

Complaint about Accident Compensation Corporation not notifying health practitioners about treatment injury claims

Legislation	Ombudsmen Act 1975
Agency	Accident Compensation Corporation
Ombudsman	Chief Ombudsman Peter Boshier
Case number(s)	0004398
Date	October 2024

Health practitioner complained that Accident Compensation Corporation not providing an opportunity to respond to treatment injury claims before they are accepted was a breach of natural justice under the NZ Bill of Rights Act - Ombudsman considers ACC did not act unreasonably or contrary to law

Background

The Accident Compensation Corporation (ACC) provides cover for claims of personal injury suffered by a person as a result of medical treatment (or a lack of medical treatment). When the Accident Compensation Act 2001 (ACA) was amended in July 2005, the previous need to prove fault for a treatment injury was no longer required.

The 2005 amendment also repealed sections of the Injury Prevention, Rehabilitation, and Compensation Act 2001¹ that required ACC to notify a health practitioner of any treatment injury claims made against them, and gave the practitioner the right to review ACC's decision on a claim.

Separate to its role in determining claims for treatment injuries, ACC also has the ability under section 284 of the ACA to notify a health practitioner's relevant regulatory authority if they believed the practitioner's treatment practices pose a risk to the public.

¹ Sections 64(3) and 134(4) specifically.

ACC received a number of treatment injury claims relating to a health practitioner, Dr X. In 2017, ACC notified Dr X's regulatory authority (the Regulatory Authority) about the claims and raised concerns about Dr X's practice. It was later discovered that incorrect information was given to the Regulatory Authority by ACC.

Dr X complained to the Ombudsman about ACC's process of accepting treatment injury claims. Dr X stated that, in failing to give them an opportunity to respond to treatment injury claims before they were accepted, ACC acted unreasonably and in breach of section 27(1) of the New Zealand Bill of Rights Act 1990 (BORA) - the right to natural justice.

Investigation

The Ombudsman's investigation considered (amongst other issues) whether, in the course of accepting treatment injury claims where Dr X was allegedly responsible, and in notifying the Regulatory Authority of concerns with Dr X's practice based on the claims, ACC acted consistently with section 27(1) of BORA.

Notifying a practitioner of a treatment injury claim received

The key principle of natural justice to be considered in this case, is the right for a person to be heard before a decision affecting their rights or entitlements is made.

The Ombudsman noted that the requirements of natural justice depend on the significance of the rights or interests at stake and how they might otherwise be protected. Essentially, natural justice requires decision-makers to act fairly. However, precisely what that means in practice will vary depending on the nature and impact of the decision and the statutory context in which it was made.

The Ombudsman considered that while the change from 'medical misadventure' to 'treatment injury' as a claim category removed the obligation of the consumer to prove fault, fault can still exist in some treatment injury claims. He therefore acknowledged that situations where a claim has been accepted because a provider could and should have followed a different treatment pathway, might be viewed as ACC implying that the provider is at fault for an injury caused.

However, the Ombudsman noted that treatment injury claims are accepted by ACC on a no fault basis, and the key outcome of acceptance is the claimant being able to access entitlements (whereby ACC may pay or contribute to the cost of treatment, rehabilitation and/or compensation). Acceptance of a claim alone, even if provider fault does exist, does not inherently impact on the provider's rights or entitlements. The primary purpose of the ACA, as ACC pointed out, is for accident compensation purposes and this is the main outcome of an accepted claim. The Ombudsman also acknowledged the legislative amendments in 2005, which specifically repealed sections of the Injury Prevention, Rehabilitation, and Compensation Act 2001 that required a health practitioner to be notified of any claim against them.

Accordingly, the Ombudsman did not consider it was unreasonable or contrary to section 27(1) of BORA for ACC to not routinely allow practitioners the opportunity to be heard before accepting a treatment injury claim.

Notifying a practitioner of a risk of harm referral

The Ombudsman acknowledged that a practitioner's rights or entitlements may be impacted when ACC notifies a regulatory authority of a potential risk of harm to the public. As such, the Ombudsman also turned his mind to whether fairness in this context requires the practitioner, who is the subject of such a notification, to be given an opportunity to comment before ACC notifies the relevant authority.

ACC explained that section 284 of the ACA creates a legislative requirement to report a belief of a risk of harm to the appropriate authority, which sits alongside, but is not always informed by, decisions relating to the merits of a treatment injury claim. ACC has a separate team which assesses risk, which is not always based on error by a practitioner and can even occur when a treatment injury claim has been declined. Similar to ACC's assessment of treatment injury claims, Parliament did not include a requirement to notify practitioners who may be the subject of a section 284 report.

In considering the purpose of section 284 the Ombudsman noted that ACC is not a medical regulator—while it needs to ensure it has the information to form a belief about a risk of harm, it is not required to determine whether such harm, in fact, exists. That is the role of the regulatory authority that is being notified.

The Ombudsman noted that Part 3 of the Health Practitioners Competence Assurance Act 2003 (HPCA Act) sets out the process for reviewing the competence of health practitioners. This includes advising the health practitioner under review that there is a belief their practices pose a risk of harm, as well as giving them a reasonable opportunity to make written submissions and to be heard on the matter.

The Ombudsman considered that while the act of notification may have reputational risks and serious implications for health practitioners, the relevant authority's review process should ensure that their natural justice rights are adhered to.

Accordingly, the Ombudsman considered that ACC's omission to consult with practitioners before making a report under section 284 of the ACA does not appear unreasonable or to breach section 27(1) of NZBORA.

Outcome

The Ombudsman formed the final opinion that ACC did not act unreasonably or contrary to section 27(1) of BORA in not giving the health practitioner the opportunity to be heard before accepting a treatment injury claim against them or making a section 284 referral.

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