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Accident Compensation Appeals– options for reform

Introduction

1. The New Zealand Law Society welcomes this opportunity to comment on options for reducing the time taken to resolve accident compensation appeals, outlined in the discussion document released by the Ministry of Business, Innovation and Employment in December 2015.

2. The Law Society has actively contributed to accident compensation (ACC) law reform since the inception of the statutory accident compensation scheme in 1974. The Law Society's Accident Compensation Committee monitors the application of the accident compensation scheme with reference to the purposes of the ACC legislation and the principles in the Woodhouse Report 1967, to ensure operations or policy do not undermine New Zealand's unique social contract relating to personal injury.

3. The discussion document has been considered by the Committee, which includes a number of leading ACC lawyers with considerable practical experience of the ACC appeals process and the issues confronting it.

4. The discussion document seeks feedback on four alternative reform options:

   - Retaining the status quo (i.e. keeping the District Court and the current rules for dealing with accident compensation appeals)
   - Retaining the District Court and imposing time limits for dealing with accident compensation appeals
   - Introducing an Accident Compensation Appeal Tribunal
   - Modifying the proposed Accident Compensation Appeal Tribunal – led by a District Court Judge.

Executive summary

5. The purpose of the current consultation is to gather information to ensure the reform proposals best meet the needs of people involved in the accident compensation appeal process (discussion document, page 2). The Minister's foreword makes it clear that there is a strong focus on maintaining a fair process for ACC claimants and looking for options to improve the way claimants are treated in accident compensation appeals.

6. The Law Society endorses this approach. ACC claimants are entitled to have their statutory rights properly considered and adjudicated on appeal – particularly in light of the fact that claimants in general are a vulnerable group, having suffered injuries and disabilities (often serious and/or long-term).

7. It is also important to bear in mind, as Judge Trapski said in his *Report of the Inquiry into the Procedures of the Accident Compensation Corporation* (1994), that:

> *The Corporation is a monopoly; there is no competition and nowhere else for claimants to go. There is a lack of bargaining power in the claimant and too much room for administratively perverse decisions.*
>
> *The public is entitled to overt protection from administrative deficiencies in return for the loss of their right to sue. They are entitled to the confidence that everyone who is involved in an accident will be able to receive a proper decision on their entitlement with a minimum of fuss and cost.*

8. The objectives of the reform proposals are primarily to reduce waiting times, protect existing substantive appeal rights and cost-effectiveness (discussion document, p5). The Law Society agrees that efficiency and cost-effectiveness are important considerations in any dispute resolution scheme but submits that the overriding objective must be to protect substantive appeal rights and a fair appeal process. The drive to reduce delays should not override access to justice and fair decision-making.

9. There is no doubt that improvements can and should be made to the current ACC appeals system, and these are discussed below. But the objective of reducing costs and delays in ACC appeals will only be achieved if their root causes are properly examined and understood. It appears from the discussion document that this is yet to be done. The main factors the Law Society believes contribute to cost and delay are discussed in the next section.

10. Regrettably, the Law Society considers that none of the reform options outlined in the discussion document addresses the defects in the current ACC appeals system. Any change would need to be a clear improvement on the status quo. There is no indication that would be the case under any of the proposals for change.

11. In summary, the Law Society cannot support any of the reform proposals because it does not consider any is likely to achieve the desired outcomes in a way that is fair and fully informed. The Law Society therefore supports continuation of the current ACC appeals system – but nonetheless points out its shortcomings so that those can be remedied, for the benefit of improved access to justice for injured New Zealanders.

The causes of delay and cost

12. As discussed below, the main reasons for delay appear to be a combination of systemic issues in the review and appeal processes.

13. It is apparent however from the discussion document that there is a general trend of improving figures, and delays are reducing. The discussion document at page 8 notes that "further work will be carried out to evaluate whether [current] initiatives can substantially and sustainably reduce the average age of appeals. This would take the pressure off the District Court, which may affect whether or not to establish the [proposed Accident Compensation Appeal] Tribunal". That further evaluation data must be central to informing the analysis of the advantages and disadvantages of a change to the status quo.

14. The Law Society understands that under the current system the following issues are the main contributing factors to delay and cost in progressing appeals to a hearing:

- *Difficulties in obtaining expert evidence*

A key difficulty for claimants is the scarcity in New Zealand of experts in different branches of medicine, resulting in significant delays in claimants obtaining specialist medical reports for appeal hearings. The Law Society has been told these problems are acute in the South Island, with some lawyers informing the Law Society that they have sought medical opinions of experts in Australia. The Law Society also understands that specialists can be reluctant to provide opinions contrary to those of colleagues. In other cases, medical experts advise that they are unable to give an independent report for an injured person because previous reporting for ACC leaves that expert conflicted.

A related cause of delay is the high cost of obtaining a private medical report (without which failure on appeal is more likely). Reports can cost up to $7,000. Affordability is a real issue, since the subject of many disputes is whether the claimant is entitled to weekly compensation, without which he or she will be unable to fund the report that will establish that fact.

Difficulties in claimants obtaining expert evidence appear to be a major issue leading to delay in hearing ACC appeals in the District Court. It is also a significant cause of inequality between ACC and the claimant. The Law Society understands that ACC has a Clinical Advisory Board of medical experts on which it can call to provide reports.

We understand the experts providing opinions seldom if ever appear at appeal hearings in the District Court and so their evidence is not subject to cross-examination. In their absence, the expert opinions are sometimes criticised by the Court. More commonly, however, their views are accepted without being fully tested. This is a shortcoming of the status quo.

- *Delays in the system*

The Law Society understands delays occur mainly after the claimant's submissions are lodged and before a hearing is set down. Once an appeal is filed there are delays within the system while a transcript of the evidence given at the review hearing is prepared, ACC considers its response to the appeal and obtains further evidence in response to the claimant's evidence, and negotiations for settlement or mediation are undertaken. Submissions are not usually prepared by the appellant until all the preliminary actions and decisions have been completed and, once filed, there can be delays in ACC preparing submissions in response

- *Problems with the review process*

It is regrettable that the review process has been stated as being out of scope of the current consultation (discussion document, p6). It is simply not possible for the government to understand the 'bigger picture' and take account of all the factors affecting accident compensation appeals (Minister's foreword, p1), without considering the review process. The review process is a key contributor to the current problems with ACC appeals in the District Court.

The Law Society understands that FairWay Resolution Limited (the organisation responsible for the review of ACC decisions that are challenged by claimants) is paid only approximately $450 for each review, regardless of the complexity of the case. There is no additional funding provided to enable the reviewer to carry out a proper investigation of all the issues in a review. Problems with reviews lead directly to problems in the District Court.

We understand that in many cases reviewers are unable to prepare cases in a way that is needed for appeals to be heard by a judge. This essentially leaves the judge to carry out the investigative work that should have been undertaken at the review hearing. If reviewers are not given necessary resources to undertake an effective investigative approach to review

hearings, the need for the appeal body (whether that is the District Court or a tribunal) to do that work will remain.

- *Issues with legal aid and representation*

Legal aid documentation is complex and time-consuming. Legal aid will cover the cost of a specialist report for eligible claimants, but if a claimant needs to obtain an additional report as a result of questions raised by ACC's expert report, there will be further delay as legal aid approval is obtained for funding that additional report. The Law Society also understands that the requirement for legally aided clients to accept a charge being placed on their property often causes panic and delay in agreeing to proceed with an appeal.

In many cases claimants represent themselves. Self-representation can be difficult in any case, but especially for ACC claimants, many of whom are suffering the effects of an injury that is ongoing while they are presenting their case. All of these factors can lead to delays in making submissions and proceeding with the appeal. There is a marked inequality of arms as between ACC and claimants: ACC is legally represented in nearly every case, if not at the outset then very regularly as the dispute develops.

Comment on the four options in the discussion document

Option 1 – Retain the District Court and the current rules for dealing with accident compensation appeals (status quo)

15. Judges hearing ACC appeals in the District Court consider decisions made by reviewers, not decisions made by ACC. As noted above, this means the review process is a likely source of problems later, when the dispute gets to the appeal stage in the District Court. As noted earlier, problems appearing at the appeal stage could (and should) be reduced by improving the effectiveness of the review process. This can be done within existing statutory wording. Resourcing and other incentives may well encourage reviewers to undertake the investigative approach required under section 140(e) of the Accident Compensation Act 2001 (the Act).

16. An appeal to the District Court is a rehearing (s155), but evidence about a question of fact may be brought before the court under section 156(2). If a question of fact is involved in an appeal, the evidence taken before or received by the reviewer about the question may be brought before the court. Again, this makes a high quality review process important.

17. The court is able to hear any evidence it thinks fit, whether or not the evidence would otherwise be admissible in a court of law (s156). A judge also has power to appoint a person as an assessor if he or she considers that the appeal involves consideration of matters of a professional, technical or specialised nature and it would be desirable to appoint an assessor with expert knowledge (s157). The Law Society understands that at present, judges are sometimes reluctant to use these powers. This is a shortcoming of the status quo.

18. The judge's decision is published with reasons, and although District Court decisions are not binding precedents, they are readily available and generally will be followed. This is of significance in ACC law, a jurisdiction that deals with a wide range of matters intersecting economic value, and legal, medico-legal and factual complexity. The Law Society endorses this aspect of the status quo: it is important to fairness and the perception that justice is being done – both of which are critical to the long term viability of any system of dispute resolution.

Option 2 - Retain the District Court and change the rules for dealing with accident compensation appeals

19. The suggested rule changes contained in the discussion document are to:

- reduce the time available for filing an appeal (from 28 calendar days to 20 working days);
- introduce a time limit for lodging an extension of time application, and permit it to be granted only in "exceptional circumstances"; and
- introduce a time limit for making submissions and, where submissions are not filed in time, allow the appeal to be dismissed.

20. These changes are described in the discussion document as "procedural". That underplays their significance. In reality, the changes would inevitably result in many claimants losing the right to have their statutory entitlements under ACC legislation determined on appeal.

21. Reduced timeframes would be particularly hard on unrepresented claimants who attempt to manage their appeal without legal assistance.

22. The Law Society is concerned that the suggested statutory time limits for providing evidence and lodging submissions (and the "exceptional circumstances" threshold) may lead to increased numbers of meritorious cases not being heard. This is for the reasons given above in relation to the root causes of delay. But in any case, the proposal is likely to produce complicated layers of litigation – claimants will no doubt attempt to appeal or otherwise challenge the decision refusing an extension of time. Determination even of unmeritorious challenges will require valuable judicial time. Effort will be expended in disputes about these matters rather than on the substantive dispute about cover or entitlements.

23. In practice, there is a risk that the proposed rules will prevent people from accessing the appeal stage but will not achieve the stated objective of helping appellants (or at least of not disadvantaging them relative to current appeal rights).

24. The Law Society opposes the proposed rule changes in Option 2. It is essential that claimants have sufficient time to file an appeal and make proper submissions. Reducing existing timeframes and introducing a time limit where none currently exists (i.e. in respect of the time available to claimants to file submissions in support of an appeal) will not address the causes of delays in the system, as discussed above.

Option 3 – Accident Compensation Appeals Tribunal

25. The Law Society does not support Option 3, for the reasons set out below.

26. The first objection is that a tribunal does not have the same degree of perceived independence from the Executive. Tribunal members are appointed by the Executive for a set term, and no reasons are required if a member is not reappointed. The Law Society considers this is an institutional weakness of the proposal.

27. By contrast, the courts' function is based on the constitutional principle that judicial decision-makers – the judiciary – are independent of the Executive and Parliament. The Executive has no authority to direct the judiciary. Judges are accountable in various ways, including through judges' oath of office, the obligation to give reasons for decisions, and through the ability of a dissatisfied party to appeal. These are all well-established and valuable institutional safeguards. An ACC appeals body exercises an important adjudicative function, and the Law Society considers it essential to retain the constitutional independence of the courts in the ACC appeals system.

28. The accident compensation system cannot be equated with the law under which other bodies (referred to in the discussion document) such as the Taxation Review Authority, Weathertight Homes Tribunal and the Social Security Appeal Authority operate. ACC legislation is unique because it replaces common law rights in respect of personal injury suffered in New Zealand. This fundamental understanding must remain central to any proposal for reform: New

Zealanders have given up their ability to sue for personal injury and in exchange they must retain access to a system that safeguards their statutory rights and entitlements.

29. It is essential that, having given up common law rights through the introduction of the accident compensation legislation, claimants have access to the courts to determine their rights and entitlements.

30. As noted earlier (at paragraph 18), District Court decisions on ACC appeals are valuable in terms of precedent. It is unclear what weight would be given to tribunal decisions, how consistent they would be, or what quality of decisions would result. There is potential for conflicting lines of decisions about vital entitlements but without the corresponding legal reasoning methods developed by courts to resolve such problems.

31. If however a tribunal were to be introduced, the Law Society makes the following points:

    a. It would make sense for the tribunal to be able to hear all matters including historic cases under the 1972 and 1982 legislation. This would remove a layer of additional complexity in the scheme.

    b. It would be preferable if tribunal members were appointed to act full-time and were selected from the existing District Court bench. This would enable the current specialist knowledge held by judges to be retained. Having the members act full-time would also speed up progress on the inevitable learning curve for new members, which is important to the integrity of the system, and is worth considering given the small size of the ACC-experienced legal profession. Full-time appointment would also help realise the efficiency gains that the discussion document implies are an advantage over retaining the District Court. If the tribunal members sit only part-time, the fact there will be ten of them is not indicative of the true capacity of the adjudicators to decide cases. For instance, it is unclear how officials can compare the overall efficiency of the current number of full-time District Court judges as against ten part-time tribunal members.

    c. It is also problematic that members (except the Chair) will be paid only for the time spent on a case (as opposed to a salary). This is in unfortunate contrast to the position of judges, who have security of tenure and remuneration, for constitutional reasons: they can focus on determining the issues of the case without fear or favour. Judges are safe from the possibility that the Executive will use remuneration to influence outcomes, processes, time frames or any other aspects of the adjudication task.

Option 4: Tribunal led by a District Court Judge

32. Option 4 is a hybrid version of Option 3, and the same concerns outlined above apply.

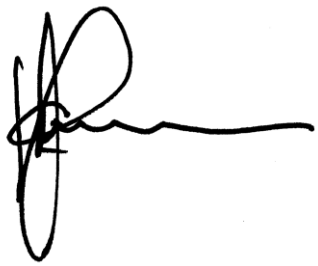
33. In addition, the extent of the judge's proposed leadership over the tribunal has not been made sufficiently clear. The suggestion appears to be related to the stated objective: to "provide for the oversight of and consistency in decision making processes for … appeals". If this is the case, it is problematic. It would be inappropriate for a judge to 'lead' the tribunal if that means the judge would be enforcing or even suggesting appropriate lines of reasoning, factual findings and legal conclusions that other tribunal members should come to. The essence of adjudication is that it is impartial and independent – even between each decision maker.

34. If that is not what is meant by "oversight", it is difficult to see what would be the purpose of having a District Court judge head the tribunal. Arguably a judge heading a tribunal would reassure people including the public, claimants and their advocates. If, however, that is the intended purpose, in itself it shows there is reason to doubt the value of replacing the District Court with a tribunal.

Conclusion

35. The Law Society and its ACC Committee are committed to supporting the long-term sustainability of the ACC compensation scheme, and would welcome further engagement with the Minister and officials about viable reform options. The Committee convenor, Don Rennie, can be contacted in the first instance via Jo Holland, secretary to the Committee (jo.holland@lawsociety.org.nz / (04) 463 2967).

Yours faithfully



Chris Moore
President