

INQUIRY INTO 2020 REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: Workers Compensation Independent Review Office (WIRO)
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WIRO Submission to the Standing Committee on Law and Justice

2020 Review of the Workers Compensation Scheme

29 May 2020

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Workers Compensation Independent Review Office

The NSW Parliament established the statutory office of the Workers Compensation Independent Review Officer (Independent Review Officer) in 2012 as part of significant reforms of the workers compensation scheme. The Independent Review Officer is assisted by a team of approximately 55 persons employed in the Public Service under the *Government Sector Employment Act 2013*; these persons are employees of the Department of Customer Service. Collectively, these persons and the Independent Review Officer are known as WIRO, the Workers Compensation Independent Review Office.

The statutory functions of the Independent Review Officer are set out in section 27 of the *Workplace Injury Management and Workers Compensation Act 1998* (WIMA):

(a) to deal with complaints made to the Independent Review Officer under this Division,

(c) to inquire into and report to the Minister on such matters arising in connection with the operation of the Workers Compensation Acts as the Independent Review Officer considers appropriate or as may be referred to the Independent Review Officer for inquiry and report by the Minister,

(d) to encourage the establishment by insurers and employers of complaint resolution processes for complaints arising under the Workers Compensation Acts,

(e) such other functions as may be conferred on the Independent Review Officer by or under the Workers Compensation Acts or any other Act.

In addition, WIRO manages the Independent Legal Assistance and Review Service (ILARS) to ensure injured workers are able to obtain legal advice, assistance and representation to assert their rights and entitlements under workers compensation legislation. WIRO intervenes in some ILARS matters to promote early solutions for workers compensation claims. ILARS informs the Independent Review Officer's function to report on matters in connection with the operation of workers compensation legislation.

WIRO also regularly runs seminars and publishes information about the latest cases and reforms in workers compensation and insights arising from WIRO's work. This contributes to the professional development of lawyers, insurers and others with an interest in NSW workers compensation.

Overview of submission

WIRO's submission draws on the complaints, enquiries and applications for ILARS grant funding, in particular those handled during the current financial year. We focus on common and important issues raised, and how they reflect on the operation of the workers compensation system.

Across all of our services there has been an increase in demand, in part due to system changes that have expanded WIRO's role, process changes to make our services more accessible and fit for purpose and an underlying increase in demand that may indicate there are more complaints and disputes in the workers compensation system.

The most common complaints are from injured workers dissatisfied with insurer delays in determining liability on their claims. These delays can place workers in financial hardship and impact on their recovery. We have commenced a project to examine a number of these complaints more closely, to better understand the reasons for delay and identify improvement opportunities.

We are also monitoring closely other persistent issues of importance to workers including:

- errors in weekly payments that are made by employers on behalf of insurers, which sometimes require multiple inquiries by WIRO to reach an appropriate solution
- inadequate notices to workers advising them about important decisions, such as notices to reasonably excuse the acceptance of provisional liability and notices to dispute liability or reduce weekly payments.

The use of whole person impairment as a gateway to a range of workers compensation benefits continues to present issues for injured workers. WIRO has recommended consideration of a number of reforms to reduce these impacts. These include allowing more than one assessment of impairment and ensuring injured workers can receive medical treatment claimed during a period of entitlement.

Reforms to the workers compensation system since 2015 are reflected in the following WIRO trends:

- reforms to reduce the impairment threshold to receive lifetime medical expenses is reflected in more ILARS applications where injured workers can establish this entitlement
- reforms to the calculation of pre-injury average weekly earnings is resulting in fewer complaints and enquiries for workers disputing the calculation of weekly payments.

Responding to the impact of COVID-19 on WIRO and the workers compensation system has been a significant focus in 2020. We are performing all our functions remotely, actively monitoring the system and reporting on common issues for injured workers and supporting Approved Lawyers who represent injured workers.

In an everchanging environment, we are setting a clear direction for WIRO, with a focus on increasing the impact of our early solutions and system improvement functions. Our WIRO Direction will build on the solid foundations of our first eight years of operation and position us well to respond to upcoming challenges.

Complaints and solutions

WIRO provides an informal, accessible and effective information and complaints service for injured workers. The core elements of this service include:

- informal access by injured workers (by telephone, online, email, mail or in-person) to expert WIRO dispute resolution officers
- fast and fair solutions for injured worker complaints
- expert information provided for general enquiries about how the workers compensation scheme operates
- early intervention in some ILARS funded matters to seek quick solutions
- collection of information to identify systems issues that may warrant review.

Demand for services

Complaints and enquiries

The use of WIRO complaint and enquiry services has more than doubled over the past three (3) years. Complaints have grown from 2,304 in 1 July 2017 – 31 March 2018 to 5,949 complaints in 2019 - 2020.

Table 1: Enquiries and Complaints received by WIRO over first three (3) quarters from 2017 - 2020

	Enquiries received	Complaints received
1 Jul 2017 – 31 Mar 2018	2,737	2,304
1 Jul 2018 – 31 Mar 2019	4,287	3,161
1 Jul 2019 – 31 Mar 2020	8,410	5,949

Note:

Data is taken from 1 July to 31 March as the most current data available for comparison purposes.

The above complaints data does not include early intervention matters. See data dictionary.

One key reason for this increase in demand is the reforms that commenced on 1 January 2019, which provided for WIRO as a single point of contact for injured workers (including exempt workers and coalminers) to raise complaints and enquiries about workers compensation insurers.

Another reason for the increase in complaints may include improved awareness of WIRO and its role. Finally, there may be increased disputation more generally, as demonstrated by a parallel increase in applications for ILARS grant funding over the last several years.

Early intervention matters (ILARS funded)

WIRO also continues to identify ILARS funded matters, that may be appropriate for intervention to prompt early solutions. Most commonly, where grant matters relate to claims to which the insurer has not responded, WIRO will raise the matter with the insurer to prompt a decision.

Table 2: WIRO early intervention matters over first three (3) quarters from 2017 - 2020

	No. WIRO early intervention matters
1 Jul 2017 – 31 Mar 2018	816
1 Jul 2018 – 31 Mar 2019	1,013
1 Jul 2019 – 31 Mar 2020	702

Early interventions support just, quick and inexpensive solutions to workers compensation disputes. The case studies below are typical examples of matters that demonstrate the impact of these early interventions.

Case Study 1 - early intervention

A WIRO Approved Lawyer sought an extension of grant funding to proceed to the Workers Compensation Commission (Commission) after an insurer failed to respond to a request for review of the injured worker's pre-injury average injury earnings (PIAWE) calculations.

WIRO determined to intervene early in the dispute and contacted the insurer to seek a response to the request for review. WIRO negotiated between the lawyer and insurer to clarify what information was required to review the PIAWE calculation. The insurer then determined the calculation was incorrect and corrected an underpayment of weekly payments in excess of \$35,000.

As a consequence of WIRO's early intervention, the dispute was solved within approximately six weeks of receipt of the grant extension application and the extension of funding for the matter to proceed to the Commission was not required.

Case Study 2 - early intervention

A worker suffered both physical and psychological injuries following a workplace accident in which they received an electric shock. The worker's Approved Lawyer sought an extension of their grant funding to proceed to the Commission after the insurer failed to respond to the worker's claim for permanent impairment lump sum compensation.

WIRO determined to intervene early in the dispute and contacted the insurer to seek a response to the claim. Following WIRO's intervention, the insurer accepted the worker's claim for 23 per cent whole person impairment and agreed to pay the lump sum entitlement.

As a consequence, the dispute was solved within eight days of the grant extension application being received by WIRO and without the need for the dispute to be referred to the Commission.

Timely and effective solutions

WIRO solves complaints, including early intervention matters, in a speedy and effective manner. Eighty (80) per cent are finalised within seven (7) days of receipt or action, and 95 per cent within 15 days.

Table 3 below summarises the outcomes of the complaints and early intervention matters received by WIRO from 1 July 2019 – 31 March 2020. The outcome in 88 per cent of matters is a solution for the injured worker.

The various case studies included in this submission provide examples demonstrating the effectiveness of WIRO's enquiries and interventions.

Table 3: Complaints and early intervention matters outcomes 1 July 2019 - 31 March 2020

Outcomes achieved	Number of matters (complaints and early intervention matters)	% of all outcomes
Resolved – action	966	15%
Resolved – benefit	1,872	28%
Resolved – information	3,001	45%
Referred	524	8%
Not resolved	174	3%
No action	93	1%

Note:

The above data includes only closed matters. See data dictionary for definitions of outcomes provided.

Common complaint issues

Table 4 includes the top five (5) categories of complaint issues received by WIRO, as defined by the primary issue.

Table 4: Top complaint issues, 1 July 2019 - 31 March 2020

Top five complaint issues	Number	% of complaints
Delay in determining liability	1,661	28%
Delay in payment	1,306	22%
Errors in weekly benefits	905	15%
Denial of liability	496	8%
General case management	425	7%

Notes

WIRO undertook substantial changes to its issue categories from 1 July 2019 to reflect reforms in the broader workers compensation scheme including for work capacity decisions and pre-injury average weekly earnings calculations. These changes limit comparisons between issue types in periods prior to 1 July 2019.

Delay in determining liability

Almost 30 per cent of complaints to WIRO are from injured workers who report that the insurer has not determined their claim within the required timeframe.¹

Timeliness in determining claims is self-evidently important. Injured workers rely on these decisions so that they can progress their claim, access treatment to aid in recovery and meet financial commitments. Most of these complaints, 1321 matters between 1 July 2019 and 31 March 2020, concerned decisions about liability for weekly payments and medical treatment expenses.

In half of these matters (670 cases in the first months of 2019-20) WIRO established that the insurer was outside the required timeframe in determining liability.

Case Study 3 - delay in determining liability

A worker suffered an amputation of their middle finger at work. The insurer was notified of the injury and requested additional information from the worker as part of efforts to locate the employer's insurance policy. The worker provided the information requested. After three (3) weeks the insurer was yet to determine if provisional liability for weekly payments would be accepted.

The injured worker contacted WIRO to complain about the delay. They reported that they had care of three children, they were unable to access any government welfare payments and they were in extreme financial hardship.

WIRO made enquiries with the insurer about the delay in deciding whether weekly benefits were payable – the insurer's obligation is to commence weekly payments or provide a reasonable excuse

¹ WIMA sets out timeframes for determining certain types of claims. For example, Sections 274 and 279 require claims for weekly payments and medical expenses respectively to be determined within 21 days.

for not doing so within seven (7) days. WIRO recommended the insurer accept provisional liability for weekly payments while it continued investigations regarding the policy. The insurer agreed and commenced payments.

Case Study 4 - delay in determining liability

The injured worker notified the insurer of a psychological injury. The insurer sought to reasonably excuse determining the claim and therefore not commence weekly payments based on insufficient medical information. The injured worker then submitted a worker's injury claim form, which required the insurer to determine the claim within 21 days.

The injured worker contacted WIRO after the 21-day period, complaining that the insurer had not determined the claim. The worker reported they were in financial hardship, having gone nearly a month without pay and being unable to pay rent.

WIRO made enquiries with the insurer about the delay in determining the claim and provided information about the worker's vulnerable situation. As a result of the enquiries, the insurer agreed to accept provisional liability and pay weekly payments to the worker for a period of up to 12 weeks while it continued to investigate the claim. During the 12-week period the insurer determined to accept liability for the claim.

Given delay in determining liability is the most common issue raised in complaints, WIRO is commencing a project to examine in detail a sample of these complaints. This will help provide a better understanding of the reasons for delay, how this has impacted injured workers and any opportunities for improvement.

Errors by employers when making weekly payments

It is common for employers to make weekly payments to injured workers on behalf of insurers and done well this is often a preferable system. It is administratively streamlined from the injured worker's perspective and maintains their relationship with the employer.

Administering workers compensation payments can be complex and many small employers may do it infrequently without a full appreciation of the complexity involved in determining payments. Approximately six (6) per cent (344 matters) of all complaints made by injured workers to WIRO in the first three quarters of 2019-20 were matters where WIRO established there had been errors by employers in making weekly payments. Two (2) case studies are provided below.

Case Study 5 - errors in weekly payments

An injured worker on suitable duties was unable to work over the Christmas-New Year period due to a shut-down by their employer over this period. The worker provided a Certificate of Capacity and made a claim for weekly payments.

The worker complained to WIRO that their employer had advised that they were not entitled to receive weekly payments.

WIRO commenced enquiries with the insurer who confirmed the worker was entitled to weekly payments for the period when suitable duties were not offered. The employer was requested to make an immediate payment and WIRO monitored the case to ensure the payment was made.

The worker subsequently advised a payment was not received from the employer and further WIRO enquiries indicated this was due to an administrative error. Following WIRO's intervention an immediate payment in excess of \$2000 was made to the worker.

Case Study 6 - errors in weekly payments

An injured worker complained they had not received weekly payments for five (5) different pay periods. The worker had been trying for a number of months to resolve this matter with their employer and the insurer.

The worker complained to WIRO, describing their frustration that they were owed many thousands of dollars in weekly payments and that they were unable to rectify the problem.

WIRO commenced enquiries with the insurer, who agreed that the payments were outstanding, advised that the employer had been reimbursed the payments and requested the employer to make weekly payments to the worker.

WIRO monitored the claim to ensure the payments were made. After further follow up the insurer advised that the employer had still not made the payments. To rectify the situation, the insurer made a payment of more than \$14,000 directly to the worker and agreed to pay the worker directly in the future.

WIRO's view is that insurers share a responsibility with employers to remedy any errors in payments. In some cases, WIRO's view is that an insurer is not active enough in remedying payment errors. WIRO is also concerned that delays in resolving these complaints can impact on the trust between the employer and worker, potentially impacting the speed and success of the worker's return to work.

WIRO proposes to monitor errors in payments attributed to employers closely in 2020-21, to identify any systemic causes and possible solutions to reduce these complaints and their substantial impact on injured workers.

Inadequate 'reasonable excuse' notices

An insurer who has been notified that a worker is injured must accept provisional liability and commence weekly payments unless the insurer has a reasonable excuse for not doing so.² The insurer must provide the worker with a written notice outlining the reasonable excuse (reasonable excuse notice) and advising the worker that they are entitled to make claim for compensation.³ The acceptance of provisional liability means that the injured worker can get an immediate payment at a time when they have just been injured and may be most vulnerable.

WIRO understands that considerable effort has been applied by icare in developing reasonable excuse notices that are clear and provide the correct information for workers. However, WIRO is of the view that the system for administering provisional liability can be further improved, including through:

- explicit and clear information from the insurer about the reasonable excuse relied upon to refuse commencing payments
- clear and transparent processes to request and act on additional information that may be requested from the worker to further assess provisional liability
- clearer information about the separate entitlement of the worker to make a claim for compensation.

Case Study 7 - reasonable excuse notices

A worker notified the insurer of a physical and psychological injury following being attacked with a knife at work.

The insurer reasonably excused weekly payments and the notice advising the worker of this sought more medical and factual information about the injury, including valid certificates of capacity, payslips, the worker's employment contract and bank statements.

The worker made a complaint to WIRO after receiving the insurer's reasonable excuse notice. WIRO made enquiries about the complaint and the insurer advised the only reasonable excuse relied upon was that the injury was not work-related. The insurer's explanation was that it was unable to contact the employer or obtain a police report.

WIRO was concerned about the notice as the insurer sought to rely on a reasonable excuse that the injury was not work related due to the employer being unresponsive to its contact. In addition, the insurer sought unnecessary information that was not the basis of the reasonable excuse.

² Section 267 WIMA states that within seven days of an insurer being notified of an injury, it must commence provisional weekly payments unless there is a reasonable excuse.

³ See section 268 WIMA

Given the insurer's reason for applying a reasonable excuse was based on the failure of the employer to provide information, there was no clear basis for why additional information would be requested from the worker.

WIRO has raised our concerns about reasonable excuse notices with icare, including in the 2018-19 WIRO Annual Report. WIRO has recommended icare improve templates to ensure that the reasonable excuses are clearly stated and information requests to the injured workers are directly relevant to these excuses.

Pre-injury average weekly earnings

The Standing Committee on Law and Justice (Committee) has in previous reports commented on the difficulties arising from the complex computation methodology for calculating pre-injury average weekly earnings (PIAWE).

As the Committee would be aware, a new and simpler methodology for calculating PIAWE applies to workers injured on and from 21 October 2019.⁴ For all other workers, the previous method of calculating PIAWE applies. There is an exception for those injured after 26 October 2018 and before 21 October 2019 where the previous 52-week step-down (to remove shift and overtime allowances) was removed.

Since the commencement of the PIAWE reforms, WIRO has observed a noticeable reduction in complaints and enquiries about the calculation of PIAWE, although errors in calculations still occur.

Case Study 8 – PIAWE calculation

A worker injured in June 2019 complained to WIRO that their weekly workers compensation payments were significantly less than their pre-injury earnings.

WIRO made inquiries with the insurer, who provided a spreadsheet of earnings drafted by the employer for the PIAWE calculation. WIRO provided this information to the worker, who disputed the earnings outlined in the spreadsheet and provided payslips as proof. On close review, it was evident that employer's spreadsheet did not include the worker's overtime earnings of 10 hours per week.

WIRO put this to the insurer, who accepted that there was an error in the calculation, increased the PIAWE and made an adjustment payment of over \$9,000.

The weekly payments of some workers remain based on the previous methods of PIAWE calculation, and WIRO continues to deal with complaints about these matters.

⁴ Since the Committee's last review, the Workers Compensation Legislation Amendment Act 2018 reformed the calculation of PIAWE. The new methodology is set out in Schedule 3 of the 1987 Act as well as Part 4 of the Workers Compensation Regulation 2016.

Case Study 9 – PIAWE calculation

The worker had been injured after 26 October 2018 but before 21 October 2019. The insurer notified the worker in May 2020 that it would remove shift and overtime allowances from the worker’s PIAWE calculations after 52 weeks.

WIRO made inquiries with the insurer as to the reason for the re-calculation of PIAWE. The insurer’s initial response to WIRO confirmed it was applying the 52-week step-down. WIRO made further inquiries, pointing the insurer to amendments to the calculation of PIAWE and noting that as the worker was injured after 26 October 2018 the step-down no longer applied and a fresh PIAWE calculation was not required. .

The insurer conceded it had made an error and sent correspondence to the injured worker retracting its earlier advice and confirming there would be no step-down.

WIRO will continue to monitor PIAWE calculation complaints. WIRO will also provide what assistance we can to the review and remediation of errors in weekly payments calculations notified by icare to the State Insurance Regulatory Authority (SIRA) in February 2020.

Grants of legal funding

WIRO administers the Independent Legal Assistance and Review Service (ILARS) to ensure injured workers have access to lawyers who are expert at workers compensation law and practice to advise, assist and represent them in accessing workers compensation entitlements. The core elements of this service include:

- simple, clear and accessible processes for lawyers to be approved to make applications for grants of funding
- fast, consistent and fair decision making on applications for grants and extensions of funding by expert WIRO Principal Lawyers, so that Approved Lawyers can provide high-level services to injured workers
- early intervention in some matters the subject of an ILARS grant to seek early solutions (see above)
- collection of information to identify systems issues that may warrant review.

Demand for services

There has been an increase in demand for ILARS grant funding in the first nine (9) months of 2019-20.

Table 5: Number of ILARS grant applications over first three (3) quarters from 2017 -2020

	No. ILARS grant applications
1 Jul 2017 – 31 Mar 2018	10,010
1 Jul 2018 – 31 Mar 2019	8,558
1 Jul 2019 – 31 Mar 2020	12,795

One reason for this increase in demand is reform to the WIRO Funding Policy for ILARS, which was substantially revised in September 2019. A significant change was to bring forward the initial application by a lawyer for a grant of funding.

Previously funding was not applied for until after Approved Lawyers had undertaken substantial investigations and provided detailed advice. Approved Lawyers and WIRO were concerned this approach impacted on the access of workers to legal assistance.

Approved Lawyers can now apply for funding at an earlier stage, when a worker initially consults the lawyer for advice. Our initial analysis indicates that this has brought forward applications for funding in matters where, previously, the application would not have been made until a later stage.

We are currently examining more closely the data on injuries and claim outcomes to understand if there are other underlying reasons for this increase in demand. A preliminary analysis indicates some increase in applications for grants of funding where:

- medical and other treatment claims have been denied on the basis that the treatment is not reasonably necessary
- workers are seeking assessment of the degree of permanent impairment to establish ongoing entitlement to benefits and lump sum compensation claims.

At least in part, these may be further indicators of increased disputation in the workers compensation system resulting in increased demand for WIRO’s funding services.

Observations arising from grant applications

Information included in ILARS grants applications provides insights into the claims where the impacts on workers and insurers is the most substantial, in particular from a financial perspective.

Whole person impairment – gateway issues

The workers compensation system embeds the degree of whole person impairment (WPI) and when it must be established as the gateway for eligibility to a range of entitlements. Table 6 sets out several examples of entitlements based on WPI.

Table 6: Examples of entitlements based on WPI

WPI	Entitlement
More than 10%	Ongoing entitlement to medical expenses between two (2) and five (5) years after cessation of weekly payments or after the date of injury Lump sum compensation for permanent impairment (excluding psychological injury)
15% or more	Entitlement to pursue a work injury damages claim (statutory) Ability to negotiate a commutation of full future statutory rights and entitlements Lump sum compensation for permanent impairment (psychological injury) Payment of the cost of domestic assistance
More than 20%	Ongoing entitlement to weekly payments after 260 weeks Ongoing entitlement to medical expenses

An injured worker’s WPI therefore plays a crucial role in determining eligibility for different benefits. One advantage of the use of an impairment-based system is that it is a consistent measure and therefore able to be applied across a range of injuries. However, there are a number of issues with using the degree of impairment for the purpose of assessing eligibility which have been raised previously . These include:

- whether impairment, which reflects the severity of a medical condition and its impact on activities of daily living, is also a fair measure to determine the ability of an injured worker to undertake work (and therefore not require weekly payments) and the worker’s need for ongoing medical and other treatment and support for injuries
- whether the requirement that injured workers can only have one assessment of the degree of permanent impairment provides wrong incentives for early and invasive intervention for injuries that might preferably be treated in a more conservative manner
- whether other settings in the legislation result in unfairness, including:
 - the current requirement that medical treatment must be received during the relevant entitlement period, such that treatment that has been approved by the insurer but not

- yet received may not be compensated for, even where the worker is not responsible for the delay in the treatment
- the inability, in circumstances where both the injured worker and insurer agree the worker has not reached maximum medical improvement but that the WPI arising from the injury is likely to be more than 20 per cent, for entitlements to continue without a formal assessment and medical assessment certificate from the Commission.

WIRO has previously recommended a number of reforms that would go some way to ameliorating these impacts. These include: allowing more than one assessment of impairment where the purpose is other than for a lump sum impairment claim; and to permit an injured worker to receive medical treatment that is claimed before the expiry of a relevant entitlement period, irrespective of whether the treatment was approved, given or received in that period.

Whole person impairment – impact of 2015 reforms

An important workers compensation reform in 2015 was to reduce the gateway for workers to be eligible to lifetime medical expenses from more than 30 per cent WPI to more than 20 per cent WPI.

Prior to 2015, a worker had to meet the ‘seriously injured’ threshold (more than 30 per cent WPI) to be eligible for lifetime medical expenses. At the end of December 2013, 1008 workers under the Nominal Insurer Scheme met this threshold.

Since 1 January 2019 WIRO has commenced collecting information on WPI outcomes in matters that are funded through an ILARS grant, and where the grant is finalised. In the 15 months from 1 January 2019 to 31 March 2020, 1,474 injured workers whose matters were funded through ILARS grants established an impairment of more than 20 per cent. The trend has been increasing over this fifteen-month period. For example:

- between January and March 2019, 217 workers were successful in establishing an impairment of more than 20 per cent
- between January and March 2020, 331 workers were successful in establishing an impairment of more than 20 per cent.

This trend in outcomes and increased absolute number of workers with impairment more than 20 per cent indicates that more injured workers with high needs are becoming eligible for lifetime medical treatment and weekly payments beyond 260 weeks, consistent with the intention of the reforms.

Section 78 notices

An important requirement of fairness is to provide notice to an injured worker whenever an insurer decides to dispute liability for a claim, or to discontinue or reduce weekly payments. Important reforms to these so-called ‘section 78 notices’ (as they are issued under section 78 of WIMA) were included in clause 38 of the *Workers Compensation Regulation 2016* (the Regulation). Clause 38 of the Regulation specifies the information the section 78 notice must contain, including:

- the effect of the decision
- the worker’s rights of review of the decision
- the procedure for requesting a review
- legal and other services (including contact details for the WIRO) that may be available to the worker to assist with the dispute.

WIRO conducted a real-time review of the implementation of these reforms during early 2019 by examining ILARS funding applications where a section 78 notice was issued. Over 90 per cent of the notices reviewed (392 out of 429) were either deficient or defective and did not comply with the requirements under the Regulation or Act. The main issues identified included:

- decision notices which made no mention of the worker's option to seek assistance from WIRO
- workers being referred to the "WorkCover Claims Advisory Service" which did not exist after 1 September 2015
- notices being given under the repealed section 74 of WIMA.

In addition, some of the template decision notices used by insurers raised concerns as being confusing. For example, a notice where the insurer was disputing liability for the worker's lump sum compensation claim stated:

"It is important to remember that if you lodge a dispute with the [Commission] before the date the decision takes effect, there will be no change to your weekly benefits until the [Commission] makes its decision".

This statement was confusing as weekly benefits in compensation were not disputed. This was stated clearly later in the notice:

"Your claim for injury, weekly compensation and reasonable medical expenses is not disputed and as such, it is not a matter which you can refer to the Commission."

WIRO raised issues with section 78 notices with icare and self-insurers from the commencement of the reforms, and suggested steps insurers could take to rectify the notices. Generally, insurers have been receptive to our comments.

WIRO also provided a copy of all instances of deficient or defective section 78 notices to SIRA. SIRA has since published an amended Form of Summary of Notice and undertook to discuss the form of the section 78 letters with the insurers with identified issues.

WIRO will continue to monitor section 78 notices during the 2020 calendar year.

COVID-19

The COVID-19 pandemic has required WIRO to adapt quickly to both ensure the safety and wellbeing of WIRO staff and to provide effective services to injured workers and the NSW community. Set out below is a brief summary of the steps taken by WIRO during the COVID-19 pandemic.

Monitoring impact on the system

Almost every injured worker with a current workers compensation claim is potentially impacted by COVID-19 in some way. These impacts may include reduced availability of consultations with treating practitioners, reduced rehabilitation and treatment availability, transport issues in attending appointments, more limited options when returning to work and reduced availability of suitable duties. Worker compensation claims may also be delayed where medical examinations cannot be conducted.

To monitor the workers compensation system impacts arising from COVID-19, WIRO implemented changes to our case management system from 1 March 2020 to capture complaints, enquiries or funding applications with a COVID-19 related issue.

WIRO also provided weekly reports to system participants with trend and issue information about matters raised with WIRO and case studies demonstrating the impact of COVID-19 on injured workers, to inform policy and operational responses to the pandemic.

Set out below is a brief report of our observations:

- in the 13 weeks between 1 March and 25 May 2020, WIRO received some 200 complaints, enquiries or grant application matters with a COVID-19 issue
- common concerns arising from these matters include:
 - issues about attending medical appointments and treatment; this includes complaints about being required to travel and attend medical examinations, issues about obtaining certificates of capacity, and concerns about being unable to access treatment and rehabilitation services
 - issues about suitable duties, including enquiries about the interaction between JobKeeper and weekly payments where a worker was still able to access suitable duties, concerns about workers compensation entitlements where a worker's employer had ceased operations and suitable duties were no longer available, and complaints about changes to suitable duties where employers sought to redeploy injured workers.

Case Study 10 – COVID 19

In early April 2020, an injured worker complained to WIRO after their employer advised all employees that work hours would be reduced by 50 per cent due to business disruption caused by COVID-19.

The worker, who had been injured in February and was performing suitable duties three days a week, was informed by their employer that their weekly payments (95 per cent of PIAWE) would also be reduced by half.

WIRO made inquiries into the complaint, and as a result the insurer contacted the employer and confirmed that the worker's payments, after expiry of the first entitlement period of 13 weeks, would continue at a rate of at least 80 per cent PIAWE depending on the number of hours worked each week.

Case Study 11 – COVID 19

An injured worker with chronic asthma contacted WIRO in early April 2020 after becoming concerned about an increased risk of exposure to COVID-19 if required to attend a medical examination arranged by their insurer with an injury management consultant (IMC).

WIRO made inquiries into the complaint, and as a result the insurer agreed to reschedule the assessment as a video consultation. The insurer also advised it would request the IMC to discuss the findings of the assessment with the worker's nominated treating doctor.

WIRO has also used this information and our workers compensation expertise to actively participate in developing system responses to the impact of the pandemic.

Providing assistance to Approved Lawyers

The firms of Approved Lawyers, who are granted funding by WIRO to provide advice, assistance and representation to injured workers, are among the many businesses potentially impacted by COVID-19. As a consequence, WIRO has taken a number of steps to support Approved Lawyers, including:

- prioritising the processing and payment of invoices and reducing the terms of payment (from 30 days to seven (7) days) to assist cash flow
- permitting applications to be executed electronically to reduce the need for office administration
- offering to work with any Approved Lawyer who is in financial hardship, to identify matters where earlier payments of legal costs may be appropriate
- adapting grant amounts to revised procedures in the Commission, including to enable the participation of barristers in some matters at an earlier stage to assist in reaching resolutions
- communicating regularly with Approved Lawyers about any changes in laws, regulations or procedures to adapt to COVID-19, to assist them to keep up to date with these reforms.

WIRO operations

WIRO's crisis response team commenced meeting in February 2020 with the primary focus being to enable all WIRO functions to be performed by team members working from their home. A key advantage is that WIRO has been a paperless office since commencement. Set out below is a brief outline of the steps we have taken:

- All WIRO staff commenced performing their roles remotely from 30 March 2020. Ongoing improvements to WIRO's technology in partnership with the Department of Customer Service (DCS) have addressed some time-limited workarounds.
- Office equipment has been made available for WIRO officers to be able to work safely from home, and we have increased the support for staff welfare and connectedness.
- More flexible work options have been offered following whole-of-public service changes to increase the bandwidth in which work can be completed and removal of core hour requirements. These changes have enabled many WIRO officers to better balance work, caring and other responsibilities.
- We have published on WIRO website frequently asked questions for injured workers about COVID-19 and workers compensation.

We have been embedded in a number of crisis response groups within the DCS cluster, and where appropriate have been able to coordinate our response with broader efforts within DCS.

Recommendations from previous inquiries

Standing Committee on Law and Justice 2018 review of the workers compensation scheme

The Committee made five (5) recommendations following its 2018 review of the workers compensation scheme. WIRO's update on the relevant recommendations is set out below:

- **Recommendations 1 and 2** concern the establishment of a single personal injury tribunal. The Committee would be aware that the Hon Victor Dominello MP, Minister for Customer Service has announced the Government's commitment to establish a Personal Injury Commission (PIC). The Independent Review Officer has been included in a DCS Reference Group to discuss options for reform and provide advice. We have also made ourselves available to the project team to provide whatever assistance is requested.
- **Recommendation 3** is that the NSW Government preserve the WIRO and ILARS e in the workers compensation scheme and expand its services to claimants in compulsory third party insurance scheme disputes.
The response of the NSW Government, provided to the Committee in August 2019, is to support this recommendation in principle. Since my appointment, there have been no detailed discussions with DCS or other agencies about this recommendation. My understanding is that further consideration of the recommendation will occur after arrangements for the PIC are settled.
- **Recommendation 5** is that SIRA consider resolving legislative ambiguities including issues of back-pay following resumption of weekly payments, pre-existing psychological injury, assessment of permanent impairment and aggregating impairments, as part of the Workers Compensation Dispute Resolution Reform Steering Committee Review, and in ongoing consultation with the WIRO.
I understand that SIRA will provide to the Committee an update on this recommendation. I note that since my commencement as Independent Review Officer, regular meetings have been established with the President of the Commission and Chief Executive Officer of SIRA. The focus to date has been primarily on the responses of each agency and the workers compensation system more generally to COVID-19.

Public Accountability Committee Report Number 5

Kim Garling, the first Independent Review Officer, made a submission to the Public Accountability Commission (PAC) in November 2019, in response to the PAC's inquiry into the budget process of independent oversight agencies and the Parliament of New South Wales (the inquiry). Mr Garling's submission raised a number of concerns including:

- control by SIRA over the budget for WIRO
- control by DCS of Independent Review Officer's and WIRO's procurement, recruitment and other functions
- the impact of these matters on the Independent Review Officer's independence and public trust in the workers compensation scheme.

The PAC referred the submission to this Committee.⁵

Similar concerns to those outlined by Mr Garling were canvassed before the Committee in its *Review of the exercise of the function of the WorkCover Authority* (report 54 – September 2014). The

⁵ Public Accountability Committee Report Number 5, Chapter 5, paragraph 5.19.

Committee noted that WIRO should be able to undertake its role with complete independence from WorkCover and recommended the NSW Government amend Part 3 of Schedule 1 of the *Government Sector Employment Act 2013* (GSEA) to designate WIRO as a separate agency.⁶

Mr Garling's submission to the *2018 Review of the Workers Compensation Scheme* in July 2018 noted that there has been no discussion about the Committee's recommendation.

Since my appointment, I have been pleased with the high levels of cooperation and collaboration extended by SIRA and DCS in working with WIRO. A key and shared objective has been to make the existing arrangements work as effectively as possible.

However, there is no question that the Independent Review Officer and the WIRO do not have an equivalent foundation to strongly support independence when compared to a number of other similar agencies.

For example, many other NSW complaint handling and oversight agencies and the Legal Aid Commission Staff Agency, are nominated as separate agencies under the GSEA and heads of those agencies have both enhanced accountability to the Parliament or relevant Minister and may exercise employer functions of the Government.

The Independent Review Officer is not an employer of her or his staff. The current arrangements, where this and other functions reside with the Secretary of the DCS can potentially impact on independence. Mr Garling has highlighted previous examples in his submission to the PAC.

In addition, the WIRO budget is developed by SIRA consistent with its legislative remit under Chapter 2, Part 6 of the WIMA. I have been consulted by SIRA on budget projections for both expenses of the WIRO office and the cost of the ILARS for the coming financial year and future years, and the level of cooperation has been high.

However, the budget process does not have the openness and transparency for funding that might be preferable for an agency exercising complaint handling, inquiry and legal funding functions in the workers compensation system. Budget arrangements similar to those recommended by the PAC for other independent oversight bodies include:

- a process of parliamentary oversight to review budget submissions of the Independent Review Officer (for example, by the Committee)
- a direct allocation of annual funding from the Workers Compensation Operation Fund
- a contingency fund to address unbudgeted financial demands, with appropriate criteria and approval processes governing access to any contingency funds.

Providing for these matters would go some way to better ensuring the independence (both actual and perceived) of both the Independent Review Officer and the WIRO.

I also note the WIMA includes fairly brief provisions for the establishment of the Independent Review Officer. These provisions do promote, to an extent, independence and accountability, for example by:

- providing for the Independent Review Officer to be appointed by the Governor for a fixed term
- prescribing the basis for removal from or vacation of office

⁶ Review of the exercise of the function of the WorkCover Authority (report 54 – September 2014) see recommendation 4 and paragraphs 3.61-3.73 and 3.81-3.83

- requiring insurers to provide information for the purpose of the exercise of functions
- requiring an annual report to be forwarded to the Minister, who must promptly table the report in Parliament.

A comparison with the legislation establishing offices with analogous functions points to additional arrangements that would further bolster independence. These include:

- specifying the function of administering a scheme for legal assistance and review services for injured workers (i.e., ILARS) and any other functions performed by the Independent Review Officer in the WIMA
- providing for immunity or excusing personal liability for the Independent Review Officer and WIRO staff when taking actions in good faith to exercise functions
- providing for protection from liability for persons making complaints or providing information to the Independent Review Officer in good faith
- providing that the Independent Review Officer and WIRO staff are not competent and compellable to give evidence in legal proceedings
- providing that the Independent Review Officer may engage expert assistance in the exercise of her or his functions
- specifying the Independent Review Officer as a complaints handling agency as provided for in Part 6 and Schedule 1A of the *Ombudsman Act 1974*.

WIRO Direction 2020-22

WIRO is finalising its 2020 – 2022 strategic plan (WIRO Direction). The WIRO Direction will make clear our highest priorities to:

1. increase our impact in finding early solutions for injured workers by improving how we intervene in grant matters appropriate for early solutions and improving our capability to investigate hard-to-solve complaints
2. increase our impact in improving the workers compensation system by improving how we collect, analyse and share our information and insights.

We will also prioritise the wellbeing and development of the WIRO team as part of our recovery plan following COVID-19 and place a strong focus on the efficiency and effectiveness of our operations.

The WIRO Direction will build on the solid foundations of the WIRO office over the past eight (8) years including our paperless processes, expert team and easily accessible services. The Direction will complement new initiatives to improve how we receive and act on feedback about WIRO and how we manage unreasonable conduct by people using WIRO's services. It will position us to quickly adapt for new functions we are asked to perform, increase our capability to manage any further increased demand for our services and better prepare us for unexpected events that may occur in the future.

Data dictionary

Complaint

A Complaint is an expression of dissatisfaction or grievance possibly requiring a more formal approach.

Section 27(a) of the WIMA provides that one of the functions of the Independent Review Officer is to deal with complaints.

Enquiry

An Enquiry is a request for information which does not require referral to an insurer.

Early intervention matter

An early intervention matter is one that is the subject of an ILARS grant of funding, where the injured worker has legal representation and where it may be appropriate for WIRO to intervene to prompt early solutions.

Outcomes of Complaints and early intervention matters:

Resolved - Benefit

to prompt the acceptance of a claim which had not previously been determined, an increase in the value of an existing benefit (for example, increased weekly payments) or the insurer to overturn a decision to dispute liability.

Resolved - Action

to prompt the insurer to take action to progress a claim, for example to amend an injury management plan or to arrange a medical examination.

Resolved - Information

to provide information to the injured worker, for example to confirm correct advice was provided by the insurer after independent examination by WIRO or ensure access to information the worker is entitled to.

Referred

to refer the injured worker to another entity (such as a WIRO Approved Lawyer) or organisation who is best able to assist them.