

**INQUIRY INTO 2022 REVIEW OF THE COMPULSORY
THIRD PARTY INSURANCE SCHEME**

Organisation: State Insurance Regulatory Authority (SIRA)

Date Received: 8 November 2022

The Hon Christopher Rath MLC
Chair, Standing Committee on Law and Justice
Parliament of NSW

Dear Mr Rath,

SIRA's supplementary submission

Thank you for the opportunity to provide a supplementary submission to the 2022 Review of the Compulsory Third Party insurance scheme.

I note that in accordance with clause 12, Part 5, Schedule 5 to the *Personal Injury Commission Act 2020*, the Committee is to 'enquire into and report on the whether ILARS should be extended to claimants for statutory benefits under the *Motor Accident Injuries Act 2017*'.

I am pleased to provide the Committee with additional information and insights into the current program of work SIRA is leading focused on the provision of legal and other supports in the CTP scheme. I trust that this will assist the Committee when considering the extension of the ILARS model operating in the NSW workers compensation scheme into the CTP scheme.

This supplementary submission should be read together with our submission dated 27 September 2022, and our submission to the Independent Review Office (IRO) Review of Independent Legal Advice and Review Service issues paper in July 2022.

I look forward to appearing before the Committee to assist your inquiry.

Sincerely,

Adam Dent
Chief Executive

8 November 2022

SIRA

2022 Review of the Motor Accidents Scheme

Supplementary Submission to the
Standing Committee on Law and Justice

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1. Executive Summary

Access to legal support for people injured on NSW roads is an integral part of the motor accidents scheme. As of June 2022, approximately 90 per cent of people with a claim for damages have a lawyer and 33 per cent of those with a claim for statutory benefits have a lawyer. The legal costs of these claims¹ are currently \$67 million or 3.6 per cent of total scheme payments, and there are currently \$74 million or 4 per cent of total scheme payments in related costs covering insurer investigations and insurer medico-legal spend.

SIRA is committed to ensuring that all people with a compulsory third party (CTP) insurance claim have access to appropriate legal and other supports throughout the claims journey, while also maintaining scheme sustainability, policy affordability, and alignment with the legislative objectives of the *Motor Accidents Injuries Act 2017*.

SIRA commissioned an Independent Review of Legal Supports in response to feedback that the current arrangements could be improved to ensure that injured people are able to access timely and affordable legal support. The review was undertaken in line with the following principles reflective of stakeholder views:

- Legal supports frameworks should ensure that injured people can access the necessary benefits under the scheme to promote their recovery and return to work and other activities.
- Legal supports should provide an incentive for the early resolution of claims and the quick, cost-effective, and just resolution of disputes.
- Legal supports should work with other mechanisms in the scheme to ensure continued affordability for policy holders.
- Legal supports should be proportionate to the complexity of the issue in dispute.

The feasibility of expanding the Independent Legal Assistance and Review Service (ILARS) into the CTP scheme was considered as part of the Independent Review of Legal Supports, as was the role and alignment of SIRA's Legal Advisory Service. It recommended against adoption of ILARS in its current form.

SIRA agrees that the ILARS model should not be expanded into the motor accidents scheme for the following reasons:

- Premium prices would be impacted and the risk to scheme sustainability is potentially very high.
- Implementation of options that enable end-to-end support for injured people is underway and will be the subject of public consultation in early 2023.
- The early involvement of lawyers would impact all matters and is more consistent with the previous scheme.
- The ILARS model in the workers compensation system has not been tested through an independent review process.

More detail on the above points is included in the remainder of this submission.

¹ Claimant legal costs and excluding any 'contracted out' legal costs

2. Reviews to inform the legal supports model

SIRA has undertaken considerable work to understand and enhance legal and other supports that are available to people who make a claim in the 2017 scheme. Informed by the Independent Review of Legal Supports, the Statutory Review of the *Motor Accident Injuries Act 2017*, and an actuarial assessment of the cost impacts, SIRA is considering options to ensure that people can access legal support at the right time to help them navigate the dispute process. The results of a work value assessment that is underway will provide further insights on the appropriate model for support.

2.1 Independent Review of Legal Supports

SIRA commissioned Taylor Fry to undertake an [Independent Review of Legal Supports](#) in the CTP scheme, which was finalised in September 2021. The Review assessed whether the current legislative, regulatory, and service provision of legal support was promoting the objects of the *Motor Accident Injuries Act 2017*, including encouraging the early resolution of motor accident claims, and the quick, cost-effective, and just resolution of disputes.

The review also considered the feasibility of expanding ILARS to the CTP scheme, as well as the role and alignment of SIRA's Legal Advisory Service in the suite of supports injured people can access in the CTP scheme.

The review found that disputes, legal representation, and legal costs have been below levels that were expected under the 2017 reforms. The review indicated that this could be the result of a combination of factors, such as:

- the scheme working better than expected
- some injured people finding the claims process difficult to navigate
- the scheme needing more time to mature.

The review also considered recommendation 3 of the Law and Justice Committee's 2018 Review of the Workers Compensation Scheme: "That the NSW Government preserve the Workers Compensation Independent Review Office and Independent Legal Assistance and Review Service in the workers compensation scheme and expand its services to claimants in the CTP insurance scheme disputes".

The reviewer did not recommend introducing ILARS "in its current form" to the CTP scheme. The review suggested that if an ILARS model was to be considered for the CTP scheme, legal fees should be set by the relevant Minister and reviewable by Parliament. The review noted that while this proposed model could assist injured people at key points of friction and provide simplicity, it could disincentivise insurers and be potentially costly. Further, the review noted that the introduction of a modified ILARS in the CTP scheme would represent a significant departure from the policy objectives of the 2017 reforms.

The reviewer did not indicate a preferred option for legal supports, except that the role of CTP Assist is expanded. SIRA has implemented this recommendation and will continue to review the role of CTP Assist in the scheme. The reviewer put forward various options for potential reform:

- Option 1: Make no change to existing legal services arrangements
- Option 2A: Review the triggers for entitlement to legal services
- Option 2B: Set legal fees to more closely reflect the work involved
- Option 2C: Simplify some common specific issues disputes so that the requirement for legal representation is reduced
- Option 2D: Increase resourcing for and the role of CTP Assist
- Option 2E: Discontinue the Legal Advisory Service and consider alternatives to replace this function
- Option 3A: Introduce a modified ILARS to the scheme
- Option 3B: Defer consideration of ILARS so that it can be considered as part of the broader scheme review.

2.2. Statutory Review of the *Motor Accidents Injuries Act 2017*

The [Statutory Review of the *Motor Accident Injuries Act 2017*](#), undertaken by Clayton Utz and Deloitte, further considered the legal arrangements of the scheme.

As noted in the Statutory Review, the legislation aims to restrict access to legal advice and representation in the course of statutory benefits claims, and to restrict the fees that lawyers may charge for their work within the scheme. This is intended to facilitate achievement of the

Act's objectives, particularly objective (g) 'to encourage the early resolution of motor accident claims and the quick, cost effective and just resolution of disputes'; and to limit scheme costs to keep premiums affordable.

The Statutory Review considered the range of concerns expressed by stakeholders and the work already progressed by SIRA, including the [Report of the Independent Review of the operation of SIRA's Legal Advisory Service Pilot](#), and the Independent Review of Legal Supports.

In the final report, recommendation 30 stated that: "SIRA should develop and consult on recommended changes to the provisions of the Act and Regulations that govern the provision of legal support in the scheme, noting that Scheme outcomes and injured persons' experience in the Scheme will often benefit from access to the services of an adviser and advocate".

SIRA has continued to progress this work as part of an overall program considering the legal, procedural, and other supports available to injured people, and will commence public consultation in early 2023.

2.3. Cost impact of ILARS in the motor accidents scheme

SIRA commissioned an actuarial assessment of the estimated premium impact of a modified ILARS, to understand its impact on scheme sustainability and premium costs.

Based on 2017 scheme data as of 31 March 2022, the actuarial analysis found that the total premium impact of introducing an ILARS model in the motor accidents scheme is estimated to be between \$95 to \$165 million each accident year. This equates to an estimated premium impact per policy of \$16 to \$28.

This costing did not include additional operating or administration expenses associated with the extension of ILARS to the motor accidents scheme. Further information would be required to allow for any additional operational expenses.

The workers compensation ILARS fee structure differs to the legal cost framework within the motor accidents scheme. For the purposes of this costing, a fee structure broadly consistent with the workers compensation ILARS model was considered with similar grants (where relevant) assumed to be available at claim lodgement (i.e., stage 1), disputes resolved at insurer internal review (i.e., stage 2), and disputes in the Personal Injury Commission (i.e., stages 3 and 4).

Key uncertainties of this costing include any potential behavioural changes from insurers, legal representatives, and injured people in response to a new fee structure, and changes to the levels of legal representation in the scheme and the relationship between higher legal representation and disputation.

2.4. Work value assessment

To further inform the most appropriate model for legal supports, SIRA engaged DGT Costs Lawyers in April 2022 through a procurement process to undertake a work value assessment of legal supports in the scheme.

The scope of work is assessing the feasibility of Option 2A and 2B of the Independent Review of Legal Supports, which was for SIRA to review the appropriate triggers for legal support and consider setting legal fees in the scheme to more closely reflect the work involved. Taylor Fry recommended that this be done through a work value assessment of legal fees.

While DGT Costs Lawyers experienced delays in accessing legal files from lawyers and received only a small sample of files across a range of legal firms, these files are being analysed to understand the work undertaken by lawyers, costs incurred, and challenges faced in relation to motor accidents injury claims.

Early indications from this work suggest that some lawyers undertake work that cannot be charged for under the scheme, however the work appears to be on cases that progress to a damages claim where lawyers can access regulated fees.

The report will be finalised before the end of 2022, and the results will inform the public consultation SIRA is undertaking in early 2023.

3. Proposed model for end-to-end support

The approach to legal supports in the CTP scheme should consider the end-to-end support required for people who make claims.

SIRA has been carefully considering the appropriate balance of system supports – from CTP Assist, insurer case managers, and lawyers – to both meet the needs of people with claims throughout the claims lifecycle while also maintaining broader scheme affordability and efficiency.

SIRA's CTP Assist service is a well-established and respected service that calls every person that makes a claim to offer information and support at various claim milestones. Taylor Fry noted in its Independent Review of Legal Support that: "It is our strong view that independent of any other potential reforms, CTP Assist needs to have an expanded role and that SIRA needs to more proactively promote CTP Assist as the first point of call for injured people."

SIRA has increased the number of milestone calls and calls to people from culturally and linguistically diverse backgrounds, and is undertaking a range of actions to increase the outbound contact success rate to 30 per cent. Injured people now receive an automated introductory email as soon as their claim is lodged that introduces them to CTP Assist, the services it provides, and notifies them to expect a call from SIRA.

SIRA is also exploring how it can increase the impact of CTP Assist, using predictive modelling to target those most in need and reducing friction in technology and digital innovation.

SIRA has been actively regulating CTP insurers to ensure they are making quality decisions, adhering to timeframes, and acting in line with SIRA's Customer Service Conduct Principles. In response to the findings of the Independent Review of Legal Supports, SIRA undertook a claims assurance activity focused on ensuring injured people are given information about their entitlement to damages. SIRA reviewed the claims of people injured in 2019 whose statutory benefits had been accepted as not at-fault or non-minor injury. The outcomes of the review identified that 94 per cent of injured people within this cohort received information about their entitlement to damages. SIRA required retrospective remediation where insurers did not demonstrate 100 per cent compliance.

4. The Independent Legal Assistance and Review Service

The *Personal Injury Commission Act 2020* establishes “an Independent Legal Assistance and Review Service managed and administered by the Independent Review Officer” with the purpose of providing “funding for legal and associated costs for workers under the Workers Compensation Acts seeking advice regarding decisions of insurers for those Acts and to provide assistance in finding solutions for disputes between workers and insurers”.

Despite the legislation setting out a clear purpose for ILARS, it does not adequately describe clear objectives in relation to the administration of ILARS. There is a lack of separation and independence of the administration of ILARS and the distinguished functions of the IRO, where independence is integral to the functions performed.

4.1. ILARS fees structure

IRO issues ILARS Funding Guidelines that establish the allocation and amount of funding for legal and associated costs under ILARS. The ILARS Funding Guidelines, including fee schedules, are published on the NSW Legislation website, tabled in both houses of Parliament, and are subject to disallowance. From 2015/16 to 2020/21, IRO increased legal fees by 47 per cent.

The costs that IRO has set in the ILARS Funding Guidelines do not align with regulated amounts. Rates in the ILARS Funding Guidelines are above the rates prescribed in the Workers Compensation Regulation 2016, even in circumstances where analogous costs exist. For example, ILARS pays \$3,500 for ‘Commutations including registration of agreement’ while the Regulation provides for a payment of \$1,897.50 for the ‘Registration of a commutation agreement’. Similarly, ILARS funds barristers to advise and appear in the Personal Injury Commission whereas this is not available to employer representatives under the Regulation.

The difference in the ILARS Funding Guidelines and the Workers Compensation Regulation 2016 has led to inconsistent legal costs regimes in the workers compensation system. With legal fees in the Workers Compensation Regulation 2016 in need of review, SIRA has committed to reviewing legal supports and fees in the system next year. This will include a scheme view of legal supports and costs encompassing both ILARS fees and regulated fees.

The change to the existing fees structure suggested by the Independent Review of Legal Supports was for the legal and associated costs under ILARS to be determined by Regulation. This could remove the existing conflicts of interest where IRO acts as the provider of legal services while also setting legal costs, and enable a consistent legal fee regime that is required to have regard for outcomes, fairness, affordability, and viability, and align to overall scheme objectives.

Prior to 2012, the then Workers Compensation Commission had the power to award legal costs. The Commission could not order the payment of costs by a claimant unless the Commission was satisfied that the claim was “frivolous or vexatious, fraudulent or made without proper justification” (section 341 of the *Workers Compensation and Workplace Injury Management Act 1998*). The Commission also had the power to order that costs that were ‘unreasonably incurred’ were not to be paid by the other party (section 342 of the *Workers Compensation and Workplace Injury Management Act 1998*). Examples of costs “unreasonably incurred” included where a party unreasonably refused to participate in conciliation of a dispute resulting in unnecessary litigation. While these powers were rarely exercised, having the power enshrined in legislation operated to moderate the behaviour of legal practitioners and provided an important element of oversight and control by the Commission.

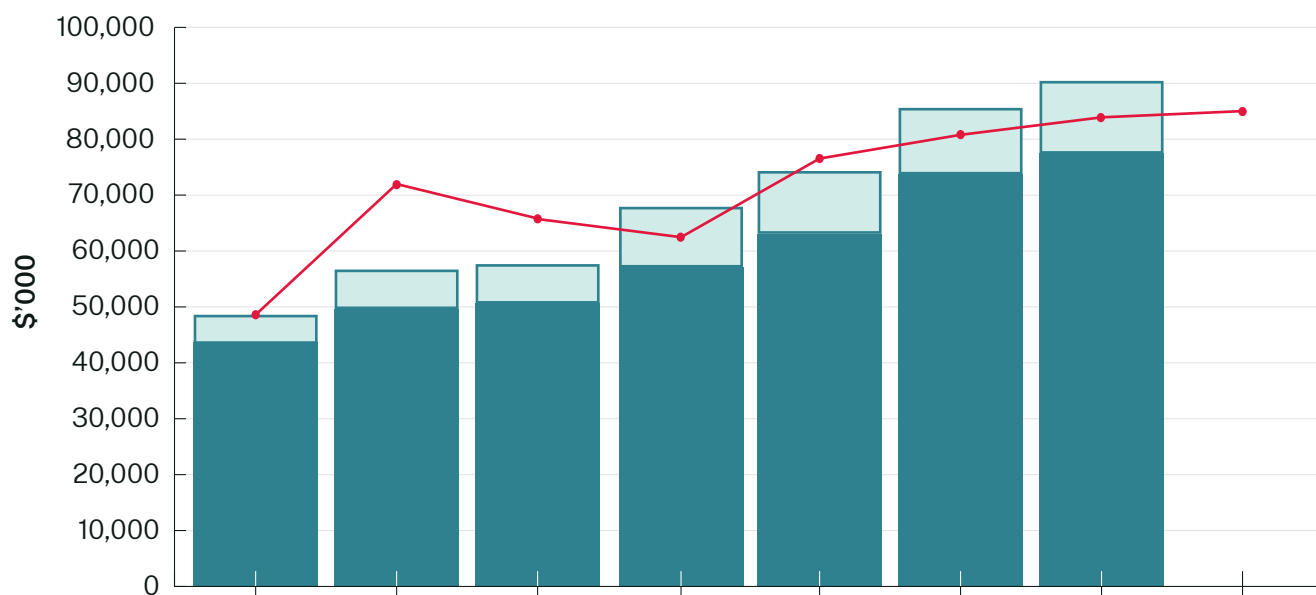
4.2. Rising costs

The annual spend on ILARS from the Workers Compensation Operational Fund (WCOF) has been increasing year on year. Between 2015/16 and 2021/22, the cost of ILARS increased by 175 per cent.

The table below provides a summary of funding from the WCOF to cover IRO's operations and ILARS. These costs are in addition to legal and other costs paid by insurers, including those legal costs paid by insurers for exempt categories of workers.

While SIRA is the administrator of the WCOF and funds the operations of IRO and ILARS, the legislation does not provide SIRA with the corresponding oversight of how funds are spent. The increase in expenditure demonstrates a longer-term need for an independent means by which to review the ILARS model and how it is delivering benefits that balance affordability and financial viability.

Figure 1: Total W(IRO) Expenditure (funded from WCOF)



	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22	2022/23
(W)IRO Operations	4,898	6,582	7,343	10,559	10,957	11,864	13,094	
ILARS	44,034	49,864	50,465	57,313	63,060	73,611	77,238	
W(IRO) Budget	48,639	71,987	65,858	62,127	76,460	80,722	83,659	85,333

4.3. Reviews of ILARS

While the IRO's predecessor, the Workers Compensation Independent Review Office (WIRO), commissioned the Nous Group to undertake an assessment in 2020 and the IRO is in the process of a further review of the ILARS Funding Guidelines, these reviews have been narrow in their focus.

The terms of the ILARS Review that is underway are to examine the current arrangements to manage and administer ILARS aligned to its statutory purpose, and whether the guidelines promote relevant system objectives in section 3 of the *Workers Compensation and Workplace Injury Management Act 1998*. The review was limited to the current guidelines and did not extend to a careful analysis of the efficiency and effectiveness of the model. SIRA made a [submission](#) to the review raising a number of concerns, including the critical need to better understand the drivers of increasing applications for legal funding, and the impact this is having on return to

work and recovery outcomes for injured people and the scheme more broadly.

SIRA is currently leading the Statutory Review of the *Personal Injury Commission Act 2020* required under section 68 of that Act, the purpose of which is to determine whether the policy objectives of the Act remain valid, and whether the terms of the Act remain appropriate for securing those objectives. Although the functions and establishment of the IRO and ILARS are established under Schedule 5 to the *Personal Injury Commission Act 2020*, the scheme objectives outlined in section 3 primarily deal with the establishment, operation, and practices of the Personal Injury Commission. Accordingly, the terms of reference for this review do not extend to the functions and operation of the IRO or the ILARS model currently operating in the workers compensation system.

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