Submission of the Independent Review Office: Consultation on the McDougall Review, COVID-19 and future opportunities for personal injury scheme - November 2021

About the Independent Review Office

The Independent Review Officer is an independent statutory office established under the *Personal Injury Commission Act 2020* (PIC Act).

The Independent Review Officer is supported by an expert team employed under the *Government Sector Employment Act 2013*. Collectively, this team and the Independent Review Officer are known as the Independent Review Office or IRO.

The IRO was established as a public sector agency under the PIC Act and commenced operation on 1 March 2021.

The NSW Government first established the statutory office of WorkCover Independent Review Officer (WIRO) under the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act) in 2012 as an oversight mechanism across the workers compensation system. The WIRO is the predecessor of the Independent Review Officer.

The statutory functions of the Independent Review Officer (Officer) include dealing with complaints by people who are injured at work or in motor vehicle accidents about the acts or omissions of insurers. The Officer also undertakes inquiries into matters arising in connection with the operation of the PIC Act, and the workers' compensation and motor vehicle accident legislation (the enabling legislation). In addition, the Officer manages and administers the Independent Legal Assistance and Review Service (ILARS) which funds Approved Lawyers to provide legal advice and assistance to injured workers pursuing workers compensation entitlements.

Introduction

The IRO welcomes the opportunity to provide a submission to SIRA's consultation in response to recommendations of the McDougall Review, recommendations made in the Standing Committee on Law and Justice's 2020 review of the workers compensation scheme and targeted questions related to COVID-19 effects and harmonisation of the workers compensation and the CTP schemes (consultation paper).

The IRO's submission draws in part on the complaints and enquiries we have received from injured people, in particular, injured workers.

Some of the issues raised for consultation were considered by the WIRO's Parkes Project, which was undertaken in 2014-15. This was an inquiry initiated by WIRO under the power of inquiry in the now repealed section 27(c) of the1998 Act. The terms of reference included:

- to resolve conflicts in workers compensation legislation
- to reduce the complexity of the legislation

- to identify potential enhancements to the legislative framework to benefit all stakeholders.

The Parkes Project Advisory Committee, representing all key stakeholders, came to a unanimous agreement as to a Statement of Principles and draft recommendations which are referenced in this submission.

Our responses below adopt the headings and numbering provided by SIRA in the consultation paper.

Responses to Discussion Questions

Replacement threshold test

1. What do you consider would be a suitable replacement threshold test for entitlement to ongoing weekly and/or medical payments?

Using a whole person impairment (WPI) evaluation as the threshold test to access benefits under the workers compensation scheme can lead to unfair results and produce outcomes contrary to the system objectives of providing income support during incapacity and reasonable medical expenses for injured workers.

Case study 1 – Whole person impairment

The worker had suffered a psychiatric injury in the course of their employment working with violent adolescents, allegedly without adequate support and training. The worker's independent medical examiner (IME) found that the worker's ability to work in their pre – injury occupation was significantly affected by their injury. However, the IME assessed the worker with only a 7 per cent WPI. This level of WPI would restrict the worker's access to a range of workers compensation benefits.

There is no direct relationship between an injured worker's whole person impairment and their capacity for work. The authors of the American Medical Association *Guides to the Evaluation of Permanent Impairment (5th Ed)* (AMA5) caution that it is not appropriate to use WPI assessments as a way of assessing the payment of benefits for incapacity for work.[1] Chapter 1 of AMA5 specifically advises that "*impairment ratings should not be used as direct estimates of disability. …. The complexity of work activities requires individual analysis*".[2]

Likewise restricting an injured worker's access to medical benefits without considering the nature of their injury and resulting requirements is arbitrary and can hinder a durable return to work in circumstances where a worker relies on regular treatment to remain fit for work.

The Joint Select Committee on the NSW Workers Compensation Scheme, which was established in April 2012 to consider reform options, believed "*it is appropriate, irrespective of the level of WPI, to consider the effect of being severely injured on a person under the Scheme*".[3]

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[1] The method for calculating WPI is established by SIRA issued Guidelines for the Assessment of Permanent Impairment which provide that the assessments are to be made in accordance with AMA5.

[2] At page 5

[3] NSW Workers Compensation Scheme, Joint Select Committee on NSW Workers Compensation Scheme, June 2012, paragraph 3.42

Stakeholders have previously recommended that the scheme should revert to a fair and straightforward system in which reasonably necessary medical expenses are payable to all injured workers.[4]

The IRO endorses the view expressed in the McDougall Review that the policy of ensuring that the most injured workers should receive appropriate support "*would be better served by a test that assessed the severity of an injury by reference to the treatment and support necessary to manage its consequences, as well as its impact on the worker's capacity for work*".[5]

Reforms in this area will require widespread consultation and careful consideration. Any extension of benefits may significantly increase the scheme's claims liability, and therefore require detailed actuarial costings for the costs and benefits to be weighed.

In the meantime, the IRO recommends consideration of a number of reforms to reduce the impacts of current arrangements, including allowing more than one assessment of impairment and ensuring injured workers can receive medical treatment claimed during a period of entitlement (see below).

Further assessment of degree of permanent impairment

2. What limitations and controls should be placed upon a further assessment of impairment?

As the consultation paper notes, recent reviews (and less recent scheme reviews) and submissions made to the McDougall Review have raised the issue of injustice caused by the operation of section 322A of the 1998 Act.

The 2012 Issues Paper, which identified areas for reform, suggested there was no reasonable rationale for obtaining multiple reports, and that limiting workers to one assessment would reduce the scope for disputes and resulting medical, legal and administrative costs.[6] The introduction of section 322A appears to have been intended to further entrench the one claim for lump sum permanent impairment compensation allowed in section 66(1A) of the *Workers Compensation Act 1987* (the 1987 Act).

The 2012 reforms introduced WPI as a limiting mechanism for access to various benefits including weekly payments and access to lump sum compensation. The 2015 reforms increased the use of WPI for a threshold for accessing a range of benefits, including, importantly, access to medical treatment expenses.

The legislation does not account for the fact that over time injuries can deteriorate and WPI assessments increase.

The IRO considers that section 322A should be reformed to restrict its application to claims for lump sum compensation only, thereby better giving effect to the intentions of Parliament with respect to the one claim policy and section 66(1A) of the 1987 Act.

[4] For example, submission by the NSW Bar Association to the 2020 Review of the Workers Compensation Scheme, page7

[5] icare and State Insurance and Care Governance Act 2015, Report by the Hon Robert McDougall, April 2021, Page 267, paragraph 96

[6] NSW Workers Compensation Issues Paper, released by the Hon Greg Pearce, 23 April 2012, Page 26

If WPI is used as the threshold for access to weekly payments and medical treatment, injured workers should be entitled to have their permanent impairment assessed at any stage of their injury and, in particular, following a demonstrable change in their condition.

3. How could a 'significant deterioration in injury' be measured?

Whether a worker has suffered a 'deterioration' of an injury is a question for the worker's treating doctors and medical specialists/assessors and should be capable of measurement in the same way as impairment resulting from the injury was first measured.

The concept of 'deterioration' is present in the current workers compensation legislation. For example, one of the grounds for appeal under section 327 of the 1998 Act is "*deterioration of the worker's condition that results in an increase in the degree of permanent impairment*".

In addition, the definition of 'injury' in section 4(b)(ii) of the 1987 Act, includes the "*aggravation, acceleration, exacerbation or* ***deterioration*** *in the course of employment of any disease ….*" (our emphasis). The words in this definition have been considered in case law and speaking generally are directed to a worsening of the disease.[7]

4. Should a further assessment of impairment be limited to certain injuries - for example, those prone to deterioration over time?

The IRO considers that the availability of subsequent assessments of impairment should not be restricted to certain types of injuries; the key question is whether there has been a deterioration of the injury.

'Reasonably necessary' test

5. What are the advantages and disadvantages of replacing the words 'reasonably necessary' in section 60 of the Workers Compensation Act 1987 with the words 'reasonable and necessary'?

Section 60(1) of the 1987 Act sets out that the treatment or services must be 'reasonably necessary'. It is the test that has been used to determine eligibility for medical treatment in the workers compensation scheme for many years and is well understood. The leading cases are *Diab v NRMA*[8] (*Diab*) and *Rose v Health Commission*[9] (*Rose*). *In Diab,* Deputy President Roche stated that:

> *"Reasonably necessary does not mean "absolutely necessary".....If something is "necessary" in the sense of indispensable it will be "reasonably necessary". That is because reasonably necessary is a lesser requirement than "necessary'."*

Roche DP went on to state that that the relevant matters, according to the criteria of reasonableness, include but are not necessarily limited to the matters noted in *Rose*, namely:

- the appropriateness of the particular treatment
- the availability of alternative treatment, and its potential effectiveness

[7] For instance, *Federal Broom Co Pty Ltd v Semlitch* [1964] NSWR 511 at 519

[8] *Diab v NRMA Ltd* [2014] NSWWCCPD 72 at [86- 88

[9] *Rose v Health Commission* (NSW) (1986) 2NSWCCR 32 at 48A - C

- the cost of the treatment
- the actual or potential effectiveness of the treatment
- the acceptance by medical experts of the treatment as being appropriate and likely to be effective.

We observe, as noted in the consultation paper, that the test of 'reasonably necessary' predates the rapid increase in workers compensation healthcare costs, indicating it is not causative of this increase.

Having dealt with innumerable complaints about access to healthcare treatment, our experience is that insurers carefully assess claims by workers for treatment. Where they assess the treatment as not reasonably necessary, it is refused.

The test of 'reasonable and necessary' has been described by the Commission[10] as '*a significantly more demanding test*' (see *Diab* at paragraph 86; *Proctor v Paragon Risk Management Pty Ltd* [11] at paragraph 109).

In the current workers compensation scheme, there are already various restrictions and hurdles for eligibility for payment of medical treatment expenses, including time limits, WPI thresholds and pre-approval requirements. The current test of 'reasonably necessary' has been closely considered by the Commission which has provided clear guidance, and it is well understood.

Any amendments that further restrict access to treatment by changing the 'reasonably necessary' test to a higher requirement should not be introduced without strong and compelling justification aligned to system objectives.

6. Are there alternative tests that align more closely with the principles of value- based healthcare or evidence – based medicine?

It is unclear that there is any inconsistency between treatment that is reasonably necessary on the one hand, and value-based healthcare or evidence-based treatment on the other.

A value-based approach to healthcare includes matters such as timely access to appropriate healthcare; delivery of healthcare that is high quality and safe; evidence-based care pathways; and improved patient outcomes.[12]

The various considerations set out in *Rose* and *Diab* to take into account when considering if treatment is reasonably necessary, including the appropriateness of the treatment, the potential effectiveness of the treatment and the acceptance by medical experts of the treatment as being appropriate and likely to be effective, seem well aligned to this approach.

[10] "Commission" refers to the Workers Compensation Commission or Personal Injury Commission

[11] *Proctor v Paragon Risk Management Pty Ltd* [2021] NSWPIC 382

[12] SIRA, Value-Based Healthcare Outcomes Framework, July 2021 (Value-Based Healthcare outcomes Framework for the NSW Workers Compensation and Motor Accident Injury/Compulsory Third Party Schemes)

Commutation and settlement

7. Given historical experience, what controls are appropriate in expanding access to commutation?

8. What classes of claims, if any, lend themselves to commutation?

Both the McDougall Review and the 2020 Review of the Workers Compensation Scheme by the Standing Committee on Law and Justice highlighted concerns about limited options for workers to reach agreement with insurers to settle their workers compensation claim and exit the scheme, despite general support for such arrangements.

The IRO already supports workers who wish to explore the option of exiting the scheme through the existing commutation mechanism in workers compensation legislation[13] by funding Approved Lawyers to assist workers to negotiate such agreements. There were 37 grants sought to explore commutation of an injured worker's future rights finalised in the 2020/21 financial year. Twenty workers successfully commuted their rights with an Agreement registered in the Commission. These small numbers demonstrate the current limitations on the ability of parties to agree to a settlement on a final basis of statutory compensation.

The case studies below demonstrate matters where agreements were, and were not, reached. They demonstrate that claimants, with the assistance of Approved Lawyer, are well able to assess whether commutation, in all the circumstances, is the right choice for them.

Case Study 2 – Commutation – agreement reached

The worker sustained a serious injury to the neck and back resulting in a 41% WPI. The worker received an offer from the insurer to commute their full future workers compensation rights. The worker sought legal advice and instructed their lawyer to negotiate with the insurer to increase the offer. The lawyer negotiated a sum substantially higher than the original offer. The insurer applied to SIRA to approve the commutation. The commutation was approved by SIRA and the agreement registered by the Commission.

Case Study 3 – Commutation - no agreement reached

The worker engaged a lawyer to engage with the insurer to explore an offer to consider a commutation of their workers compensation rights. The worker had recently resolved a claim for permanent impairment lump sum compensation for a 25% WPI. The worker was concerned to protect their entitlement to future medical and treatment expenses. After an exchange of offers and counter offers the worker was not prepared to accept the final offer of the insurer and instructed their lawyer to withdraw from negotiations. The worker remains on benefits.

We note that the consultation paper reports that unrestricted access to commutations can drive changes in behaviour resulting in a 'lump sum culture', poorer return to work outcomes

[13] Part 3, Division 9 of the 1987 Act

and higher scheme costs. This was the evidence of Mr Playford, the Scheme Actuary, to the Joint Select Committee on NSW Workers Compensation Scheme in 2012[14]. However, many stakeholders, including legal representative organisations and the Self-Insurers Association strongly disagreed with this view.

The Committee rejected the 'lump sum culture' argument and stated:

> *"The Committee is not convinced that liberal availability of commutations leads to a 'lump sum culture'. It has considerable sympathy for the views of the NSW Self-Insurers Association and the NSW Bar Association on this point. Any 'culture' is more likely to stem from the size and scope of the underlying benefits, rather than from an ability to commute them. Commutations have the potential to reduce ongoing administrative costs. If they release an injured worker from the 'system' he or she has a greater incentive to return to work than if kept on a drip feed. The Committee considers that commutations should be much more freely available*."[15]

The Committee therefore proposed Recommendation 13:

> "*That the NSW Government liberalise the availability of commutations, generally subject to the proviso that the injured worker has obtained independent legal and financial planning advice before agreeing to a commutation*."

We note that the Centre for International Economics (CIE) recommended removing the "*barriers to commutations where they provide a workable and mutually agreed outcome for employers and injured workers*" for the purpose of "*providing better tools and supports to enable return to work outcomes*". [16]

The CIE report found that:

> *"[t]he existing restrictions to commutations reflect a reluctance to expose the Nominal Insurer Scheme to funding risk, but for self-insurers and specialised insurers these risks are internalised, and if both parties should seek to enter into a voluntary and mutually agreeable commutation arrangement it seems reasonable that they should not be prevented from doing so (as is currently happening under existing workers compensation legislation), so long as workers are protected (receive proper legal advice) and are not coerced into suboptimal agreements*."[17]

The Parkes Project Advisory Committee adopted the principle that workers should be entitled to exit the scheme on a fair and reasonable basis with minimum constraints.

The IRO endorses this principle. The lack of settlement options and exit strategies prevents the resolution of low-cost claims and increases disputation. Insurers should be able to make decisions about the value of claims and workers should be able to achieve the certainty of an outcome and assume control of their financial and recovery destiny, allowing them to get on with their lives without the burden of an enduring relationship with an insurer. A major cause

[14] Report of the Joint Select Committee on the NSW Workers Compensation Scheme, June 2012, paragraph 3.192
[15] Ibid,,paragraph 3.221
[16] The CIE Final report: *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, prepared for the Office of Finance and Services, 30 June 2014, page 15
[17] CIE Final report, Ibid page 15

of complaint to the IRO over the years from injured workers has been about the emotional distress caused by having to regularly attend medical appointments and submit monthly certificates of capacity.

We consider the preconditions to commutation in section 87EA of the 1987 Act are overly onerous and make it inaccessible to most workers. The IRO believes the section should be repealed to allow the parties to agree to a settlement of statutory compensation entitlements, however described, on a final basis.

The availability of a settlement on this basis should be subject to the requirement that a claimant obtain independent legal advice concerning any such settlement, and there should be an appropriate approval process presided over by the Commission in the event the claimant is operating under a disability.

Compromised settlement of the lump sum death benefit

9. Should compromised settlement of death benefits be permitted? Why or why not?

10. What oversights are needed to protect the parties?

The IRO supports the availability of a compromised settlement as a means of resolving a disputed claim for a lump sum death benefit. The issues that often arise and are in dispute with respect to the death of a worker are often complex and the outcome of the proceedings in the Commission often difficult to predict. Additionally, the current 'all or nothing' system can be very stressful and distressing to the dependant/s of deceased workers at an already difficult time.

The IRO supports an amendment to the 1987 Act to give the Commission power to approve the compromise of a claim for the lump sum death benefit pursuant to section 25 of the 1987 Act for such sum as appears proper in the circumstances.

Protection for claimants could be achieved by providing that such resolution requires each potential beneficiary to have obtained independent legal advice concerning the proposed resolution, and oversight by the Commission.

Definition of suitable employment

11. Is the definition of suitable employment used prior to the 2012 reforms more appropriate than the current definition? What risks would you see with re-instating the previous definition?

12. What might be an alternative solution or definition and why?

The problem with the current definition of suitable employment in section 32A of the 1987 Act is that it includes any employment for which the worker is currently suited, regardless of:

- whether such a job is available
- whether the job is of a type that is generally available
- the nature of the worker's pre-injury employment
- the worker's place of residence.

It is therefore based on theoretical rather than actual jobs and can make a work capacity decision almost entirely hypothetical. The consequences can be that a worker who is fit for

work that is unavailable is left with reduced or no weekly compensation, in circumstances where had they not been injured at work, they would still be employed. This position is both unfair and contrary to the objectives of the workers compensation scheme including a real focus on sustainable return to work.

The case study below demonstrates the potential unfairness of the operation of the current definition.

Case study 4 - Suitable employment

An injured worker who lived in Wagga Wagga complained to the IRO that they had been advised their weekly payments would be reduced in 3 months time. The IRO obtained the work capacity decision from the insurer which found that the worker was able to work in suitable employment 5 hours per day, 3 days per week. A vocational assessment had identified the role of construction estimator as suitable. However, the labour market analysis noted the only vacancy for that role in the Riverina district was 180 kms away. Additionally, all advertised roles were full time positions which the insurer's own assessor said the worker could not do. Nevertheless, weekly payments were reduced because the definition of suitable employment did not have to consider the existence of the role in the labour market. The IRO provided information about the review process and legal assistance available through ILARS.

The Parkes Project Advisory Committee adopted the principle that the suitable employment test has resulted in unfairness in the measure of benefits/earnings for certain categories of injured workers and recommended that the definition in section 32A be amended to reflect an actual and not a theoretical test.

The removal of paragraph (b) in the definition of suitable employment in section 32A of the 1987 Act would go a long way to remedying the current unfairness. However, reverting to the pre-2012 definition in the former section 43A of the 1987 Act would be preferable as it made clear that regard must be had to "the nature of the worker's incapacity and pre-injury employment".

Legal costs under the Workers Compensation Regulation 2016

13. What are the benefits and impacts associated with increasing legal costs under the Workers Compensation Regulation 2016?

14. How can a sustainable approach to legal costs regulation be set in the workers compensation scheme?

Lawyers are essential service providers in the NSW workers compensation system. The Law Council of Australia's Policy Statement with respect to Rule of Law Principles dated March 2011 states that everyone should have access to a competent and independent lawyer of their choice in order to establish and defend their rights. Legal assistance and access to justice is particularly important where legislation is as complex as the NSW workers compensation laws, and entitlements go directly to a worker's health and financial wellbeing; in many cases the stakes could not be higher.

Lawyers are also entitled to be paid fairly for the work done. A draft recommendation of the Parkes Project Advisory Committee was that costs should reflect proper remuneration for all lawyers for both workers and insurers.

These principles – of access to justice for injured workers and fair remuneration for legal service providers – underpin the IRO approach to administering ILARS and align with system objectives. These include to provide injured workers with access to income support, payment for reasonable treatment and payment for permanent impairment of death, and to be fair, affordable and financially viable.

Fees that align with outcomes or events, rather than time-based fees, can promote system objectives provided the events are relevant and the fees regularly reviewed. Given this, the IRO considers that scheduled fees for lawyers should properly align with the relevant events in the life of a claim and proceedings through the Commission, and that fees should be regularly reviewed to assess whether adjustments are required.

Prior to 2012, Schedule 6 of the *Workers Compensation Regulation 2010* dealt with the maximum costs for all workers' and insurers' lawyers in compensation matters.

Post-2012, Schedule 6 remains applicable to claims from workers not affected by the 2012 amendments.[18] Schedule 6 also remains as the basis for payment of legal costs to the insurers' legal practitioners post-2012. In addition, it provides a benchmark for professional fees payable under ILARS where there is a directly comparable event.

We note that the Law Society of NSW and WorkCover undertook a review of Schedule 6 in 2010 to address anomalies identified by the legal profession, and to bring the events provided for in the Schedule into line with the Commission's practice and procedure. The amended Schedule was never gazetted. The anomalies identified remain, and new problems have arisen with the Schedule as a result of changes to the scheme and increased complexities post-2012.

As noted in the consultation paper, there is no annual indexation of the fees prescribed in Schedule 6, with two increases applied in 2012 and 2020. By contrast most benefits, including those to injured workers and fees for health services and medico–legal reports, are indexed by means of annually gazetted fee orders. Representative bodies for lawyers in NSW have regularly submitted to scheme reviews that the sums prescribed in Schedule 6 are inadequate and represent an underfunding of the work required by lawyers working in the system.

The IRO considers that in the absence of a complete review of Schedule 6, which is long overdue, indexation of fees under the Schedule should be introduced to bring these fees into line with other scheme expenses that are indexed.

Barristers play a key role in some workers compensation matters, providing advice on complex issues, representation in Commission hearings and assistance in the settlement of some claims at an early stage. Lawyers representing insurers who are paid under Schedule 6 cannot claim payment of counsels' fees in these circumstances as a disbursement. This means counsels'

[18] i.e., police officers, firefighters, paramedics and coal miners

fees must be absorbed by the insurers' solicitors. This is particularly problematic in a complex matter, or a matter heard over multiple days.

The ILARS Funding Guidelines[19] (ILARS Guidelines) provide for the payment of counsels' fees in appropriate circumstances (see section 5.2) where the work is well aligned with Counsels' skills and functions. These fees are in addition to the fees payable to solicitors representing the worker. This approach is consistent with the principles guiding ILARS administration, and we recommend a similar approach should be adopted in matters not funded through ILARS.

The consultation paper notes the ILARS Guidelines state the IRO is not bound by Schedule 6, and comments that ILARS generally pays higher fees than Schedule 6. The ILARS Guidelines reflect the enabling provisions of the PIC Act, which provide for the Independent Review Officer to issue ILARS Guidelines for matters including the amount of funding for legal and associated costs.[20] However, where there is a corresponding cost item for the resolution type under the Schedule, the ILARS Guidelines are generally benchmarked to the nearest $100.

The consultation paper also refers to a recent review of legal supports in the CTP scheme[21] (Taylor Fry report). We have written to SIRA expressing our concerns with the analysis of ILARS in the Taylor Fry report, including our concerns that the analysis misinterprets ILARS data, makes assumptions about ILARS data that may not be accurate, overstates the cost of ILARS administration and does not acknowledge the oversight of the Guidelines by the Parliament. We have advised that these and other concerns reduce any confidence that can be placed in the Taylor Fry report and its observations.

With respect to sustainability, it is important to note that workers' need for legal assistance is substantially influenced by what is occurring in the broader workers compensation system. Examples of this include:

- where workers have reduced opportunities for work and return to work (such as during an economic downturn or during the COVID-19 pandemic), their compensation payments may be reduced and cause financial hardship, which may result in workers seeking legal assistance to ensure they are receiving the correct entitlements
- higher incidence of mental health issues in the community and in workplaces may result in increased psychological injury claims, which may be complex and contested, and where injured workers may need the assistance of an expert lawyer
- the complexity of the workers compensation legislation, recently described by the McDougall Review as "*Byzantine in their elaboration and labyrinthine in their detail', and that '[result] in a level of confusion, inconsistency and complexity that does nothing to assist the schemes to achieve their policy objective*"'[22], means injured workers are more likely to need assistance to understand their rights and obligations
- the performance of workers compensation insurers in promoting worker recovery

[19] Available here: https://iro.nsw.gov.au/sites/default/files/ILARS%20Funding%20Guidelines.pdf
[20] Clause 10, Schedule 5 to the PIC Act
[21] Review of legal support for people injured in the NSW CTP Scheme, Taylor Fry, 3 September 2021
[22] icare and *State Insurance and Care Governance Act 2015* Independent Review, April 2021 (McDougall review), at section 29.2

against measures such as return-to-work rates may impact on a worker's need for legal assistance in both the short and long term; this is reflected in the increase in ILARS applications correlating with the increase in workers with significant injuries[23].

These matters of scheme performance, scheme complexity and the broader community environment impact on overall scheme sustainability, of which legal costs are only one part. Responding holistically and effectively to these challenges will have an enduring impact on the need for legal (and other) assistance while aligning with broader system objectives.

Impact of COVID -19 on personal injury schemes

15. How can the needs and interests of scheme participants be balanced during COVID-19 so that there are optimal outcomes for injured people and scheme sustainability for policyholders?

The IRO acknowledges the swift, fair and effective legislative and other reforms made to reduce the negative impact of COVID-19 on injured workers and other scheme participants.

In addition to the actions outlined in the consultation paper, a further example is seen in the many calls our Solutions team have fielded from injured workers concerned about attending in-person medical appointments. They were very relieved to learn that alternate telehealth appointments were possible.

Our Solutions team have also taken a number of calls from injured workers distressed that their access to medical treatment has been delayed or compromised due to the impacts of COVID-19. Particularly in circumstances where eligibility for treatment is time-limited due to the operation of section 59A of the 1987 Act. This matter is discussed further below.

There have been other examples where necessary responses by workplaces to COVID-19 restrictions have impacted disproportionately on injured workers, as exemplified in the following case study. Continuing to review these impacts and considering whether a policy response is appropriate will remain important while the NSW community learns to live with COVID-19.

Case study 5 – Application of section 33 of the 1987 Act

An injured worker complained that their case manager had indicated that their weekly payments would cease at the end of September 2021 and they should apply to Centrelink. The worker had been certified fit for 18 hours work a week and had been provided with suitable duties until the employer's business had closed as a result of COVID-19. The insurer confirmed to the IRO that it accepted the injured worker had partial incapacity for work as stated on the certificate of capacity. However, the insurer still issued a section 78 notice disputing liability pursuant to section 33 of the 1987 Act because the reason the worker could not do suitable duties (COVID-19 Order) was not related to their injury. The IRO advised the worker that they could seek legal advice from an IRO Approved Lawyer.

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[23] a workplace injury where the worker will have an incapacity for work (whether total or partial) for a continuous period of more than seven days.

16. ***Should there be a statutory review of, or limits (such as time limits), placed on measures taken in response to the COVID-19 pandemic like the workers compensation COVID-19 presumption?***

17. ***What alternative measures may be appropriate?***

The IRO agrees there should be a review of the measures taken in response to COVID-19 but recommends this should not commence before mid-2021, by which time there should be a clearer picture of the effects of COVID-19 on the scheme generally.

The ramifications of 'long COVID' for instance, will be better understood in time, and this will be particularly relevant for workers who have contracted COVID-19 at work.

As a further example, we are aware SIRA has been considering any impacts on the Pre-injury Average Weekly Earnings (PIAWE) of injured workers following a loss of wages due to business closures or slow-downs caused by COVID-19 Public Health Orders. We commend SIRA for this initiative, but our response is that any such effects will not manifest themselves fully until later in 2022. The majority of people who have had reduced earnings or no earnings as a result of the pandemic in 2021 will only now be returning to work after the easing of restrictions. It is these workers who might sustain an injury following the return to work, who are most likely to be impacted by any reduced PIAWE calculation.

Access to services and treatment in workers compensation

18. **What measures might be appropriate for workers where they may not be able to access treatment in their compensation period as a result of COVID-19 impacts or other delays beyond their control?**

19. ***Is the existing framework in section 59A providing revival of treatment compensation adequate and appropriate? What are the opportunities to improve the framework?***

The IRO commenced an Inquiry into some of the practical issues arising from section 59A of the 1987 Act, and the problems raised in the *IRO Issues Paper: Practical issues arising from the operation of section 59A Workers Compensation Act 1987* (issues paper) now form part of this consultation paper. The issues paper canvasses possible solutions and we await stakeholder feedback with interest.

Future opportunities for personal injury schemes

20. ***Are there opportunities for alignment across schemes that would improve outcomes for injured people, premium affordability and scheme sustainability?***

21. ***How could thresholds and entitlements be modernised to meet best practice and be closer aligned to value-based care?***

22. ***How can there be greater alignment of the workers compensation and CTP schemes so that people with the same type of injury receive the same type of treatment and outcomes?***

Harmonisation of the two schemes to achieve a more consistent and improved experience for an injured person has been progressed by a number of administrative reforms, including the recent changes that created the Personal Injury Commission and Office of the Independent Review Officer in March 2021.

An example of the positive impact of this harmonisation reform, from our own direct experience, is the implementation of a consistent IRO complaints handling approach across the workers compensation and CTP schemes. As a result of the reform there is a single complaints handling protocol for the personal injury schemes with consistent complaint solution and investigation processes, and a consistent benchmark ('fair and reasonable') to assess insurer responses. A single dataset is being created and consistent reporting framework adopted. The reform promotes achievement of shared goals including early solutions to claims and fast and fair solutions to complaints.

Our early observation is that injured persons complain to the IRO for similar reasons across both schemes. In particular, delays by insurers in deciding claims and requests, errors in weekly payments and case management concerns are consistent reasons why injured people complain, and the issues can have real impacts on their wellbeing and recovery. These types of complaints benefit from a consistent approach to reaching solutions, and from the complaints management and personal injury expertise the IRO can offer.

When considering further opportunities to align the workers compensation and CTP schemes, our view is that the key question is whether the proposed harmonisation positively contributes to the shared goals of the schemes.

Consistent with this approach there are domains that may be amenable to fairly uncontroversial future harmonisation reforms, and continue the work already undertaken. These include:

- medical assessment processes, including use of the same Guides to assess permanent impairment (promotes scheme efficiency and fast and fair solutions to disputes)
- administrative processes – about matters such as authorisation processes for treatment services and timeframes for making decisions in the schemes (promotes access to treatment and scheme efficiency)
- consistent processes and procedures to collect, collate, analyse and report on scheme outcomes (promotes scheme fairness and efficiency).

Another area concerns fees for services, including treatment and medical assessment services. Harmonisation would likely contribute to shared goals of access to treatment services and scheme fairness and efficiency. We note that SIRA is already working on bringing surgical fees in workers compensation in line with Australian Medical Association rates and fees paid in the CTP scheme.

However, a key challenge is that bringing harmonisation for workers compensation and CTP schemes in more substantive areas – such as entitlement periods, calculation of and access to weekly payments and thresholds for access to treatment services – raises questions as to which of the current arrangements (or a new 'harmonised' arrangement) should be preferred.

It is difficult, from a fairness perspective, to argue in favour of arrangements that provide different benefits based on the modality of injury only. However, existing differential

arrangements often have long and complex histories, and reflect a delicate balance of interests. Positions in support of some of these existing arrangements may be entrenched. Each will raise complex questions including about alignment to scheme objectives, scheme costs, individual benefits, competing stakeholder interests and views, and disparate political philosophies and realities.

Our comments in respect of these matters are that:

- such considerations militate against an approach of harmonisation for its own sake - there is no value in harmonisation where it derogates from a scheme goal.
- regular reviews of legislation or regulatory and administrative arrangements for either scheme provide an opportunity to be explicit about a goal of harmonisation where similar goals exist – this will promote incremental harmonisation
- harmonisation in these areas is best informed by a thorough policy development approach so that the respective costs and benefits are fully transparent, inform any debate and contribute to well informed options and decision-making.

Finally, a key harmonisation issue is the issue of access to legal assistance for persons injured in motor accidents. A number of stakeholders have recommended that ILARS be extended to the CTP scheme.

The IRO considers that such an extension would have direct costs but deliver significant whole-of system efficiencies to the CTP scheme. It would promote shared goals of access by injured persons to treatment and income support, scheme fairness and fast and fair solutions to disputes. This view is informed by our awareness, through our complaints function, that injured persons do find the personal injuries schemes complex, in particular where a dispute arises, and comprehensive assistance at this time can work to the benefit of all involved.