

IRO Preliminary Response to ILARS Review – June 2023



	Independent Legal Assistance and Review Service (ILARS) Review Recommendation	Independent Review Office (IRO) Response
C.	The Guidelines	
1.	The Officer should closely monitor the timeliness of processing of funding applications (para 43)	<p>Accepted: The Officer and IRO Executive monitor approval times for ILARS applications each month as part of a standing item on IRO Executive Team meeting agenda.</p> <p>Where timeliness measures fall outside benchmarks enquiries are made to assess the reasons for the variance and any appropriate response.</p>
2.	<p>That the Officer amend the Guidelines to include a clear statement of their purpose. An example of such purpose is as follows:</p> <p><i>The Personal Injury Commission Act 2020 provides that the Independent Review Officer may issue guidelines for or with respect to the allocation and amount of funding for legal and associated costs under ILARS (Clause 10, Schedule 5 PIC Act). The purpose of the Guidelines is to create a governance framework for the ILARS scheme that supports the early resolution of compensation claims of injured workers and ensures funds expended in achieving this goal are effective and proportionate. (para 66)</i></p>	<p>Accepted in Principle: The Officer will include within the terms of reference for the next review of IRO Funding Guidelines (Guidelines) the inclusion of a statement of purpose or similar.</p>



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3.	That the Officer consider supplementing the Guidelines with a Practice Note to provide detailed operational rules, and which can be easily updated to align with improvements to IRO’s business processes. (para 67)	<p>Accepted in Principle: IRO understands that there is a question as to the appropriate level of detail to be included in Guidelines given their status as a statutory instrument.</p> <p>IRO understands that many practitioners value the inclusion, in a single document, of various process and procedural elements, and this is reflected in the feedback of practitioners (see paragraph 48 of the review).</p> <p>On the other hand, being able to quickly respond to emerging issues through the use of practice notes or similar mechanisms may better enable ILARS to meet the needs of injured workers and their lawyers to a high level.</p> <p>IRO will establish a User Group in 2023 (see response to recommendation 5 below) as a first step, and propose a standing agenda item for the Group focused on operational issues where improved, amended, or additional IRO guidelines or practice notes may be desirable.</p>
4.	That IRO continue to develop processes for knowledge sharing amongst ILARS Principal Lawyers with the aim of promoting consistency of decision making (para 68)	<p>Accepted: IRO already has processes to share knowledge amongst ILARS staff, including through professional development training provided by the Manager Legal Education and informal case discussions.</p> <p>It is acknowledged these mechanisms can be improved, for example through more regular sharing of recent decisions and ILARS review outcomes.</p> <p>These and other options will be explored in 2023.</p>
5.	That the IRO establish a Practice Note User Group to provide feedback and suggestions for improvements to the ILARS Practice Note. The Practice Note User Group would meet at least annually and more frequently if required (para 69)	<p>Accepted: During 2023 IRO will establish an Approved Lawyer User Group (User Group) to provide feedback and suggestions about matters including the Guidelines, ILARS practices notes, policies and procedures, and the overall operation of ILARS.</p>



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6.	That IRO establish a timetable for regular review of the Guidelines, with such a review being undertaken no more frequently than three yearly and no less frequently than five yearly. That any review of the Guidelines be undertaken in consultation with stakeholders through a Reference Group including members of the Practice Note User Group, and representatives of insurers, SIRA, and PIC (the Guidelines Reference Group) (para 70)	<p>Accepted: The first edition of the current Guidelines commenced in 2019, and they were further reviewed in 2020 after consultation with the legal profession and public consultation¹, with the current version commencing in March 2021. This ILARS Review has included, within its scope, an examination of the Guidelines, and a number of recommendations for reform have been made that will be implemented in 2023.</p> <p>Given these activities, it is proposed to commence the next review of the ILARS Guidelines in 2025.</p> <p>IRO proposes to establish a Reference Group for the purpose of the review.</p>
7.	That the Officer develop appropriate performance standards and report against their achievement to assess whether the Guidelines contribute to the objectives of the workers compensation system (para 71)	<p>Accepted in principle: The Review suggests that any standards would address timeliness, quality, and costs.</p> <p>While the Guidelines are not explicit about all performance standards, they do include timeliness standards for determining new applications (part 2.3) and undertaking reviews of funding decisions (part 2.12).</p> <p>In addition, IRO reports on matters such as worker outcomes and costs (for example, in the Annual Report (e.g., IRO Annual Report 21-22 FINAL - 07Dec22.pdf (nsw.gov.au)) and quarterly Performance Report (e.g., IRO Performance Report July 2021 to June 2022.pdf (nsw.gov.au)).</p> <p>IRO has also commenced User Experience testing for ILARS, with an initial benchmarking report completed and reported in the Annual Report.</p> <p>IRO will consider the recommendation and available information and options to determine appropriate measures and benchmarks.</p>

¹ [WIRO WIRE Personal Injury Commission Act 2020-Implementation of Schedule 5.pdf \(nsw.gov.au\)](#)



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D.	Becoming/Remaining an Approved Lawyer	
8.	The Officer expands the discretion to accept applications for Approved Lawyer status to those who demonstrate knowledge of, and familiarity with, workers compensation law and practice in New South Wales but do not otherwise satisfy the criteria for approval (para 82)	<p>Under consideration: Approval of a lawyer under ILARS reflects that the lawyer is competent to provide a full range of legal services to an injured person that relate to a statutory workers compensation matter.</p> <p>This goes beyond a knowledge of and familiarity with workers compensation law and practice, and includes a familiarity which provided legal services as a lawyer. This is the reason a mandatory period is provided for admission as a legal practitioner.</p> <p>However, there may be some lawyers (for example, those who have previously worked for insurers or respondent law firms) who may meet the mandatory criteria but not the required number of general criteria (three), and who may demonstrate a knowledge of and familiarity with workers compensation law and practice. Increasing discretion to approve these lawyers may be appropriate.</p>
E.	Practice Standards for Approved Lawyers	
9.	That IRO develop a short information sheet providing a brief summary of the standards IRO expects of Approved Lawyers and guidance on how to raise concerns about a lawyer’s service and to escalate the matter if remedies are not achieved. This information sheet should be provided by Approved Lawyers to clients in ILARS funded matters at the commencement of the retainer (para 100)	Accepted: IRO will develop the recommended information sheet during 2023.



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F.	Requirements for Remaining as an Approved Lawyer	
10.	That the current requirement to remain an Approved Lawyer of at least one annual application for a grant of funding, to one requiring the conduct of a minimum number of active matters annually (para 116)	Accepted in principle: IRO will undertake an examination of data about the number of active matters being managed by Approved Lawyers in 2023 and consult with the User Group on any proposed changes to current eligibility requirements.
11.	That there is a requirement for completion of annual CPD in workers compensation law in order to remain an Approved Lawyer (para 117)	Accepted in principle: IRO will consider the most appropriate way to prescribe and implement an annual continuing professional development (CPD) requirement in 2023 and will consult with the Law Society of NSW and the Australian Lawyers Alliance. The IRO understands that any requirement would not result in an increased aggregate number of hours annual CPD that Approved Lawyers would be required to undertake. Instead, IRO would specify a minimum requirement of workers compensation law as a component of existing CPD requirements.
12.	That IRO monitor that the requirements for ongoing approval are met (para 118)	Accepted in principle: As part of the work to review requirements for ongoing active involvement in ILARS matters and CPD, IRO will examine options for monitoring compliance with these requirements. IRO notes this will place a new administrative requirement on both Approved Lawyers and IRO and will examine ways to minimise this impact.
13.	That an Approved Lawyer who is an accredited specialist notify IRO of this qualification, and it be recorded on the Approved Lawyer list maintained on the IRO website as a searchable criterion (para 119)	Accepted: IRO will aim to implement this recommendation during 2023, following the replacement of the existing IRO website.
G.	Should IRO Recommend Particular Lawyers	
14.	That IRO improve the accessibility of the list of Approved Lawyers on its website to make it easier to find. (para 128)	Accepted: IRO will aim to implement this recommendation during 2023, following the replacement of the existing IRO website.



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15.	That IRO encourage Approved Lawyers to provide information about languages spoken and specialist accreditation to be included as searchable components in the list of Approved Lawyers on the IRO website (para 129)	Accepted: IRO will aim to implement this recommendation during 2023, following the replacement of the existing IRO website.
H. Applying for Grants of Funding		
16.	That IRO: <ul style="list-style-type: none"> • Make public the criteria relevant to Stage 2 and Stage 3 funding decisions; • Provide information regarding the information and documentation required at each Stage in order for applications for funding to be considered; and • Continue to implement training and regular knowledge sharing and case discussions among ILARS staff (para 163) 	Accepted: IRO will develop a practice note that provides more information than is presently in the Guidelines about the criteria considered and information required at each stage of ILARS funding. IRO will consult with the proposed User Group about the practice note. As noted above (see response to recommendation 4), IRO already has processes to share knowledge amongst ILARS staff and acknowledges these mechanisms can be improved. Options for this will be explored in 2023.
17.	That IRO obtains feedback from the Practice Note User Group regarding ways to promote consistency of decision making (para 164)	Accepted: IRO will establish a User Group in 2023 (see response to recommendation 5 above) and include an agenda item for the Group about ways to promote consistent decision making by ILARS staff.
I. Early Solutions		
18.	That IRO consult with key stakeholders, including insurers to identify additional opportunities to implement early solutions, to advise of any identified trends in insurer decision making, and to facilitate better consistency and merit assessment in insurer decision making (para 174)	Accepted: IRO will consult with key stakeholders in 2023 to identify additional opportunities to implement early solutions. This may include consultation on proposed pilots of early solutions initiatives, and broader consultation on additional areas where early solutions may be trialed.



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J.	ILARS Funded Fees	
19.	That the Staged Fee arrangement be retained, as best meeting the ILARS Scheme objectives (para 235)	Accepted: IRO agrees that the staged funding approach is the appropriate.
20.	That the fees for Stage 1 are reviewed having regard to the typical scope of work in that stage, best practice in the industry and whether a loading of those fees to incentivise early finalisation is desirable (para 236)	<p>Accepted in principle: IRO agrees that the Professional Fees Schedule in Part 6 of the Guidelines (Fees Schedule) should be regularly reviewed, including fees for Stage 1.</p> <p>IRO has committed to review the Guidelines commencing in 2025 (see response to recommendation 6). IRO has also committed to undertaking the recommended 'root and branch' review of the Fee Schedule at this time (see recommendation 23).</p> <p>IRO will include in the terms of reference for the review the Professional Fee and Counsel Fee Schedule, including the fees paid at Stage 1.</p>
21.	That the Officer develop guidance about "complex issues", the circumstances in which a complexity increase will be allowed for such claims and the supporting material required to assess an application for a complexity loading. (para 237)	Accepted: IRO will develop a practice note that provides guidance about the assessment of complexity increase applications. IRO will consult with the proposed User Group about the practice note.
22.	That the Officer consider developing a set loading or range of complexity loadings by reference to different criteria to increase consistency in decision making and reduce the administrative burden. (para 238)	<p>Accepted in principle: IRO proposes to commence a program in 2023 to regularly review all matters where complexity increases are applied for and granted, to identify whether any category of matters can be identified for consideration of set loadings or a similar arrangement.</p> <p>IRO will consult with the proposed User Group about the outcomes of these reviews.</p>



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23.	That the Officer undertake a root and branch review of the Guideline Professional Fee and Counsel Fee Schedule (para 239)	<p>Accepted in principle: IRO agrees that the Fee Schedule should be regularly reviewed.</p> <p>IRO has committed to review the Guidelines commencing in 2025 (see response to recommendation 6). This is the most appropriate time to undertake the recommended 'root and branch' review, and will ensure the Fee Schedule aligns with any reforms to the Guidelines.</p> <p>IRO will include in the terms of reference for the review the Professional Fee and Counsel Fee Schedule.</p>
24.	That the Fee Schedule be indexed to CPI or another appropriate benchmark, with annual adjustments (para 240)	<p>Accepted in principle: IRO notes that other legal cost schedules are regularly indexed. For example:</p> <ul style="list-style-type: none"> the Victorian Transport Accident Commission indexes legal costs annually at the rate of CPI (Legal-costs-1-July-2022.pdf (tac.vic.gov.au)) the NSW Attorney General's rates for Legal Representation are indexed at the annual inflation rate (Attorney General's rate for Legal Representation (nsw.gov.au)). <p>IRO also notes the indexation of fees in the NSW workers compensation scheme, including for example the fees paid for medical examinations and reports under relevant SIRA fee orders (Independent medical examiners - SIRA (nsw.gov.au)).</p> <p>IRO will undertake consultation in 2023 with SIRA and other system stakeholders to determine an appropriate index for the Fee Schedule.</p>



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25.	That a three yearly review of the level of fees be undertaken, having regard to any changes to the work required be undertaken and industry best practice, together with the impact on the scheme of any change in the fees. (para 241)	Accepted in principle: IRO agrees that the Fee Schedule (including the level of fees) should be regularly reviewed, and notes the last review of the level of fees was completed in 2020, and the revised Fee Schedule commenced in 2021. IRO has committed to review the Guidelines commencing in 2025 (see response to recommendation 23). This will be the appropriate next opportunity to review the level of fees.
26.	Any review of the funding amounts by the Officer should seek input from relevant stakeholders including SIRA (para 242)	Accepted: IRO will seek input from relevant stakeholders including SIRA in undertaking a review of the Guidelines, which will include a review of the Fee Schedule.
K.	Should Scheduled Fees be Exclusive of Counsel Fees?	
27.	The Review Committee considers counsel’s fees should continue to be paid as a disbursement, separate to the professional fees of Approved Lawyers (para 245)	Accepted: IRO agrees that counsel’s fees should be paid as a disbursement separate to the professional fees of Approved Lawyers.
L.	Disbursements	
28.	That IRO develop a Practice Note in consultation with stakeholders, to provide guidance about the application of the “reasonably necessary” test (para 262)	Accepted: IRO will develop a practice note in 2023 that provides guidance about the application of the ‘reasonably necessary’ test for disbursements funded through ILARS. IRO will consult with the proposed User Group about the practice note. This will include specific guidance on when it is reasonably necessary to obtain treating practitioner clinical notes of an injured worker.



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29.	That IRO undertake a review of the process for monitoring medical report expenses for reports obtained through MRPs, and put in place controls to ensure that the “reasonably necessary” test applies to these reports (para 263)	<p>Accepted: IRO has processes in place to monitor medical report expenses for reports obtained through Medical Report Provider firms (MRPs), including exception processes that highlight reports where pre-approval is required before an Approved Lawyer is permitted to incur a disbursement or expense, and refer these matters to an ILARS staff member for further review.</p> <p>IRO will review the current process for monitoring medical report expenses during 2023 and consider whether additional controls are required.</p>
N.	Appeal Costs	
30.	<p>Acknowledging that work is continuing within IRO on this policy, the Review Committee recommends that IRO continue to develop a policy for funding appeals that clarifies:</p> <ul style="list-style-type: none"> • Workers should seek a costs order to be paid by insurer if they are successful in an appeal (whether as applicant or respondent) • If a worker is successful in an appeal, but the Court declines to award costs, IRO will fund the appeal • If a worker is unsuccessful in an appeal (as applicant), that IRO will not pay their costs • IRO will fund the costs of an injured worker where they are respondent to an appeal • The method by which costs will be assessed (para 273) 	<p>Accepted in principle: IRO has commenced a project to review appeal costs. The Guidelines reflect most of the matters recommended by the Committee, except in respect of workers seeking a costs order where they are successful in an appeal.</p> <p>The IRO will consult with the proposed User Group as part of the review and will consider replacing the Policy with an appropriate practice note and/or an amendment to the Guidelines.</p> <p>IRO will aim to complete this project during 2023.</p>

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O.	Funding Federal Jurisdiction Matters	
31.	The Review Committee recommends that IRO include the finalised principles of the Appeal Costs Policy and the Federal Jurisdiction Funding Policy in the Guidelines and other IRO practice guidance (para 268)	<p>Accepted in principle: IRO’s Federal Jurisdiction Policy (Policy) commenced on 1 July 2022, and a review is proposed after 12 months of operation (Federal jurisdiction funding policy IRO (nsw.gov.au)).</p> <p>The IRO will consult with the proposed User Group as part of the review and will consider replacing the Policy with an appropriate practice note and/or an amendment to the Guidelines.</p>