

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

Government Bill

Explanatory note

General policy statement

The Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Bill **2021** (the **Bill**) has 2 main objectives as follows:

- to provide more equitable coverage for injuries covered by the Accident Compensation Scheme (the **AC Scheme**);
- to provide greater clarity for claimants, and to better give effect to the policy intent of the Accident Compensation Act 2001 (the **AC Act**).

Maternal birth injuries (other than treatment injuries) are not eligible for cover under the AC Scheme, although they have the same characteristics as injuries (such as sprains or strains) already covered under the AC Act.

The Bill will extend cover to a specified list of maternal birth injuries that have the same characteristics as injuries that are already covered. This new cover is intended to apply to the specified list of maternal birth injuries (other than treatment injuries) that occur on or after the proposed commencement date of the Bill, which is 1 October 2022.

For clarity, maternal birth injuries that are treatment injuries can continue to be covered as treatment injuries. Examples below illustrate how this new cover provision interacts with the existing treatment injury provision.

Example 1

A birthing parent has an episiotomy during delivery, and it is, in this instance, an appropriate treatment and is performed correctly. No other tears occur and the episiotomy wound heals without infection. This event would not be likely to meet the test for cover as a personal injury caused by accident (under section 25(1)) or as a treatment injury (under section 32).

Example 2

A birthing parent has an episiotomy, and this is performed appropriately. The birthing parent suffers some tearing, despite the episiotomy. This injury may meet the test for cover as a personal injury caused by accident under section 25(1).

Example 3

During delivery, an episiotomy is not performed, despite it being clinically appropriate to do so. The birthing parent suffers tearing. This injury may meet the test for cover as either a personal injury caused by accident under section 25(1) or a treatment injury under section 32.

Example 4

An epidural is given to a birthing parent during labour and causes nerve damage. This injury may meet the test for cover as a treatment injury under section 32.

The Bill will also make 5 additional policy changes to the AC Act and 7 technical changes intended to make the AC Scheme coverage more equitable, provide greater clarity for claimants, and better give effect to the policy intent of the AC Act.

The additional 5 policy changes are—

- clarifying the section 30 test for work-related gradual process, disease, or infection cover and restoring the more claimant-friendly test that was in place before 2010:
- requiring that occupational assessors must (rather than may) consider pre-incapacity earnings when undertaking occupational assessments to support certainty and transparency:
- reducing the threshold for injury-related hearing loss cover from 6% hearing loss to 5% hearing loss to ensure greater support for those with low-level hearing loss:
- increasing the size of the Accident Compensation Board (the **Board**) by 1, which will assist the Board in representing a wider range of specialists and stakeholders:
- ensuring legislative certainty that dependants of claimants will not be disentitled from fatal injury entitlements covered under the AC Scheme following a claimant's assisted death in accordance with the End of Life Choice Act 2019.

The 7 technical changes are—

- moving the definition of medical practitioner to the Accident Compensation (Definitions) Regulations 2019. This will allow the definition to be more easily updated in future via regulations:
- updating the definitions of child and other dependant to improve the clarity of the AC Act:

- enabling a method to be set in regulations for the rate of interest for levy over-payments on interim assessments to better and more efficiently enable the rate to reflect changes in economic circumstances:
- enabling the Accident Compensation Corporation (the ACC) to use the most recent employer filing to the Inland Revenue Department (the IRD) when determining a client's weekly compensation:
- aligning the ACC's penalty rules with the IRD's rules by charging the 1% monthly interest rate from the day after a levy invoice is due, rather than 30 days after the payment is due:
- excluding weekly compensation top-ups made under the Veterans' Support Act 2014 from abatement against the ACC's weekly compensation payments to better give effect to the policy intent for abatement:
- aligning the definitions of moped and motorcycle in the AC Act with the definitions in the Land Transport Act 1998 to ensure legal clarity.

Departmental disclosure statement

The Ministry of Business, Innovation, and Employment is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2021&no=103>

Regulatory impact statement

The Ministry of Business, Innovation, and Employment produced a regulatory impact statement on 4 August 2021 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact statement can be found at—

- <https://www.mbie.govt.nz/dmsdocument/17157-regulatory-impact-statement-extending-the-accident-compensation-scheme-cover-to-obstetric-injuries-pro-activerelase-pdf>
- <https://treasury.govt.nz/publications/informationreleases/ris>

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause. *Clauses 6* and *17*, which relate to maternal birth injuries, come into force on 1 October 2022. *Clauses 12* and *21*, which relate to the date from which the Accident Compensation Corporation (the ACC) may charge interest on unpaid levies, come into force on 1 July 2023. The rest of the Bill comes into force 30 days after the date on which it receives the Royal assent.

Clause 3 provides that the Bill amends the Accident Compensation Act 2001 (the **principal Act**).

Part 1

Amendments to principal Act

Clause 4 amends the definitions of moped and motorcycle to align with the definitions in the Land Transport Act 1998. (The principal Act currently refers to the definitions in the Transport (Vehicle and Driver Registration and Licensing) Act 1986, which was repealed in 2009.) *Clause 4* also replaces the definition of medical practitioner, with the effect that the definition is now found in regulation 3 of the Accident Compensation (Definitions) Regulations 2019. This is consistent with the approach to other definitions in the principal Act.

Clause 5 amends section 17, which sets out the requirements for a person to be considered ordinarily resident in New Zealand. Section 17 provides that, in certain circumstances, children and other dependants outside New Zealand may be considered ordinarily resident in New Zealand for the purpose of the principal Act. The amendment inserts bespoke definitions of child and other dependent into section 17 (previously, these terms had the global definitions in section 6). The new definitions align with the approach taken to children and other dependants of deceased claimants in clause 70 of Schedule 1.

Clause 6 extends the definition of accident in section 25. An accident now includes an application of a force or resistance internal to the human body at any time from the onset of labour to the completion of delivery that results in an injury described in *new Schedule 3A* to a person who gives birth.

Clause 7 amends section 26, which defines personal injury. Currently, personal injury includes any degree of hearing loss that is 6% or more of binaural hearing loss caused by a personal injury described in section 20(2). The amendment reduces this threshold to 5%.

Clause 8 amends section 30, which relates to personal injury caused by work-related gradual process, disease, or infection. Currently, a person has cover under section 30 if they suffer a personal injury caused by a gradual process, disease, or infection in the circumstances described in section 30(2). Section 30(2) contains the following 3-step test:

- a person must perform an employment task or be employed in an environment that has a particular property or characteristic; and
- the particular property or characteristic must cause, or contribute to the cause of, the personal injury and not be found to any material extent in the person's non-employment activities; and
- the person must be at significantly greater risk of suffering the personal injury than those who do not perform the employment task, or be employed in a type of environment where the risk is significantly greater.

The amendments reinstate the 2008 3-step test, which is as follows:

- a person must perform an employment task or be employed in an environment that has a particular property or characteristic; and
- if the property or characteristic is present in both the person's employment and non-employment tasks or activities, it must be more likely that the personal injury was caused as a result of the employment tasks or environment than the non-employment activities or environment; and
- the ACC may decline the claim if the ACC establishes that the risk of suffering the personal injury is not significantly greater for others who perform the employment task than it is for persons who do not perform it, or is not significantly greater for others who are employed in that type of environment than it is for persons who are not.

Clause 9 amends section 91, which relates to the conduct of initial occupational assessments. The effect of the amendment is that, when considering the suitability of the types of work referred to in section 91(1)(b), an occupational assessor must (rather than may) take into account the claimant's earnings before the claimant's incapacity.

Clause 10 amends section 119, which provides for disentitlements 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 was as a result of an assisted dying procedure under the End of Life Choice Act 2019.

Clause 11 amends section 173. Section 173(1) provides that the ACC may require an employer to pay a levy based on the ACC's reasonable estimation of the levy. The ACC must refund any amount greater than \$20 that is overpaid, together with interest if the refund exceeds \$1,000. Currently, interest is paid at a rate prescribed by regulations under the principal Act. The amendment provides that the regulations may instead prescribe a method by which the interest rate is calculated. This enables the interest rate (which is now reviewed every 2 years, instead of annually) to reflect market changes.

Clause 12 amends section 250, which enables the ACC to charge interest and penalties on late payment of levies. The amendment to section 250(1) means that the ACC is able to start charging interest or penalties on late payments from the day after the date on which those payments are due (instead of 30 days after the date on which payment is due).

Clause 13 amends section 267 to increase the maximum size of the Board from 8 members to 9 members.

Clause 14 amends section 329, consequential on the amendment to section 173.

Clause 15 amends Schedule 1AA to insert the following transitional provisions that apply to some amendments made by this Bill:

- claims for personal injury including hearing loss that, at the commencement of *clause 7*, have been lodged with the ACC but not decided will continue to be dealt with as if *clause 7* had not been enacted:
- claims for personal injury caused by work-related gradual process, disease, or infection that, at the commencement of *clause 8*, have been lodged with the ACC but not decided will continue to be dealt with as if *clause 8* had not been enacted.

Clause 16 amends Part 2 of Schedule 1, which relates to weekly compensation payable to a claimant by the ACC. The amendment inserts *new clause 31A*, which enables the ACC, when determining a claimant's earnings for the purposes of calculating weekly compensation, to take into account their most recent employment income information (as defined in section 3(1) of the Tax Administration Act 1994) available from the Inland Revenue Department. A claimant's right to apply under section 134 for a review based on their actual earnings is not affected.

Clause 16 also amends clause 49 to address an unintended anomaly that arises where an injured veteran receives more than 100% of their pre-incapacity earnings through a combination of compensation under the principal Act and compensation under the Veterans' Support Act 2014 (the **VS Act**). Currently, in this situation, the ACC is required to reduce (or abate) its weekly compensation payments (*see* clause 51 of Schedule 1 of the principal Act). Veterans' Affairs New Zealand is then required by the VS Act to top up the ACC's abated payments to the amount that an injured veteran is entitled to under the VS Act (*see* sections 64 and 102 of the VS Act), which means that the ACC must once again abate its payments (and so on). The amendment addresses this issue by excluding from the definition of earnings in clause 51 payments of weekly compensation and weekly income compensation under the VS Act (which means that these payments are not required to be abated).

Clause 17 inserts *new Schedule 3A* into the principal Act, which describes maternal birth injuries for the purposes of *new section 25(1)(f)*.

Part 2

Consequential amendments

Clauses 18 and *19* relate to the Accident Compensation (Definitions) Regulations 2019, which are amended consequential to the amendment in *clause 4(3)* to the definition of medical practitioner in section 6.

Clauses 20 and *21* relate to the Injury Prevention, Rehabilitation, and Compensation (Interest Rate for Late Payment of Levies) Regulations 2002, which are amended consequential to the amendment to section 250.

Hon Carmel Sepuloni

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

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Contents

		Page
1	Title	2
2	Commencement	2
3	Principal Act	2

Part 1

Amendments to principal Act

4	Section 6 amended (Interpretation)	2
5	Section 17 amended (Ordinarily resident in New Zealand)	3
6	Section 25 amended (Accident)	3
7	Section 26 amended (Personal injury)	3
8	Section 30 amended (Personal injury caused by work-related gradual process, disease, or infection)	3
9	Section 91 amended (Conduct of initial occupational assessment)	4
10	Section 119 amended (Disentitlement for wilfully self-inflicted personal injuries and suicide)	4
11	Section 173 amended (Estimation of levy)	4
12	Section 250 amended (Penalties and interest due to Corporation in respect of unpaid levies)	4
13	Section 267 amended (Board of Corporation)	4
14	Section 329 amended (Regulations relating to levies)	4
15	Schedule 1AA amended	5
16	Schedule 1 amended	5
17	New Schedule 3A inserted	5

Part 2

Consequential amendments to regulations

*Amendment to Accident Compensation (Definitions) Regulations
2019*

18	Principal regulations	5
19	Regulation 3 amended (Interpretation)	5

*Amendment to Injury Prevention, Rehabilitation, and
Compensation (Interest Rate for Late Payment of Levies)
Regulations 2002*

20	Principal regulations	6
21	Regulation 3 amended (Interest rate for late payment of levies)	6

Schedule 1 7

New Part 3 inserted into Schedule 1AA

Schedule 2 9

New Schedule 3A inserted

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Act **2021**.

2 Commencement 5

- (1) **Sections 6 and 17** come into force on **1 October 2022**.
- (2) **Sections 12 and 21** come into force on **1 July 2023**.
- (3) The rest of this Act comes into force 30 days after the date on which it receives the Royal assent.

3 Principal Act 10

This Act amends the Accident Compensation Act 2001.

Part 1

Amendments to principal Act

4 Section 6 amended (Interpretation)

- | | | |
|-----|---|----|
| (1) | In section 6(1), replace the definition of medical practitioner with:
medical practitioner means a medical practitioner of a type defined in regulations made under this Act | 15 |
| (2) | In section 6(1), definition of moped , replace “Transport (Vehicle and Driver Registration and Licensing) Act 1986” with “Land Transport Act 1998”. | |

- (3) In section 6(1), definition of **motorcycle**, replace “Transport (Vehicle and Driver Registration and Licensing) Act 1986” with “Land Transport Act 1998”.

5 Section 17 amended (Ordinarily resident in New Zealand)

After section 17(5), insert:

- (6) In this section,— 5
- child**, in relation to a person described in subsection (1)(a) or (4)(a),—
- (a) means a child who, at the date of that child’s injury,—
- (i) was aged under 18, or was aged under 21 and was in full-time study at a place of education; and
- (ii) either— 10
- (A) was that person’s natural or adopted child; or
- (B) would ordinarily have been regarded as that person’s child because they were the child of that person’s spouse or partner, and that person acted as their parent; and
- (b) does not include an other dependant of that person 15
- other dependant**, in relation to a person described in subsection (1)(a) or (4)(a), means a dependant who, at the date of that dependant’s injury,—
- (a) was financially dependent on that person because of the dependant’s mental or physical condition; and
- (b) was not that person’s spouse, partner, or child. 20

6 Section 25 amended (Accident)

- (1) After section 25(1)(e), insert:
- (f) an application of a force or resistance internal to the human body at any time from the onset of labour to the completion of delivery that results in an injury described in **Schedule 3A** to a person who gives birth. 25
- (2) After section 25(2), insert:
- (2A) Subsection (2)(a) does not apply to an accident of the kind described in subsection (1)(f).

7 Section 26 amended (Personal injury)

In section 26(1A), replace “6%” with “5%”. 30

8 Section 30 amended (Personal injury caused by work-related gradual process, disease, or infection)

- (1) After section 30(1), insert:
- (1A) Subsection (1)(c) is subject to subsection (2A). 35
- (2) Repeal section 30(2)(b)(ii).

- (3) Replace section 30(2)(c) with:
- (c) that, if the particular property or characteristic is present in both the person's employment tasks or environment and non-employment activities or environment, it is more likely that the person's personal injury was caused as a result of the employment tasks or environment rather than the non-employment activities or environment. 5
- (4) After section 30(2), insert:
- (2A) However, even if it is established that a claimant's personal injury was caused in the circumstances described in subsection (2), the Corporation may decline the claim if the Corporation establishes that the risk of suffering the personal injury is not significantly greater for persons who— 10
- (a) perform the employment task than it is for persons who do not perform it; or
- (b) are employed in that type of environment than it is for persons who are not. 15
- 9 Section 91 amended (Conduct of initial occupational assessment)**
In section 91(1A), replace “may” with “must”.
- 10 Section 119 amended (Disentitlement for wilfully self-inflicted personal injuries and suicide)**
After section 119(3), insert: 20
- (4) Subsection (1) does not apply if the death was the result of assisted dying in accordance with the End of Life Choice Act 2019.
- 11 Section 173 amended (Estimation of levy)**
In section 173(2)(a), after “at the rate prescribed by regulations”, insert “or the rate as calculated by the method prescribed by regulations”. 25
- 12 Section 250 amended (Penalties and interest due to Corporation in respect of unpaid levies)**
In section 250(1), delete “that is 30 days”.
- 13 Section 267 amended (Board of Corporation)**
In section 267(1), replace “8” with “9”. 30
- 14 Section 329 amended (Regulations relating to levies)**
After section 329(1)(h), insert:
- (ha) prescribing the rate of interest payable on any amount exceeding \$1,000 under section 173(2)(a) or the method by which the rate is to be calculated: 35

15 Schedule 1AA amended

In Schedule 1AA,—

- (a) insert the Part set out in **Schedule 1** of this Act as the last Part; and
- (b) make all necessary consequential amendments.

16 Schedule 1 amended

5

- (1) In Schedule 1, clause 25(1A), replace “may” with “must”.
- (2) In Schedule 1, after clause 31, insert:

31A Use of employment income information in determining earnings

- (1) The Corporation, for the purposes of calculating a claimant’s earnings for any period under this Part, may take into account the claimant’s most recent pre-incapacity employment income information available from the Inland Revenue Department. 10
- (2) Subsection (1) applies even if that information does not relate to the period immediately before the claimant’s incapacity commenced.
- (3) Subsections (1) and (2) do not affect a claimant’s right under section 134 to apply for a review of the Corporation’s decision as to the amount payable to the claimant for weekly compensation, based on their actual earnings. 15
- (4) In this Part, **employment income information** has the same meaning as in section 3(1) of the Tax Administration Act 1994.
- (3) In Schedule 1, after clause 49(6), insert: 20
- (7) In clause 51(2), **earnings** does not include payments of weekly compensation and weekly income compensation under the Veterans’ Support Act 2014.

17 New Schedule 3A inserted

After Schedule 3, insert the **Schedule 3A** set out in **Schedule 2** of this Act.

Part 2

25

Consequential amendments to regulations

Amendment to Accident Compensation (Definitions) Regulations 2019

18 Principal regulations

Section 19 amends the Accident Compensation (Definitions) Regulations 2019. 30

19 Regulation 3 amended (Interpretation)

In regulation 3(1), insert in its appropriate alphabetical order:

medical practitioner means a health practitioner who—

- (a) is, or is deemed to be, registered with the Medical Council of New Zealand continued by section 114(1)(a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of medicine; and
- (b) holds a current practising certificate

5

Amendment to Injury Prevention, Rehabilitation, and Compensation (Interest Rate for Late Payment of Levies) Regulations 2002

20 Principal regulations

Section 21 amends the Injury Prevention, Rehabilitation, and Compensation (Interest Rate for Late Payment of Levies) Regulations 2002. 10

21 Regulation 3 amended (Interest rate for late payment of levies)

In regulation 3(a), replace “date that is 30 days” with “day”.

Schedule 1
New Part 3 inserted into Schedule 1AA

s 15

Part 3	
Provisions relating to Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Act 2021	5
8 Interpretation	
In this Part, amendment Act means the Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Act 2021 .	
9 Assessment of vocational independence	10
An assessment of a claimant's vocational independence that has been commenced, but not determined, before the commencement of this clause must, on or after that commencement, be considered and determined as if sections 9 and 16(1) of the amendment Act had not been enacted.	
10 Claims for personal injury including hearing loss that have been lodged but not decided	15
(1) This clause applies if, before the commencement of this clause,—	
(a) a person has suffered a personal injury that includes any degree of hearing loss caused by a personal injury described in section 20(2); and	
(b) the person has lodged a claim with the Corporation under section 48 in respect of the personal injury; and	20
(c) the Corporation has not made a decision on the claim.	
(2) On or after the commencement of this clause, the Corporation must make a decision on the claim as if section 7 of the amendment Act had not been enacted.	25
11 Claims for personal injury caused by work-related gradual process, disease, or infection that have been lodged but not decided	
(1) This clause applies if, before the commencement of this clause,—	
(a) a person has suffered a personal injury caused by work-related gradual process, disease, or infection described in section 30; and	30
(b) the person has lodged a claim with the Corporation under section 48 in respect of the personal injury; and	
(c) the Corporation has not made a decision on the claim.	

- (2) On or after the commencement of this clause, the Corporation must make a decision on the claim as if **section 8** of the amendment Act had not been enacted.

Schedule 2
New Schedule 3A inserted

s 17

Schedule 3A
Maternal birth injuries

5

s 25(1)(f)

Birth injuries

Labial, vaginal, vulval, clitoral, cervical, rectal, and perineal tears

Levator avulsion

Obstetric fistula (including vesicovaginal, colovaginal, and ureterovaginal)

Obstetric haematoma of pelvis

Pudendal neuropathy

Ruptured uterus during labour

Uterine prolapse