NEW SOUTH WALES
BAR ASSOCIATION

14 July 2022

Sarah Harvey
Principal Policy Officer, ILARS Review
Independent Review Office
Level 17, McKell Building
2-24 Rawson Place
HAYMARKET NSW 2000

By email: sarah.harvey@iro.nsw.gov.au

Dear Ms Harvey,

Review of Independent Legal Assistance and Review Service – Issues Paper

The New South Wales Bar Association (**the Association**) thanks the Independent Legal Assistance and Review Service (**ILARS**) Review Committee for the invitation to comment on the June 2022 Issues Paper with respect to a review of ILARS and the ILARS Scheme.

The Association's members are frequently briefed by solicitors acting for injured workers and respondent insurers and are also periodically briefed by solicitors acting for the employers of injured workers. The Association is supportive of the ILARS Scheme and considers that it is meeting its purpose under the *Personal Injury Commission Act 2020* (NSW).

The Association provides the following responses in relation to certain matters raised for comment in the Issues Paper.

Question 4. How frequently should the IRO review the Guidelines?

The Association considers that a review of the Guidelines every few years would be sufficient, unless there was a significant legislative change that warranted an earlier review. Fee variations should be considered on an annual basis.

Question 5. Is information about the ILARS Scheme sufficiently accessible to injured workers including:

A. those who are geographically remote; and
B. those from diverse communities.

Information about the ILARS Scheme is typically accessed via online methods and through solicitors informing their clients of the Scheme. These avenues appear to be generally sufficient, though more foreign language content could be of assistance to those from diverse communities.

Question 6. How could IRO improve the way it provides information about the ILARS Scheme to workers, and lawyers who are not an Approved Lawyer?

The current arrangements with respect to accessible online information and the ability of persons to make direct phone calls to ILARS are satisfactory.

5.2 Approved Lawyers

Question 7. Do you think the Approved Lawyer arrangements ensure the quality of legal services provided to injured workers? If not, how else could the IRO ensure lawyers funded by the Scheme have sufficient expertise to effectively advise injured workers?

The current Approved Lawyer arrangements generally seem to ensure the quality of legal services provided to injured workers through the Scheme.

The list could potentially be reviewed every few years to ensure that solicitors and barristers who are on the list continue to practice in the area on a regular basis.

Question 8. Do you think the restricted approval arrangements for lawyers who do not meet the requirements of the Approved Lawyer Scheme could be improved? If so, how?

The Association recommends that the IRO give consideration to identifying and facilitating a pathway for solicitors to gain accreditation where they have not had the opportunity to work in the field previously and are not in a position to work under the supervision of an Approved Lawyer in the same firm. The types of solicitors that the Association has in mind when making this recommendation include, for example, a sole practitioner with his or her own practice in an isolated regional centre, or an interstate solicitor working in a "border town" such as Coolangatta, Wodonga, or Mildura.

Question 9. Should Approved Lawyers be required to maintain or develop their professional skills and expertise in the area of workers compensation to retain Approved Lawyer status? Should there be a minimum level of activity required each year to retain Approved Lawyer status?

The Association is of the view that the present Continuing Professional Development (**CPD**) requirements of the Law Society and the Association are adequate to achieve this end. Whilst the Association appreciates that CPD requirements do not specifically require practitioners to attend seminars or lectures in the area of workers compensation, there are many available CPD options in this area.

5.3 IRO's role in supervising the conduct and services of Approved Lawyers and Approved Barristers

Questions 10 -13. Should the IRO play a role in assessing the quality of the professional services provided by Approved Lawyers, and whether they meet the Scheme objectives of efficiency, effectiveness and timeliness? If so, what should that role be?

How should the IRO deal with Approved Lawyer conduct issues (including complaints from injured workers, complaints made by IRO staff, and enquiries from and actions taken by professional and regulatory bodies)?

Should there be a process for respondents to complain to the IRO in relation to the conduct of Approved Lawyers representing injured workers? If so, what should that process look like?

What role (if any) should the IRO play in supervising the professional services provided by Approved Barristers?

The Law Society, the Association and the Legal Services Commissioner have well established, pre-existing schemes which deal with complaints about the quality of legal services and significant conduct-related issues. The IRO and the PIC may bring matters of this nature to the attention of these bodies for appropriate investigation and action. No further layer of professional oversight is required.

Question 11.

Complaints regarding the conduct of Approved Lawyers representing injured workers should be directed to the Law Society, the Association or the Legal Services Commissioner, as appropriate.

5.4 Other Issues – Approved Lawyers

Question 14. Should the IRO adopt a practice of recommending particular Approved Lawyers to an injured worker?

The Association considers that any recommendations of this nature should be limited to cases where the injured worker is from a linguistically diverse background and the IRO has reliable information about certain Approved Lawyers being fluent in a relevant language. In these circumstances, the IRO should convey this information to the injured worker.

Question 15. Are the current arrangements for separate legal representation of each dependent where there is a claim for death benefit appropriate? If not, what other arrangements best manage potential conflicts of duties?

The Association notes that it will often be desirable and appropriate for different extended family members to have separate legal representation in relation to entitlement and apportionment issues that arise with respect to the division of a lump sum death benefit. The current arrangements seem to achieve this end.

As to whether the IRO should seek to identify Approved Lawyers with particular experience in death benefit claims, the Association believes that this is not required. Approved Lawyers typically have the degree of expertise required. If they do require guidance, this can be provided by the counsel they instruct. The PIC members also point out practical concerns to practitioners who are involved in claims of this kind.

Question 16. Are there any other issues that exist in relation to Approved Lawyers, that have not been addressed and are within the scope of the Review?

The Association encourages the IRO to review the level of fees paid to Approved Lawyers and Approved Barristers as soon as reasonably practicable. In this regard, the Association notes that the costs of legal practice have been steadily increasing in recent years but the fees payable for the provision of legal services, including under the Scheme, have not increased accordingly or sufficiently.

Specifically, barristers have not had a relevant increase of their fee rate for some time and the current rate does not reflect the work required. Most matters in which counsel appear for an applicant involve:

a. one if not more conferences with the client *before* the listed conciliation/arbitration hearing;
b. review of voluminous briefs (over 1000 pages) which often take between 2-3 hours to consider and prepare for the hearing; and
c. remaining available for conciliation/arbitration hearings which often run over three hours.

This equates to, at a minimum, 5-6 hours per matter for which counsel only receive $1,600 for their appearance and even less when acting for an insurer.

Further, during the COVID-19 pandemic, pursuant to the *Workers Compensation Amendment (COVID-19 Weekly Payment Compensation) Regulation 2020* (**COVID-19 Regulation**), there was a 10% increase to all legal firms' professional costs items specified in Table 1, Part B of Schedule 6 to the *Workers Compensation Regulation 2016* (**WCR 2016**). Barristers did not see any such fee increase. This should be rectified.

5.5 ILARS Grants – Funding Structure

Question 17. Does the ILARS fund the right types of legal work and claims? Are there any other types of legal work or claims that should be eligible for the ILARS funding? Are there types of work or claims that the ILARS currently funds which you consider should not be funded? What are these?

The Association believes that the current arrangements in this regard are satisfactory.

Question 18. Are the current arrangements (including for apportionment and payment of costs) for dealing with multiple applications for funding for the same injured worker appropriate – and if not, how could they be improved?

The Association considers that solicitors involved in the Scheme are better positioned to comment on this question.

Question 19. What improvements could be made to the process for Approved Lawyers to apply for the ILARS funding? Are the threshold tests applied at each stage of funding appropriate – and if not, what other options may be preferable?

The Association believes that the current process and threshold tests are appropriate.

Question 20. To what extent should the IRO be assessing the merits of the case before granting Stage 3 funding?

The Association believes that the present arguable case threshold test for Stage 3 funding is appropriate. However, the Association notes that in relation to grants of Stage 4 funding, it appears to be difficult for practitioners to obtain non-conditional grants for appeals involving questions of law of general importance. Accordingly, it is suggested that the subjective threshold test for such matters should be appropriately lowered.

Question 21. Is the exclusion of low value matters (where the amount is dispute is less than $3,000) for funding at Stage 3 appropriate – and are the exceptions to this rule sufficient? Should the low value monetary threshold be indexed or periodically reviewed?

The Association believes that the present $3,000 threshold for Stage 3 funding appears to be appropriate. However, this low value monetary threshold should be periodically reviewed every few years.

5.6 ILARS Grants – Funding Amounts

Question 22. Is the IRO's current approach to determining professional fees appropriate (i.e. where the amounts payable for professional fees are specified in a schedule and referable to

the outcomes of a matter)? If not, what other method should be used to determine the professional fees payable?

The Association believes that the current approach to determining professional fees is generally appropriate. However, complex and protracted matters will sometimes create effective shortfalls between scheduled fees and the amount of work required. Accordingly, the Association firmly recommends that the Guidelines and Grant Amount Guide be amended to ensure that the officers of ILARS have a flexible, general discretion to permit increased fees in appropriate cases.

Question 23. Does the IRO's current approach to determining professional fees promote the early resolution of matters? If not, how could this be improved?

The Association believes that the current approach operates on the assumption that solicitors can collate the initial medical evidence required to analyse a potential claim by collating the clinical notes of treating practitioners and the concise routine medical certificates and reports that they have already compiled. In the experience of the Association, solicitors are now only rarely communicating directly with treating practitioners in the initial stages of a matter and sometimes not at all, including in the final stages.

This trend is leading to certain claims being advanced in inappropriate ways and then delayed, usually due to an incorrect understanding of the clinical history. Accordingly, the Association suggests that the quality of the service being provided to injured workers could be improved by facilitating and encouraging solicitors to correspond and communicate with treating practitioners at an early stage. This will hopefully result in matters being better prepared, which should in turn improve the rates of early resolution.

Question 24. Should the IRO periodically review the professional fees it pays against external benchmarks? If so what benchmark (e.g. consumer price index) should be applied?

The Association recommends that the IRO periodically review the professional fees that it pays against consumer price index data as an external benchmark.

Question 25. In what circumstances should Approved Barrister's fees be allowed as a fee separate to the Approved Lawyer's fees? Why should such an allowance be made? If an Approved Barrister is briefed, should the Approved Lawyer's fees be adjusted?

Approved Barrister's fees should always be separate to the Approved Lawyer's fees. The current arrangements are satisfactory in this regard. If barristers' fees have to be paid out of the solicitor's fees, barristers will be briefed less frequently and their skills and experience will not be available. This would reduce the quality of matter preparation and advocacy and lead to inferior outcomes for injured workers. The PIC would also become less efficient, as lower quality advocacy consumes more time and creates more difficult situations for the PIC to manage. Additionally, the appearance of barristers before the PIC is likely to improve the quality of the decisions it delivers because of these matters.

If solicitors are compelled to forego some of their professional costs by paying a proportion of them to counsel, they will tend to do less work on matters and the quality of matter preparation will deteriorate. This will in turn lead to inferior outcomes for injured workers.

Insurer's solicitors are generally required to fund counsel's fees out of their Schedule 6 professional costs. This means that counsel are often not briefed to act for employers or are only briefed at the "last minute" (after settlement prospects are exhausted) and are unable to provide guidance with respect to

matter preparation. This results in poorer quality outcomes for employers and insurers. The Association suggests that the obvious solution to this imbalance is for iCare and others to amend Schedule 6 or otherwise to permit insurers and scheme agents to fund counsel's fees as a disbursement that their solicitors are reimbursed for.

The Association recommends that the issue of representational imbalance be solved in this way and notes that depriving injured workers of the assistance of experienced counsel, far from offering a solution to the existing problem, will simply create a new one. Further, the fewer the number of matters coming before the PIC in which competent and experienced counsel are briefed the lower is the likely quality of the resultant decision making by the PIC.

Question 26. Are there specific circumstances in the application of the Guidelines and Grant Amount Guide that result in unfair or inappropriate outcomes – and if so, what is the appropriate way to deal with these circumstances?

See answer to Question 22 above.

Another circumstance that could result in unfair or inappropriate outcomes arises in matters where the early advice fee of $500 for counsel is inadequate. This typically occurs when the briefed material is extensive and a complex history has to be ascertained and analysed before proper advice can be given. The Association suggests that this early advice fee could be appropriately increased in more situations of this kind.

Further, in matters where counsel act for respondent insurers/self-insurers, there is no additional amount payable (other than the initial brief fee, paid out of the insurer's/employer's Schedule 6 costs as noted above) for the drafting of written submissions as ordered by a member if the matter does not resolve within the time period allocated.

This means that counsel briefed for respondents are effectively doing this work for free, whilst counsel briefed for applicants receive a fee of $1,500 for the provision of written submissions in addition to the appearance fee at the conciliation hearing. As suggested in the Association's answer to Question 25 above, an amendment to Schedule 6 or otherwise to permit insurers and scheme agents to fund counsel's fees as a disbursement for the work actually undertaken would be appropriate.

More generally, the Association suggests that the officers of ILARS should have flexible, general discretions to vary the scheduled amounts in appropriate cases.

5.7 ILARS Grants – Discretion

Question 27. Are there any categories of matters or circumstances where funding grants should be reduced? What are those?

The Association also recommends that if funding grants are going to be reduced, there should be a broad discretion to reverse the decision and the relevant legal practitioner should be advised at the earliest available opportunity and there should be a system of requesting a review of such decisions.

Question 28. Are the circumstances where fees are increased due to complexity appropriate, and are there other categories of matters where increases should be permitted?

See answers to Questions 22 and 26 above.

Question 29. Should the IRO provide more guidance about the circumstances where a complexity uplift is appropriate?

The Association would encourage the IRO to provide more guidance about the circumstances where a complexity uplift is appropriate, and believes that this would be of practical assistance to all those concerned.

5.8 ILARS Grants – Appeals

Question 30. In what circumstances (if any) should the IRO fund appeal matters? Should different circumstances apply if the appeal is to the Supreme Court where costs can be awarded?

The Association considers that appeal matters should always be funded when the injured worker is the respondent to the appeal and understands that this is the current practice. The IRO should also clarify that funding for a matter will also include providing an indemnity for any costs order made against a respondent to an appeal. In this respect, it needs to be appreciated that the Suitors Fund provides inadequate protection. It seems particularly harsh that injured workers can be punished with costs orders when it is the PIC or a Medical Appeal Panel which has made the error and caused the appeal.

As to appeals by injured workers, the Association understands that the usual approach is to fund such appeals on a "no win no fee" conditional basis, unless the appeal involves an important point of law in which case a discretion exists to fully fund the appeal. However, the Association notes that it seems to be very difficult to obtain full funding on this basis. For this reason, the Association suggests that the subjective threshold for matters of this kind should be lowered and notes that some published guidelines on this issue might assist. This Association also believes that there should be a swift review procedure available to address the limited 28-day appeal period.

Question 31. Does the requirement that Approved Lawyers seek a mutual assurance from an insurer in an appeal matter before court, that neither party will seek to enforce a costs order made by the court, strike the right balance – and if not, what other arrangements are appropriate?

Whilst the Association acknowledges that the mutual assurance requirement has potential utility, it notes that in practice the assurance is usually not provided by self-insurers or specialised insurers. This has meant that the risk of an adverse costs order has been preventing some meritorious claims and/or important questions of law being taken to the Supreme Court or the Court of Appeal.

This issue could be reduced by the IRO adopting a more generous approach to providing full appeal funding and an offer to indemnify injured workers for any party/party costs orders.

5.9 ILARS Grants – Disbursements

Question 32. Is the 'reasonably necessary' test for funding disbursements appropriate – and if not, what other test should be applied?

The Association believes that the current test for funding disbursements is appropriate.

It is noted that barristers' fees are classified as a disbursement in relevant ILARS payment statistics. Barristers' fees are calculated as separate from the classification of firm professional fees and comprise only 13.9% of the total disbursements paid in the period of IRO performance data from 1 July 2021 to 31 March 2022, representing considerable value in the total resolution model.

The Association contends that barristers' fees should not be classified or subject to any further tests for funding as a disbursement.

Question 33. Is it necessary to outline the matters that might be considered in determining if a disbursement is reasonably necessary – and if so, what considerations should be included?

The Association recommends that the IRO retain the present terminology which is useful and concise.

Question 34. Is the approach of generally not requiring pre-approval for identified categories of disbursements appropriate; and have these categories been appropriately identified? If not, why is the current approach inappropriate and what would be a preferable method?

The Association is of the opinion that the present approach is sensible, although notes that, as discussed in its answer to Question 23 above, it would prefer to see the permitted Stage 1 disbursements to include fees for reports from important treating medical practitioners if the matter has some complexities.

The Association has also noticed that some solicitors do not realise what is permitted once they have secured Stage 2 funding, and suggests that the IRO could remind them of this in some suitable ways.

Question 35. Are the current arrangements to enable the use by Approved Lawyers of MRP services fair, efficient and effective – and how might the value of these services be maximised?

The Association is of the view that the current arrangements are appropriate, but notes that solicitors involved in the Scheme are far better positioned to comment on this issue.

Question 36. Are there any changes to the arrangements which would improve their operation from an MRP perspective?

The Association does not deal with medical report providers so cannot comment on this point.

Question 37. Where Approved Lawyers do not use approved MRP services, are any changes to the Guidelines required to ensure workers they represent have equal access to medical reports and other evidence? If so, what changes should be made?

The Association believes that the current arrangements are satisfactory given that the main practical problem observed by the Association, being the difficulty of obtaining specific reports from some busy medical practitioners, is a problem beyond ILARS' control.

Question 38. Are the circumstances in which the IRO reimburses other disbursements appropriate?

The Association believes that the circumstances in which the IRO reimburses other disbursements seem to be appropriate, but notes that solicitors involved in the Scheme are better positioned to comment on this issue.

Question 39. Are there any other categories of disbursement which should be captured?

Please note the Association's answer to Question 32 above.

Although counsel's fees are identified as a separate disbursement type, the Association submits that they should be considered to be separate and discrete from the other disbursements, as they are representative of considerable work undertaken in the scheme by counsel, which contributes to positive outcomes for workers and the scheme.

By way of example, the IRO Performance Report of 1 July 2021 to 31 March 2022 recorded that 63% of ILARS payments were for "professional costs" (namely, legal professional costs of law firms), whilst

37% of ILARS payments were allocated to all disbursements for the same period. However, barristers' fees made up only a total of 5.21% of the total ILARS payments over this period.

The statistics for the period suggested that at least 48% of all matters recorded as "resolved" in the Commission (including straight referrals to Medical Assessment) involved counsel, whether during the conciliation or the hearing stage. It is noted that this figure would be higher in matters where counsel was briefed during the first telephone conference.

The value, and in turn the cost, of the involvement of counsel in resolution outcomes is not clearly demonstrated in the empirical reporting by both ILARS and the PIC. Counsel is involved in almost half of the resolution of all matters, but the overall cost is just over 5%.

Question 40. What is the best way to determine disbursement amounts for medical evidence?

The Association believes that realistic scheduled fees and rates are the best way to determine disbursement amounts for medical evidence.

Question 41. Are the current arrangements for funding interpreters appropriate? If not, how could they be improved.

Solicitors involved in the Scheme are better positioned to comment on this question. However, the Association's members have noticed a reluctance on the part of some solicitors to engage interpreters for the taking of statements. The reasons for this are not clear. It may be that some solicitors are not aware that interpreter fees are payable as a Stage 1 disbursement, in which case the IRO could suitably remind them of this.

5.10 ILARS Grants – Early Solutions for Disputes

Questions 43-44. What are the current barriers or challenges to utilising early solutions? What other circumstances, beyond those where there is NRTC prior to granting Stage 3 funding, may be appropriate for the early solutions program?

The Association is not in a position to comment on these questions.

5.11 Reviews of Funding Decisions

Question 45. Are current arrangements to review funding decisions adequate – and if not, what other arrangements should be considered?

The Association considers that the described process for review of funding decisions seems appropriate. However, the appeal-related decisions are preventing some important questions of law being canvassed on appeal and, as noted in the answers provided to Question 30 and Question 31 above, the Association believes that the Scheme, and hence workers, may benefit from some relaxation of the necessarily subjective thresholds being applied.

Question 46. Should the IRO publish reviews of funding decisions, and/or provide more regular guidance on the application of the Guidelines? If not, what other arrangements should be considered, if any?

There would likely be some utility in the IRO publishing certain decisions which conveniently set out the types of practical matters considered. This would provide helpful guidance for subsequent applications.

Conclusion

The Association thanks you in advance for considering this submission. Should you wish to discuss or may we be of further assistance, please do not hesitate to contact Policy Lawyer, Lucy-Ann Kelley at lkelley@nswbar.asn.au.

Yours sincerely,

Gabrielle Bashir SC

President