

11 July 2022

Sarah Harvey
Principal Policy Officer, ILARS Review
Independent Review Office
By email: ilarsreview2022@iro.nsw.gov.au

Dear Sarah

Re: Review of Independent Legal Advice and Review Service – icare’s submission

1. Insurance and Care NSW (**icare**) thanks the Independent Review Officer (**IRO**) for the opportunity to respond to its ILARS Review Issues Paper dated June 2022 (the **Issues Paper**). icare acknowledges the important role of the Independent Legal Assistance and Review Service (**ILARS**) in providing injured workers in its Workers Compensation Nominal Insurer and Treasury Managed Fund schemes with access to legal representation.
2. With respect, in icare’s view, the focus of the ILARS Review is too narrow. The Issues Paper is centred on the mechanics of the ILARS Funding Guidelines and Guidelines for Approval as an IRO Approved Lawyer (together, the **ILARS Guidelines**). The review panel members represent the legal industry only.
3. Many stakeholders, including icare, employers and injured workers, have limited visibility over how the details of the ILARS Guidelines play out in practice and importantly, what they achieve, particularly when it comes to the impact of ILARS on resolving and reducing disputes and contributing to injured worker health outcomes. Despite this, the costs of ILARS are paid by insurers and ultimately borne by employers, and are growing year-on-year.
4. icare believes that any review of the ILARS Guidelines requires clear evidence of the impact of ILARS on injured worker outcomes. Without this, the review misses an opportunity to enhance ILARS for the benefit of all stakeholders, particularly injured workers.
5. We recommend the IRO implements processes to ensure a transparent and systematic approach to monitoring and reporting on the achievement of injured workers’ outcomes through ILARS, consistent with the objectives of workers compensation system. This may include collecting data on the outcomes of matters, for example, numbers of injured workers returning to work as a result of the legal practitioner’s intervention; reduction of disputation; impact on health outcomes for injured workers; injured worker and employer satisfaction; and the performance of funded lawyers.
6. Indeed, we consider that measurement of the performance of funded lawyers – for example through quantitative and qualitative metrics which are published on timely basis and publicly available to insurers, injured workers and employers – is critical to ensure value-based funding for legal services. Further transparency regarding how fees are spent at all stages, including on counsel, medico-legal report experts and interpreter and other services is also important.
7. We set out our position in more detail below.

The role of ILARS in promoting the workers compensation system objectives

8. The legislated objectives for the NSW workers compensation system require a balance between outcomes for injured workers, costs to employers and the overall financial sustainability of the scheme.¹
9. While the Issues Paper suggests that the review will examine whether the current ILARS Guidelines promote the system objectives,² it does not provide any analysis of the impact of ILARS on those system objectives, leaving insurers (including icare) and the employers who fund ILARS with limited visibility over these matters.
10. icare's view is that this analysis is imperative in light of the decline in return to work outcomes for injured workers across the NSW workers compensation system as a result of the COVID-19 pandemic, changing nature of work, increase in psychological injuries and ageing working population. More specifically, the aim of any workers compensation resolution service is to minimise disputes, as disputation rates are linked to poorer outcomes for injured workers.
11. While we consider that each of the matters identified in the Issues Paper should be reviewed, to determine whether value is being delivered from legal funding expenditure, the impact of ILARS on injured worker outcomes must first be measured and understood. The analysis of ILARS data and trends we recommend above is fundamental to achieving this.
12. Once this data is available, it can inform a broader review of ILARS and the extent to which it is achieving the system objectives, including by considering the appropriate governance and oversight mechanisms. That review could in turn inform changes to the ILARS Guidelines and icare and other stakeholders including workers, employers and other insurers will be in a better position to provide input. The scheme as a whole will benefit from this transparency.

Costs of ILARS

Source, extent and nature of ILARS fees

13. Data collected from the annual reports of State Insurance Regulatory Authority's (SIRA) and the WorkCover Authority of New South Wales shows that the costs of ILARS are growing year-on-year:

Costs of ILARS from FY12/13 (\$)

FY	FY12/13	FY13/14	FY14/15	FY15/16	FY16/17	FY17/18	FY18/19	FY19/20	FY20/21
Costs of ILARS	929,000	19,832,000	41,838,000	44,034,000	49,864,000	50,465,000	57,449,000	63,050,000	73,613,000

14. In icare's view, it is critical that any review of ILARS considers the extent to which the growth in its fees achieves the legislated objectives for the NSW workers compensation system.
15. The costs of ILARS are borne by the Workers Compensation Operational Fund, which is funded by contributions from insurers that are comprised of employer premiums (and equivalents). The fees available to lawyers under the ILARS Funding Guidelines are higher than those available to insurers under Schedule 6 of the *Workers Compensation Regulation 2016*. Notably, the ILARS Funding Guidelines provide for an allowance for an initial advice on prospects and allows for counsel's fees as a separate disbursement, whereas Schedule 6 requires solicitors acting on behalf of insurers to meet counsel's fees from within their fixed fee.
16. In icare's view, the policy objectives underpinning these distinctions in available fees need to be clearly articulated in the context of system objectives and improved outcomes for injured workers and

¹ See section 3 of the *Workplace Injury Management and Workers Compensation Act 1998*

² See page 7 of the Issues Paper

employers. In relation to counsel’s fees, transparent reporting about which barristers are used and the associated costs should be published. Harmonisation of fee schedules could also be considered as part of a broader review.

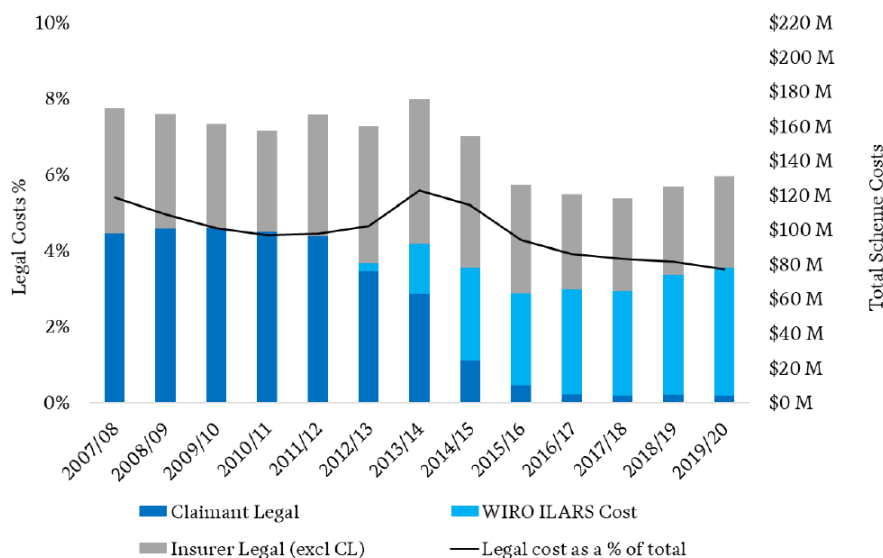
Analysis by Taylor Fry in 2021

17. Taylor Fry conducted an initial analysis of the costs of ILARS in a [report dated 3 December 2021](#) that was commissioned by SIRA. Taylor Fry made the following relevant observations in section 5.8 of the report, titled ‘ILARS experience in Workers Compensation’:

- “Reforms to the NSW workers compensation system in 2012 significantly reduced the number of claims and disputes in the system. Following the reforms, the number of claims reduced by around 28% [and] the number of claims for which there are insurer legal costs also reduced by around 28% ... Applications [to the Workers Compensation Commission (**WCC**) – now the Personal Injury Commission] to resolve a dispute are reduced by around 44% and total dispute applications reduced by around 37%”.
- “Arguably, the claims dealt with through ILARS that have disputes resolved prior to WCC proceedings should be considered as disputes potentially avoided... That said, it impossible to know to what degree matters resolved prior to the [Workers Compensation Commission (**WCC**) – now the PIC], with the support of ILARS, would have otherwise proceeded to dispute at the WCC. Comparisons are further confounded because WCC statistics measure the number of claimants whereas ILARS statistics measure the number of disputed matters, and we are advised that there are often several disputed matters per claim. We have attempted to notionally adjust for this [and on] this (untested) basis, ‘disputation’ in the post [2012] reform scheme is around 21% lower than pre-reform levels (not 37%-44% lower, as indicated only by applications to the WCC). The 21% reduction in disputes is less than the observed 28% reduction in claim numbers overall”.
- “Adjusted for inflation, total legal spend (excluding common law legal) reduced by around 25% following scheme reform, but has been increasing in recent years (to around \$130m in 2019/20). Claimant legal spend (including WIRO/ILARS costs) initially reduced by around 35% but is now around 23% lower than pre-reform levels. The initial 35% was broadly in line with the initial expectations of the scheme actuary at that time”

18. Taylor Fry included the following figure comparing legal spend by claimants, ILARS and insurers and made the following comments about it:

Figure 5.14 – NSW workers compensation legal costs as a percentage of total scheme costs



“Excluding common law legal, claimant legal spend was approximately 150% of insurer legal spend prior to the scheme reforms in 2012 and reduced to around 105% of insurer legal spend immediately following the reforms. In 2018/19 and 2019/20 claimant legal spend was back to around 150% of insurer legal spend.”

19. Taylor Fry concluded:

“Noting the limitations of this rudimentary analysis, overall these indicators suggest ... the introduction of ILARS did not appear to immediately impact legal costs (and excluding common law, claimant legal costs were broadly reduced to a level similar to insurer legal costs). However, over time the initial reductions in claimant legal costs have been eroded and they have returned to a level that is now around 50% greater than insurer legal costs – similar to the pre- (2012) reform relativity.”

Next steps

20. icare would welcome the opportunity to discuss this submission further and to work collaboratively with the IRO, SIRA and all stakeholders in the workers compensation system to advance the issues we have raised.
21. Please don't hesitate to contact Parthena Elias, General Manager Customer, Policy and Design, on parthena.elias@icare.nsw.gov.au to discuss further.

Yours sincerely



Richard Harding
Chief Executive & Managing
Director

Copy to: Darren Parker, Executive Director, Workers & Home Building Compensation Regulation, SIRA, darren.parker@sira.nsw.gov.au