Independent Review Office

7 October 2022

The Hon Chris Rath MLC
Chair
NSW Legislative Council Standing Committee
On Law and Justice
By email: law@parliament.nsw.gov.au
(FAO Talina Drabsch, Principal Council Officer)

Dear Chair

**Inquiry into the 2022 Review of the Workers Compensation Scheme – Answers to Supplementary Questions and Questions on Notice**

The Office of the Independent Review Officer (**IRO**) is pleased to provide the following responses to the supplementary questions following my appearance before the Committee on 8 September 2022.

For ease of consideration the responses will be numbered in the same manner as the questions.

**Question 1:**
**How do you envisage providing mental health interventions regardless of liability, could be funded?**

The Productivity Commission (**PC**) Report[1] recommended (at Action 7.4):

> *Workers compensation schemes should be amended to provide and fund clinical treatment (including any required rehabilitation) for all mental health-related workers compensation claims, regardless of liability, until the injured worker returns to work, or up to a period of six months following lodgement of the claim. Similar provisions should be required of companies that self-insure.*

The summary statement in support of this Action stated:

> *In dealing with mental health claims, workers compensation schemes can improve outcomes for employers and employees by providing for early intervention, early treatment and rehabilitation and successful return to work.*

[1] Inquiry report - Mental Health (pc.gov.au) p66

The PC's analysis of the cost of such a measure is that it would be a very small proportion of annual premium cost of employers – estimated at 0.6%. The PC balanced this against '*the significant benefits achievable through early intervention and early return to work*' in making the recommendation. This analysis suggests the costs of such a reform may be low.

If this recommendation is adopted, our view is that broad consultation take place and appropriate actuarial advice be obtained in deciding the appropriate manner to fund any additional cost.

**Question 2:**
**What changes to the legislation need to be made to improve return to work rates for psychological claims?**

The IRO submission to the Committee's 2022 Review (**IRO submission**) highlights both legislative and non-legislative steps that might improve return to work rates for workers with psychological injuries. Possible legislative steps include:

- Amending workers compensation laws so that treatment for workers is funded until they return to work for up to six months following the lodgement of a claim, regardless of liability (paragraph 6.5).
- Considering amendments to legislation to expand the role of the Personal Injury Commission (**PIC**) in expedited assessment of work injury management disputes, including to allow binding decisions by the PIC in these matters (paragraph 6.6).

Non-legislative measures include, for the NSW Government and its agencies, expanding return to work options beyond the employing agency or cluster, so that options are actively explored across the whole of the public sector (paragraph 6.6). In addition, a sustained focus on high-quality case management by insurers for workers with psychological injuries is critical (paragraph 6.8).

Submissions to the Committee (including the IRO submission) and the summary report of the injured workers roundtable point to the exacerbation of psychological injuries by workers' experience of the compensation scheme, preventing their return to work. Efforts that improve this experience will therefore likely also improve return to work rates. These include:

- legislative measures that reduce the use of independent medical examinations (paragraph 6.5 of the IRO submission).
- regulatory measures to improve Guidelines and Standards to remove common points of friction (paragraphs 6.10, 6.11) and increase scrutiny of high-stake decisions – such as decisions to dispute liability for the injury, or to dispute the payment of weekly payments or treatment expenses (paragraph 6.8).

**Questions 3 and 5:**

**What process should be undertaken to review the workers compensation legislation?** AND

**McDougall recommended that the work of the Parkes Project should be continued. Do you agree?**

The 'icare and State Insurance and Care Governances Act 2015 Independent Review report' – more widely referred to as the McDougall Review – identified two significant problems with the current state of the workers compensation scheme.

The first is that the scheme is the legacy of more than 30 years of repeated amendment and accretion, without there having been any comprehensive review. The result, as noted in the McDougall Review, has been 'confusion, inconsistency and complexity' (McDougall Review, page 256).

The second issue identified by the McDougall Review is that the scheme is not equipped to address the changing nature of work. Most obviously, this includes, but is not limited to the gig economy (McDougall Review, page 257). The McDougall Review argued changes would need to be considered and potentially, made to accommodate these developments. However, it was opposed to further piecemeal amendments.

The process advocated by the McDougall Review and reflected in recommendation 34 (page 258) of the report, is to:

> *[appoint] a suitable agency or body to conduct a review and reconciliation of the Workers Compensation Act 1987, Workplace Injury Management and Workers Compensation Act 1998 and State Insurance and Care Governance Act 2015 into a single consolidated piece of legislation.*
>
> *That review should consider, among other things, the appropriate legislative response to the changing nature of work and the growth of the gig economy, and the extent to which, and ways in which, gig workers should have the benefits provided by the workers compensation scheme.*
>
> *The reviewing body should be instructed to consider the further recommendations made herein this report, and should not otherwise consider, review, or amend workers compensation benefits.*

The IRO supports this recommendation and considers the process should incorporate principles such as the following:

- The review is conducted by an agency or body independent of all stakeholders – we think this is critical as stakeholders have roles that inform their perspective and understandably impact on their ability to apply an independent mind to the task. In addition, the views of all stakeholders will be made more transparent through such an approach, better informing the final outputs.

- The terms of reference be limited as proposed in the McDougall Review to ensure that the scope of the review is manageable, and the outcome can be achieved in a timely manner.
- The review is deeply informed by the experience and views of stakeholders who work day-to-day in administering the workers compensation legislation – such as insurers, legal practitioners, worker and employer representatives, treatment providers and government agencies. These groups will have a clear perspective and examples that illustrate where complexities, inconsistencies and ambiguities impact on the effective operation of the workers compensation scheme, and solutions that could solve these issues.
- The review has access to relevant independent technical expertise – including for example actuarial expertise in respect of any changes to legislation that may be proposed as a result of considering the recommendations in the McDougall Review, and legal expertise as required.
- The review is otherwise appropriately resourced and provided a clear and realistic timeframe to complete its work.

As the McDougall Review notes, a valuable aid to the work of any agency or body appointed to review and reconcile the various pieces of legislation – particularly in view of the scale of such an endeavour - will be the work of the Parkes Project.

The Parkes Project was formed by the predecessor to IRO (the WorkCover Independent Review Officer) in 2014 as an inquiry pursuant to s.27 of the *Workplace Injury Management and Workers Compensation Act 1998*, on the basis that workers compensation legislation had become complex, confusing and ambiguous as a result of reforms over many decades.

The Parkes Project appointed an Advisory Committee - comprised of 35 stakeholder and industry groups - to steer the process. The Advisory Committee formulated a 'Statement of Principles and Recommendations' (Attachment A) which set out comprehensive recommendations for amendments to the legislation, with the support of most Committee members (with several stakeholders requesting additional time to provide feedback and some minority opinions).

This work will be a valuable tool for the body or agency reviewing the current legislation and writing an improved, consolidated version. However, there have been numerous changes to the legislation and associated statutory instruments since the final interim report in 2015. In addition, at the time of the final interim report in August 2015, the work of the Parkes Project was not complete.

For these reasons the IRO recommends the work of the Parkes Project be provided to the review proposed by the McDougall Review, and that a specific term of reference include consideration of the work and outputs of the Parkes Project, including to complete inquiries or activities necessary to fully consider the Parkes Project outputs.

**Question 4:**

**In your opinion, who should be able to access commutations and why?**

IRO recommends that access to a commutation, a procedure whereby an ongoing entitlement to benefits can be commuted to a single lump sum payment, be broadened.

As noted in IRO's submission to the State Regulatory Insurance Authority (**SIRA**) 'Consultation on the McDougall Review, COVID-19 and future opportunities for personal injury scheme November 2021' (Attachment B, page 6), IRO is concerned about the limited options for workers to reach agreement with insurers to settle their workers compensation claim and exit the scheme. Claimants are often further distressed by engagement with insurers over many years.

IRO currently supports workers who may want to exit the scheme through the commutation by providing grants of funding to Approved Lawyers under the Independent Legal Assistance and Review Service (**ILARS**) to assist workers to negotiate such agreements. There were 37 ILARS grants of funding to lawyers engaged by injured workers to explore commutation settlements which were finalised in the 2020/21 financial year. Twenty workers successfully commuted their rights with an Agreement registered in the PIC. In 2021/2022 there were 26 such applications for funding and 24 Agreements successfully registered. These small numbers demonstrate the current limitations on the ability of parties to agree to a settlement on a final basis of statutory compensation.

The Parkes Project recommended claimants be able to exit the scheme on a fair and reasonable basis with minimal constraints. It argued the availability of such settlements should be subject to requirements for the claimant to obtain independent legal advice and an approval process through the PIC for claimants who have a disability.

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

Our view is therefore that injured workers generally should be able to access commutations subject to the requirement that they obtain independent legal advice concerning any such settlement, and there is an appropriate approval process presided over by the PIC in the event the claimant is operating under a disability.

**Question 6:**
**How can the use of IME's be reduced?**

IRO's submission to the Committee discusses two main methods of reducing the use of Independent Medical Examinations (**IMEs**).

The first concerns the role of case management, with particular reference to insurer decisions to request a worker attend an IME. While there has been regulatory improvement through the *Workers*

*Compensation Guidelines* to more closely specify when requests for a worker to attend an IME will be appropriate, complaints made to the IRO demonstrate that they are not always effectively applied. This results in multiple, unnecessary medical examinations. We have recommended that there be particular focus on better case management by insurers in order to achieve a number of improvements, including a reduction in the use of IMEs. We have also recommended that this be an area of increased regulatory scrutiny.

In IRO's submission (at 6.5, page 25), we also refer to a recommendation of the Parkes Project, that consideration be given to implementing a system whereby a worker is referred to one IME for a joint assessment of any medical issue, reporting to both the worker and insurer. Further details of this recommendation are set out in the Parkes Project 'Statement of Principles and Recommendations' (Attachment A) at page 11.

There are a range of possible mechanisms to achieve such a system, which may include, for example, agreement between the worker and the insurer as to an appropriate medical specialist to undertake the examination, or a 'cab rank rule' for allocation of medical specialists from a pre-qualified list to examine a worker. Our view, if a joint assessment approach is adopted, is that it would benefit from consultation with the representatives of workers, insurers and medical specialists to arrive at the most efficient and effective approach.

**Question 7:**
**What do you think are the most pressing issues regarding the workers compensation system?**

Our response to this question focuses on high priority legislation reform matters.

We have not addressed the broader question of insurer case management, although it will be evident from our submission that this is an ongoing area of concern to the IRO. It is, however, the current target of substantial business improvement activities and substantial regulatory oversight, and given this we will not make comment other than to support any actions that demonstrably improve case management for injured workers

We have also not repeated the matters outlined in our submission to the 2022 Review on Workers Compensation which focus primarily on psychological injury.

We note the following additional pressing issues:

- there is a need to replace whole person impairment (**WPI**) evaluation as the threshold test to restrict access weekly payments and treatment compensation, which can result in unfair outcomes for workers that are contrary to the system objectives of providing income support during incapacity and reasonable medical expenses.
- if WPI assessments continue to be used as a threshold to restrict access to weekly payments and treatment compensation, the failure of the legislation (which currently restricts workers to a single assessment) to account for the fact that over time injuries can deteriorate and WPI assessments increase needs to be remediated. There is a pressing need to reform the

legislation to ensure workers can have their WPI assessed at any stage, and in particular following a demonstrable change in their condition.

- there is a high priority to increase access to commutations and to allow compromised settlements for disputed claims for lump sum death benefits. Provided there are appropriate safeguards (including independent legal advice and supervision by the PIC), reforms in these areas will substantially reduce the stress and impact of the existing scheme arrangements.
- the current definition of 'suitable employment' is theoretical and results in demonstrable unfairness to some workers. The definition requires amendment – our recommendation is to replace it with the previous definition (the former section 43A of the *Workers Compensation Act 1987*).

These concerns are largely reflected in the recommendations of either the McDougall Review (at recommendations 27, 38 and 40) and/or the Committee's '2020 Review of the Workers Compensation Scheme' (at recommendation 9).

The detailed reasons for our view are set out in our submission to the SIRA 'Consultation on the McDougall Review, COVID-19 and future opportunities for personal injury scheme November 2021' (Attachment B). Our views are also generally consistent with the recommendations of the Parkes Project.

More generally, there is a pressing need to review the broader legislative scheme – consistent with the recommendation of the McDougall Review – to address the complexities and inconsistencies of current legislative arrangements.

**Question 8:**
**Do you think that the learnings that IRO are finding from dealing with disputed claims are being effectively integrated into public policy, practices, procedures and guidelines?**
**If not, what needs to change to make this happen?**

The IRO has adopted a number of practices to inform, from our work, the policy, practices, procedures and guidelines in the workers compensation system:

- The IRO identifies systemic issues in the workers compensation scheme that arise from our complaints handling role in particular, and we undertake enquiries as permitted by clause 6 of Schedule 5 to the *Personal Injury Commission Act 2020*.

- Recent and ongoing enquiries cover issues such as delays by insurers in determining liability, the operation of section 59A of the *Workers Compensation Act 1987* and errors in weekly payments made to injured workers.

- Where appropriate, IRO makes recommendations following these inquiries directed to improving case management and regulatory settings – including legislation, standards of practice and guidelines. We provide these to SIRA, and to icare and other insurers, and publish our reports.

- We also closely monitor emerging issues to inform the responses of agencies and insurers. A recent example has been our monitoring of every complaint, enquiry and application for an ILARS grant connected with COVID-19, to identify common issues and ensure that they have been considered in regulatory and operational responses. We also published reports about the trends and illustrative case studies to inform the broader community.

- IRO is also regularly invited to participate in consultations conducted by SIRA and is able to use insights gained from its complaints and legal funding functions to provide useful feedback. Our experience is that SIRA values our input, and it does positively affect the outcomes of these consultations.

- In addition, IRO has regular engagement with SIRA, icare and other insurers. We have formalised information sharing arrangements with SIRA, that ensure we can share information about complaints and escalate concerns about significant issues emerging from complaints using agreed pathways within both SIRA and icare.

It's important to emphasise, though, that this work is undertaken with limited resources. Given the high demand for our key complaint handling and ILARS functions, and that we have a limited budget, we are constrained in the matters we can thoroughly inquire into. For example, we have only a single data analyst to support IRO's activities. And our policy team is small and required to focus on both internal IRO processes and external policies, procedures, consultations and developments. The lack of dedicated resources reduces our capacity to draw and share insights from our work.

**Questions on Notice**

We provide the following responses to Questions on Notice:

- I was asked about decision-making processes and roles between insurers, scheme agents and employers (at page 39).

  As reflected in the response to the Committee, the IRO does have visibility of decision-making as regards icare and a scheme agent when they are responding to particular complaints. We are not, however, privy to the detailed arrangements for those decision-making processes, or the stages at which an employer is also consulted.

- I was asked whether the IRO had any data on the number or cost of secondary psychological injuries (at page 40).

  Our case management system does not record data about this specific issue, and there is no useful additional data we can provide.

- I offered to provide the Committee with a link to the SIRA 'Standard of Practice 33' (page 41). This was provided immediately after my appearance before the Committee, and can also be accessed here: S33. Managing psychological injury claims | SIRA: Workers compensation claims management guide (nsw.gov.au).

If the Standing Committee has any questions, or requires any further information or assistance, the responsible IRO officer is Marilyn Cassidy, Principal Policy Officer, who can be contacted at

Yours sincerely

Simon Cohen
**Independent Review Officer**

Attachments:

A: Parkes Project – Statement of Principles and Recommendations

B: IRO's submission to the Consultation on the McDougall Review, COVID-19 and future opportunities for personal injury scheme November 2021

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# PARKES PROJECT ADVISORY COMMITTEE
# STATEMENT OF PRINCIPLES AND RECOMMENDATIONS

## SETTLEMENT AND FINALISATION OF CLAIMS

### Principles adopted

1. Workers should be entitled to exit the Scheme on a fair and reasonable basis with minimal constraints.

2. Negotiation between degrees of impairment should be permitted.

### Recommendations

1. Permit all injured workers to exit the scheme by choosing a lump sum in place of periodic or other payments (subject to the appropriate approval process).
2. Parties to a permanent impairment claim should be able to negotiate the degree of Whole Person Impairment for the purpose of determining the quantum of permanent impairment compensation (note protections in section 66A(3))
3. Repeal the commutation provisions in the 1987 Act (sections 87E – 87K)

## WEEKLY PAYMENTS

### Principles adopted

1. The calculation of Pre Injury Average Weekly earnings should be a **simple and fair process**

2. The calculation method of PIAWE should provide a fair outcome regardless of the class of worker (for example, to ensure workers are not penalised for working more than one job, part time hours, or are aged)

3. 'PIAWE' should reflect the **current value** of 'pre-injury average weekly earnings' (Indexation) as should the Maximum cap on weekly payments.

4. Where there has been an inadequate payment of weekly payments, adjustments should be easily arrived at and paid from the date of the claim/notification

5. An injured worker should not be penalised because of their continued lack of any capacity (total incapacity) for work.

6. The suitable employment test has resulted in unfairness in the measure of benefits/earnings for certain categories of injured workers.

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## Recommendations

### *Pre Injury Average Weekly Earnings*

1. Simplify the definition and computation method of **pre-injury average weekly earnings.** As a guide, some of the features the former section 43 (Computation of Average Weekly Earnings) be retained including providing for the employer to provide to the worker such details of the earnings of the worker as will enable the worker to determine his or her pre-injury average weekly earnings.
2. Provide for a "default" (or "interim") rate of weekly payments where calculation of PIAWE can not be accurately completed to enable weekly payments to commence within 7 days of injury
3. Amend Section 82A to ensure indexation of PIAWE in all circumstances.
4. Clarify the meaning of a "week" in the context of calculating PIAWE.
5. Provide for adjustment and backdating of adjustments of PIAWE to encourage early and prompt payments and avoid unnecessary time consuming disputation. Considerations:
    - Exclude PIAWE calculated in the provisional liability period from the definition of 'Work Capacity Decision' and/or
    - Mandate the provision of the employer's completed PIAWE form and exchange of information required to calculate PIAWE between the parties as part of the 'revision' process and/or
    - Permit backdating of adjustments to PIAWE to the date of injury with force and effect from that date.
6. Amend Schedule 3 in relation to 'Workers employed by 2 or more employers' (Items 2, 3, 4, 5, 6, and 8) so as not to penalise such workers in the calculation of PIAWE and therefore weekly payments.

### *Weekly payments of compensation*

7. Clarify the meaning of a "week" in the context of determining weekly payments entitlements.
8. Amend the definition of 'suitable employment' in section 32A to reflect an actual and not a theoretical test.
9. Amend section 38(2) and (3)(c) to remove the discretion of the insurer (*"the worker is assessed by the insurer as having no current work capacity and is likely to continue indefinitely to have no current work capacity", "the worker is assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker's current weekly earnings"*).
10. Amend Section 41 to provide for continuing weekly payments during a period of reduced work capacity post second surgery until the worker resumes or improves their pre-surgery work capacity.

11. Amend section 52 to ensure that injured workers have as a minimum an entitlement to 12 months of weekly payments regardless of the date of their injury.
12. Amend section 54 to provide an exclusion to the 3 month notice period where a worker who has current work capacity and who has employment commences to earn sufficient wages such that their continuing weekly payment is reduced to $0.
13. Remove clause 21 of Schedule 8 of the Workers Compensation Regulation 2010 (which provides that three months notice must be given to a worker before increasing the amount of compensation payable to them).

***Generally***

14. Increase weekly payments in the first entitlement period to 100% of pre-injury average weekly earnings.
15. Provide a simplified and enhanced weekly payments regime for seriously injured workers with removal of subjective tests of capacity based on 100% of pre-injury average weekly earnings.
16. Remove the 52 week step down which occurs as a consequence of removal from the PIAWE calculation of overtime and shift allowances.
17. Remove impairment evaluation as a measure for access to incapacity payments, alternatively have one threshold for continuation of payments beyond 5 years (20%).

## MEDICAL EXPENSES

### Principles adopted

1. Prompt and early medical treatment underscores and supports early and successful return to health and work.
2. Access to medical treatment and services should not depend on impairment evaluation.
3. A medical expenses claims process including pre-approval processes must be prescribed and be simple.
4. Delays in treatment can lead to undesirable outcomes.
5. The 12 month cap on medical expenses should run from when weekly payments are last made and should capture all claims for medical treatment expenses **made** within that 12 months (currently, must have *received the treatment within the 12 months*).
6. For medical treatments or services, recognition should be given to the best practice scheduling of such treatments and standard treatment plans. (*Effect should be given to section 60(2C)(d) of the 1987 Act)*.
7. There should be a general exception to the cap on duration of medical treatment to cover:

a. Reasonably necessary surgery

b. Treatment required to ensure the worker *remains at work* or is capable of returning to work

c. Essential services to ensure that the worker's health or ability to undertake the necessary activities of daily living does not significantly deteriorate

- **Minority Position:** the 12 month cap should be removed for all injured workers.

**Recommendations**

***Section 59A***

1. Extend the operation of the *Workers Compensation Amendment (Existing Claims) Regulation 2014* [especially Schedule 8, Part 2, R 28(1)] to all claims by amendment of the legislation (currently applies to existing claims only: cf definition of existing claims in 1998 Act).
2. Extend the exemption provided in the Existing Claims Regulation for 'life'.
3. Clarify 'claim for compensation' or prescribe that time runs from the date the first claim for medical expenses or treatment is made.
4. Replace the requirement that the treatment be <u>provided or given</u> within the 12 months period with a requirement that the 'claim for medical expenses compensation to be made within the 12 months' - as an example :

   *Section 59A(1) "Compensation is not payable to an injured worker under this Division in respect of any treatment, service or assistance* ***for which a claim is made*** *more than 12 months after a claim for compensation in respect of the injury was first made, unless weekly payments of* compensation are or have been paid or payable to the worker."
5. Amend section 59A(2) to clarify from when the 12 months commences:

   *Section 59A(2) "If weekly payments of compensation are or have been paid or payable to the worker, compensation is not payable under this Division in respect of any treatment, service or assistance* ***for which a claim is made*** *more than 12 months after the worker* ***last*** *ceased to be entitled to weekly payments of compensation."*
6. Delete the words "*but only in respect of treatment… weekly payments are payable to the worker*" from section 59A(3).
7. There should be a general exception to the cap on duration of medical treatment to cover:
   a. Reasonably necessary surgery
   b. Treatment required to ensure the worker *remains at work* or is *capable of returning to work*
   c. Essential services to ensure that the worker's health or ability to undertake the necessary activities of daily living does not significantly deteriorate

8. Consider a 6 year ultimate cap on medical and treatment expenses (seriously injured workers and those with an impairment of greater than 20% excluded).

***Pre-approval of medical treatment***

*9.* Provide a defined and easier path for pre-approval of specific treatments and courses of treatment including post operative treatment plans in accordance with clinical practice thereby avoiding unnecessary and repeated requests for pre-approval

10. Add to the exemptions to pre-approval those services provided on emergency admissions to hospital (outside the first 48 hours after injury)

***Generally***

11. For the purpose of exempting those with an impairment of greater than 20% and seriously injured workers from the 12 months cap:
    a. Provide an eligibility test permitting impairments from all injuries to be aggregated
    b. Provide that a worker who meets the eligibility test not impact premiums
    c. Provide that the Nominal Insurer meet the medical and treatment expenses
12. Medical treatment and service providers should be clearly informed of the duration cap (expiry date for payment of medical treatment in advance and the grounds, if any for provision of services beyond that date).
13. Amend Section 60(5) to make the referral to medical assessment discretionary rather than mandatory
14. Consider reformulation of policy in relation to the payment of medical and treatment expenses for injured workers particularly the 12 months cap and the reliance on impairment evaluation to determine access to benefits..

## PERMANENT IMPAIRMENT

### Principles adopted

1. Workers should receive fair compensation for the permanent impairment which arises as a consequence of a work related injury.

2. Workers whose impairment significantly increases as an unintended consequence of reasonably necessary surgery or deterioration of the underlying injury/condition should be compensated for the consequent 'permanent impairment'.

3. There should be an exception to the one claim policy if it is established that an agreed degree of impairment is manifestly too low or there has been a significant increase in the degree of impairment.

4. The impairment assessment methodology and quantification of compensation should be the same regardless of when the injury occurred.

5. In a scheme where impairment thresholds determine access to various levels and types of benefit there must be exceptions to the 'one assessment' principle.

6. **Minority Position:**

   a. Workers should be able to access compensation for pain and suffering in addition to permanent impairment;

   b. There should be no threshold for permanent impairment compensation;

   c. there should be no restriction on claims for permanent impairment compensation (repeal section 66(1A) of the 1987 Act).

7. **Further Minority Position**:

   a. Reduce threshold in section 66(1) of the 1987 Act to 5%

   b. As an alternative to 6 a. above, incorporate the former pain and suffering compensation (section 67) into the compensation available for permanent impairment.

**Recommendations**

1. Provide exceptions to the 'one claim policy' to permit workers to bring second and subsequent claims for permanent impairment compensation for deterioration in their condition which results in a significant increase in impairment.
2. Remove section 322A (one assessment of permanent Impairment) from the 1998 Act.

## SERIOUSLY INJURED WORKERS

**Principles adopted**

1. There should be a separate assessment for determining whether a worker is seriously injured which is for the purpose of determining entitlement to weekly payments and medical treatment.

2. All of a worker's injuries and impairments should be considered for the purpose of satisfying a seriously injured worker threshold test, so long as there are compensable rights attached to each injury and impairment evaluation.

3. Determination of the apportionment of liability between insurers to the benefits payable to a seriously injured worker should be prescribed in the legislation.

4. A seriously injured worker who has no prospect of returning to work should be exempt from monthly medical assessments and regular certification of capacity where appropriate clinically.

**Recommendations**

1. Provide a separate assessment test (if section 322A not repealed) for determining threshold issues.
2. Specifically permit aggregation of impairments arising from separate and distinct (work related) injuries for which there are ongoing compensable rights for the purpose of the seriously injured worker threshold and ensure section 22 (apportionment of liability) adequately provides for consequent apportionment of liability in respect of each injury.
3. Reduce the seriously injured worker threshold to 'greater than' 20% WPI.
4. Remove the theoretical test of suitable employment where it is to be applied in respect of a seriously injured worker. (eg section 38 1987 Act, Section 49 1998 Act)

## DISPUTE RESOLUTION SYSTEMS

**Principles Adopted**

1. There should be one Dispute Resolution System which works within the legislation.
2. There should be one form of dispute notification.
3. Minor disputes or issues should be capable of resolution in a timely manner without the formality required for more complex issues.

**Recommendations**

1. Remove the multiple review processes for Work Capacity Decisions
2. Replace the multiple dispute resolution paths with a single dispute resolution process/system in a single tribunal (the Workers Compensation Commission) with an appeal path.
3. Continue and refine in the Workers Compensation Commission a more simplified expedited claims resolution pathway for 'minor' or urgent disputes.
4. Permit workers and 'insurers' to engage legal advice in respect of a workers compensation issue. Provide for workers' legal costs to be met through ILARS.

## COSTS AND LEGAL REPRESENTATION

**Principles adopted**

1. Workers and insurers should be able to obtain legal **advice** and representation with respect to all disputes (including WCDs)
2. Costs should reflect proper remuneration for all lawyers for both workers and insurers.
3. Part 16 "Marketing of Work Injury Legal Services and Agent Services" of the *Workers Compensation Regulation 2010* and Division 8 of Part 2 of Chapter 4 "Prohibited

Conduct Related to Touting for Claims" of the *Workplace Injury Management and Workers Compensation Act 1998* should be deleted as this will be the subject of the *Legal Profession Uniform Law Application Legislation Amendment Bill 2015* introduced into NSW Parliament on 27 May 2015.

**Recommendations**

1. Remove section 44(6) of the 1987 Act
2. Remove clause 9 of Schedule 8 of the Workers Compensation Regulation 2010
3. Establish a proper costs regime for legal representatives for workers and employers/insurers

## RETURN TO WORK OBLIGATIONS AND SUITABLE EMPLOYMENT

**Principles adopted**

1. Supported early return to work after injury is fundamental to the system and the scheme.
2. The test for suitable employment should be an actual test not a theoretical test
3. Disputes about provision of suitable employment or return to work should be simply and quickly managed.
4. Incentives should be provided to employers to provide suitable employment to injured workers and to workers to return to work after injury.
5. Rehabilitation following work injury should be meaningful and provided in a timely manner.

**Recommendations**

1. Replace the Suitable employment test in section 32A with an actual test for the purpose of facilitating quick safe and durable return to work
2. Provide an appropriate dispute resolution pathway (within the Workers Compensation Commission) to manage disputes concerning 'Chapter 3 Obligations' with power to make prompt determinations.
3. Workers who seek and are not provided with suitable employment by their employer should be entitled to receive an extension of their weekly payments until suitable duties are provided or they have received five years of weekly compensation.

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## JOINT TORTFEASORS AND SECTION 151Z

### Principles adopted

1. Workers should not be penalised in a joint third party tortfeasor action where they are unable to recover work injury damages from the employer

2. The insurer should be able to recover additional compensation paid to or on behalf of a worker as a consequence of a subsequent negligent act of a third party (not the employer)

3. Third Party tortfeasors should be able to be compelled to attend Mediation in Work Injury Damages claims.

### Recommendations

1. To resolve the unfair erosion of damages through operation of section 151Z(2) where the employer *is negligent* but there is *no claim* capable of being maintained due to threshold issues, the Section 151H threshold should be ignored for the purpose of calculating any s 151Z(2) reduction. A suggested amendment to the section is:

   151Z(2)(f) *"In reducing damages in accordance with sub-section (c) above, the injured worker is deemed to be above the threshold referred to in Section 151H".*

2. Amend Section 151Z to specify that sub-section (2) does not apply to extreme injury where the total damages recoverable by the worker from a person other than their employer exceeds one million dollars. An appropriate amendment is:

   *151Z(2A)(a) sub-section (2)(c) does not apply to the damages recoverable in the case ofextreme injury.*

   *(b) For the purpose of this sub-section a case of extreme injury is one where the total damages recoverable from a person other than the worker's employer:*
   *exceeds one million dollars.*

3. Add a further paragraph to sub section 151Z(2)(e) as follows:

   *In any event, the repayment referred to in ss.(1)(b) and the indemnity referred to in ss.(1)(d) is for the amount of any weekly payments of compensation already paid in respect of the injury concerned only.*

4. Add to Section 151Z(2) a further paragraph:

   *For the purpose of ss.(2)(d) damages shall be taken to include any compensation already paid under Division 3 and Division 4 of Part 3.*

5. Provide for mandatory attendance of any third party tortfeasor at a Mediation between Worker and employer in a Work Injury Damages Claim.

## ACCESS TO INFORMATION BY A WORKER

### Principles adopted

1. There should be transparency about information collected by an employer or insurer about an individual injured worker.

2. A worker should be provided by the employer or insurer with information of the kind referred to in clause 46 of the WCR 2010 with the general exception that if the supply of that information would pose a serious threat to the life or health of the worker or any other person, the information, in the case of medical information, must be provided to a medical practitioner, or in other case, to a legal practitioner.

### Recommendations

1. Mandate provision to a worker or person nominated by the worker (such as a legal practitioner or union or doctor), upon request, of all documents relating to the worker's claim and return to work *prior to* or *regardless of* the issue of a dispute notice. [Amend the Workers Compensation Regulation 2010 and the Claims Guidelines and the Claims Manual to reflect a worker's entitlement to request and receive all information pertaining to the worker (other than information which is subject to legal professional privilege or other privilege)]

## DEFINITIONS

### Principles adopted

1. There should be consistency of language, terminology and drafting throughout the legislation.
2. The legislation should be clear on its face as to its meaning and intention.
3. The structure of the Act(s) should reflect the practical operation of the Scheme.
4. Where possible there should be national consistency or harmony of definitions used in workers compensation legislation.

### Recommendations

1. Consolidate terms and expressions used in the legislation to ensure consistency. For example "more than" and "greater than".
2. Redraft existing provisions of the Acts to provide clarity and where possible, incorporate nationally consistent language.
3. Amalgamate the two Acts into one with the purpose of ensuring that the Act sets out the rules that govern the Scheme in a way that is comprehensive, coherent and readily understood by Scheme participants.

Workers Compensation independent review office

## INDEPENDENT MEDICAL EXAMINERS / EXAMINATIONS (IME'S)

### Principles adopted

1. Where possible only one IME should be requested by a worker and an employer/insurer in relation to a medical issue with respect to a worker unless there are comorbid conditions.
2. Independent Medical Examiners (IMEs) should have qualifications, training and clinical experience commensurate with the body part/injury they are required to assess.
3. There should be better regulation of the use of IMEs in all circumstances (see section 119 WIM Act)
4. The Guideline on Independent Medical Examination requires updating through stakeholder consultation to achieve relevance in the current scheme design.

### Recommendations

1. Consider implementing a system whereby the injured worker is referred to one IME relevant to the body system/part injured who will report to both the worker and the insurer. That report should be accepted unless there is an exceptional reason for the worker to be referred to an Approved Medical Specialist (AMS).
2. Introduce a mechanism by which Independent Medical Examiners are accountable for their opinions.
3. Change the rules around the use of IMEs to accommodate the single IME system.

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

## About the Independent Review Office

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

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

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

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

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

## Introduction

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

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

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

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

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

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

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

# Responses to Discussion Questions

## Replacement threshold test

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

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

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**Case study 1 –** Whole person impairment

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

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

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

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

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

[2] At page 5

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

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

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

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

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

## Further assessment of degree of permanent impairment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 'Reasonably necessary' test

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Commutation and settlement

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

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

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

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

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

**Case Study 2 –** Commutation – agreement reached

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

**Case Study 3 –** Commutation - no agreement reached

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

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

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

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

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

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

The Committee therefore proposed Recommendation 13:

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

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

The CIE report found that:

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

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

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

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

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

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

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

### Compromised settlement of the lump sum death benefit

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

***10. What oversights are needed to protect the parties?***

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

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

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

### Definition of suitable employment

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

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

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

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

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

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

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

**Case study 4** - Suitable employment

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

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

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

### Legal costs under the Workers Compensation Regulation 2016

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Impact of COVID -19 on personal injury schemes

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

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

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

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

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

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

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

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

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

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

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

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

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

## Access to services and treatment in workers compensation

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

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

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

## Future opportunities for personal injury schemes

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

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

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

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

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

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

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

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

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

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

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

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

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

Our comments in respect of these matters are that:

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

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

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