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# Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Bill

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*11/02/2022*

## **Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Bill 2021**

### **1 Introduction**

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Bill (**Bill**).
- 1.2 The Bill seeks to provide more equitable coverage for injuries covered by the Accident Compensation Scheme (**AC Scheme**) and provide greater clarity for claimants, and to give better effect to the policy intent of the Accident Compensation Act 2001 (**Act**).
- 1.3 The Law Society commends the initiative to extend cover to some types of maternal birth injuries. This submission, which has been prepared with input from the Law Society's Accident Compensation Committee,<sup>1</sup> makes some recommendations to improve the Bill and to ensure it is consistent with the purpose of the Act.
- 1.4 The Law Society does not wish to be heard.

### **2 Retrospective cover for maternal birth injuries (clause 6)**

- 2.1 Clause 6 of the Bill seeks to extend cover under the AC Scheme to a specified list of maternal birth injuries that have the same characteristics as injuries that are presently covered under the Scheme. The list of maternal birth injuries is set out in proposed new Schedule 3A.
- 2.2 This cover will have only prospective effect, and will be available for maternal birth injuries which occur on or after the date on which the relevant provisions come into force.
- 2.3 The Regulatory Impact Statement for the Bill states that this approach is consistent with the Legislation Guidelines (2018 edition), which state that legislation should have prospective, not retrospective effect.<sup>2</sup> However, we also note that the Legislation Guidelines state that retrospective legislation might be appropriate in certain circumstances, including where it is intended to be entirely to the benefit of those affected.<sup>3</sup>
- 2.4 The retrospective application of this provision would no doubt benefit claimants who would otherwise have no cover for any maternal birth injuries which are set out in Schedule 3A. We therefore invite the select committee to consider whether it would be appropriate for this provision to have retrospective effect.

### **3 List of specified maternal birth injuries (Schedule 2)**

- 3.1 The specified list of maternal birth injuries that are to be covered by the AC Scheme are set out in proposed new Schedule 3A. This list is exhaustive, and there appears to be no provision for the Accident Compensation Corporation to exercise any discretion to provide

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<sup>1</sup> The Law Society's Accident Compensation Committee makes submissions on proposed legislative changes which impact on the scheme and liaises with the Accident Compensation Corporation and the Minister for ACC where operations or policy undermine New Zealand's unique social contract relating to personal injury. See here for more information: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/accident-compensation-committee/>.

<sup>2</sup> Regulatory Impact Statement: Extending the Accident Compensation Scheme Cover to Obstetric Injuries (4 August 2021), page 15.

<sup>3</sup> Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021), page 58.

cover for other maternal birth injuries that occur during birth. This is inconsistent with the Act's general approach, under which only the coverage for occupational disease is specified in this manner.

- 3.2 Any such additional birth injuries would need to be inserted into Schedule 3A by way of an amendment bill or regulations if they are to be covered under the AC Scheme.
- 3.3 We invite the select committee to consider if a non-exhaustive list would be more appropriate. This would enable the Corporation to exercise some discretion when determining cover, and ensure that injuries which are not listed in Schedule 3A (but have the same characteristics as injuries that are already covered under the Act) are also covered. This approach would also ensure greater consistency with the purpose of the Bill, which is to provide more equitable coverage for injuries.

#### **4 Personal injury caused by work-related gradual process, disease, or infection (clause 8)**

- 4.1 Clause 8 proposes to amend section 30(2) of the Act, which sets out the test for determining whether an injury qualifies as "personal injury caused by a work-related gradual process, disease, or infection" under the Act. Clause 8 of the Bill proposes to replace this test with "the more claimant-friendly" test which was in place before 2010,<sup>4</sup> set out in clause 8(3) of the Bill.
- 4.2 This proposed new test effectively shifts the burden of proof to the Accident Compensation Corporation (**Corporation**). These amendments would require the Corporation to establish that the risk of suffering the injury is not significantly greater for those who perform employment tasks or are in an employment environment (proposed new section 30(2A)).
- 4.3 Practitioners have observed that the 'significantly greater risk' test is overly vague, often misapplied, and difficult to establish, regardless of onus.<sup>5</sup> Therefore, reversing the onus does not necessarily assist claimants in the absence of any guidance as to how a 'significantly greater risk' is to be established.
- 4.4 We therefore invite the select committee to consider whether the purposes of the Act would be better met by removing the 'significantly greater risk' test altogether. Alternatively, we suggest amending this clause to provide some clarity and guidance on how a 'significantly greater risk' is to be established.

#### **5 Conduct of initial occupational assessment (clause 9)**

- 5.1 Clause 9 proposes to amend section 91(1A), which relates to the conduct of initial occupational assessments. This section currently states that an occupational assessor *may* take into account, among other things, the claimant's earnings before the claimant's incapacity, when discussing the types of work that are available in New Zealand and suitable

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<sup>4</sup> Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Bill, Explanatory Note.  
<sup>5</sup> Section 60 of the Act enables the Corporation to similarly decline claims for injuries described in s 30(3) of the Act, if the Corporation can establish that the injury has a non-work related cause. Practitioners have observed that this section is frequently misapplied by the Corporation, perhaps due to a lack of any guidance and understanding of how the Corporation should establish a non-work related cause for the injury.

for the claimant. Clause 9 seeks to make this a statutory requirement to support certainty and transparency.<sup>6</sup>

- 5.2 We note that occupational assessors are also required to adhere to schedule 1, clause 25 of the Act (which governs the critical vocational independence process). This clause provides that the occupational assessor *may* take into account the claimant’s pre-incapacity earnings. We recommend making a similar amendment to clause 25(1)(a) to ensure consistency and clarity.

## **6 Threshold for cover for hearing loss (clause 7)**

- 6.1 Clause 7 proposes to amend section 26(1A) of the Act by reducing the threshold for cover for noise induced hearing loss from 6% to 5%. Law Society members have advised that the use of an arbitrary threshold to determine coverage can lead to outcomes that are inconsistent with clinical evidence, as the need for hearing aids due to noise-induced hearing loss may not bear any direct relationship to the percentage threshold set out in section 26(1A).<sup>7</sup> In other words, someone may need hearing aids at a lower level than 6% or 5%.
- 6.2 We therefore invite the select committee to seek expert advice on this issue, and to consider whether the purposes of the Act are better met by removing this percentage threshold altogether.

## **7 Cover for death by assisted dying (clause 10)**

- 7.1 Clause 10 seeks to amend section 119, which provides for disentanglements from cover for self-inflicted personal injuries and death due to suicide. The amendment provides that section 119(1) does not apply if a claimant’s death is the result of an assisted dying procedure under the End of Life Choice Act 2019 (ELCA).
- 7.2 It is implicit that this clause seeks to ensure that entitlements remain available to claimants who are *already covered* for a personal injury under the Act, and who subsequently opt to end their life under the ELCA because of that injury. The clarity of the Bill could be improved by amending clause 10 so this position is explicitly set out.
- 7.3 Clause 10 could otherwise be misinterpreted to suggest that the AC Scheme is to be expanded to provide entitlements for deaths relating to injuries that are not covered under the Act (noting that such an approach would be inconsistent with the principles and purposes of the AC Scheme).

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<sup>6</sup> Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Bill, Explanatory Note.

<sup>7</sup> See, for example, Brian Moore “A review of the perceptual effects of hearing loss for frequencies above 3 kHz” (2016), available here: <https://www.tandfonline.com/doi/full/10.1080/14992027.2016.1204565>. Also see Larry Humes “What Is “Normal Hearing” for Older Adults and Can “Normal-hearing Older Adults” Benefit from Hearing Care Intervention?” (2020), available here: <https://hearingreview.com/inside-hearing/research/what-is-normal-hearing-for-older-adults>.

**8**      **Other reform suggestions**

- 8.1      The Law Society has, on several occasions, suggested reforms which would benefit all claimants, including the cohort of claimants who will receive entitlements under this Bill. These reform options are set out in the appended letter dated 8 July 2021.
- 8.2      In our view, these reforms would improve claimants' access to justice, and provide more equitable coverage for all New Zealanders, and they could be incorporated into this Bill by making some modest amendments. We therefore invite the select committee to make appropriate amendments to incorporate some of these suggestions.



Herman Visagie  
**Vice-President**

Appended:      Law Society letter to Hon Carmel Sepuloni, dated 8 July 2021.

8 July 2021

Hon Carmel Sepuloni  
Minister for ACC

By email: [carmel.sepuloni@parliament.govt.nz](mailto:carmel.sepuloni@parliament.govt.nz)

Tēnā koe Minister Sepuloni

**Re: Low-cost and high-impact solutions to some current ACC problems**

In November 2020, the New Zealand Law Society | Te Kāhui Ture o Aotearoa met with officials from the Ministry of Business, Innovation and Employment (**MBIE**) and had a constructive discussion about possible law reform initiatives that would improve access to justice for those using the Accident Compensation scheme.

At that meeting, MBIE officials suggested that we might usefully prepare for your consideration a list of low-cost reform proposals. We have now consulted with members of the Law Society's Accident Compensation Committee,<sup>1</sup> and prepared such a list.

At the outset, we wish to note that we continue to believe that a holistic review of the Accident Compensation scheme is required. In the long term, it may not be desirable (or cost-effective) to undertake a series of more discrete changes in place of the more challenging task of large-scale reform. Our members consider that review of the scheme will provide the best prospect of creating durable improvements to access to justice.

Nevertheless, as officials have indicated to us that you are currently interested in options for more discreet changes, we have summarised a small number of proposals for your consideration. The solutions we have proposed are not costless, but their costs simply comprise the resources and time required to make modest legislative amendments or other limited changes, as we describe below.

- 1. First, insert a new section which would require ACC to make decisions on entitlement claims within a set timeframe.**
  - 1.1. Efficiency and speed are hallmarks of justice (together with accuracy of decision-making and affordability of accessing justice). At present there is an impediment to achieving fairness because the Accident Compensation Act 2001 (**Act**) does not formally require ACC to make entitlement decisions within a set timeframe.

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<sup>1</sup> The Accident Compensation Committee is one of 16 specialist law reform committees providing subject matter expertise to the Law Society's Law Reform Committee. The Committee is well-versed in ACC law and policy, and its members are lawyers who are drawn from those who represent claimants, the Corporation, accredited employers, and have experience in related areas such as health law and privacy law. More information regarding the Committee can be found on the Law Society's website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/accident-compensation-committee/>.

- 1.2. We note that previous Acts did impose specific time frames on entitlement claims. These requirements were, in our view, effective and workable, and could be drawn upon when drafting a provision to this effect. This simple change would improve the efficiency of the scheme with no increase in cost exposure for ACC.
- 2. Second, improve education so that deemed cover is in practice extended to a developing diagnosis.**
  - 2.1. Section 58 of the Act (deemed cover) is not necessarily limited to the diagnosis on an initial claim form. However, that is how it is used in many instances. This is problematic because the information known when an initial claim form is completed (often by a medical professional) is limited or partial, and as more information becomes known over time, a more accurate diagnosis can later be reached. If the diagnosis has evolved, at the time the deadline was missed, deemed cover should extend to the evolved/clarified diagnosis.
  - 2.2. This will require education, development, and policy material (rather than a legislative change which expands the ACC scheme in any way). We understand that this is also supported by the proposals of the ACC Futures Coalition.
- 3. Third, allow modest extensions of time to bring an appeal where appropriate.**
  - 3.1. The legislation does not currently give any discretion to the High Court to accept late appeals beyond 21 days after the District Court decision. As a result, the High Court has decided (in several cases) that even though, in the Court's assessment, the applicant was deserving of a hearing, the Court was simply unable to entertain their appeal. This includes claims where the appeal papers were filed late because the person sent them to the wrong registry of the Court, or where the person's legal adviser sent an electronic copy in time, but the hard copy did not arrive within the deadline.
  - 3.2. Amendment of this position is a matter of fairness. An appropriate and modest level of flexibility already exists in general appeals in a wide variety of legislative contexts, including at the highest level of appeal. We therefore suggest it would be fair to give the High Court a discretion to accept late appeals. This solution will not add any cost to the administration of the scheme but does allow deserving cases to be aired in the courts. This too has been proposed by the ACC Futures Coalition.
- 4. Fourth, enable appeals (with leave) to proceed to the Supreme Court.**
  - 4.1. ACC law is a uniquely New Zealand part of the law, and there are cases which merit the Supreme Court's attention. However, the ACC scheme does not presently allow appeals to the Supreme Court. We therefore suggest amending the Act to improve claimants' access to justice by facilitating access to the Supreme Court.<sup>2</sup> The change needed to implement this proposal is a simple legislative amendment which will not lead to an expansion or an increase to the cost of the scheme.

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<sup>2</sup> Parties who wish to apply for leave to appeal to the Supreme Court will still need to meet the criteria for leave to appeal (set out in s 74 of the Senior Courts Act 2016).

**5. Fifth, encourage ACC to widen the pool of assessors.**

- 5.1. Clause 58 of Schedule 1 to the Act provides that assessors for lump sum payments can only be appointed by ACC. As a result, there is a limited pool of assessors available to determine lump sum payments.
- 5.2. Fairness requires even-handedness between ACC and claimants. We therefore suggest amending clause 59 to enable assessors with appropriate qualifications to undertake lump sum assessments, once they have received training in the relevant assessment tools.
- 5.3. Again, this has also been proposed by the ACC Futures Coalition. The proposal does not increase the cost of the scheme because current assessors are already being paid for their work. Instead, it improves access to justice by increasing the available pool of assessors.

**6. Finally, remove the requirement for claimants to be working at the time of injury, as opposed to the date of incapacity.**

- 6.1. Section 103 of the Act requires a claimant to be working both at the date of injury and the date of incapacity. This has led to the unfair outcome that claimants can be working when incapacitated by injury but have no entitlement to weekly compensation.
- 6.2. The High Court has indicated that a legislative response is needed to ensure fair outcomes for this class of claimants.<sup>3</sup> We suggest making a minor amendment to section 103 to clarify that claimants who were not working at the date of the injury are nevertheless entitled to weekly compensation if they were working at the date of incapacity.

**Next steps**

We are encouraged to hear that MBIE officials are already working on some of these proposals. We hope that your engagement on these matters will lead to these timely changes being implemented, and the promotion of greater access to justice.

We are very happy to meet with you to discuss the issues raised in this letter if that would assist. Please feel free to contact me via the Law Society's General Manager External Relations, Fazleen Ismail ([Fazleen.Ismail@lawsociety.org.nz](mailto:Fazleen.Ismail@lawsociety.org.nz)).

Nāku iti noa, nā



Tiana Epati  
**President**

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<sup>3</sup> See *Accident Compensation Corporation v Vandy* [2010] 2 NZLR 131.