

# Review of Independent Legal Advice and Review Service

State Insurance Regulatory  
Authority Submission to IRO  
Issues Paper

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## 1. About SIRA

The State Insurance Regulatory Authority (SIRA) regulates three statutory insurance schemes in NSW – Compulsory Third Party (CTP), Workers Compensation, and Home Building Compensation. At any one time, more than 10 million people are protected under one of these schemes.

The schemes are funded by more than 6 million vehicle owners, employers and homeowners who together pay more than \$7 billion in premiums each year. Together, they provide an essential social safety net.

SIRA has a broad range of stewardship, scheme design, and regulatory functions to deliver on our **core purpose - making sure that NSW insurance schemes protect and support the people who need them, now and in the future.**

SIRA also has some regulatory functions in other schemes including the Lifetime Care and Support and Dust Diseases schemes.

SIRA is established by section 17 of the *State Insurance and Care Governance Act 2015* (SICG Act).

SIRA's principal objectives are set out in section 23 of the SICG Act:

- a) to promote the efficiency and viability of the insurance and compensation schemes established under the workers compensation and motor accidents legislation and the other Acts under which SIRA exercises functions
- b) to minimise the cost to the community of workplace injuries and injuries arising from motor accidents and to minimise the risks associated with such injuries
- c) to promote workplace injury prevention, effective injury management and return to work measures and programs
- d) to ensure that persons injured in the workplace or in motor accidents have access to treatment that will assist with their recovery
- e) to provide for the effective supervision of claims handling and disputes under the workers compensation and motor accidents legislation
- f) to promote compliance with the workers compensation and motor accidents legislation.

SIRA's regulatory functions with respect to each scheme are set out in respective legislation. For workers compensation, SIRA's objectives and general functions are set out in section 22 of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act) and includes the principal objective 'to ensure the timely and effective resolution of disputes arising under the workers compensation legislation'<sup>1</sup>. Specific functions of the Authority are outlined in section 23 of the 1998 Act.

SIRA's strategic priorities<sup>2</sup> seek to deliver improved outcomes for the people of NSW, including:

- people injured at work or on the road can access the benefits and support they are entitled to, and need, to recover, return to work or achieve the best possible quality-of-life outcome after an injury
- employers, homeowners, and motorists are well protected through affordable insurance policies
- scheme insurers, providers and policy holders comply with regulatory requirements and the Customer Service Conduct Principles, and are accountable for their actions

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<sup>1</sup> Section 23(1)(d) of the *Workplace Injury Management and Workers Compensation Act 1998*

<sup>2</sup> SIRA2025 Strategy (2022); Available at: <https://www.sira.nsw.gov.au/corporate-information/strategy>

- markets that underpin the State's statutory insurance schemes are ethical, innovative, and competitive
- statutory insurance schemes are financially viable and responsive to social and economic changes to meet the needs of customers today and into the future, and
- customers, stakeholders, and the community trust that SIRA-regulated schemes are operating as intended and meeting the needs of customers and policy holders.

## 2. Workers compensation

### 2.1. The Workers compensation scheme

The NSW workers compensation system is an important social safety net for more than 4.1 million workers in NSW. It is the largest defined benefits system in Australia offering protection to people who are injured at work.

Workers compensation assists with the costs of weekly payments, medical and hospital expenses, and a range of other benefits to help the worker recover and return to work, including domestic assistance, education and training, and payments in the event of death.

Each year, around 100,000 people depend on the workers compensation system for income replacement and medical support. These benefits are funded by around 340,000 employers who contribute more than \$4.2 billion in premiums each year.

### 2.2. Objectives

The objectives of the workers compensation system are set out in section 3 of the 1998 Act:

- a) to assist in securing the health, safety and welfare of workers and in particular preventing work-related injury,
- b) to provide –
  - Prompt treatment of injuries, and
  - Effective and proactive management of injuries, and
  - Necessary medical and vocational rehabilitation following injuries

in order to assist injured workers and to promote their return to work as soon as possible,

- c) to provide injured workers and their dependants with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses,
- d) to be fair, affordable, and financially viable,
- e) to ensure contributions by employers are commensurate with the risks faced, taking into account strategies and performance in injury prevention, injury management, and return to work,
- f) to deliver the above objectives efficiently and effectively.

### 2.3. The Independent Legal Assistance and Review Service (ILARS)

The Independent Legal Assistance and Review Service (ILARS) was established in 2012 under section 23(1)(q) of the 1998 Act which outlines a function of the Authority to provide and administer (subject to the regulations) a legal aid service for persons who are parties to proceedings related to workers compensation.

ILARS does not extend to workers exempt from the 2012 amendments. While coal miners, dust disease claimants and volunteers have their statutory compensation disputes heard in the District Court, the other exempt workers (police, firefighter and paramedics) have their disputes heard and determined in the Personal Injury Commission.

With the introduction of the *Personal Injury Commission Act 2020* (PIC Act) in 2020, Part 5, Schedule 5 of the PIC Act provides *'there is to be an Independent Legal Assistance and Review Service managed and administered by the Independent Review Officer'*<sup>3</sup>.

The PIC Act outlines the purpose of ILARS which is to *'...provide funding for legal and associated costs for workers under the Workers Compensation Acts seeking advice regarding decisions of insurers for those Acts and to provide assistance in finding solutions for disputes between workers and insurers'*<sup>4</sup>.

## **2.4. A fair, affordable and effective scheme**

The interests of NSW workers and employers are best served by a workers compensation system that is fair, affordable, and effective.

The IRO issues paper refers to a record demand for ILARS funding in 2020-21, with more than 21,000 applications for grants of legal funding at a cost of approximately \$75M for professional fees and disbursements, being a 22 per cent increase from the 2019-2020 year. The increase in the number of funding applications was on top of an increase of 50 per cent in applications from 2019-2020. This is despite the disputation rate remaining fairly static.

SIRA supports timely access to benefits and supports to enable injured workers recover, return to work and achieve the best possible quality of life outcome following a work injury.

In this context, it is critical we better understand the drivers of increasing applications for legal funding and the associated impacts to the scheme, as well as the impact increased legal funding and associated costs is having on return to work and recovery outcomes for injured people in NSW. Cost impact also needs to be considered in the context of the funding structure of the scheme and an employer's liability under workers compensation legislation.

## **3. Review of Independent Legal Advice and Review Service (ILARS Review)**

### **3.1. Terms of Review**

The terms of the ILARS Review are to examine the current arrangements to manage and administer ILARS aligned to its statutory purpose, and whether the current guidelines promote relevant objectives as described by section 3 of the 1998 Act.

The focus of this review is the Guidelines, allocation and amount of funding for legal and associated costs, and arrangements for Approved Lawyers and the role played by Solutions. The IRO have also noted concurrent reviews of business processes, appeal costs review and user experience surveys.

### **3.2. Conduct of the Review**

As outlined in the issues paper, the independent Review Committee is overseeing the ILARS Review. SIRA also welcomed the opportunity to provide input via participation in the reference group in April 2022.

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<sup>3</sup> Clause 9(1), Part 5, Schedule 5 to the *Personal Injury Commission Act 2020*

<sup>4</sup> Clause 9(2), Part 5, Schedule 5 to the *Personal Injury Commission Act 2020*

While SIRA support the role of an oversight committee, it is important IRO clarify how conflicts of interest are being identified and managed in the conduct of the review given members of both the oversight committee and reference group are currently Approved Lawyers under the ILARS scheme.

### **3.3. Issues for Comment**

Rather than address each individual question, comments are provided as considered relevant from the perspective of the Regulator.

Provision of additional insights and analysis through available data would be required to fully consider the current operation of ILARS and its' impacts to better inform opportunity for improvements to be made to the guidelines.

### **3.4. Overall operation of the ILARS scheme and the ILARS guidelines**

As outlined above, SIRA's role as Regulator and system steward include to:

- promote the efficiency and viability of the insurance and compensation schemes established under the workers compensation Acts
- minimise the cost to the community of workplace injuries
- provide for the effective supervision of claims handling and disputes under the workers compensation and motor accidents legislation, and
- promote compliance with the workers compensation legislation.

Any statutory instrument or guideline must be issued in accordance with the respective guideline-making power under the Act and should support system objectives as outlined in section 3 of the 1998 Act.

The PIC Act provides guideline-making power at clause 10, Part 5 of Schedule 5:

*The Independent Review Office may issue guidelines (ILARS guidelines) for or with respect to the following –*

- a) the approval of lawyers to be granted funding under ILARS (including qualifications and experience for approval),*
- b) the allocation and amount of funding for legal and associated costs under ILARS.*

Any review of the guidelines should be undertaken on an as needs basis or as determined appropriate by the IRO with opportunity for input from key stakeholders.

The guidelines are disallowable instruments and subject to parliamentary scrutiny<sup>5</sup>.

Accordingly, the IRO should be confident that the guidelines made are within power and all relevant stakeholders engaged appropriately.

### **3.5. Approved lawyers**

The *Guidelines for Approval as an IRO Approved Lawyer* have been made under clause 10(1)(b), Schedule 5 of Part 5 to the PIC Act (it is presumed this should instead read clause 10(1)).

These Guidelines essentially set out an approval framework including approval requirements, the effect of approval, continuing eligibility and process of termination (etc).

In effect, an injured worker has the choice of their own lawyer, providing that lawyer is approved by the IRO in accordance with the guidelines.

SIRA recommend as part of a review of these guidelines that consideration be given to, subject to guideline-making power, outlining conditions of approval which are designed to

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<sup>5</sup> Clause 11, Part 5 of Schedule 5 to the *Personal Injury Commission Act 2020*

support scheme objectives and the effective and efficient delivery of legal services to injured workers. This should include expected outcomes or expectations regarding service delivery and conduct which is a requirement to maintaining approval under the guidelines.

### **3.6. IROs role in supervising the conduct and services of Approved Lawyers and Approved Barristers**

The functions of the IRO are outlined in clause 6, Part 3 of Schedule 5 to the PIC Act:

- a) to deal with complaints made to the Independent Review Officer under this Schedule
- b) to inquire into and report to the Minister on any matters arising in connection with the operation of this Act or the enabling legislation as the Independent Review Officer considers appropriate or as may be referred to the Independent Review Officer for inquiry and report by the Minister
- c) to encourage the establishment by insurers and employers of complaint resolution processes for complaints arising under the enabling legislation
- d) to manage and administer ILARS (including by issuing ILARS guidelines)
- e) any other functions as may be conferred on the Independent Review Officer by or under this Act or any other Act (including the enabling legislation).

The IRO's functions relating to complaints relate to claimants making a complaint about any act or omission of an insurer that affects the entitlements, rights or obligations of the claimant under the enabling legislation<sup>6</sup>.

In New South Wales, the Office of the Legal Services Commissioner (OLCS) operates as an independent complaints handling and disciplinary body who receive and deal with complaints about solicitors and barristers in NSW. The OLCS oversees the investigation of complaints, may take disciplinary action or commence disciplinary proceedings in the NSW Civil and Administrative Tribunal (NCAT). The OLCS together with the Law Society of New South Wales and the New South Wales Bar Association establish an appropriate co-regulatory system for legal practitioners.

The PIC Act does not extend IROs legislative functions to dealing with complaints about the conduct of Approved lawyers, or how matters are dealt with by Approved lawyers or Barristers.

Given the existing regulatory framework in NSW to deal with complaints and current legislative provisions, the IRO do not have a role in dealing with complaints about lawyers.

However, the IRO may consider as part of the approval requirements in the guidelines, subject to guideline-making power, what outcomes and quality assurance processes are required to be in place by Approved lawyers. Further, whether IRO has capability to reject an application for approval or revoke an existing approval for legal practitioners who are the subject of complaint to IRO.

### **3.7. Other Issues – Approved Lawyers**

One option may be that the guidelines consider approval categories which recognise experience or expertise, which may then be included as part of the Approved listing. This may include those lawyers who have experience in certain areas such as death claims.

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<sup>6</sup> Clause 8, Part 4, Schedule 5 to the *Personal Injury Commission Act 2020*

### 3.8. ILARS funding

#### Impact on Scheme Viability

Any funding arrangements must balance access to appropriate benefits and supports for the injured person with scheme viability and affordability.

The overall cost of providing ILARS is continuing to increase.

**Table 3** provides a summary of funding from the workers compensation operational fund to cover operations, ILARS Professional Fees and ILARS disbursements.

These costs are in addition to legal and other costs paid by insurers, including those legal costs paid by insurers for exempt categories of workers. As at April 2022, 3.1% of \$4.5B in total payments made over a 12 month period are for legal costs<sup>7</sup>.

**Table 3 Summary of Funding**

WCOF Funded Expenditure	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	DRAFT \$'000
<b>WIRO</b>							
• Operations	4,898	6,582	7,343	10,558	10,967	6,940	-
• ILARS Professional Fees			50,465	34,561	37,630	26,278	-
• ILARS Disbursements	44,034	49,864	18,620	22,888	25,420	17,009	-
<b>IRO</b>							
• Operations	-	-	-	-	-	5,228	13,654
• ILARS Professional Fees	-	-	-	-	-	18,112	44,798
• ILARS Disbursements	-	-	-	-	-	12,214	32,440
<b>Total</b>	<b>48,932</b>	<b>56,446</b>	<b>57,808</b>	<b>68,007</b>	<b>74,017</b>	<b>85,781</b>	<b>90,892</b>
<b>Summary</b>							
Operations	4,898	6,582	7,343	10,558	10,967	12,168	13,654
ILARS Professional Fees			50,465	34,561	37,630	44,390	44,798
ILARS Disbursements	44,034	49,864		22,888	25,420	29,223	32,440
<b>Total</b>	<b>48,932</b>	<b>56,446</b>	<b>57,808</b>	<b>68,007</b>	<b>74,017</b>	<b>85,781</b>	<b>90,892</b>

Given the potential impact to scheme liabilities, any amendment or increase to funding amounts or process requires careful consideration, including actuarial assessment, to understand potential cost impacts to the scheme.

#### Consistency with SIRA regulated fees and fees orders

As the regulator for the scheme SIRA is required to ensure legal costs are funded within the constraints of the statutory framework, including the regulations made under the Acts.

The *ILARS Funding Guidelines* have been made under clause 10(1)(b), Schedule 5 of Part 5 to the PIC Act.

SIRA recommend that review of these guidelines be undertaken in collaboration with SIRA to ensure consistency with any maximum fees provided for in the Workers Compensation Regulation 2016, as well as any maximum fees set out in SIRA Fees Orders, including maximum fees payable for health reports under section 339 of the 1998 Act<sup>8</sup>.

<sup>7</sup> Refer to **SIRA 'Open Data'** data extracted in July 2022 as at April 2022 over a 12 month period

<sup>8</sup> Section 339 enables the Authority to fix maximum fees for the provision reports by health service providers for use in connection with a claim.

## Governance Arrangements on Discretion

For increased transparency, consistency and certainty, any instances where discretion is able to be applied with respect to the maximum amounts payable for costs in accordance with the statutory framework, the guidelines should outline the power relied upon and the terms of how the discretion may apply and /or how it will be exercised.

## Presumption in favour of funding

The guidelines state there is a general presumption in favour of funding. While it is not possible to fully compare ILARS funding with matters that progress to disputes in the Personal Injury Commission (ILARS reports based on multiple issues while the Commission records a single disputes per matter lodged), it appears that a significant percentage of ILARS grants do not progress to dispute in the Personal Injury Commission.<sup>9</sup>

The current merit test a lawyer is required to establish in order to access Stage 2 Funding is '*has some merit*'. Having some merit is described as meaning that '*there is a basis in fact and law to conclude that the worker has a claim or dispute to pursue which may result in a successful outcome*'. This, combined with the presumption in favour of funding represents a low bar with minimal grants being declined<sup>10</sup>.

SIRA recommends the IRO review the presumption in favour of funding and the current merit test are aligned to the system objectives of the workers compensation scheme of being fair, affordable, and financially viable.

Further, a review of the current ILARS service delivery model should be undertaken to examine which matters may be dealt with utilising existing IRO internal resources and expertise. Adoption of a hybrid approach to provision of legal support through internal resourcing together with ILARS grants to external legal practitioners may assist with reducing costs, utilising internal expertise and experience, and improving the customer experience.

The experience for the injured person and subsequent outcome should also be considered as part of further detailed analysis as to whether the presumption and current test ensure the balance is right.

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<sup>9</sup> Based on the most recent data in the ***IRO Periodic Performance Review 1 July 2021 to March 2022***, no claim is progressed in 44% of matters, compared with 31% of matters resolving before proceedings and 25% of matters resolving after proceedings have commenced.

<sup>10</sup> Based on the most recent data in the ***IRO Periodic Performance Review 1 July 2021 to March 2022***, 0.4% of all ILARS grants received are declined.

## **Disclaimer**

This publication may contain information that relates to the regulation of workers compensation insurance, motor accident compulsory third party (CTP) insurance and home building compensation in NSW. It may include details of some of your obligations under the various schemes that the State Insurance Regulatory Authority (SIRA) administers.

However to ensure you comply with your legal obligations you must refer to the appropriate legislation as currently in force. Up to date legislation can be found at the NSW Legislation website [legislation.nsw.gov.au](http://legislation.nsw.gov.au)

This publication does not represent a comprehensive statement of the law as it applies to particular problems or to individuals, or as a substitute for legal advice. You should seek independent legal advice if you need assistance on the application of the law to your situation.

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