

Indexation Review: Independent Legal Assistance Review Service (ILARS)

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Report prepared for the NSW Independent Review Officer*

March 2024

* The review thanks the various stakeholders who have contributed to this work.

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Executive Summary

The Independent Review Officer accepted in principle the recommendation of the independent ILARS Review 2022 that the ILARS (professional legal) Fee Schedule be indexed to the 'CPI or another appropriate benchmark, with annual adjustments'. This review advises on the most appropriate index and on its implementation. The terms of reference for this report are set out in Attachment A.

This review focuses on choices of indexation benchmarks: matters concerning the current structure of ILARS fees are outside the terms of reference.

The term 'fairness to lawyers and to the system' and that the level of legal fees be 'reasonable' were important considerations in the 2022 Review. For the purpose of this review, they are interpreted as requiring ILARS legal fees be set and maintained over time at a level that:

- reflects the value of the work done by qualified, efficient and experienced legal practitioners (ie fair to lawyers);
- is efficient by providing a 'normal' market return to efficiently operated and capable suppliers of the ILARS legal services (ie reasonable for lawyers and the system)
- is adequate to attract and retain sufficient qualified, efficient and experienced legal practitioners to meet ILARS ongoing needs (ie reasonable and fair to the system).

It is important to note for the choice of benchmark index for indexation that these three elements imply maintaining ILARS legal fees compared with NSW *legal fees* in general. The general cost of living is not, generally speaking, the appropriate yardstick for this purpose.

Five possible benchmark ABS indexes are identified in Chapter 2: the Producer Price Index Australia Legal Services; the Consumer Price Index Sydney All Groups; the Consumer Price Index Sydney Insurance and Financial Services; the Wage Price Index NSW Private; and the Wage Price Index Australia Professional, Scientific and Technical Services. Examples of indexation of legal fees by comparator organisations show a tendency to use the Consumer Price Index and indicate circumstances where indexation may be suspended, including when the results of a specific price review are implemented. In some cases, the underpinning legislation does not provide any discretion to suspend indexation. The comparator authorities include the NSW State Insurance Regulatory Authority, the Victorian Transport Accident Commission and the Commonwealth Joint Costs Assessment Committee.

Chapter 3 sets out and applies criteria for choosing the most relevant benchmark index. It also examines the practical experience over the decade to the September quarter 2023 with the five indexes. The conclusions are the Producer Price Index Australia Legal Services is the most fit for purpose choice for indexing against NSW legal services prices, with the Consumer Price Index Sydney All Groups being a 'second best' alternative. There are significant differences in the inflation rates measured by the series, both over the decade and in the period since the introduction of the ILARS Guidelines in March 2021. During the latter period the general price level rose significantly more than Producer Prices Index Legal Services.

The consultation with stakeholders revealed significant differences between the lawyer groups on the one hand and SIRA and icare on the other. The lawyers generally supported indexation to maintain the competitiveness of the ILARS fee schedule, most commonly using CPI. The Australian Lawyers Alliance took a more nuanced approach to the choice indexation index, applying a similar logic to this review.

Drawing these elements together, this review makes three recommendations.

Recommendation 1: That the IRO:

- 1) *adopt the Australian Bureau of Statistics Producer Price Index Australia Legal Services (PPI Legal Services) for the purpose of making indexation adjustments to the ILARS fee schedule for professional legal services and counsel fees (disbursements)*
- 2) *make annual indexation adjustments as soon as conveniently possible after the June quarter of the year in which the adjustment is made, using the percentage increase in the PPI Legal Services calculated by the June quarter in that year relative to the June quarter in the preceding year*
- 3) *make no index adjustment in the year where any of the following circumstances occur:*
 - a) *changes have been made to the ILARS fee schedule for approved legal fees and counsel fees as a result of a review of those fees*
 - b) *the indexation calculation results in a negative number*
 - c) *there is an external crisis (eg public health) that is relevant to workers compensation.*

Recommendation 2: That, in implementing Recommendation 1, the IRO:

- 1) *adopt the indexation regime in 2024, with the first indexation adjustment being made as soon as conveniently possible after the publication of the June quarter 2024 PPI Australia Legal Services;*
- 2) *make no adjustment for 2021 in view of the introduction of the ILARS Guidelines in March 2021 and;*
- 3) ***either***
 - a) *catch up the movement in prices between 2022 and 2023 by making an adjustment of 6.1 per cent reflecting the increase in that index between the June quarter 2021 and the June quarter 2023 for obtained by applying the formula in Recommendation 1; or*
 - b) *incorporate consideration of the catch up adjustment in the terms of reference for the 2025 review of the ILARS Guidelines.*

If the IRO is not disposed to accept PPI Legal Services as the benchmark index, then the CPI Sydney All Groups is the best 'second best' alternative. The option of a catchup adjustment (Recommendation 2.3a) would consequently increase to 12.2 per cent.

The IRO's capacity to assess the adequacy of the ILARS legal fees (including indexation) would be assisted by having authoritative information on the fitness for purpose of the ILARS Approved Lawyer workforce. The current information contains major gaps in relevant information and is not held centrally in a convenient accessible form that can readily be interrogated.

Recommendation 3 *The review suggests the capacity of the IRO to monitor and assess the adequacy and sustainability of the Approved Lawyer workforce, including the adequacy of the IRO legal fees to attract and retain Approved Lawyers, would be increased by the IRO:*

- 1) *establishing what information it currently gathers and holds regarding the Approved Lawyer workforce and identify gaps in that information including (but not confined to)*
 - a) *numbers, type and experience of legal practitioners*
 - b) *the demographic profile including age, gender and skills*
 - c) *patterns of cases taken by Approved Lawyers and their outcomes*
 - d) *the numbers of workers compensation claims handled by each Approved Lawyer*
 - e) *the number and type of complaints about Approved Lawyers in the workforce.*
- 2) *collecting the necessary information and monitor and analyse trends in that workforce*
- 3) *using this additional information and insight to improve the operation of ILARS, including the effectiveness of indexation in assisting to maintain an adequate Approved Lawyer workforce.*

1. Introduction

This report provides advice to the NSW Independent Review Officer (IRO) on options for an appropriate benchmark or benchmarks against which to index the Grant Amounts in Part 6 of the Independent Legal Assistance Review Service (ILARS) Funding Guidelines – specifically the Professional Fees Schedule (6.3) and Disbursement – Counsel’s fees (6.4).

Recommendation 23 of the independent external ILARS Review 2022 proposed that the ILARS Fee Schedule be indexed to the ‘CPI or another appropriate benchmark, with annual adjustments’. The IRO accepted this recommendation in principle and also undertook to consult in 2023 with SIRA and other system stakeholders to determine an appropriate index for the fee schedule.

This indexation review began in late October 2023. Its terms of reference are in Attachment A. The scope is confined to matters relevant to indexation of the ILARS Guidelines Professional Fees Schedule and Disbursement – Counsel’s fees (hereafter referred to as ‘ILARS legal fees’).

1. ILARS and institutional context

The purpose of the ILARS is to provide funding for legal advice and representation for injured workers (claimants). It covers 60-70 per cent of NSW workers other than exempt workers and miners who are covered by other legal arrangements. The schedule of Professional Fees and Disbursements (Counsel fees) sets out fees for 27 approved selected legal services and counsel’s fees for 12 approved services. Funding approval is at the complete discretion of the IRO and is considered on a case-by-case basis.

ILARS was established in 2012. The current ILARS fee schedule came into effect on 1 March 2021.

Schedule 6 (statutory compensation) of the NSW Workers Compensation Regulation 2016 (hereafter ‘Schedule 6’) governs the costs available to lawyers acting for scheme agents/insurers and for those workers who are exempted from the 2012 amendments (including the establishment of ILARS) to workers compensation. Schedule 6 sets out, in four tables, maximum costs payable by SIRA to agents for eligible claimants or insurers for general resolution types costs payable (Table 1), the applicable rate for general resolution types (Table 2), special resolution types costs payable (Table 3) and additional legal services or factors (Table 4).

Schedule 6 legal fees have been increased twice since 2006: by 15 per cent in 2012 and by 10 per cent taking effect on 1 March 2021 when the Personal Injury Commission commenced.¹

The ILARS and Schedule 6 fee schedules are based on resolution events and resolution types at various points in the dispute resolution process, with the structures intended to incentivise early resolution of disputes. There are differences between the two fee schedules in terms of events, what is covered and the comparative quantum of allowable fees. Stakeholders consider ILARS legal fees provide higher levels of funding and also fund earlier involvement of counsel (barristers) than Schedule 6.

The Independent Review Officer administers ILARS. The NSW State Insurance Regulatory Authority (SIRA) regulates workers compensation insurance in addition to motor accidents compulsory third party insurance (CTP) and the home builders’ insurance scheme. It also administers the Workers Compensation Operating Fund, that, among other things, funds the IRO, including ILARS.

¹ Correspondence – ALA *Indexation of Legal Costs* 2 February 2024

icare provides workers compensation insurance to more than 329,000 private and public sector employers and their approximately 3.28 million employees.

The stakeholders consulted for this review comprise SIRA, icare, the NSW Workers' Compensation Self Insurer Association, plaintiff and respondent lawyers and their associations (the NSW Law Society, the Bar Association and the Australian Lawyers Alliance), Legal Aid, the IRO Approved Lawyer User Group and Unions NSW (whose member organisations supports injured workers).

2. 'Reasonable' and 'fairness to lawyers and the system'

The term 'fairness to lawyers and to the system' and the notion of the level of fees being 'reasonable' were important considerations in the 2022 ILARS review recommendations and to the IRO response.

'Reasonable' and 'fairness' are broad concepts. They need further definition.

This review interprets them to mean the ILARS legal fees need to be set and maintained over time at a level that:

- reflects the value of the work done by qualified, efficient and experienced legal practitioners (ie fair to lawyers);
- is efficient by providing a 'normal' market return to efficiently operated and capable suppliers of the ILARS legal services (ie reasonable for lawyers and the system)
- is adequate to attract and retain sufficient qualified, efficient and experienced legal practitioners to meet ILARS ongoing needs (ie reasonable and fair to the system).

It is important to note that these three elements imply maintaining ILARS legal fees compared with NSW *legal fees* in general. The general cost of living is not, generally speaking, the appropriate yardstick for this purpose. These and other matters are considered in Chapter 2.

Over time, ILARS legal fees may become dated and inefficient where either the overall schedule lags behind movements in prices elsewhere in the NSW legal services sector (and the economy generally) and/or administered price relativities within the schedule are, or become, anomalous. The consequences of the former include legal work covered by the Fees Schedule becoming less financially attractive for a legal practitioner/legal practice to supply, compared with supplying other legal services. Anomalies within the schedule may mean some services within the ILARS legal fees are less remunerative than others in terms of the work required, potentially leading those services being under supplied or actions being taken to bypass the inefficient prices.

Keeping ILARS legal fees current requires both *periodic structural reviews* of fee relativities within the Fees Schedule to ensure the price structure properly reflects the relative values of the services provided (ie address anomalies amongst other considerations) and *annual adjustments between structural reviews* to reflect the general movement of the prices of legal services in NSW (ie indexation).

On the former, this review expects a structural review of ILARS legal fees will be part of the foreshadowed 'root and branch' review of the ILARS Guidelines in 2025. The existing ILARS Guidelines and ILARS legal fees took effect in March 2021.

On the latter, an appropriate system of annual indexation adjustments ought to have a generally neutral impact on the relative attractiveness of supplying workers compensation legal services compared with other legal services that a legal practitioner might choose to supply.

This approach was tested with stakeholders who broadly agreed with the logic and provided a range of views about the appropriate choice of index. A variety of views about the adequacy and sustainability of the current ILARS Approved Lawyer workforce was offered, largely based on judgements and personal experience in the absence of much relevant factual data.

An indexation system for ILARS legal fees also ought to include the period since March 2021 to the present and establish the basis for annual indexation adjustments until the next structural review (presumably in 2025). The relationship between indexation and the timing of periodic structural reviews of legal fees is important, especially in implementing an indexation system and is considered in Chapter 5 below.

This review notes its terms of reference necessarily confine the focus to the ILARS Guidelines. While Schedule 6 legal fees are relevant to considering the possible impacts of an indexation system for ILARS legal fees, Schedule 6 itself is outside this review's terms of reference.

3. Structure of the report

The report is structured as follows:

- Chapter 2 examines a range of possible index options. It addresses the purpose of the proposed indexation and reports on the use of benchmarks by other agencies and systems to index comparable legal cost schedules.
- Chapter 3 sets out criteria with which to assess the possible index options, having regard to the defined terms 'reasonable' and 'fairness to lawyers and the system'. The chapter then assesses the options against those criteria, followed by an empirical assessment based on experience over the past decade. It sets out the conclusions of these assessments.
- Chapter 4 reports the results of consultation with selected key stakeholders regarding indexation options and assessment criteria.
- Chapter 5 synthesises the conclusions in the preceding chapters to provide a recommended option for indexing the Professional Fees Schedule and Disbursement – Counsel's fees. It also makes recommendations on: the implementation of the option, including frequency of adjustments and any appropriate discretion to override indexation when exceptional circumstances dictate; and on gathering additional information on the ILARS Approved Lawyer workforce to assist with the indexation system.

2. Possible index options

This chapter sets a range of indexation options. It identifies and examines the use of benchmarks to index other comparable legal cost schedules. It concludes with five possible indexes for further consideration.

The purpose is central to any system of indexation.

Following Chapter 1, the purpose of the proposed indexation of the ILARS legal fees is taken to be *to maintain those fees at a level that is reasonable and fair to lawyers and to the system*. This primary purpose translates to broadly maintaining the position of the ILARS Fees Schedule and Counsel fees (disbursement) in the overall prices of legal services in NSW.

Indexation of this character is intended to have a neutral impact, over time and between structural reviews of ILARS legal fees, on the incentives for legal practitioners to supply the ILARS legal services compared with supplying other legal services.

For such a purpose the most appropriate price index is an index of *prices* of legal services in NSW. Other (non-legal) goods and services prices are generally not relevant, except to the extent they are used in the production of legal services (and even then, they will be reflected in the prices of legal services). Examples of goods and services that might be incorporated into the prices of legal services include insurance, rent, information technology and so on.

In some circumstances an index based on the *costs* of providing legal services, which would include both standard and bespoke services, may be appropriate. Where the costs are predominantly labour, an appropriate wage index may be considered.

1. Available official indexes

The search for appropriate indexes has been confined to published series compiled by the Australian Bureau of Statistics (ABS). This reflects the considerations that:

- The ABS is Australia official national statistical agency and enjoys a national and international reputation for the excellence of its work in collecting, assembling and disseminating Australian economic and social statistics.
- The series are compiled using high quality, transparent methodology, the collection cycle enables annual measurements and they are published shortly after being compiled.
- ABS price and wage indexes are, and have been, used relatively widely for indexation purposes including for allowable fees and cost of living adjustments.
- There is no conflict of interest between the role of the ABS and the ILARS indexation purpose in this review.

The review was unable to locate any appropriate published indexes from other bodies that might be considered for this review.

There are three ABS series that are most relevant to indexation of ILARS legal fees. They are:

- The Consumer Price Index (CPI), which also includes a sub-index that incorporates some legal services within a group of other financial services
- The Producer Price Index (PPI), which includes a sub-index for prices of legal services in Australia
- The Wage Price Index (WPI), which has a sub-index that incorporates legal services within a broader group of professional, scientific and technical services.

These series are described below.

Consumer Price Index

The CPI All Groups is regarded as Australia's key measure of inflation. It is a broad measure of directly measured consumer prices in a basket of goods and services for Australian households. The basket includes a wide range of goods and services purchased by Australian metropolitan households. As such, it is an important tool for measuring changes in the cost of living experienced by households and the economy more broadly. It is published quarterly, four to five weeks after the reference quarter.

The suite of CPI indexes includes a range of measures for states and territories, including the CPI (Sydney All Groups). This is the broad measure of household prices for Sydney and therefore NSW. The CPI is revised only in exceptional circumstances, such as to correct a significant error². The CPI may be impacted when government policies are introduced that affect the prices faced by consumers. Examples of this include the introduction of the Goods and Services Tax and child care subsidies as temporary COVID measures.

The CPI suite includes CPI (Sydney Other Financial Services) which includes fees charged by stockbrokers and real estate agents, taxes on transfers for real estate fees for accounting and fees for legal services. This series is published from the June quarter 2005. Other Financial Services is the only part of the CPI that measures fees for selected legal services. It accounted for 4.02 per cent of the CPI index in the September quarter 2017.³

The CPI is used by Australian governments and the private sector for a variety of purposes including:

- As a short-term indicator of inflationary trends and the cost of living
- For indexation in legal contracts
- For adjusting fee schedules.

The ABS also publishes a monthly CPI indicator which provides a near contemporary general measure of prices of goods and services purchased by Australian metropolitan households. This series is routinely subject to revision and accordingly is not considered an option for the present purpose.

The CPI (Sydney All Groups) and the CPI (Sydney Other Financial Services) are possible options for indexation of the ILARS legal fees.

Producer Price Index

The PPI measures the price of products as they leave the place of production or enter the production process. The ABS publishes quarterly PPIs for final demand and for selected manufacturing, construction, mining and service industries and sub-sectors, four to five weeks after the end of the reference quarter. Index numbers are released as final figures at the time they are first published. Once published, PPIs are revised infrequently, sometimes to incorporate improved methods in one or more of the components and occasionally to correct an error⁴.

² ABS, *Use of Price Indexes in Contracts*, released 6/06/2022.

³ Other financial fees comprise commissions or fees charged by stockbrokers and real estate agents; taxes on transfers for real estate; fees for real estate; *fees for legal services*; and fees for accounting services. The legal services are not specified. (Source: ABS, *A Guide to the Consumer Price Index: 17th Series methodology*, 2017)

⁴ ABS, *Use of Price Indexes in Contracts*, released 6/06/2022.

The ABS notes the main sources of ongoing price data are samples of business establishments, using precisely specified products and services as far as possible. The reported prices are actual market transaction prices, meaning they reflect the actual prices received or paid after taking into account all discounts applied to the transactions. Where specification pricing is not possible, such as when services are unique and not reproduced over time, other methods need to be used including “model pricing, unit values for reasonably homogeneous components of a product, input pricing and collecting charge out rates (eg for a legal service)”.⁵

The PPI suite includes the PPI Australia, Legal Services (henceforth PPI legal services), which began in the December quarter 2004. This index covers entities in Australia mainly engaged in providing legal representation and advice and the preparation of legal documents and entities mainly engaged in establishing the legal ownership of a property such as title-searching services. The PPI legal services index is for Australia as a whole – there are no counterpart series for states and territories. The primary activities included are:

- Advocate service
- Barrister service
- Conveyancing service
- Legal aid service
- Legal service
- Notary service
- Patent attorney service
- Solicitor service
- Title-searching service.

Producer Price Indexes are used by the Australian government and private sector for a variety of purposes:

- As deflators in the Australian National Accounts
- As a short-term indicator of inflationary trends
- For indexation in legal contracts in both the public and private sectors
- To inform business and government policy decisions by international organisations such as the OECD and the IMF for economic monitoring and comparison.

The PPI legal services Australia is an option for indexing the ILARS legal fee schedule. It is unique among the available indexes in focusing solely on legal services. Given that, the PPI Australia is not considered further in this review.

Wage Price Index

The WPI broadly measures changes in the wages paid by Australian businesses to their employees and the WPI suite includes many measures. It is published quarterly about six to seven weeks after the end of the reference quarter. The headline series measures total hourly rates of pay excluding bonuses and is published in original, seasonally adjusted and trend terms. The original data series is not revised in normal circumstances.⁶

⁵ ABS, *Producer Price Indexes, Australia methodology*, released 2/02/2024

⁶ ABS, *Use of Price Indexes in Contracts*, released 6/06/2022.

There are WPI series for Australia and the states and territories for the public and private sectors and WPI series for Australia by industry and public and private sector.⁷ The WPI suite also includes WPI by industry for Australia (not states and territories), including for professional, scientific and technical services which includes the legal services industry.

The WPI original series are not adjusted in normal circumstances.

The WPI NSW private sector and the WPI Australia professional, scientific and technical services are possible options for indexing the ILARS legal fee schedule.

2. Benchmarks used by other public authorities to index comparable legal cost schedules

Prices or wages

Price indexes and wage indexes are used by public authorities in various contexts. The choice depends on the purpose of indexation and tempered by the practicalities of data availability.

As a rule, where the purpose is to measure the level of, and changes in, the prices of goods and/or services, it is appropriate to use a *price* index. Moreover, the price measure should bear as close relation as possible to the specific goods or services to be indexed.

On the other hand, where the purpose is to measure wage movements or to index costs in which wages are a dominant component or to maintain wage relativities for industrial relations purposes, a wage index is appropriate.

But using wages as a proxy for movements in final prices can be misleading, especially where competitive markets drive productivity and efficiency, meaning that that price inflation will be generally lower than wage inflation. Using a wage index to index prices in such circumstances would raise the indexed prices relative to prices in general.

Several instances of indexation of allowable legal costs by public sector authorities in NSW and elsewhere in Australia, including:

- The *NSW State Insurance Regulatory Authority (SIRA)* oversees the NSW transport accidents Compulsory Third Party system (CTP), which is regulated by the NSW Motor Accident Injuries Act 2017 and the Motor Accidents Injuries Regulation 2017. The Act limits the matters for which an Australian legal practitioner is entitled to be paid or recover for a legal service in relation to CTP claims. Part 6 of the Regulation and Schedule 1 Maximum Costs for Legal Services to the Regulation provides, among other things for the maximum legal costs in respect of CTP claims. They govern the legal fees that can be charged in connection with legal work performed and do not prohibit the provision nor pro-bono arrangements. The maximum legal costs are specified in monetary units and since 1 October 2018 have been indexed each year in line with inflation. The adjustment uses the percentage increase in the CPI (Sydney) over the year to the June quarter in the year in which the adjustment is made⁸.

⁷ The WPI also includes a series for the healthcare and social services sector (Australia) which is used to index the costs of some medical and health care services in the NSW workers compensation system (see below).

⁸ As soon as practicable after the CPI for the June quarter is published by the Australian Statistician, the authority (SIRA) is required, inter alia, to give public notice on an appropriate government website of the actual amounts of the maximum costs and fees applying in each adjustment year and similarly notify the Parliamentary Counsel so notice can be published on the NSW legislation website. Apparently there is no discretion to set aside indexation adjustments in exceptional circumstances.

For example, allowable legal costs were increased from 1 October 2023 by 6.6 per cent, which was the increase in the CPI (Sydney) over the year to the June quarter 2023.

- The *Victorian Transport Accident Commission (VTAC)* uses the CPI (Melbourne All Groups) to adjust legal fees for Impairment Protocols, No Fault Dispute Protocols and Common Law Protocols. Adjustment is made from 1 January based on the percentage increase in the indexation over the year to the December quarter two years prior and has been applied annually since at least 1 January 2013. For example, Protocol Legal Costs were increased from 1 January 2023 by reference to an increase in the CPI of 2.53 per cent. This increase was identical to the percentage increase in the CPI (Melbourne) over the year to the December quarter 2021. There have been no variations from this approach over the past decade. Counsel's fees are allowable as disbursements in Common Law matters that are conducted in accordance with the TAC protocols and supplementary protocols are also adjusted annually, although the increases do not appear to reflect the CPI movements that are applied to legal fees.
- In the Commonwealth jurisdiction the Joint Costs Advisory Committee makes annual recommendations on the quantum of costs allowable to legal practitioners pursuant to the scales of costs contained in the rules of the High Court of Australia, Federal Court of Australia and the combined Federal Circuit and Family Court of Australia adjust legal costs. The Federal Costs Advisory Committee Formula is part of this process. The formula is a method for calculating a change, rather than an index as such although it uses ABS indexes⁹. It is an example of price modelling where assumptions are made about costs drivers and their contribution to prices. While the quantum resulting from JCAC's formula is one element that guides its recommendations, the JCAC is not obliged to adopt it.
- The *NSW Attorney General's rate for Legal Representation* which are rates payable for to legal representatives (Solicitors, Junior and Senior Counsel) engaged by and on behalf of government departments and agencies. Since at least 2019/20 a common percentage adjustment has been made to all three categories of legal representatives. NSW agencies can negotiate lower rates where appropriate having regard to the matter, the experience of the practitioner/counsel and the need to keep legal costs to government reasonable. These rates include all overheads, secretarial, legal and administrative assistance but not out-of-pocket disbursements and are GST exclusive. They do not apply to services provided by firms engaged under the NSW Government Legal Services Panel.

This review notes that the legal costs payable provided in Schedule 6 have been adjusted twice since they were first set in 2006. The first adjustment, of 15 per cent, was made in 2012; the second, of 10 per cent, took effect on 1 March 2021.¹⁰ In both cases there was no change in the structure of allowable costs: the adjustments had the character of flat adjustments to account for increased costs. The first adjustment of Schedule 6 was similar to the increase in the CPI Sydney which rose by 15.5 per cent between the June quarter 2006 and the June quarter 2012. The later adjustment was less than inflation, with the CPI Sydney increasing by 17.9 per cent between the June quarter 2012 and the March quarter 2021 and the PPI legal services rising by 36.5 per cent over the same period.

⁹ The formula for the change is a weighted average of the percentage changes in the national Wage Price Index and the Consumer Price Index. The weight for the WPI is the sum of the shares in total revenue of: the sum of wages and salaries (31 per cent) and partners' salaries and profit (30 per cent); and for the CPI is other overheads (39 per cent). The weights are based on a 2008 survey by the ABS and have not been updated (*check source*).

¹⁰ Correspondence – ALA

Indexation of healthcare fees in workers compensation system

An example of indexation of allowable non-legal costs is the treatment of healthcare fees in the NSW workers compensation system as contained in the applicable Fee Orders which are set out by SIRA.¹¹ WPI Australia healthcare and social services (a component of WPI Australia) make annual adjustments to its Fee Orders for Allied health, independent assessors, private hospital and medical reports fees.¹² In the absence of an index of prices for these services, using the WPI is appropriate since the costs of these services are predominantly driven by the cost of the relevant labour.

A hybrid CPI/WPI index is used to adjust the fee order for private hospitals. In the absence of a directly measured index for the price of services provided by private hospitals this treatment reflects two key cost drivers for private hospitals – employee wages and hospitable consumables¹³.

Indexation does not always occur for healthcare fees in the workers compensation system. For example, there was no annual indexation applied to any of the fees orders on January 2021 due to the ongoing effects of COVID. In some cases the outcome of reviews of specific fees orders replaced and incorporated indexation in the years where the results of reviews were implemented.

One conclusion from all of the foregoing is that the CPI, WPI and components of the WPI are currently used for indexing a range of legal fees and non-legal fees in areas relevant to ILARS. The PPI legal services is not used as far as the review has been able to determine.

3. Index options to be assessed

Having regard to the previous material in this chapter, the following indexes are considered to be relevant options for the purpose of indexing the ILARS legal fee schedule:

- Producer Price Index Australia legal services
- Consumer Price Index Sydney all groups
- Consumer Price Index Sydney other financial services
- Wage Price Index NSW private all industries
- Wage Price Index Australia professional, scientific and technical services.

The Joint Costs Assessment Committee formula is also considered as a general reference.

¹¹ NSW State Insurance Regulatory Authority, *SIRA – Indexation of Healthcare Fees – Workers Compensation*

¹² For 2023 the adjustments (other than for private hospitals) took effect on 1 February 2023 using the WPI Australia, Healthcare and social services for the 12 months ending September 2022. Other Fee Orders are indexed differently, such as using the AMA fees list for medical practitioners.

¹³ The ALA considers “these fees are most analogous to legal costs and in fact are ‘controlled’ as a recoverable ‘disbursement’ by a lawyer under their ILARS Grant as referred to in the Guidelines. Medico-legal services have been subject to regular annual increase since at least 2001.” Correspondence – ALA *Indexation of Legal Costs* 2 February 2024.

3. Criteria for assessing indexation options

The review was tasked to identify criteria for assessing the options. The five index options specified at the end of Chapter 2 are the PPI legal services, CPI (Sydney all groups), CPI (Sydney other financial services), the WPI (NSW private sector all industries) and the WPI (Australia professional, scientific and technical services). The Joint Costs Assessment Committee formula is also relevant.

In its recommendation on indexation, the ILARS 2022 Review Committee stated “... other fee schedules, such as scales of costs, are indexed to ensure that the level of fees remains reasonable. The most common benchmark for indexation is CPI relevant to legal practices and the Review Committee recommends that the Guideline Fees be annually adjusted by reference to this benchmark or another appropriate benchmark, such as increases in SIRA fee orders.” All five indexes are consistent, to a greater or lesser extent, with this recommendation.

The chapter is organised into three sections. This first sets out criteria for assessing the options, drawing in part on ABS advice on the use of price indexes in contracts. The second section assesses the five indexes using these criteria other than the empirical properties and performance of the indexes which is the subject of the third section. This empirical assessment focuses on the decade to the September quarter 2023. The final section summarises the conclusions.

1. Assessment criteria

ABS advice on indexation

The Australian Bureau of Statistics identifies issues to be taken into account when incorporating indexation into legal arrangements¹⁴. They comprise, in brief:

- *Establish the base payment(s) subject to indexation.* This is the ILARS schedule for professional legal fees and counsel’s fees (disbursements).
- *Select an appropriate index (or indexes).* The index or indexes selected will affect the price change recorded and should be chosen carefully to best represent the item subject to indexation and the intention of the parties.
- *Clearly identify the selected index* and cite an appropriate source
- *State the frequency of price adjustment* of the base payments (ILARS schedule of legal fees and counsel’s fees (disbursements))
- *Provide for renamed, varied or discontinued price indexes*
- *Provide for potential revisions* to the price index data
- *Avoid locking indexes* used for indexation into any particular reference base period
- *Define the formula for the price adjustment* calculation
- *Allow for negative price movements.*

These issues are a useful starting point. Most are relevant to this review.

Two further considerations are the extent of discretion provided to government decision makers to depart from strict indexation, including when that may be appropriate, and consistency with approaches taken by comparable agencies.

Against that background, and the considerations of Chapter 2, the review adopts the following assessment criteria. The index needs the following properties:

- **Appropriate, incorporating:**

¹⁴ ABS, *Use of Price Indexes in Contracts*, released 6/06/2022

- Aligned with purpose
- High quality and reliability
- (Minimal) annual frequency and timeliness
- No or very infrequent revisions
- Clearly identified index and source
- Use for similar purpose by comparable public authorities, including circumstances justifying departure from indexation.
- Satisfactory empirical properties.

These criteria are explained below

The first assessment criterion is that the index be *appropriate*. The key technical criteria for selecting an appropriate index are:

- Aligned with purpose
- High quality and reliability
- Frequency and timeliness.

Aligned with purpose: the intent of indexation is to broadly maintain the position of the ILARS fees schedule in relation to the prices of legal services in NSW. Ideally, the index should be based on directly measuring the prices of an appropriate sample of legal services in NSW. Chapter 2 concluded the available choices are very limited, with only one direct measure (PPI legal services) being available although there are other high quality measures of the prices of a much broader basket of goods and services (CPI and PPI).

Two other ‘second best’ approaches may be available. The first is to use a broad measure of prices movements in general, such as the CPI or PPI. This approach would broadly maintain the ILARS legal fees in relation to economy wide prices, rather than prices of legal services. This approach inherently carries significant risks, such as overcompensating ILARS legal fees when the general price level grows much faster than the prices of legal services. The second is to construct a price model for legal prices based on the components of legal prices, which include wages, other costs and profits. This is a reasonable interpretation of the JCAC costs formula. The second approach, being a linear combination of its component indexes, contains all of their shortcomings.

Quality and reliability: this means the index should be constructed using appropriate methodology, consistently applied, to high professional standards. It also means the measure should, within the limits of the methodology, accurately reflect movements in the prices on which it focused and that it is rarely, if ever, revised. All the ABS series considered as options meet this test.

Frequency and timeliness: this means the index should be measured sufficiently often to meet the needs of indexation. In view of the recommendation of the independent ILARS Review 2022 for *annual* indexation, the minimum frequency is annual measurements. All the index options under consideration are measured quarterly and all are typically published within eight weeks of the reference period, with most of them being published sooner. All options meet this test.

Given these observations, alignment with purpose is the sole dimension of ‘appropriateness’ that distinguishes among the options.

2. Assessment against the criteria

The options are equivalent with respect to some of the criteria. All five options are compiled and published by the ABS, which identifies and explains each index and source. All five options may be

subject to revision in exceptional circumstances. (The same comments apply to the JCAC formula, noting it is a weighted average of percentage changes in the CPI and the WPI.)

The remainder of this section assesses each of the five indexes against the remaining criteria of alignment and use by other agencies, while section 3 addresses empirical performance.

Producer Price Index – Australia, Legal Services (PPI legal services)

Aligned with purpose: The PPI legal services measures prices of an Australian (including NSW) sample of legal services. This focus is appropriate for the purpose of maintaining the position of the ILARS fees schedule relative to the prices of legal services in NSW. The option’s shortcomings are that it is based on Australian data, rather than NSW data, and the legal services included in the sample may be insufficiently representative of the legal services sector.

On the former point, the review has no evidence to assess the impact of using an Australian rather than a strictly NSW sample. This review notes NSW constitutes a large share of legal services supplied in Australia based on the state’s share of registered solicitors, from which it may be assumed the NSW legal services sector a key driver of the prices of legal services for Australia as a whole¹⁵.

There are also precedents of using Australia data where state data are unavailable for indexation. For example, SIRA uses the WPI – Australia, Healthcare and social services to make annual adjustments to a range of medico-legal reports used in connection with a claim for compensation or work injury damages.

On the latter point, while the ABS’s definition of ‘legal services’ does not directly include some major areas of the law (such as Family Court matters), it includes areas that are directly relevant to services included in ILARS (such as barrister service and solicitor service). Chapter 2 provided additional detail.

PPI legal services is assessed as being aligned with the purpose of indexation of ILARS legal fees.

Use by other agencies: As far as this review could determine, PPI legal services has not been used for indexation purposes by any public authority that has a comparable role to the IRO.

Consumer Price Index - Sydney all groups (CPI Sydney)

Aligned with purpose: The CPI Sydney measures the prices of a broad basket of goods and services purchased by NSW households. It is primarily intended to measure the cost of living to household and, in the words of the ABS, it is regarded as “Australia’s key measure of inflation”.

As an index for ILARS, however, CPI Sydney has shortcomings. The chief problem is that it is dominated by goods and services that are unrelated to the prices of legal services¹⁶. Its broad focus means it would do a good job for indexation purposes if the task was to maintaining prices of legal services in relation to state-wide goods and services if used for indexation purposes. But that is not what is needed in the present case.

Movements in CPI Sydney can be due to factors and circumstances in sectors that are unrelated to the legal services sector and also to NSW. The legal services included in CPI Sydney are not

¹⁵ The *Urbis 2022 National Profile of Solicitors* prepared for the Law Society of NSW shows there were at October 2022 0,329 practising solicitors, of whom 42 per cent were registered in NSW, followed by 25 per cent in Victoria.

¹⁶ More than 96 per cent of the goods and services are not legal services.

representative of legal services supplied in NSW (see description of the series in the previous chapter). In addition, the series is subject to special events from government policies that impacts on particular price components such as the Australian government's COVID-era childcare measures in 2020 and the introduction of the GST in the 1990's.

Consequently, on the alignment criterion CPI Sydney is a second best option.

Use by other agencies: Its Australian and state counterparts are used by other public authorities comparable to IRO to index allowable fees for selected legal services. These authorities include the NSW SIRA (in relation to the CTP) and the Victorian TAC (which uses CPI Melbourne all groups), while CPI Australia is an element of the JCAC formula.

Consumer Price Index – Sydney, insurance and financial services (CPI Sydney insurance and finance)

Aligned with purpose: This CPI index includes legal services along with fees charged by stockbrokers and real estate agents, fees for accounting services and taxes. Fewer legal services are included in this index compared with the sample in PPI legal services and the other services in the sample have limited relevance to ILARS.

This index is a compromise between accepting a broad-based price index such as CPI Sydney and attempting to directly measure legal prices. It does neither role well. Consequently it is a second-best option that is inferior to CPI Sydney.

Use by other agencies: As far as the review could determine, this index is not used by any public authorities for indexation purposes.

Wage Price Index – NSW, Private all industries (WPI NSW private)

Aligned with purpose: WPI NSW private measures a broad range of wages and salaries across the private sector in NSW. Its strengths are it focuses on NSW and is a broad measure of labour cost. Like both CPI series, it includes wages from many industries that are extraneous to legal services. Being a wage series, it does not account for productivity movements.

This series has significant limitations as a suitable index for indexing the ILARS schedule of legal services. Its alignment to the purpose of indexing ILARS legal fees is low.

Use by other agencies: Its national counterpart WPI Australia is used in the Joint Costs Assessment Committee formula.

Wage Price Index – Australia professional, scientific and technical services (WPI professional and other services)

The WPI professional and other services incorporates, for Australia as a whole, standard wage and salary rates of pay excluding bonuses for a range of workers and professionals in the professional, scientific and technical service sectors, including legal services. Legal professionals, paraprofessionals and other legal employees are included together with other employees not working in the legal services industry.

This series has similar shortcomings to WPI NSW private. First, while the sub-sector focus on legal services is tighter than WPI NSW private, that focus is diminished by the inclusion of other unrelated industries. Second, it measures wages not prices and therefore excludes productivity movements in the provision of legal services.

This series is assessed as having low alignment.

Use by other agencies: This index is not used by other comparable agencies.

Joint Costs Assessment Committee formula

Aligned with purpose: This approach to indexation is a weighted average of the percentage change in CPI Australia and WPI Australia. It is an example of another 'second best' price model approach. A counterpart series for NSW could be constructed using the CPI Sydney the WPI NSW private and the same weights as the JCAC formula.

While this approach is logical in terms of estimating broad movements in legal practice costs and prices, the shortcomings of CPI Sydney and WPI NSW private carry through to this measure. It is not based on direct measurement of price and the weights used in its construction are dated.

This approach is not considered further.

Use by other agencies: The price model approach is used by the JCAC using national data.

[3. Comparative empirical properties of the options](#)

This section addresses the question to what extent do the indexes behave differently over the long terms and for extended periods. This is an important consideration for the overall design of the system for adjusting the ILARS legal fee schedule, which based on the IRO response to the recommendations of the 2022, may comprise a combination of periodic detailed reviews of the legal fee structure together and indexation between any such reviews. If the indexes empirically behave differently for extended periods of up to (say) five years, this may lead to material differences in the schedule of legal fees over time.

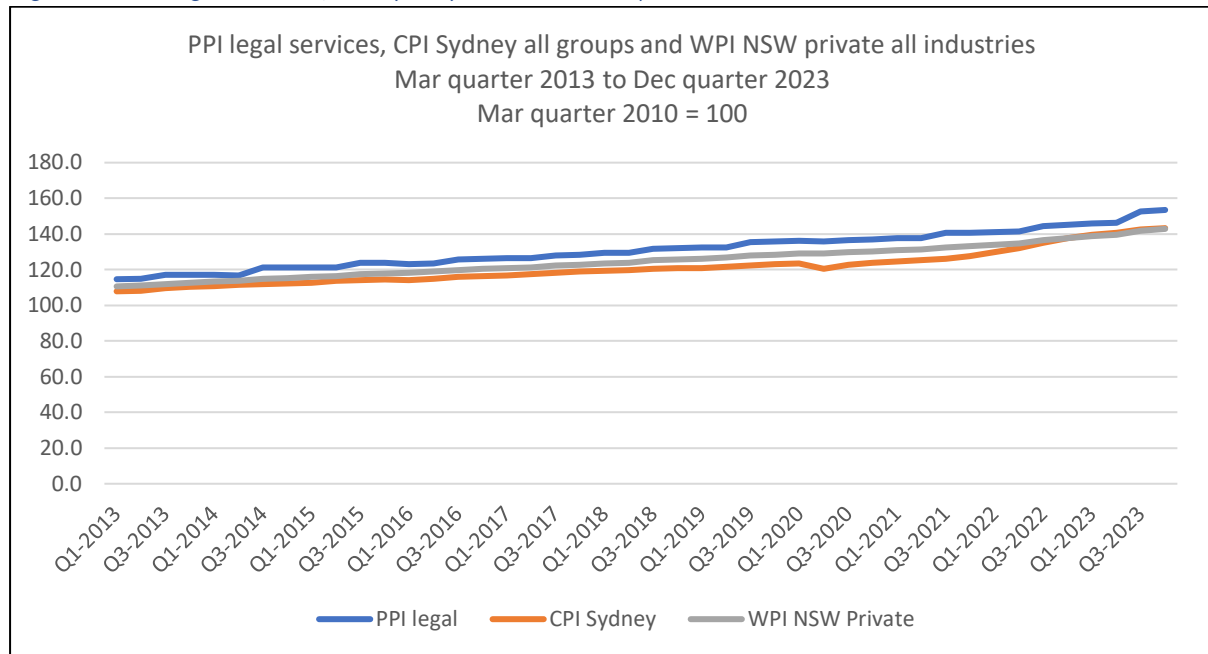
The analysis focuses on the past decade from the March quarter 2013 to the December quarter 2023, which, at the time of writing this report, is the latest quarter for which all five indexes are available.

Figures 1a, 1b and 1c show, for this decade, the comparative experience of the five series: PPI legal services; CPI Sydney; CPI Sydney insurance and financial services; WPI NSW private and the WPI Australia professional and other services.

Figure 1a shows the PPI legal services, CPI Sydney and WPI NSW private industries. Over the decade the three series broadly grew at similar compound growth rates in the long term. But this long term behaviour includes periods where they diverge. Table 1 provides more detail.

In the period since March 2021 (ILARS Guideline commencement), CPI Sydney rose significantly faster than both the PPI Australia legal services and both WPI options.

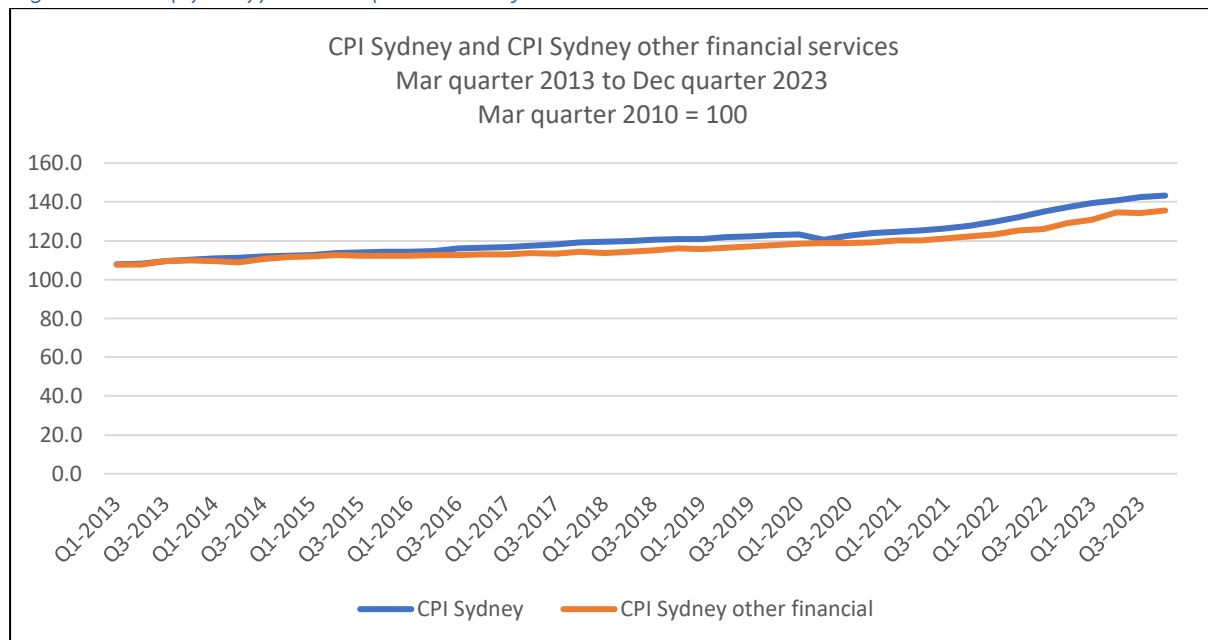
Figure 1a PPI legal services, CPI Sydney and WPI NSW private 2013 – 2023



Source: ABS

The only instance of a negative movement in any of the series during the decade is when CPI Sydney fell 2.3 per cent in the June quarter 2020. This was the result of temporary free childcare measures to mitigate the impacts of COVID on households. The subsequent withdrawal of the measure caused the measured CPI to rebound. None of the other index options was affected by this policy.

Figure 1b CPI (Sydney) and CPI (NSW other financial services 2013 – 2023

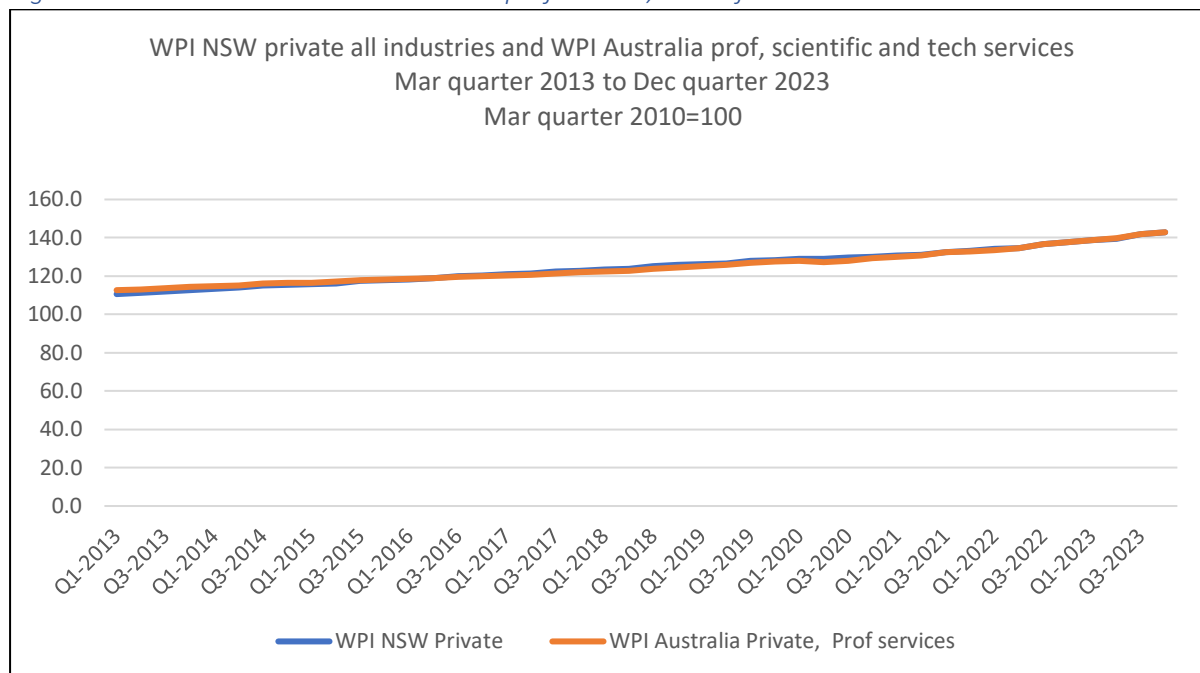


Source: ABS

Figure 1b compares the CPI Sydney and the CPI Sydney insurance and financial services. The series grew differently both over the decade and for periods within it. CPI Sydney insurance and financial services was unaffected by the changes in the childcare measures in mid-2020.

Figure 1c shows the WPI Australia and WPI Australia professional, scientific and technical services. They are, for all intents and purposes, indistinguishable over the decade.

Figure 1c WPI Australia and WPI Australia professional, scientific and technical services 2013 - 2023



Source: ABS

Table 1 sets out the empirical experience of the five series over three timeframes ending with the September quarter 2023 (the latest quarter for which the ABS has published data for all five series).

Table 1: Annual inflation rates, selected timeframes 2013 – 2023 (average compound growth per cent)

Period	PPI legal services	CPI Sydney all groups	CPI Sydney other financial	WPI NSW Private all industries	WPI Australia Private, Prof services etc
Decade: (Dec qtr 2013 to Dec qtr 2023)	2.7	2.6	2.1	2.4	2.2
Five years: (Dec qtr 2018 to Dec qtr 2023)	3.0	3.4	3.1	2.5	2.7
Since ILARS Guidelines: (March qtr 2021 to Dec qtr 2023)	3.9	5.1	4.4	3.2	3.4

Source: Australian Bureau of Statistics, review's calculations

It shows:

- Comparing the *PPI legal services* and the *CPI Sydney*:
 - Over the past decade, the two indexes increased at essentially the same average annual rate of inflation (slightly over 2 ½ per cent)

- Over the past five years, the average annual inflation rate measured by the CPI Sydney was higher by almost half a percentage point than for the PPI legal services (3.4 per cent compared with 3.0 per cent respectively)
- Since the introduction of the ILARS fee schedule to the December quarter 2023 (past 11 quarters), average annual inflation measured by CPI Sydney was significantly higher (5.1 per cent) than PPI legal services (3.9 per cent). By the December quarter 2023 the cumulative increase in CPI Sydney was 15.1 per cent, compared with 11.4 per cent for PPI legal services.
- Comparing the *PPI legal services* and the *WPI NSW private*:
 - Over the past decade to the December quarter 2023 average annual inflation measured by the PPI legal services was around quarter of a percentage point higher than for the WPI NSW private sector index. This gap increased to half a percentage point over the past five years to the December quarter 2023.
 - Since the introduction of the ILARS Guidelines and fee schedule in March 2021, this annual average difference has risen to almost three quarters of a percentage point.
- Comparing the CPI (Sydney) and the CPI (Sydney other financial services):
 - Over the last decade the average annual inflation rate for the CPI (Sydney) was half a percentage point higher than the CPI insurance and financial services, with this gap falling to just over one quarter of a percentage point over the five years to the December quarter 2023.
 - This gap between the annual inflation rates widened to around three quarters of a percentage point from the March quarter 2021 to the December quarter 2023.
- Comparing *WPI NSW private* and *WPI Australia for professional, scientific and technical services* (which includes legal fees), the latter series by around a quarter of one percentage point faster over the five years to the December quarter 2023 and also in the period since the March quarter 2021.

At a practical level, the experience of the past decade shows the choice of index matters in terms of outcomes. This applies especially over sub-periods of three to five years, which are most relevant to indexation between price reviews. Some series have averaged similar rates of inflation over the decade (PPI legal services and CPI Sydney in particular) but have differed significantly during sub periods of a few years. And while special events such as the price impacts of government policies can be allowed for in the design of the indexation system, the choice of index can reduce the likelihood of needing such compensatory adjustments.

Since the adoption of the ILARS Guidelines

An indexation system for legal fees consists of an indexation (catchup) adjustment for the period since March 2021 (when the ILARS Guidelines took effect) to the indexation implementation date, followed by annual adjustments. The catchup could also be part of the 2025 ILARS Guideline review.

Table 2 compares the annual inflation rates measured by PPI legal services and CPI Sydney for 2021-22 and 2022-23 (measured to the June quarter of the reference year).

It shows that for each year during that period CPI Sydney grew twice as fast as the PPI legal services. This reflects the sources of inflationary pressures during that period. General inflation (measured by CPI Sydney) accelerated in 2021 and 2022, driven by international factors including the sharp rise in international energy prices, especially petroleum which flowed on to other related energy sources including gas and household fuels, rents and home ownership, the prices for international travel and the price of electricity.

Table 2 Annual growth rates June quarter 2021 to June quarter 2023

Period	PPI Australia legal services	CPI Sydney all groups
2021-22 (June qtr 2021 to June qtr 2022)	2.7%	5.3%
2022-23 (June qtr 2022 to June qtr 2023)	3.3%	6.6%

Source: Australian Bureau of Statistics

None of these factors is a price of a legal service, meaning that prices of legal services in relative terms fell compared to the general price level. Moreover, legal fees were not identified by the ABS in its CPI releases as experiencing a significant increase during this period.

In such circumstances, using the CPI Sydney would very likely 'overcompensate' ILARS legal fees relative to general movements in legal fees.

4. Conclusions

The review's conclusions from this chapter may be summarised as follows:

- The PPI legal services index is the most appropriate choice of the five indexes.
 - Uniquely among the options it measures the *prices of legal services* only. Unlike the other two *price* indexes (CPI Sydney and CPI Sydney insurance and finance), its focus is not diluted by the inclusion of prices of unrelated goods and services.
 - The legal services included in PPI legal services are a broader sample than those in the CPI measures, although that said, the sample does not directly measure some significant areas of legal practice.
 - Whilst the measure covers Australia, rather than being restricted to NSW, there are precedents for using national measures for indexation purposes (and over 40 per cent of Australia's solicitors are registered in NSW).
 - The empirical experience of PPI legal services is consistent with legal prices moving consistently with CPI Sydney over the past decade. But the two series differ recently, with the CPI being driven by circumstances outside the legal sector.
 - As far as the review was able to determine, PPI legal services is not used for indexing legal fees by other public authorities in Australia. The search has not been exhaustive.
- The CPI Sydney is less fit for purpose than PPI legal services but is a possible second best choice for indexing the ILARS schedule of legal fees and disbursements (counsel fees).
 - It is accepted as a very high quality general measure of inflation and movements of the cost of living. Its use for indexation would be consistent with maintaining the ILARS schedule of legal fees relative to prices in general (but *not* prices of legal services).
 - It measures NSW *prices*, albeit with a broad focus, not *remuneration*.
 - It is already used by SIRA to make annual adjustments to legal fees in the CTP scheme

- CPI Sydney recorded one quarterly negative movement in the past decade (June quarter 2020), it has been affected on other occasions by government policies and it has grown significantly faster since March 2021 than the PPI legal services.
- The CPI Sydney other financial services index is less appropriate than CPI Sydney. It effectively would maintain ILARS legal fees relative to a subset of services (including a sub-sample of legal services). The review considers the subset of services to be a compromise between a precise focus on legal services (PPI legal services) and a broad focus on the general price level (CPI Sydney). The narrower CPI measure has some virtues:
 - It is less susceptible to changes in government policy
 - Prices of some legal services have a higher weight than in CPI Sydney
- The two WPI indexes are less appropriate in principle than the three price indexes because they measure hourly remuneration (a cost) rather than prices.

The JCAC formula is a weighted average of movements in cost drivers of costs/prices. As such, the shortcomings of each of those cost drivers (CPI and WPI) carries through to the composite index. Given the weights in the calculation are now very dated, this review sees no additional benefit in this approach compared with using a precisely focused index of legal services (PPI legal services) or the alternative second best approach of a broadly based index of general prices (CPI Sydney).

Table 3 summarises the conclusions of the assessment of the indexes against the criteria and their empirical experience, noting the relative numerical assessments are subjective.

Table 3: Summary assessment of indexes

Assessment criterion	PPI legal services	CPI Sydney	CPI Sydney Other financial services	WPI NSW private	WPI professional and other services
Appropriateness (Maintains the ILARS schedule of legal fees relative to prices of NSW legal services in NSW)	4.5 <ul style="list-style-type: none"> Australia not NSW sample excludes some significant areas of legal practice 	3.5 <ul style="list-style-type: none"> general prices, not legal services unrepresentative sample of legal services 	3.0 <ul style="list-style-type: none"> prices of narrow services, not just legal services unrepresentative sample of legal services 	2.0 <ul style="list-style-type: none"> broad earnings not legal prices 	2.0 <ul style="list-style-type: none"> earnings not legal prices Australia not NSW
Frequency and timeliness (published within two months of measurement period)	Quarterly Yes	Quarterly Yes	Quarterly Yes	Quarterly Yes	Quarterly Yes
Likelihood of revisions (original data)	Low	Low	Low	Low	Low
Published with transparent methodology and definitions	Yes	Yes	Yes	Yes	Yes
Empirical experience <ul style="list-style-type: none"> Decade 2013-2023 annual inflation rate Total increase since March quarter 2021 Negative quarterly movements decade to 2023 	2.9% 10.9% No	2.8% 14.6% Yes (June qtr 2020)	2.4% 11.7% No	2.5% 9.2% No	2.3% 13.9% No
Use by other public authorities in Australia for indexation	No	Yes NSW CTP, Vic TAC	No	Yes JCAC formula	No
Overall ranking	1	2	3	4	4

4. Consultation

The review consulted with SIRA, ALA, NSW Workers' Compensation Self Insurer Association (SIA), Law Society of NSW, NSW Bar Association, Unions NSW, icare, Legal Aid and the IRO Approved Lawyer User Group (ALUG). The issues of interest differed among stakeholders, reflecting their roles and perspectives. With some matters, two different perspectives were being – the lawyer (including the plaintiff lawyers – groups and the workers insurance authorities (SIRA and icare). Several stakeholders followed up their discussion with correspondence. This has been drawn on.

Views were sought on:

- the recommendation for indexation by the ILARS 2022 review
- (where appropriate) the stakeholder organisation's approach to indexation of allowable legal costs, including the purpose, design and operation of the indexation arrangements (noting the ILARS fee structure was not in scope) and circumstances
- (where appropriate) the stakeholder organisation's approach to indexation of allowable costs (including legal costs where appropriate) in their organisation's purview, including the purpose, design and operation of those indexation arrangements
- (where appropriate) the level of discretion of the stakeholder's organisation has to adjust or set aside indexation and the type of circumstances where that discretion may occur
- preferred candidates for indexation, such as the Consumer Price Index
- any relevant considerations, such as regional differences and size among providers
- any other advice that could assist the IRO in this matter.

Stakeholders raised some issues outside the terms of reference which included: the (in)adequacy of the current Schedule 6 allowable legal costs; specific issues in the ILARS fee schedule; disparities between the ILARS and Schedule 6 fee structures; and the desirability of coordinated reform of the workers compensation system.

1. Key issues

Views on the ILARS Review 2022 recommendation for indexation

Divergent views were expressed. Groups representing legal practitioners and Unions NSW agreed with the recommendation in favour of indexing the ILARS schedule of legal fees. This was largely on principle, with these stakeholders noting, inter alia, the history of adjusting allowable legal fees in the workers compensation system over the past twenty years (particularly in relation to Schedule 6 which is outside the terms of reference for this review) and the anomalous position where some other (non-legal) fees are indexed in the workers compensation scheme but not legal fees. Unions NSW agreed with this view, noting the importance to the workers compensation system of having an adequate legal workforce.

The SIA considered there are more significant structural issues to be dealt with in legal costs in workers compensation than indexation, although it did not have an in-principle difficulty with indexing legal fees using an appropriate methodology, particularly in inflationary times. The SIA considered indexing ILARS legal fees is likely to “exacerbate the already significant disparity between the legal costs paid to lawyers represent injured workers as opposed to the legal costs recoverable by lawyers representing employers and insurers”. The SIA noted the ILARS fee scale, while imperfect, is

“more generous and more accurately reflects the work required to be performed in workers compensation matters” than Schedule 6.¹⁷

SIRA was concerned that ILARS indexation would adversely impact on the costs of the workers compensation scheme and on increasing rates of disputation. It considered better understanding was needed of the drivers of the demand for ILARS and their impact on the costs of the workers compensation scheme. The latter view was stated in SIRA’s submission to the 2022 ILARS review.

Consultation with icare highlighted concerns with any ILARS fee increases (including indexation) as they may lead to more disputes and higher premiums. In its submission to the 2022 ILARS review icare considered the “extent to which the growth in [ILARS] fees achieves the legislated objectives for the NSW workers compensation system” was a critical issue. The submission also pointed out that ILARS fee schedule “are higher than those available under Schedule 6”, providing an initial allowance for advice on prospects and counsel’s fees as a separate disbursement.

Approach to allowable legal costs

This was discussed with SIRA in relation to workers compensation and CTP. Schedule 6 governs SIRA’s role in the workers compensation system regarding legal costs for respondents and their lawyers and for plaintiff lawyers whose clients (exempt workers inter alia) are not covered by ILARS. The amount of the Schedule 6 fees has been adjusted twice, most recently in 2021 but it is not systematically indexed. The legislation for CTP is different and requires, amongst other things, that allowable legal fees are indexed.

The ALA provided additional information about the relevant legal authorisation for various indexation systems in NSW and Victoria.

Organisation approach to indexation of other allowable costs, including purpose, design and operation, and discretion to adjust/set aside indexation

These matters were relevant mainly to SIRA in relation to the workers compensation scheme and the CTP insurance system. The relevant Acts and Schedules specify the allowable costs that are indexed under the two schemes. There appears to be no discretion to set aside or modify indexation. Additional detail on the practical operation of the authorising frameworks for indexation was also provided by the ALA.

Other views on when indexation could be set aside came from the Law Society and the Bar Association. The former suggested that, when its proposed indexation model resulted in a decrease, no increase should be applied. The Bar Association proposed that any indexation increase of less than one per cent be set aside and the ILARS fee schedule not be indexed for the relevant period; and that indexation adjustments should be capped at 10 per cent.¹⁸

Preferred indexation measures

There was no unanimous view put forward by the lawyer groups. Some preferred the CPI Sydney all groups.

¹⁷ Correspondence – NSW Workers’ Compensation Self Insurer Association, *IRO – ILARS Indexation Consultation*, January 2024.

¹⁸ Correspondence – Law Society of NSW, *ILARS Consultation*, 24 January 2024 and NSW Bar Association, *Consultation – Proposal to Index ILARS Fees*, 2 February 2024

The Law Society considered the CPI is a well-known, established and readily accessible method of indexation that is also used under existing workers compensation legislation. It also suggested that using the CPI reflected the “no reduction principle” in s 82F of the Act. The Law Society further proposed that the indexation be applied annually from 1 July based on the percentage increase in the CPI for the March quarter over the March quarter in the preceding year.¹⁹

The Bar Association considered the CPI is preferable to a wage-based index because wages are a small part of the professional expenses of most barristers. In their view CPI should be: specific to Australia; used to adjust the Professional Fees Schedule and Disbursements Schedule annually; and indexed fees “should be rounded to the nearest \$50”.²⁰

The ALA considered indexation to be important, while taking a different position. Its view was that indexation should “maintain the competitive position of the structure for the provision of legal services”. Accordingly, it considered the CPI to be inappropriate “as it references cost of living and not provision of services”. Further, it proposed an indexed fee ‘should apply based on the date of outcome, not the date of the commencement of the work’.²¹

The SIA questioned whether CPI is sufficient to reflect “the more significant increases in costs” for workers compensation legal practices but did not suggest an alternative.²²

Implications of regional location and size of practice

Some lawyer stakeholders expressed views on practice in regional areas. The complexity of the workers compensation system and the allowable legal fee structures have, over time, encouraged the development of specialised, larger legal practices that tend to be located in metropolitan areas. These practices accept and seek regional clients. While regional practices operate in regional centres such as Orange, they are considered disadvantaged compared with metropolitan practices for reasons including greater difficulty in accessing relevant medical services and having less expertise due to less workers compensation work.

Clients also travel to Sydney for specialist and other medical appointments that are not as readily available where they live.

The Bar Association noted the country loadings in the ILARS Disbursements Schedule have not been reviewed since 2015 and proposed a 15 per cent increase with annual CPI based adjustment thereafter. The ALA advocated for regular review of the Stages and Events in the ILARS Guidelines.

2. Other matters

Stakeholders raised several issues that, while falling outside the terms of reference, were considered relevant to the broad matter of adjusting the ILARS schedule of legal fees and disbursements (counsel fees). They are reported here for completeness.

They include: perceived anomalies and gaps in the current ILARS fee structure; the need for a comprehensive review of legal costs (ie including both ILARS fee schedule and Schedule 6) and for periodic increases in the base amounts in the ILARS funding guidelines; incentives in the ILARS payment of legal costs irrespective of outcomes that encourage running cases “which objectively

¹⁹ Correspondence – Law Society

²⁰ Correspondence – Bar Association

²¹ Correspondence – ALA

²² Correspondence – SIA

may be viewed as hopeless”;²³ and the supply of qualified, experienced and efficient lawyers in ILARS Approved Lawyers.

Perceived anomalies

Stakeholders identified three anomalies in the ILARS schedule of legal fees and disbursements. First, stakeholders suggested the amounts of ILARS funding for some dispute types is inadequate. Psychological injury claims were instanced, with several stakeholders asserting they have increased both absolutely and relatively in recent years and since COVID and are often more difficult to assess than physical injuries. (The size of this impact was questioned by other stakeholders.) Approved legal fees are asserted to be inadequate for such injuries, because the legal support required for such injuries does not fit the current fee structure.

Second, the complexity of workers compensation law and the complex nature of psychological injuries are such that early involvement of counsel is said to be efficient in reaching resolution of claims. Stakeholders advised that in some cases law practices are expected to obtain barrister advice during the preliminary stages of a claim but IRO may not agree and refuse the claim. More provision for early involvement of counsel was considered by some of the lawyer bodies to be efficient.

Third, the ILARS schedule for legal fees is said not to properly reflect the complexity of some dispute types. Law practices may do significant work that cannot be remunerated under current schedule.

Broader reviews of legal costs

This matter had two elements. First, several stakeholders (SIA, ALA and Bar Association), while not opposing indexation of ILARS legal fees, considered the whole structure of workers compensation legal fees – Schedule 6 and ILARS – needed review to make them mutually consistent and fit for purpose. The SIA was concerned the incentives in the fee structures encouraged lawyers to do plaintiff work, which was better remunerated. SIA noted that certain matters, such as complex psychological injury claims disputes, “cannot realistically be conducted by employers within the current cost constraints”.²⁴

Second, the Law Society suggested there be periodic increases in the base amounts of the ILARS Funding Guidelines.

ILARS Approved Lawyers

Most discussions with stakeholders provided views on the adequacy of the current supply of ILARS Approved Lawyers about attracting and retaining qualified workers compensation lawyers and on the demographics of the ILARS Approved Lawyer group.

Generally speaking, stakeholders considered the Approved Lawyer workforce met the needs of ILARS. Several stakeholders, including ALUG, suggested that the experience and demographic of the group was hollowing out. That is, the proportion of middle ranked lawyers with several years of experience was falling relative to senior practitioners/partners on the one hand and new/inexperienced lawyers on the other. Moreover, this reflected a pattern of most work being done by junior lawyers or clerks under the supervision of senior lawyers.

Stakeholders noted these observations were anecdotal because hard data is very limited: for example, the IRO does not hold information on the years of experience of the ALUG members or

²³ Correspondence – SIA

²⁴ Correspondence – SIA

other pertinent demographic information. There was general agreement much better information was needed to understand the demographics, capabilities and experience of the ILARS Approved Lawyer group, including whether it was meeting the needs of the workers compensation system.

For its part, icare found that its panel of legal service providers (under Schedule 6) met its needs.

5. Conclusion and recommendations

The IRO responses to the ILARS 2022 review contemplate a system for adjusting the ILARS Fee Schedule for professional legal fees and counsel fees that comprises regular reviews of the schedule combined with indexation between reviews.

This review was established to consider indexation and, as such, did not examine the structure of the Fee Schedule relating to legal fees and disbursements (counsel fees) in the ILARS Guidelines. As noted in Chapter 1 the IRO intends to review the ILARS Guidelines in 2025, including a ‘root and branch’ review of the Fee Schedule (including the Professional Fee and Counsel Fee Schedule). The current ILARS Guidelines were implemented in March 2021.

This means, inter alia, indexation needs to consider adjustments for relevant price movements from March 2021 to the present; and the ongoing indexation arrangement from the present.

Against that background, this chapter makes recommendations to the IRO on two options for indexation of the ILARS schedule of legal fees and disbursements (counsel fees). It also makes recommendations on the implementation of the recommended indexes and on the collection of information to monitor the adequacy and sustainability of the ILARS Approved Lawyer workforce.

1. Preferred index, indexation adjustment and timing

Chapter 3 concluded, all things considered, that:

- the ABS index PPI legal services was the most suitable candidate for the indexation of the ILARS schedule of legal services and disbursements (counsel fees) principally because it measures the prices of legal services with a singular focus (and the other candidates did not); and
- the ABS index CPI Sydney, all groups was less suitable as a candidate because it measures the cost of living for households and thus was appropriate for comparison with the general price level but not legal prices.

The consultations with stakeholders reported in Chapter 4 showed support among most lawyer groups for the CPI measure because it is a well-known and established measure that is also used under existing workers compensation legislation and for other essentially inflation adjustment purposes.

The ALA dissented, considering the CPI to be not the “correct” index “as it references cost of living and not provision of services”.

This review, based on the logic stemming from Chapter 1 about the purpose of indexing the ILARS legal fees, concludes the PPI Australia Legal Services is the most suitable index to maintain the position of ILARS legal fees relative to legal fees more broadly. The review also notes this index is not affected by price movements or the impact of government policies and has not recorded negative movements over the past decade.

The independent ILARS Review 2022 recommended indexation adjustments be annually.

The review notes the comparator indexation systems examined make annual adjustments.²⁵ There is no common date of adjustment across these systems; nor is there a common reference period. For example, the CTP indexation is based on annual CPI movements to the June quarter; the Victorian TAC uses annual CPI movements to the December quarter lagged one year; and SIRA uses movements in the WPI Australia, Healthcare and social services over the year to the September quarter.

The review considers annual indexation to be appropriate. It is consistent with indexation of other costs in the workers compensation system and allowable legal costs in CTP. The review suggests the indexation timing used in the NSW CTP scheme be adopted, namely increases over the year to the June quarter.

Circumstances where indexation adjustments amended or not made

The recent experience of indexation of healthcare fees in the workers compensation scheme illustrates circumstances where indexation was set aside. The adoption of changes from a review into selected fees was one situation that replaced indexation in the relevant year; while the cancelling of indexation during a health national crisis was another.

Temporarily suspending indexation on such occasions is appropriate. It would mean that the outcome of the planned review of the ILARS Guidelines in 2025 would replace an indexation adjustment for that year, with indexation resuming in subsequent years until the next review. It would also mean there would be no indexation adjustment for 2021 because the ILARS Guidelines took effect in January of that year.

Negative outcomes lead to significant administrative and practical challenges. The review considers where such an event occurs, there should be no indexation adjustment for the relevant period. The preferred index makes this a very low probability event based on the experience over the past decade.

Recommendation 1: That the IRO:

- 1) adopt the Australian Bureau of Statistics Producer Price Index Australia Legal Services (PPI Legal Services) for the purpose of making indexation adjustments to the ILARS fee schedule for professional legal services and counsel fees (disbursements)*
- 2) make annual indexation adjustments as soon as conveniently possible after the June quarter of the year in which the adjustment is made, using the percentage increase in the PPI Legal Services calculated by the June quarter in that year relative to the June quarter in the preceding year*
- 3) make no index adjustment in the year where any of the following circumstances occur:*
 - a) changes have been made to the ILARS fee schedule for approved legal fees and counsel fees as a result of a review of those fees*
 - b) the indexation calculation results in a negative number.*

²⁵ Examples of this include fees orders for allied health, independent assessors and medical reports in the NSW workers compensation system, allowed legal costs in the NSW CTP system and allowed legal costs in the Victorian transport accident system. Chapter 2 provides further details.

Alternative indexation approach

If the IRO decided to adopt CPI Sydney as the method of indexation of ILARS legal fees (rather than the PPI legal services), then the review proposes the same approach as set out in Recommendation 1 be followed.

Treatment of period since March 2021

Since the adoption of the ILARS Guidelines and fee schedule for professional legal services and counsel fees in March 2021, the PPI Legal Services has increased (Table 3 in Chapter 3 provides further detail). If Recommendation 1 were adopted and applied to the period from March quarter 2021, then it would imply the (retrospective) indexation adjustments set out in Table 4 below. The catchup would be confined to 2022 and 2023 because the introduction of the ILARS Guidelines in 2021 set contemporary prices, removing the need for a further 'indexation' component. This treatment follows the approach used by SIRA (see page 13).

The timing of an adjustment for 2024 would depend on when the indexation system was introduced and obtaining the index numbers for the March and June quarters 2024.

Movements in CPI Sydney are included for completeness.

Table 4 Implied retrospective indexation adjustments 2021 - 2013

Period	PPI Australia legal services (per cent increase)	CPI Sydney all groups (per cent increase)
2021 (ILARS Guidelines adopted)	Nil	Nil
2022 (June qtr 2021 to June qtr 2022)	2.7	5.3
2023 (June qtr 2022 to June qtr 2023)	3.3	6.6
Combined increase 2022 and 2023	6.1	12.2

Source: Australian Bureau of Statistics and own calculations

The combined implied indexation increase since the introduction of the ILARS Guidelines for the PPI Australia legal services is 6.1 per cent. It is half the corresponding figure for CPI Sydney, illustrating the differences between the series for short periods.

The calculation again illustrates the point that the choice of index matters: price indexes can differ markedly over short periods relevant to indexation whilst at the same time behaving in a broadly similar fashion over longer periods such as a decade.

An alternative available to the IRO would be to make no catchup adjustment covering 2022 and 2023 at the time of introducing the indexation system and to incorporate consideration of it in the planned 2025 review of the ILARS Guidelines.

The review notes that in the absence of corresponding adjustments to the allowable costs in Schedule 6, adoption of Recommendations 1 and 2 would increase the differential between those costs and the allowable ILARS legal fees. As previously noted, Schedule 6 is beyond the terms of reference for this review.

Recommendation 2: That, in implementing Recommendation 1, the IRO:

- 1) adopt the indexation regime in 2024, with the first indexation adjustment being made as soon as conveniently possible after the publication of the June quarter 2024 PPI Australia Legal Services;
 - 2) make no adjustment for 2021 in view of the introduction of the ILARS Guidelines in March 2021 and;
 - 3) **either**
 - a) catch up the movement in prices between 2022 and 2023 by making an adjustment of 6.1 per cent reflecting the increase in that index between the June quarter 2021 and the June quarter 2023 for obtained by applying the formula in Recommendation 1; **or**
 - b) incorporate consideration of the catch up adjustment in the terms of reference for the 2025 review of the ILARS Guidelines.
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2. Other matters

The adequacy of the ILARS Approved Lawyer workforce, including its sustainability, is a relevant consideration in this review's approach to 'reasonable' and 'fair to lawyers and the system'. This is because remuneration of this workforce is one important factor (among others, including a commitment to the intrinsic merit of this work) in establishing and maintaining a fit for purpose workforce.

The review summarises the evidence it heard as being consistent with no immediate serious problem, but that significant demographic weaknesses appear to exist including asserted reduction in the proportion of middle ranking (in terms of experience and seniority) legal practitioners has reduced over time.

The qualification is that the evidence was both very limited and impressionistic.

This is an important issue. Demographic trends in a workforce are often slow moving and difficult to reverse in the near term. Ongoing monitoring with adequate information is necessary to intervene before problems become evident (let alone acute). The review suggests this task falls to the IRO and that it would be greatly assisted by having more relevant information about the Approved Lawyer workforce, including with respect to:

- workforce dynamics, principally attraction and retention of Approved Lawyers.
- the demographics of the workforce with respect to qualifications, age, gender, seniority and experience
- patterns of cases (including injury types) taken on by Approved Lawyers and their outcomes
- number of grants/cases for which Approved Lawyers seek funding.

This information would assist the IRO in understanding, among other things:

- the impact of ILARS legal fees, including indexation, in attracting and retaining ILARS Approved Lawyers
- whether actions complementary to indexing ILARS fee legal services might be needed to ensure an adequate supply of competent and efficient Approved Lawyers for ILARS.

Consequently, this review proposes that as part of the introduction of the indexation system specified in Recommendations 1 and 2 that the IRO substantially improve its ability to monitor the Approved Lawyer workforce. This entails consolidating in a single database existing information and also gathering additional information necessary for the purpose.

Trends in this database could be analysed and discussed with the Approved Lawyer User Group as part of ILARS ongoing consultation with that group and the advice of that group regarding the key statistics is likely to assist in the design of the database.

Recommendation 3 *The review suggests the capacity of the IRO to monitor and assess the adequacy and sustainability of the Approved Lawyer workforce, including the adequacy of the IRO legal fees to attract and retain Approved Lawyers, would be increased by the IRO:*

- 1) *establishing what information it currently gathers and holds regarding the Approved Lawyer workforce and identify gaps in that information including (but not confined to)*
 - a) *numbers, type and experience of legal practitioners*
 - b) *the demographic profile including age, gender and skills*
 - c) *patterns of cases taken by Approved Lawyers and their outcomes*
 - d) *the numbers of workers compensation claims handled by each Approved Lawyer*
 - e) *the number and type of complaints about Approved Lawyers in the workforce.*
 - 2) *collecting the necessary information and monitor and analyse trends in that workforce*
 - 3) *using this additional information and insight to improve the operation of ILARS, including the effectiveness of indexation in assisting to maintain an adequate Approved Lawyer workforce.*
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Attachment A – Terms of reference for the review

To advise the Independent Review Officer as to an appropriate benchmark or benchmarks against which to index the Grant Amounts in Part 6 of the Independent Legal Assistance Review Service (ILARS) Funding Guidelines – in particular the Professional Fees Schedule (6.3) and Disbursement – Counsel’s fees (6.4).

Background

The Independent Review Office (IRO) is established by Schedule 5 to the Personal Injury Commission Act 2020 (PIC Act). It is the successor organisations to the Workers Compensation Independent Review Office that commenced in October 2012.

A key function of IRO is to administer ILARS. The purpose of 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.

The PIC Act provides that IRO may issue guidelines for matters including the allocation and amount of funding for legal and associated costs under ILARS. The guidelines are tabled in Parliament and subject to disallowance.

The ILARS Funding Guidelines made pursuant to this power commenced on 1 March 2021, the date that IRO was established under the Act.

ILARS Review 2022

In 2022 an expert committee external to the IRO examined whether the ILARS Funding Guidelines and Guidelines for Approval as an IRO Approved Lawyer enable the effective achievement of ILARS’ statutory purpose.

At a high level, the Committee concluded that the two ILARS guidelines enable the effective achievement of ILARS’ statutory purpose and effectively support the objectives of the workers compensation system. They do so by:

- authorising a body of capable legal professionals (Approved Lawyers) to assist injured workers
- setting fees for professional costs and disbursements that achieve the balance of being fair to Approved Lawyers and the system; and
- providing processes and incentives for early resolution of matters.

The Review made a range of recommendations to clarify and improve the operation of the guidelines, including a number focused on measures to ensure that the fee schedule (in Part 6 of the ILARS Funding Guidelines) remains fair to lawyers and the scheme.

Chapter J of the Report is headed ‘ILARS FUNDED FEES’. At paragraph 221 the Committee makes the following finding:

The Review Committee notes that other fee schedules, such as scales of costs, are indexed to ensure that the level of fees remains reasonable. The most common benchmark for indexation is CPI relevant to legal practices and the Review Committee recommends that the

Guideline Fees be annually adjusted by reference to this benchmark or another appropriate benchmark, such as increases in SIRA fee orders.

Recommendation 23 of the Committee is:

That the Fee Schedule be indexed to CPI or another appropriate benchmark, with annual adjustments.

IRO's has responded to this recommendation:

Accepted in principle: *IRO notes that other legal cost schedules are regularly indexed. For example:*

- *the Victorian Transport Accident Commission indexes legal costs annually at the rate of CPI (Legal-costs-1-July-2022.pdf (tac.vic.gov.au))*
- *the NSW Attorney General's rates for Legal Representation are indexed at the annual inflation rate (Attorney General's rate for Legal Representation (nsw.gov.au)).*

IRO also notes the indexation of fees in the NSW workers compensation scheme, including for example the fees paid for medical examinations and reports under relevant SIRA fee orders (Independent medical examiners - SIRA (nsw.gov.au)).

IRO will undertake consultation in 2023 with SIRA and other system stakeholders to determine an appropriate index for the Fee Schedule.

Deliverables

The advice to the Independent Review Officer will include the following deliverables:

- developing possible index benchmark options, including through identifying and examining the use of benchmarks to index other comparable legal cost schedules or regimes
- developing appropriate criteria against which to assess the options
- consulting with up to ten (10) key stakeholders about the possible options and assessment criteria
- recommending to the Independent Review Officer a preferred option or options, including reasons for any recommendations
- advising about the implementation of the recommended benchmark or benchmarks, including:
 - whether there are circumstances (and if so the type or range of circumstances) where it may not be appropriate to apply the index in any given period
 - the nature and frequency of any periodic review of the index
- preparing a report that outlines the activities of the review, with relevant findings and recommendations addressing the other deliverables.

Attachment B – Consultation

The review met with representatives from nine stakeholder organisations between December 2023 and February 2024, comprising:

- State Insurance Regulatory Authority (SIRA)
- NSW Bar Association (Bar Association)
- Law Society of NSW (Law Society)
- NSW Workers Compensation Self-Insurer Association (SIA)
- Australian Lawyers Alliance (ALA)
- Unions NSW
- icare
- IRO Approved Lawyer User Group (User Group)
- Legal Aid.

The review thanks those stakeholders, whose input provided helpful insights and information on key issues and context on the review's task.