

31 October 2016

The Manager
Accident Compensation Policy
Ministry of Business, Innovation and Employment
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By email: ACregs@mbie.govt.nz

Consultation on changes to the Injury Prevention (Review Costs and Appeals) Regulations 2002

Introduction

1. The New Zealand Law Society welcomes the opportunity to comment on the Ministry of Business, Innovation and Employment's discussion document *Consultation on Changes to the Injury Prevention (Review Costs and Appeals) Regulations 2002* (discussion document). The discussion document seeks views on an inflation adjustment of 14.9% in the scale of costs awards made under the Injury Prevention (Review Costs and Appeals) Regulations 2002 (Regulations) for costs incurred in ACC statutory reviews.

General Comments

2. The discussion document notes that prescribed costs under the Regulations are no longer in line with inflation and do not provide adequate support for ACC claimants, particularly in more complex cases. A 14.9% increase in scale costs is proposed, to "ensure that the Regulations make a meaningful contribution to clients to access the statutory dispute resolution processes".¹
3. The Law Society welcomes the proposed increase, as an initial step in improving ACC claimants' access to justice. However, an inflation adjustment increase of 14.9% is insufficient to provide adequate support for claimants. The recent *Independent Review of the Acclaim Otago (Inc) July 2015 Report into Accident Compensation Dispute Resolution Processes* (Independent Review) recommended that review costs should be increased "and more than by just inflation".² The Law Society agrees.
4. The Independent Review made the following observations:³

Many [submitters] said that preparation costs – particularly if a lawyer or advocate was representing the claimant – were so inadequate that many claimants were denied competent representation as a result. They could not afford the shortfall between actual legal costs and

¹ Discussion document, page 1.

² *Independent Review of the Acclaim Otago (Inc) July 2015 Report into Accident Compensation Dispute Resolution Processes*, Miriam Dean QC, 26 May 2016 (released publicly on 20 September 2016), at page 32.

³ *Ibid.*

the amount recovered (by regulation). And the review was left in no doubt that for many claimants their ability to persist with a review often came down to their own lawyer or advocate's commitment not to abandon them despite the risk of non-recovery of that shortfall (or their time in general).

It is appropriate that review costs are increased – and more than by just inflation. The Ministry should also take into account recommendations for change to the review process, including that there is no one-size-fits-all review. One option is to allow the reviewer come flexibility for additional costs where a particularly complex matter has demanded significant preparation (gathering evidence, preparing submissions and obtaining specialist reports) and potentially a hearing of a day or more. Regulations currently provide \$175 for a second hour and any later hours at \$14 per 15 minutes (or \$56 an hour).

Increased costs will, of course, fall on ACC. But review numbers should drop significantly if ACC really gets behind its new alternative dispute resolution processes, while more robust review decisions will result in fewer District Court appeals (where costs are much greater).

5. The discussion document acknowledges that the concerns about prescribed costs providing inadequate support for clients, especially in more complex cases, are valid.⁴
6. While the current proposal is limited to an inflation adjustment, the discussion document notes that there are likely to be further, more substantive changes to the regulations:⁵

“Work is underway to better understand the nature and extent of the issues and to inform assessment for substantive changes to the regulations.”
7. The Law Society agrees that further work on the Regulations is required and would welcome the opportunity to assist with that work.
8. It is clearly beneficial for meritorious appeals to be investigated and resolved to the fullest extent possible at the Review stage. Increasing costs awards under the Regulations for medical evidence and legal representation to a more realistic level would very likely contribute to resolving disputes at an earlier stage, thus minimising the number of appeals to the District Court. It could also potentially reduce the number of self-represented litigants.

Responses to consultation questions

Question 1: *What do you think of the current scale of regulated costs, bearing in mind that it is not intended to cover the full cost in a review? Are there particular areas where increased support is necessary? Do you have any data that will help us to establish the extent of the shortfall more clearly?*

9. As the Independent Review made clear, the current scale of regulated costs is insufficient, even when taking into account that the scale is not intended to cover the full costs of a review. The amount available for legal representation and medical evidence under the Regulations is far below the actual costs incurred. ACC practitioners advise that it is common for ACC cases to involve very complex medical evidence and ACC files in excess of 2,000

⁴ Pages 1 and 2.

⁵ Page 2.

pages of documentation. In practical terms, the costs available under the Regulations often cover only a minimal amount of work on the claimant's case. The level of legal aid available is also insufficient.

10. With regard to medical evidence costs, the Independent Review cited a range of medical report costs.⁶ The Law Society understands that the cost of medical reports is often substantially higher than the figures quoted in the Independent Review. For example, a comprehensive psychiatric assessment for a complex case is approximately \$5,000, and an occupational medical assessment averages between \$1,600 and \$4,000.
11. ACC frequently refers the medical evidence adduced by claimants to its own medical advisers. The claimant has the right of reply but as the prescribed costs under the Regulations are minimal, in many cases it is not feasible to get a further report, leaving the reviewer with conflicting evidence.
12. This has been somewhat ameliorated recently by the decision of *Anderson v Accident Compensation Corporation* where Judge Powell held at [70] that:

*“Quite clearly, the maximum award must relate to each report prepared rather than the maximum that the specialist is entitled to with regard to the totality of their involvement in a review.”*⁷
13. The situation is however still problematic at the appeal stage. It has become commonplace in elective surgery appeals for ACC to adduce further medical evidence at appeal upon receipt of submissions being filed (often when the appellant has not filed further medical evidence).
14. The Law Society understands that ACC employs many medical professionals, who are able to provide advice at short notice. Clinical Advisory Panel (“CAP”) members, Branch Medical Advisors (“BMAs”) and Branch Advisors Psychologists (“BAPs”) are often in full time employment by ACC. By contrast, claimants are often forced to rely on their treating practitioners to assist them. There is no full time panel available to provide advice for claimants in accident compensation cases.
15. Increasing prescribed costs for medical evidence under the Regulations would go some way to remedying this inequality of arms and would enable medical professionals to be properly remunerated for their expertise and time. This may also have the effect of encouraging medical professionals to assist claimants with ACC cases, thus minimising some of the difficulties claimants face in obtaining medical evidence.
16. Another significant cost (not provided for by the Regulations or by legal aid) is travel to obtain medical assessments associated with the hearing. The Law Society understands that the majority of available specialists are located in the main centres of Auckland, Christchurch

⁶ Note 2 above, at page 32: “The review was given a range of report costs. ... for example, ... a report by a psychiatrist costs \$1,200 to \$2,500; ... and \$1,500 to \$2,000 for a neuropsychology report.”

⁷ [2016] NZACC 164.

and Wellington. Claimants in rural areas are often unable to afford to travel to medical assessments.

Question 2: *Do you agree with the objectives identified here?*

17. As noted at paragraph 6 above, increasing the prescribed costs under the Regulations for medical evidence and legal representation is likely to contribute to the resolution of disputes at an earlier stage, thus reducing the number of appeals to the District Court. It is clearly beneficial for meritorious appeals to be investigated and if possible resolved at the review stage.
18. The Law Society acknowledges that the Regulations are not intended to be full reimbursement, and that some costs will need to be borne by claimants. Nevertheless, for the reasons outlined above, the proposed inflation-based increase of 14.9%, whilst welcome, is insufficient.

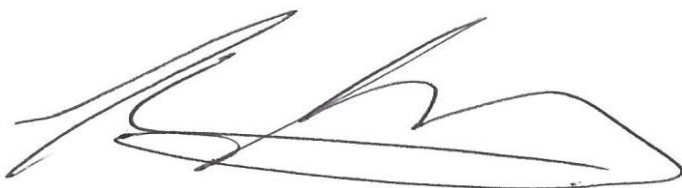
Question 3: *Is there another option(s) you would like to suggest? Are there any other changes needed?*

19. The Independent Review proposed that cases subject to review could be categorised (“tracked”) according to complexity.⁸ There is merit in considering a similar type of streamlining for costs awards, with justification for higher amounts of legal costs being awarded in complex cases (for example, treatment injury claims, vocational independence decisions and decisions where the claimant has been on weekly compensation for a number of years).

Conclusion

20. This submission has been prepared with the assistance of the Law Society’s ACC committee. If you wish to discuss this further please contact the convenor, Don Rennie, via the committee secretary, Jo Holland, at jo.holland@lawsociety.org.nz / 04 463 2967.

Yours faithfully



Kathryn Beck
President

⁸ Note 2, at page 29.