

23 September 2022

Personal Injury Commission Act Statutory Review – icare submission

Executive summary

1. Insurance and Care NSW (**icare**) thanks the State Insurance Regulatory Authority (**SIRA**) for the opportunity to provide a submission to the Statutory Review of the *Personal Injury Commission Act 2020* (**PIC Act**).
2. icare acknowledges the important role the Personal Injury Commission (**Commission**) plays in assisting to resolve disputes for people in NSW injured in motor accidents or workplaces under the Workers Compensation Nominal Insurer and Treasury Managed Fund schemes. icare also acknowledges the important role the Independent Review Officer (**IRO**) plays in managing and resolving complaints and managing the Independent Legal Assistance and Review Service (**ILARS**) to provide injured workers with access to legal representation.
3. As per the Terms of Reference of the Statutory Review, icare provides recommendations in this submission with a focus on ensuring the objects of the PIC Act remain valid and the terms of the PIC Act remain appropriate for securing those objectives.
4. With respect to the IRO, icare recommends the objects of the PIC Act be extended to apply to the IRO, or alternatively for a set of separate objects to be prescribed to help inform the IRO's statutory purpose and functions. There is currently no oversight of the management and administration, or the independence of ILARS. Legislating objectives for the IRO will support any future reviews of ILARS and provide clear standards to assess the future operation of the PIC Act and both agencies it governs.
5. Consistent with the PIC Act objectives, we also recommend the IRO adopt a transparent and systematic approach to monitoring and reporting on:
 - a. the IRO's exercise of discretion with respect to the maximum amounts payable under the ILARS framework; and
 - b. the achievement of injured workers' outcomes through ILARS.
6. With respect to the Commission, icare recommends that the current procedure for setting the Commission's rules and procedural directions be examined and amended to ensure the Commission is open and transparent about its processes. icare believes greater transparency could be achieved by introducing new powers for the Commission to consult stakeholders prior to issuing rules or procedural directions, in a similar manner to the consultation undertaken by SIRA when issuing the Motor Accident Guidelines.
7. We also recommend amendments to the PIC Act to enable the Commission to publish additional disputes information to promote public confidence in its decision-making.
8. Further, icare recommends exploring how the powers of the Commission may be expanded to deal with federal matters, including by engaging at a Commonwealth level, in order to reduce delays and

increased legal costs in the scheme. icare also supports the Commission's actions in addressing ongoing delays in dispute resolution for most vulnerable claimants.

9. icare sets out its recommendations in more detail below.

Stronger governance and the independent administration of ILARS

10. According to the Terms of Reference, the Statutory Review includes consideration of whether the policy objectives of the PIC Act remain valid. While the objectives, so far as they deal with the Commission, may remain valid, icare considers that the objectives should be extended so they apply to the IRO, established by Schedule 5 of the PIC Act, in its management and administration of ILARS.
11. ILARS has been operating since 2012 with the introduction of the requirement under s 341 of the *Workplace Injury Management and Workers Compensation Act 1998* for each party bear their own cost in relation to a claim for compensation. However, ILARS was only given specific statutory basis from 1 March 2021 when the PIC Act was passed. Even though the PIC Act established the IRO and ILARS through Schedule 5, the objects under s 3 of the PIC Act are specific to the Commission in its conduct and how it performs its functions, and do not make reference to the IRO.
12. The PIC Act does not define standards for how the IRO is to manage and administer ILARS. As a result, there is currently no oversight of the management and administration, or the independence of ILARS. This is a significant barrier to assessing whether ILARS is appropriately balancing access to benefits and supports for injured workers with the scheme objectives of viability and affordability.
13. icare recommends the objects of the PIC Act be extended to the IRO, or in the alternative that the PIC Act be amended to include a statement of the IRO's objects to help inform how its functions and powers should be performed. For example, icare acknowledges that the IRO is already committed to achieving "just, quick, and cost-effective resolution of the issues in the claims and disputes of injured workers" as described in section 1.6 of the ILARS Funding Guidelines. Legislating this objective would more strongly support the IRO's purpose, provide a basis to measure performance of ILARS, and align the IRO's objectives with the objects of the PIC Act.
14. One of the key objects under s 3(b)(ii) of the PIC Act is to ensure the Commission is open and transparent about its processes. icare considers that a similar objective should apply to the IRO. This would address a broader issue in the workers compensation scheme where there is currently limited ability to properly measure the impact of ILARS on the broader system due to the lack of reporting practices in place. Meanwhile, icare notes that the costs of ILARS are growing significantly, despite the disputation rate remaining static. According to Taylor Fry's *Review of legal support for people injured in the NSW CTP Scheme* (3 September 2021) at page 49, initial reductions in claimant legal costs since the introduction of ILARS have been eroded and returned to a level that is now 50% greater than insurer legal costs, similar to the pre 2012 reform relativity.
15. icare acknowledges that the IRO is currently conducting a review of ILARS. However, without clear legislative objectives to guide this review, it is difficult to assess and evaluate the performance of ILARS to ensure it is working as intended for the benefit of all stakeholders, particularly injured workers.

16. In icare's view, it is critical that any future reviews of ILARS, whether through the PIC Act or otherwise, consider the extent to which the growth in ILARS's fees is achieving legislative objectives. For increased transparency, consistency and certainty, this should also include a review of the IRO's exercise of discretion with respect to the maximum amounts payable under the ILARS framework. It is important to ensure that the IRO is identifying and managing any conflicts of interest in setting of ILARS fees and exercising this discretion in accordance with its statutory purpose and any prescribed maximum amounts.
17. To further contribute to greater openness and transparency and promote public confidence in the IRO, icare suggests that the terms of the PIC Act be amended to require the IRO to:
 - a. report on the outcomes of matters that receive funding through ILARS (e.g. impact on timeliness of treatment, reduction of disputation, impact on return to work, injured worker satisfaction, etc.);
 - b. measure the performance of funded lawyers (e.g. through qualitative and quantitative; measures such as quality assurance, penalties for non-compliance, receiving and assessing complaints from insurers and measuring against scheme objectives);
 - c. review and report on the drivers of increases in the costs of ILARS, including how fees are spent at all stages, including on counsel, medico-legal report experts and interpreter and other services.

Consultation over the Commission's rules

18. To further promote the objective under s 3(b)(ii) of the PIC Act of ensuring the Commission is open and transparent about its processes, icare recommends that the terms of the PIC Act be amended with respect to the current procedure for issuing the Commission's rules and directions.
19. Division 2.6 of the PIC Act gives the Commission powers to authorise a Rule Committee of the Commission to make Commission rules and for the President of the Commission to give procedural directions relating to the practice and procedures. Currently, the Commission has no legislative power to consult with relevant stakeholders prior to issuing proposed rules or procedural directions.
20. While acknowledging the independence of the Commission, icare supports amending the PIC Act to include the power for the Commission to consult with relevant stakeholders prior to issuing proposed rules and directions, in a similar manner to how SIRA consults with stakeholders before issuing the Motor Accident Guidelines under s 10.5 of the *Motor Accident Injuries Act 2017*.
21. Enabling the stakeholders outside of the Rule Committee to provide feedback on any changes would help ensure that these instruments relating to practice and procedure align with the relevant scheme objectives and can be operationalised. For example, certain procedural directions (such as the introduction of pagination) may have an impact on insurer operations and legal costs. It is crucial that these types of changes are consulted on with stakeholders prior to their introduction so that their broader scheme impact can be understood and mitigated.

22. icare also suggests introducing provisions to enable relevant stakeholders a right to seek an administrative review of decisions made by the Rule Committee and establishing a forum for the resolution of such reviews.

Monitoring and reporting on disputes

23. Consistent with the object under s 3(e) of the PIC Act to promote public confidence in the Commission's decision-making, icare recommends that the Commission implement processes to ensure a transparent and systematic approach to monitoring and reporting on disputes, which would allow an end to end holistic view of disputes in the schemes.
24. icare suggests this would include reporting on disputes outcomes (such as whether the outcome was a determination, settlement, consent agreement, discontinued, etc.), key upcoming hearing dates and dispute status. While we accept that this information is available from the Commission's published decisions, to enable icare to assess the operation of the workers compensation scheme and to monitor emerging trends, the outcomes of all disputes must be proactively monitored and understood.
25. There is significant value to the injured workers, general public and scheme stakeholders, including insurers, employers, injured workers and lawyers, to be able to access key disputes data from the Commission. Structured reporting of data on the outcomes of disputes and dispute processes, including timeframes and costs, would enhance transparency and accountability for all scheme participants and help monitor and improve outcomes for injured workers.
26. Amending the PIC Act to ensure proactive reporting of these matters will ensure stakeholders are informed and provide icare with the ability to develop informed interventions about emerging trends or insurer issues.

Federal jurisdiction

27. icare strongly supports exploring options, including engaging at a Commonwealth level, to enhance the powers of the Commission to consider federal matters. Currently, the Commission cannot determine an application if it would require the exercise of the federal jurisdiction (see *Burns v Corbett* [2018] HCA 15 and *Attorney General for NSW v Gatsby* [2019] NSWCA 254 for authority that the relevant state tribunal was unable to exercise judicial power to determine federal matters).
28. The inability of the Commission, as a state tribunal, to determine federal matters impacts both injured workers and people injured on NSW roads. Currently, injured people in both motor accidents and workers compensation schemes must proceed to the District Court to have their matters heard where it involves an interstate driver, or an injured worker who has moved interstate. This causes further delays in dispute resolution and attracts higher legal costs in the schemes.
29. If there is a way for the Commission's powers to be extended to consider federal matters, this would be in the best interest of the injured persons and would support the financial viability of the schemes. This would also promote the object under s 3(a) of the PIC Act to have the Commission be the central registry for matters under the workers compensation legislation and motor accidents legislation, and support the object under s 3(c) of the PIC Act to enable the Commission to resolve proceedings justly, quickly, cost effectively and with as little formality as possible.

30. icare acknowledges that potential options may require engagement or statutory reform at a federal level, and therefore supports engagement between the state and Commonwealth to help address this.

Delays

31. icare is aware of and acknowledges that the continuing delays from the COVID-19 pandemic, winter flu season, floods, strikes and subsequent non-attendance rates to medical examinations have led to an increasing backlog at the Commission.
32. Taking into account the soon to be fully commenced Compulsory Third Party (CTP) Care, which provides treatment and care statutory benefits to a potentially vulnerable cohort of injured people with persistent treatment and care needs, icare supports the Commission in its efforts to reduce the backlog and the current process of prioritising expedited assessments for individuals with urgent treatment needs until the backlog is cleared. This is imperative to resolve proceedings justly, quickly and cost effectively in line with the object under s 3(c) of the PIC Act.

Next steps

33. icare welcomes the opportunity to discuss this submission further and to work collaboratively with SIRA to advance the recommendations and issues we have raised.
34. Please do not hesitate to contact James Camilleri, Head of Regulatory Affairs, to discuss further.

Yours sincerely

Richard Harding
Chief Executive & Managing Director