

Regulatory Impact Statement: Extending the Accident Compensation Scheme Cover to Obstetric Injuries

Coversheet

Purpose of Document	
Decision sought:	<i>Agreement from Cabinet to extend the Accident Compensation Scheme cover to obstetric injuries</i>
Advising agencies:	<i>Ministry of Business, Innovation and Employment (MBIE)</i>
Proposing Ministers:	<i>Minister for ACC</i>
Date finalised:	<i>4 August 2021</i>
Problem Definition	
<p>We define obstetric injuries as injuries sustained by birthing parents during childbirth. Most obstetric injuries are not eligible for cover under the Accident Compensation Scheme (the AC Scheme) even though many of them have the same characteristics as other injuries that are covered by the AC Scheme (i.e. injuries caused by accidents). This means injuries with the same characteristics are not treated in the same way in the AC Scheme.</p>	
Executive Summary	
<p>The <i>Accident Compensation Act 2001</i> (the AC Act) only covers injuries resulting from accidents. The definition of accident most relevant to obstetric injuries (not already covered as treatment injuries) is ‘the application of force (including gravity), or resistance, external to the human body’.¹ Obstetric injuries are not covered by the AC Act because, until a foetus is born, it is legally considered to be part of the birthing parent. Therefore the application of force by the foetus to the birthing parent during childbirth is considered to be internal to the human body.</p> <p>We recommend extending the AC Scheme cover to certain obstetric injuries. This proposal requires changes to the legislation, therefore Government intervention is required.</p> <p>We have considered three main options to address the problem identified (on page 6), and have compared them against the criteria detailed in section 2 (page 9):</p>	

¹ Section 25(1)(a) of the *Accident Compensation Act 2001*.

Option one: maintain the status quo.

Option two: extend cover to obstetric injuries by including these injuries under the existing cover category ‘personal injury caused by accidents’ (i.e. recognising obstetric injuries as accidental injuries).

Option three: extend cover to obstetric injuries by creating a new cover category for personal injuries that are not related to accidents; this means making a deliberate and targeted expansion of the AC Scheme to cover non-accidental injuries).

Within option two, we have considered three sub-options on how to extend cover to obstetric injuries under the AC Scheme:

- Option 2(a): extend cover to a specified list of obstetric injuries caused to birthing parents during labour and delivery that fall under a scoping definition of ‘obstetric injuries’.
- Option 2(b): extend cover to all injuries that meet a definition of obstetric injury in the AC Act, for example, mechanical trauma caused by labour and delivery (i.e., do not specify the injury types which may be covered as a result).
- Option 2(c): define foetuses as a ‘force external to the body’, so all injuries caused by the foetus to the birthing parent during labour and delivery would be considered to be caused accidents under the AC Act.

MBIE’s preferred option is option 2(a). The Cabinet paper will recommend MBIE’s preferred option.

There has been ongoing advocacy from the general public (which includes ACC claimants) to extend the AC Scheme cover to obstetric injuries (i.e. option two and option three). The preferred option (option 2(a)) is aligned with this.

Targeted consultation with obstetric injury experts has been undertaken to test and firm up the details of the final recommendation (i.e. option 2(a)). MBIE has consulted, and worked closely with ACC in the development of the proposal.

There are no significant divergences in the experts’ views. We are aware that there has been advocacy for ACC to cover babies who are injured during birth and delivery (who are not already covered under the treatment injury provision). It is likely this group would become more active in advocating for change if birthing parents are given AC Scheme cover for injuries suffered during childbirth, while their babies remain without cover. The injuries suffered by babies during childbirth tend to have different characteristics to those suffered by their birthing parents, but can be caused by the same forces of labour and delivery acting on their bodies.

Limitations and Constraints on Analysis

We have identified the following constraint on our analysis:

- lack of reliable data – the estimates of the cost of extending AC Scheme cover are uncertain, but do provide a sense of their likely order of magnitude. The costs are based on hospital-based births which could underestimate true costs of all

births, and do not consider costs associated with ongoing surgical and non-surgical treatment

- limited consultation informed this proposal – only targeted consultation with clinical experts took place for testing and firming up the types of obstetric injuries for inclusion in the proposal. Limiting consultation to experts is the most efficient way to test the proposal, as this proposal already addresses the ongoing advocacy from the general public (which includes ACC claimants and birthing parents who sustained birthing injuries) to extend the AC Scheme cover to obstetric injuries. Subject to Cabinet approval, public consultation on the proposal will happen at the Select Committee stage.

Responsible Manager

Hayden Fenwick



Policy Manager

Accident Compensation Policy

Ministry of Business, Innovation and Employment

30/07/2021

Quality Assurance (completed by QA panel)

Reviewing Agency:	Ministry of Business, Innovation and Employment
Panel Assessment & Comment:	MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Impact Statement prepared by MBIE. The Panel considers that the information and analysis summarised in the Impact Statement Meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

Section 1: Diagnosing the policy problem

(1) What is the context behind the policy problem and how is the status quo expected to develop?

Context

The AC Scheme provides no-fault compensation for accidental personal injuries

ACC provides fair and sustainable compensation for managing eligible personal injury as a result of an accident, regardless of who was at fault on causing the accident. It is largely funded by specific levies on employers, earners, and motorists. The Government funds the Non-Earners Account as a form of social insurance.

‘Accident’ is defined under the AC Act as the application of external force only

The relevant definition of accident to obstetric injuries is ‘the application of force (including gravity), or resistance, external to the human body’. This definition reflects the purpose of the AC Scheme to provide compensation for personal injury as a result of accident, and to restrict the AC Scheme from covering injuries that are the result of aging or non-work related gradual process.

Consequently, injuries, such as obstetric injuries, may not be covered by the AC Scheme if they are not treatment injuries

Injuries that occur as a result of labour and delivery of a baby are not covered by the AC Scheme, if those injuries are not caused by treatment or a failure to provide treatment. It can be difficult for a layperson to understand why the AC Scheme would cover sprains or strains caused by, e.g. a sporting event, but not injuries caused by the birthing process.

This difference in accessing AC Scheme cover recently drew media attention after ACC updated its guidance for assessing perineal tear claims

ACC recently reviewed its approach to providing cover for severe perineal tears after it noticed that the number of claims it was receiving and accepting varied across the country. ACC discovered that it had accepted claims that it should not have. ACC issued new guidance to ensure consistency and accuracy in providing cover for perineal tears. This resulted in the number of perineal tear claims accepted by ACC dropping from an average of 32 per month to an average of three per month.

The perception in the media was that ACC had changed its policy on perineal tears.

The Minister for ACC commissioned work to better support people who suffer obstetric injuries under the AC Scheme

This development sparked media attention in April 2021 and the Minister for ACC requested advice on the scope of cover for obstetric injuries under the AC Act.

This work is aligned with the Minister for ACC's broader vision of delivering ACC reforms to improve the AC Scheme for all New Zealanders, with cover for obstetric injuries being an area to focus on.

This issue highlights the inherent boundary issues that exist between the AC Scheme and the health and welfare systems as a result of the different purposes they serve

Boundaries between the AC Scheme and the health and welfare systems mean that people with the same or similar health conditions and disabilities can be provided with different levels of support (both financial and non-financial), depending on the cause of their health conditions and disabilities (which determines the system they are eligible for support from).

In terms of obstetric injuries, for most cases the AC Scheme cover would mean more timely access to treatments such as surgeries and contributions towards private pelvic physiotherapy, compared to support available in the health and welfare systems. For those few very severe cases where people are incapacitated for the longer term, the additional benefits of the AC Scheme cover would be access to non-means-tested weekly compensation, home help, and rehabilitation.

These disparities are the result of the AC Scheme and the health and welfare systems serving different purposes. The AC Scheme provides fair and sustainable compensation for personal injury as a result of accident in return for giving up the right to sue. It is largely funded by levies, paid by those covered by the AC Scheme. Whereas the health system provides needs-based support to ensure an equitable base standard of care for all other health needs. Trade-offs within the health system are made to best meet the needs of the population as a whole, as opposed to the AC Scheme, where individual loss is compensated irrespective of need. Funding for the health system is prioritised against other areas of government spending funded by general taxation, such as education.

How is the status quo expected to develop?

Without intervention from the Government, people with obstetric injuries (that are not already covered by ACC through treatment injuries) will continue to be ineligible for ACC cover. This means:

- injuries with the same characteristics would continue to receive different treatment under the AC Scheme, and
- because of the rationed services and support available under the health and welfare systems compared to the AC Scheme, people suffering obstetric injuries would continue being unable to receive timely treatment to support their rehabilitation and recovery, and will only be eligible for means-tested income support. This compromises their quality of life and limits their ability to recover.

(2) What is the policy problem or opportunity?

Obstetric injuries (that are not treatment injuries) are not eligible for cover under the AC Scheme, although they have the same characteristics (such as sprains or strains) to injuries already covered under the AC Act. This is because the most relevant definition of accident in the context of obstetric injuries is 'the application of force (including gravity), or resistance, external to the human body'. Obstetric injuries do not meet this definition because, until a foetus is born, it is legally considered to be part of the birthing parent. Therefore the application of force by the foetus to the birthing parent during childbirth is considered to be internal to the human body, even though it is not the birthing parent's body that is exerting the force.

(3) What objectives are sought in relation to the policy problem?

The overarching objective in relation to the problem identified is to ensure that injuries with the same characteristics as ones that are currently covered (i.e. ones that result from the application of force (including gravity), or resistance, external to the human body), are treated in the same way under the AC Scheme.

Section 2: Deciding upon an option to address the policy problem

(1) What criteria will be used to compare options to the status quo?

We have used the following criteria to assess options (including the status quo):

- **Equity:** whether this ensures that injuries with the same characteristics to the ones already covered by the AC Act are treated in the same way
- **Coherence:** the extent to which the change maintains the illness and accident boundary and works within the structure of the AC Act, and avoids creating exceptions and precedents that could undermine the AC Scheme's primary purpose in the longer term
- **Financial sustainability:** the impact of the change on levy and tax payers, and financial sustainability of the AC Scheme
- **Administrative efficiency:** how easy or complex the change is to implement

(2) What scope will options be considered within?

This RIS provides analysis on options for extending the AC Scheme cover to ensure that obstetric injuries that have the same characteristics of the ones that are already covered are treated in the same way under the AC Scheme.

(3) What options are being considered?

We have considered the following options.

Option one – status quo

This means obstetric injuries (that are not treatment injuries) will continue being ineligible for cover under the AC Scheme as no change would be made to the AC Scheme. This means injuries with the same characteristics to the ones that are already covered will continue to receive different treatment under the AC Scheme. People who suffer these injuries will continue receiving primary support through the health and welfare systems where services are rationed according to need (if they cannot access cover from private insurance). They will continue being unable to receive timely treatment to support their rehabilitation and recovery, and will only be eligible for means-tested income support.

Option two – extend cover to obstetric injuries by including these injuries under the existing cover category ‘personal injury caused by accidents’

This means recognising obstetric injuries as ‘accidents’ under the AC Act, by recognising them under the existing cover category ‘personal injury caused by accident’ in the AC Act.

We have considered three sub-options on how to extend cover to obstetric injuries under the AC Scheme. They are:

- Option 2(a): extend cover to a specified list of obstetric injuries caused to birthing parents during labour and delivery that fall under a scoping definition of ‘obstetric injury’
- Option 2(b): extend cover to all injuries that meet a definition of obstetric injury in the AC Act, for example, mechanical trauma caused by labour and delivery (i.e., do not specify the injury types which may be covered as a result)
- Option 2(c): define foetuses as a ‘force external to the body’, so all injuries caused by the foetus to the birthing parent during labour and delivery would be considered accidents under the AC Act

Option three – extend cover to obstetric injuries by creating a new cover category for personal injuries that are not related to accidents

Instead of bringing obstetric injuries under any existing cover category in the AC Act, this option would create a new cover category for non-accidental personal injuries. This would be a divergence from the core purpose of the AC Scheme to provide compensation for personal injury as a result of accident, apart from a few exceptions related to providing cover for work-related injuries, such as work-related gradual process diseases. These exceptions have been inherited from the AC Scheme’s history as a workers’ compensation scheme.

We have ruled out the option of extending cover to third and fourth degree perineal tears only

This is not a viable option because it arbitrarily excludes other obstetric injuries which are also caused from the same forces acting on the body as perineal tears. This goes against the policy objective for this work, which is to ensure that obstetric injuries with the same

characteristics of the ones that are already covered are treated in the same way under the AC Scheme.

We have also ruled out the option of providing additional funding to the health and welfare systems to better meet the needs of obstetric injury patients

This option is not viable because it falls out of the purview of the Accident Compensation Regulatory System (it is an intervention through the Budget process). Furthermore, intervention in the health and welfare systems will not address the problem identified, i.e. injuries that have the same characteristics of the ones that are already covered are not treated in the same way under the AC Scheme (as they do not have cover).

Also, there is no certainty funding to the health and welfare systems will benefit patients with obstetric injuries. In practice, funding can be re-prioritised to other services based on need. There are also regional variations in support levels, as once the funding to the health sector is appropriated, each region would make its own allocation and delivery decisions.

(4) How do the options compare to the status quo/counterfactual?

	Option one: status quo	Option two: extend cover to obstetric injuries by including these injuries under the existing cover category 'personal injury caused by accidents'			Option three: extend cover to obstetric injuries by creating a new cover category for personal injuries that are not related to accidents
		Option 2(a): Extend cover to a specified list of obstetric injuries caused to birthing parents during labour and delivery that fall under a scoping definition of 'obstetric injury'	Option 2(b): Extend cover to all injuries that meet a definition of obstetric injury in the AC Act e.g., mechanical trauma caused by labour and delivery (i.e., do not specify the injury types which may be covered as a result)	Option 2(c): Define foetuses as a 'force external to the body', so all injuries caused by the foetus to the birthing parent during labour and delivery would be considered <i>accidents</i> under the AC Act	
Equity: whether this ensures that injuries with the same characteristics as the ones already covered by the AC Act are treated in the same way under the AC Scheme	0 No change.	+ <ul style="list-style-type: none"> Obstetric injuries, which have the same characteristics as injuries covered under the AC Scheme, are treated the same. 	+ <ul style="list-style-type: none"> Obstetric injuries, which have the same characteristics as injuries covered under the AC Scheme, are treated the same. 	+ <ul style="list-style-type: none"> Obstetric injuries, which have the same characteristics as injuries covered under the AC Scheme, are treated the same. 	-- <ul style="list-style-type: none"> Unfair to other people who have illnesses and are not covered.
Coherence: the extent to which the change shifts the illness/accident boundary and works within the structure of the AC Act, and creates exceptions and precedents that could undermine the AC Scheme's primary purpose in the longer term	0 No change.	0 <ul style="list-style-type: none"> New cover boundary does not shift the existing accident/illness boundary. Works within the structure, and in particular, the definition of 'accident' of the AC Act. Clinicians may be incentivised to lodge claims under this category when they should lodge Treatment Injury claims, creating operational incoherence. May limit ACC's visibility of injury trends and ability to intervene to prevent further injury. 	- <ul style="list-style-type: none"> New cover boundary does not shift the existing accident/illness boundary. Works within the structure of the AC Act, but significant judgement required to determine cover (as it only contains a definition and not a prescriptive list). Clinicians may be incentivised to lodge claims under this category when they should lodge Treatment Injury claims, creating operational incoherence. May limit ACC's visibility of injury trends and ability to intervene to prevent further injury. 	-- <ul style="list-style-type: none"> New cover boundary does not shift the existing accident/illness boundary. Works within the structure, but risks a broader interpretation to also include injuries to the birthing parent throughout the pregnancy, and the child. Clinicians may be incentivised to lodge Personal Injuries Caused by Accident claims, instead of Treatment Injury claims. May limit ACC's visibility of injury trends and ability to intervene to prevent further injury. 	-- <ul style="list-style-type: none"> A departure from the existing structure of the AC Act, as cover is extended to non-accidents. Shift to the illness/accident boundary between the AC Scheme and the health and welfare systems. May invite inconsistent interpretations from the courts. Risks a broader interpretation to also include injuries to the birthing parent throughout the pregnancy, and injuries to the child through the birthing process.

	Option one: status quo	Option two: extend cover to obstetric injuries by including these injuries under the existing cover category 'personal injury caused by accidents'			Option three: extend cover to obstetric injuries by creating a new cover category for personal injuries that are not related to accidents
		Option 2(a): Extend cover to a specified list of obstetric injuries caused to birthing parents during labour and delivery that fall under a scoping definition of 'obstetric injury'	Option 2(b): Extend cover to all injuries that meet a definition of obstetric injury in the AC Act e.g., mechanical trauma caused by labour and delivery (i.e., do not specify the injury types which may be covered as a result)	Option 2(c): Define foetuses as a 'force external to the body', so all injuries caused by the foetus to the birthing parent during labour and delivery would be considered <i>accidents</i> under the AC Act	
Financial sustainability: the impact of the change on levy and tax payers, and financial durability	0 No change.	0 <ul style="list-style-type: none"> Minor increase in ACC levies and funding to ACC's Non-Earners' Account (as detailed on page 13). Costs are likely to remain relatively contained and predictable. But new boundaries will encourage lobbying for further Scheme expansion, which may be very costly. 	- <ul style="list-style-type: none"> Risk costs could escalate if cover is interpreted more broadly than envisaged, but still contained to labour and delivery, and the known injuries are unlikely to change much over time. New boundaries will encourage lobbying for further Scheme expansion, which may be very costly. 	-- <ul style="list-style-type: none"> Risk costs could significantly escalate if cover is interpreted more broadly than envisaged. New boundaries will encourage lobbying for further Scheme expansion, which may be very costly. 	-- <ul style="list-style-type: none"> Once cover is extended to non-accidents, pressure will come for further non-accident extensions, which may be very costly. Risk costs could significantly escalate if cover is interpreted more broadly than envisaged.
Administrative efficiency: how easily is the change to implement	0 No change.	+ <ul style="list-style-type: none"> Claims would be quicker and simpler to process than the status quo. A scoping definition will work in conjunction with the list to ensure only injuries caused by labour and delivery are covered. A clearer boundary for obstetric injuries means less ambiguity for treatment providers and claimants and improved quality of ACC applications. 	- <ul style="list-style-type: none"> ACC has existing systems in place to process new claims. Cover boundary would be less ambiguous than the status quo, but more ambiguous than option 2(a). May need to be tested through the courts as the definition may be challenged without being accompanied by a prescriptive list. 	- <ul style="list-style-type: none"> ACC has existing systems in place to process new claims. Cover boundary would be less ambiguous than the status quo, but more ambiguous than option 2(a). May need to be tested through the courts. 	- <ul style="list-style-type: none"> Whilst ACC has an existing system in place to process claims, this cover category would be new.
Overall assessment	0	+	0	--	--

Example key for qualitative judgements:

- ++ much better than doing nothing/the status quo/counterfactual
- + better than doing nothing/the status quo/counterfactual
- 0 about the same as doing nothing/the status quo/counterfactual
- worse than doing nothing/the status quo/counterfactual
- much worse than doing nothing/the status quo/counterfactual

(5) What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

Option 2(a) is the best option to deliver more benefits, with its associated costs being likely to remain relatively contained and predictable

As detailed above under section 2(4), option 2(a) achieves the benefit of ensuring that the AC Scheme covers obstetric injuries that have the same characteristics of the ones that are already covered, and greater administrative efficiency. It also works within the structure of the AC Act. These benefits outweigh the risk of new Scheme boundaries, further lobbying for greater Scheme expansion, and small financial impact on the levy payers and the Crown (as detailed below).

(6) What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact	Evidence Certainty.
Additional costs of the preferred option compared to taking no action			
Levy payers who fund ACC Earners Account (i.e. earners), which will be used to pay for injuries sustained by earners	50-60 percent of the costs are estimated to support earners ² . The earners portion of the costs will be incorporated into the next Levy setting process in 2024, and in the interim, absorbed by the Earners Account.	Approximately \$12M per year	Medium-Low
Tax payers (Crown appropriation for non-earners)	40-50 percent of the costs are estimated to support non-earners. The Minister for ACC will seek a Budget 2022 pre-commitment to fund the non-earners portion of the costs. Opportunity cost for other Government priorities.	Approximately \$13M per year	Medium-Low
ACC	Negligible increase in claim volumes in the context of ACC's management of claims in the Non-Earners' Account overall (an additional 17,000-18,000 injuries (i.e. potential claims) out of approximately 2 million claims a year)	Low	Medium

² Based on the number of working females in the reproductive age range, and paid parental leave figures.

Health sector	Pressure on health workforce (pelvic physiotherapists, surgeons, and mental health providers) to meet the demand for ACC entitlements	Medium-Low	Low
	Risk of diverting resources from the health system to ACC, resulting in people with potentially higher need not being prioritised	Medium-Low	Low
Total monetised costs		\$25M per year	Medium-Low
Non-monetised costs		<i>Medium-Low</i>	<i>Medium-Low</i>
Additional benefits of the preferred option compared to taking no action			
Obstetric injury patients who may access ACC through this new cover route	Estimated to be approximately between 17,000-18,000 injuries out of 55,000 to 65,000 births per year	Medium	Medium-Low
ACC	Greater administrative efficiency	Low	Medium-Low
Obstetric injuries care and treatment providers	Easier to lodge claim as the AC Scheme cover boundary would be clearer	Low	Low
Health sector	Greater understanding of the prevalence of obstetric injuries because more claims may be lodged and recorded	Low	Low
Health and welfare systems	Potential reduced pressure for services to support obstetric injuries (offset by increased demand for AC Scheme entitlements)	Low	Low
Total monetised benefits		N/A	
Non-monetised benefits		<i>Medium-Low</i>	<i>Medium-Low</i>

Section 3: Delivering an option

(1) How will the new arrangements be implemented?

Option 2(a) will be implemented by amending the AC Act to extend cover to a specified list of obstetric injuries caused to birthing parents during labour and delivery. MBIE has consulted a group of clinical experts to confirm the types of obstetric injuries appropriate for inclusion in the list.

This proposed cover will be given to obstetric injuries occurring on and after the date the relevant provision comes into force

Because this is consistent with Legislation Guidelines (2018 edition), which state that legislation should have prospective, not retrospective effect. Although there are recognised exceptions to this principle, this proposal does not meet the Legislation Guidelines' criteria for retrospective legislation, which includes addressing a previous error in legislation and addressing a matter essential to public safety. This is a new policy seeking to expand cover, rather than addressing previous errors.

Making the new arrangement prospective is also consistent with the AC Scheme's principle of intergenerational equity. The AC Scheme has a broadly user-pays funding model, whereby levies are set to reflect the level of entitlements that are available under the AC Scheme at a particular point. If people claim cover for injuries incurred before the period covered by levies, these costs are unfairly falling on current and future levy payers.

Moreover, there is precedent for making new cover prospective in the AC Act. For example, the 2008 introduction of cover for work-related mental injury (section 21B of the AC Act) came into force from the date the relevant Bill was enacted. Conversely, providing retrospective cover would set a precedent for any future expansions of cover to be retrospectively applied, which would be both costly and against the AC Scheme's principles.

(2) How will the new arrangements be monitored, evaluated, and reviewed?

The monitoring, evaluation, and review has been built into the design of the AC regulatory stewardship. ACC, as the Crown Entity set up under the AC Act to deliver the AC Scheme, will continue being the operational agency to deliver the new arrangement (this includes assessing claims, making cover and entitlement decisions, and providing financial and non-financial support, such as covering physiotherapy and surgeries from private health providers).

ACC reports its performance through quarterly reports and annual reports. These reports cover its performance on claims experience (including claims volumes, costs, and outstanding claims liability), injury prevention, customer outcomes and experience, and financial sustainability and governance.

The Treasury monitors ACC's performance, and MBIE is responsible for advising the Minister for ACC on matters relating to the AC Scheme, including broader Scheme direction and performance.

We anticipate that if the proposed option were implemented, we would have enough information to review the new arrangement within the first year of its implementation. By the time MBIE and ACC include this new extension of cover in the next levy consultation round (2024), we will have gathered robust data on the numbers of claims, types of injuries and entitlements, and costs.