



Independent
Review Office

ILARS Review Issues Paper

June 2022

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1. Introduction

Your comments and feedback are invited on any of the issues in this discussion paper. The paper sets out the background and purpose of this review of the Independent Legal Assistance and Review Service (**ILARS**), its scope and processes, and outlines some key issues and questions about the operation of the ILARS scheme. You are also invited to raise any additional issues for consideration that have not been covered in this paper relevant to the operation of the ILARS scheme.

Your submissions can be made by sending an email to ilarsreview2022@iro.nsw.gov.au.

Submissions close **8 July 2022, 5pm AEST**. Submissions will be published on the Independent Review Office (**IRO**) website unless the author requests that they be kept confidential.

2. Background

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

The Independent Review Officer is supported by an expert team, the IRO.

The ILARS was established in 2012 in response to reforms to section 341 of the *Workplace Injury Management and Workers Compensation Act 1998*, requiring that '*[e]ach party is to bear the party's own costs in or in relation to a claim for compensation*'.

In announcing the ILARS the then Minister for Finance and Services outlined its features as:

- A free legal review service within the WorkCover Independent Review Office – no legal expenses need be covered by the worker;
- Reviews to be conducted by independent legal experts in the area of workers compensation.
- Where the insurer does not agree with the opinion of that independent legal advice, workers may be provided with independent legal representation to pursue matters in the Workers Compensation Commission following a merit review.¹

The ILARS was given a specific statutory basis from 1 March 2021, with Part 5 of Schedule 5 to the PIC Act establishing the ILARS as a function managed and administered by the Independent Review Officer.

The purpose of the ILARS is:

- to provide funding for legal and associated costs for workers under workers compensation legislation seeking advice regarding the decisions of insurers under this legislation

¹ Greg Pearce MLC, Minister for Finance and Services Media release 26 September 2012

- to provide assistance in finding solutions for disputes² between workers and insurers.

The ILARS has two functions to address its purpose - a funding function, which is managed within the ILARS and an early solutions function, addressing its purpose of providing solutions for disputes between workers and insurers. This work is undertaken by the IRO's Solutions team (**Solutions**).

The ILARS provides funding to lawyers who have been approved to participate in the ILARS scheme (Approved Lawyers). In limited circumstances lawyers who have not been approved may also be funded. Applications for funding are made by the lawyer, not workers.

The ILARS has developed two sets of guidelines to support its provision of funding of legal advice to workers by independent experts namely:

- Funding Guidelines; and
- Guidelines for Approval as an IRO Approved Lawyer (together the Guidelines³).

The ILARS currently has more than 800 legal services providers, (solicitors and barristers) who are approved to apply for funding to assist injured workers.

In 2020-21 there was record demand for the ILARS. The IRO approved more than 21,000 applications for grants of legal funding, a 22% increase from 2019-20. ILARS paid some \$75M for the professional fees and disbursements of approved legal service providers to assist injured workers to investigate workers compensation claims and resolve disputes with insurers. The increase in the number of funding applications was on top of an increase of 50% in applications in 2019-2020.

Given the ILARS has now been operating for 10 years, and the recent reforms that provide a legislative framework for the ILARS, the Independent Review Officer has decided it is appropriate to review its operation.

Achieving the Scheme Objectives

The IRO considers that the ILARS function makes a meaningful contribution towards achieving the objectives of the workers compensation system by the way in which it sets fees for professional costs and disbursements and creates the structures for payment.

Funding the provision of advice is the primary statutory purpose of the IRO. It is also a principal means by which injured workers are informed of their rights to access treatment and rehabilitation services. Other benefits include income support and lump sum compensation. Well informed workers are better able to access support, which will assist them to recover from injury and return to work sooner.

Where disputes arise, there may be delays to treatment and rehabilitation. Delays in payments also cause financial distress. This impairs an injured worker's ability to recover from injury. The IRO aims to respond to applications for funding in a timely manner, to assist Approved Lawyers to advance the claims of injured workers with as little delay as possible.

² This is distinct from those disputes resolved by PIC

³ Funding Guidelines and Guidelines for Approval as an IRO Approved Lawyer

The objective of the Guidelines is to establish payment criteria for professional costs in such a way as to balance the considerations of:

- fairness to Approved Lawyers;
- the rights of injured workers;
- financial prudence; and
- promoting the efficient operation of the claims and dispute mechanisms in the workers compensation scheme.

Other Reviews

This Review complements other reviews currently underway within the IRO. This includes a Business Process Review (**BPR**), user experience surveys (covering both the ILARS and the IRO's Solutions function) and a review of recovery of appeal costs.

The BPR is a review of all the IRO processes to identify opportunities for business process transformation and reform. The BPR commenced in mid 2021 and is expected to be completed by the end of 2022.

The IRO is conducting user experience surveys through an external consultant (Fiftyfive 5). The results of these surveys will show how service users perceive the ILARS and Solutions and identify opportunities to improve the user experience. Three surveys were developed to best target each type of user: Approved Lawyers, injured workers and insurers. The surveys are currently being completed and the IRO anticipates results will be available to inform this Review.

The Funding Guidelines⁴ also provide funding for appeals to the Personal Injury Commission (**PIC**) but not for appeals to other jurisdictions. The IRO is currently reviewing those appeals not currently supported to consider any appropriate funding principles. The outcomes of this work will be available for consideration by the Review Committee.

Basis of this Review

The ILARS Review is not a review by a Committee of Parliament as envisaged in s.27 of the *State Insurance and Care Governance Act 2015*.

There is no current legislative, or other requirement for review of the Guidelines. Historically, reviews and reform of the ILARS funding arrangements have taken place when the Independent Review Officer determined. In this respect it should be noted the Guidelines are the first to be implemented on commencement of the Independent Review Officer as an independent statutory body. They are now subject to scrutiny and potential disallowance by the NSW Parliament.

The IRO has not yet articulated a policy which describes when and how a review of the Guidelines should occur and feedback on this issue is sought – see Section 5 below.

⁴ ILARS Funding Guidelines

3. Terms of Review

The Review will examine the current arrangements to manage and administer the ILARS, and enable the effective achievement of its statutory purpose, that is to:

- provide funding for legal and associated costs for workers under workers compensation legislation seeking advice regarding the decisions of insurers under this legislation; and
- provide assistance in finding solutions for disputes between workers and insurers.

The Review will examine whether the current Guidelines promote relevant objectives of the workers compensation system as set out in section 3 of the *Workplace Injury Management and Workers Compensation Act 1998* including those focused on:

- the prompt and effective treatment and rehabilitation of workers following injuries to assist them and promote return to work, as soon as possible;
- providing income support for injured workers during periods of incapacity, and lump sum payments for permanent impairment and death;
- fairness, affordability, and financial viability; and
- efficiency and effectiveness.

In view of the concurrent reviews of business processes, appeal costs review and user experience surveys being undertaken by IRO, the ILARS Review will focus on the Guidelines, the allocation and amount of funding for legal and associated costs, arrangements for Approved Lawyers and the role played by Solutions.

The ILARS Review is intended to be broad in scope. Matters that may be examined include (but are not limited to):

- arrangements for approving legal service providers to provide advice and assistance to injured workers.
- arrangements for dealing with funding applications and requests, including funding for investigations (such as obtaining clinical notes and medical reports/assessments) and advice of counsel.
- promoting early solutions for claims and disputes through ILARS; and
- grant amounts for professional fees and disbursements.

4. Conduct of the Review

The ILARS Review is being overseen by an independent Review Committee. They comprise experts in legal costs, public administration, and the provision of legal services to injured workers.

The Review Committee members are:

- *Shane Butcher* – Shane is a principal at Law Partners and an Accredited Specialist in Personal Injury Law. He is an Approved Lawyer under the ILARS scheme, with extensive experience in providing legal services to injured workers. He is a member of the Rules

Committee of PIC, the Law Society of NSW's Injury Compensation Committee and the Australian Lawyers Alliance.

- *Elizabeth Harris* – Elizabeth is an expert costs lawyer and principal of Harris Costs Lawyers and Ovid Consulting. She is former joint editor of 'Quick on Costs' and serves as a member of the National Legal Services Council and Victorian Legal Services Board.
- *Michael Talbot* – Michael is a former Deputy Secretary, Courts and Tribunal Services at the then NSW Department of Justice. He was previously a senior executive at Australia Post. He is currently a senior consultant and independent director on the Boards of the Uniting Church and the Australian Disputes Centre.

The Review Committee is supported by a Secretariat within the IRO.

A Reference Group has been established to inform the ILARS Review. It comprises representatives of workers compensation system stakeholders including government agencies, lawyers, workers, insurers and employers. The Reference Group will raise issues, provide comments and perspectives, participate in consultations and respond to information requests.

The feedback to this Issues Paper as well as the outcome of direct consultation with participants in the workers compensation system, will form a report to the Independent Review Officer which will be delivered by the end of October 2022.

5. Issues for comment

5.1 Overall operation of the ILARS Scheme and the ILARS Guidelines

Questions

1. Have you had experience of the ILARS Scheme? If so, was it as:
 - A. an injured worker;
 - B. an approved lawyer acting for an injured worker;
 - C. a respondent insurer;
 - D. a lawyer acting for a respondent insurer; or
 - E. the employer of an injured worker.
2. How should the IRO assess if the ILARS Scheme meets its statutory purpose under the PIC Act?
3. Do you think the Guidelines ensure the ILARS Scheme meets its statutory purpose under the PIC Act? Why or why not?
4. How frequently should the IRO review the Guidelines?
5. Is information about the ILARS Scheme sufficiently accessible to injured workers including:
 - A. those who are geographically remote; and
 - B. those from diverse communities.
6. How could IRO improve the way it provides information about the ILARS scheme to workers, and lawyers who are not an Approved Lawyer?

5.2 Approved Lawyers

Current state

An Australian legal practitioner can apply to the IRO to become an Approved Lawyer. This enables them to seek grants of funding to provide legal services to injured workers in respect of matters under the *Workers Compensation Act 1987 (NSW)* and *Workplace Injury Management and Workers Compensation Act 1988 (NSW)*.

The IRO has developed Guidelines for Approval as an IRO Approved Lawyer⁵. These provide for the manner of application, eligibility criteria and termination of approval.

To become an Approved Lawyer, a legal practitioner must:

- be admitted as an Australian legal practitioner and certified to practice as a solicitor for a period of at least 12 months; and
- demonstrate general competence and diligence, knowledge, skill and familiarity with NSW workers compensation law and practice.

In addition, a lawyer must satisfy three of the following general criteria relating to their experience, within the preceding 12 months before their application for approval:

- Working as a lawyer in the workers compensation statutory benefits area for at least 12 months.
- Working under the supervision of an IRO Approved Lawyer for at least 12 months.
- Working in a law practice that has handled at least five ILARS grants of funding for individual clients in the preceding 12 months.
- Have undertaken four points of Continuing Professional Development in the NSW workers compensation jurisdiction in the preceding twelve (12) months.
- Accreditation by the Law Society of NSW as a Personal Injury Specialist.

Approved Lawyers are bound by the terms and conditions set out in the Application and Agreement. This includes compliance with the IRO's Guidelines, Practice Standards and administrative requirements.

Barristers may also apply for IRO approval. This allows them to receive payment for legal services either directly or under a brief from an Approved Lawyer in relation to a matter the subject of an IRO funding grant.

To become an Approved Barrister the person must hold a practising certificate without any qualification that would limit or restrict accepting briefs from Approved Lawyers or directly from injured workers.

The IRO can grant restricted approvals, that allow an injured worker to access paid legal representation from their preferred lawyer even if the lawyer does not meet the Approved Lawyer requirements.

⁵ [Guidelines for approval as an IRO Approved Lawyer](#)

Restricted approvals may be granted, subject to various conditions. These include where a lawyer cannot:

- meet the eligibility requirements for full approval;
- is instructed by an existing client to assist with a workers compensation claim; and
- is unable to refer the client to an Approved Lawyer.

Restricted approval conditions may include that the Approved Lawyer:

- engage the services of an Approved Barrister to assist in dealing with the client's claim; and
- professional fees and counsel disbursements combined be no more than would otherwise be invoiced by an Approved Lawyer.

The IRO reviews the allocation of grants annually and may remove an Approved Lawyer from the list if they have not applied for an ILARS grant in the previous 12 months.

On 30 June 2021, there were 836 Approved Lawyers and approximately 200 Approved Barristers.⁶ Fifteen lawyers currently hold restricted approvals.

Issues

The IRO imposes no continuing professional development obligations on Approved Lawyers. To maintain status as an Approved Lawyer the only requirement is that they must apply for an ILARS grant at least once every 12 months.

Restricted approvals allow an injured worker to be represented by their preferred lawyer who does not meet the Approved Lawyer requirements. This benefits workers in rural or regional areas who may wish to use a local lawyer, or workers for whom English is not their first language.

Questions

7. Do you think the Approved Lawyer arrangements ensure the quality of legal services provided to injured workers? If not, how else could the IRO ensure lawyers funded by the Scheme have sufficient expertise to effectively advise injured workers?
8. Do you think the restricted approval arrangements for lawyers who do not meet the requirements of the Approved Lawyer Scheme could be improved? If so, how?
9. Should Approved Lawyers be required to maintain or develop their professional skills and expertise in the area of workers compensation to retain Approved Lawyer status? Should there be a minimum level of activity required each year to retain Approved Lawyer status?

⁶ [IRO Annual Report](#) - page 26

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

Current state

The Practice Standards for Approved Lawyers⁷ and the terms of the IRO Agreements with Approved Lawyers⁸ and Approved Barristers⁹ set out the IRO's expectations of the conduct of approved legal service providers.

There are a number of ways the IRO deals with complaints against Approved Lawyers, including the following:

- Where an injured worker raises concerns about the conduct of an Approved Lawyer, the IRO can encourage them to raise their concerns directly with the partner of the Approved Lawyer's firm or the Office of the Legal Services Commissioner or both.
- The Law Society of NSW provides the IRO with information about lawyers who are the subject of action by the Law Society, and the IRO reviews these to act on any matters concerning Approved Lawyers

The IRO also works with legal regulators and liquidators/managers of firms when requested to provide information.

The IRO does not deal with complaints about the competence or professional conduct of lawyers.

Issues

There is no mechanism for the injured worker or their representative (or the respondent parties) to raise complaints about how matters are dealt with by Approved Lawyers.

There is currently no mechanism for insurers to raise concerns with the IRO about the conduct of Approved Lawyers.

The IRO co-operates with other legal oversight bodies but does not undertake its own separate investigations into the conduct of Approved Lawyers and Approved Barristers.

Questions

10. Should the IRO play a role in assessing the quality of the professional services provided by Approved Lawyers, and whether they meet the Scheme objectives of efficiency, effectiveness and timeliness? If so, what should that role be?
11. How should the IRO deal with Approved Lawyer conduct issues (including complaints from injured workers, complaints made by IRO staff, and enquiries from and actions taken by professional and regulatory bodies)?

⁷ [Practice Standards for IRO Approved Lawyers](#), IRO Website

⁸ [Application and Agreement to be an Approved Lawyer](#), IRO Website

⁹ [Application and Agreement to be an Approved Barrister](#), IRO Website

12. Should there be a process for respondents to complain to the IRO in relation to the conduct of Approved Lawyers representing injured workers? If so, what should that process look like?
13. What role (if any) should the IRO play in supervising the professional services provided by Approved Barristers?

5.4 Other Issues - Approved Lawyers

Issues

Sometimes injured workers ask IRO staff to recommend a lawyer. The IRO generally informs the worker of Approved Lawyers located closest to them but does not recommend specific lawyers.

Where there is a death benefit claim the Guidelines allow for every dependent and potential dependent of a deceased worker to be separately represented. The Guidelines also state that the IRO can provide assistance in finding an Approved Lawyer to represent a dependant or potential dependant. It has been suggested that, in this context, the IRO should identify Approved Lawyers with substantial experience in such matters.

Questions

14. Should the IRO adopt a practice of recommending particular Approved Lawyers to an injured worker?
15. Are the current arrangements for separate legal representation of each dependent where there is a claim for death benefit appropriate? If not, what other arrangements best manage potential conflicts of duties?
16. Are there any other issues that exist in relation to Approved Lawyers, that have not been addressed and are within the scope of the Review?

5.5 ILARS Grants – Funding Structure

Current state

ILARS funding grants are provided to enable injured eligible workers to obtain independent legal advice, assistance and representation with respect to their rights and entitlements to workers compensation benefits under the workers compensation legislation.

Grants of funding are made in accordance with the Funding Guidelines. These address the approval of lawyers to be granted funding (including qualifications and experience for approval) and the allocation and amount of funding for legal and associated costs.

Under the Guidelines, funding may be granted with respect to:

- professional fees;
- counsel's fees;
- medical report fees;
- other disbursements; and
- incidental expenses reasonably necessary to investigate a claim or to pursue a dispute about a claim.¹⁰

The Funding Guidelines adopt a staged approach to funding matters. Each stage permits an Approved Lawyer to undertake a specified range of work and incur certain types of disbursements without additional approvals. In applying for a grant, or extension of funding, an Approved Lawyer must provide sufficient information to satisfy the IRO that the matter meets the requirements set out in the Funding Guidelines – referred to as threshold tests.

The Independent Review Officer has overarching discretion as to the amount of professional fees that are payable. However, the professional fees generally payable are set out in part 6.

Process of Seeking Funding

Generally, Approved Lawyers who are seeking a grant, or extension, of funding must provide sufficient evidence to show:

- Stage 1 - The worker is an eligible worker.¹¹
- Stage 2 - The purpose for which the request for funding is made has 'some merit'.¹²
- Stage 3 - There is an arguable case for the worker and reasonable steps have been taken to achieve an early resolution.¹³
- Stage 4 - The worker is a respondent to an appeal. Otherwise, funding is generally granted on a conditional basis, with rare exceptions.¹⁴

¹⁰ [ILARS Funding Guidelines - page 9](#)

¹¹ [ILARS Funding Guidelines](#) part 3.1.1

¹² [ILARS Funding Guidelines](#) part 3.2.3

¹³ [ILARS Funding Guidelines](#) part 3.3.2

¹⁴ [ILARS Funding Guidelines](#) parts 3.4.4.1 & 3.4.4.2

The IRO aims to approve or decline grants of funding within five working days from lodgement of the initial application. Grants may take longer to be determined if the IRO has requested the Approved Lawyer to provide additional information.

When an extension of funding, is sought by an Approved Lawyer, the IRO aims to respond within 10 working days. A response may include approving the request, declining it with reasons, or requesting further information.

The Funding Stages

Stage 1 - Advice

Stage 1 funding¹⁵ is provided to Approved Lawyers to determine whether they can assist an eligible injured worker to pursue any of their rights and entitlements under the workers compensation legislation. This includes providing comprehensive legal advice. Stage 1 funding is not available in respect of industrial deafness (hearing loss) claims.¹⁶

Stage 1 funding is only available once per claim. When an injured worker changes lawyers, the new Approved Lawyer can apply for and receive stage 1 funding. This will be granted, but it is unlikely that they will be paid any professional costs unless the matter proceeds past Stage 1. Alternatively, if they can demonstrate that the work they have done relates to a new or different issue. Part 2.9 of the Funding Guidelines outlines the process that will be followed in this circumstance.

Initially, there was no Stage 1 funding. Since September 2019 the ILARS funding has been available for advice about whether the lawyer could provide assistance.

There is currently no requirement for Approved Lawyers to prove to the ILARS team that advice was provided to the injured worker. However, the Director of ILARS regularly reviews data from law firms and discusses any concerns in relation to numbers of advice only or other grants with the relevant law firm.

Stage 2 - Merit Test

Stage 2 funding¹⁷ is available to further investigate and proceed on a claim for benefits, a dispute about a decision or any aspect of a claim and the assertion of a threshold (excluding a threshold for work injury damages claim).

This stage includes all work up to the commencement of proceedings in the PIC (including attempting resolution of the claim or dispute).

Where Stage 1 funding has already been approved, and a matter progresses to Stage 2, the ILARS requires a further funding application. This further application must demonstrate to the IRO that the purpose for which the extension is sought has some merit. This is defined in the Funding Guidelines to mean there is a basis in fact and law to conclude that the worker has a claim or dispute to pursue.

¹⁵ [ILARS Funding Guidelines](#), part 3.1 – page 18

¹⁶ [ILARS Industrial Deafness \(Hearing Loss\) Claims Practice Guide](#)

¹⁷ [ILARS Funding Guidelines](#), part 3.2 – page 19

Stage 3 – Arguable Case

Stage 3 funding¹⁸ is available to Approved Lawyers to pursue dispute resolution proceedings in the PIC. At this stage, Approved Lawyers are required to demonstrate there is an arguable case. Generally, Approved Lawyers are not required to provide all evidence that they intend to rely upon. Issues arise as to whether the IRO should require copies of all the evidence available to an Approved Lawyer or whether the test is appropriate for the purpose of granting Stage 3 funding.

Application is made either by Application Form (if the application is a new application), or if an extension of Stage 2 funding is sought, by an email requesting extension of funding.

The assessment of a Stage 3 funding claim is also the point within the IRO where the Early Solutions process is activated. This is discussed in more detail below.

Stage 4

Stage 4 funding¹⁹ relates to reviews and appeals. Outcomes can be appealed as specified in the legislation. The IRO recognises that time is of the essence for the approval of funding. The IRO will consider an extension of funding for an appeal in the categories set out in the Guidelines based on particular terms.

Issues

Funding under the Guidelines falls broadly into the categories of professional costs and disbursements. This reflects an approach that has prevailed since the inception of the Workers Compensation Commission (predecessor to the PIC) in 2002, where legal costs are paid as single amounts for set pieces of work, whereas disbursements are scrutinised and paid on an individual basis.

Whilst the Funding Guidelines stipulate the basis on which professional costs are to be paid (parts 4 and 6) and the way in which disbursements will be paid (part 5), they also specify (part 2.13) that '[f]unding approval is at the complete discretion of the IRO and will be considered on a case-by-case basis.'

This provision enables funding to be granted or declined outside the parameters set by the Funding Guidelines.

The IRO sometimes receives multiple applications for funding for the same injured worker. This can happen where:

- the worker has changed lawyers and the new lawyer intends to provide the same service (usually limited to advice) as that provided by the original lawyer; or
- to provide further legal assistance to the same worker.

¹⁸ [ILARS Funding Guidelines](#), part 3.3 – page 20.

¹⁹ [ILARS Funding Guidelines](#), part 3.4.1. – page 22

The Funding Guidelines related to these circumstances seek to strike a balance between:

- the competing objectives of ensuring a worker has confidence in their legal representative;
- preventing unnecessary ‘lawyer shopping’; and
- fair remuneration for Approved Lawyers.

In Stage 2 funding, the Approved Lawyer should provide short reasons together with any evidence or material available which supports the request for funding and demonstrates that the purpose for which the extension is sought has some merit. The primary issue is whether the definition of this test and surrounding explanation provides sufficient guidance to Approved Lawyers. In addition, whether the application of the test leads to consistent decision making by the IRO.

Where Stage 2 funding is granted to investigate a denial of liability, the Approved Lawyer is generally required to demonstrate they have requested a review of the insurer’s decision to deny liability, before Stage 3 funding is approved. The insurer has a period of two weeks to respond to this request. Stage 3 funding will usually not be granted until after the expiry of this period. This means there is likely to be a short delay to the extension of funding for some matters. The issue at hand is whether the IRO should impose this requirement given its potential to impact injured workers.

The Funding Guidelines provide that funding will not be granted, subject to some exemptions, to commence proceedings in the PIC if the amount in dispute is less than \$3,000. This amount has remained the same since the original scheme started. The issue to be considered is should this threshold be periodically indexed and if any appropriate exceptions to this general policy should apply.

Questions

17. Does the ILARS fund the right types of legal work and claims? Are there any other types of legal work or claims that should be eligible for the ILARS funding? Are there types of work or claims that the ILARS currently funds which you consider should not be funded? What are these?
18. Are the current arrangements (including for apportionment and payment of costs) for dealing with multiple applications for funding for the same injured worker appropriate – and if not, how could they be improved?
19. What improvements could be made to the process for Approved Lawyers to apply for the ILARS funding? Are the threshold tests applied at each stage of funding appropriate – and if not, what other options may be preferable?
20. To what extent should the IRO be assessing the merits of the case before granting Stage 3 funding?
21. Is the exclusion of low value matters (where the amount in dispute is less than \$3,000) for funding at Stage 3 appropriate – and are the exceptions to this rule sufficient? Should the low value monetary threshold be indexed or periodically reviewed?

5.6 ILARS Grants – Funding Amounts

Current state

Professional fees are event based and paid for resolving a claim or dispute or providing comprehensive advice. For example, a fee may be paid to an Approved Lawyer for resolving a lump sum claim. The amount paid will depend on the stage at which the matter is resolved, which is a proxy to reflect the work done by the Approved Lawyer to achieve the resolution.

The amounts listed for professional fees are cumulative. This means that the amount in the Fee Schedule is the total paid for all work done up to and including resolving a matter at a particular stage. The amounts for each stage are not added together to arrive at a final figure for payment.

Fees for appeals and reconsiderations are additional to the fee paid for the substantive proceedings.

At present, the IRO does not have a formal process to index, or otherwise review fees on a regular basis.

Issues

It is timely to consider whether the Professional Fees Schedule appropriately sets fees that fairly remunerate Approved Lawyers for the work they do, whilst encouraging sustainability, efficiency, and the early resolution of disputes.

A specific issue recently raised with the IRO by an Approved Lawyer was that while funding is available for representation by a barrister at multiple hearings an Approved Lawyer generally only receives funding for a single hearing. The IRO has been able to address this issue in some cases by the payment of a complexity uplift. However, this means such amounts are not standardised and can only be paid if the Approved Lawyer seeks the uplift.

Another issue is that the Schedule of Fees does not allow for the time and effort of Approved Lawyers in more complex cases, for example psychological injury cases.

The Guidelines state that where an Approved Lawyer briefs a barrister that barrister must be one approved by the IRO. Exceptions apply for matters outside the jurisdiction of the PIC.

The IRO may encourage an Approved Lawyer to seek early assistance from an Approved Barrister as they develop their acquaintance with the law and practice. However, the Approved Barrister should not be providing assistance to the Approved Lawyer on the fundamental areas of law and practice. The IRO does not pay both Approved Lawyers and Approved Barristers for the same work. Therefore, where the Approved Barrister is briefed to undertake work the IRO considers is within the Approved Lawyer's remit, e.g. conducting a teleconference in the PIC, the IRO may reduce the professional fees payable at the conclusion of the matter.

Funding counsel to give pre-hearing advice and to appear at teleconferences, may also be a disincentive to early resolution of contested matters.

Questions

22. Is the IRO's current approach to determining professional fees appropriate (i.e. where the amounts payable for professional fees are specified in a schedule and referable to the outcomes of a matter)? If not, what other method should be used to determine the professional fees payable?
23. Does the IRO's current approach to determining professional fees promote the early resolution of matters? If not, how could this be improved?
24. Should the IRO periodically review the professional fees it pays against external benchmarks? If so what benchmark (e.g. consumer price index) should be applied?
25. In what circumstances should Approved Barrister's fees be allowed as a fee separate to the Approved Lawyer's fees? Why should such an allowance be made? If an Approved Barrister is briefed, should the Approved Lawyer's fees be adjusted?
26. Are there specific circumstances in the application of the Guidelines and Grant Amount Guide that result in unfair or inappropriate outcomes – and if so, what is the appropriate way to deal with these circumstances?

5.7 ILARS Grants - Discretion

The Guidelines permit the IRO to increase professional fees (for complexity), reduce or decline to pay them. All such decisions are discretionary, albeit with some guidance as to how that discretion will be applied.

Issues

There are a number of circumstances outlined in the Guidelines where professional fees payable may be increased or reduced, although most of these require the application of some degree of discretion on the part of the IRO.

The only exception to this is in part 4.1.5.1, which specifies that where proceedings in the PIC are discontinued without an outcome, the professional fees payable will be reduced by 50%.

It is not clear if the overarching discretion expressed in part 4.1.3 applies to part 4.1.5.1 (i.e. whether the IRO can waive the 50% fee reduction where proceedings in the PIC are discontinued without an outcome).

This raises the question of whether there should be consistency across all such matters or is the application of discretion appropriate for some types of outcomes, but not others. If the latter, do the Guidelines maintain a fair balance?

Questions

27. Are there any categories of matters or circumstances where funding grants should be reduced? What are those?
28. Are the circumstances where fees are increased due to complexity appropriate, and are there other categories of matters where increases should be permitted?
29. Should the IRO provide more guidance about the circumstances where a complexity uplift is appropriate?

5.8 ILARS Grants – Appeals

Current state

The Funding Guidelines permit funding of appeals to the PIC and appeals from PIC decisions, including appeals from the PIC to the Supreme Court. The funding principles for appeal matters differ from other types of matters in significant ways. However, it remains a requirement that Approved Lawyers seek an extension of funding prior to undertaking any substantial work on an appeal.

The IRO will grant unconditional funding to an Approved Lawyer where the worker they represent is a respondent to an appeal.

Funding is generally granted on a conditional basis where the worker is the proposed appellant or applicant. This means the IRO will pay the Approved Lawyer's fees only if the appeal is successful. However, the IRO will consider granting full funding if the matter has reasonable prospects of success and involves an important question of law.

As part of a grant of funding for an appeal outside the PIC, the IRO currently requires Approved Lawyers to seek agreement with the other party that neither will seek to enforce a costs order, or that both will seek an order that each party is to bear its own costs of the proceedings. This is to protect an injured worker from a potential costs order being made against them.

Issues

The IRO funds workers to get advice from counsel about the prospects of success/important question on appeal. It actively considers this when deciding whether to grant full funding in matters where the worker is the appellant. Questions arise as to whether funding should be granted on different bases, depending on whether the worker is an appellant or respondent to an appeal.

Professional and counsel fees for appeals to a Court are agreed on a case-by-case basis and must be what the IRO considers fair and reasonable. For Approved Lawyers this creates a degree of uncertainty about the costs they might expect to recover in any particular matter. Similarly, the IRO may have difficulty maintaining consistency of approach to such matters without predetermined parameters with which to assess costs.

This raises questions about how the IRO should:

- prioritise consistency in the approach to funding decisions;
- tailor funding classes to the nature of the work to be done; and
- equity between funding recipients.

The requirement to seek agreement or orders with respect to parties bearing their own costs means the IRO will pay costs in matters where the Approved Lawyer would otherwise have been entitled to claim costs from the unsuccessful insurer.

Questions

30. In what circumstances (if any) should the IRO fund appeal matters? Should different circumstances apply if the appeal is to the Supreme Court where costs can be awarded?
31. Does the requirement that Approved Lawyers seek a mutual assurance from an insurer in an appeal matter before court, that neither party will seek to enforce a costs order made by the court, strike the right balance – and if not, what other arrangements are appropriate?

5.9 ILARS Grants – Disbursements

Current state

The underlying principle which the Funding Guidelines apply to funding disbursements is that they must be reasonably necessary.

The staged approach to funding embeds pre-approval for most types of disbursements relevant to the stage of funding (part 4.2.2.1). Where the Funding Guidelines state the IRO approval is required before an Approved Lawyer incurs an expense, or it is unclear whether that is so, Approved Lawyers are advised to consult with the ILARS Principal Lawyer managing their grant.

The Funding Guidelines set out the types of disbursements funded by the IRO and the general approach to doing so.

Many of the disbursements incurred by Approved Lawyers are for items where a fee is fixed by the State Insurance Regulatory Authority (**SIRA**), or in the Disbursement Schedule to the Funding Guidelines.²⁰

Incurring a disbursement in excess of these set fees requires prior approval from the IRO. The IRO retains the discretion to either pay or decline to reimburse an amount more than the set fee.²¹ For disbursements which do not have a set fee, the IRO will have regard to reputable published material relating to fees charged by providers in other contexts.

The IRO will also permit Approved Lawyers to retain and pay medicolegal report experts through Medical Report Provider (**MRP**) entities.

The IRO has entered into agreements with 16 MRPs under which the IRO pays the MRP directly on a monthly basis for medical reports delivered to Approved Lawyers during the previous month.

Approved Lawyers benefit from this arrangement through improvements to their cash flow and administrative ease.

However, this arrangement does mean the IRO has limited capacity to ensure the request for report complies with the grant of funding and the correct fee is being charged for the report provided.

The IRO does not pay GST on incurred disbursements. Under the arrangements with MRPs the IRO reimburses the medico-legal report provider for the cost of the report excluding GST.

Approved Lawyers are liable to pay GST to MRPs for any reports obtained through them.

²⁰ Funding Guidelines, part 6

²¹ Funding Guidelines, part 4.2.2.2

Issues

The Guidelines provide limited explanation of the criteria that the IRO uses to determine what is 'reasonably necessary' with respect to a disbursement. While this allows for discretion it provides little guidance to Approved Lawyers as to what may be claimed.

Where the costs of medico-legal reports are reimbursed directly to the MRP there is limited opportunity for the IRO to review the expenditure.

A more holistic assessment could potentially be undertaken whereby the disbursement is assessed at the end of the matter and informed by the outcome.

Questions

32. Is the 'reasonably necessary' test for funding disbursements appropriate – and if not, what other test should be applied?
33. Is it necessary to outline the matters that might be considered in determining if a disbursement is reasonably necessary – and if so, what considerations should be included?
34. Is the approach of generally not requiring pre-approval for identified categories of disbursements appropriate; and have these categories been appropriately identified? If not, why is the current approach inappropriate and what would be a preferable method?
35. Are the current arrangements to enable the use by Approved Lawyers of MRP services fair, efficient and effective – and how might the value of these services be maximised?
36. Are there any changes to the arrangements which would improve their operation from an MRP perspective?
37. Where Approved Lawyers do not use approved MRP services, are any changes to the Guidelines required to ensure workers they represent have equal access to medical reports and other evidence? If so, what changes should be made?
38. Are the circumstances in which the IRO reimburses other disbursements appropriate?
39. Are there any other categories of disbursement which should be captured?
40. What is the best way to determine disbursement amounts for medical evidence?
41. Are the current arrangements for funding interpreters appropriate? If not, how could they be improved.

5.10 ILARS Grants - Early Solutions for Disputes

Current state

A key role of the IRO is to find early and quick solutions to disputes arising under the workers compensation legislation. The IRO identifies ILARS funded matters that may be appropriate for intervention to prompt early solutions. Early interventions to achieve solutions for workers compensation disputes are intended to be just, quick, and inexpensive outcomes that benefit the injured worker and the insurer.

The ILARS identifies matters appropriate for early solutions. This is where the IRO's ILARS and Solutions Teams work particularly closely to facilitate early solutions for disputes at key stages. This includes when a worker's Approved Lawyer applies to the IRO for a grant of funding under the ILARS to pursue a claim.

In 2020/21 the IRO identified 1,020 matters suitable for early intervention and resolution.²² Of the 1,020 early intervention matters, 88% were closed and resolved within seven days and 90% of cases closed within 15 days.²³ Around 20% of matters were resolved with a final outcome – most others proceeded on, albeit with further progression (a decision being made, grounds narrowed, a counter-offer being made etc)

Where the grant funded matters relate to claims to which the insurer has not responded, the IRO will raise the matter with the insurer to prompt a decision. These are classified as no response to claim (**NRTC**) matters.

The Guidelines outlines the NRTC process:

- A. Where the insurer has not responded to a claim or a request for a review within set timeframes the IRO may seek to engage with the insurer to resolve the outstanding dispute or to obtain a response from the insurer.
- B. Where the IRO engages with the insurer, the correspondence to the insurer and any response from the insurer (generally received within five working days) will be provided to the Approved Lawyer. The IRO will generally not grant Stage 3 funding during this period.

If Stage 3 funding is requested on the basis that the insurer has not responded to the claim in the legislative period for determination of the claim, the ILARS team will refer the matter to the Principal Lawyer Dispute Resolution in the Solutions Team.

²² [IRO Annual Report 2020-21](#) - page 15.

²³ [IRO Annual Report 2020-21](#) – page 16.

Issues

While the IRO staff already actively identify opportunities for early solutions, the Guidelines provide little assistance on when early solutions may be appropriate.

There may be scope to extend the early solutions program, however, any such extension would need to address issues such as the interaction of the program with the Alternative Dispute Resolution function of the PIC.

Questions

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

5.11 Reviews of Funding Decisions

Current state

If funding is declined, it is the IRO's practice to provide brief reasons.

The Guidelines provide for an Approved Lawyer to request a review of a funding decision at any time by email. The request for review must be supported by submissions:

- why the decision was in error;
- demonstrate a lack of procedural fairness; or
- there is further information which means the original decision should be altered.

A review of a funding decision is conducted by the Director of the ILARS at first instance. If the Approved Lawyer remains dissatisfied, they can request a further review from the Independent Review Officer. The decision of the Independent Review Officer is final²⁴.

The IRO now includes summaries of significant review decisions in the IRO News. These are available to all ILARS team members to assist in Guideline administration and consistency.

Issues

Reviews of funding decisions involve a range of issues, from the correct interpretation of legislation or case law and its impact on an entitlement or dispute, to interpretation of the Professional Fees Schedule in Part 6. Not surprisingly, many requests for review of funding decisions concern issues which are complex and/or difficult. The IRO frequently receives requests for review on very similar issues.

As review decisions are not published, an Approved Lawyer considering whether to request a review has no way of knowing whether the particular issue may have previously been the subject of a review, or the outcome.

The IRO is mindful of the fact requests for review can involve significant expenditure of time by Approved Lawyers. Additional guidance material – which may include published decisions, or similar information in another format – may allow Approved Lawyers to determine whether a particular funding decision is reasonable and in accordance with the IRO's funding principles.

²⁴ Funding Guidelines part 2.12.5

Questions

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