



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Dear Mr Cohen

### **ILARS Review**

Thank you for the opportunity to make a submission to the Independent Review Office's (IRO) Independent Legal Assistance and Review Service (ILARS) Review. The Law Society's Injury Compensation Committee has contributed to this submission. We are also grateful to representatives from a number of law firms (both those with experience as Approved Lawyers acting for injured workers and those representing respondent insurers) for sharing their experiences about the ILARS with us.

The establishment of the ILARS in 2012 represented a landmark development for personal injury law in NSW. The ILARS has assisted injured workers in gaining independent advice to have their claims investigated and professionally represented. Further, from the perspective of injury compensation lawyers who represent injured workers, the ILARS scheme is far preferable to the "no win, no fee" approach broadly used prior to 2012, which involved law firms assuming substantial risk and overheads to run matters on a speculative basis.

As not all of the questions posed in the Issues Paper are relevant to the solicitor arm of the legal profession, we have chosen to broadly address the issues identified under the headings at 5.1 to 5.11 as follows.

#### **5.1 Overall Operation of the ILARS Scheme and the ILARS Guidelines**

The purpose of the ILARS is to provide funding for legal and associated costs for workers under the Workers Compensation Acts seeking advice regarding decisions of insurers for those Acts and to provide assistance in finding solutions for disputes between workers and insurers.<sup>1</sup>

The Law Society is of the view that the ILARS contributes positively to the objects of the workers compensation system in the way in which it sets fees for professional costs and disbursements. As a whole, we consider that the ILARS Guidelines (**Guidelines**) effectively

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<sup>1</sup> *Personal Injury Commission Act 2020* (NSW), Sch 5, cl 9(2).

balance the rights of injured workers (including the rights to access to justice and to the fair, quick and cost-effective resolution of disputes), fairness to Approved Lawyers, financial prudence and the efficient operation of the claims and dispute mechanisms in the workers compensation scheme.

We consider that the Guidelines, particularly as they pertain to the allocation and amount of funding for legal and associated costs under the ILARS, should be reviewed approximately every three years, to ensure that the right types of legal work are being funded, and that the approach to determining professional fees is appropriate and fair, in light of any legislative changes to the workers compensation scheme. It may also be timely to review the Guidelines when significant changes are made to the dispute resolution mechanisms or to rights and benefits.

In our view, it is important that despite the increased caseload experienced by the ILARS in FY2020-21, the ILARS should not become a “legal aid” style scheme, namely one that is means-tested and that relies on government solicitors or rates. We consider that a scheme that engages expert and experienced lawyers in private practice at reasonable commercial rates leads to optimal outcomes for both workers and insurers.

## **5.2 Approved lawyers**

The Law Society considers that it is important that Approved Lawyers under the ILARS scheme have competence, diligence, and knowledge, skill and familiarity with NSW compensation law and practice.

We note that the IRO reviews the allocation of grants annually and may remove an Approved Lawyer from the list if they have not applied for an ILARS grant in the previous twelve months. In light of the complexities and legislative changes that frequently occur in the workers compensation statutory benefits area, we consider the requirement of one ILARS grant per year to remain on the list may be too low. We suggest that consideration be given to requiring Approved Lawyers to apply for two or more ILARS grants in the previous 12 months in order to remain on the list. Furthermore, consideration should be given to requiring those on the list to undertake professional development in NSW compensation law and practice annually to ensure the highest quality of advice and service.

We understand that restricted approvals are of benefit to workers in rural or regional areas who may wish to use a local lawyer, or workers for whom English is not their first language. We agree with the current approach where restricted approval arrangements may apply to ensure that the injured worker receives competent and professional advice.

We consider that the prerequisite that an Approved Lawyer have 12 months experience may have the unforeseen effect of preventing newly admitted lawyers who have transitioned from law clerk, paralegal or secretarial positions with demonstrated experience in the field of personal injury law from continuing to take up professional service. This could be managed by a system of probationary approval.

## **5.3 IRO’s role in supervising the conduct and services of Approved Lawyers and Approved Barristers**

We understand that the IRO does not deal with complaints about the competence or professional conduct of lawyers. However, in the experience of our members, when an issue about service of an Approved Lawyer is raised, the Principal Lawyer at IRO who is managing the grant will sometimes contact the partner of the firm where the Approved Lawyer works to discuss the issue (which may become a complaint) and ways it may be resolved.

We consider that this approach of informally addressing what is a service issue should remain. For example, it may be the simple case of an Approved Lawyer needing to communicate more frequently or in a clearer manner with the client. Often an informal discussion on such an issue

(as opposed to a formal investigative process) yields far better results for both the lawyer and the client.

We understand that the IRO keeps detailed statistics on all ILARS grants. We consider that one example where the IRO should begin informal discussions with the law firm of the Approved Lawyer is where an Application to Resolve a Dispute is discontinued on multiple occasions, or if multiple grants have not been closed for an extensive period. If such a pattern emerges, it would be helpful for the IRO to make enquiries and provide coaching to the Approved Lawyer/firm involved.

On the other hand, we consider that the IRO should refer complaints about the competence or professional conduct of lawyers to the Office of the Legal Services Commissioner (**OLSC**) as provided for in the *Legal Profession Uniform Law* (NSW). It is certainly appropriate for IRO to provide information about the OLSC to those clients who express concerns about the conduct of their Approved Lawyer so that these matters are dealt with through the appropriate channels. It is preferable that a discussion with the Approved Lawyer, the subject of such a referral, be formally notified by IRO before the referral takes place.

In a similar way, Approved Lawyers should be able to raise issues concerning the conduct of ILARS Principal Lawyers with the IRO, with a view to informally resolving issues.

#### **5.4 Other issues – approved lawyers**

The Law Society does not agree that the IRO should adopt a practice of recommending particular Approved Lawyers to an injured worker. There is no clear basis upon which such recommendations could be made, and such an approach may infringe competition principles.

Nevertheless, we do note that there are some matters, for example death benefit claims or commutations, where a higher level of experience and expertise is required from the lawyer representing the claimant. In those circumstances, it may be useful for the IRO to keep a list of solicitors who are able to represent clients in those types of matters. It could, for example, check that the Approved Lawyer in a death benefit claim has self-nominated with IRO as having experience in acting in that area, or be an accredited specialist with the Law Society.

#### **5.5 ILARS Grants – Funding Structure**

Overall, the Law Society considers that ILARS funds the right type of legal work and claims. However, consideration should be given to funding threshold disputes regardless of whether the threshold is for statutory benefits (for example, commutation, impairment lump sum) or work injury damages purposes.

The Law Society considers that significant problems arise where there are multiple applications for funding for the same injured worker. ILARS Approved Lawyers have cited examples of circumstances in which they have provided a Stage 1 advice to an injured worker, only to later find out that their client has previously obtained a Stage 1 advice from another Approved Lawyer who has received payment of the ILARS grant of \$800.

We consider that it is important for Approved Lawyers to be able to verify whether a worker has received advice in the previous six months about the same issue, and to learn from whom that advice has been obtained, in order to prevent unnecessary duplication of work. It is in the interests of justice and the sustainability of the ILARS scheme to provide such disclosure, to ensure that workers are not encouraged to 'lawyer shop', noting that such disclosure must satisfy applicable privacy principles and the protection of legal professional privilege.

While we generally consider the threshold tests applied at each stage of funding to be appropriate, there are sometimes difficulties caused by the need to obtain medical evidence in order to allow the IRO to make the assessment on the merits of the case. We also consider it is important that the ILARS Principal Lawyers dealing with the grants are further trained to

ensure consistency of approach, taking into account that it is not their role to determine the ultimate merits of any application.

We note that the Funding Guidelines provide that funding will not be granted to commence proceedings in the Personal Injury Commission (**PIC**) if the amount in dispute is less than \$3000, except in certain circumstances. We consider this to be an amount which strikes an appropriate balance. We note the IRO has discretion to allow cases that fall below this amount, thereby preventing unfairness to certain claimants.

## 5.6 ILARS Grants – Funding Amounts

The Law Society considers that the IRO should periodically review the professional fees it pays against external benchmarks. It is important that Approved Lawyers are paid at competitive rates for their work. We consider there should be the implementation of an annual CPI increase to the Professional Fees to align with the increases made by SIRA to Fees Orders under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW).

One issue raised by ILARS Approved Lawyers relates to the threshold for professional fees for Stage 1 work in the amount of \$800. Often the work at this stage can be time consuming and in excess of the \$800 threshold. For example, the lack of experience of some junior case managers in the insurance industry means that injured workers are being provided with erroneous advice without a statutory basis. It is therefore incumbent upon the Approved Lawyer to correct the advice provided by the insurer and, in some cases, to prepare an extensive written submission to the Solutions Team which sets out a chronology of what has occurred. It is clearly in the interests of the injured worker and the workers compensation system as a whole that such advice is provided at this early stage rather than the matter proceeding to the PIC or otherwise. However, we suggest there needs to be an appropriate increase in these circumstances to ensure that Approved Lawyers are properly remunerated for their work.

We agree with the proposal that Approved Barrister's fees should be allowed as a fee separate to the Approved Lawyer's fees. In this context, we note that the Law Society has previously argued for Barristers' fees to be a separate disbursement since the advent in 2006 of Schedule 6 to what is now the *Workers Compensation Regulation 2016* (NSW).

One area of concern for some plaintiff lawyers has been the fact that the ILARS will generally not fund an independent medical assessment for a worker once an insurer has served an assessment indicating Whole Person Impairment (**WPI**) does not exceed 20% for the purposes of section 39 of the *Workers Compensation Act 1987* (NSW). In those circumstances, the injured worker's lawyer is required to make a submission that an independent medical assessment is warranted. It is concerning that lawyers are required to make submissions to ILARS on what is essentially a medical opinion and provide advice in light of the purpose of funding stated in the *Personal Injury Commission Act 2020* (NSW).<sup>2</sup> While Approved Lawyers must have a working knowledge of the permanent impairment Guides<sup>3</sup> in order to competently practice in this area of law, they are not medically qualified nor experienced in making assessments. To deprive workers of an assessment in circumstances where their entitlement to weekly payments and subsequent medical and treatment expenses will end is contrary to the purpose of ILARS and, in some circumstances, may amount to a denial of access to justice.

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<sup>2</sup> Ibid.

<sup>3</sup> Including the NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, 4th edition, reissued 1 March 2021 and both the AMA4 (for select body systems) and AMA5 Guides to the Evaluation of Permanent Impairment.

## **5.7 ILARS Grants – Discretion**

We understand that in the experience of the ILARS Approved Lawyers, approvals of complexity increases are relatively rare. The requirements to establish a complexity approval are time consuming and often subject to delay.

In our view, there are circumstances where increases should be considered as a matter of course. For example, matters involving psychiatric injuries sometimes have upwards of 20 separate events. These matters are clearly more complex than a simple physical injury and, as a consequence, are more time-consuming and costly to prepare. There is also the additional time required for communicating with injured workers that often have complex mental health needs. In our view, there should be a presumption in favour of a complexity uplift or, as an alternative, an elevated rate for such matters.

Further examples of matters with particular complexity are where the employer is uninsured or there are multiple insurers. Death benefit claims involve the important but often time-consuming steps in *Procedural Direction WC1 – Compensation payable on death* and often require application for an increase in professional fees. Additionally, acting for clients that need an interpreter in these matters takes considerably more time and should be noted as an additional area of complexity.

The Law Society considers that while some level of discretion should remain with regard to permitted increases to professional fees, it is important that those making the decisions are given training to ensure consistency as much as possible.

## **5.8 ILARS Grants – Appeals**

### **5.8.1 Appeals/Reconsideration applications before the PIC**

The Law Society considers that the Guidelines operate relatively well in relation to appeals before the PIC.

### **5.8.2 Court appeals/administrative reviews**

The Law Society considers that the Guidelines relating to Court appeals should be revised. Approved Lawyers report that they are receiving lower fees (including Counsel's fees) in circumstances where reasonable costs in the jurisdiction are well above the rates considered by IRO/ILARS as appropriate.

The Law Society is aware that some member Approved Lawyers were consulted about potential changes to these settings by IRO (as WIRO) in mid-2020. Some of the principles from that consultation were supported by the Law Society are set out below:

- As the Supreme Court and Court of Appeal are costs jurisdictions, workers should not be prevented from seeking a costs order (to be paid by the insurer) in the event of their success.
- Where a worker is successful in the Court, the unsuccessful party (ie the insurer) should be responsible for the payment of the worker's lawyer's costs where an order for costs is made by the Court. In those circumstances, that responsibility should not default (as it does in the current funding settings) to payment by ILARS out of the Workers Compensation Operational Fund.
- Where a worker is successful in the Court, but the Court declines to make an order for costs against the unsuccessful party, ILARS should pay the worker's costs at commercial rates.
- Where a worker is a respondent to an appeal, ILARS should continue to provide funding and, where the worker is the successful party, and an order for costs is made by the Court,

the unsuccessful party should be responsible for the payment of the worker's lawyer's costs.

- Where a worker is a respondent to an appeal, ILARS should continue to provide unconditional funding and where the worker is the unsuccessful party, ILARS should be responsible for the payment of the worker's lawyer's costs.
- Approved Lawyers should be relieved of the current Guideline requirements:
  - to use their best endeavours to seek an undertaking from the insurer that neither party will seek to enforce a costs order made by the Court, or alternatively that both parties will seek an order that "each party is to bear its own costs";
  - to establish reasonable prospects of success to the satisfaction of ILARS before funding is approved;
  - to provide ILARS with a copy of their costs agreement and a copy of any retained barrister's fee agreement; and
  - to negotiate fees with ILARS in the event of a funded appeal where either the worker is successful but no order for costs has been made, or an unsuccessful respondent to an appeal.

We note that lawyers are already required to certify that there are reasonable grounds for believing that the appeal has reasonable prospects of success.

The experience of our members is that it has become very difficult to obtain the undertaking from insurers, particularly self-insurers. As a consequence, many lawyers opt not to seek funding and instead run the appeal on a speculative basis. Where the worker is successful, and a costs order is obtained in their favour, our members report that insurers generally meet their costs as claimed.

We understand that there have been disagreements between the IRO and Approved Lawyers on the rates payable to solicitors and barristers in Court appeals. We therefore suggest that ILARS set a fixed rate/scale for appeals (including Counsel's fees by agreement with the Bar Association) at commercial rates (for example, the Federal Court scale) to ensure a consistent and fair approach. This would alleviate the requirement to provide a copy of the costs agreement.

## **5.9 ILARS Grants – Disbursements**

While we consider the 'reasonably necessary' test for funding disbursements appropriate, we note that there can be rather large disparities between what is deemed reasonably necessary by different ILARS Principal Lawyers and ILARS Managers. In addition, there is significant disparity between Principal Lawyers and Managers in the approval of multiple medico-legal reports for a single worker. It is important that approval for disbursements should be granted in accordance with the general purposes of the regime, namely to ensure the system operates efficiently and in a fair way to injured workers.

The process whereby Approved Lawyers are permitted to retain medico-legal report experts through the Medical Report Provider (**MRP**) relieves law firms from having to arrange overdraft facilities and facilitates quick and easy progression of a worker's claim. This is a significant benefit to workers towards resolution of their claims and disputes, and not an arrangement that the Law Society seeks to substantially change, let alone remove. However, we consider there could be greater transparency around the MRP arrangements, in particular arrangements that allow for a fee for service in addition to regulated fees permitted under the SIRA Fees Orders.

## 5.10 ILARS Grants – Early Solutions for Disputes

The Law Society notes from the WIRO/IRO Annual Performance Reports that the vast majority of grant matters resolved (regardless of outcome) in a year do so without the intervention of the PIC or a court.<sup>4</sup> We regard Approved Lawyers as most appropriate to resolve their client's disputes and suggest there should be a limited role only for ILARS as interveners, dispute managers or mediators.

Thank you for the opportunity to make a submission. Questions at first instance may be directed to Sophie Bathurst, Policy Lawyer, at [sophie.bathurst@lawsociety.com.au](mailto:sophie.bathurst@lawsociety.com.au) or (02) 9926 0285.

Yours sincerely,



Joanne van der Plaat  
**President**

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<sup>4</sup> See for example IRO Performance Report 1 July 2021 to March 2022, available at <https://iro.nsw.gov.au/sites/default/files/IRO%20Performance%20Report%20July%202021%20to%20March%202022.pdf>