suffered in a car crash, where the car (property) is written off as unusably damaged.

Another limit on the breadth of the personal injury system comes from the way that entitlements are received. Because of the large scale involved, individualised entitlements have given way to a generic kind of entitlement. Remedies given to people to manage the impact of their injuries have become de-individualised and more in the nature of a welfare scheme. This happens at ACC, where staff are tasked with managing specific "entitlements" with limited, prescribed terms of entry and from a pre-set list of options, whose nature and quantum are pre-determined. For instance, one is entitled to six visits to the physio at a set rate. In this way the state has limited its obligation to cover the consequences of injury.

But we think these inevitable limits tell in favour of a Commissioner. A significant advantage of the Commissioner proposal is that there will be a much greater wealth of information, coordinated effort, and expert knowledge to draw on in making these decisions. The Commissioner proposal that we suggest would respect the existing knowledge and expertise of institutions that manage personal injury and seek to leave that specialist area to that institution. Our proposal would provide legislated authority to a single organisation to coordinate and oversee those efforts. This will be more efficient than what currently occurs, and will also make the effect of proposed intervention easier to measure. We have considered other institutional structures<sup>121</sup> and believe that the certainty, longevity and authority of a statutorily-based commissioner is required. The Commissioner's primary mechanism for operating will be based on good faith cooperation with limited data compulsion abilities: it will need have powers and authority consistent with that role. It will also need to at times be in direct conflict with the Accident Compensation Corporation, which has formidable power and resources.

#### **4.4 Management institutions: management is not the same as legal liability**

*An unconstrained view of personal injury is required*

There are two kinds of institutions that form New Zealand's personal injury system:

1. Institutions that manage personal injury, or "management institutions"; and
2. Institutions that regulate the conduct of those institutions, as they relate to individuals ("regulatory institutions").

To understand what each does, a proper – unconstrained – meaning of "personal injury" is required. So what does it mean to "manage" personal injury, as we understand it? Any institution that manages the incidence of injury or its impact, on individuals, the community, or both, is an institution that manages personal injury. Using those criteria, we have identified the following organisations as management institutions:

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<sup>121</sup> University (eg Injury Prevention Research Unit, University of Otago); private ombudsman (eg Banking Ombudsman); research institution or private foundation (eg the Privacy Foundation), or private company.



- Coroner
- Accident Compensation Corporation
- Medical Council
- Companies and others with obligations under the Consumer Guarantees Act, Fair Trading Act and other consumer goods regulation
- Health and safety representatives in workplaces
- Worksafe
- Private insurance providers
- Transport Accident Investigation Commission
- Criminal Court
- Corrections
- District and Regional Councils<sup>122</sup>
- NZTA
- Customs
- DHBs
- New Zealand fire service
- St John Ambulance

Evidently, there is a proliferation of organisations who deal with “personal injury”, when broadly defined. We recognise that some of these may only have a distant connection, for example by playing a role in preventing or limiting the incidence of injury, such as a company with responsibilities to provide safe goods or services under consumer protection legislation, or Customs, who is responsible for the entry into New Zealand of all imported goods, including those which can cause injury. It may be difficult to assert in many cases that these organisations could have envisaged harm to an individual in a particular position from a particular kind of conduct by them, in the manner of the negligence standard.

We emphasise that to say an institution plays a role in managing personal injury is separate from any argument that there should be legal liability associated with that role owed to a victim of injury. In our view, the privative provisions at ss 133(5) and 317 of the Accident Compensation Act 2001 would still apply. There are positive and negative policy consequences associated with imposing liability for actions carried out in managing personal injury. The point for now, however, is to separate out function from liability, so that the breadth of personal injury management functions can be viewed more accurately than has usually been possible.

Management institutions do not enjoy unbridled power, however. They are overseen by what we call “regulatory institutions”.

## 4.5 Regulatory institutions

Regulatory institutions oversee the management institutions. They play a fundamental role in ensuring that the management institutions are “managing” properly and with due regard to other rights held by individuals. For example, the Privacy Commissioner (a regulatory institution) has power to investigate certain complaints about privacy breaches at ACC (a management institution). Our proposal is to establish a regulatory institution to monitor and coordinate the entire personal injury system, with appropriately limited accountability mechanisms.

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<sup>122</sup> “A judge has slammed Dunedin City Council's traffic light set-up, which he described as "an accident waiting to happen". ... "The council carry a major responsibility for not looking at the way lights are set up," Judge Kevin Phillips said. "The people who should really be here [in court] are the people who put the lights in place, did what they did and designed them." <<https://www.odt.co.nz/news/dunedin/traffic-lights-blasted-judge>>.



*Why the personal injury system needs a dedicated regulatory institution*

We agree that good legislative design means that “A new public body should only be created if no existing body possesses the appropriate governance arrangements or is capable of properly performing the necessary functions.”<sup>123</sup> In our view the need for a dedicated regulatory institution to oversee ACC is made out, and justifies our Commissioner proposal.

“Oversight” is an ambiguous concept and we insist on an important distinction between “accountability” and “monitoring”. The Commissioner’s primary function is to monitor. It would then make recommendations available and its primary tools would be political through the building of relationships and facilitating access to information, consistent with the policy-oriented nature of the scheme. However, there is one limited “accountability” role that will be held by the Commissioner over the Accident Compensation Corporation specifically, given the historic issues with that particular management institution.

A key reason for introducing a personal injury commissioner is that we believe greater access to justice will be facilitated by increasing the feedback from these regulatory institutions into the way that ACC carries out its management of personal injury. At present, the only institution that determines how far systemic learning from interaction with regulatory institutions is sustainably implemented into ACC’s processes is ACC. The Commissioner would make this learning more systematic and transparent. At present, the only confidence the public can have is the confidence ACC gives us, or tells us we should have. That puts ACC in a tricky position, even if public trust and confidence in ACC was high.

The composition of personal injury management institutions also means there is a need for a Personal Injury Commissioner. Two features of most management institutions create this need for greater coordination of the regulatory institutions and enhanced feedback from them into the management institutions. First, they are corporate bodies of some kind, operating with legal authority of some kind, with a variety of organisational purposes and incentives. They are operated by networks of individual people according to policies and procedures. Secondly, management organisations have two key kinds of external relationships with two key kinds of actors: with individuals affected by the “management of personal injury”, and with other management institutions.

Current regulatory institutions are primarily orientated toward governing the first kind of relationship: between management institutions and individuals. It appears that there is a lack of coordination between management institutions, and no oversight by any one regulatory institution.

To the extent these institutions exercise legal authority over individuals, there is a need to properly define an individual’s rights in dealing with them. This is especially the case where political calculations or debates are engaged, for example by preventing or compelling conduct or compulsorily acquiring or withholding resources. Some proportionality is required. At one extreme, Customs would never let anybody import anything that may cause injury. At the other, there may be no import or travel controls whatsoever, allowing the importation of epidemics (ebola) or dangerous products (weaponry). To take another example, we could forever remove the ability of people who are convicted of even the most minor traffic infringements from driving again, because of the fact that they have a documented history of behaviour that puts people at a greater risk of injury, but that would be a disproportionate response given the various benefits of private automobiles.

In New Zealand’s personal injury system there are a number of institutions that we, for convenience, describe as “regulatory institutions”. These institutions do not necessarily deal with the incidence or impact of injury themselves, but they govern relationships between individuals

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<sup>123</sup> Legislative Design and Advisory Committee (LAC) Guidelines 2014, 17.1.

and the management organisations that do manage the incidence and impact of injury on individuals and the community.

Many of these institutions are Independent Crown Entities, and tend to be described as “Commissioners”:

- Privacy commissioner
- Human rights commissioner
- Ombudsman
- Medical Council
- Health and disability commissioner

A key feature of the regulatory institutions is that they tend to adopt a rights-focused approach. In a very broad sense, they recognise that regardless of the outcome or purpose of what you are doing, there are certain legal minimums that should not be infringed unless there is very good reason to do so. They are oriented toward the justice impulse that forms the basis for human rights doctrines, that people should not be treated in particular ways regardless of the ends involved.

#### **4.6 System coordination: management and regulation**

A significant gap that will be filled by the personal injury commissioner relates to the second kind of relationship that ought to dominate management institutions: their interaction with other management institutions. ACC dispute resolution at review and appeal is focussed on substantive issues of cover and entitlements. It is focussed on law and not policy or historic or systemic practice. For that reason, its impact on the relationships between management institutions is heavily limited, despite the fact that it drives the “being heard” barrier. Grievances that go wider than cover and entitlement decisions need to be productively dealt with within the personal injury system.

A personal injury commissioner needs to do this work because the management institutions themselves are not best placed to do it. In relation to individuals or the community, management institutions do not know – or necessarily need to know – what work other management institutions are doing. Yet, these institutions will obviously not be minimising the impact or incidence of injury effectively or efficiently if they are working at cross-purposes, or if there is a gap in personal injury data or management.

Because of the complexity of the overall task – minimising the incidence and managing the impact on individuals and the community – and the natural limitations on the resources available to do so, it is only natural that these corporate bodies identify the most pressing identifiable need for those resources and it is important to acknowledge the individual expertise of those institutions. Yet this too might not be what the personal injury system as a whole requires if those institutions were acting with better information.

There is also the fact that managing personal injury may only be one task performed by the management institution. For example, all management institutions need to make sure whatever personal injury work they do is done quickly and efficiently. And, particular management institutions have other, sometimes more pressing, jobs than the management of personal injury. The police, for example, manage personal injury (they are interested in the incidence of injury, for example resulting from an assault). Yet management institutions like the police are also tasked with preventing crime against property, not just crimes against the person.

There can be social, legal or political limits on an organisation’s ability to prevent or manage injury, for example, the police can only do so much to address the socio-economic influences on

crimes and instead have to focus on immediate cases where someone has identified an imminent case of injury by calling 111.

We consider that ACC is in the same position as any other personal injury management institution. It is of course tasked with managing personal injury (impact and incidence). But it is also tasked with other important priorities. It must manage disputes under the statutory mechanisms. Levies need to be kept down. Prudent investments need to be made. The eye-watering investment fund needs to be kept healthy. Its thousands of employees need to be given opportunities to advance their careers. Public trust and confidence needs to be restored or maintained. Strategic direction needs to be set and re-set depending on the government of the day and on an evidence base that currently does not appear to exist.

We need an institution that has, as its core function, the coordination of these institutions and the management of the personal injury system.

#### 4.7 What will the Personal Injury Commissioner Bill achieve?

We have drafted and we **attach** a draft Personal Injury Commissioner Bill 2018. The Bill establishes a personal injury commissioner to steer the personal injury system. The commissioner will be able to do this in five main ways:

| Commissioner's role           | Specific components of that role   |
|-------------------------------|--|
| Complaints                    | <p>The Commissioner can receive complaints from anyone, about management institutions and regulatory institutions, on a wide variety of topics.</p> <p>The Commissioner is responsible for liaising with the complainant and that institution to resolve the complaint in the best way.</p> <p>The purpose of enabling the Commissioner to receive complaints is systemic learning – what is going wrong? Who should fix that? How?</p> <p>Independence and impartiality of the Commissioner are ensured by giving the Commissioner a set term of office, limited grounds for their removal, recovery of costs provisions, discretions about how to deal with any complaint, and a requirement the Commissioner reports on its findings.</p> |
| The Code of Claimants' Rights | <p>The Code will be removed from the Accident Compensation Act, and thus no longer needs to be managed by ACC. The Commissioner will be responsible for enforcing the Code against ACC in a durable systemic manner.</p> <p>The content of the Code is also strengthened as are enforcement provisions.</p> <p>This will be the commissioner's main oversight function in terms of accountability rather than monitoring.</p>  |
| Investigations                | <p>The Commissioner can, for the purpose of system learning, investigate widely any issues in the personal injury system.</p> <p>Data collection and statistics provisions mean information will be reliable, regular and kept independently.</p>  |

|   |  |
|---|--|
|   | The Commissioner can intervene in litigation. This removes the burden on an individual claimant in bringing a case that is in the public interest. It also enables the Courts to participate in the personal injury system as appropriate by making legal findings.  |
| Working together with management institutions | <p>The Commissioner’s empowering Act has the same purpose as the Accident Compensation Act to ensure that its oversight of ACC is consistent with ACC’s obligations under the Accident Compensation Act.</p> <p>The Commissioner may reach delegation agreements and memoranda of understanding with ACC and regulatory institutions on certain matters.</p> <p>ACC has duties to consult with the Commissioner before making certain decisions.</p> <p>PIC could be used for relationship management between various institutions to ensure independence, eg for managing the relationship between ACC and medical experts, or ACC and Fairway.</p> |
| Advocates                                     | <p>The Commissioner is responsible for recruiting, training and helping the victims of injury make appropriate use of personal injury advocates.</p> <p>Generally, the role of advocates is to help injured people receive independent assistance from existing regulatory institutions in navigating the personal injury system.</p>  |

The Commissioner will not take over ACC’s most important job – the management of personal injury, primarily through making decisions about cover and entitlements. Establishing the Commissioner as a regulatory institution to oversee ACC doing this work will remove many of the varied functions currently assigned to ACC. We think this will make it easier for ACC to do a good job of managing personal injury.

ACC will be responsible for meeting the costs of the Commissioner. This is for several reasons. First, ACC can afford it, by making use of its vast reserves, which it has been able to collect from some of its more indirect “personal injury management” functions. We do not believe this will require levies to increase. We anticipate after initial set up costs it would produce a return on investment in the same way contemplated (but never realised) by the original Woodhouse report.

More importantly, we consider it is appropriate that ACC meet whatever the Commissioner’s reasonable costs may be, because ACC will be getting a great benefit from the existence of a Commissioner. The Commissioner will remove the potential conflicts of interest arising from ACC currently having to manage many considerations, some of which are more focussed on managing personal injury than others. It will also remedy the repeat player advantages that ACC enjoys, which we wrote about in our previous report in some detail. It will somewhat level the playing field, which is essential to a fair and sustainable personal injury system.

In any case we consider that over time the arrangement we propose will be less costly than the present arrangement of many management institutions all playing some limited and uncoordinated part in managing personal injury. We believe that a well co-ordinated system led by the Commissioner will be more efficient, not to mention the benefit for New Zealand from avoiding the social and economic consequences of injury. The Commissioner proposal should be seen as a chance to affect the actual cost of injury to society, a central pillar of the original Woodhouse concept that has not been realised over the past half-century of scheme development.

“Sir Owen also had the habit of asking disconcerting questions from the Bench. ... [T]here was [one] occasion when I advanced a watertight argument on behalf of one of New Zealand’s largest corporations. ... Sir Owen leaned forward and mused, “Yes, ... but what would that do for the little man?”

The Rt Hon. Sir Edmund "Ted" Walter Thomas KNZM QC  
“Tribute to Sir Owen Woodhouse” (2008) 1 NZLR 129 at 133 and 135

“I repeat that in no way are my remarks to be regarded as a general criticism of the conscientious public servants of the country. My concern is with the gradual development of a system which now leaves in the hands of the executive branch of government so large a share of the great sovereign powers of the state ...

I refer to ... the critical importance for citizens in our society to be able to arrive at sensible and informed conclusions upon public issues and so have reasonable access to official information and the reasons underlying proposals put forward by the executive arm of the state. The whole essence of democracy is participation ... As the Evening Post put it only four days ago: “There is an obligation on those in authority to take the public into their confidence, to the extent that it is possible practically, so that what is proposed is understood and not revealed as a *fait accompli* because of secretive government. ...”

...

Indeed, the reply is made, just as it is made when other powerful reasons are advanced for constitutional checks upon Executive power, that much that needs to be done must be done speedily; that public debate will often produce public solutions that are wrong or belated; that expert knowledge and a capacity for appraisal is not the gift of the man in the street; that intervention by the Courts would stifle efficiency; that the judicial instinct is not in tune with administrative needs. ... I would ally myself with the undoubted claim of Justice Oliver Wendell Holmes of the United States Supreme Court ‘that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [the purposes of society] safely can be carried out’.”

The Rt Hon. Sir Owen Woodhouse ONZ KBE DSC  
“Government Under the Law” (JC Beaglehole Memorial Lecture)  
Wellington, 4 October 1979

## Chapter 5. Conclusion

This report is the product of research and reflection by the research team members over a decade. It is beyond the capabilities of our small team<sup>124</sup> to complete all the nuanced detailed tasks that are required in taking a broad policy concept from an abstract idea to a bill (let alone legislation), which is still in draft form. But we have found it a useful exercise to present our recommendations as practical, tangible solutions.

In considering how to remove the access to justice barriers faced by injured people in New Zealand, we have tried to arrive at a balance between the micro and macro levels (which we acknowledge is perhaps the most difficult problem faced by ACC scheme administrators, too).

The reassessment of how causation is applied under the scheme will affect every decision on cover and entitlements made by ACC and all its associated processes, but, in the absence of better access to data suggesting otherwise, we do not believe the shift will be radical. Importantly, our criticism is not of the courts or any individuals at ACC or in the medical and legal professions. Our criticism is of the use of one reading of a causation standard and the way it undermines access to justice and the purpose of the Act.

If anything, our amendments would make ACC's job easier. In practice, ACC only disputes causation in a relatively small number of cases. It must be a very difficult task for the people in the ACC system like assessors, technical claims managers, case managers and reviewers who have to grapple with the lack of certainty and principle involved in causation issues. They are generally trying to apply the scheme fairly with due regard for the financial sustainability of the scheme. But for the unlucky injured people who have to dispute causation in the face of insurmountable access to justice barriers, the impact on them, their families and their community is unacceptable. We believe the complexity and slipperiness of the concept of causation means that disputing ACC's view of causation is in many cases a waste of time and resources.

At the macro level, we are well aware of the scope of the Commissioner proposal. It is by no means finalised and the best thing that could happen to the policy and draft legislation underlining the proposal is vigorous informed debate. Despite the ambition of the project, New Zealand has shown time and again that it is committed to ambitious reform when the long-term benefits are clear and the national conscience is outraged.<sup>125</sup>

There are some striking consistencies between the management and regulatory institutions in the personal injury system which we have endeavoured to highlight. We emphasise that the primary goal of the Commissioner proposal is to let all the agencies who are currently performing their functions to continue doing so. The Commissioner's role is to provide better advice and better monitoring of the complex web of institutions managing personal injury and to restore trust and confidence in ACC through dedicated transparency and oversight mechanisms.

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<sup>124</sup> We are grateful to the New Zealand Law Foundation and the University of Otago Law Faculty Legal Issues Centre for their financial and professional support throughout much of this period.

<sup>125</sup> Refer Ministry for Vulnerable Children. We note that ACC has been subject to a similar number of continuous independent systemic reviews and reports with similar levels of public and political dissatisfaction as Child Youth and Family, which is itself a kind of access to justice scheme. See also the Health and Safety at Work Act 2015 as a result of the Pike River Mine disaster.

There is not much merit to casual romanticism about the history of the ACC scheme: society is a very different place from New Zealand in 1967 and we have done our best to acknowledge that and avoid conjuring idealised solutions. We are working under no illusions about the daunting scale of the Commissioner proposal and the work that ACC already has to do just to manage claims for cover and entitlements. We fully expect rigorous refinement of specifics from the experts within Government, especially once further information becomes available<sup>126</sup> to describe the operation of the ACC scheme. That is the purpose of the policy process.

We don't apologise for ambitious thinking in response to such a big problem with such unacceptable harm to people with injuries: we hope the conversation will be progressed by our attempts to be specific.

We think that, as a matter of legal, social and financial necessity, there is no going back from New Zealand's ACC scheme. But if we are going to continue with this system, then we ought to do it properly.

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<sup>126</sup> See appendix 11, information request of May 2016.

# Draft Personal Injury Commissioner Bill 2018

## PERSONAL INJURY COMMISSIONER BILL

### Part 1

#### Preliminary provisions

#### 1 Title

This Act is the Personal Injury Commissioner Act 2018.

#### 2 Commencement

#### 3 Purpose and functions of Act

(1) The purpose of this Act is to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury.

(2) To achieve that purpose, this Act provides for minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs), through—

- (a) establishing a Personal Injury Commissioner and setting out its processes and functions;
- (b) conferring powers on the Personal Injury Commissioner to achieve its functions;
- (c) allocating responsibility for coordinating the various mechanisms in New Zealand that manage personal injury;
- (d) facilitating the administration of the Accident Compensation Act 2001 while enhancing systemic learning from interactions between management institutions and regulatory institutions;
- (e) maintaining the emphasis on the substance of claims and disputes for cover and entitlements under the Accident Compensation Act 2001, while ensuring that systemic issues or issues of process are appropriately incorporated into the personal injury system through a dedicated mechanism;
- (f) developing expertise in the law, policy and practice in the personal injury system and associated opportunities for education;
- (g) taking into account New Zealand's signature and ratification of the United Nations Convention on the Rights of Persons with Disabilities.

#### 4 Act binds the Crown

(1) This Act binds the Crown.

#### 5 Interpretation

(1) In this Act, unless the context otherwise requires,—

**action** includes a course of conduct pursuant to a policy;

**Convention** means the United Nations Convention on the Rights of Persons with Disabilities.

**delegation arrangement** means a delegated arrangement pursuant to s 18 of this Act  
**Health and Disability Commissioner** has the same meaning as in the Health and Disability Commissioner Act 1994:

**Human Rights Commissioner** has the same meaning as in the Human Rights Act 1993:



**management institution** means any institution that manages personal injury, and includes the entities or individuals listed at schedule 1 to this Act, and **management enactment** has a corresponding meaning as it relates to legislation:

**personal injury** [means] the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs):

**personal injury system** means the operation and interaction between management institutions and regulatory institutions:

**Personal Injury Commissioner** means the commissioner established by this Act, and **Commissioner** and **PIC** have corresponding meanings:

**personal injury system advocate** means an advocate appointed by the Commissioner pursuant to part 5:

**Privacy Commissioner** has the same meaning as in the Privacy Act 1993:

**regulatory institution** means any institution that regulates the actions taken by [management] institutions that affect victims of personal injury or the personal injury system, and includes the entities or persons listed in schedule 1 to this Act and **regulatory enactment** has a corresponding meaning as it relates to legislation.

- (2) In this Act, unless the context otherwise requires, —
- (a) terms defined under both this enactment and the Accident Compensation Act 2001 shall be given the same meaning.
  - (b) terms not defined under this Act but defined under the Accident Compensation Act 2001 shall be given the same meaning as in the Accident Compensation Act 2001.

## **6 Recovery of costs of Commissioner**

- (1) The Corporation must in each financial year pay to the Commissioner such amount as the Corporation and the Commissioner agree as being—
- (a) the reasonable administrative costs of the Commissioner; and
  - (b) the reasonable costs in relation to salaries, fees, and allowances by the Commissioner and its staff.
- (2) No part of the Commissioner's costs are excluded from recovery from the Corporation simply because those costs may be recoverable from claimants.
- (3) The Commissioner and the Corporation must submit any agreement under subsection (1) of this section to the House of Representatives, together with any significant documents or calculations relied upon by them in reaching the agreement.

## **Part 2 Personal Injury Commissioner**

### **7 Personal Injury Commissioner [taken from Privacy Act]**

- (1) There shall be a Commissioner called the Personal Injury Commissioner.
- (2) The Commissioner is—
- (a) a corporation sole; and
  - (b) a Crown entity for the purposes of section 7 of the Crown Entities Act 2004; and
  - (c) the board for the purposes of the Crown Entities Act 2004.
- (3) Except as expressly provided otherwise in this or any other Act, the Commissioner must act independently in performing its statutory functions and duties, and exercising its statutory powers, under—
- (a) this Act; and
  - (b) any other Act that expressly provides for the functions, powers, or duties of the Commissioner (other than the Crown Entities Act 2004).
- (4) Except as otherwise provided in this Act, the Crown Entities Act 2004 applies to the Commissioner.

**8 Term of Commissioner [Taken from Ombudsmen Act]**

- (1) Except as otherwise provided in this Act, every Commissioner shall hold office for a term of 5 years.
- (2) Unless the office of the Commissioner sooner becomes vacant, every person appointed as a Commissioner shall hold office until the Commissioner's successor is appointed. Every such person may from time to time be reappointed.
- (3) The Commissioner may at any time resign office by writing addressed to the Speaker of the House of Representatives, or to the Prime Minister if there is no Speaker or the Speaker is absent from New Zealand.

**9 Removal of Commissioner [from Constitution Act s 23]**

- (1) The Commissioner shall not be removed from office except by the [Sovereign or the Governor-General], acting upon an address of the House of Representatives, which address may be moved only on the grounds of the Commissioner's misbehaviour or of the Commissioner's incapacity to discharge the functions of the office of Commissioner.

**10 Functions of Commissioner**

- (1) The functions of the Commissioner are:
  - (a) to coordinate the actions of management institutions;
  - (b) to facilitate and lead transparency and systemic learning by management institutions;
  - (c) to lead and administer a system of personal injury system advocates;
  - (d) to investigate and determine complaints by individuals about management institutions;
  - (e) to manage complaints in the personal injury system and refer them to regulatory agencies where appropriate;
  - (f) to coordinate and learn from complaints about management institutions to regulatory institutions;
  - (g) to ensure that management institutions take into account findings by regulatory institutions;
  - (h) to measure and assess the compliance of the policy and practice of the Accident Compensation Corporation with the Accident Compensation Act 2001;
  - (i) to act as an intermediary between the Accident Compensation Corporation and providers of services under the Accident Compensation Act 2001.

*Complaints*

**11 Jurisdiction to receive complaints about operation of personal injury system**

- (1) The Commissioner may receive complaints from any person about the operation of the personal injury system, including management and regulatory institutions.
- (2) Upon receiving a complaint, the Commissioner shall notify the complainant of their right to access the personal injury system advocacy service.
- (3) The Commissioner may receive complaints about the personal injury system that relate to:
  - (a) management enactments;
  - (b) regulatory enactments;
  - (c) the Code of Claimants' Rights.

**12 Process for managing and coordinating complaints**

- (1) Where the Commissioner receives a complaint pertaining to a management or regulatory enactment, the Commissioner shall ensure that the complaint is referred to the institution responsible for managing complaints under those enactments.

- (2) After referring a complaint under (1), the Commissioner shall allow a reasonable period in the circumstances for the complaint to be investigated and processed according to that institution's processes.
- (3) Where the complaint relates to the Code of ACC Claimants' Rights, the complaint shall be dealt with in accordance with Part 3 of the Act provided that the Commissioner is satisfied that doing so is in the interests of justice.
- (4) For the avoidance of doubt, in managing and coordinating complaints under this section, the Commissioner may take a different view from a regulatory institution for the purposes of incorporating systemic learning into management institution processes.

### **13 Jurisdiction and referrals in respect of regulatory institutions and regulatory enactments**

- (1) In considering how to respond to a complaint received, the Commissioner shall take appropriate account of the expertise and jurisdiction of regulatory institutions according to that institution's regulatory enactment.
- (2) For the avoidance of doubt, nothing in (1) prevents the Commissioner from entering into a delegation arrangement.
- (3) For the avoidance of doubt, a complaint or remedy made or sought under this enactment does not affect any other right or remedy the complainant may have under any other enactment.

### **14 Other complaints**

- (1) Where the Commissioner receives a complaint not otherwise provided for in this Act, the Commissioner shall determine whether to further consider the complaint and if so the manner in which to do so.
- (2) If the Commissioner determines that further consideration of a complaint received under subsection (1) of this section is not appropriate, for whatever reason, the Commissioner must within a reasonable time inform the complainant the reasons that the complaint will not be further considered.

### **15 Manner of making complaint**

- (1) Complaints shall, where reasonably possible, be made in writing to the Commissioner or the Commissioner's authorised representative.
- (2) Despite (1) and in accordance with article 21 of the Convention, a complainant may make a complaint in any other manner.
- (3) All complaints shall be recorded in a manner that allows for systemic learning.
- (4) Where any complaint is made in a manner consistent with (2) the Commissioner shall ensure that as soon as reasonably practicable a personal injury system advocate or health and disability advocate is made available to assist the complainant.

### **16 Power to aggregate similar complaints with a systemic focus**

- (1) The Commissioner may aggregate complaints for the purpose of dealing with them jointly, but only if reasonably satisfied that:
  - (a) the Commissioner has taken account of any delegation arrangement under s 18 and aggregation would not undermine that arrangement; and
  - (b) the aggregation of the complaints would not undermine s 13(1) and
  - (c) the subject matter of the complaints or the systemic issue raised by the complaints is, in the Commissioner's opinion, substantially similar; and
  - (d) it would be a more efficient use of resources to consider the complaints together; and
  - (e) where the various complaints have been received over a period of time, the decision to aggregate later complaints would not unduly delay resolution of earlier complaints; and
  - (f) the complainants have been given a reasonable opportunity to comment on the proposed decision to aggregate and no undue prejudice would be imposed

- on any single complainant, or there are no circumstances justifying more rapid resolution of the particular individual complaint; and
    - (g) the privacy of the complainants can be adequately protected and the subject matter of the complaint is suitable for aggregation.
- (2) Where the Commissioner makes any decision to aggregate a series of complaints in accordance with this section:
  - (a) any complainant whose complaint has not been resolved after 3 months elapses since the date the complainant lodged its complaint is entitled to apply to have their complaint disaggregated; and
  - (b) the Commissioner must disaggregate the complaint unless on reasonable grounds remains satisfied that the criteria at (1) continue to be met; and
  - (c) in either case, if the complainant remains dissatisfied, the Commissioner must provide a certificate of investigation allowing the complainant to apply to the Tribunal under s 24.

**17 Procedure after investigation of complaint**

- (1) This section applies in every case where, after making any investigation under this Act, the Commissioner forms an opinion that any decision, recommendation, act, or omission which was the subject matter of an investigation—
  - (a) appears to have been contrary to law; or
  - (b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
  - (c) was based wholly or partly on a mistake of law or fact; or
  - (d) was wrong.
- (2) This section shall also apply in any case where the Commissioner forms an opinion that in the making of a decision or recommendation, or in the doing or omission of an act, a discretionary power has been exercised for an improper purpose or on the taking into account of irrelevant considerations, or that reasons should have been given for the decision.
- (3) Whenever the Commissioner forms an opinion under this section, the Commissioner must report to the appropriate department or organisation, and may make such recommendations as he or she thinks fit, including:
  - (a) that the matter should be referred to the appropriate authority for further consideration; or
  - (b) that the omission should be rectified; or
  - (c) that the decision should be cancelled or varied; or
  - (d) that any practice on which the decision, recommendation, act, or omission was based should be altered; or
  - (e) that any rule of law on which the decision, recommendation, act, or omission was based should be reconsidered; or
  - (f) that reasons should have been given for the decision; or
  - (g) that any other steps should be taken.
- (4) In any such case, the Commissioner may make a binding request that the department or organisation notify him, within a specified time, of the steps (if any) that it proposes to take to give effect to his or her recommendations.
- (5) If within a reasonable time after the report is made no action is taken which in the opinion of the Commissioner is adequate and appropriate, the Commissioner, in its discretion, after considering any comments made by or on behalf of any department or organisation affected, may send a copy of the report and recommendations to the appropriate Minister.
- (6) The Commissioner shall attach to every report sent or made under subsection (4) a copy of any comments made by or on behalf of the department or organisation affected.

- (7) Notwithstanding anything in this section, the Commissioner shall not, in any report made under this Act, make any comment that is adverse to any person unless the person has been given an opportunity to be heard.

**18 Power to enter into delegation arrangements with regulatory institutions**

- (1) In achieving its functions and exercising its powers under this Act, the Commissioner may enter into delegation arrangements with regulatory institutions if:
- (a) the delegation arrangement meets the requirements of this section; and
  - (b) would not otherwise be inconsistent with the functions of the Commissioner or the purpose of this Act.
- (2) No delegation arrangement may be entered into in respect of s 19 of this Act with the Accident Compensation Corporation.
- (3) Where any delegation arrangement is proposed, the Commissioner must make the proposed delegation arrangement and its proposed terms available to the public for consultation for a period that is reasonable in the circumstances
- (4) The terms of any delegation arrangement agreed under this section must be made publicly available in all respects.
- (5) Any delegation arrangement by the Commissioner may only be entered into in respect of the following matters;
- (a) the Commissioner undertaking to perform initial investigations and make initial recommendations to another regulatory institution;
  - (b) investigation of conduct by the Accident Compensation Corporation;
  - (c) according to the enactment the regulatory institution is statutorily responsible for administering.

*[Compare ss 68 to 71 of Health and Disability  
Commissioner Act 1994.]*

**19 Fraud**

- (1) The Commissioner may receive complaints about fraudulent activity in the personal injury system from any person.
- (2) Any complaint about fraud received by the Accident Compensation Corporation must be referred to the Commissioner together with all relevant information that is available to the Corporation.
- (3) The Commissioner must refer all complaints received, together with all relevant information that is available to the Commissioner, to the Police.

*Resolution of complaints*

**20 Powers to resolve complaints**

- (1) Where the Commissioner investigates a complaint under s 11(3)(c), the Commissioner must issue written findings on the outcome of its investigation.
- (2) A complainant may only apply to the tribunal under s 24 after written findings have been issued in accordance with (1) of this section.
- (3) Where the Commissioner receives any complaint under ss 11(3)(a) or (b) and investigates under s 12, the Commissioner must issue written findings on the outcome of its investigation addressing the following matters:
- (a) the impact of its investigation on the personal injury system on the purpose of this Act;
  - (b) the impact of its investigation on the personal injury system on the Commissioner's statutory functions;
  - (c) the impact that a finding by a regulatory institution has had on the processes of any management institution in relation to:
    - (i) any individual complainant; and
    - (ii) the personal injury system.
- (4) The Commissioner may utilise its powers under Part 4 [Powers and Duties] in relation to the outcome of any investigation under this section.

**Part 3**  
**Code of ACC Claimants' Rights**

**21 Code of ACC Claimants' Rights**

- (1) The Code of ACC Claimants' Rights applies in the same manner and with the same force as in the Accident Compensation Act 2001 and the Injury Prevention, Rehabilitation, and Compensation (Code of ACC Claimants' Rights) Notice 2002.

**22 Interference with Code right**

- (1) For the purpose of this Act, an action or omission is an interference with a claimant's rights if, and only if,—
- (a) in relation to that claimant the action breaches a right under the Code; and
  - (b) in the opinion of the Commissioner or, as the case may be, the Tribunal, the action or omission:
    - (i) has caused, or may cause, loss, detriment, damage, or injury to that individual; or
    - (ii) has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of that individual; or
    - (iii) has resulted in, or may result in, significant humiliation, loss of dignity, or injury to the feelings of that individual.

**23 Investigation of interference with Code right**

- (1) The functions of the Commissioner under this Part shall be—
- (a) to investigate any action that is or appears to be a breach of or interference with a Code right :
  - (b) to act as conciliator in relation to any such action:
  - (c) to take such further action as is contemplated by this Part.
- (2) The Commissioner may commence an investigation under subsection (1)(a) either on complaint made to the Commissioner or on the Commissioner's own initiative.

*Appeal to Human Rights Review Tribunal*

**24 Appeal by complainant to Human Rights Review Tribunal about interference with code right**

**Part 4**  
**Powers and functions of Personal Injury Commissioner and Accident Compensation Corporation**

**25 Duty to coordinate actions in achieving statutory purpose**

- (1) The Commissioner and the Accident Compensation Corporation shall take every step reasonably possible to ensure a positive working relationship between them in order to achieve the purpose of this Act, including the regular exercise of powers under this Act and good faith compliance with them by all relevant parties.
- (2) The Commissioner and Corporation may enter into and must accordingly make publicly available a memorandum of understanding that records the way in which the Commissioner and Corporation will work together in relation to any aspects of this Act where each party has rights, powers, duties or liabilities in relation to the same or similar subject matter.

**26 Duty on Accident Compensation Corporation to consult with Commissioner on policy and practice**

- (1) Before the Corporation disseminates any guideline or policy in any form to any of its employees, agents or contractors it shall deliver an accurate copy of that guideline or policy to the Commissioner, as soon as reasonably practicable and sufficiently in advance to allow for a reasonable period of consultation with the Commissioner.
- (2) In the following circumstances, the Corporation shall, unless extreme or extenuating circumstances exist, consult with the Commissioner on any guideline or policy before it is disseminated or relied upon:
  - (a) where the guideline or policy is of wider significance to the personal injury system; or
  - (b) where the guideline or policy relates to decision-making that will determine the legal rights and obligations of claimants; or
  - (c) where the guideline or policy will be applied to a large class of people including providers of services to claimants.
- (3) In complying with (1) and (2) of this section, the Corporation shall make available to the Commissioner all data collected or relied upon and any analysis undertaken by the Corporation that it has taken into account in formulating the policy.
- (4) The Commissioner shall assess the proposed guideline or policy and any information provided under this section in accordance with:
  - (a) the purpose and provisions of this Act;
  - (b) the purpose and provisions of the Accident Compensation Act 2001;
  - (c) the purpose and provisions of any relevant regulatory enactment;
  - (d) the Commissioner's functions;
  - (e) the Convention.
- (5) The Commissioner shall prepare a written report of its assessment under (4) and any information provided under (3) and make that report publicly available.
- (6) The Corporation shall not withhold any information from the Commissioner under this section on the grounds of legal privilege or commercial sensitivity but the Commissioner:
  - (a) shall not publish any privileged information unless there is a public interest in doing so; and
  - (b) shall not publish any commercially sensitive information unless, after consulting with the Accident Compensation Corporation, it is satisfied there is good reason for doing so.
- (7) For the avoidance of doubt:
  - (a) nothing in the Official Information Act 1982 overrides this section; but
  - (b) the Privacy Act 1993 continues to apply in respect of information disclosed under this section in relation to individuals as defined by that Act.
- (8) Within two years of the commencement of this Act, all guidelines and policies already in place at the time this Act commences must be reviewed by the Commissioner as if those guidelines and policies were disseminated or relied upon pursuant to this section.

**27 Duty on Accident Compensation Corporation to consult with Commissioner on any information disseminated to public about legal rights and obligations**

- (1) Where the Accident Compensation Corporation proposes to publicise [or has publicised before the coming into force of this Act] any information to the public about individuals' legal rights and obligations in dealing with the Corporation, the Corporation must provide that information to the Commissioner to enable the Commissioner to consult with the public on the accuracy of that information.
- (2) The Corporation must comply with any direction by the Commissioner to amend any public materials produced by the Corporation in order to fully inform individuals of their rights and obligations in respect of the Accident Compensation Act 2001, judicial interpretations of that legislation, and any other closely related legal materials.

*Collection and publication of data*

**28 Duty to collect and publish data on personal injury system**

- (1) The Commissioner must collect data from institutions comprising the personal injury system in New Zealand so that it can achieve its functions and the purpose of this Act.
- (2) The Commissioner must publish an annual report on the data it has collected in a way that facilitates transparency in the personal injury system and systemic learning that is in the public interest.
- (3) The Commissioner must ensure that report is made available publicly and to the House of Representatives.
- (4) In exercising powers under this section the Commissioner shall take into account article 31 of the Convention.

**29 Power to enter into collaborative arrangements for data collection**

- (1) In discharging its duty under s 28, the Commissioner may enter into reasonable collaborative arrangements with other agencies collecting such data provided that the final responsibility for ensuring the data is collected in accordance with the purpose of this Act is the Commissioner's.

**30 Power to recommend collection of data**

- (1) The Commissioner may recommend to any agency in schedule 1 or 2 that it keep data or monitor a statistical trend to enable the Commissioner to comply with this Act.
- (2) For the avoidance of doubt, in this section **data** means quantitative and qualitative data, and the latter includes data obtained by way of interview or similar methodology.
- (3) Where the Commissioner makes any recommendation to an agency under this section, the Commissioner shall cause that recommendation to be listed in a publicly accessible form with all other recommendations made under this section.

*Participation in disputes under the Accident Compensation Act 2001*

**31 Power to intervene in dispute under Part 5 Accident Compensation Act 2001**

- (1) In exercising its powers under this section the Commissioner shall take account of the principle that while settlement may be efficient between the parties, the final determination of questions of law is more efficient for the wider personal injury system.
- (2) The Commissioner shall have the power to seek to intervene in disputes under Part 5 of the Accident Compensation Act 2001 in accordance with the principle at (1).
- (3) Provided that the Commissioner gives notice of intention to intervene in a particular proceeding, the District Court shall have the power to admit the Commissioner as an intervener in any dispute before it under s 149 Accident Compensation Act 2001.

**32 Power to refer question of law or policy to District Court**

- (1) In exercising its powers under this section the Commissioner shall take account of the principle that while settlement may be efficient between the parties, the final determination of questions of law is more efficient for the wider personal injury system.
- (2) The Commissioner has the discretion to seek to refer questions of law to the District Court in accordance with this section.
- (3) In exercising its discretion under this section, the Commissioner shall take account of the following considerations:
  - (a) the extent to which future disputes over cover and entitlements will be resolved by the application of a judicial precedent;
  - (b) the impact of ACC's advantages as a repeat litigant before the District Court;
  - (c) the likelihood that the question of law will be resolved;
  - (d) the difficulties of stating a case on the question of law;



- (e) the desirability that the question of law is resolved expediently;
- (4) The Commissioner may consult with any person at the Commissioner's sole discretion in deciding whether to exercise its discretion under this section, provided that:
  - (a) any information or submission the Commissioner takes into account from the Accident Compensation Corporation shall be made publicly available for comment by any other consultees; and
  - (b) the Commissioner shall take that comment into consideration.

**33 Duty to report on retrospective application of judgments**

- (1) The Commissioner must identify significant judicial decisions that are determined pursuant to Part 5 Accident Compensation Act 2001 and other significant decisions bearing on the Accident Compensation Act 2001.
- (2) The Commissioner must collect data from the Accident Compensation Corporation and may do so in the manner it sees fit in order to assess the effect of those judicial decisions on claimants under the scheme other than those who were a party to the dispute.
- (3) The Commissioner shall prepare and make publicly available regular reports on its activities under this section.
- (4) The Accident Compensation Corporation shall take account of those reports and take steps to ensure that claimants are provided with their full statutory entitlements according to the law as stated in those judgments.
- (5) The Accident Compensation Corporation must comply with the Commissioner's recommendations made pursuant to this section.
- (6) Without limiting this section, where the Corporation and the Commissioner disagree on any direction under subs (4) or (5), the Commissioner may utilise its powers under this Act.

**34 Power to compel witnesses**

- (1) [safeguards for employees and their rights]

**35 Admissibility and relevance of recommendations in proceedings**

- (1) Any written findings or recommendations issued by the Commissioner under this Act are admissible in the Part 5 process and any other Court or tribunal according to the rules relating to evidence that apply to that Court or tribunal.
- (2) The Commissioner is not compellable as a witness in respect of the Commissioner's investigation or findings [except in proceedings before the High Court].

**Part 5**

**Personal injury system advocates**

**36 Director of Personal Injury System Advocates**

- (1) For the purpose of this Act, the Commissioner shall from time to time designate one of its employees as the Director of Personal Injury System Advocacy.
- (2) In exercising or performing the powers, duties, and functions of the Director of Advocacy under this Act, the person for the time being designated under subsection (1) shall not be responsible to the Commissioner and shall act independently.
- (3) Nothing in subsection (2) limits the responsibility of the Director of Advocacy to the Commissioner for the efficient, effective, and economical management of the activities of the Director of Advocacy.

**37 Functions of Director of Personal Injury System Advocacy**

- (1) The functions of the Director of Advocacy are:
  - (a) to administer advocacy services agreements;
  - (b) to promote, by education and publicity, advocacy services;

- (c) to oversee the training of advocates:
- (d) to monitor the operation of advocacy services, and to report to the Minister from time to time on the results of that monitoring.

**38 Advocacy services to operate independently**

Subject to this Act, advocacy services shall operate independently of the Commissioner, the regulatory institutions, management institutions, purchasers, health care providers, and disability services providers.

**39 Purchase of consumer advocacy services**

- (1) Subject to this Act, the Director of Advocacy may from time to time, in the name and on behalf of the Crown,—
  - (a) negotiate and enter into agreements for the provision of advocacy services containing such terms and conditions as may be agreed; and
  - (b) monitor the performance of each advocacy services agreement.
- (2) Every advocacy services agreement shall impose on the person that agrees to provide, or arrange for the provision of, advocacy services pursuant to the agreement the duty to ensure that any guidelines for the time being in force pursuant to section 28 are followed in the provision of those services.
- (3) Nothing in this section limits—
  - (a) any other enactment; or
  - (b) any powers that the Minister or the Crown has under any enactment or rule of law.
- (4) Despite subsections (1)-(3), the Director of Advocacy may not enter into any advocacy services agreement with the Accident Compensation Corporation or with any organisation that would undermine the purpose of this Act and the independence of the advocacy service.

**40 Guidelines for operation of advocacy services**

- (1) The Commissioner may from time to time issue guidelines relating to the operation of advocacy services.
- (2) Without limiting subsection (1), any guidelines shall include provisions relating to the procedures to be followed by advocates in carrying out their functions, including any special procedures to be followed when advocates are dealing with any particular persons or classes of persons.
- (3) The Commissioner may from time to time issue an amendment or revocation of any guidelines issued pursuant to this section.
- (4) No guidelines issued pursuant to this section, and no amendment or revocation of any such guidelines, shall have any force or effect unless those guidelines or, as the case requires, that amendment or revocation has been approved by the Minister.
- (5) Where the Minister approves any guidelines issued pursuant to this section or any amendment or revocation of any such guidelines, the Minister shall—
  - (a) publish a notice of the approval in the Gazette; and
  - (b) show the date of the approval on the guidelines or amendment or revocation, and promulgate the approval in such manner as the Minister thinks fit.
- (6) The Commissioner shall ensure that copies of all guidelines, and all amendments to any such guidelines, that are for the time being in force pursuant to this section are available—
  - (a) for inspection by members of the public free of charge; and
  - (b) for purchase by members of the public at a reasonable price.
- (7) The notice of approval published in the Gazette pursuant to subsection (5)(a) shall show, in relation to the guidelines or the amendment to which it relates, a place at which copies of the guidelines or, as the case requires, the amendment are available for inspection free of charge and for purchase.

**41 Consultation on preparation of guidelines**

The Commissioner shall, before issuing any guidelines or amendments to guidelines pursuant to subsection (1) or subsection (3) of section 40, consult with, and invite representations from, such persons, bodies, organisations, and agencies, including representatives of health consumers, disability services consumers, health care providers, and disability services providers, as the Commissioner considers necessary to ensure that a wide range of views is available to the Commissioner to assist in the preparation of those guidelines or amendments.

**42 Functions of advocates**

(1) Without limiting the Commissioner's power to determine any functions of advocates, advocates may have any of the following functions:

- (a) to act as an advocate for health consumers and disability services consumers:
- (b) to use his or her best endeavours to ensure that—
  - (i) health consumers on or in respect of whom any health care procedure is carried out, or is proposed to be carried out, by a health care provider; and
  - (ii) disability services consumers to whom disability services are provided, or are proposed to be provided, by a disability services provider—are made aware of the provisions of the Code:
- (c) having regard to the needs, values, and beliefs of different cultural, religious, social, and ethnic groups, to provide information and assistance to health consumers, disability services consumers, and members of the public for the purposes of—
  - (i) promoting awareness of the rights of health consumers and of disability services consumers:
  - (ii) promoting awareness of the procedures available for the resolution of complaints involving a possible breach of the Code:
- (d) to provide to health consumers or, where applicable, persons entitled to consent on a health consumer's behalf such assistance as may be necessary to ensure—
  - (i) that the health consumer's or, as the case may be, that person's consent to the carrying out of health care procedures is obtained; and
  - (ii) that that consent is informed consent:
- (e) to promote, by education and publicity, an understanding of, and compliance with, the principle that, except where any enactment or any provision of the Code otherwise provides, no health care procedure shall be carried out without informed consent:
- (f) in respect of health care providers and disability services providers in the area that the advocate serves,—
  - (i) to provide information on the rights of health consumers and disability services consumers:
  - (ii) to promote awareness of advocacy services:
  - (iii) to provide advice on the establishment and maintenance of procedures for providing proper information to health consumers in relation to health care procedures and for the obtaining of consent to such health care procedures:
  - (iv) to provide advice on the establishment and maintenance of procedures to ensure the protection of the rights of health consumers and of disability services consumers, including monitoring procedures and complaints procedures:
- (g) to receive complaints alleging that any action of any health care provider or disability services provider is or appears to be in breach of the Code:
- (h) in respect of a complaint of the kind referred to in paragraph (g), to represent or assist the person alleged to be aggrieved for the purposes of endeavouring to resolve the complaint by agreement between the parties concerned:
- (i) to provide assistance to persons who wish—

- (i) to pursue a complaint of the kind referred to in paragraph (g) through any formal or informal procedures (including proceedings before an authority) that exist for resolving that complaint:
- (ii) to make a representation to the Commissioner or any other body or person in respect of any matter that is or appears to be in breach of the Code:
- (j) to report regularly to the Director of Advocacy on the operation of advocacy services in the area served by the advocate:
- (k) to report to the Commissioner from time to time on any matter relating to the rights of health consumers or disability services consumers or both (whether in relation to a particular health consumer or disability services consumer, or a group of health consumers or disability services consumers, or in relation to health consumers or disability services consumers generally) that, in the advocate's opinion, should be drawn to the attention of the Commissioner:
- (l) to exercise and perform such other functions, powers, and duties as are conferred or imposed on advocates by or under this Act or any other enactment.

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